Appeal No. UKEAT/0272/10/RN
UKEAT/0479/10/RN
UKEAT/0480/10/RN

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 29 March 2011
Judgment handed down on

Before

THE HONOURABLE MRS JUSTICE COX

MR B BEYNON

SIR ALISTAIR GRAHAM KBE

PRESSURE COOLERS LTD — APPELLANT

(1) MR J MOLLOY
(2) MAESTRO INTERNATIONAL LTD
(3) THE SECRETARY OF STATE FOR TRADE AND INDUSTRY — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADAM SOLOMON (of Counsel) Instructed by: Messrs Clarkson Wright & Jakes LLP Solicitors Valiant House 12 Knoll Rise Orpington Kent BR6 0PG
For the First Respondent	MR J MOLLOY (The First Respondent in Person)
For the Second Respondent	No appearance or representation by or on behalf of the Second Respondent
For the Third Respondent	MR ADAM HEPPINSTALL (of Counsel) Instructed by: The Treasury Solicitor (Employment Law Team) One Kemble Street London WC2B 4TS

SUMMARY

TRANSFER OF UNDERTAKINGS – Insolvency

The issue in these appeals is who, in law, should pay the Claimant employee's basic award and notice pay following his unfair and wrongful dismissal by the transferee after a "pre-pack" TUPE transfer. Consideration was given to the meaning and effect of regulation 8(3) of TUPE in circumstances where, following the transfer of a business in administration as a going concern, the employee is then dismissed by the transferee. The ET's decision, on review, that in these circumstances the transferee, and not the Secretary of State, was liable for these sums under the relevant statutory scheme in Part XII ERA was upheld.

Criticisms were also made of the procedure adopted at review in this case. The ET's decision simply to substitute the original judgments on liability and remedy with new judgments, without any reference to the review, was found to be unhelpful and the practice should not therefore be followed.

THE HONOURABLE MRS JUSTICE COX

Introduction

1. In this matter Pressure Coolers Limited (PCL), the First Respondent below, is appealing against three separate judgments of the Ashford Employment Tribunal, as follows. The first appeal is against the original remedy judgment, promulgated with reasons on 4 March 2010, ordering PCL to compensate the Claimant for unfair dismissal and age discrimination. The second and third appeals are brought against the two judgments given on review, relating to both liability and remedy, following a review hearing held on 8 June 2010. Following that hearing the Tribunal decided to review both their original judgments in this case. These review judgments, which were ordered to stand in substitution for the original judgments, were both promulgated with reasons on 9 July 2010.

2. The issue at the heart of these appeals is who is liable for the Claimant employee's claims under the "relevant statutory schemes" referred to in regulation 8(4) of the **Transfer of Undertakings (Protection of Employments) Regulations 2006** ('TUPE'). Who, in law, should pay the Claimant's basic award and notice pay where he is unfairly and wrongfully dismissed by the transferee (PLC) after a "pre-pack" TUPE transfer of a business in administration? Is it PCL, as the Tribunal decided on review, or is it the Secretary of State (now for Business, Innovation and Skills), who was joined as the Third Respondent below? The point is of some importance in practice.

3. The Claimant, although a party in these appeals and appearing in person at the hearing before us, confirmed that he did not wish to advance any arguments of his own on this point. The transferor, Maestro International Limited (Maestro), the Second Respondent below, is now

in liquidation and the liquidator has indicated in writing his intention not to take any part in these proceedings.

4. The issues raised have therefore been the subject of submissions from Mr Solomon, appearing for PCL, and Mr Heppinstall, for the Secretary of State, and we are grateful to them both for their assistance.

5. The point is essentially one of statutory construction, although its inherent complexities have not been assisted by the procedural complications below, of which more later on. There is, however, no appeal against any of the Tribunal's findings of fact, which did not form any part of the review process. We therefore start with them, so far as they are relevant to this appeal.

The Background Facts

6. The Claimant, who was born in 1948, had been employed by Maestro as a bench fitter for some 20 years, commencing his employment in January 1989. Until 2007 he worked mainly on the manufacture of safety equipment but, from time to time, he also worked on the other part of Maestro's business, namely the manufacture of water coolers and drinking fountains. The two other employees engaged in manufacturing, Mr Wright and Mr Foster, were some 20 years younger than the Claimant and had been employed there only since 2003.

7. In 2006 Maestro decided that the costs of labour and parts for its manufacturing operations were excessive and that all manufacturing in the UK would therefore come to an end. In 2007 Maestro sold its safety equipment business and thereafter the Claimant worked mostly on drinking fountains, with occasional spells on the production line and water coolers.

8. By the end of 2008 Maestro had around 50 employees, who were mostly area managers, drivers and service engineers. By then it had become clear that the company was in financial difficulties and, in May 2008, it had entered into a creditors' voluntary arrangement under the supervision of an insolvency practitioner, Mr Lord. This, however, did not solve the company's problems. In early January 2009 Mr Lord, together with Maestro's directors and shareholders, entered into negotiations with the managing director of PCL, Mr Mitchison, with a view to PCL's purchase of Maestro's assets. At this time PCL had approximately 10 employees.

