Appeal No. UKEATS/0013/20/SH (V)

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 2nd February 2021
Judgment handed down on
16th February 2021

Before

THE HONOURABLE LORD FAIRLEY

(SITTING ALONE)

GREATER GLASGOW HEALTH BOARD APPELLANT

DR D NEILSON

RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised UKEATS/0013/20/SH

APPEARANCES

For the Appellant	MR D HAY (Advocate) Instructed by: NHS Central Legal Office Anderson House Breadalbane Street Edinburgh EH6 5JR
For the Respondent	MR A COWAN (Advocate) Instructed by: Anderson Strathern LLP, Solicitors 1 Rutland Court, Edinburgh EH3 8EY.

SUMMARY

TOPIC NUMBER(S):

3 – TRANSFER OF UNDERTAKINGS; dismissal; remedies; re-engagement

The Claimant was dismissed by the Appellant immediately prior to a **TUPE** transfer from the Appellant to a third party. He brought a claim for unfair dismissal against the Appellant alone in which he claimed that his dismissal was unfair in terms of Regulation 7(1) of **TUPE**. The Appellant conceded that the dismissal of the Claimant was by reason of the transfer and was unfair. Following a remedies hearing, the Employment Tribunal concluded that it would be reasonably practicable for the third party to re-engage the Claimant. It further concluded that the third party was a "successor of the employer" in terms of sections 115, 116 and 235 of the **Employment Rights Act, 1996** ("**ERA**") and ordered the Appellant to re-engage the Claimant with the third party. The Appellant appealed, *inter alia* on the ground that the Tribunal had failed to consider whether or not it would be reasonably practicable for the Appellant to comply with that order.

Held: Appeal allowed and case remitted to a different Tribunal. The correct interpretation and application of section 116(3)(b) **ERA** required the Tribunal, before making a re-engagement order against the Appellant, to consider whether or not it was practicable for the Appellant to comply with that order. The Tribunal had not done so.

The Tribunal had also failed correctly to apply Regulation 4 of **TUPE** in determining which party bore the liability for an automatically unfair dismissal in terms of Regulation 7(1), and had misdirected itself as to the applicability of the "successor employer" provisions of section 115, 116 and 235 **ERA**.

THE HONOURABLE LORD FAIRLEY

1. Greater Glasgow Health Board ("the Appellant") has appealed against a remedies Judgment of an Employment Tribunal sitting at Glasgow dated 20 January 2020. The Respondent to the appeal is Dr David Neilson. I will refer to Dr Neilson, as he was referred to before the Employment Tribunal, as "the Claimant". The appeal was heard at a sitting of the Employment Appeal Tribunal in Edinburgh on 2 February 2021. Due to Covid restrictions, the hearing was conducted by video conference. The Appellant was represented by Mr David Hay, Advocate. The Claimant was represented by Mr Alan Cowan, Advocate. I am very grateful to both Counsel for their clear and helpful submissions.

Facts

2. The Appellant is the National Health Service Board with responsibility for the Greater Glasgow area. In that capacity, it enters into General Medical Services ("GMS") contracts with general practitioners. Under such contracts the general practitioners, operating as independent contractors, provide general practitioner ("GP") services within the geographical area for which the Appellant is responsible.

3. Between 2005 and 2017, the Claimant was a partner in a GP practice based at Dumbarton Health Centre and known as The Neilson McGonagle Partnership ("the NMP"). The NMP was responsible for providing GP services to approximately 2000 patients at Dumbarton Health Centre. It did so under a GMS contract with the Appellant. In in his capacity as a partner of the NMP the Claimant was not an employee of the Appellant. He did, however, hold certain other positions of employment with the Appellant which he performed separately from his role as a partner of the NMP.

4. On 23 March 2017, the NMP was dissolved. The effect of the dissolution was immediately to bring to an end the GMS contract between the NMP and the Appellant. By letter to the former partners of the NMP dated 3 April 2017, the Appellant advised that, with immediate effect, the Respondent would take over the running of the practice formerly carried on by the NMP pending a decision being taken as to the longer term arrangements to be put in place for the patients of the practice. In the same letter, the Appellant confirmed that it would take over the employment contracts of all of the staff of the NMP under and in terms of the **Transfer of Undertakings (Protection of Employment) Regulations, 2006** (S.I. 2006/246) ("**TUPE**"). The former partners of the NMP were not employees of the partnership. Consequently, they did not form part of the group of employees of the NMP whose contracts of employment transferred to the Appellant.

5. The Claimant and Dr McGonagle were, however, each offered fixed term contracts of employment with the Appellant to continue to provide GP services at Dumbarton Health Centre. They each accepted those offers. The fixed term contracts were for a fixed period from 4 April 2017 to 30 June 2017. The Claimant's salary under the fixed term contract was £84,276 per annum, pro-rated to 0.8 of full time-equivalent to reflect the Claimant's working hours. The Claimant was subsequently offered and accepted a short extension to his fixed term contract until 31 July 2017.

