

# Merely technical breaches of TUPE, and can liability survive a withdrawal?

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## *Clark v Middleton and anor [2022] EAT 31*

The Employment Appeal Tribunal considered the Tribunal's discretion to make (or not make) an award of compensation for breaches of TUPE Regulations, and the effect of withdrawal of a claim on a defendant's liability to pay compensation, in circumstances where the claimant has no freestanding right to bring a claim against them.

### **The Case at First Instance**

The Claimant had worked for a "micro-business" with fewer than ten employees, run by a sole trader, Mrs Middleton. It was principally run as a hobby, rather than as a profit-making enterprise. The entire business was transferred to a company, Black Dog Hydrotherapy ("BDH") created for the purpose by another employee.

There had been a meeting involving staff, including the founder of BDH, to discuss the retirement of Mrs Middleton and the transfer of employment. While the creation of a limited company had been floated at that meeting (it was a suggestion of the Claimant), it doesn't seem the issue was decided. BDH was created very shortly before the transfer took effect.

The Claimant's relationship with that new employer soured and she resigned, bringing a claim in the Employment Tribunal against both Mrs Middleton and BDH. The claim against Mrs Middleton included an alleged failure by her to consult with and inform the Claimant of the proposed transfer, its effects, and any measures envisaged by her or by the transferee company, as required by TUPE Regulations.

Mrs Middleton asserted that she had complied with those Regulations, but in the alternative that any failure found was the result of the failure of BDH to Mrs Middleton of measures which

it envisaged taking and that were to affect the Claimant, so it had not been reasonably practicable for her to inform her of that. This defence raised the potential for BDH to be liable for an award of compensation under Regulation 15(8)(b).

The Claimant's claim against BDH was settled before the final hearing, and dismissed upon withdrawal.

The Tribunal at first instance found that a number of measures, including changes to contract, were in fact envisaged by BDH pre-transfer and that the Claimant wasn't informed of them. However, it also found that these were withheld from Mrs Middleton as she was likely to resist them, and her defence on that basis succeeded.

However, it found that Mrs Middleton had been in breach of the Regulations specifically in relation to failing to inform the Claimant that her employment was to be transferred to a limited company.

The Tribunal considered the wording of Regulation 15(8), that the remedy for breach is that the Tribunal "shall make a declaration to that effect and may order [...] appropriate compensation". It considered the circumstances to be exceptional and the breach to have been a merely technical one. It awarded no compensation.

The Tribunal also considered making an award against BDH under Regulation 15(8)(b). It decided that it couldn't do so, the Claimant's claim against it having been settled and it having been unrepresented at the final hearing.

## **The Grounds of Appeal and EAT's Judgment**

The Claimant advanced four grounds of appeal, two dealt with far more substantively than the others.

### *Effect of withdrawal where Claimant has no right to bring freestanding claim*

The first of those was that the Tribunal were incorrect in considering that the withdrawal of the claim against BDH precluded an award being made against it under Regulation 15(8)(b) in relation to the failure by Mrs Middleton to inform and consult, where that was a result of their action.

There is no freestanding right to make a claim for such an award: it can only arise as a result of the particular defence raised by the transferor: the Claimant argued that it was not possible for the Claimant to withdraw or compromise a claim she couldn't bring.

The EAT considered that such an award *could* be precluded by a withdrawal and/or settlement. There is no reason why the Claimant cannot compromise their right to an award being made to them, even where that award was contingent upon the actions of some third party. The liability of a transferee is directly to the claimant and not by way of an indemnity to the transferor.

The EAT went on to consider the scope and meaning of the word "claim" in such withdrawals or compromises. The word is ambiguous and is capable of referring to (a) the causes of action as set out in a particular claim form, or (b) more broadly, the right to a particular remedy, for instance. In this case, the context suggested the latter, broader, meaning: the purpose was to draw a line under BDH's involvement in the entire proceedings.

#### *Failure to inform employees of legal identity of transferee is not a "merely technical" breach*

The second substantive ground of appeal was that the Tribunal's approach to awarding compensation, and its conclusion of the breach as being merely technical, was incorrect.

The EAT agreed without reservation. The legal identity of the potential employer is a fact of fundamental importance to any employee. It is an "essential facet" of the employee being told that the transfer is happening *at all* and therefore is required by Regulation 15(2)(a), rather than merely being a matter of the "legal, economic and social implications" of the transfer which employees are to be informed about as a result of Regulation 15(2)(b).

## **Discussion and Conclusions**

The case shows the potential pitfalls for very small businesses that may be run with a high degree of informality, as in this case, when running up against mandatory requirements set out in statute and which limit the discretion of the Tribunal as to what might reasonably be expected of an employer of that size – although one would think giving the name and nature of the transferee would always, in any case, be reasonably achievable.

An important point to be drawn from the second ground of appeal considered is that the EAT's conclusions weren't limited to the perhaps more obvious conclusion that whether employees are to be employed by a natural person or a company post-transfer is an important fact that should be communicated to employees. The *legal identity* of the transferee is important – and so, one assumes, the actual name of any company. This might often give rise to difficulties where, as here, the company was set up for the purpose of receiving the business at the eleventh hour.

Circumstances where a party can receive an award of damages directly from a respondent but has no power to directly bring a claim against them must be few and far between, but the EAT has clarified (if any clarification was needed) that such contingent claims are dismissed upon withdrawal. Claimant's representatives will need to factor the possibility of awards under Regulation 15(8)(b) into any settlement reached with transferee employers.

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