9. Maestro and PCL reached agreement in principle that PCL would acquire the business and an Administration "pre-pack" was created for that purpose.

10. On 7 January 2009 the High Court was given formal notice of the intention to appoint Mr Lord as Maestro's Administrator.

11. At about this time Mr Mitchison had discussions with Mr Williams and Mr Strom, directors of Maestro, regarding the company's business. He took the view that the business was over-staffed and that redundancies should be made. He thought it unnecessary for there to be three manufacturing staff and he wanted one redundancy. He accepted the advice of Mr Williams and Mr Strom that the Claimant should be selected. Mr Williams gave evidence that this was because of the Claimant's skills, absence and disciplinary records.

12. The Tribunal found on the evidence that there was no consultation at all by Maestro with the Claimant or his colleagues concerning the proposed sale of the business to PCL.

13. At 6:43pm on 12 January 2009 Mr Mitchison sent an email to Mr Lord in which he set out a list of intended redundancies by reference to the names and addresses of a total of seven members of staff, of which the Claimant was one. He concluded with these words: "Hopefully you can send out letters to them tonight. I will notify them all tomorrow in any case."

14. Mr Lord forwarded that email to an employee of the Administrator, Mr Wilkinson, at 10:12am the following morning, 13 January, with a request that he should "make these letters up and send them out today please, assuming we get appointed."

15. The sale of Maestro's assets to PCL was the subject of a formal agreement, dated 13 January 2009. It was not in dispute that that agreement was entered into simultaneously with Mr Lord's appointment as Administrator. The express terms of that agreement included the following:

> **"2.1 Subject to the terms and conditions of this Agreement the Seller shall sell and the Buyer shall buy the Business and whatever right, title and interest (if any) the Seller may have in: -**
>
> **(a) The debts**
>
> **(b) Goodwill**
>
> **(c) The intellectual property**
>
> **(d) The plant and machinery**
>
> **(e) The stock**
>
> **(f) The telephone number**
>
> **(g) The work in progress**
>
> **to the intent that the Buyer shall from the transfer date carry on the business as a going concern.**
>
> **10.1 The parties agree that this agreement constitutes the sale of a business as a going concern (in respect of the Business) to which the Transfer Regulations shall apply and that in accordance with the Transfer Regulations the Buyer shall with effect from the Transfer Date take over from the Seller the contracts of employment of the Employees and each of them."**

16. At 11 am on 13 January Mr Mitchison, who was in Maestro's offices with Mr Williams, received a telephone call from Mr Lord to inform him that the sale agreement had been completed. Mr Mitchison then asked Mr Williams whether the identified employees had been made redundant by the liquidators, to which Mr Williams replied "no".

17. Later on that day, in the mid afternoon, Mr Mitchison held a brief meeting with each of the seven members of staff he intended to make redundant. He told them that they were now redundant and they were each handed a form "RP1". As at that date the Claimant was owed wages and he was also entitled to accrued but untaken holiday. He received no notice of dismissal and no pay in lieu.

18. At some point after the completion of the sale agreement Mr Wilkinson, on the instructions of Mr Lord, caused letters to be sent on behalf of the Administrators to each of those made redundant to inform them of this fact and to assert that this had been the act of Mr Lord.

19. As was intended by the sale agreement, upon completion some fifty of Maestro's staff transferred to become employees of PCL, which acquired all Maestro's meaningful business assets. The Tribunal found that PCL had then continued to trade with the use of those staff and assets since that date, but that the company had ceased all manufacturing operations in the UK. Mr Wright and Mr Foster had remained as employees of PCL.

Proceedings before the Tribunal

20. On 9 April 2009, and subsequently on 3 June 2009, after complying with the statutory grievance procedure then in place, the Claimant presented claims to the Employment Tribunal

against both PCL and Maestro, complaining of unfair dismissal, age discrimination, failure to consult pursuant to the requirements of TUPE, unauthorised deductions from wages and a failure to give him notice pay or payment for his accrued but untaken holiday.

21. He also complained of disability discrimination, as a sufferer of rheumatoid arthritis, but the Tribunal dismissed that claim on the basis that he was not suffering a disability as defined by the legislation. His claim for entitlement to a redundancy payment was also dismissed. No issue arises on those findings in this appeal and we therefore say no more about them.

22. Maestro failed to enter a response to either claim and PCL entered a response only to the first claim. The Secretary of State was joined to the proceedings and entered responses to both claims.

23. After hearing the evidence and finding the facts, as set out above, the Tribunal's first liability judgment was promulgated with reasons on 23 December 2009.

24. The important point, so far as this appeal is concerned, is that clear and unchallenged findings were made by the Tribunal as to the order of events that occurred on 13 January 2009. At 11 a.m. on that day, Maestro went into administration; there was a TUPE transfer of Maestro's business to PCL; and the Claimant's employment transferred from Maestro to PCL. Subsequently, at about 3 pm that day, the Claimant was dismissed by PCL.