6. Having secured the provision of GP services to the former patients of the NMP on an interim basis, the Appellant then sought applications from existing local GP Practices:

> **"to provide primary medical services to the 2089 patients of the former Drs Neilson & McGonagle Practice, Dumbarton Health Centre…from 1 August 2017."**

The successful applicant was another GP practice which already operated from Dumbarton Health Centre under the name of The Levenside Practice ("the LP"). By letter dated 30 June 2017, the Appellant gave the Claimant notice of termination of his fixed term contract of employment with effect from 31 July 2017.

7. On 1 August 2017, the LP took over the provision of primary medical services at Dumbarton Health Centre to the former patients of the NMP. From that date, the former employees of the NMP who had previously transferred to the Appellant under **TUPE** became employees of the LP by virtue of a further **TUPE** transfer from the Appellant to the LP.

8. The Claimant's employment was not treated either by the Appellant or by LP as having transferred to LP on 1 August 2017. Instead, the Appellant embarked upon a process of attempting to identify suitable alternative positions for the Claimant through its redeployment process. In parallel with that process, the Claimant appealed against his dismissal, contending that his employment should have transferred to LP with effect from 1 August 2017. The Claimant's appeal against dismissal was refused by the Appellant on 27 July 2017, and the redeployment process did not ultimately succeed in identifying a post which the Appellant could offer and which the Claimant was prepared to accept.

Procedural history

9. In a claim form (ET1) presented on 22 November 2017, the Claimant averred that he had been unfairly dismissed by the Respondent. Within a paper apart to section 8.2 of the claim form, the Claimant provided specification of the basis of his claim of unfair dismissal as follows:

> **"The Claimant believes that the principal reason for the decision to terminate his employment as GP at the Dumbarton Health Centre was the TUPE Transfer. He appealed the decision that his contract should be terminated arguing that any decision that his contract should be so terminated was by reason of the TUPE transfer and thus automatically unfair. His appeal was unsuccessful. He believes that his dismissal is automatically unfair in terms of Regulation 7 of the TUPE Regulations, 2006"**

10. The reference to "the TUPE transfer" was a reference to the transfer which took place on 1 August 2017 from the Appellant as transferor to the LP as transferee. The reference to dismissal was to the termination by the Appellant of the Claimant's fixed term contract with effect from 31

July 2017. Apart from the reference to Regulation 7 of **TUPE**, the ET1 did not rely upon any other ground of alleged unfairness.

11. The only Respondent named by the Claimant in the ET1 was "NHS Greater Glasgow and Clyde" at an address at Gartnavel Hospital, Glasgow. Correctly, that description was treated as being a reference to the Appellant, on whom the ET1 was duly served. The LP was not named as a Respondent. In due course, the Appellant lodged a Response Form (ET3) in which it resisted the claim. Paragraph 1 of section 6.2 of the ET3 stated:

> **"1. It is denied that the Claimant was unfairly dismissed as alleged or at all."**

Paragraphs 13-16 of section 6.2 of the ET3 stated:

> **"13. It is denied that the Claimant was unfairly dismissed in terms of Regulation 7 of TUPE, or at all.**
>
> **14. The Claimant was dismissed fairly at the end of his fixed term contract**
>
> **15. *Esto* the Claimant was dismissed by reason of the TUPE transfer, liability for that claim does not rest with the Respondent.**
>
> **16. The Claimant's claim should be dismissed."**

12. As noted above, the Claimant's fixed term contract with the Appellant subsisted only for a period of approximately four months. Following a Preliminary Hearing on 17 and 18 April 2018, however, the Claimant was found to have sufficient continuity of employment to enable him to bring a claim of unfair dismissal by virtue of the other positions of employment with the Appellant which he had performed separately from his role at Dumbarton Health Centre for a period which exceeded the qualifying period.

13. By e mail dated 6 June 2018, the Appellant's solicitors wrote to the Employment Tribunal. The e mail was copied to the Claimant's solicitors. It stated:

> **"Further to the outcome of the recent Preliminary Hearing that the Claimant has the necessary service to proceed with his claim, my clients have considered their position and wish to admit that the Claimant was dismissed by reason of the TUPE transfer…**
>
> **I confirm that the Respondent would be content for the Remedy Hearing to be listed…now that there is no need for an evidential / merits Hearing."**

14. Whilst the e mail of 6 June 2018 did not expressly concede the unfairness of the dismissal, such a concession appears to have been implied since no "economic, technical or organisational reason" defence had been pled by the Appellant under Regulation 7(2) of **TUPE**. Accordingly, on 3 September 2018, the Employment Tribunal issued a Judgment under Rule 21 of the Employment Tribunal Rules in the following terms:

> **"The judgment of the Employment Tribunal is that the claimant's complaint of unfair dismissal (in terms of regulation 7 Transfer of Undertakings (Protection of Employment) Regulations 2006 succeeds."**

15. In the Reasons accompanying its Judgment of 3 September 2018, the Employment Tribunal stated *inter alia*:

> **"3. The respondent, by letter of the 6 June 2018, confirmed it admitted the claimant was dismissed by reason of the TUPE transfer.**
>
> **4. The remedy to which the claimant is entitled for the claim will be determined by an Employment Judge at a hearing."**

16. A further Hearing was duly fixed and took place on 3 and 4 October 2019. Though described as a remedies Hearing, the issues which were canvassed before the Employment Tribunal on those dates and ultimately determined by it in a reserved Judgment also included (i) whether or not, in terms of Regulation 2(1) of **TUPE**, the Claimant was "assigned" to the organised grouping which transferred to the LP on 1 August 2017 (the Appellant's contention being that he was not by virtue of the temporary basis of his employment); and (ii) whether or not the LP was a "successor of the employer" in terms of sections 115(1), 116(3)(b) and 235 of the **Employment Rights Act, 1996** ("**ERA**"). One of the agreed issues bearing upon remedy was in the following terms:

> **"1/. Should the Tribunal make an order for re-engagement of the claimant in terms of section 115 and 116 ERA? In particular:-**
>
> **should the Order be made against the Levenside Medical Practice, a "successor" in the language of section 116(3)(b)…"**

In the course of the Hearing, the Tribunal heard evidence from one of the partners of the LP, Dr Fergus MacLean. The LP was not, however, joined as a party to the proceedings in terms of either of Rules 34 or 35 of the Employment Tribunal Rules.

The Employment Tribunal's Judgment and Reasons

17. Having heard evidence and submissions, the Tribunal reserved its decision. On 20 January 2020, it issued a Judgment against the Appellant in the following terms:

> **"The tribunal decided to make an order for re-engagement. The claimant is to be re-engaged with the Levenside Practice as a salaried GP working 0.8 full time equivalent. The principal place of work will be Dumbarton Health Centre. The salary for the position will be £84,276 per annum pro rata.**
>
> **The respondent shall pay to the claimant the sum of £32,408, being the amount the claimant might reasonably have been expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement.**
>
> **All rights and privileges (including seniority and pension rights) must be restored to the claimant.**
>
> **This Order must be complied with by 28 February 2020."**

18. Within its Reasons (at paras. 101-105), the Employment Tribunal explained *inter alia* that it had concluded that the Claimant's fixed term contract with the Respondent was not a temporary assignment, and that Claimant was accordingly "assigned" to the organised grouping which transferred to the LP. At paragraph 105, the Tribunal stated:

> **"I should state that if I had concluded that the claimant's contract of employment with the respondent was not assigned to the organised grouping of resources, this would not have impacted on the decision regarding remedy. I say that because the issue of the claimant's contract being assigned to the organised grouping of resources is not an issue going to the practicability or otherwise of an order for re-engagement."**

19. The Employment Tribunal also considered whether the LP was a "successor of the employer" in terms of sections 115, 116 and 235 **ERA**. The focus of that inquiry was on whether the transfer to the LP was a mere change in the identity of a service provider (as in **Dafiaghor-Olomu v. Community Integrated Care** [2018] ICR 585) or, alternatively, entailed a change in ownership of the practice. In that regard, the Tribunal identified three parts to the undertaking, namely the premises (including fixtures, fittings and equipment), the patients and the staff. There was no evidence as to the basis on which the premises at the premises at the Dumbarton Medical Practice were occupied either by the NMP or by the LP. The Tribunal noted that "*[s]ome or all*" of the assets of the NMP had been purchased by the LP from the NMP. It also noted that the patients of the former NMP became registered with the NMP and that there was a value to the LP associated with that – apparently as an aspect of turnover. Finally, it noted that five employees of the NMP had transferred to the Appellant and thereafter to the LP under **TUPE**.

