EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111131/2019

Preliminary Hearing Held at Glasgow on 13 February 2020

Employment Judge A Kemp (sitting alone)

Ms N Aden	**Claimant** **Represented by** **Mr G Loughrey** **Solicitor**
Ace Cleaning Services	**Respondent** **Represented by** **Mr A Queen** **Business Manager**

JUDGMENT

1. **The designation of the respondent is amended to The Cleaning Company (West) Limited.**

2. **The claimant was not the subject of a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 to the respondent, and the Claim is dismissed.**

REASONS

Introduction

1. The Claim made was for unfair dismissal and related remedies on the basis that there had been a relevant transfer by way of a service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations") to the respondent on or around 11 June 2019. The respondent denied that.

2. Evidence was given by the claimant herself and Mrs Laura Guarino, a director of the respondent. The parties spoke to a small number of documents that each produced. I undertook questioning of both witnesses in an attempt to elicit the material facts. On a number of occasions a question could not be answered by the witness, and it appeared to me that neither witness had a full understanding of the terms of the Regulations or how they operated.

3. During submission, the claimant applied to amend the designation of the respondent to its formal name, having previously been designed using its trading name. That was not opposed and has been granted accordingly.

The issue

4. The issue that arose for decision was whether or not there had been a relevant transfer of the employment of the claimant to the respondent under the Regulations by way of a service provision change.

The Facts

5. The Tribunal found the following facts established:

6. The claimant is Ms Nima Aden.

7. She was employed by a company named only as ABM as a cleaner with effect from 1 July 2016. ABM provided cleaning services to a number of clients.

8. In the period up to and including May 2019 the claimant worked at two different premises for ABM, in each case as a cleaner. The first role was for 10 hours per week and was undertaken with other employees of ABM at premises in West George Street, Glasgow. The second role was for 6 hours per week, at premises known as the Whisky Bond, 2 Dawson Street, Glasgow, occupied by Glasgow Sculpture Studios ("GSS"). The GSS premises were situated on the first and second floors of the building. She worked at GSS on Mondays, Wednesdays and Fridays from 1 – 3pm. She was the only ABM employee who carried out the cleaning work at the GSS premises.

9. The activities carried out by the claimant at the two sets of premises were for general cleaning work, including of toilet areas, emptying bins, replenishing stocks of soap, and related activities.

10. The respondent is a cleaning company. It has offices on the fourth floor of the premises occupied by GSS. It provided cleaning services to other parts of those same premises as were provided by ABM.

11. In about March 2019 Ben Lowry the manager of the GSS premises approached the respondent to seek a quotation to replace ABM as the provider of cleaning services for GSS. The respondent provided the quotation and was informed that it had been successful.

12. On 10 May 2019 Mr Lowry gave written notice to ABM that a new provider would start in June that year, and that the current month was the final service required from it. He did so as he considered that the standard of cleaning was not adequate. He informed the respondent that they would commence on the contract from 1 June 2019.

13. ABM did not give the claimant notice of any prospective transfer under the Regulations, nor did it give the respondent any employee liability information under those Regulations. It did however inform the claimant that from the first week of June 2019 she would cease to work at West George Street, Glasgow, and work at the reception floor of the said premises occupied by GSS for 12.5 hours per week.

14. ABM did not inform the claimant specifically that she should cease to clean the GSS premises. She continued to do so for two weeks in the period 1 to 12 June 2019, for three days each week being Mondays, Wednesdays and Fridays, on each occasion doing so from 1pm to 3pm.

15. The claimant did not contact the respondent in the first half of June 2019, as she was not at that stage aware of which party was to be taking over the contract from ABM.

16. On 5 June 2019 during the morning Mr Queen of the respondent carried out cleaning at the premises of GSS. His doing so was the first occasion on which the respondent carried out cleaning work at the GSS premises. That same day Mr Lowry emailed ABM, referred to the fact that the claimant had cleaned the GSS premises that day, a Friday, and asked whether they had informed her that GSS were no longer using ABM's services.