25. On the basis of the evidence and their findings of fact, the Tribunal found that there had been no consultation with the Claimant by Maestro, in accordance with the requirements of TUPE; that the Claimant's dismissal by PCL had been on the grounds of age, contrary to the

Employment Equality (Age) Regulations 2006; and, further, that his dismissal was unfair under both section 98A **Employment Rights Act 1996** (automatic unfairness in failing to follow any procedure) and section 98 (objectively unfair redundancy and dismissal in circumstances which the Tribunal regarded as "lamentable").

26. Before the Tribunal PCL argued that the Claimant's employment had not in fact transferred from Maestro to PCL, by virtue of the provisions of regulation 8(7) of TUPE and the Employment Appeal Tribunal's decision in **Oakland v. Wellswood (Yorkshire) Limited** [2009] IRLR 250. Regulation 8(7) provides:

> **"Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."**

Regulations 4 and 7 deal with the effect of a relevant transfer on contracts of employment, and with dismissal of employees because of a relevant transfer.

27. The Tribunal rejected this submission. They held that neither the decision of the Employment Appeal Tribunal, nor the subsequent decision of the Court of Appeal, in **Oakland** were relevant to the present case because it was clear that this Claimant was not dismissed by the Administrator at a time when Maestro was in administration. He was dismissed by Mr Mitchison of PCL, the transferee, after a TUPE transfer had taken place.

28. Further, in relation to regulation 8(7), the Tribunal said that that regulation did not apply where the transfer arose from a "pre-pack" sale agreement entered into by an Administrator, who clearly intended, by the terms of that agreement, to transfer the business as a going concern. The Tribunal concluded on the evidence that the transfer was not done with a view to

the "liquidation of the assets" of Maestro, but with a view to the preservation of the business as a going concern.

29. Thus, the Tribunal found that regulations 8(1) to (6) applied; that Maestro was subject to "relevant insolvency proceedings" as defined in regulation 8(6); and that the Claimant was a "relevant employee" within regulation 8(2)(a). The argument relating to regulation 8(7) has not been resurrected in this appeal.

30. In the original liability judgment, the Secretary of State was found to be liable to the Claimant for payment in lieu of notice; unauthorised deductions from wages; payment for accrued but unpaid holiday; and payment of 13 weeks pay for Maestro's failure to consult pursuant to regulations 15 and 16 of TUPE.

31. Subsequently, after sitting in chambers on 9 February 2010, the Tribunal promulgated their reasoned remedy judgment on 4 March 2010. In the Judgment itself, on the first two pages of this document, the Tribunal made the following awards to the Claimant.

32. The Secretary of State was ordered to make the following payments:

(1) £3,534.84 in respect of pay in lieu of notice

(2) £224.56 for accrued and unpaid holiday pay

(3) £505.26 for unauthorised deductions

(4) £3,649.36 as being 13 weeks pay pursuant to regulation 15 of TUPE.

33. PCL was ordered to pay £10,000 with interest, in respect of injury to feelings for unlawful age discrimination. Further, at paragraph 7, PCL was ordered to pay compensation to

the Claimant for unfair dismissal in the sum of £9,975 for the basic award and £31,468.86 for the compensatory award.

34. However, in their Reasons the Tribunal said this at paragraph 14:

> **"In light of our finding that the Claimant was unfairly dismissed he is entitled to a basic award equal to 28.5 weeks pay. That pay is subject to the statutory cap and is therefore calculated at £9,975. For the reasons set out above we consider the Secretary of State to be liable for that payment."**

35. On 5 March 2010 Mr Mitchison wrote to the Tribunal suggesting that there was an error in the remedy judgment and asking for it to be corrected. Referring to the inconsistency between paragraph 7 of the Judgment and paragraph 14 of the Reasons, he stated that the basic award should be ordered to be paid by the Secretary of State.

36. The Tribunal's response, on 18 March, was as follows:

> **"The Judgment is correct, and paragraph 14 is in error. The dismissal took place after the transfer. Employment Judge Kurrein intends to review this error of his own motion and invites submissions from the parties within 14 days of the date of this letter ..."**

37. Unfortunately the procedural picture then becomes somewhat confusing, and we need to refer to this briefly.

Review Proceedings

38. In his written submissions in response to this invitation, presented to the Tribunal on behalf of the Secretary of State, Mr Heppinstall took the opportunity to invite the Tribunal to conduct a more comprehensive review of both their liability and remedy judgments. By that stage, the Secretary of State had lodged Notices of Appeal at the Employment Appeal Tribunal

against both judgments. The Tribunal was therefore invited to review both judgments in the interests of justice, so as to obviate the need for, and costs of, these appeals.

39. The procedure adopted was then as follows. In the Secretary of State's submissions the Tribunal was asked both to extend time for such a review and to issue a rule 36(2)(a) notice to the other parties. It appears that, in error, the Tribunal issued only a Notice of Review Hearing. At that hearing, on 8 June 2010, the Tribunal raised the failure to issue the requisite notice, but we are told that all parties, including Mr Mitchison then appearing in person for PCL, agreed to waive any procedural defect and to proceed with the review. The review hearing therefore went ahead.