20. Having regard to these factors, the Tribunal accepted a submission made on behalf of the Claimant, relying upon **Dafiaghor-Olomu**, that the LP was indeed "a successor of the employer" for the purposes of sections 115, 116 and 235 **ERA** 1996 (paragraphs 87-100). At paragraph 100, the Tribunal stated:

> **"I was persuaded in this conclusion by the fact that the three component parts of [the NMP] were subsequently "owned" by [the LP]. I say this because [the LP] occupied the premises formerly occupied by [the NMP] and purchased the fixtures and fittings equipment (*sic*). [The LP] took over the provision of care for 2089 patients formerly registered with [the NMP]; and they took on the five members of staff. I accordingly concluded that [the LP] was a successor employer for the purposes of sections 115 and 116 of the Employment Rights Act."**

21. Turning to the Claimant's desired remedy of re-engagement, at paragraph 107, the Employment Tribunal asked itself the question:

> **"…whether it was practicable (including having regard to section 116(5) and (6) Employment Rights Act) for [the LP] to comply with an order for re-engagement."**

It considered that issue at paragraphs 107 to 124 of its Reasons. The Tribunal considered but ultimately rejected the evidence of Dr MacLean about practicability concluded (at paragraph 124):

> **"…that it would be practicable for [the LP] to re-engage the claimant."**

The Appeal

22. The Appellant challenged the Judgment of 20 January 2020 on a number of grounds. These are discussed more fully below. Following an initial perusal of parties' Skeleton Arguments during the week before the appeal hearing, I requested that notice be sent to the parties of my wish also to be addressed on the following two preliminary questions on the basis that they might raise *pars judicis* issues about the competence of the Employment Tribunal's Judgement of 20 January 2020. The questions were: -

> **Having regard to (a) Litster v. Forth Dry Dock & Engineering Co. Ltd [1989] ICR 341; and (b) Allan v. Stirling District Council [1995] ICR 1802, was it competent for the Employment Tribunal to make any remedies order against the Respondent for a dismissal of the Claimant that was unfair - as conceded by the Respondent - by virtue of Regulation 7(1) of TUPE, 2006?**
>
> **In any event, was it competent for the Employment Tribunal to order the re-engagement of the Claimant as an employee of a legal entity that was neither a Respondent to the proceedings before it, nor independently represented at the remedies Hearing on 3 and 4 October 2019?**

23. In advance of the appeal hearing, both parties lodged Supplementary Skeleton Arguments addressing these two questions.

Submissions - Appellant

24. Whilst accepting that the combined effect of **Litster v. Forth Dry Dock & Engineering Co. Ltd** [1989] ICR 341, **Allan v. Stirling District Council** [1995] ICR 1802, Regulation 4(2) and Regulation 4(3) would usually be to impose liability only upon the transferee for a dismissal which occurred immediately prior to and by reason of a **TUPE** transfer, Mr Hay submitted that

this was not inevitably the case. He noted that whilst automatic unfairness of a dismissal in terms of Regulation 7(1) of **TUPE** does not depend upon the dismissed employee having been "assigned" to the organised grouping which transferred (see Regulation 7(4)), the transfer provisions in Regulation 4(1) require there to have been such assignment. Thus, a situation could arise where liability remained with the transferor for a dismissal that was automatically unfair under Regulation 7(1). This would be the case where the employee in question was not "assigned" to the relevant grouping – either because of the temporary nature of the assignment (per Regulation 2(1)) or for some other reason. At the remedies hearing before the Employment Tribunal he had submitted that, because of the temporary nature of the Claimant's fixed term contract, he had not been "assigned" to the grouping which transferred. The Employment Tribunal had ultimately rejected that argument. Mr Hay accepted that, whilst he had not expressly departed from the *esto* position pled at paragraph 15 of the paper apart to the ET3, nor had he expressly advanced a fallback position before the Tribunal that if the Claimant *was* assigned to the organised grouping which transferred, liability for the unfair dismissal fell solely upon the LP.

25. On the second of my two preliminary points, Mr Hay submitted that *pars judicis* considerations of unfairness and / or Article 6 ECHR compliance could potentially arise where the effect of the Tribunal's order adversely affected the interests of the LP. He submitted that the LP had a direct interest in two particular matters which had been decided by the Tribunal, *viz*: (i) the question of practicability of re-engagement; and (ii) the facts and circumstances in which it could be asserted that the LP was "a successor of the employer" in terms of sections 115, 116 and 235 **ERA**. He submitted also that there was a link between this question and his Ground of Appeal 3.1.

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26. Turning to his Grounds of Appeal, Mr Hay submitted (Ground 3.1) that, even on the hypothesis that the Tribunal was correct in its conclusions about "assignment" and "successor employer", it had erred in considering only whether or not it was practicable for the LP to re-

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engage the Claimant. The correct question in terms of section 116(3)(b) was whether or not it was practicable for the Appellant to comply with a re-engagement order. The Tribunal had made no findings in fact bearing upon that question, and had not considered it.

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27. In any event, the Tribunal had erred (Ground 3.2) by ordering re-engagement of the Claimant under a contract without any express limit on its duration and thus on terms which were more favourable than he had enjoyed under his previous fixed term contract with the Appellant. It was not permissible in terms of sections 115 and 116 **ERA**, 1996 for the Tribunal to order re-

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engagement on significantly more favourable terms (**Rank Xerox Ltd v. Stryczek** [1995] IRLR 568).

