



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4104644/2018

Preliminary hearing held in Glasgow on 23, 24 and 25 September 2019

Employment Judge M Whitcombe

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**Mrs D McKibbens**

**Claimant**

**Represented by:**

**Ms L Neill**

**(Solicitor)**

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**1<sup>st</sup> Lets (UK) Limited (Dissolved)**

**First Respondent**

**Represented by:**

**Response struck out**

**No appearance**

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**1<sup>st</sup> Lets (Scotland) Limited**

**Second Respondent**

**Represented by:**

**Mr Sohail Iqbal**

**(Director)**

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**1<sup>st</sup> Lets (Glasgow) Limited**

**Third Respondent**

**Represented by:**

**Ms J Simpson**

**(PA to Director)**

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**1<sup>st</sup> Lets (South) Limited**

**Fourth Respondent**

**Represented by:**

**Ms J Simpson**

**(PA to Director)**

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## JUDGMENT

The judgment of the Tribunal on the preliminary issues is as follows.

5 (1) 1st Lets (UK) Limited did not dismiss the claimant prior to the dissolution of that company.

(2) There was no relevant transfer of an undertaking under regulation 3(1)(a) or (b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 so as to transfer the claimant's employment to 1st Lets (Scotland) Limited, 1st Lets (Glasgow) Limited or 1st Lets (South) Limited. Consequently, those respondents are dismissed from the proceedings.

## REASONS

### Introduction

15 1. I gave a judgment in this case with recorded oral reasons on 25 September 2019 (the third day of the hearing) in the presence of the parties. These written reasons have been prepared at the claimant's subsequent request in accordance with rule 62(3) of the ET Rules of Procedure 2013. Subject to minor corrections and rephrasing, they are the same as the reasons given orally. I will refer to the Transfer of Undertakings (Protection of Employment) Regulations 2006 as "TUPE 2006".

25 2. By way of overview, the purpose of this preliminary hearing is not to determine any of the merits of the claimant's claims. Its purpose is to decide the identity of the correct respondent. The claimant is by no means indifferent since the original respondent, 1<sup>st</sup> Lets UK Limited, has ceased trading and has now been dissolved. It has therefore ceased to be a legal entity capable of being sued, quite apart from the question of it having any assets to make it worth suing.

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3. In these reasons it is necessary to refer to four similarly named companies: “1st Lets UK Ltd”, “1st Lets Scotland Ltd”, “1st Lets Glasgow Limited” and “1st Lets South Limited”. For ease of reference I will simply refer to them as “UK Ltd”, “Scotland Ltd”, “Glasgow Ltd” and “South Ltd”.

### **Relevant procedural background**

#### *Claim originally brought*

4. By a claim form presented to the Tribunal on 11 May 2018 the claimant brought claims against UK Ltd for disability discrimination. None of the other respondents listed above were parties to the proceedings at that stage. Relevantly, at the time of lodging the claim form the claimant alleged that her employment with UK Ltd was continuing.

#### *Amendment*

5. On 25 March 2019 the claimant’s solicitor applied to add three new respondents in order to argue that her employment had transferred on or around 20 January 2019 from UK Ltd to one of the following three companies: Scotland Ltd, Glasgow Limited and/or South Limited. According to information held at Companies House, 22 January 2019 is the date on which UK Ltd was dissolved. EJ Wiseman granted the application to add three new respondents on 29 March 2019.

6. The same application sought to add claims for automatically unfair dismissal given the failure of any of those alleged transferees to treat the claimant as an employee. EJ Wiseman directed on 29 March 2019 that this amendment would only be considered when a draft amended statement of claim had been provided, a direction which is in accordance with well-established case law. The claimant had still not provided a draft amended ET1 paper apart at the time of a preliminary hearing for case management conducted by EJ Gall on

10 July 2019. The claimant's "further pleadings" were finally provided by email on 31 July 2019. In addition to arguing the transfer point they sought to add an alternative claim for automatically unfair dismissal and a claim for failure to inform and consult in relation to the transfer under regulation 13 of TUPE 2006.

