Case Number: 1803864/2020
1803895/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr L Porter**

Respondent (1): **Kingdom Services Group Limited**
Respondent (2): **Coral Solutions Limited**
Respondent (3): **aAFD Services Limited**

HELD at: **Leeds, partly by CVP video link** **ON:** **23, 24, 25, 26 and 27 August 2021**

BEFORE: **Employment Judge Lancaster**
Members: **H Brown**
N Arshad-Mather

REPRESENTATION:

Claimant: **Mr P Kerfoot, counsel**
Respondent (1): **Mr B Udeje, counsel**
Respondents (2 & 3): **Mr D Welch, counsel**

JUDGMENT having been sent to the parties on 31 August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, derived from the transcript of the oral decision delivered immediately upon the conclusion of the hearing:

REASONS

Introduction

1. Yorkshire Dales National Park was established in 1954 and is currently administered by the Yorkshire Dales National Park Authority. It is, as its name suggests, an area in North Yorkshire of exceptional beauty and attracts a large number of visitors. Therefore the authority is responsible amongst other things

for maintaining the necessary facilities and particularly in this case for the provision of public toilets.

2. The contract for the cleaning of those toilets was sub-contracted and until 1 April of last year, the First Respondent in this case Kingdom Services Group held that contract for the entire area. In addition to the contract for cleaning of toilets it also had a contract to clean various other Park Authority facilities including in particular the museum at Hawes. There was a separate cleaning contract for office buildings and that at the time was held by a company based in Skipton called Bulloughs.

3. The Claimant had worked for the First Respondent or its predecessors in title continuously since 8 February 2010. That date appears from his current contract, which is in fact now with Bulloughs Cleaning Services, which records that as the start of continuous employment.

4. At the end of 2019 the Park Authority resolved to put the cleaning contracts out to tender and to divide the area into three; west, north and east. The First Respondent Kingdom Services was unsuccessful in its tender for any of those new areas and therefore it lost the entirety of its cleaning contract. The work was allocated for the northern area to Bulloughs, to the western area to the Second Respondent, Coral Solutions Limited, and to the eastern area to the Third Respondent, aAFD Services Limited.

Transfer of Undertakings – the relevant law

5. That is clearly, and it has not ever been an issue in this case, a service provision change within the Transfer of Undertaking (Protection of Employment) Regulations 2006. That is a relevant transfer under section 3(1)(b)(ii).

6. Cleaning activities had ceased to be carried by the contractor, the First Respondent, and were re-allocated to the three new successful contractors Bulloughs and the Second and Third Respondents.

7. The issue then of course arose as to what effect that service provision change under the TUPE Regulations would have upon the employment of the First Respondent's existing staff.

8. The effective date of transfer was 1 April 2020. This case has raised particular complications because on 26 March 2020 the decision of the European Court of Justice in **ISS Facilities Services NV v Govaerts and Another [2020] IRLR 639** was handed down. That we shall refer as the Govaerts decision.

9. At the point, as between all the various parties including Bulloughs, who are not a respondent to these proceedings, and of course the Yorkshire Dales National Park Authority, the client, which is similarly not involved, when contemplating the service provision changes and the fragmentation it was common ground that the situation was governed by the authority of **Kimberley Group Housing Limited v Hambley and Others** [**2008] ICR 1030**. We shall refer to that as the Kimberley case. That authority determined that there could only be one transferee so that even though there was fragmentation so that some of the work that had previously been done by an employee would be allocated to other areas, they would not transfer to more than one new employer. The exercise that had to be carried out in those circumstances and if in dispute would fall to be determined by the Tribunal was where the majority of the work done by a particular employee was assigned. Whichever of the new putative employers

took over the bulk of the existing work would become the single transferee. The position under Kimberley was understood to be that the entirety of the contract would then transfer, though this necessarily would cause some detriment to the new employer. They would be taking on somebody on their full hours and full terms of conditions when in fact perhaps only part of the work they had done previously had been re-assigned under the service provision change.