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28. Mr Hay further submitted (Grounds 1.1 and 1.2) that the Tribunal had misdirected itself in considering whether the LP was a successor employer to NMP. The correct question, he submitted, was whether the LP was a successor employer of *the Appellant*. In the Claimant's case the LP could never be "a successor employer" to the NMP because the NMP had never employed

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him. The only party which had ever done so was the Appellant. Reference was made to the definitions of "employer", and "employee" in section 230 **ERA**. In any event, the Tribunal had misunderstood and mis-applied the **Dafiaghor-Olomu** case. In attaching significance to the

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issues of premises, staff and patients the Tribunal had erroneously conflated a transfer of the provision of services with a transfer of ownership. Such sale of moveable property as there had been by the NMP to the LP was irrelevant to the question of whether or not the LP was a successor employer of the Appellant. Even if that was wrong, the Tribunal's only finding in fact about that

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issue – at paragraph 25 – that *"[t]he partners of [the LP] purchased equipment and furniture*

from the previous Practice" was insufficient in itself to support the conclusion of a change of "ownership" of an undertaking in terms of section 235(1) **ERA** (per **Dafiaghor-Olomu** *ibid*) such as to make the LP a successor employer. This difficulty with the Tribunal's reasoning was highlighted by its reference at paragraph 93 to "*[s]ome or all*" of the assets of the NMP having been purchased by the LP – illustrating that the Tribunal did not know exactly what had been purchased – and by the repeated references in its Reasons to the LP having purchased "*fixtures and fittings*" (paragraphs 93, 99, 100) when there was no finding in fact to that effect (*cf* paragraph 25 quoted above). Finally under Grounds 1.1 and 1.2, Mr Hay submitted that the possibility of the LP being a successor to the NMP (rather than to the Appellant) had not been canvassed by the Tribunal with parties, and it was procedurally improper for the Tribunal to have reached a conclusion on that issue (and on its relevance) without first having invited submissions on it.

29. Finally, on the issue of "assignment" to the organised grouping which transferred to the LP on 1 August 2017 (Ground 2), Mr Hay submitted that it was clear from paragraphs 101 to 104 of its Reasons that the Tribunal had taken into account and placed significant weight upon an irrelevant factor, namely the Claimant's prior work as a partner of the NMP between 2005 and March 2017. Mr Hay submitted that in considering whether the Claimant's assignment to the organised grouping that transferred on 1 August 2017 had been any more than "temporary" in terms of Regulation 2(1), only assignment *qua* employee was relevant.

30. Mr Hay accordingly invited me to allow the appeal and to remit the case to a different Tribunal for re-determination of the issue of remedy.

Submissions – Claimant

31. For the Claimant, Mr Cowan submitted that any issues which might have arisen from **Litster** and **Allan** were not *pars judicis* issues of competence. He submitted that in not advancing the *esto* position pled by it at paragraph 15 of the paper apart to its ET3 at the hearing on 3 and 4

October 2019, the Respondent had waived any right to take the point about the identity of the party who should bear liability for the unfair dismissal of the Claimant on 31 July 2017.

32. In relation to the second of my preliminary questions, and under reference to what was said by Underhill LJ in **R (Mackenzie) v. University of Cambridge** [2019] ICR 1477 at paragraphs 20 and 25, Mr Cowan submitted that the effect of the Tribunal's Judgment of 20 January 2020 was not to impose any obligation on the LP at all. Rather, it created a situation where the Appellant must *either* secure the re-engagement of the Claimant with LP or satisfy the Tribunal at a further hearing that it was not practicable to do so (section 117 **ERA**). If it does neither of those things, the Appellant will then require to pay further compensation to the Claimant calculated in accordance with section 117 **ERA**. In these circumstances, it was not necessary either for the LP to have been convened as a Respondent or for it to have been separately represented at the Remedies Hearing.

33. In any event, the LP had been fully aware since November 2018 of the Claimant's intention to seek an order for re-engagement with the LP, but had chosen not to seek to enter the proceedings in terms of Rule 35 of the Employment Tribunal Rules. On the issue of the LP's state of knowledge of the Claimant's intentions, I was referred by Mr Cowan to the existence of an Opinion of Lord Pentland in a Petition by the LP to the Court of Session (**Levenside Medical Practice, Petitioner** [2020] CSOH 67). In that Petition, the LP had sought suspension and suspension *ad interim* of the Judgment of the Employment Tribunal which is now the subject of this appeal. The Petition was resisted by the Claimant on the basis that the LP had an extant statutory right of appeal to this Tribunal. On 3 July 2020, the Petition was refused by the Lord Ordinary on that basis. Within paragraph [13] of his Opinion, the Lord Ordinary recorded as undisputed facts (i) that the Appellant, through its solicitor, had informed the LP's solicitor on 21 November 2018, that the Claimant intended to seek the remedy of re-engagement by the LP;

(ii) that the LP had taken legal advice about that; and (iii) that it had thereafter decided not to become "voluntarily involved in the Employment Tribunal" proceedings.

