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OUTSIDE THE TRANSFER WINDOW: TUPE AND SHARE SALES

When does TUPE apply to a share sale? The answer to that question is highly relevant for both employment litigators and those involved in M&A transactions.

Overview

The recent decision of Garnham J in *IMSL v Berry* [2017] EWHC 1321 (QB) addresses the above question in the context of an application for a garden leave injunction. The Court rejected the Defendants' attempts to extend the proper scope of TUPE's application, but provided helpful new guidance on the relevance of TUPE to share sales. It also clarified the circumstances in which:

i. the Court will recognise a non-contractual employer; and

ii. a new parent can be said to have taken control of a subsidiary to such an extent that it takes over the subsidiary's role as employer.

KEY TAKEAWAY: WHAT DOES THIS MEAN FOR YOU?

IMSL v Berry confirms the generally accepted position in relation to potential TUPE transfers in the context of an M&A transaction, and between companies within a group. In general:

- The fact that an employee is working for a business ultimately owned by a parent company will not by itself create a non-contractual employment relationship between the employee and the parent company. Whilst an assignment to the parent is possible, the Court will not construct such an assignment on the basis of a general inference.
- The provision of services by an employee to group companies generally is not sufficient to create an employment relationship with all of the potentially-relevant companies: there must be a permanent assignment or secondment to a particular entity.
- It is possible for a new parent to make some strategic changes to the business as a whole without becoming the new employer for TUPE purposes. On analysis, the principles on which the Millam and Jackson Lloyd case rest should perhaps be confined to circumstances where there is a complete takeover by a new parent which takes upon itself the actual day-to-day running of the subsidiary.

LEGAL IMPLICATIONS

If TUPE (the Transfer of Undertakings (Protection of Employent) Regulations 2006) is engaged then obligations to inform and consult will be imposed – which if not complied with can give rise to substantial claims. Moreover, even where a TUPE transfer occurs between group companies, employees may be entitled to object to it, and thus be released from notice periods or other employment obligations.

THE FACTS

In 2016, the First Defendant, Mr Berry was employed by an inter-dealer broker, ICAP, as the CEO of its Global eCommerce business. His role encompassed wide oversight of electronic broking platforms and a seat on committees dealing with highly confidential matters. He was employed by the Claimant, IMSL, a services company within the ICAP Plc group.

On 22 July 2016, Mr Berry resigned from his employment with IMSL to join one of ICAP's competitors - BGC. As permitted by his employment contract, IMSL put Mr Berry on garden leave for the duration of his 12 month notice period.

On 30 December 2016, Tullett Prebon Plc (now TP ICAP Plc) completed the acquisition of the entirety of ICAP's voice broking business (known as the "IGBB"), of which its Global eCommerce business was a part. The transaction was effected (in summary) by the sale of the shares in a holding company within the ICAP Plc group, ICAP Global Broking Holdings Limited, which was the parent of the relevant operating subsidiaries, including the Claimant.

Mr Berry notified IMSL that:

1. he considered the transaction had given rise to a TUPE transfer (that is, a "relevant transfer" under reg.3 of TUPE);
2. he objected to the transfer; and
3. his employment was thereby brought to an end. This, he and BGC argued, freed him from the terms of his employment contract and allowed him to commence work with BGC before the end of his garden leave period (which he did, albeit briefly).

WHAT IS TUPE?

The TUPE regulations give effect in English law to the EU Acquired Rights Directive 2001/23/EC. The purpose of the regulations is to protect employees by ensuring that, if the *"undertaking"* (i.e. the business) that they work for is transferred by their employer (a transferor) to a new owner, their employment transfers along with it.

Employees can consent to the transfer (and are given certain protections by TUPE, such as the new company being prohibited from adversely changing the terms of their employment) or can object to that transfer, in which case they can treat their employment contract as terminated. Employees are not entitled to any compensation if they object and terminate their employment but would be free to commence work for a competitor (subject to the application of any post-termination restrictions).

A TUPE transfer does not occur simply because the ownership of the employer company changes. Thus, in an M&A context, it typically applies to transactions structured as asset or business sales and not to share sales.

For reg.3 of TUPE to apply, it is necessary, among other things, to identify the "undertaking" which is said to have transferred, the transferor (which must be a legal entity), and the transferee (similarly also a legal entity). Reg.3 defines a TUPE transfer as *"a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity".*

THE DEFENDANTS' ARGUMENTS

The Defendants argued that, in the particular circumstances of the Tullett / ICAP transaction, there had been a TUPE transfer of Mr Berry's and other employees' employment, although it was common ground that Mr Berry's contractual employer, IMSL, had not changed.

