# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Barsoum

**Respondents:** (1) Greenzest Limited
(2) Prestige Services London Limited

**Heard at:** **London South Employment Tribunal** **On: 8-9 July 2019**

**Before:** **Employment Judge Ferguson (sitting alone)**

**Representation**

| | |
|---|---|
| Claimant: | In person |
| First Respondent: | Mr L Godfrey (counsel) |
| Second Respondent: | Ms R Morton (counsel) (day 1);<br>Ms K Evans (office manager) (day 2) |

# RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant's employment did not transfer to the Second Respondent.
2. All claims against the Second Respondent are dismissed.
3. The Claimant was unfairly dismissed by the First Respondent.
4. The Claimant's holiday pay claim succeeds against the First Respondent.
5. A remedy hearing will be listed in due course.

# REASONS

## INTRODUCTION

1. By a claim form presented on 15 March 2018 following a period of early conciliation from 11 January to 11 February 2018, the Claimant brought complaints of unfair dismissal, failure to pay notice pay and failure to pay holiday pay. He alleged that he was dismissed on 18 December 2017, his

employment having transferred to the Second Respondent on 16 December 2017 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). In the alternative he argued that his employment did not transfer and he was dismissed by the First Respondent. He claimed that his dismissal was automatically unfair under Regulation 7 of TUPE, or alternatively unfair under s.98 of the Employment Rights Act 1996 ("ERA").

2. It is not in dispute that a relevant transfer took place at midnight on Friday 15 December 2017 in that cleaning services provided to a client, MCS, ceased to be carried out by the First Respondent and were instead carried out by the Second Respondent. It is also not disputed that the Claimant was dismissed on Monday 18 December 2017, since both Respondents denied (and continue to deny) that they employed the Claimant after the transfer.

3. Neither Respondent disputes that the transfer was the sole or principal reason for the Claimant's dismissal. Both argue as an alternative case, however, that the dismissal was not automatically unfair under Regulation 7 of TUPE because the sole or principal reason for the Claimant's dismissal was an economic, technical or organisational reason entailing changes in the workforce of either the First or Second Respondents before or after the transfer ("an ETO reason"). They also dispute "ordinary" unfair dismissal, in that they say the reason for the Claimant's dismissal was redundancy. They argue that any procedural unfairness made no difference to the outcome.

4. Subject to the transfer issue, both Respondents accept that the Claimant is entitled to a redundancy payment. They also accept he is entitled to notice pay. The First Respondent accepts he is entitled to nine days' holiday pay. The Second Respondent disputes the holiday pay claim.

5. Issues:

   5.1. Did the Claimant's employment transfer to the Second Respondent, i.e. who employed the Claimant as at 18 December 2017?

   5.2. Was the sole or principal reason for the Claimant's dismissal an ETO reason? If not, the Claimant's dismissal was automatically unfair.

   5.3. If the sole or principal reason for Claimant's dismissal was not an ETO reason, was his dismissal fair under s.98 ERA? Whichever Respondent is found to have employed the Claimant at the point of dismissal:

      5.3.1. Has that Respondent established that the reason for his dismissal was redundancy?

      5.3.2. Did that Respondent act reasonably (s.98(4) ERA)?

   5.4. If the Claimant's dismissal was procedurally unfair, what is the chance he would have been dismissed following a fair procedure?

6. It was agreed that all other issues on remedy and holiday pay (if the Second Respondent is liable) would be be dealt with separately if they arise.

7. Both Respondents made an application at the start of the hearing to strike out the claim on the basis that the Claimant had failed to comply with case management directions. In particular he had not produced a witness statement or a schedule of loss. It was evident when the Claimant was asked about the matter that he did not understand the need to produce a witness statement because he was the Claimant, not a "witness". This is a common misunderstanding. I considered that it would be possible for the hearing to proceed without any real prejudice to the Respondents on the basis of the information in the claim form together with some additional oral evidence and cross-examination. I therefore refused the application. With the parties' agreement I asked the Claimant open questions about his role and treated this as his evidence in chief. I then allowed the Respondents some time to take instructions before commencing cross-examination. The point about the absence of a schedule of loss became academic because I reserved judgment on liability.

