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TUPE: When is a share sale not a share sale

Millam -v- The Printer Factory (London) 1991 Limited

The Court of Appeal

Background

TUPE does not apply to share sales. However, it has long been understood that TUPE can apply where there is a series of transactions notwithstanding that those transactions include share sales. In the earlier case of *Brookes -v- Borough Care Services (1998)* the EAT had considered the situation where business assets were sold, but the employees who worked on those assets were contained in a service company, the shares of which were also sold. In this situation, the EAT considered that TUPE did not apply and that the employees remained employed by the service company. This was the case even though the running of the business transferred was effectively passed to the Purchaser. The EAT was reluctant to "pierce the corporate veil" in order to find that the employees employment had transferred to the Purchaser. This approach was in line with earlier case law where the Court of Appeal and the EAT had both implied that the corporate veil should not be pierced in employment cases simply because a group of companies was operated as a single economic entity.

Facts

Mr Millam was employed as a printer by Fencourt Printers Limited ("**Fencourt**"). Fencourt was sold to McCorquodale Confidential Print Limited ("**McCorquodale**") on 2 November 1999 by way of a share sale.

During 2005 both Fencourt and McCorquodale went into administration and the Print Factory (London 1991) Limited ("**Print Factory**") acquired the business of McCorquodale on 18 May 2004. The assets purchased did not include the shares in Fencourt.

Mr Millam was dismissed the day before the transfer of assets and brought a number of claims against Print Factory. He argued that, notwithstanding the terms of his employment contract with Fencourt he was actually an employee of McCorquodale. Since the takeover of Fencourt by McCorquodale work had been transferred between the two companies and PAYE documents showed that McCorquodale paid the employees wages and administered the pension scheme. Fencourt had no payroll facilities of its own.

The Tribunal concluded that Mr Millam's real employer was McCorquodale. Although the business was still run in the name of Fencourt it was actually in the hands of the holding company which in practice directed its affairs. As a result, upon the purchase of the business Mr Millam's employment would have transferred if he had not been dismissed the day before. Print Factory appealed to the EAT which allowed the appeal on the basis that the Tribunal had lifted the corporate veil between Fencourt and McCorquodale, two entities which remained separate as a matter of law and the relationship of holding company and subsidiary was not, in the view of the EAT, a mere sham. It considered that the arrangements between the two companies were not uncommon in this sort of relationship and did not demonstrate that the subsidiaries business had passed to the holding company. The fact that PAYE and pension arrangements were dealt with by one company for the whole group was not considered by the EAT to be of any real significance. The EAT was clear that it was possible for a sale of shares to take place and for a business to

subsequently be transferred from the subsidiary to the holding company, a transfer to which TUPE would apply. However the EAT considered that for this analysis to apply there would need to be evidence to support it, in the sense of either assets or employees actually transferring to the holding company in order to trigger TUPE. In this case, only one member of staff (a salesman) had in fact transferred to the holding company and, even if one could argue that the sales function had therefore transferred, this had no relevance to Mr Millam who was a printer. Mr Millam appealed to the Court of Appeal.

Decision

The Court of Appeal upheld Mr Millam's appeal and found that his employment had transferred to McCorquodale following the purchase of Fencourt by McCorquodale and that his employment would therefore have further transferred to Printer Factory had he not been dismissed prior to that transfer.

The Court of Appeal sought to suggest that this was not an example of an attempt to pierce the corporate veil at all. That would only have been the case if the Tribunal's finding of fact had been that an activity was actually carried out by Fencourt but, for policy reasons, should be attributed to McCorquodale. The Tribunal had not taken this approach at all, but instead had found as a question of fact that the activity was being carried out by McCorquodale. The Court of Appeal considered that the EAT had not given adequate weight to the findings of fact as to how the business was operated. The Court held that the arrangements were not in fact typical of the arrangements between a subsidiary and parent, where some loss of independence would be expected, but were in fact such that the business was actually being operated by McCorquodale. The Court of Appeal therefore reinstated the Tribunal's decision.

Comment

This case is of significance to purchasers of new subsidiaries, and also to purchasers of assets where share sales have previously taken place in relation to the business being acquired. While the Court of Appeal's decision does not change the legal position as such, it does provide a sound precedent to establish that the integration of a company's business into its new group may result in transfers of employment, even without any formal hive up or reorganisation being entered into. Earlier decisions had shown some reluctance to make such findings, save where the corporate structure was a deliberate sham. However, the application of this case must be seen as resting on the facts, and the degree to which the parent company had in fact taken over the activities of the subsidiary was vital to the determination.

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