



EMPLOYMENT TRIBUNALS

Claimants: Mr C Horobin
Mr K Pratt
Miss N Jones
Miss H Donovan
Miss M Gard
Miss Rezaei Kalantari
Mr G Saunders

Respondent: Jaegar Retail Ltd

Heard at: London Central

On: 12 November 2018

Before: Employment Judge H Grewal

Representation

Claimants: Miss N Jones

Respondent: Mr N Sidall, Counsel

JUDGMENT

1 The Tribunal does not have jurisdiction to consider Miss H Donovan's claim because it cannot be accepted.

2 The Tribunal has jurisdiction to consider Miss Rezaei Kalantari's claim against the Respondent.

3 The Tribunal does not have jurisdiction to consider any of the claims for breach of regulation 13 of Transfer of Undertakings (Protection of Employment) Regulations 2006 against the Respondent.

REASONS

Procedural History

1 This case concerns the following claims:

Claimant	Respondents	Date presented	Complaints
C Horobin	Jaeger London Ltd Jaeger Retail Ltd	21 Aug 2017	Unlawful deductions from wages (salary and accrued annual leave), Failure to inform and consult (reg 13 TUPE Regs)
K Pratt	Jaeger London Ltd Jaeger Retail Ltd	21 Aug 2017	Unlawful deductions from wages (salary and accrued annual leave), Failure to inform and consult (reg 13 TUPE Regs)
N Jones	Jaeger London Ltd Jaeger Retail Ltd	19 Aug 2017	Unlawful deductions from wages (salary, accrued annual leave, notice pay and payments during notice period), Failure to inform and consult (reg 13 TUPE Regs)
H Donovan	Jaeger Co Shops Ltd Jaeger Retail Ltd	24 Aug 2017	Unlawful deductions from wages (salary, accrued annual leave, notice pay and payments during notice period), Failure to inform and consult (reg 13 TUPE Regs)
M Gard	Jaeger London Ltd Jaeger Retail Ltd	24 Aug 2017	Unlawful deductions from wages (salary, accrued annual leave, notice pay and payments during notice period), Failure to inform and consult (reg 13 TUPE Regs)
M Rezaei Kalanatari	Jaeger Co Shops Ltd Jaeger Retail Ltd	24 Aug 17	Unlawful deductions from wages (salary, accrued annual leave, notice pay and payments during notice period), Failure to inform and consult (reg 13 TUPE Regs)
G Saunders	Jaeger Co Shops Ltd Jaeger Retail Ltd	24 Aug 17	Unlawful deductions from wages (salary, accrued annual leave, notice pay and payments during notice period), Failure to inform and consult (reg 13 TUPE Regs)

2 On 24 November 2017 the Tribunal wrote to the Claimants and informed them, inter alia, that:

(a) Ms Donovan's claim could not be accepted because ACAS certificate numbers had not been provided and the exemption claimed by her did not appear to be applicable;

(b) Ms Jones' claim against Jaeger London Ltd was rejected because there was no separate ACAS certificate for that company.

(c) Ms Gard's claim against Jaeger Company's Shops Ltd was rejected because there was no separate ACAS certificate for that company;

(d) Mr Saunders' claim against Jaeger London Ltd could not be accepted without a certificate in the name of that company;

(e) Ms Kalantari cited one EC certificate for both Respondents. The Tribunal needed to see to which company the certificate related.

(f) Jaeger London Ltd ("JLL") and Jaeger Company's Shops Ltd ("JCSL") were in Administration and the claims against them could not proceed unless the Claimants obtained the consent of the Administrator or a court order.

3 At a preliminary hearing on 30 November 2017 Messrs Horobin and Pratt withdrew their claims against JLL and those claims were dismissed. The other Claimants (referred to as "the Jones Claimants") were ordered to notify the Tribunal by 19 December 2017 whether they agreed that their claims to be pursued lay against Jaeger Retail Ltd only and the claims against the other Jaeger companies must be dismissed or stayed indefinitely. Ms Donovan was asked to notify the Tribunal whether an ACAS certificate had been issued against any of the Respondents and Ms Kalantari whether she had an ACAS certificate for Jaeger Retail Ltd.

4 On 18 January 2018 the Jones Claimants submitted amended particulars of claims. None of them submitted any additional ACAS certificates, and on 6 March 2018 the Tribunal confirmed that the position on ACAS certificates was still as set out in its letter of 24 November 2017.