8. I heard evidence from the Claimant. On behalf of the First Respondent I heard from Iain Fraser-Jones (owner and Managing Director) and Andre Van Biljon (General Manager Operations). On behalf of the Second Respondent I heard from Robert Giles (Operations Director) and Katie Evans (Office Manager).

## THE FACTS

9. The First and Second Respondents are both contract cleaning companies. They are competitors in the office and commercial cleaning industry in London.

10. The Claimant commenced employment with the First Respondent on 7 July 2014 as an Operations Manager. He was not given a written contract of employment until 15 December 2017. He signed a contract on that day, which stated he was employed as an Operations Manager. As to place of work, the contract provides:

> "You are based at locations as required by the business.
>
> The Company may request you to work at other Company locations on a temporary basis. It is a condition of your employment that when made, such a request is complied with."

11. One of the First Respondent's clients was MCS, a company operating a number of office buildings in central London. By the time of the Claimant's dismissal the First Respondent's contract with MCS covered cleaning services at four sites. The main site was at 36 Golden Square. There were two other sites on Golden Square and one on Great Portland Street.

12. The contracts between the First Respondent and MCS require the First Respondent to provide cleaning services to the properties identified for a fixed monthly price. The terms and conditions state, so far as relevant:

> "1) Greenzest … agrees to furnish all suitable labour, equipment, supplies and supervision necessary to provide cleaning services to the Named Areas. Greenzest will select all suitably qualified and trained personnel to perform its obligations hereunder. The personnel shall be employees or sub-contractors of Greenzest".

13. When the Claimant commenced employment with the First Respondent he was allocated a number of clients, of which MCS was one. He was made aware that MCS was an important client. It is not in dispute that by the time of the Claimant's dismissal the MCS contract was worth approximately £400,000 a year.

14. The Claimant was one of three operations managers employed by the First Respondent. The Claimant was responsible for central London, another manager was responsible for outer London and another oversaw the window cleaning side of the business. On 27 September 2017 the First Respondent employed Andre Van Biljon in the newly created post of General Manager Operations. Mr Van Biljon's role was a new layer of management between the operations managers and Mr Fraser-Jones, the principal owner and Manging Director.

15. The Claimant's salary was £36,000 gross per annum. He was also provided with a company car, mobile phone and laptop.

16. The Claimant's evidence as to the other clients for whom he was responsible was not entirely clear or consistent. It was alleged in the ET1 that he was responsible for 25 sites including the four MCS sites. The Claimant ultimately agreed in cross-examination that, in 2017 at least, it was probably 18 sites in total, not 25. Of the 14 non-MCS sites, 8 were for one client and the other 6 were small sites. The Claimant had originally been responsible for a large site in Bracknell, but another operations manager took over that site in 2015. It was put to the Claimant that the value of the non-MCS contracts for which he was responsible was £190,000. The Claimant said he could not remember, but did not directly dispute the figure. The Claimant accepted that he visited all four MCS sites every day. Of the other sites, some he visited only once a week or less frequently.

17. There was a dispute about a further site at King's Cross. This was another large client of the First Respondent's. The only evidence as to its value came from the Claimant, who said it was roughly equivalent to MCS, i.e. around £400,000 a year. The Claimant said that in addition to the sites mentioned above, he was also responsible for the King's Cross site until Mr Van Biljon was taken on as General Manager in September 2017 and he took over responsibility for it. The Claimant accepted that there was a dedicated contract manager for this site, but maintained that he oversaw the contract and had a monthly meeting with the client. The First Respondent disputed this and claimed that the contract manager reported directly to Mr Fraser-Jones. The Claimant's only involvement was in the "mobilisation" stage of the contract, between December 2016 and February 2017. The First Respondent did not dispute, however, that Mr Van Biljon took over responsibility for the King's Cross site when he commenced employment in September 2017.