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7. Although that correspondence was acknowledged by the Tribunal I cannot see that permission to amend the claims was ever formally granted, or that the respondents even made submissions on the proposed amendment. It seems that the parties may then have been distracted by an unsuccessful application by the claimant to strike out the responses. I was not directed to an order or correspondence granting permission to amend. This may well need to be addressed in due course.

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*Issues for this preliminary hearing*

8. That is the context in which this preliminary hearing was arranged to determine the following preliminary issues:

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a. Was the claimant at the time of dissolution of UK Ltd an employee of UK Ltd or had her employment ended prior to that?

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b. If the claimant was an employee of UK Ltd at the time of its dissolution, was there a transfer in terms of TUPE which saw her employment transfer?

c. If there was such a transfer, to whom did the claimant transfer as an employee?

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9. Those issues were discussed and slightly refocused at this hearing with the consent of all parties. It was agreed that in order to determine most of the relevant questions in relation to TUPE 2006 it was necessary to focus on the moment immediately before the transfer, which may or may not be the same thing as the moment immediately before the dissolution of UK Limited.

10. At the start of this hearing Ms Neil on behalf of the claimant put it in a rather different way. She alleged that the transfer took place at some point during the period November 2018 to January 2019 and initially alleged that it was from UK Limited to any *or all* of the additional respondents. I had some difficulty in understanding how the employment of a single employee could transfer to more than one transferee (see the **Kimberley** case referred to below), but eventually the claimant's argument became narrower. It was alleged that her employment transferred to Glasgow Ltd, and Ms Neil accepted that the other respondents should be dismissed from the proceedings given that no alternative or secondary arguments were advanced against them. That disposed of the claims against Scotland Ltd and South Ltd. The sole remaining respondent was Glasgow Ltd.

15 *Long term sickness and assignment*

11. Another issue emerging during the hearing was whether, having regard to the claimant's absence from work on long term sick leave prior to the alleged transfer, she was assigned to any organised grouping which might have transferred. See e.g. **BT Managed Services v Edwards** [2016] ICR 733, EAT, which I drew to the attention of the representatives. Since the resolution of this further question would probably require medical evidence, it was agreed that I could not properly deal with it at this hearing. Therefore, if I found that there was a relevant transfer, it would not be possible to determine the identity of the correct respondent since it would remain to be decided whether the claimant had been assigned to the relevant organised grouping immediately before that transfer.

*Adjournment of day 1*

12. The first day of the hearing was abandoned. On the application of the claimant's solicitors, unopposed by the respondents, the hearing began properly on day two because the claimant's solicitors said they were completely unready to begin the hearing. I was told that Ms Neil had only become aware of the hearing on the morning of the day it was due to commence and it was clear from discussions with her that she was under the misapprehension that the purpose of the hearing was to deal with disability status. She had not had time to look at her firm's file. In fact, disability has always been admitted and the purpose of this hearing, set out above, was clearly set out in the notice of hearing. Ms Neil was unable to explain how this state of affairs had come about and, having telephoned her supervising partner Mr Allison, she was not able to add anything. That is the subject of another order but all that I need to say for present purposes is that it was possible to complete the evidence and submissions in about a day of hearing time. Submissions were actually deferred until the morning of the third day at the joint request of the representatives in order to give them more time to prepare.

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13. The subsidiary reason for abandoning the first day of the three listed was that neither side had attended the Tribunal with any of the documents they wished to rely on. By the morning of the second day, the claimant and the final remaining respondent had each prepared a bundle of documents for use during the hearing.