40. No further evidence was adduced. At the end of submissions the parties withdrew and the Tribunal subsequently announced their decision and gave short, oral reasons for deciding, in the interests of justice, to review both their earlier judgments. The Employment Judge indicated that they accepted the submissions of the Secretary of State. He then explained how they proposed to vary their original judgments to reflect that. The Review Judgments were then both promulgated with reasons on 9 July 2010, effectively being substituted for each of the original judgments.

41. We have set out this procedural history because Mr Solomon, appearing before us on behalf of PCL, raised in his skeleton argument a number of alleged, procedural irregularities in respect of this review process, which were said to vitiate the Tribunal's decision to conduct a review. These were new points, not raised in PCL's Notices of Appeal, and Mr Solomon has since clarified that he does not seek leave to amend the Notices of Appeal, in order to advance these arguments as part of PCL's appeal.

42. However, he draws attention to the unsatisfactory nature of the procedure adopted below in this case which, he submits, resulted in the Review Judgments simply being substituted for the original Judgments, without it being made clear what exactly was being reviewed, and why. The fact of the 8 June hearing is not even referred to in the Review Judgments.

43. It is possible, on a careful comparison between the original judgments and the judgments on review, to understand the Tribunal's decisions on review and the reasons for them, albeit briefly expressed. However, we consider that there is some force in the criticisms made by Mr Solomon. Further, the situation was not helped by the fact that the Employment Judge had apparently indicated orally, at the original hearing, that the Secretary of State would be liable for the basic award, leading Mr Mitchison to consider that there had been an error on the face of the subsequent order, and to write to the Tribunal on 5 March to seek to put it right.

44. There is a wide, general power given to Tribunals, by rule 34(3) of the 2004 Regulations, to review their judgments if the interests of justice require such a review; and to do so either on application by a party, or by the Tribunal or Employment Judge acting on their own initiative. Further, the hearing of an application for a review can continue, notwithstanding the fact that the Tribunal's decision is under appeal to the Employment Appeal Tribunal (see **Blackpole Furniture Limited v. Sullivan** [1978] ICR 558). On review a Tribunal can confirm, vary or revoke the original judgment; and the power to vary the judgment is sufficiently wide to enable a Tribunal to reverse the original decision completely, if appropriate.

45. In this case, however, whilst we can understand the approach the Tribunal took at the review hearing, suffice it to say that the confusion that ensued has not assisted the progress of this litigation. In our view, it would have been preferable for the Tribunal to promulgate

entirely fresh judgments on review, explaining clearly which aspects of the original judgments and of their reasoning were being varied on review, and why.

46. Since what happened here is not being pursued as a specific ground of appeal in this case we do not feel it necessary to comment further, save to say that, in our view, the procedure adopted here by the Tribunal was unhelpful and, as a matter of practice, should not be followed.

47. In the circumstances, since the Review Judgments effectively substitute those which were originally promulgated, PCL's appeal against the original remedy judgment should now be dismissed, and Mr Solomon fairly accepts that. The substantive points on appeal can properly be dealt with in the two appeals now pursued against the substituted Review Judgments.

48. We return, then, to the substantive issues.

49. In his submissions to the Tribunal, for the purposes of the review hearing, the Secretary of State's case was essentially as follows:

(i) The Secretary of State was not liable to make any payments in respect of a dismissal occurring after a relevant transfer, and PCL should be liable for all such payments. Paragraph 14 of the original remedy judgment reasons was in error and, further, the judgment was not correct in ordering the Secretary of State to make payment in lieu of notice.

(ii) The Secretary of State could not be liable for payment pursuant to regulation 15 of TUPE because it is not a payment to which the statutory guarantee in section 184 Employment Rights Act 1996 (ERA) applies.

(iii) The Tribunal should also reflect the fact that the Secretary of State had now made payments to the Claimant in respect of his pay arrears and accrued holiday pay, for which the Secretary of State was liable, and that therefore all valid claims against the Secretary of State had been satisfied.

50. Following the Review Hearing the Tribunal accepted all these submissions, so that PCL were ordered to pay the remaining awards to the Claimant, and the claims against the Secretary of State were described as being "dismissed". In fact, a better description would have been that all the claims for which the Secretary of State accepted liability had been discharged and were therefore no longer live claims before the Tribunal.

51. The Tribunal held, for the reasons set out at paragraphs 46 - 48 of their reviewed liability judgment, that the Secretary of State was only liable for sums, payable pursuant to Parts XI and XII of the ERA, that were due on or before the transfer date. In so deciding, they accepted Mr Heppinstall's submissions as to the correct interpretation of regulation 8(3) of TUPE, supported by the terms of Article 5 of Council Directive 2001/23/EC.

52. As a result of those findings, both the appeals lodged at the Employment Appeal Tribunal by the Secretary of State have now been dismissed upon withdrawal.