10. In this case there is no dispute that carrying out that Kimberley exercise the claimant was correctly assigned to be transferred to Bulloughs, who took over the contract for cleaning in the northern part of the region. There were three other employees affected. For two of those there was no issue whatsoever. One of them worked solely and only in the northern region and one of them worked solely and only in the western region and their contracts did duly transfer to Bulloughs and to the Second Respondent respectively: the only potential issue was identifying the actual terms and conditions that were to transfer.

11. The other employee who was affected was in fact the Claimant's grandfather. He, like the Claimant, worked across more than one of the three new regions, but in his case similarly there is no dispute that the majority of his work was to be assigned to the eastern region and he then duly transferred to the Third Respondent.

12. The decision in Govaerts, which as we have said came out just five days before the effective date of transfer potentially altered that situation. That is because, although it related only directly to the other limb of relevant transfers, that is a business transfer, it identified contrary to received opinion that applying the Acquired Rights Directive appropriately it was possible for an employee upon a transfer to be re-allocated to more than one employer. That did not necessarily affect the position of service provision changes. That is not directly covered by the Directive, but is a matter of purely domestic law. However subsequently in the Employment Appeal Tribunal case **of McTear Contracts Limited v Bennett and Others and Mite Property Services v Bennett and Others UKEATS/0023/19/SS & UKEATS/0030/19/SS** ("McTear"), which was a decision before the Honourable Lord Fairley and handed down on 25 February 2021, it was held that there should be no differentiation between the way in which the courts treat a business transfer and a service provision change. Therefore the relevant conclusion of Lord Fairley was at paragraph 41 that:

"There is no reason in principle why an employee may not following such a transfer hold two or more contracts of employment with different employers at the same time provided that the work attributable to each contract is clearly separate from the work on the other or others and is identifiable as such. The division on geographical lines of work previously carried out under a single contract into two new contracts is, in principle, a situation where there could properly be found to be different employers on different jobs."

The claims

13. As a result of that declaration as to the law first intimated in Goevarts, contrary to the received opinion following Kimberley, these claims are brought. On 17 July 2020 a single claim was issued against the First Respondent for an alleged failure to appoint employee representatives and a failure to consult in relation

to the transfer to Bulloughs. The principle complaint, as has already been identified in a grievance brought by the Claimant on 6 March 2020 prior to the transfer, was that his new contract with Bulloughs resulted in a significant loss of earnings. That is because although the preponderance of hours worked in the northern region had apparently been correctly identified, on the Claimant's own calculations, at 48 hours, such that under Kimberley he would transfer only to Bulloughs, he had negotiated an innovation of that contract which reduced his actual hours worked in the north region to 40 but entailed an increase in the hourly rate. But that necessarily meant that he would still not be receiving as much in total as he had when working for Kingdom.

14. The Claimant has never sought to bring any claim that Bulloughs should in fact have taken on the entirety of his contract though that would be the obvious claim to have brought following the application of Kimberley. His complaint about the alleged failure to consult is that his then employer, the First Respondent, failed to inform him of the consequences of only part of his contract been reflected in the new terms with Bulloughs. Again he has not also brought that claim against the transferee who would be jointly and severally liable, and nor has the First Respondent served notice under TUPE regulation 12 (5) to join Bulloghs as a party to these proceedings. That claim is in time. The claimant had started early conciliation proceedings on 1 May 2020 and received a certificate in relation to the First Respondent on 21 May 2020. So allowing for that extension of 21 days, added to the three months from 1 April 2020, that initial complaint is within the time limit.

15. Although the decision in Govaerts had been handed down on 26 March 2020 we accept that it may not have been widely reported immediately. In particular the claimant has waived privilege in relation to his correspondence with his solicitors, Thompsons, regarding this matter and it is clear that it is only when it was included in a bulletin from Daniel Barnett, a customary source of information for employment lawyers, on 20 July 2020 that those solicitors altered their position. They had previously advised that in the light of Kimberley it was not appropriate to bring a complaint that would certainly be bound to fail at first instance because the Employment Tribunal would be bound by the EAT decision. They now advised that after Govaerts although it only obviously related to business transfers at that stage, the Claimant should consider pursuing a claim and he did so immediately on 21 July 2020. But that was one day out of time.