18. Taking into account all of the evidence on this issue, and noting that the First Respondent did not produce any documentary or other evidence setting out the clients for which the Claimant was responsible, I accept that between February and September 2017 the Claimant retained some responsibility for the King's Cross site, which included a monthly meeting with the client, but this inevitably involved less work than MCS because there was a dedicated contract manager

who would have dealt with all day to day issues with the staff. I also take into account that Mr Van Biljon has been responsible for this site since September 2017, which undermines the First Respondent's evidence that the contract manager always reported directly to Mr Fraser-Jones and that there was no need for an additional layer of management. I find that the Claimant's evidence, although somewhat unclear at times, was on the whole credible, noting in particular that he has always adopted a neutral stance as to whether he transferred to the Second Respondent.

19. There was also a dispute about the Claimant's normal place of work and duties. The First Respondent does not have its own office. The Claimant's evidence was that he spent between one and three hours a day at MCS. He would typically arrive between 5am and 6am at 36 Golden Square and would have to leave by 9am because they were not allowed in the building after that time. During that period he would also visit the other three MCS sites. He would check the cleaning and resolve any problems that might arise. He would then visit non-MCS sites before returning to the Café Nero on Golden Square mid-morning to do paperwork. This included working on payroll (entering hours from timesheets), completing risk assessments, ordering consumables, conducting interviews, disciplinary and grievance meetings, processing starter forms and holiday forms, and answering emails. The Claimant agreed in cross-examination that he was responsible for around 45 staff including 27 MCS staff. A further 30 staff were employed at King's Cross. The Claimant said he would then have lunch, sometimes with a client, visit the sites again and then go home. He estimated that in terms of administrative work he would spend about 30 minutes a day on MCS-related matters. The First Respondent put to the Claimant that he would always end his day at 36 Golden Square. This was denied. There appears to have been a sign-in book for 36 Golden Square, but it was not produced in evidence by either party. The First Respondent had no records of how the Claimant spent his time, but alleged that he spent "significantly in excess of 60 per cent of his working time and effort engaged with the day to day administration and running of the MCS Contract for cleaning the Buildings".

20. I accept that the Claimant's description of his typical day was accurate, i.e. he would spent the first part of the day exclusively on MCS, but after 9am he would be visiting other sites and carrying out administrative work in respect of all of the sites for which he was responsible. I find that in terms of time spent on site, the Claimant would spend more time at MCS than at non-MCS sites. I find that on average he would spend 60% of his "on-site" time at MCS sites, i.e. up to three hours before 9am, compared to up to two hours thereafter, before returning to Café Nero. As for the administrative work, I consider the number of staff is the most reliable indicator of how the Claimant's time was apportioned. As 27 of the 45 staff were MCS staff, I accept that approximately 60% of the Claimant's administrative work was on MCS-related matters. I do not take account of the staff at King's Cross because the Claimant never alleged that he was responsible for payroll or other employment-related matters for them.

21. In early 2017 Ms Celino of MCS took over responsibility for liaison with the First Respondent. Evidently MCS were not happy with the performance of the contract because in mid-2017 they invited the Second Respondent to bid for the contract. The First Respondent was not informed. Mr Fraser-Jones's

evidence was that he was unaware the contract was at risk, but he accepted that there was a breakdown in communication between the Claimant and Ms Celino which later led him to remove the Claimant as the first point of contact with MCS (see below).

22. As part of MCS's discussions with the Second Respondent, Ms Celino sent the Second Respondent a copy of the First Respondent's spreadsheet providing a breakdown of the services provided. This listed the staffing costs, but all other costs were blanked out. The staff listed did not include the Claimant. Under "other costs" there is a line for "area management", but the cost is blanked out. The First Respondent did not produce the original of this document and there was no evidence as to what this figure would have been.

23. On 27 September 2017 the First Respondent employed Andre Van Biljon as General Manager Operations. Mr Fraser-Jones's evidence was that he was taken on because the business was growing at such a rate he did not feel he could give the correct support to the operations managers. It is not in dispute that very shortly after his appointment Mr Van Biljon took over all communication with Ms Celino at MCS. The Claimant was informed not to respond to emails, but to pass them to Mr Van Biljon. The Claimant also ceased carrying out the fortnightly "audits", walking around the sites with the client. Mr Van Biljon attended any other meetings with MCS. The Claimant continued to attend MCS sites and carry out other administrative work as usual.