34. Turning to Mr Hay's Grounds of Appeal, Mr Cowan accepted (Ground 3.1) that the Tribunal had not considered the issue of practicability of compliance by the Appellant with the order for re-engagement, but submitted that it had not been necessary for it to do so. As a preliminary observation, he reminded me that the issue of practicability requires to be considered at two separate stages. The first, under section 116 **ERA**, is no more than a provisional assessment (**McBride v. Scottish Police Authority** [2018] ICR 591). The second, under section 117 **ERA**, arises only if the section 116 order has not been complied with. The determination at that second stage is a conclusive one, with the burden of proof being on the "employer" to show that compliance with the order was not practicable (section 117(4)(a); and **McBride** *ibid* at paragraphs 37 and 38). Mr Cowan submitted that the provisional question of practicability which the Tribunal had to consider at the first stage in terms of section 116(3)(b) was simply:

> **"…whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement"**

In this case, the Tribunal had correctly concluded that the LP was "a successor employer" and had then gone on to consider in terms of section 116(3)(b) whether or not it was practicable for the LP to re-engage the Claimant. Having concluded that it was, the Tribunal did not need separately to consider whether it was practicable for the Appellant to comply with an order against it that it should re-engage the Claimant with the LP. He submitted that the focus before the Tribunal had been – correctly – on the question of whether or not it was practicable for the LP to re-engage the Claimant.

35. In relation to Ground 3.2, Mr Cowan submitted that the reference in section 115 to "comparable" employment was a reference only to the type of work (in this case, work as a GP)

rather than to particular terms of the contract. The reference in section 116(4) to the terms of an order for re-engagement being:

> **"…on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement."**

did not require that the Claimant's previous fixed term contract be replaced by another contract for the same fixed term, but was habile to include re-engagement under an open-ended contract "at will", terminable by notice given by either party. If the required periods of notice were not expressly agreed, they would be implied by law.

36. Turning to Grounds 1.1 and 1.2, Mr Cowan submitted that, in applying the definition of "successor" in section 235 **ERA**, the starting point was to identify "the undertaking". In the circumstances of this case, he submitted that it was clear that the Tribunal had correctly identified that the "undertaking" was the medical practice formerly carried on by the NMP. It was then necessary to consider whether "ownership" of that undertaking had been transferred to the LP in the sense described in **Dafiaghor-Olomu**. It was not necessary that ownership should transfer in a single transaction. In this case, ownership had transferred by virtue of (i) the transfer of the staff, patients and use of the premises initially from the NMP to the Appellant and then from the Appellant to the LP; and (ii) the sale of certain moveable assets of the former NMP directly from the NMP to the LP without the involvement of the Appellant. The combined effect of these transactions was that the LP became the owner of the undertaking and thus became the "successor" for the purposes of section 235 **ERA**. Mr Cowan accordingly submitted, under reference to **Dafiaghor-Olomu**, that a party was a "successor" for the purposes of section 235 – and thus also sections 115 and 116 – if they became the employer as a result of a change in ownership of the undertaking. That was the position here.

37. In relation to Ground 1.1, he submitted that, on a fair reading of the Tribunal's Reasons, the use of the premises was not a significant factor in its conclusion that there had been a change

of ownership of the undertaking. The important factor, he submitted, was the purchase of assets by the LP from the NMP. It was not necessary to know exactly what was purchased to reach the conclusion that there had been a change of ownership. Subject to the *de minimis* principle, as long as something was acquired by the LP from the NMP (which conclusion was supported by the Tribunal's finding in fact at paragraph 25), that was a sufficient basis for the Tribunal's conclusion that there had been a change in ownership. Mr Cowan rejected the suggestion of procedural impropriety and submitted that all that the Tribunal had done was correctly to apply section 235 **ERA** to the facts before it.

38. In relation to Ground 2 and the issue of "assignment", Mr Cowan adopted what was said in his Skeleton Argument at paragraphs 17-19. The fact that the Claimant was, as an employee, dealing with the same patients with whom he had previously dealt as a partner of NMP was a relevant factor to which the Tribunal was entitled to attach weight. In any event, the suggestion that the Claimant was only assigned to the undertaking on a temporary basis confused the fixed term nature of the Claimant's employment with the nature of his assignment to the undertaking. Finally, and as noted by the Tribunal, this issue was not relevant to the question of remedy.

39. For all of these reasons, Mr Cowan invited me to refuse the appeal. Alternatively, if there was any error on the part of the Tribunal which justified allowing the appeal, he submitted that the appropriate course was to remit to the same Tribunal with appropriate directions.