16. In that second complaint as against the First Respondent there was a further allegation of failure to inform and consult, an allegation which Mr Kerfoot for the claimant frankly has to accept is somewhat hypocritical because the Claimant sought to rely upon his own solicitor's lack of knowledge of the Govaerts' decision as a reason for bringing it late, but yet in bringing that late claim he then sought to criticise the First Respondent for failing to consult and inform him specifically about the transfer to the Second and Third Respondents which was only an argument that could be contemplated in litigation after knowledge of Govaerts.

17. He also brought a claim against the Second Respondent, Coral. That too, a complaint of automatically unfair dismissal and ordinary unfair dismissal was out of time. A complaint alleging that he was entitled to a statutory redundancy payment was not out of time because of the greater time limits. So far as the

Third Respondent, aAFD Services, was concerned he brought a similar complaint that there was an automatically unfair dismissal or alternatively an ordinarily unfair dismissal or a claim for a redundancy payment. But in the case of aAFD those complaints were in time because for some reason although early conciliation had commenced at the same date the certificate for aAFD was not issued until 1 June so that it afforded a longer extension.

18. We are faced in that scenario with the somewhat artificial situation of trying to identify legally what were the effects of a fragmented transfer on 1 April 2020, but which were never in the contemplation of the parties at the time because applying Kimberley there could be no transfer other than to Bulloughs.

The issues: (1) the contract

19. The Claimant did not have a written contract nor a written statement of the terms and conditions of his employment ever issued by Kingdom Services. He had transferred to them under an earlier TUPE in 2017 and there is no contractual documentation from that period that would satisfy the requirements of Part 1 of the Employment Rights Act 1996. There is a partial document from the transferor, Super Clean, purporting to be a written statement of terms and conditions but it does not satisfy the statutory requirements. Despite that the First Respondent took no steps in the supervening three years to rectify that situation. However although their conduct in this regard is reprehensible it has no repercussions for them. Within the second claim, that issued on 21 July 2020, there is also now a complaint by way of a reference to the Tribunal to determine what should have been included in the written particulars to be provided by Kingdom. But that complaint is clearly out of time and it would obviously have been reasonably practicable in the circumstances to have brought that within the original claim on 17th July 2020, and in time. Nor if the Claimant were to succeed on a complaint in respect of the failure to consult is that a matter which comes within schedule 5 of the 2002 Employment Act such that we could apply section 38 to award an uplift of two or four weeks for the failure to provide such written terms. Nonetheless, though we are not in fact directly concerned with that reference, we have necessarily had to consider what were the terms of the claimant's contract at the point of transfer.

20. There is a letter from Superclean from 2015 identifying a variation in terms and from that we are able to make the following decision. The claimant's core contractual hours were to work 6.75 hours in the summer and 4 hours in the winter cleaning seven toilets. The claimant drove a loop around the Dales and on a daily basis, as ascertained in January 2020, he would start at Malham which was in the western region, then move on to Clapham which was also in the western region. He would then drive north to Hawes in Wensleydale in the northern region. He would clean the toilets there and he would also work additionally at the museum. So far as the cleaning loop was concerned he would then move on to Buckden, now in the eastern region, and work his way down Wharfedale to Kettlewell, to Grassington and to Linton. That is the total of the seven facilities that he was cleaning on that daily basis within the allocated 6.75 hours shift.