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*Abandonment of "earlier dismissal" argument*

14. During the hearing the only remaining respondent, Glasgow Ltd, abandoned the argument that, long before any relevant transfer, the claimant had already been dismissed by UK Ltd, such that she could not benefit from the effect of TUPE 2006 even if those regulations applied. This is effectively the first of the issues set out in the notice of hearing and noted above. It was acknowledged

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that there was no dismissal letter and that there was no evidence that dismissal by any other means had ever been communicated to the claimant by UK Ltd. Glasgow Ltd also abandoned the difficult argument that the claimant had dismissed herself when employed by UK Ltd, an argument which now appears to be ruled out by *Zulhayir v JJ Ford Service Ltd* [2013] EWCA Civ 1226.

*Sole remaining issue*

- 10 15. That lengthy introduction explains why, in the end, the sole issue I had to decide was whether there was at any relevant time a transfer from UK Limited to Glasgow Limited.

**Evidence**

- 15 16. This is a case in which it is important to emphasise the burden and standard of proof. The burden of proof is on the party asserting that something was the case, so the burden of proving that there was a transfer lies with the claimant. The standard of proof is the balance of probabilities. In other words, if I decide that it is more likely than not that something occurred, it is deemed for the purposes of this judgment to have occurred. Nothing has to be proved beyond reasonable doubt, and I do not have to be *certain* of my factual findings. Instead, where there are disputes of fact I have to decide who is *more likely* to be correct, or what, *most likely*, happened.

- 25 17. There were only two witnesses. Both gave their evidence on oath or affirmation and were cross-examined. Witness statements were not used.

- 30 a. The claimant.  
b. Mr Nadeem Iqbal, the former director of UK Limited prior to its dissolution and also a sometime director of other respondents. Relevantly, he was also a director of the alleged transferee Glasgow

Ltd from 15 August 2016 to 18 April 2017 and 24 April 2017 to 12 March 2019.

- 5 18. I found both witnesses to be honest and credible. I do not accept the criticism of Mr Iqbal's evidence that he was vague and evasive. He has run several businesses, and cannot reasonably be expected to recall every single detail of their trading positions more than a year after the event. In my assessment he gave a reasonable amount of detail and was not evasive. I found his evidence cogent and plausible.
- 10 19. Where the evidence of the claimant and Nadeem Iqbal conflicted, I had to decide who was more likely to be correct. I emphasise that this does not imply a finding that the other has lied.
- 15 20. I have concluded that Nadeem Iqbal is more likely to be right about the affairs of the alleged transferor (UK Ltd) and transferee (Glasgow Ltd). He was, at the relevant times, a director of both, and worked in both businesses. He is in a position of knowledge. While he could not reasonably be expected to recall every matter of fine detail, he could reasonably be expected to recall  
20 obvious and essential details accurately. It has not been suggested that he has any financial incentive to influence the outcome of these proceedings. He is no longer a director of the remaining respondent and the alleged transferor no longer exists. It was not suggested that he has anything to gain or lose either way.
- 25 21. In contrast, the claimant had been absent from the workplace on sick leave for more than a year prior to the alleged transfer. The last day on which the claimant attended the workplace was 23 October 2017. After that, her knowledge of the business activities conducted from that address was either  
30 hearsay or else an informed guess based on an assumption that things had continued much as they had been on 23 October 2017 and earlier. That is not a safe assumption. She had no up to date knowledge of the dealings of the alleged transferor (UK Ltd) and she never worked for the alleged



transferee (Glasgow Ltd), although she worked close to people who did, in the same building.