5 On 2 May 2018 Ms Jones sent to the Tribunal her responses to the issues that had been raised at the preliminary hearing on 30 November 2017. She confirmed that the Jones Claimants were pursuing their claims against Jaeger Retail Ltd. As their claims against JLL and JCSL had either been rejected or not accepted and they had not obtained the consent of the Administrator or a court order to pursue claims against them, they could not pursue their claims against those entities. She said that Ms Donovan had never been issued with an EC certificate due to an error on behalf of ACAS. There was no document from ACAS to confirm that. Ms Donovan had claimed in her form that she did not have an ACAS EC certificate number because another person with whom she was making the claim had such a number. She was the only Claimant on her claim form. Ms Jones produced a letter from ACAS which stated that an EC certificate had been granted to Ms Rezaei in respect of Jaeger Retail Ltd.

6 At a preliminary hearing on 16 May 2018 EJ Tayler identified the preliminary issues to be determined at today's preliminary hearing. They included the following two issues –

- Whether Ms Donovan and Ms Kalantari possessed ACAS EC certificates permitting them to bring their claims against the Respondent.
- Whether the Claimants had standing to present a claim under Regulation 13 of the TUPE Regulations 2006 against the Respondent.

Just prior to this hearing, the Claimants applied for specific disclosure of a large number of documents. It was agreed between the parties that the disclosure sought would not have any bearing upon the above two issues and that they could be determined in advance of the disclosure application being determined.

7 I concluded that the claim of Ms Donovan could not be accepted and that the Tribunal did not have jurisdiction to consider her claim because she had not complied with the requirement set out in section 18A(1) of the Employment Tribunals Act 1996 and the exemption upon which she relied did not apply in her case. I concluded that Ms Kalantari's claim against Jaeger Retail Ltd should be accepted as she had complied with section 18A(1) of the 1996 Act. I gave detailed reasons for that decision orally.

The Regulation 13 complaint

8 In their particulars of claim Messrs Horobin and Pratt set out their regulation 13 claim as follows –

“31. The Claimant was not informed or consulted about a proposed transfer nor about dismissal. The Administrators were appointed on Monday 10 April 2017 and the claimant was informed that he was being dismissed with immediate effect early in the morning of Tuesday 11 April 2017. He was given a letter later that day confirming that he had been dismissed and that the date of dismissal was 10 April 2017, the day before he was told of his dismissal. He was referred to the Redundancy Payments Service to claim holiday pay, notice pay, arrears of wages and any statutory payment that may have been owed.

32. None of the information required by regulation 13(2) of the TUPE Regulations was provided to the Claimant.

...

34. JLL therefore failed in all respects to comply with its obligations under Regulation 13 of the TUPE Regulations.

Transfer of liabilities to JLL

35. By virtue of Regulations 4(1)-(3) of the TUPE Regulations JLL's liability to the Claimant in respect of its failure to comply with its obligations under Regulation 13 has transferred to the Respondent, save only that the Respondents are jointly and severally liable in respect of such liability by virtue of Regulation 15(9).”

9 The Jones Claimants' claim is in similar terms and is set out at paragraphs 50 to 55 of their particulars of complaint, save for two differences. Firstly, they allege that "the Respondent" failed to comply with its obligations under regulation 13 of the TUPE Regulations 2013. At that stage the claim was being brought against Jaeger Retail Ltd and JCSSL for all the Claimants except Ms Jones. Secondly, they allege that there has been transfer of JLL's liabilities under regulations 4(1)-(3) to the Respondent only in respect of Ms Jones.

10 All the Claimants state in their particulars of claim that certain of the businesses and assets of the Jaeger Group (which included JLL and JSCL) transferred on or around 28 May 2017 to Jaeger Retail Ltd. As the Claimants were dismissed over two months before that date, their complaints of failure to inform and consult must be against their employers at the time, i.e. either JLL or JSCL.

11 The Respondent in its Grounds of Resistance stated, at paragraph 25,

*"Further, the Claimants' claim under Regulation 13 as against the Respondent is misconceived. The claim can only be pursued against the employer of affected employees which the Respondent is not, nor ever has it been. Further the Claimant has no locus to advance such a claim against the Respondent by reason of the express provisions of TUPE as analysed in **Allen-v-Morrisons facilities Services** [2014] IRLR 514."*

The Law

12 Regulation 4(1) and (2) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regulations 2006") provides,

"(1) ... a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer –

- (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and*
- (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee."*

13 Regulation 13 provides,

“(1) In this regulation and regulations 13A, 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of –

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, of that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages that the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be taken, of that fact.