The Appeal

53. We shall first set out the relevant legal framework.

54. Regulation 8 of TUPE provides as follows:

> **"Insolvency**
>
> **(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.**
>
> **(2) In this regulation 'relevant employee' means an employee of the transferor -**
>
> **(a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or**
>
> **(b) whose employment with the transferor is terminated before the time of the relevant transfer in the circumstances described in regulation 7(1).**
>
> **(3) The relevant statutory scheme specified in paragraph (4)(b) (including that sub-paragraph as applied by paragraph 5 of Schedule 1) shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee's employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.**
>
> **(4) In this regulation the 'relevant statutory schemes' are –**
>
> **(a) Chapter VI of Part XI of the 1996 Act;**
>
> **(b) Part XII of the 1996 Act.**
>
> **(5) Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes.**
>
> **(6) In this regulation 'relevant insolvency proceedings' means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.**
>
> **(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."**

55. As Elias J. explained in **Secretary of State for Trade and Industry v. Slater** [2007] IRLR 929, regulation 8 envisages the operation of two different sets of rules, depending upon whether regulation 8(6) or (7) is the applicable insolvency procedure. It is not in dispute in this case that we are concerned with regulation 8(6). As we indicated earlier, Mr Solomon has not sought to resurrect the argument he advanced below that regulation 8(7) applied here.

56. The "relevant statutory scheme" in this case is Part XII of ERA which, so far as is relevant, provides as follows:

> **"182 Employee's rights on insolvency of employer**
>
> **If, on an application made to him in writing by an employee, the Secretary of State is satisfied that –**
>
> **(a) the employee's employer has become insolvent,**
>
> **(b) the employee's employment has been terminated, and**
>
> **(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,**
>
> **the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.**
>
> ...
>
> **184 Debts to which Part applies**
>
> **(1) This Part applies to the following debts-**
>
> **(a) any arrears of pay in respect of one or more (but not more than eight) weeks,**
>
> **(b) any amount which the employer is liable to pay the employee for the period of notice required by section 86(1) of (2) or for any failure of the employer to give the period of notice required by section 86(1),**
>
> **(c) any holiday pay-**
>
> **(i) in respect of a period or periods of holiday not exceeding six weeks in all, and**
>
> **(ii) to which the employee became entitled during the twelve months ending with the appropriate date,**
>
> **(d) any basic award of compensation for unfair dismissal or so much of an award under a designated dismissal procedures agreement as does not exceed any basic award of compensation for unfair dismissal to which the employee would be entitled but for the agreement, and**
>
> **(e) any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice or articled clerk.**
>
> **(2) For the purposes of subsection (1)(a) the following amounts shall be treated as arrears of pay-**
>
> **(a) a guarantee payment,**
>
> **(b) any payment for time off under Part VI of this Act or section 169 of the Trade Union and Labour Relations (Consolidation) Act 1992 (payment for time off for carrying out trade union duties etc),**
>
> **(c) remuneration on suspension on medical grounds under section 64 of this Act and remuneration on suspension on maternity grounds under section 68 of this Act, and**
>
> **(d) remuneration under a protective award under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992.**
>
> **(3) In subsection (1)(c) "holiday pay", in relation to an employee, means-**

(a) pay in respect of a holiday actually taken by the employee, or

(b) any accrued holiday pay which, under the employee's contract of employment, would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday.

...

185 The appropriate date

In this Part 'the appropriate date'-

(a) in relation to arrears of pay (not being remuneration under a protective award made under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992) and to holiday pay, means the date on which the employer became insolvent,

(b) in relation to a basic award of compensation for unfair dismissal and to remuneration under a protective award so made, means whichever is the latest of-

(i) the date on which the employer became insolvent,

(ii) the date of the termination of the employee's employment, and

(iii) the date on which the award was made, and

(c) in relation to any other debt to which this Part applies, means whichever is the later of-

(i) the date on which the employer became insolvent, and

(ii) the date of the termination of the employee's employment."

Section 186 makes provision for limits to be set on the amounts payable under section 182.

57. Thus in general terms the Part XII regime bestows various rights on an employee should his or her employer become formally insolvent. One of these rights is that the employee may obtain payment of certain "guaranteed debts" from the National Insurance Fund, i.e. the Secretary of State. In general, the scheme applies only to certain, identified debts as set out in the relevant sections. There is no right to protection in respect of claims which have not been made at the date of the insolvency and which therefore have not given rise to a debt of the relevant kind.

58. In **Slater** Elias P explained the rationale behind regulation 8 in the following paragraphs, with which we all agree:

"13. The rationale behind reg. 8

The scheme of the TUPE regulations broadly is this. Typically where there is a transfer of an undertaking, reg. 4 provides that the employees are automatically transferred to the transferee with the latter taking over all the liabilities of the transferor.

14. Regulation 7 provides that any dismissal will be automatically unfair unless it is for an economic, technical or organisational reason connected with the transfer. However, it is recognised that to apply these principles to insolvent businesses would discourage potential purchasers of the business from acquiring the business. That would be to the detriment of the employees.

15. Regulation 8 therefore aims to relieve transferees of the burdens which would otherwise apply in certain defined circumstances.

16. Essentially this is done in two quite distinct ways. The most extensive exception from the effect of TUPE is created by reg. 8(7) (which is intended to reflect the provisions of Article 5(1) of the Directive). This provides that where the insolvency proceedings are analogous to bankruptcy proceedings and have been instituted with a view to liquidation of the assets, then neither reg. 4 nor 7 apply at all. There is no transfer of staff to the transferee and no claim for unfair dismissal against him (although other provisions of TUPE, such as the information and consultation regulations, continue to operate).