21. The time allocated for actual cleaning at each of those locations as specified in the contract between Kingdom and the National Park Authority, and

perpetuated under the new tender agreements, was half an hour for each. That is three and a half hours of actual cleaning time within that 6.75 hours and the remainder necessarily is to be largely allocated to the travel time. The claimant was provided by Kingdom with a company vehicle that facilitated him being a mobile operative between those fixed sites (we assume there will have been a similar arrangement with Super Clean). However because that is a shift of more than six hours we are entitled to and do presume that under that contractual arrangement there was provision for the minimum 20 minute rest break. That leaves a balance of two hours and 55 minutes of travel time within each normal working day. That would remain constant because even when additional work was added, which could be by way of amendment to the contract on an ad hoc basis and included up to the material time 1 April 2020 included additional work cleaning at the information centre at Malham and at the information centre at Grassington and at the Dales Museum in Hawes, those are on the same sites as the toilet cleaning run and involved no additional travel time.

22. As at 27 January 2020 the First Respondent somewhat belatedly actually identified the work specifically being done by the claimant. In conjunction with him his manager Chloe Thompson recorded what he did on a normal working day. The Claimant would work Monday to Friday during the week, doing the cleaning at those seven allocated toilet facilities and at the two information centres and working six hours at the museum: there was a total of 10 and a half hours cleaning time. On a Sunday there was nine and a half actual cleaning time. That is a total weekly number of hours of 62. As the claimant accepts that the six and three quarter hours core working time to clean the toilets remained unaltered we can still apply that and at two hours 55 travelling time per day over the six days that adds seventeen and a half hours to 62 which takes us to 79.5 hours. That we note corresponds almost exactly with the figure on total hours that the First Respondent provided to the National Park Authority when providing employer's information in advance of the service provision change. The figures they provided to the authority was 79.75 hours.

23. That we conclude was the contractual obligation. The Claimant would work 79.5 or 79.75 hours, it matters little which. We can see how the figure corresponds to the actual cleaning time together with an application of the allocated travelling time that remained constant since 2015. That is of course not necessary the same as the equivalent hours for which he was paid and that appears to have led to a degree of confusion in this case. The claimant is incapable of separating the actual hours worked from what he was paid for doing. So for instance on a Sunday he was paid at time and a half and though his basic pay was simply national minimum wage that would mean his weekly would not be limited to the 79.5 hours at that rate. It would also increase and if there were at any point any additional agreement to pay at a higher rate that too would be reflected in the total payment. But the contractual hours we can identify.

24. That does create a problem because that is in excess of the maximum hours that would be permitted under the Working Time Regulations. There are a number of provisions that apply. Of course primarily there is a prohibition upon working more than 48 hours a week unless there is an expressed written opt out by the worker. And it is pointed out by Mr Welch for the Second and Third Respondents that in this case there is no such evidence of an opt out agreement ever having been prepared. However we are not particularly

concerned with that because it is clear from the facts of this case that the Claimant would at any point have provided that written consent to work more than 48 hours. Whatever else can be said about him it is undisputed that he is a very hard worker and was determined to do as much as possible to maximise his income.

25. But what the Claimant cannot ever contract out of is the provision that there must be a weekly rest period of 24 hours and a daily rest period of not less than 11 consecutive hours in any 24 hour period. He did not ordinarily work Saturdays though on occasion would have worked overtime which may have caused contraventions of this provision. His work was spread over six days. Allowing for the 11 hours continuous rest the maximum time he could work in any one day is therefore 13 hours and that would equate to 78 hours per week. So that is slightly less than the figure of 79.5 or 79.75 hours that we arrive at looking at the contract. That of course is unlawful. It is right that the Claimant did not seek to ever challenge that but it must be the case that his employer Kingdom at any stage could properly have reduced his hours to comply with the Working Time Regulations. Similarly no transferee can be expected to take on an employee upon existing terms and conditions that contravene those legal obligations. But it is a relatively minimal excess and we do not think particularly troubles us for present purposes.

26. So that then is the totality of the contractual hours and as we can see those were the total hours provided to the National Park Authority and then to prospective transferees. As a total there can be no criticism that the First Respondent failed in fact to provide correct information about the Claimant's contract. Though of course we observe that that is not directly relevant to our deliberations because there could be no complaint by the individual worker in relation to an alleged failure to provide information as between transferor and transferee; only about an alleged failure to consult with him.