- 5 22. I prefer Nadeem Iqbal's evidence because he was and is better informed and because he has more up to date knowledge than the claimant. That is not intended to sound critical of the claimant, but it is an objective reason to prefer Nadeem Iqbal's evidence.
- 10 23. There is also a lack of documentary evidence to support several of the claimant's suggestions: for example, there were no contracts of employment in the bundle to prove that certain individuals were ever employees of UK Ltd as alleged, or that they ever became employees of Glasgow Ltd. In those circumstances, I accept Mr Iqbal's evidence on employees and their status. The claimant conceded that she would not know about their payslips or payroll information. The claimant had no direct responsibility for other staff.
- 15 24. Importantly, there was no documentary evidence to demonstrate the housing stock let by the relevant companies at any particular time. Once again, it is the claimant who has the burden of proof and the lack of evidence is therefore a difficulty for her. In the absence of cogent *documentary* evidence regarding housing stock, I prefer Mr Iqbal's *oral* evidence on that issue.
- 20 25. I was not impressed by the bank statement evidence, because it relates to a single client. Taking it at its highest, it might support the argument that the client concerned transferred from UK Ltd to Glasgow Ltd, but it proves nothing of a general nature in relation to other clients.
- 25 26. It was accepted in the submissions made on behalf of the claimant that she did not actually know how many clients had transferred from UK Ltd to Glasgow Ltd but thought that many had done so and supplied the names of two. That is entirely consistent with my findings below. It also highlights the claimant's own realistic recognition of the limits of her knowledge.
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**Findings of fact**

27. I therefore make the following relevant findings of fact on the balance of probabilities.

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*Premises*

28. Prior to the alleged transfer, UK Limited and Glasgow Limited operated from the same business address, 704 Cathcart Road, Glasgow. Those premises were not owned by either business, but rather by the director of both, Nadeem Iqbal. I did not see or hear any evidence to indicate whether there was a formal lease arrangement between Mr Iqbal and either company.

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*Activities*

29. Both businesses were of a very similar nature: the letting of residential properties in Glasgow. They did so on very similar terms, with the obvious and necessary difference that the letting agreement would be with or through a different letting agency. However, I find that the clients and the housing stock let were very different. I return to this below.

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*Staff*

30. As for staff, I accept Nadeem Iqbal's evidence that the only *employee* of UK Ltd prior to the alleged transfer was the claimant herself. Clearly, the claimant did not transfer to Glasgow Ltd. Nadeem Iqbal worked in the business too, but did so as a director rather than as an employee. His work and skill was the human resource that made the business work, especially during the long period for which the claimant was absent on sick leave. Indeed, he was the *only* person doing significant work in the business of UK Ltd in the year or so prior to the alleged transfer.

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31. Nadeem Iqbal's son Sohail Iqbal did some unpaid work both for UK Ltd and for Glasgow Ltd, but he was a volunteer and was not an employee of either company. I heard no evidence which would allow me to make findings on precisely how much work he did for either company.

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32. I accept Nadeem Iqbal's evidence that Messrs Fleming and Mulholland, who carried out rent collection and handyman duties respectively, were self-employed, and did work on that basis for UK Ltd prior to the alleged transfer, but no work of any sort for Glasgow Ltd after the alleged transfer. Mr Fleming worked approximately 2-3 days each week and was free to work for other organisations if he wished. Mr Mulholland worked perhaps one week out of two. They did not wear branded clothing as suggested by the claimant. Although they were certainly part of the human resource which operated the business of UK Ltd (albeit on a self-employed basis), they were not part of the human resource which operated the business of Glasgow Ltd after alleged transfer. They simply did not transfer from one company to the other.

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33. In summary, the people working in the business of UK Ltd prior to the alleged transfer were the claimant (subject to sick leave), Nadeem Iqbal, Messrs Fleming and Mulholland and, to a minor and unquantifiable extent, Sohail Iqbal. Only Nadeem Iqbal and Sohail Iqbal worked for Glasgow Ltd after the transfer, the latter once again unpaid and to an unquantifiable extent.

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34. If the situation is instead analysed in terms of employees in the strict sense, the only employee of UK Ltd prior to the alleged transfer was the claimant herself. She did not transfer to Glasgow Ltd.

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35. A further point must be made. Nadeem Iqbal did not really *transfer* from UK Ltd to Glasgow Ltd. He was a director of *both* businesses before the alleged transfer and he worked in the business of Glasgow Ltd both before and after the alleged transfer. It cannot be said in any meaningful sense that he transferred from UK Ltd to Glasgow Ltd since he was already working in the business of Glasgow Ltd. There was no evidence which would allow me to

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distinguish between the amount of work done by him in the business of Glasgow Ltd before and after the alleged transfer.

