



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4102066/2020**

**Hearing held by Cloud Video Platform (CVP) at Glasgow on 1 & 2 June 2021**

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**Employment Judge: Frances Eccles**

**Mr Gary Scott**

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**Claimant  
In person**

**Holt Leisure Parks Limited**

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**First Respondent  
Represented by:  
Mr M O'Carroll -  
Counsel &  
Mr R White -  
Instructing Solicitor**

**Mr Kenny Knox**

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**Second Respondent  
Represented by:  
Mr F Tait -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Employment Tribunal is that (i) the claimant was not unfairly dismissed by the first respondent; (ii) the first respondent failed to comply with the requirements to inform and consult in terms of Regulation 13 of the TUPE Regulations 2006 & (iii) the claimant is entitled to compensation of **£1,950** (£150 x 13 weeks) for which the first respondent and the second respondent are jointly and severally liable.

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**REASONS**

## BACKGROUND

1. The claim was presented on 5 April 2020 against the first respondent. The claimant complained of unfair dismissal. The claim was defended. In their response, received on 12 May 2020, the first respondent denied having unfairly dismissed the claimant. The first respondent stated that the claimant had agreed to work for another company, identified as 2KS Security on the basis that they would give the claimant the opportunity to undertake training for a Security Industry Authority (SIA) licence. The first respondent stated that the claimant had agreed to work a period of notice and that his employment terminated on 12 February 2020 when he went to work for 2KS Security.
2. At a preliminary hearing held on 24 June 2020 an Employment Judge decided that the second respondent should be joined as a party to the proceedings on the basis that he is potentially liable for the claim. In his response, received on 9 April 2021, the second respondent denied that the claimant had transferred to his employment. He stated that the claimant knew that he would be self-employed from 12 February 2020. He stated that he was unable to engage the claimant after he refused or was unable to obtain an SIA licence.
3. At a preliminary hearing held on 4 December 2020 the claimant was ordered to provide further and better particulars of his claim and a schedule of loss. The claimant provided a document referred to as his "statement of case" on 30 December 2020. In the above document the claimant referred to "*the only alternative*" offered by the first respondent was to work for the second respondent which "*turned out to be in a self-employed capacity*". In the same document, the claimant referred to his assessment of loss as being "*around £6,000*". He stated that to date he had been unsuccessful in obtaining alternative employment and was currently living off money inherited from his late father's estate.
4. In additional information, received on 18 January 2021, the first respondent claimed that there had been a transfer of the claimant's contract of

employment to the second respondent in terms of the TUPE Regulations 2006. The first respondent contended that the transfer was either by way of the transfer of an economic entity which retained its identity under Regulation 3(1)(a) of the TUPE Regulations 2006 or as a result of a service provision change under Regulation 3(1)(b) of the TUPE Regulations 2006. The first respondent stated that they had complied with their obligations to inform and consult under Regulation 13 of the TUPE Regulations 2006.

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10 5. At a preliminary hearing held on 29 March 2021 an Employment Judge identified the issues to be determined by the Tribunal as;

- (i) Whether the claimant's employment transferred from the first to the second respondent under the TUPE Regulations 2006;
- (ii) In the event that the claimant's employment did not transfer under the TUPE Regulations 2006, whether the claimant was unfairly dismissed by the first respondent and if so, any remedy to be awarded &
- (iii) In the event that the claimant's employment did transfer to the second respondent, whether the first respondent complied with their obligations to inform and consult under the TUPE Regulations 2006.

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20 The Employment Judge noted the claimant's position that he was unfairly dismissed by the first respondent on 12 February 2020 and that he was not pursuing a claim of unfair dismissal against the second respondent. The Employment Judge also noted that the remedy sought was compensation and that the claimant had indicated the amount sought in his statement of case. The claimant was ordered to produce a schedule of loss setting out how the sum sought was calculated and to provide details of steps taken to mitigate his loss. It was agreed that the claim should be listed for a final hearing at which evidence in chief would be given by witness statement.