The issues; (2) the First Respondent

27. So having provided that correct information to the client, there is then a period of various discussions and exchanges of correspondence regarding the proposed transfer. The Claimant states that he was not provided with the requisite information under TUPE regulation 13. We simply find as a fact that that is not right. The Claimant knew that there was to be a transfer. He knew that the reason for that was the re-tendering by the Park Authority. He knew that that also involved a fragmentation into three areas. He knew that applying the principle in Kimberley he had been allocated the northern area and he does not dispute that that apportionment was correct. Whatever his dispute at that time about the alleged hours he actually worked, which we find was wrong on his part, he also knew full well of the implications of Bulloughs only offering him a contract for the hours he actually did in the northern area at Hawes. And we repeat that if there was any complaint at this stage it ought properly to be considered as a complaint against Bulloughs that they were not fulfilling their obligations as the sole transferee under the Kimberley principle in taking the entirety of his contractual terms and conditions. That of course may then have led to various interactions with Bulloughs as to whether there was in fact a permitted economic technical or organisational reason for changing the conditions to effect the fact that some of the work could no longer be offered by

them because they no longer have that part of the contract. But that is outside of our remit for this hearing.

28. The Claimant received that information because he was directly involved with discussions with the witness Miss Batters of HR from the First Respondent and he also, when he realised that he was transfer to Bulloughs, was in direct communication himself with them to negotiate the new terms of his contract. As we have said he was prepared to accept a reduction in hours from 48 to 40 but a consequential increase in salary rate. Once he had ascertained the position that he would on accepting those new terms that he'd agreed with Bulloughs receive a decreasing salary, his union were also involved in assisting him and he raised a grievance on 6 March 2020 in which the principle complaint was that this necessary change would reduce his income. At no point in the course of these discussions however did he ever make any objection to the fact that there had technically not been an election of employee representatives.

29. So as a matter of fact he simply cannot say that he did not receive all the requited information about the implications of the change.

30. In so far as the additional complaint of failure to consult and inform is concerned where it is alleged that he ought to have been expressly consulted about the changes involved in his moving across to the Second and Third Respondents, we can dismiss that very shortly. Nobody contemplated there would actually be a TUPE transfer, applying the Kimberley principles. There was nothing to consult about and as we have said it is somewhat disingenuous that the claimant would suggest that he would have an extension of time to present his claims on the basis he did not know about the Govaerts decision yet say that the Respondents should have consulted on something about which they too would have been unaware. Certainly as of 1 April 2020 they would not yet have known about that European Court decision that may or may not have altered the position in this case.

31. Although there is no election we are quite satisfied that the exception applies. That is in Regulation 13 (9). There are, we find, special circumstances in which it would not have been reasonably practicable for the employer to perform a duty imposed on it, so that it should take such steps towards performing that duty as are reasonably practicable in the circumstances.

32. In this context we construe reasonably practicable as meaning what could reasonably be expected of an employer without imposing an unduly onerous and unnecessary administrative burden in the circumstances where the claimant was already actively engaged in discussions personally, both with the transferor First Respondent and the actual transferee Bulloughs, and also indeed with the putative Third Respondent. It is not reasonable to expect and employer to step outside of that discussion and invite the four involved employees to elect a representative or representatives who will then continue those discussions. In practical terms of course the employer can dictate from what category of workers a person is elected and how many are to be appointed. So the employer could for instance have identified that there should be four representatives to represent the four employees. They could certainly have ensured, had they wished , that the Claimn was elected by specifying that one of those representatives should be in a particular category of employee, that is those who were going to transfer to the northern region but who were affected by the simultaneous service provision changes in the east and west

because they had previously done work in those regions and that would be a category of one – the claimant. So it is simply nonsense to suggest retrospectively, when no complaint was ever made at the time, that there should have been an election of representatives. And we note that the union were involved within this process and this is not an argument that they ever put forward. They did make a suggestion there been a failure meaningfully to consult but not to have been carried out through improper channels. So we consider that the exemption applies. In any event if there had been a failure to consult there is no material deficiency in the information that the First Respondent provided and we would not have awarded any compensation in any case.