17. In the following week, a cleaner employed by the respondent carried out cleaning for two hours per day on Monday, Wednesday and Friday, in the morning. The respondent provided cleaning services for the GSS premises for six hours per week in the period that followed thereafter. The services provided by the respondent were fundamentally the same as had been provided by ABM.

18. On 11 June 2019 ABM sent an email to Mrs Linda Guarino, a director of the respondent, stating "Nima [the claimant] was informed that the contract at

GSS finished on the 31/05/19 and instructed by ABM **NOT** to work in this area. If she was instructed by anyone else outside of ABM to do this cleaning we are not liable."

19. On 15 June 2019 the claimant contacted Mr Lowry, who told her that ABM no longer had the contract to clean the GSS premises, and that another company, being the respondent, had taken over. She understood from that that another company provided the cleaning service and she ceased to carry out cleaning activities at the GSS premises.

20. The claimant did not contact the respondent at that stage about her belief that she had transferred to their employment. She continued in the employment of ABM, carrying out 12.5 hours cleaning work per week at the reception floor of the same premises as occupied by GSS at the building known as the Whisky Bond, but at the floors occupied by GSS.

21. On 18 July 2019 the claimant's solicitor wrote to the respondent alleging that she had transferred to their employment under the Regulations.

22. The respondent replied on 26 July 2019 to deny that there had been any transfer.

Law

23. The Regulations provide, so far as material for the purposes of this Claim, as follows:

> "**2 Interpretation**
> 'Assigned' means assigned other than on a temporary basis
> …….
> References to 'organised grouping of employees' shall include a single employee
> …….

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—

(i) activities cease to be carried out by a person ('a client') on his own behalf and are carried out instead by another person on the client's behalf ('a contractor');

(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

(iii) activities cease to be carried out by a contractor or a subsequent 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 the client on his own behalf,

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

(2) In this regulation 'economic entity' means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

(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.

……

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.

4 Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), 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.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

> (3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions……"

24. The provisions as to service provision change, on which the claimant founded, are new in the Regulations. They do not rely on the pre-existing case law on contracting out under the transfer of an undertaking, and so are to be construed separately from the provisions emanating from the Acquired Rights Directive, as explained by the EAT in ***Metropolitan Resources Ltd v Churchill Dulwich Ltd [2009] IRLR 700***, and by the Court of Appeal in ***McCarrick v Hunter [2013] IRLR 26***.

Submissions

25. Mr Loughrey argued that there had been a relevant transfer by way of a service provision change under Regulation 3(1)(b). No argument was made under paragraph (a). He argued that the provisions operated as a matter of law, and that what the respondent sought to do was question whether the provisions were fair or not. That was not relevant. It was not for a client, or the respondent, to decide if there was such a transfer. He argued, in answer to questions from me, that there was no fundamental difference in the activities before and after transfer, and that the claimant was a part of two organised groupings, one for West George Street, and one for GSS. He argued that it was competent to split the employment for transfer purposes, so that part of the employment remained with ABM, and part transferred to the respondent.

26. Mrs Guarino and Mr Queen argued that there was no transfer, as they had not been informed of any suggestion of that occurring at the time, they had high standards which meant that there was a fundamental difference with the activities of ABM, and there could be no organised grouping where the claimant remained an employee of ABM carrying out other work.

27. Neither party referred to any authority.

Discussion

28. The basic facts were not in substantial dispute, but there were issues as to what the claimant was told by ABM, or what she could have known. No one from ABM gave evidence, nor did Mr Lowry. There was some hearsay evidence in an email to Mr Lowry from ABM to the effect that the claimant had been told not to work at GSS after 1 June 2019. I accepted the claimant's evidence however that she had not been told that. She confirmed that she had worked there for two weeks in the early part of June 2019 as no one had told her otherwise, and as in earlier cases she had continued working for the party which took over a contract. Her position was supported by an email to ABM from Mr Lowry on 5 June 2019, and common sense is that someone is not likely to carry out work if told specifically not to, when that would mean doing the work without a right to payment.

29. Subject to that I generally accepted the evidence on direct facts from each of those who gave evidence as being credible and reliable. The key question was of the application of the facts to the statutory scheme in the Regulations.