Decision

40. For reasons to which I will return below, the facts of this case simply did not engage the "successor employer" provisions of sections 115, 116 and 235 **ERA**. Quite apart from that issue, however, the Appellant's Ground of Appeal 3.1 is well founded, and the appeal succeeds on that basis. The correct interpretation and application of section 116(3)(b) **ERA** required the Tribunal, before making a re-engagement order against the Appellant, to consider whether or not it was

practicable for the Appellant to comply with that order. The Tribunal did not do so. Contrary to Mr Cowan's submission, it is clear when sections 116 and 117 are read together that the reference to "the employer (or a successor or an associated employer)" in section 116(3)(b) **ERA** is intended to be a reference to the party against whom the Tribunal is considering making the order for re-engagement. The conclusion on practicability under section 116(3)(b) need only be provisional. It must, however, have some reasonable basis in the evidence (see **McBride v. Scottish Police Authority** [2016] ICR 788, per Baroness Hale of Richmond at paragraph 38; **Port of London Authority v. Payne** [1994] ICR 555 at page 569B).

41. In this case, the Tribunal considered only the question of whether or not it would be practicable for the LP to re-engage the Claimant. Even on a provisional basis, it did not consider whether it was practicable for the Appellant – against whom the order was ultimately directed – to bring about that result. For that reason alone, this appeal succeeds. Since the issue of re-engagement may be linked to the issue of compensation, it is appropriate that the whole of the Tribunal's Judgment of 20 January 2020 be set aside.

42. Before turning to the consequences of that conclusion, however, I return to the first of the two preliminary questions that I asked parties to address. That question has an important bearing upon how the issue of remedy case will require to be considered by the Tribunal to which the case is ultimately remitted.

43. Unnecessary complexity has been added to this case by the Claimant's erroneous approach to the issue of allocation of liability for a dismissal that is automatically unfair by virtue of Regulation 7(1) of **TUPE**. That approach, in turn, led the Tribunal into error.

44. Specifically, there was a failure by the Tribunal properly to apply Regulation 4 of **TUPE** in determining which party bore the liability for an automatically unfair dismissal in terms of Regulation 7(1). As was made clear by the House of Lords in **Litster** and by the Inner House of

A the Court of Session in **Allan**, where Regulation 4(1) of **TUPE** applies, all of the transferor's liabilities, whether accrued or continuing, pass to the transferee and the transferor is no longer subject to any of those liabilities. These principles are also apparent in the clear words of Regulation 4(2) and (3). As Mr Hay correctly submitted, there can be cases where a dismissal is automatically unfair under Regulation 7(1), but Regulation 4(1) is not engaged. One such situation would be where the Claimant was not "assigned" to the relevant organised grouping of resources or employees. In that situation, the combined effect of Regulation 4(1) and Regulation 7(4) would be to leave liability for the unfair dismissal with the transferor. Another possible exception is seen within the opening words of Regulation 4(1), which deal with the issue of employee objection to the transfer under Regulation 4(7).

45. In this case, however, the Claimant's position was that he was assigned to the relevant organised grouping which transferred, that his dismissal was by reason of the transfer and that it was automatically unfair in terms of Regulation 7(1). The latter two points were determined – at least against the Appellant – by its concession of 6 June 2018 and were reflected in the Tribunal's subsequent Judgment of 3 September 2018. Assignment, however, remained a contested issue at the hearing on 3 and 4 October 2019.

46. In its Reasons of 20 January 2020, the Tribunal concluded that Claimant was "assigned" to the relevant organised grouping in terms of Regulations 2(1) and 4(1). Having come to that conclusion, there was no basis in law on which the Tribunal could properly have made any further remedies order against the Appellant in respect of the unfair dismissal of the Claimant. The inevitable consequence of the conclusion on assignment, applying Regulation 4(1) to (3) of **TUPE**, and the *dicta* in **Litster**, and **Allan** was that sole liability for the unfair dismissal of the Claimant passed to the LP as the transferee. Had the Tribunal found instead that the Claimant

A was *not* assigned to the relevant grouping, liability for the consequences of the unfair dismissal would simply have remained with the Appellant in terms of Regulations 4(1) and 7(4) of **TUPE**.

B 47. The Tribunal's failure properly to apply Regulation 4 was compounded by its acceptance of the Claimant's submissions about the **Dafiaghor-Olomu** case and the "successor employer" provisions of sections 115, 116 and 235 **ERA**. Again, the Claimant's position on this issue was based upon a misunderstanding of the law. The LP was not "a successor employer" either of the

C Appellant or of the NMP for the purposes of sections 115, 116 and 235 **ERA**. The circumstances in which the "successor employer" provisions of those sections will be relevant following a **TUPE** transfer are very limited. As was noted by Simler J (P) in **Dafiaghor-Olomu**, what are now the "successor employer" provision in sections 115, 116 and 235 date back to 1974 and pre-

D date both the **TUPE Regulations, 1981** and the **Acquired Rights Directive** 77/187. Section 115 **ERA** derives from section 69 of the **Employment Protection (Consolidation) Act 1978**. A "successor" is defined in section 153 of that Act as having the meaning given to "successor" by

E section 30(3) and (4) **Trade Union and Labour Relations Act 1974** ("TULRA"). The definition provided by section 235 **ERA** remains in almost identical terms to that provided by section 30 **TULRA**.