33. We do not need to address the alternative time point as to whether the complaints about the failure to consult in respect of the transfer to the Second and Third Respondent are in or out of time. They are on the face of it, if they were indeed separate complaints, out of time as against the First Respondent and that is a pre-condition to establishing any joint and several liability on the part of anybody else. But in reality this is a single consultation. The Claimant was entitled to be consulted as an affected employee in relation, not only to his own transfer but also to all the service provision changes, and in fact he was so consulted within the understanding of Kimberley.

34. In the course of these discussions as we say the claimant raised a grievance and there he asserted on the advice of his union, though we do not of course know on what basis that was given, he was entitled to have had the employee liability information passed to all three transferees with a view to his existing contract being fragmented between them.

35. Initially he was told on the clearest terms by the First Respondent that was not the case that they had taken legal advice in January which was, in accordance with Kimberley, that there could only be one transferee and he had been properly allocated to Bulloughs. That too was the position adopted by the Second and Third Respondents when, following that grievance, the First Respondent belatedly did also send additional employee information about the claimant and his grandfather.

The issues : (3) the Second Respondent

36. So far as the Second Respondent is concerned, we conclude that the claim for unfair dismissal, whether automatic or otherwise, is out of time. It is admittedly one day late so the question is whether time should be extended on the grounds that it was not reasonably practicable to have brought it in time and it should be extended for a further reasonable period. It is common ground that a delay of one day would mean the second limb were met if we got to that stage. So the argument is was it or was it not reasonably practicable to have presented that complaint in time. The claimant seeks to argue that because his solicitors had not adverted to the European Court decision in Govaerts until the very day when time ran out, it was not reasonably practicable for him to bring his complaint.

37. The difficulty with that and what is fatal to that argument in our view is the authority of **Biggs v Somerset County Council [1996] ICR 364**. Admittedly an unusual case on its facts but one which established that where there is a subsequent higher court decision that is declaratory of the law, even if it is contrary to the received opinion up to that point, that does not mean that is has

not been practicable to present a complaint. And that we find to be the position here. The effect of the decision in Govaerts and McTear is declaratory, that applying the Acquired Rights Directive a business transfer is capable of being divided between more than one transferee and to achieve consistency that provision should also apply to the service provision changes.

38. The claimant knew all the relevant facts. He had an early conciliation certificate against the Second Respondent. He had access to legal advice and it would have been reasonably practicable for him to bring a complaint seeking to argue that Kimberley was incorrect in the light of the Directive, or seeking to add this complaint to an allegation that Bulloughs were in breach of the obligations if Kimberley were correct, or seeking potentially a referral to the European Court. There are various options that would have been open. It was reasonably practicable to bring this complaint. What happened we are satisfied is that a pragmatic decision was taken because his solicitors were aware of the Kimberley authority and considered it did not justify the expense of pursuing this complaint on behalf of the union member for whom they acted. The test in tis context is however is reasonable practicability, not reasonable pragmatism

39. It is right that there is a line of authority particularly summarised in **Lowry Beck Services Limited v Brophy [2019] Court of Appeal Civil 2490** which advocates a liberal interpretation of what is or is not reasonably practicable. But it is to be observed that within the leading judgment there is discussion of Biggs and that sits outside Lord Underhill's summary of the factual issues in the actual case as to what is reasonably practicable. Although he rejected the argument that it was not reasonably practicable in that instance he accepted that had it been a case analogous to Biggs and where it was purely a matter of a declaratory statement of the law after the event it would have been different. This is a case that is entirely in line with Biggs and therefore there is no liberal interpretation that allows us properly to depart from that authority.

40. So that means that against the Second Respondent the claims of automatically unfair and ordinary unfair dismissal are out of time. It leaves the redundancy claim.