30. The first issue for me was whether the activities at GSS were fundamentally the same where carried out by the respondent as had been carried out by ABM. The respondent argued that they were not, as the standard of service provided by ABM was inadequate, which was why they had been brought in. I did not consider that that argument was right. The activities were cleaning the GSS premises. They were fundamentally the same before and after the

putative transfer. They were carried out during the same days, and for the same number of hours per day. It did not appear to me that the question of the standard of the activities was sufficient to render those activities not fundamentally the same.

31. The second issue was more complex, and that is whether there was an organised grouping of employees situated in Great Britain which "had as its principal purpose the carrying out of the activities concerned on behalf of the client". The claimant argued that there were in effect two organised groupings of employees, one at GSS which involved only the claimant, and another at the West George Street premises which involved the claimant and other employees of ABM. The claimant argued that she fell within the statutory provisions in light of that, such that the GSS element of her contract transferred to the respondent. The respondent argued that there was no such organised grouping of employees, and that that was supported by the lack of any contact from ABM to them regarding a possible transfer, or direct contact to them by the claimant in the early days of June 2019.

32. I concluded that the circumstances of the claimant's employment did not meet the statutory test, in that at the time of the prospective transfer on or about 5 June 2019 (the date when in effect the respondent commenced its contract for GSS) the claimant had been working at two separate premises, with the majority of her time not spent at those of GSS. I did not consider that as a result it could be said that there was an organised grouping of employees, being the claimant alone, for the GSS premises, which had as its principal purpose the activities at the GSS premises. That is as there was no such organised grouping.

33. I have not found any authority which supports the claimant's argument that an employee can simultaneously be in two separate organised groupings of employees for the purposes of the Regulations, such that when the activities of one such group are undertaken by another entity, that part of the

employment splits off to the transferee whilst the employee also retains employment for the other group with the transferor.

34. Some support for the conclusion that that argument for the claimant is not correct can however found in authority. The organised grouping must exist as at the time of transfer, and not merely be present as a matter of history: ***Amaryllis Ltd v McLeod UKEAT/0273/15*** and ***Tees, Esk and Wear Valleys NHS Foundation Trust v Harland [2017] IRLR 486***.

35. The fact that one section of the workforce happened in practice because of the employer's shift pattern to work largely on one contract, but without any formal dedication to it, was held not to mean that they transferred with that work when that contract was lost: ***Eddie Stobart Ltd v Moreman [2012] IRLR 356***. The same conclusion was reached in ***Seawell Ltd v Ceva Freight (UK) Ltd [2013] IRLR 726,*** in which the Inner House of the Court of Session approved the judgment of Lady Smith in the EAT, where she said that 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'.

36. That principle was applied in ***Rynda UK Ltd v Rhijnsburger [2015] IRLR 394*** to the transfer of a single individual, but there all the work was undertaken for the activities that transferred. Here the claimant is arguing that she is part of two organised groupings, which is a very different set of facts, and very different argument.

37. The sense of the authorities is that for someone to be part of an organised grouping of employees for these purposes, they need to be consciously assigned only, or very largely, to work for either one client or one aspect of the services given, so that it is clear that when the contract for the client or services is lost, and taken over by another party, the employment of that employee transfers. The service provision change provisions are UK ones, that do not require the kind of purposive construction necessary where a Directive of the European Union is being implemented, but even giving the

Regulations a wide interpretation it appeared to me that the construction argued for on behalf of the claimant could not be the correct one.

38. There is, I consider, no basis in the Regulations for the kind of "split" transfer that the claimant argues for. Regulation 4 has provision for all rights and liabilities transferring from transferor to transferee. I consider that that is not practicable on a basis of dividing the employment between two employers. Here, the claimant argues for payment of matters such as accrued holiday pay. There is no mechanism within the Regulations to separate out the liability of ABM as the original, and continuing employer, from that of the respondent, in the event that there was held to be a transfer. The claimant also argues for notice pay, but the employment with ABM continues, and has not terminated.

39. Read as a whole, the Regulations provide that the employment contract between the employee and transferor is to transfer, in its entirety, to the transferee, such that there is a statutory novation of contract between the employee and transferee. That is not what happened in the present case, where the claimant remained an employee of the putative transferor.