24. After a period of negotiation the Second Respondent was informed on 16 November 2017 that they had been awarded the contract. A commencement date of 16 December 2017 was agreed.

25. On 16 November 2017 Katie Evans, Office Manager for the Second Respondent, wrote to Mr Fraser-Jones stating that they believed TUPE applied to the change in service provision and requesting employee liability information ("ELI") for the contract.

26. On 20 November 2017 the First Respondent wrote to the Claimant informing him that the Second Respondent would be taking over the MCS contract from 16 December 2017. The letter stated:

> "This means that as you spend more than 50% of your working hours on the customer that is being transferred, your contract of employment will transfer automatically to Prestige Services London Limited…"

27. The letter went on to explain that the Claimant had the right to object to the transfer, but if he did so his employment would cease and he would have no right to a redundancy payment.

28. On 21 November 2017 Mr Fraser-Jones sent Ms Evans the ELI data. The Claimant was included in the list, with the job title "Regional Operations Manager". On the same date Ms Evans wrote to Ms Celino forwarding the ELI data. The covering email stated:

> "Rob [Robert Giles, Operations Director] has asked me to forward the attached to you, it is the returned TUPE information for the transferring staff.

He felt you may be particularly interested in the addition of Kameil Barsoum to the list of transferring employees.

As Mr Barsoum is described as Regional Operations Manager, we do not believe TUPE applies as he would not be wholly assigned to your group. Also Managers who are employed in roles regarding client liaison etc are not normally classed as being part of the group (of transferring staff). We will be advising Greenzest of this decision shortly."

29. Ms Celino replied immediately to this email as follows:

"Thank you for the note. very surprised by this for two reasons

1. He didn't work exclusively or full time – he is support staff as you say
2. Also the recent addition of Andre as ops manager was to replace / support Kameil at this site."

30. On 27 November 2017 Ms Evans responded to Mr Fraser-Jones raising a number of issues relating to particular employees on the list. As to the Claimant, she said:

"With regard to Mr. Barsoum, as a Regional Operations Manager he would not be wholly assigned to the contract and the client has confirmed he was not present on site full time. In addition they have informed us that he had been replaced in recent weeks by another manager. Therefore we do not feel he can be assigned or identified as part of the transferring group, as he is support staff and it is not normal practice to identify managers who oversee a contract or are involved with client liaison with TUPE in this way."

31. Mr Fraser-Jones replied on the same day as follows:

"a. Having undertaken full due diligence and after meaningful consultation with Kameil, we are sure that he will be affected by the TUPE process relating to this contract. Whilst we agree that Kameil Barsoum is not wholly assigned to this contact, it is clearly evident that more than 60% of his assigned operational and administrative time is still allocated to our contract with [MCS].
b. We can evidence that Kameil continues to attend [MCS] site(s) every day (sometimes twice a day and including weekends) and that, of his portfolio of customers, [MCS] still accounts for more than 60% of the revenue that he is assigned to manage.
c. Additionally, Kameil is still required to manage the day to day operations relating to [MCS] and he spends a disproportionate amount of his working day on the administration of this contract.
d. We dispute the assertion that Kameil has been replaced. His assigned responsibilities to [MCS] remain unchanged, despite the appointment of another manager. Andre Van Biljon has recently joined Greenzest as our 'General Manager – Operations' and acts as the point of contact for our business relationship with [MCS] in a key account management role. As such, Andre relies on Kameil 100% to fulfil the operational needs of out customer's business. To

clarify therefore; Andre's position isone of a supporting role to Kameil who remains assigned predominantly to [MCS].

e. We are more than happy to provide any evidence you need to support these points should you require it."

32. In fact, contrary to Mr Fraser-Jones's claim that the First Respondent had undertaken "full due diligence" and "meaningful consultation with Kameil", there had been no formal consultation with the Claimant at all on this issue, other than informing him of the transfer and sending the letter of 20 November.