36. The equivalent point can be made in relation to Sohail Iqbal's unpaid work. Whatever its extent and value, there was no evidence which would allow me to find that Sohail Iqbal's unpaid work for Glasgow Ltd changed at all following the alleged transfer. He had done that work for Glasgow Ltd prior to the alleged transfer too.

37. Mazin Almiky worked for Glasgow Ltd both before and after the alleged transfer, but he did not at any stage work for the alleged transferee, UK Ltd. Therefore it cannot be said that he transferred from UK Ltd to Glasgow Ltd.

*Housing stock*

38. At its peak, UK Ltd had about 70-100 properties on its books. However, by the time of alleged transfer it had a small fraction of that business: just 10-20 properties. At the point of its dissolution the clients were written to and told of the situation. One option open to them was to transfer their business to Glasgow Ltd. Alternatively, they could use another letting agency or no letting agency at all. Crucially, the majority of the 10-20 clients/properties went to other agents. Only about 5 transferred their business to Glasgow Ltd. Even though that is 25-50% of total pre-transfer, the fraction is misleading. It is a fraction of a very small number to start with. I find that only a very small and insignificant amount of business transferred from UK Ltd to Glasgow Ltd.

**Submissions**

39. The claimant relied on a voluminous bundle of authorities, many of which were not referred to, and I will not refer to all of them either. The submissions made on behalf of the claimant were largely directed to the findings of fact I should make, essentially arguing that the claimant's evidence should be preferred to that of Nadeem Iqbal. I have already set out detailed reasons for reaching the opposite conclusion on many relevant disputed issues of fact.

40. It was submitted that there was, prior to the transfer, an organised grouping of employees consisting of the claimant, Nadeem Iqbal, Sohail Iqbal, Mr Fleming and Mr Mulholland. I have already set out my rather different factual conclusions, with reasons (see paragraphs 33 and 34 above, contrasting employees properly so-called with those working in a more general sense).
41. I was reminded of *Fairhurst Ward Abbots Ltd v Botes Building Ltd* [2004] ICR 919, CA, in support of the proposition that there might still be a transfer even if there were a division of clients. I was also referred to the well-known test in *Spijkers* ([1986] 3 ECR 1119, ECJ) which was not in the claimant's bundle of authorities, but the principles are distilled in *Cheesman v Brewer* [2001] IRLR 144, EAT. I was also referred to *Dines* [1994] IRLR 336, CA, in support of the proposition that the precise mechanics of the transfer were not relevant. I accept that, but I am not at all sure that it was ever a live issue in this case.
42. The claimant submitted that the bulk of UK Ltd's clients transferred to Glasgow Ltd and that the majority of the employees were taken over too. I have made rather different findings of fact on both points, for the reasons already set out. Only a very small and insignificant amount of business transferred. None of the employees (strictly speaking) transferred. None of the staff (in the widest sense) transferred in any meaningful sense.
43. I was then referred to the well-known and, I suspect, uncontroversial guidance in *Kimberley Group Housing Ltd v Hambley* [2008] ICR 1030, EAT and *Metropolitan Resources Ltd v Churchill Dulwich* [2009] ICR 1380, EAT, especially paragraph 28. I have been careful to treat the principles of service provision change quite separately from those applicable to the original definition of transfer derived from EU law and now contained in regulation 3(1)(a) of TUPE 2006.

44. Finally, the claimant submitted that there was no evidence of disruption of activities and that the activities of the alleged transferor and alleged transferee were of a similar nature.

5 45. The submissions of Glasgow Ltd, the only remaining respondent, were concise and straightforward. They were that Nadeem Iqbal was a credible witness whose evidence should be accepted, and that none of UK Ltd's assets had transferred to Glasgow Ltd. While I have accepted that Nadeem Iqbal was a credible witness, and further that his evidence should be  
10 preferred to that of the claimant, I have already explained why I do not fully accept the submission that no assets transferred at all. Clearly some housing stock did.