6. The Tribunal was provided with a Joint Bundle of Productions. For the first respondent the Tribunal heard evidence from Mr Gavin McDonagh, Managing Director. His witness statement was taken as read and stood as his evidence in chief. The second respondent gave evidence. His witness statement was taken as read and stood as his evidence in chief. The claimant relied on his statement of case with addendum as his evidence in chief which was taken as read.
7. The final hearing was held remotely by Cloud Video Platform (CVP). The first respondent was represented by Mr M O'Carroll, Advocate and Mr R White, Instructing Solicitor. The second respondent was represented by Mr F Tait, Solicitor. The claimant represented himself.
8. The second respondent incorporated his business in September 2020. It was agreed that this was after the date of any purported transfer of the claimant's contract of employment from the first to the second respondent and that accordingly the second respondent should remain as Mr Kenny Knox trading as 2KS Security.
9. The first and second respondents provided the Tribunal with written submissions,

#### **APPLICATION FOR STRIKE OUT**

10. At the start of the final hearing, Mr O'Carroll for the first respondent raised concerns about the conduct of the claimant and second respondent in relation to the Tribunal proceedings. Mr O'Carroll questioned the claimant's compliance with case management orders to provide a witness statement, a schedule of loss and evidence of mitigation of loss. The claimant apologised for any failure to comply with case management orders. He explained that he had not been involved in Tribunal proceedings before and that in addition to the information provided about loss in his statement of case, he had undertaken some voluntary work at a local garage after which he had to apply for Universal Credit given the onset of the covid pandemic. The Tribunal

considered it appropriate to set aside the case management order requiring the claimant to provide a schedule of loss and to allow the claimant to rely on his statement of case with addendum as his evidence in chief.

5 11. In relation to the second respondent, Mr O'Carroll submitted that the sentence  
"Both Respondents agree that the Claimant did not transfer employment to  
2KS" ("the sentence") should be deleted from his ET3 on the grounds that it  
was inaccurate and misleading. In addition, Mr O'Carroll submitted that there  
had been a failure generally by the second respondent to comply with case  
10 management orders. In particular, the second respondent had failed to  
provide a witness statement. Mr O'Carroll applied for strike out of the second  
respondent's response and submitted that he should not be allowed to  
participate further in the proceedings. Mr O'Carroll sought strike out of the  
response in terms of Rules 37(1) (c) and (d) of the Rules of Procedure 2013.

15 12. Mr Tait for the second respondent accepted that there had been a delay in  
lodging the ET3 for which he accepted he was largely responsible. He  
submitted that there had also been some significant delay on the part of the  
Tribunal in acknowledging receipt of the ET3 and confirming the date of a  
20 hearing as a result of which he had been "*behind the curve*" in preparing for  
today's hearing. Mr Tait confirmed that the second respondent was willing to  
amend his ET3 by deleting the sentence to which the first respondent  
objected.

25 13. The Tribunal was not persuaded that the response for the second respondent  
should be struck out or that he should not be allowed to participate further in  
the proceedings. The second respondent's ET3 was accepted by the  
Tribunal. The second respondent has now prepared a witness statement.  
Intimation of his ET3 to the first respondent and claimant so close to the  
30 hearing was in part due to delay by the Tribunal administration and inevitably  
caused some lack of clarity when preparing for today's hearing. The second  
respondent has agreed to delete from his ET3 the sentence of concern to the  
first respondent. The Tribunal was not persuaded that in all the circumstances  
any prejudice caused to the first respondent by the second respondent failing

to provide a copy of his witness statement timeously and his conduct generally outweighs the prejudice to the second respondent of being denied the opportunity to defend the proceedings to which he was added by the Tribunal. The Tribunal was satisfied that there could be a fair hearing and that  
5 having regard to the overriding objective the claim should proceed as defended by both respondents.

## FINDINGS IN FACT

14. The Tribunal found the following material facts to be admitted or proved; the claimant was employed by the first respondent as a Night Watchman from 6  
10 June 2014 to 12 February 2020. The first respondent operates marinas at various locations in Scotland including Inverkip where the claimant was employed. The first respondent employs around 90 people. The first respondent had a team of six Night Watchmen including the claimant and his brother. They worked night shifts at Kip Marina. Their work included  
15 monitoring CCTV, patrolling the marina and recording which boats were berthed in the marina. The claimant worked alternate weeks with his brother for which he was paid on average £300 per fortnight.
15. Following the death of a Night Watchman while at work in early January 2020 the first respondent decided to outsource night security of their premises at  
20 Inverkip. The second respondent submitted a tender dated 10 January 2020 (P17/93) to provide the first respondent with night time security services. The second respondent's tender (P17/93) was acceptable to the first respondent.
16. The first respondent intended to make all but one of their team of Night  
25 Watchmen, including the claimant, redundant. The second respondent informed Gavin McDonagh, the first respondent's Managing Director, that he wanted the claimant and his brother to work for him in their current role and that he would help them obtain their SIA licences. There was no discussion between the second respondent and Gavin McDonagh about the proposed employment status of the claimant. On 12 February 2020 Gavin McDonagh  
30 informed the claimant about the decision to outsource night time security of the marina to the second respondent. He mentioned that the second