40. I consider that there was no organised grouping of employees having as its principal purpose the carrying out of the activities concerned on behalf of the client, GSS.

41. There is then a third issue of whether the employee was assigned to the relevant organised grouping of employees, if such grouping existed. The term 'assigned' is not defined in the Regulations, save only as not to apply when assigned on a temporary basis, but the word is taken from the test established in the European case of ***Botzen v Rotterdamsche Droogdok Maatschappij BV C-86/83 [1986] 2 CMLR 50***. This was then applied in UK case law, for example ***Sunley Turriff Holdings Ltd v Thomson [1995] IRLR 184, EAT; Michael Peters Ltd v Farnfield [1995] IRLR 190, EAT; Duncan Webb Offset Ltd v Cooper [1995] IRLR 633; Buchanan-Smith v Schleicher &***

Co International Ltd [1996] IRLR 547, and ***CPL Distribution Ltd v Todd [2003] IRLR 28.*** These cases support the proposition that an employee can only be assigned to one organised grouping of employees.

42. In ***Costain Ltd v Armitage UKEAT/0048/14/DA*** the EAT considered the position of an employee who worked on a number of different contracts, including one subject to a service provision change. His employer had estimated that the claimant spent 80% of his time on the contract transferring and he was told that his contract of employment would be transferred to the new provider, Costain. The tribunal found that he had transferred, but the EAT held that the tribunal had erred in its approach. It stated that the tribunal should have begun by specifically defining the organised grouping of employees and then deciding whether the claimant was assigned to it. It added that the fact that an employee was working on transferring activities immediately before the transfer is not on its own sufficient to show assignment to the grouping.

43. There are some similarities between the facts of that case and the present one, in that there was participation by the employee both in the activities that transferred, and other activities that did not. In the present case matters are more clear, as the extent of that participation was less than 40% of the total time. That case I consider fortifies the conclusion that there was no assignment, but also that one cannot split employment transfers in the manner contended for on behalf of the claimant.

44. The BIS (as it was then called) Guidance on the Regulations dated January 2014 states as follows:

> Q. Which employees are assigned to the organised grouping of resources or employees?
>
> A. Whether an employee is assigned to the organised grouping can depend upon a range of factors. There is no exhaustive list of factors and in any particular case, it will depend upon the circumstances.

Factors which might be particularly significant in one case, may not be in other circumstances. The case law says that the focus should be on the link between the employee and the work or activities which are performed.

The question is not decided simply by how much time is spent doing the work that is transferring, although that might be a relevant factor. Other relevant factors are likely to include the job role and contractual duties of the employee and the reasons why an employee spends time on particular activities, for example

- an employee in a senior role with responsibilities for the whole of the employer's business might not be assigned to a part of that business which is transferring, even if that part of the business takes up most of that employee's time. "

45. Having regard to that case law and the Guidance, I do not consider that it can properly be said that the claimant was assigned to an organised grouping of employees carrying out the GSS work, (with the majority of her time both before and after the putative date of transfer spent in other work) and for that separate reason there was no transfer of her employment to the respondent.

Conclusion

46. In light of the foregoing I concluded that the claimant had not been transferred under the Regulations, and she remained an employee of ABM. As such, the claim against the respondent must be dismissed.

47. I might add firstly that I did, as confirmed above, accept the claimant's evidence that she had cleaned the premises of GSS for a period of two weeks in June 2019. If she was not told to cease doing so by ABM, which is what her evidence was, she may be able to seek payment from that entity, although whether or not she can, and if so how, is not a matter that is appropriate for me to comment on further.

48. Secondly, had the factual circumstances been different on matters of which the respondent would not have been aware at the time, the claimant may have transferred to the respondent under the service provision change provisions of the Regulations. The claimant is correct that the Regulations apply, or not, as a matter of law, and the respondent's understanding of the Regulations as disclosed in evidence was not complete. The respondent may wish to consider seeking advice on the terms and effect of the Regulations when it either takes over, or loses, an existing contract.

Employment Judge: A Kemp
Date of Judgement: 16 January 2019

Entered in Register,
Copied to Parties: 20 January 2019