### **Reasoning and conclusions**

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#### *Service provision change*

46. I will begin by analysing the position in terms of service provision change (regs 3(1)(b)(ii) and 3(3) of TUPE 2006). In order to save time and space I  
20 will not set them out in full, but I have considered all of their provisions carefully.

47. It is convenient first to analyse the "organised grouping of employees" for the purposes of regulation 3(3)(a)(i) of TUPE 2006. Even if, in the claimant's  
25 favour, "employee" is interpreted so broadly as to include any member of staff in the loosest sense, the "organised grouping of employees" was the claimant, Nadeem Iqbal, Sohail Iqbal, Mr Mulholland and Mr Francis. This captures all of those who worked in the business in any capacity at all. If on the other hand "employee" is interpreted in a strict sense then the only  
30 employee in the organised grouping was the claimant herself.

48. The relevant "activities" were the activities of a residential property letting agency, which require no further explanation.

49. The clients were the individual landlords of each property. From *Duncan v Ottimo Property Services Ltd* [2015] IRLR 806, [2015] ICR 859 I derive the proposition that “client” for these purposes can be understood in the plural as well as in the singular. I drew this authority to the attention of the representatives and invited their submissions on it before reaching my decision.
50. The principal purpose of the organised grouping of employees defined above was to carry out the activities of a letting agency for those landlord clients. The test in regulation 3(3)(a)(i) was therefore satisfied.
51. The “contractors” for purposes of regulation 3(1)(b)(ii) of TUPE 2006 were therefore UK Ltd and Glasgow Ltd.
52. I have reached the conclusion that there was no service provision change in accordance with the statutory definition for the following reasons, either of which would be fatal to the claim.
- a. When the situation before the alleged transfer is compared to the situation immediately after it, the clients were not the same. The client (which includes the plural) for the purposes of regulation 3(3)(a)(i) was not the same as the client in regulation 3(3)(a)(ii).
  - b. The activities carried out by the putative transferee were *not* “fundamentally the same” following the alleged transfer, as regulation 3(2A) requires. That question is one of fact and degree. A substantial change in the amount of the particular activity required by the client (or clients) may mean that activities are not fundamentally or essentially the same. That is my finding in this case. Here there were only 10-20 clients of UK Ltd prior to the alleged transfer. Only about five of them required the same services from Glasgow Ltd. For those reasons, the test in regulation 3(1)(b)(ii) read with 3(2A) was not satisfied.

53. By way of further explanation, I refer once again to ***Duncan v Ottimo Property Services Ltd*** [2015] IRLR 806, [2015] ICR 859, EAT for the proposition that “client” for purposes of TUPE 2006 can be more than one client. However, the grouping of clients must remain the same both before and after the alleged service provision change. See in particular the judgment of HHJ Eady QC (as she then was) at paragraph 48. Here, as in that case, there is no difficulty in allowing for the fact that the client could be plural. Here, as in that case, the question is whether it is possible to discern a common intention among those clients. My conclusion is that there was no sufficient common intention for purpose of regulation 3(3)(a)(ii). While about five of the clients of UK Ltd prior to the alleged transfer intended that, following the transfer, the activities would be carried out by Glasgow Ltd, the rest did not. Without that common intention between all of the clients, the claim must fail.

54. Additionally, there would be a fragmentation problem. Even if the clients had a common intention that the activities should be carried out by Glasgow Ltd, it is clear that the activities became so fragmented that it is impossible to say that a service provision change had taken place. Here the majority of the clients did *not* transfer. It is wholly unclear where they went instead, but there is certainly no evidence that they went to a single alternative letting agency. I therefore find that the position after the alleged transfer was fragmented.