17. A narrower exception is carved out where reg. 8(6) applies. This applies to insolvency proceedings where the purpose is not with a view to liquidation of assets. This does not altogether exclude, but it does modify, the effects of regs. 4 and 7. It means that the transferee does not pick up all of the liabilities which would otherwise transfer to him.

18. Regulation 8(3) has the effect of making the Secretary of State liable for the obligations still outstanding at the date of transfer which are caught by Part XII of the 1996 Act. There is a deemed dismissal at that stage for purposes of fixing those liabilities even although there has been no actual dismissal. However, to the extent that the liabilities exceed the statutory limits, liability transfers to the transferee.

19. Regulation 8(5) has the effect of making the insolvency fund rather than the transferee liable to meet any redundancy liabilities. (These will typically arise where there are dismissals for redundancy which are not for economic, technical or organisational reasons)."

59. More recently, further helpful observations on the meaning and effect of regulation 8 have been made by the Employment Appeal Tribunal (Underhill J presiding) in **OTG Limited v. Barke and Others** UKEAT/0320/09/RN (unreported, 16 February 2011). The primary issue in that case was whether administration proceedings under Schedule B1 of the **Insolvency Act 1986** can ever constitute "bankruptcy or analogous proceedings ... instituted with a view to the liquidation of the assets of the transferor". The EAT were therefore not directly concerned with the issue arising in the present appeal. However, in the case of the Claimant Mr Barke, it was common ground that he was not given notice of dismissal until the day following the transfer. He was therefore in a position analogous to that of the Claimant in the present case.

60. Having set out regulation 8 in full the President commented, at paragraph 31, that, "The effect of those provisions hardly leaps from the page", an observation with which we entirely agree. Assuming, however, that regulation 8(7) did not apply, he described the way in which the provisions at paragraphs (1) to (6) work in general terms as follows:

> **"(1) The first question is whether the claimant is a 'relevant employee', as defined by para. (2).**
>
> **There are two kinds of relevant employee:**
>
> > **(a) those who have <u>not</u> been dismissed pre-transfer and whose employment has accordingly transferred under reg. 4 in the ordinary way (remember, this is not, *ex hypothesi*, a case where reg. 4 has been disapplied by reg. 8 (7));**
> >
> > **(b) those who have been dismissed pre-transfer "in the circumstances described in regulation 7 (1)" - that is, in the usual shorthand, who have been dismissed for a transfer-related non-ETO reason and whose dismissal is accordingly automatically unfair.**
>
> **(2) As regards (a) - those who have transferred - the broad result is that the Part XII guarantee (that being "the relevant statutory scheme specified in paragraph (4) (b)") applies, and the transferee is relieved of the corresponding liabilities: that is the effect of paras. (3) and (5) respectively. But it is important to understand how that is achieved. In this regard, para. (3) effects three specific modifications to the provisions of Part XII:**
>
> > **(i) The "qualifying condition that the employee's employment has been terminated" - i.e. section 182 (b) (see para. 2 above) - is disapplied: in other words, the employee is entitled to be paid any sums due at "the appropriate date" even though he is in fact, by virtue of reg. 4, still employed.**
> >
> > **(ii) The date of transfer is treated as the date of termination. The reason why the date of termination matters is that it is part of the mechanism for calculating "the appropriate date".**
> >
> > **(iii) The transferor is treated as the employer notwithstanding the transfer. That matters because it is the employer's obligations that the Secretary of State guarantees.**
>
> **Thus the transferee acquires the employee without the baggage of past liabilities; but it is necessary to look to the detail to see exactly which liabilities count as past. It should be noted that para. (3) says nothing about the redundancy payments guarantee.**
>
> **(3) As regards (b) - those who have been dismissed pre-transfer but for a non-ETO transfer-related reason (and thus unfairly) - the Secretary of State is of course *prima facie* liable under the Chapter XII guarantee; but the effect of para. (5) is that he is not relieved of liability by the effect of reg. 4."**

61. The EAT found that Mr Barke came under head (a), as does the Claimant in the present appeal. They then said this at paragraph 32:

> **"32. ... Reg. 8 plainly has no application to his claim for a redundancy payment: it was, as we have said, OTG who dismissed him and there is nothing in reg. 8 to affect its liability for the consequent redundancy payment. But nor does it affect his other two claims - for pay in lieu of notice and in respect of untaken holiday. The question as regards those is whether they were due on the appropriate date: see section 182 (c) (para. 2 above). The appropriate date is,**

by section 185 (c), the later of the date of the employer's insolvency and the date of the termination of the employment. However, as explained at para. 31 (2) (ii) above, in Mr Barke's case the date of termination is deemed to be the date of transfer: on that basis the two dates are in fact the same. As at that date neither of the obligations for which Mr. Barke claims had arisen, since, as noted above, these only accrued on termination: that is of course actual termination, since the deeming provisions in para. (3) do not apply to the accrual of the obligations themselves. Accordingly OTG remains liable for the full amount awarded by the Tribunal, albeit on a different basis."