41. The Second Respondent understandably did not believe that there had been a transfer to it. If however we are able to apportion, applying McTear, work attributable to that part of the contract clearly separate from the work on the other parts and identifiable as such, it necessarily would follow that this was capable of being a partial transfer. We do conclude that that is the case. The work in the western region was identifiable solely at Malham and Clapham. It is severable from the rest of the contract both in terms of geography and also to a very large extent, certainly during week days if not Sundays, by the time at which that work was done. As we say that on an ordinary week day that would be when the claimant would start his loop starting at Malham then driving to Clapham appears to be distance as the crow flies no more than 10 miles though roads in the Dales do not necessarily afford direct linear access from one village to another.

42. That is a severable part of the contract that was therefore capable of and did transfer. And if that is the case then the refusal of the Second Respondent to accept that there was in law and in fact such a transfer must amount to a termination of the contract on their part, and that is a dismissal. We pause to observe that this type of situation will no doubt create many more complex

factual issues in the future and one of those is potentially identifiable here. That is the fact that under the contract with Kingdom the claimant had access to a single company vehicle to travel around the whole region. When the contract was severed there would be questions of when it would be possible for him to fulfil that role. Of course ordinarily travel to the place of work at the start of the working day is not working time and certainly therefore the Second Respondent would not be liable for that travel time and nor of course would they be liable for any travel having completed the work at Clapham to go on to Hawes to start working for a new employer. So if they provided a vehicle for travel between Malham and Clapham there is a question of what would happen to that vehicle. Similarly, what would happen similarly to any vehicle provided by Bulloughs when he went on to work in the eastern region had he transferred there? So it may well have been that at a subsequent stage it became apparent that the performance of this severed contract was in fact impossible, and in those situations paragraph 37 of the Govaerts decision would appear to be applicable. But those consideration only apply in our view to where there has actually been a transfer of part of a contract and it then transpires that it is impossible to perform it for some reason. That is a separate question to the issue of whether we can identify a property severable part of the contract in the first instance. Those paragraphs of Govaerts are of course applying 4.2 of the Acquired Rights Directive. That is already incorporated in relation 4.9 of TUPE which provides that where there is a material deterioration in terms and conditions the employee may elect to terminate the contract. If he terminates that prior to the date of transfer the liability will fall on the transferor. If he terminates it afterwards it will fall on the transferee. Govaerts contemplate the position where in addition to identifying a post-transfer material change in terms of conditions that may entitle the employee to terminate the contract there is also identifiable an impossibility of actual performance that would similarly entitle the transferee to terminate, but stipulates that liability would then fall on the transferee in either of those scenarios.

43. As we say we do not actually get to the stage of having to consider those practicable considerations. We have identified the severable part of the contract. That effected in law a transfer although that would have been news to Mr Bonnar of the Second Respondent and indeed news to anybody at that stage. Because the claimant pursues a complaint that he is entitled to a redundancy payment the presumption that this was a redundancy situation applies; section 163 (2) Employment Rights Act 1996. That presumption has not been rebutted by Mr Bonnar's evidence. Although what was actually operative on his mind at the time was the fact that he did not believe that TUPE applied at all, the evidence he gave is consistent with it being in a redundancy situation. He says he could not have contemplated employing the claimant on that limited number of hours, though of course the shortness of duration of the contract is not a bar to being subjected to the TUPE protection (Article 2 of the Acquired Rights Directive). It would not have been viable to employ somebody where the work could be covered by him or by his contract supervisor, and we note that the Second Respondent is a very small concern with only four employees according to the ET3. That is a cessation or diminution in the requirement for an employee to do work of a particular kind.

44. That does have the effect that the Second Respondent is unable to rebut the presumption this was redundancy and they do fall liable for a statutory

redundancy payment. Although we are not determining the actual terms of the contract that would have transferred in terms of a reference under the Employment Rights Act we do have to decide what that tranche is. It is within a working week 91/2 hours but in addition to that there is necessarily some travel time between Clapham and Malham. That would be incorporated in the 2 hours 55 minutes a day that has already been identified as a term of the total contract.