33. On 5 December 2017 Ms Evans wrote again to Mr Fraser-Jones as follows:

> "I have now spoken with my Directors they are have confirmed they will not accept the transfer of your Regional Area Manager Mr. Barsoum, his role involves activities not identified with this contract or client therefore he can not be identified with the transferring group, who are organised with the sole purpose of delivering activities to this particular client.
>
> The principle purpose of Mr. Barsoum's role by its very title is to service a variety of clients on behalf of your company, and regardless of the proportion of time allocated to each client he cannot be identifiable as a member of one specific team from the group within his Regional Area.
>
> We have spoken with the client regarding this matter and they are in agreement with our position that TUPE does not apply to Mr. Barsoum."

34. Mr Giles, Operations Director for the Second Respondent, gave evidence that he and others from the Second Respondent had spoken to the cleaning staff, including the cleaning supervisor, at MCS about the Claimant to ascertain his level of involvement in the contract. It is not in dispute that they did not consult the Claimant directly.

35. Mr Giles also said in his evidence that he believed the First Respondent was deliberately attempting to sabotage the contract by making it unaffordable.

36. Mr Fraser-Jones replied the following day, essentially repeating the points in his email of 27 November. Ms Evans replied confirming that the Second Respondent's position remained unchanged.

37. On 14 December 2017 Mr Fraser-Jones wrote to the Claimant explaining that they believed TUPE applied to him and advising him to report for duty at MCS at 5am on Monday 18 December. The letter continued:

> "I fully understand your desire to continue to work. You mentioned that you don't mind whether this is for Prestige or Greenzest.
>
> Given that your role over the past 3.5 years has always predominantly been assigned to [MCS] and that you have seen the contract grow, so that it is now such a significant part of your operational portfolio, I believe your services with any organisation would be valuable.
>
> On the basis that you decide not to present for work with Prestige as stated above, we would be able to offer you alternative employment with

> Greenzest in the role of an evening supervisor for the business inside the M25. This would be a mobile role using public transport and working in the file between 17:00 and 22:00. The focus here would be on staff training/ welfare and monitoring standards on sites where our cleaners work during the evening. The hourly rate for this would be £11.50 per hour with 4 weeks annual leave.
>
> If this position is of interest to you, please let me know as soon as possible. I'm not really in a position to give you advice on how you should proceed. However, as a valued employee I will always be willing to provide support for you if required."

38. On 15 December 2017 Mr Fraser-Jones wrote to Ms Evans informing her, among other things, that the Claimant had been advised to report for work at MCS on 18 December. Ms Evans replied on the same date saying that they felt it was unfair to inform him to report to MCS, knowing their position, and asking him to reconsider the instruction.

39. The Claimant did attend MCS on the morning of 18 December 2017, accompanied by Mr Van Biljon. There is a dispute about what was said on that morning. Mr Giles claims that Mr Van Biljon's manner was aggressive and he was insistent that they "take" the Claimant. He also alleges that he discussed the situation with the Claimant and asked him whether he felt TUPE applied to his role. The Claimant said he felt it did not. This is disputed by the First Respondent. The Claimant was not cross-examined about it. I do not consider it necessary to make any finding about it. The Claimant's evidence was that he felt he was being pushed out of the First Respondent but he did not know why.

40. Mr Fraser-Jones said in his witness statement that he had had conversations with certain individuals from MCS who agreed with his position that the Claimant should have transferred to the Second Respondent. In the absence of any evidence from MCS and documentary evidence from Ms Celino suggesting they took the opposite position, I give no weight to that hearsay evidence.

41. Mr Fraser-Jones gave evidence that the First Respondent has grown significantly since it was established in around 2012. He said it had grown 50% year on year, including after the Claimant's departure. The company now employs five operations managers.

## THE LAW

42. Regulation 3 of TUPE provides, so far as relevant:

> **3 A relevant transfer**
>
> (1) These Regulations apply to—
>
> (a) 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;

(b) a service provision change, that is a situation in which—

…

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

…

and in which the conditions set out in paragraph (3) are satisfied.

…

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

43. Regulation 4(1) provides (emphasis added):

> …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.