The Parties' Submissions

62. On behalf of PCL Mr Solomon does not seek to challenge any of the Tribunal's findings of fact. Nor does he challenge their conclusion that paragraphs (1) to (6) of regulation 8 apply. He does not appeal against the finding that the Claimant was dismissed after his employment was transferred.

63. Mr Solomon focuses instead on regulation 8(3), advancing his arguments essentially as follows.

64. He points out, first, that this is not a case in which the Claimant is adversely affected by either outcome. His rights, as an individual worker, have therefore been safeguarded, whether PCL or the Secretary of State is liable for the amounts claimed.

65. The issue therefore falls to be determined on the correct interpretation of regulation 8 and that requires effect to be given to the purpose of that regulation. Whilst the general purpose of TUPE is to protect the rights of employees, regulation 8 is concerned, primarily, with promoting a "rescue culture", under which potential purchasers of insolvent businesses are not deterred from taking them on by the prospect of inheriting the entire workforce on its previous terms.

66. Mr Solomon submits that this dual purpose, of promoting a rescue culture and protecting the rights of employees, is best achieved by the Secretary of State having liability for the claims which are the subject matter of this appeal.

67. In this case the Tribunal found that the "pre-pack" sale agreement was not entered into with a view to liquidation of the assets. Regulation 4 does not therefore apply to those sums that would otherwise be payable by the Secretary of State when an employer becomes insolvent (under regulation 8(5)). Applying regulation 8(3), he submits that the Secretary of State remains liable for all those payments listed in Part XII of the ERA. That includes all those debts set out in section 184, including arrears of pay, notice pay, accrued holiday pay and the basic award. In holding that the Secretary of State was liable only for sums, payable pursuant to Part XII, that were due on or before the transfer date, the Tribunal erred in law, apparently restricting the application of the provisions to cases where there is an express dismissal prior to a transfer.

68. Thus the focus of Mr Solomon's submissions is Regulation 8(3) and the deeming provisions it contains. Their effect, he submits, is that the relevant statutory scheme specified in paragraph 4(b), that is Part XII ERA, shall apply in the case of a relevant employee, as this Claimant was found to be, irrespective of the fact that the Claimant's employment has not in fact been terminated. Thus, whether or not the Claimant was (a) dismissed before the transfer and is therefore a relevant employee for the purposes of regulation 8(2)(b); or (b) was transferred and then dismissed after the transfer, making him a relevant employee for the purposes of regulation 8(2)(a), Part XII ERA applies; and the Secretary of State remains liable for the basic award and indeed for all the other debts listed in section 184.

69. By virtue of this "statutory fiction", created by the deeming provisions, the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer. Liability therefore falls on the Secretary of State whenever there is a transfer from an insolvent employer. Since the effect of regulation 8(3) is that there is always a deemed dismissal at the date of transfer, all Part XII "debts" crystallise at that date, even if there has been no actual dismissal prior to transfer. It is wrong to say that the debts for which the Secretary of State is liable have to arise before the transfer and the Tribunal erred in coming to that conclusion.

70. Further, he submits that the observations of Underhill J at paragraph 32 of his judgment in **OTG v Barke,** to the effect that the deeming provisions do not apply to the accrual of the obligations themselves, are wrong. The only reason that there is an obligation to pay is because of the operation of the deemed dismissal provisions. The fact that regulation 8(3) deems the date of transfer to be the date of termination and the transferor to be the employer means that, whether or not the dismissal took place after the transfer, it is deemed to have taken place as at the date of transfer. He submits, therefore, that we should not follow the reasoning of the EAT in that case; and that the construction of these provisions for which he contends accords more readily with the intention of Parliament to implement a rescue culture and to minimise the burden on acquiring employers of transferring employees.

71. Mr Heppinstall submits that this is to misunderstand entirely the purpose of regulation 8(3). The Tribunal directed themselves correctly on review and the EAT should not interfere with their decision. Regulation 8(3) is part of the implementation of Directive 2001/23/EC. The debts of the transferor which come within the scope of the State guarantee, as listed in section 184, are frozen at transfer and paid, within certain limits, by the Secretary of State.

However, the debts have to arise before the transfer. Any debt or liability arising after transfer is beyond the scope of the guarantee. Without modification to section 182 transferring employees would be unable to take advantage of the guarantee since there would have been no termination. Regulation 8(3) therefore supplies the necessary deeming modification, so that actual termination is not required to qualify for payments under the Part XII scheme. The EAT's observations in **OTG v Barke** are correct, as are those of Elias J in **Slater** in referring to the regulation making the Secretary of State liable for those obligations which are "still outstanding" at the date of transfer. In the circumstances, both the basic award and notice pay in this case fall to be paid by PCL, who unfairly and wrongfully dismissed the Claimant after the transfer.

Discussion and Conclusion

72. Both counsel ranged far and wide in their submissions before us, in addressing the different results which might flow from their respective contentions. In the event we have formed a clear view that the submissions of Mr Heppinstall are correct. Our reasoning is as follows.