respondent was willing to “*take him on*”. He did not mention any alternative to working for the second respondent. He did not mention any possibility of the claimant being made redundant. The second respondent subsequently spoke to the claimant and his brother. He offered to employ them on a self-employed basis and that the second respondent would help them obtain an SIA licence.

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17. From 15 February 2020 the claimant and his brother worked for the second respondent. The claimant’s job did not change. His duties did not change. His hours did not change. His pay increased by around £1.00 per hour. The claimant received instructions about his work from the second respondent’s Manager. The claimant was provided with a uniform by the second respondent. The claimant did not submit invoices to the second respondent.

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18. On 17 February 2020 Gavin McDonagh contacted the second respondent to enquire when he should issue the claimant and his brother with P45s (P23/101). He was unclear whether they should remain on the “books” of the first respondent. The second respondent confirmed that he had put the claimant and his brother on his rota. The claimant received a P45 from the first respondent dated 19 February 2020 confirming the termination of his employment with the first respondent on 12 February 2020 (P14/90). One of the Night Watchmen was offered another position with the first respondent. The remaining two retired and were made redundant respectively.

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19. Towards the end of March 2020, the claimant was informed that he would have to meet the cost of obtaining an SIA licence. The claimant was unable to meet this cost and towards the end of March 2020 he was informed by the second respondent that they could no longer employ him.

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20. Shortly after the claimant stopped working for the second respondent, he obtained unpaid work in a local garage for around 2 weeks. This did not continue or become paid employment due to the onset of the covid pandemic. The claimant has applied for various posts working in retail including supermarkets. He has been unsuccessful in obtaining alternative employment. The claimant does not wish to continue working in the security industry. He has not applied for any jobs in security. The claimant lived off

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money inherited from his father after which he applied for Universal Credit from around late March 2021. At the end of March 2020, the claimant was aged 26 (date of birth 15 July 1993).

## NOTES ON EVIDENCE

5 21. The Tribunal found the claimant to be a credible witness. His evidence was consistent throughout the proceedings. He had worked for the first respondent for a number of years and during January 2020 was informed that he would no longer be employed by them. The only alternative offered was that of working for the second respondent which he understood would be on a self-  
10 self-employed basis with financial support to obtain an SIA licence. The claimant did not complain of unfair dismissal by the second respondent. The Tribunal found the evidence of Gavin McDonagh less convincing. The Tribunal was not persuaded for example that there had been any discussion with the claimant about the transfer before 12 February 2020 or that the claimant was  
15 “*more than happy to go and work (for the second respondent)*”. (paragraph 7 of witness statement). As regards the second respondent, the Tribunal accepted his evidence that the claimant had been employed by him on a self-employed basis. This evidence was consistent with that of the claimant and was not challenged by the claimant. The Tribunal however did not accept the  
20 second respondent’s evidence that there had been no suggestion that he would meet the cost of the claimant obtaining an SIA licence. The Tribunal found that on balance the claimant was not offered any further work after he was unable to meet the cost of training for an SIA licence, something which he had been informed would be obtained with the help of the second  
25 respondent.

## DISCUSSION & DELIBERATIONS

### RELEVANT TRANSFER UNDER TUPE REGULATIONS 2006

30 22. The Tribunal began by considering whether the claimant’s employment transferred from the first to the second respondent. The first respondent submitted that the facts of the case can support both a finding that there



was the transfer of an undertaking under Regulation 3(1)(a), or a service provision change under Regulation 3(1)(b) of the TUPE Regulations 2006, From the evidence before it, the Tribunal found that there had been a relevant transfer by way of a service provision change under Regulation 3(1) (b) of the TUPE Regulations 2006.

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23. Regulation 3(1) (b) of the TUPE Regulations 2006 provides that the Regulations apply where “*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”)*”. Mr O’Carroll referred the Tribunal to the case of **Enterprise Management Services Ltd v Connect-Up Ltd & ors 2012 IRLR 190, EAT** for guidance on identifying whether there has been a service provision change.