44. Regulation 2(1) provides that "assigned" means assigned other than on a temporary basis.

45. HHJ Eady QC summarised the effect of these provisions in Costain Ltd v Armitage and another UKEAT/0048/14/DA as follows:

> "[34] So, first, there must be an organised grouping of employees dedicated to the client (reg 3(3)(a)(ii)) and, second, the employee must be assigned to that grouping. Those questions are "analytically distinct" per Underhill P (as he then was), at para 16 *Eddie Stobart Ltd v Moreman* (2012) UKEAT/0223/11/ZT, [2012] IRLR 356, [2012] ICR 919. But, as the learned Judge went on, the two points nevertheless self-evidently overlap to a very considerable extent since, for the purpose of considering who is assigned to a putative organised grouping, it is necessary to identify what that grouping consists of.

[35] On the first question, the concept of an organised grouping implies that there is an element of conscious organisation by the employer of its employees in the nature of a team, which has as its principal purpose the carrying out of the activities in question. So, there must be a "deliberate putting together of a group of employees for the purpose of the relevant client work. It is not a matter of happenstance", see the Judgment of the Court of Session in *Seawell Ltd v Ceva Freight UK Ltd* [2013] CSIH 59, [2013] IRLR 726, 2013 SC 596, approving the Judgment of Lady Smith in that case, reported at [2012] IRLR 802. There will not be an "organised grouping of employees" with the relevant purpose if the employees in question simply happen to be working on that activity at the time of the transfer, perhaps because shift arrangements mean that they are working on a particular contract at a particular time without their actually being dedicated to it, or they are working on that activity, even if for 100% of their time, for some other entirely fortuitous reason, and see the approach adopted by the EAT in the *Eddie Stobart* case and by the Court of Session in *Seawell Ltd.*

[36] On the second question, that of a particular employee's assignment, the starting point is generally taken to be the Judgment of the European Court of Justice in *Botzen and others v Rotterdamsche Droogdok Maatschappij BV* [1985] ECR 519, [1986] 2 CMLR 50, where it was stated:

> "An employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under [the Directive] . . . it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned."

[37] That talks of assignment in terms of a business undertaking or part, rather than any service provision change, but the language of assignment remains the same. In approaching that question, it is often tempting to try to establish assignment by reference to the percentage of time an employee is engaged in working in the relevant undertaking or part or on the particular activities in question. That might not be an irrelevant question, but it is not the test. In *Duncan Webb Offset (Maidstone) Ltd v Cooper and another* [1995] IRLR 633 the EAT observed that the question of assignment is one of fact for the Employment Tribunal, albeit that it might be relevant to look at the amount of time an employee spends on one part of the business or the other, the amount of value given to each part by the employee, the terms of the contract, showing what the employee could be required to do, and how the cost to the employer of the employee's services had been allocated between the different parts of the business (see para 1 of the Judgment of Morison J in that case). What is to be given weight in any particular case will be a matter for the Employment Tribunal as the tribunal of fact, but it will not be determinative that the different aspects of the employee's work are carried out for the same client. As Lady Smith observed, at para 19 of her Judgment in *Edinburgh Home-Link*

*Partnership v The City of Edinburgh Council* (UKEATS/0061/11 10 July 2012, unreported)):

> "Regarding the reg 4 issue of assignment, the question has to be asked in respect of each individual employee. It is not to be assumed that every employee carrying out work for the relevant client is assigned to the organised grouping . . . . If, for instance, an employee's role is strategic and is principally directed to the survival and maintenance of the transferor as an entity, it may then not be established that that employee was so assigned."

[38] In *Argyll Coastal Services Ltd v Stirling and others* (UKEATS/0012/11, 15 February 2012, unreported) Lady Smith again had to consider the interplay between regs 3 and 4, TUPE and offered the following analysis. First, in respect of the question of an organised grouping of employees for reg 3(3)(a)(i) purposes:

> "It seems to me that the phrase 'organised grouping of employees' connotes a number of employees which is less than the whole of the transferor's entire workforce, deliberately organised for the purpose of carrying out the activities required by the particular client contract and who work together as a team.
>
> 19 Turning to 'principal purpose' there seems to be no reason why the words should not bear their ordinary meaning. Thus, the organised grouping of employees need not have as its sole purpose the carrying out of the relevant client activities, that must be its principal purpose.
> . . .
>
> 21 If a Claimant can show that a relevant service provision change occurred, he then requires to satisfy the requirements of regulation 4(1). That involves considering whether or not the Claimant was assigned to the organised grouping of resources referred to in regulation 3(3)(a)(i)."