*Transfer of an undertaking or business*

55. My conclusion is the same in relation to regulation 3(1)(a) of TUPE 2006 (transfer of an undertaking or business). I have applied the guidance in paragraphs 10 and 11 of ***Cheesman***, which summarises the key points arising from many other well-known TUPE cases. I have carried out the required “multifactorial assessment” and I have not treated any single factor as determinative.

56. There was a stable economic entity: it was a stable lettings business comprising premises from which the business was conducted, the stock of



properties to let and its employees or other workers. The assets were primarily intangible: the right to let housing stock, customer goodwill and client connection. No doubt there was also some moveable property such as computers and other office equipment, but I have heard no real evidence about those sorts of assets, or where they went.

57. The decisive criterion is whether that stable economic entity retained its identity after the alleged transfer. I have found that it did not for the following reasons.

a. The claimant did not transfer to Glasgow Ltd, and strictly she was the only employee of UK Ltd. Even if a wider conception of worker is adopted, only two of those working in the business of UK Ltd worked in business of Glasgow Ltd after the alleged transfer (Nadeem Iqbal and Sohail Iqbal). However, they did not really “transfer”. They had always worked in the business of Glasgow Ltd, even before the alleged transfer. I therefore find that Glasgow Ltd did *not* take on a major part of the workforce of UK Ltd.

b. The alleged transferor and alleged transferee traded from the same premises, but once again those premises did not really transfer: Glasgow Ltd had already been trading from that address since long before alleged transfer. There is no evidence upon which I could find that, for example, Glasgow Ltd took over space within that building from UK Ltd.

c. As for letting stock, I have found that 25-50% transferred, but the proportion is misleading because the absolute numbers were small (just five).

d. The value of those intangible assets was modest – the potential income from letting just five properties. I find that it was of little commercial significance.

5 e. There was no evidence that any valuable goodwill transferred. For this purpose I take “goodwill” to be either the notional cost to purchase the business minus the value of its tangible assets, or the estimated reputation of the business as a quantifiable asset (both common definitions). There is no evidence that any goodwill in those senses was purchased or in any other way transferred. There is no evidence that would allow me to value it either.

10 f. My finding in relation to customers mirrors that in relation to letting stock. No significant volume of customers transferred.

15 g. As was noted in **Cheesman**, while similarity of activities is relevant to the assessment, the mere fact that the service provided by the old and new contractor was similar does not justify the conclusion that there has been a transfer of an undertaking.

20 h. Here there was no contractual link between UK Ltd and Glasgow Ltd, selling or otherwise transferring assets or clients between them. However, this is not decisive on its own.

i. There was no evidence of any deliberate TUPE-avoidance strategies in the decision not to transfer staff from UK Ltd to Glasgow Ltd.

25 *Overall conclusion*

58. My conclusion is therefore that there was no transfer of either type for the purposes of regulation 3 of TUPE 2006, and that the claimant did not transfer to the employment of any other organisation. She remained an employee of  
30 UK Ltd, until such time as she was dismissed by that organisation.

*Implications*

59. This does not mean that the claimant has no claim. There was no transfer, so the correct respondent for the disability discrimination claim, and presumably now the unfair dismissal claim (subject to amendment), is the one originally sued, UK Ltd. The claim for failure to inform and consult under regulation 13 of TUPE 2006 cannot survive my finding in relation to the transfer. Unfortunately UK Ltd longer exists, has no assets, and has been dissolved.

60. I originally asked the claimant to indicate by 9 October 2019 whether she wished proceedings to be sisted to allow UK Ltd to be restored to the register, or whether the claimant would seek payment from the Redundancy Payments Fund, and if so whether she withdraws her claim against UK Ltd. At the claimant's subsequent request, I now extend that deadline to 14 days after the date on which these written reasons are sent to the parties.

61. Those are the reasons for my conclusions on the preliminary issues.

Employment Judge: M Whitcombe  
Date of Judgement: 09 October 2019

Entered in Register,  
Copied to Parties: 11 October 2019