73. It is important to keep in mind that the TUPE Regulations were implemented in order to give effect to Council Directive 2001/23/EC, the "Acquired Rights Directive". Chapter 1, comprising articles 1 and 2, defines the scope of the Directive and, specifically, the transfers to which it applies. The main provisions in chapter 2, articles 3 and 4, provide for the contracts of employment of employees in a transferred undertaking to go with the transfer (art. 3) and for dismissals in connection with the transfer to be unlawful, subject to certain exceptions.

74. Article 5 provides for a two-fold exception to the primary protection afforded by articles 3 and 4. So far as is relevant to this case, article 5.1 and 5.2(a) provide as follows:

> **"1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).**
>
> **2. Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law) a Member State may provide that-**
>
> > **(a) notwithstanding Article 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer ..."**

75. Thus by article 5.2, as Underhill J pointed out in **OTG v. Barke**, where a transfer takes place in any form of insolvency situation the Member State may provide that debts of the transferor arising from the contract of employment or employment relationship and payable before the transfer shall not be transferred to the transferee, and may instead provide that those debts are paid by the State. Regulations 8(2) – (6) give effect to article 5.2(a).

76. The effect of article 5.2 (a) and TUPE is that the debts of the transferor which are within the scope of the State guarantee (i.e. those listed in section 184) are therefore frozen at transfer and paid by the Secretary of State.

77. As Mr Heppinstall points out, if a business is transferred in what he terms a "non-liquidation insolvency situation", and that commonly means administration, the Secretary of State shoulders the burden of some of the transferor's debts arising from contracts of employment or employment relationships at the point of transfer (subject to certain limits),

which do not then pass to the transferee. In this way the State is effectively subsidising the rescue of an insolvent employer, so that acquiring employers receive the transferring employees without certain debts, thereby promoting the rescue culture which underpins these provisions.

78. However, the key words in article 5.2(a), for the purposes of the present case, seem to us to be those providing that the contractual or other debts that shall not be transferred to the transferee are those which are "payable before the transfer".

79. We therefore agree with Mr Heppinstall that the relevant debts have to arise before the transfer in order to come within the State guarantee provided for in section 184. This, in our judgment, is what the EAT were saying, both in **Slater** and then in **OTG v. Barke**, in the passages we have referred to above. We find ourselves entirely in agreement with the reasoning of the EAT in those cases. Notwithstanding the fact that the cases concerned different facts, the EAT's observations, in appeals presided over by two Presidents of the EAT, as to the nature and effect of regulation 8 were clearly of general application and, in our judgment, they are correct.

80. As set out above, payments made pursuant to the State guarantee are normally made in the circumstances set out in section 182. These include requirements that, as at the date when a claim in writing is made to the Secretary of State, the employer must be insolvent; that qualifying debts are due on "the appropriate date" as defined; and that "the employee's employment has been terminated".

81. In the present case the Claimant's contract of employment was found to have been terminated only after transfer on 13 January. He was therefore a relevant employee of the transferor, as defined in regulation 8(2)(a).

82. As Mr Heppinstall submits, in our view correctly, without some modification to the terms of section 182, employees transferring in such circumstances would be unable to avail themselves of the guarantee provided by that section because, as at the date of transfer, there would have been no termination of their employment.

83. The difficulty is resolved by means of regulation 8(3), which treats the date of transfer as the date of termination and treats the transferor as the employer, thereby adapting Chapter XII so as to give effect to the aim of article 5.2, modifying both section 182 and the calculation of the "appropriate date" defined by section 185, to take into account the fact that the debts are frozen as at the date of transfer. In our view, the wording of regulation 8(3) itself suggests that the deeming provisions it contains have effect only "for those purposes", namely for the purpose of adapting Part XII to achieve the purpose of article 5.2.

84. It follows that we do not accept as correct the construction of regulation 8(3) advanced by Mr Solomon. This seems to us to be inconsistent with the policy underpinning the Directive and in particular article 5.2. The construction for which he contends would not, in our view, accord with the intention of the legislation to minimise the burden on acquiring employers of the liabilities of transferring employees. Since this Claimant was unfairly dismissed by the acquiring employer after transfer, PCL's liability to pay the basic award and notice pay cannot sensibly be said to constitute a liability of a transferring employee. As at the time he is being transferred there is no such liability.

85. Nor can we see any pressing need for regulation 8(3) to be construed in the way that Mr Solomon suggests, so as to provide incentives for a "pre-pack" administration, in addition to those which are already provided by the article 5.2 derogation. As Underhill J pointed out in **OTG v. Barke** there is a clear distinction in the Directive between liquidation, where safeguarding the interests of individual workers is paramount, and administration, where he observed:

> **"Disincentives to rescue are only mitigated by the derogations permitted by article 5.2 ... Those derogations as implemented in the UK – specifically the picking up of accrued liabilities by the Secretary of State (regulation 8(1) – (6) ... do in fact go a considerable way to diminishing the disincentive to rescue."**

86. In our judgment the Tribunal were right to conclude as they did on review in this case. PCL is liable for payment of the basic award and notice pay arising from the First Respondent's unfair dismissal. We therefore dismiss both PCL's appeals.