Then, going on to consider the question of assignment:

> "The issue of whether or not a particular employee was assigned to the 'organised grouping of employees' affected by the transfer and thus entitled to the protection of TUPE is not a mere formality. It can only be resolved after a proper examination of the whole facts and circumstances. Being involved in the carrying out of the relevant activities immediately prior to the transfer will not necessarily mean that that employee was assigned to the organised group."

This, of course, picks up on the requirement laid down by reg 2(1), that, in order for an employee to transfer, their assignment must be other than on a temporary basis.

[39] Lady Smith was emphasising that an Employment Tribunal needs to take care to consider the whole facts and circumstances in which a particular employee worked in order to answer the assignment question.

> It is not a question that will be answered simply by reference to the percentage of time worked by the employee on a particular contract unless the factual context demonstrates why that would be relevant test in the particular circumstances. Simply stating that an employee spent 100% of their time on the contract in question would not be sufficient. That might simply have represented a snapshot of the position at a particular moment in time, not an assignment to the organised group. Similarly, there might be cases where a tribunal finds that an employee is assigned to the organised group, but at a particular period spent less than 50% of their time on that work."

46. Pursuant to Regulation 7, an employee is treated as unfairly dismissed if the sole or principal reason for dismissal is a transfer. If, however, the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer, the dismissal is not automatically unfair. It will be treated as a dismissal for redundancy or some other substantial reason for the purposes of s.98 ERA.

**CONCLUSIONS**

47. It is not in dispute that there was a service provision change pursuant to Regulation 3(1)(b)(ii) of TUPE. Mr Godfrey, on behalf of the First Respondent, sought to argue that this case could alternatively be analysed in terms of a business transfer and that even if the Claimant did not transfer pursuant to a service provision change, he did so pursuant to a business transfer. I do not accept that this is a business transfer case. Mr Fraser-Jones accepted that no part of the business transferred to the Second Respondent. It was a classic service provision change situation. In any event, I do not accept that it affects the assessment of whether the Claimant himself transferred to the Second Respondent. The analysis, as suggested at paragraph 37 of Costain, is the same in either case.

48. The question is whether the Claimant was assigned to the organised grouping of resources or employees that was subject to the relevant transfer. In order to answer that question the first task is to identify the organised grouping of resources or employees. The activities that were carried out on behalf of MCS by the First Respondent immediately before the transfer were office cleaning activities as set out in the contract, i.e. all suitable labour, equipment, supplies and supervision necessary to provide cleaning services at that sites. The organised grouping of employees was those employed to carry out those cleaning services.

49. I have found that the Claimant spent 60% of his time at MCS sites and 60% of his administrative work was on matters relating to the MCS contract, but that is not determinative. As HHJ Eady QC underlined in Costain, it is a question of fact for the Tribunal. The amount of time the employee spends on one part of the business might be relevant, but it is also relevant to consider the terms of the contract, showing what the employee could be required to do, and how the cost to the employer of the employee's services had been allocated between the different parts of the business.

50. The Claimant was not expressly employed to work on the MCS contract and there has never been anything in writing specifying that he must spend a certain proportion of his time on it, that it was his "principal" client, or anything to that effect. On the contrary, his contract (albeit not signed until his last day of employment, the last working day before the transfer) stated that he would be based at "locations as required by the business". He was given a portfolio of clients, but this was liable to change as demonstrated by the fact that the site in Bracknell was taken over by another operations manager in 2015.

51. I consider it significant that the document setting out the staffing structure under the contract did not include the Claimant in the list of staff. Although there was a cost attributed to "area management", the version of the document in the bundle was the one that MCS had sent to the Second Respondent with that section blanked out. If the original document had shown that the cost of employing the Claimant was largely or even significantly covered under the contract one would expect the First Respondent to have produced it.

52. It is also relevant that the Claimant was removed as the point of contact with MCS more than two months prior to the transfer. This inevitably reduced the extent of his involvement in the contract, although I accept he continued to spend the same amount of time at MCS sites as he had done previously.