The Defendants argued in the alternative that the undertaking for which Mr Berry worked was: (a) the whole of the IGBB; (b) the Global eCommerce division of the IGBB; or (c) IMSL itself.

The Defendants said that there had been a transfer of one or more of those undertakings not by reason of the share sale in and of itself, but because following the transaction, the new ultimate parent company, TP ICAP Plc had taken control of the undertaking(s) to such an extent that it should be regarded for the purposes of TUPE as being the employer of the employees of that undertaking. The Defendants relied principally on two difficult TUPE cases: *Millam v Print Factory* (London) *1991 Ltd* [2007] ICR 1331 and *Jackson Lloyd Ltd and Mears Group plc v Smith & Ors* UKEAT/0127/13.

The Defendants' primary case was that prior to the transaction, those undertakings had been operated by their ultimate parent, ICAP Plc, and that ICAP Plc was the transferor. Although IMSL was and remained the contractual employer, they argued that ICAP Plc should be regarded as Mr Berry's *"non-contractual employer"* (applying *Albron Catering BV v FNV Bondgenotem* [2011] ICT 373), and was thus the legal entity from which Mr Berry's employment was transferred.

THE COURT'S DECISION

The Court held that there had been no TUPE transfer. Mr Berry had been, and remains, employed only by IMSL.

"Non-contractual employer"

The Court held that an employee should be regarded as working for a non-contractual employer only where he/she is permanently seconded (or assigned) to another legal entity. On a proper reading of the *Albron* case, it is insufficient that the employee is assigned to work for a business generally. Thus, Mr Berry was to be regarded as being employed by a non-contractual employer only if he could show that he was permanently assigned:

i. to a specific legal entity within the IGBB; or

ii. to ICAP plc itself.

Garnham J found that Mr Berry was assigned to work generally for the IGBB and its eCommerce division, and not for a specific company within the business. Further, there was no evidence that Mr Berry was assigned to ICAP plc; it would be artificial to regard him as assigned specifically to the group parent company.

The Defendants' attempt to establish that Mr Berry was to be regarded as employed by a *"non-contractual employer"*, or any entity other than the Claimant, accordingly failed.

"Has the new party stepped into the shoes of the employer?"

Garnham J then considered the question of TP ICAP's control of IMSL, the IGBB, and the eCommerce division. He held that whether Mr Berry's employment should be regarded as having transferred to TP ICAP Plc was a question of whether TP ICAP Plc had: (a) become responsible for carrying on the business; (b) incurred the obligations of employer; and (c) taken over the day-to-day running of the business – put colloquially, *"has the new party stepped into the shoes of the employer?"* A mere change of control by reason of change of ownership is insufficient.

The Defendants relied on "high level" management such as the formation of "TP ICAP" committees – which set strategic overview policies and targets for the whole group – and the consolidation of back office functions such as the legal and human resources departments. They also relied on work done

at a group level toward the "integration" of the two previously separately-owned businesses (integration being particularly relevant to the decision in *Jackson Lloyd*) and group-level targets for cost savings to be generated from integration.

The Court concluded that integration, whilst potentially a highly-relevant factor to take into account, was not determinative of a change of control. Moreover, the matters relied on by the Defendants, which were *"taking place above the level of day-to-day management"*, were not indicative of a parent Plc intending to take over the management of day-to-day operations of a subsidiary business.

The Judge found that there was no integration on a day-to-day level between the broking businesses or respective eCommerce divisions of the former ICAP global broking business and the equivalent Tullett Prebon businesses.

Thus, the Court did not find that, at a day-to-day level, anything had changed for Mr Berry. He remained employed by the same employer, on the same terms and he was expected to perform the same role from the same premises. In these circumstances, notwithstanding high-level strategic developments, there was no transfer for the purposes of TUPE.

ENFORCEMENT OF GARDEN LEAVE PROVISIONS

Having found against the Defendants in relation to the TUPE issue, the Court considered whether it should, as a matter of discretion, grant the Claimant an injunction to enforce the garden leave clause. It was common ground that an injunction should only be granted for a period no longer than was necessary to protect the legitimate business interests of IMSL.

The principal legitimate business interest relied on by the Claimant was the protection of its confidential information. The Court found that an injunction on that basis was justified, given the nature of the high-level management and financial information to which Mr Berry had had access, and some details of which he could recall. It was sufficient to demonstrate that the employee would be able to recall some confidential information he saw, including general trends, and that this would be of value to a new employer.

Macfarlanes acted for ICAP Management Services Limited in its claim against Mr Berry and BGC. The Macfarlanes team comprised Jonathan Arr (partner), Joanna Constantis (senior counsel) and Christopher Charlton (senior solicitor). Macfarlanes instructed counsel Daniel Oudkerk QC, Jane McCafferty and Edward Brown.

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