...

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him y virtue of paragraph (2)(d).”

14 Regulation15 provides,

“(1) Where an employer has failed to comply with a requirement of regulation 13 ... , a complaint may be presented to an employment tribunal on that ground –

...

(d) in any other case, by any of his employees who are affected employees.”

...

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee failed to give the requisite information at the required time in accordance with regulation 13(4) unless he gave the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

...

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may –

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph 11.”

15 In **Allen v Morrisons Facilities Services Ltd [2014] ICR 792** the claimant employees brought claims against the transferors and the transferee under Regulation 15(1) of the TUPE Regulations 2006 alleging a failure to comply with the duty to inform and consult them about the proposed transfer in breach of regulation 13(2). The claims against the transferors were subsequently withdrawn or settled. An employment tribunal dismissed the claims against the respondent transferee for lack of jurisdiction. The claimants appealed. The EAT held:

- (a) Regulation 13 sets out the duties of employers to inform and consult appropriate representatives of their affected employees. Regulation 15 sets out who can make a complaint to a tribunal of failure to comply with a requirement of regulation 13. Regulation 15 does not impose obligations. It provides a mean of redress for breach of the requirements of regulations 13 and 14.
- (b) The standing of an employee to bring a claim for breach of an obligation under TUPE regulation 13 is determined at the date of the breach of the obligation. An employee of a transferor cannot obtain standing to claim against a transferee for breach of pre-transfer obligations because he became an employee of the transferee on the transfer of the undertakings.
- (c) Whether or not employees transfer, regulation 15(5) provides the exclusive route for an affected employee of a transferor to obtain compensation from a transferee. The relevant obligation owed to affected employees of the transferor is that imposed on the transferor by regulation 13(2)(d). The affected employees of the transferor at the time of the breach by them of that obligation may bring a claim under regulation 15(1)(d). It is only if the affected employees bring a claim against the transferor and the transferor alleges that the transferee had failed to give them the requisite information at the requisite time in accordance with regulation 13(4) and gives the transferee notice under regulation 15(5) that the transferee is made a party to the proceedings. It is clear from the scheme of the Regulations that the transferee cannot be made a party to the proceedings by any other means.
- (d) Article 7 of Directive 2001/23/EC did not require the conferring of a right on the employee of a transferor to pursue a claim against a transferee for breach of the transferee's obligations under regulation 13(4) to provide information to the transferor.

- (e) The claimants in that case settled or withdrew their claims against all the transferors. Therefore, the tribunal could not make the findings which were the necessary preconditions for an order that the transferee responded pay compensation under regulation 15(8)(b). Nor was there an independent cause of action which could be pursued by the claimants against the respondent transferee in those circumstances.

Conclusions

16 The facts in this case are very similar to the facts in the **Allen** case (above). It is not in dispute that there was a relevant transfer to the Respondent. The Claimants' case is that it took place on 28 May 2017; the Respondent's case is that it took place on 23 June 2017. The Claimants were employed by the alleged transferors (JLL and JSCL) and were dismissed on 10 or 13 April 2017.

17 The Claimants brought claims against both the transferors (JLL in some cases, JSCL in others) and the transferee. One of the claims that they brought was for breach of regulation 13(2). It was alleged that that breach occurred before their dismissal on 10 or 13 April 2017. At that time they were employed by the transferor and therefore, their complaints must be about the transferors' failure to inform and consult.

18 Messrs Horobin and Pratt withdrew their claims against the transferor. Ms Jones and Ms Gard's claims against the transferors were rejected. Mr Saunders and Ms Kalanatari's claims against the transferors have not been accepted. None of the Claimants have sought the consent of the administrator or a court order to pursue the claims against the transferors. The consequence of that is that none of the Claimants are pursuing the breach of regulation 13(2) claim against the transferors. It is being pursued only against the Respondent transferee. According to **Allen** they do not have an independent cause of action against the transferee. Their claim has to be brought against the transferors. If such a claim was brought and was found to be well-founded and the Tribunal ordered the transferors to pay compensation, the Respondent would be jointly and severally liable with the transferors in respect of that compensation. Regulation 4 transfers the transferors' liabilities under or in connection with the employees' contracts of employment. It does not transfer any liability of the transferor for breach of regulation 13(2).

Employment Judge Grewal

Date 23 November 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

27 November 2018

.....
FOR THE TRIBUNAL OFFICE