53. I consider that the reality of the Claimant's role was that he was one of three operations managers, who between them oversaw all of the First Respondent's contracts. He carried out the same function in respect of MCS as he did for all of the other clients in his portfolio, at least until October 2017 when his role was reduced. He acted as the point of contact for the client, he dealt with all staffing issues, he resolved problems that arose on sites and he conducted regular inspections to check on the standards of cleaning. The fact that the Claimant was given MCS as one of his clients, which happened to represent a large proportion of the overall contract value and number of staff, did not alter his essential role.

54. Mr Godfrey argued that a key question is whether the role is "service delivery" in focus or whether it is "strategic or focused on the survival or development of the business". I consider this represents a misunderstanding of the comments of Lady Smith cited at paragraph 37 of Costain. If a role is strategic that may be a relevant factor, but it is not a necessary consideration in every case. In the present case the relevant factor is the Claimant's role being one of managerial oversight with responsibility for numerous contracts that were not subject to the transfer.

55. I conclude, therefore, that notwithstanding my finding about the percentage of time spent on the MCS contract, the Claimant was not assigned to the organised grouping of resources or employees that was subject to the relevant transfer. His employment did not therefore transfer to the Second Respondent and the First Respondent dismissed him on 15 or 18 December 2017.

56. As noted above, it is not in dispute that the sole or principal reason for dismissal was the transfer. The question is whether the First Respondent has established an ETO reason for dismissal. I do not accept that it has. The first point to note is that this is not the First Respondent's principal case. It cannot assert that it made a positive decision to dismiss the Claimant for an ETO reason because

it has maintained throughout that he transferred to the Second Respondent. Clearly there was a short-term diminution in work caused by losing the MCS contract, but the impression given by Mr Fraser-Jones's evidence was that contracts come and go, and overall the trend has been one of significant growth. No documents were produced by the Respondent to show what effect losing the MCS contract had on the business overall, or how long it took, or how long it was expected to take, to recover. I place significant weight on the fact that Mr Van Biljon was employed in late September 2017, apparently in response to a growth in the level of work. Had there been genuine concerns about whether the business could support the managerial costs after losing the MCS contract, it would have made far more sense to reverse that decision than to dismiss a manager with more than three years' service.

57. I also take into account that the First Respondent was somewhat disingenuous in its correspondence with the Second Respondent, claiming to have engaged in "meaningful consultation" with the Claimant when that was far from true. The moment it learned of the Second Respondent being awarded the contract it wrote to the Claimant saying that he would be transferring, or his contract would be terminated without any redundancy payment. Very late in the day it offered him an alternative job, but this was so far below his previous role in terms of seniority and pay that I do not accept it was made in good faith.

58. The evidence as to the breakdown in communication between the Claimant and MCS, the removal of the Claimant from the King's Cross contract and the decision to replace the Claimant with Mr Van Biljon for all communication with MCS, suggests that Mr Fraser-Jones had lost confidence in the Claimant. I find that Mr Fraser-Jones saw the transfer as an opportunity to get rid of the Claimant and effectively replace him, at least in the short term, with Mr Van Biljon. He may have genuinely believed that TUPE applied, or at least hoped that it did because it suited him, but that does not amount to an ETO reason. He never turned his mind to the question of the Claimant's dismissal because he closed his mind to the possibility that TUPE did not apply. In those circumstances, the Claimant's dismissal was substantively unfair pursuant to Regulation 7 of TUPE. Alternatively, it was unfair under s.98 ERA because the First Respondent has not established that redundancy was the real reason for dismissal. There is no need to address the argument on Polkey.

59. All claims against the Second Respondent are dismissed.

60. The remedy to which the Claimant is entitled will be determined at a remedy hearing. The holiday pay claim is agreed at £986.58. The basic award is agreed to be £2,200.50. It is also agreed that the Claimant is entitled to notice pay of £1,644.23. The maximum compensatory award the Tribunal could make is £36,000, but that is subject to an assessment of whether the Claimant has made reasonable efforts to mitigate his loss. Directions in respect of the remedy hearing will be sent to the parties separately.

**Case No: 2300921/2018**

Employment Judge **Ferguson**

Date: 21 August 2019