F 48. As can be seen from paragraph 7 of the Judgment in **Dafiaghor-Olomu**, the "successor employer" point arose in that case only because the unfair dismissal of the Claimant by the first respondent was wholly unrelated to the subsequent **TUPE** transfer to the second respondent. The

G dismissal of the Claimant was not unfair by virtue of Regulation 7. The dismissal had nothing to do with the transfer. If the dismissal in the **Dafiaghor-Olomu** case *had* been by reason of the transfer, and Regulation 4(1) had applied, liability for any remedy would simply have passed to

H the second respondent. As in this case, the "successor employer" provisions of sections 115, 116 and 235 **ERA** would not then have arisen.

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49. In summary, where a dismissal of an employee is automatically unfair by virtue of Regulation 7, liability for the remedy of re-engagement will either pass solely to the transferee by virtue of Regulation 4(1) or will remain solely with the transferor where the conditions in Regulation 4(1) are not met (*e.g* if the Claimant was not "assigned" to the relevant grouping). In either scenario, the "successor employer" provisions of sections 115, 116 and 235 **ERA** will not be relevant except perhaps (as was the position in **Dafiaghor-Olomu**) where there is later a transfer of the ownership of the business of the party which originally bore the sole liability for the unfair dismissal.

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50. The Tribunal's approach to each of these issues was, again, erroneous. Whilst the appeal already succeeds under the Appellant's Ground 3.1, those errors by the Tribunal were also sufficiently fundamental as to justify the setting aside of its Judgment of 20 January 2020. For completeness, I did not accept the submission for the Claimant that, in advancing its primary position on the assignation point, the Appellant had clearly and unequivocally waived its *esto* position as set out in paragraph 15 of the paper apart to the ET3.

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51. It will, therefore, be for the Tribunal to which the case is remitted to carry out a full re-hearing and ultimately to determine, on such evidence as may be heard by it, whether or not the Claimant was "assigned" to the organised grouping which transferred to the LP. Whatever conclusion is reached about that issue, the issue of "successor employer" should not arise when the Tribunal comes to consider the potential remedy of re-engagement. If liability rests with the Appellant in terms of Regulation 7(4) (because the Claimant was not "assigned" to the relevant grouping that transferred) then the Appellant will simply be "the employer" for the purposes of sections 115 and 116 **ERA**. If, on the other hand, liability has passed to the LP under Regulation 4(1) (because he *was* so assigned), the only party against which an order could be made under

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section 115 would be the LP, not as a "successor employer" but simply as "the employer", applying Regulation 4 of **TUPE**, **Litster** and **Allan**.

52. If the Claimant is ultimately found to have been "assigned" to the relevant grouping, he will not be entitled to any remedy against the Appellant. The only party against whom he could then seek a remedy would be the LP. For that to happen, however, the LP would need to be brought into the proceedings as a Respondent under either Rule 34 or 35 of the Employment Tribunal Rules. I will return to procedural implications of that below.

Disposal

53. The appeal is accordingly allowed, and the Judgment of the Employment Tribunal dated 20 January 2020 is quashed. Applying the guidance in **Sinclair Roche & Temperley v. Heard** [2004] IRLR 763, and having regard *inter alia* to the real possibility of the LP being joined to the proceedings prior to what will require to be a full re-hearing, the preferable course is for the remit of the case to be to a different Tribunal.

54. In advance of that re-hearing, the new Tribunal to which the case is remitted should consider (and, if necessary, hear submissions about) two particular case management issues arising from this Judgment, *viz*:

a. whether or not the LP should be added as an additional Respondent in terms of Rule 34; and

b. if the LP is joined as a Respondent, whether or not the Tribunal's Judgment of 3 September 2018 requires to be reconsidered in terms of Rule 70.

55. For completeness, I saw some force in Mr Hay's submissions under Ground 2 that, in its consideration of the question of the Claimant's "assignment" *qua* employee, the Tribunal had

A erred in attaching significance to the work previously undertaken by the Claimant as a partner of the NMP. It is not necessary, however, for me to reach a concluded view upon that point for the purposes of deciding this appeal. The issue of assignment will require to be considered of new by the Tribunal to which the case is remitted once it has heard evidence and submissions. LP may also wish, in due course, to lead evidence and make submissions on that point should it be joined to the proceedings.

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