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24. The Tribunal began by identifying the relevant “*activities*” that the first respondent ceased to carry out on their own behalf and that were carried out instead by the second respondent as night time security. This included monitoring CCTV, patrolling the marina and recording which boats were berthed in the marina. Night security was the activity undertaken by the team of Night Watchmen including the claimant at the first respondent’s Kip Marina. It was the activity that the first respondent wished to outsource. It was the activity for which the second respondent tendered. It was the activity which the second respondent undertook for the first respondent after the tender was accepted. While it was not in dispute that most, if not all, of the second respondent’s existing employees have SIA licences, from the evidence before it, the Tribunal was satisfied that the night time security provided by the second respondent was fundamentally the same as had been carried out by the first respondent in terms of Regulation 3 (2A) of the TUPE Regulations 2006. Similarly, the Tribunal did not accept that the increase in the claimant’s pay while working for the second respondent and the fact that he was managed by the second respondent’s Manager while working for the second respondent amounted to a fundamental change in the activity of night time security work carried out by the first and second respondents.

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25. In terms of Regulation 3(3) of the TUPE Regulations 2006, for the Regulations to apply to a service provision change, the following conditions must be satisfied;

*“(a) immediately before the service provision change –*

5 (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  
10 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”.*

15 26. It was not in dispute that the first respondent had a team of employees, of which the claimant was a member, who were employed as Night Watchmen and whose principal purpose was to carry out night time security. The team had consisted of six employees until the sudden death of one Night Watchman which led to the decision to outsource night time security. The Tribunal was satisfied that the grouping and organisation of the six  
20 employees to undertake night time security was intentional on the part of the first respondent and distinct from other employees who undertook security work for the first respondent during the day. The Night Watchmen worked night shifts. The claimant and his brother worked alternate weeks undertaking only night time security work.

25 27. From the evidence before it, the Tribunal was also satisfied that the group of employees employed by the first respondent to undertake night time security existed immediately before the service provision change. At the time of the service provision change there were five as opposed to six Night Watchmen following the death of an employee. There was no persuasive  
30 evidence that either the employee who retired and/or the employee who

was made redundant had stopped working for the first respondent long enough before the service provision change for the group undertaking night time security not to exist immediately before the service provision change.

5 28. As regards the second condition, it was not suggested or found to be the case, that the activities to be carried out by the second respondent were intended by the first respondent to be carried out in connection with a single specific event or as a task of short-term duration. The tender process between the first and second respondent was consistent with the provision of night time security by the second respondent for the foreseeable future. 10 There was no evidence that the provision of night time security was for a specific event or a limited period of time. It was also not suggested, or found to be the case, that the exemption in terms of Regulation 3(3)(b) for the supply of goods for a client's use applied to the present case.

15 29. As referred to above, the Tribunal was satisfied that the claimant was part of an organised group of employees who undertook night time security for the first respondent. The claimant was assigned to the first respondent's group of Night Watchmen.

20 30. In terms of Regulation 4(1) of the TUPE Regulations 2006, "*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 the effect after the transfer as if originally made between the person so employed and the transferee*". 25 The effect of the above provision, in the absence of any objection from the claimant, is that as a result of the relevant transfer by way of a service provision change, the claimant's contract of employment did not terminate but automatically continued as if originally made between the claimant and the second respondent.

30 31. Under the TUPE Regulations 2006, the transfer of the claimant's contract of employment to the second respondent was automatic. It did not require the

agreement of the claimant. It could not be prevented by the second respondent offering to employ the claimant on a self-employed basis. Liability cannot be avoided because neither transferor nor transferee recognise that they are parties to a relevant transfer. The Tribunal accepted the claimant's evidence and that he would have preferred to remain working for the first respondent but there was no persuasive evidence of the claimant having objected to the transfer in terms of Regulation 4(7) to (11) of the TUPE Regulations 2006 notwithstanding the substantial change in his working conditions of being notionally self-employed once transferred to the second respondent.

32. In all the circumstances, the Tribunal concluded that the claimant's employment did transfer from the first to the second respondent under the TUPE Regulations 2006. The Tribunal did not therefore have to consider the second issue identified above of whether the claimant was unfairly dismissed by the first respondent.

### **INFORM AND CONSULT**

33. In terms of Regulation 13 of the TUPE Regulations 2006, transferors and transferees to a relevant transfer are obliged to inform and consult "*affected employees*". The claimant, as an employee of the first respondent who transferred to the second respondent was an "affected employee". In the present case it was not suggested by the first respondent that they had consulted with either a trade union or an employee representative about the proposed transfer. There was no evidence of the first respondent having taken any steps in relation to the election of an employee representative. In the event that the Tribunal found that there had been a relevant transfer, which was denied, the first respondent sought to rely on the "micro-business" exemption which allows the employer to inform and consult directly with the affected employees.

34. The Tribunal was not persuaded that the first respondent was a "micro-business" for the purposes of Regulation 13A of the TUPE Regulations 2006. For Regulation 13A to apply to the first respondent, at the time when

they were required to give information under Regulation 13(2), they would have had to employ fewer than 10 employees. While it was not in dispute that the number of “affected employees” was fewer than ten, information before the Tribunal including part 2.7 of the first respondent’s ET3, indicated  
5 that they employed significantly more than ten people at the relevant time.

35. The Tribunal was also not persuaded that making the claimant aware on 12 February 2020 that the second respondent would be taking over night time security of the marina and that the second respondent was willing to “*take him on*” amounted to compliance with the first respondent’s obligations  
10 under Regulation 13 of the TUPE Regulations 2006. The requisite information about the transfer is identified at Regulation 13(2) and includes the legal, economic and social implications of the transfer for any affected employees (Regulation 13(2) (b)) and if the employer is the transferor, the measures, in connection with the transfer which they envisage the  
15 transferee will take in relation to any affected employees who will become employees of the transferee (Regulation 13(2) (d)). There was no persuasive evidence that any such information was provided to the claimant by the first respondent. The Tribunal did not accept that the claimant’s reluctance to identify questions that he might have asked the first  
20 respondent about the transfer was evidence that they had met their requirement to adequately inform and consult with the claimant. From the available evidence the Tribunal did not find that the meeting between the claimant and the second respondent could accurately be described as a “briefing meeting” about the transfer and that had such a meeting taken  
25 place it would have been sufficient to discharge the obligations of the first respondent in terms of Regulation 13 of the TUPE Regulations 2006.

36. The Tribunal also did not find that there were special circumstances in terms of Regulation 15(2) of the TUPE Regulations 2006 which rendered it not reasonably practicable for the first respondent to perform their obligations to  
30 inform and consult under Regulation 13 and that they took all such steps towards its performance as were reasonably practicable in those circumstances. There was no reasonable explanation provided as to why it

was not practicable for the first respondent to inform the claimant about the transfer before 12 February 2020 when Gavin McDonagh met with the claimant and his brother but as referred to above, the information provided to the claimant did not meet the requirements of Regulation 15(2) of the TUPE Regulations 2006.

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37. Under Regulation 15(8) of the TUPE Regulations 2006, where the Tribunal finds that a complaint against a transferor of failure to comply with the requirements of Regulations 13 is well founded, the Tribunal must make a declaration to that effect and may order the transferor to pay "*appropriate compensation*" to the affected employee. In terms of Regulation 15(9) of the TUPE Regulations 2006, where a transferor is found to have failed to inform and consult affected employees, the transferor and transferee will be jointly and severally liable in respect of any such compensation awarded to the affected employees.

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38. In terms of Regulation 16(3) of the TUPE Regulations 2006, "*appropriate compensation*" awarded under Regulation 15 means "*such sum not exceeding thirteen weeks' pay for the employee in question as the Tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty*". The Tribunal, having regard to the very limited, if any, information provided to the claimant about the transfer and the lack of mitigating circumstances, decided that an award equivalent to thirteen weeks' pay would be just and equitable. Based on the claimant's fortnightly pay of £300, the Tribunal was therefore satisfied that the

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39. claimant should be awarded compensation of £1,950 (13 weeks x £150). As referred to above, in terms of Regulation 15 (9) the transferor and transferee are jointly and severally liable for the award of compensation.

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Employment Judge: Frances Eccles  
Date of Judgment: 09 July 2021  
Entered in register: 14 July 2021  
and copied to parties

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*This document should be treated as signed by me – Employment Judge F Eccles – in accordance with the Presidential Practice Direction of 1 May 2020.*

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