45. Perhaps being somewhat generous we have identified that the appropriate time to add to the nine and a half is 45 minutes for each journey. That is a total therefore that can be allocated to the western contract of the Second Respondent of 14 hours a week. At the national minimum wage at the point of transfer which was still therefore £8.21 that is a weekly gross wage of £114.94. A very similar figure is arrived at by looking at the proportion of tasks undertaken on the western contract, as set out at page 122 in the bundle, as against the total 62 hours of actual cleaning work, the 9 ½ hours on the western contract amounts to 15.3% of the whole and applying that figure to the total wage at the time that would give a pro rata figure per week of £114.42 which is very much the same. That is calculated on an annual salary of £38,889.39 payable in equal monthly instalments on what is called an "equated contract", that is payable at a standard rate throughout the year irrespective of whether it was summer or winter timetable So we conclude that the appropriate weekly pay under the tranche of the contract which was transferred to the Second Respondent is £114.94. The claimant had 10 years' continuous employment. For all bar the first two of those he was not below the age of 22. That gives rise to a claim of nine weeks pay which means that the Second Respondent, notwithstanding its lack of knowledge of the situation at the time, finds itself in law liable for statutory redundancy payment of £1,034.46.

The issues: (4) the Third Respondent

46. The position in regard to the Third Respondent is somewhat different. The Third Respondent similarly maintained that TUPE did not apply. We have heard Mr George Asangwe and we unanimously agree that he was a very impressive and clear witness. He has experience of TUPE transfers. He understood the position that there could not be fragmentation on the service provision change as understood in the light of Kimberley and he maintained that position throughout.

47. On 13 March 2020 Mr Asangwe met with those employees who would, applying Kimberley, have transferred to his company. He had throughout of course expressed his willingness to comply with TUPE when it clearly was applicable; so that for instance his company also took on the office cleaning contract for the eastern region and there were identified three employees who without question were to TUPE across. There was also no question that the single employee who worked only the eastern region would also TUPE across and nor any question of the claimant's grandfather who predominantly worked in that region would also, applying Kimberley, transfer. And therefore Mr Asangwe acting perfectly honourably and in liaison with the park's authority undertook to meet in advance of the transfer with all those employees who would move across to the Third Respondent.

48. So on 13 March 2020 he met with the Claimant's grandfather, the witness Mr Colin Porter. The Claimant attended to represent his grandfather and was

allowed to do so, and we observe of course there was no suggestion at this stage there was any inappropriate failure actually to elect representatives. The Claimant simply took it upon himself to speak for his relative. In the course of that discussion it is clear there was some mention of the fact that the Claimant certainly would have liked to have transferred across, but of course Mr Asangwe made the point that he did not do so. The Third Respondent had not been provided with employee liability information in respect of the Claimant because it was perfectly clear that the majority of his work was done in another region. It is also clear to us, and we accept unhesitatingly Mr Asangwe's evidence, that he was told at that stage that the Claimant had already negotiated his new contract with Bulloughs, that he understood that there was potentially a prohibition upon him working for any other cleaning company (although that would not be normal practice in the industry) and therefore that at that stage he told Mr Asangwe that therefore he would not be "transferring". That may well have been because there was at that point a common understanding that, applying Kimberley, that was indeed the legal and factual position. It would also however apply to any possible negotiation of any new contract with the Third Respondent. There is nothing in the evidence of Mr Colin Porter, even if unchallenged, that goes beyond that. He simply asserts that there was a discussion but is not saying that the Claimant actually wished to transfer as aright under TUPE but rather is stating that he would have wanted to maintain his hours within the eastern region whilst confirming that he had not been allocated there but had rather taken on a full time contract with Bulloughs. We accept Mr Asangwe's evidence that advocating for his grandfather the claimant urged any hours that he himself had previously done in the eastern region could be re-allotted to his grandfather to make up the loss that he would suffer as a result of the transfer, and that was acceded to.

49. There is contemporaneous corroboration of Mr Asangwe's understanding of that conversation on the 13th in an email that he sent to Ms Batters of the First Respondent on the 16th. As we say we unhesitatingly accept the accuracy of Mr Asangwe's recollection of these conversations. There was then a further exchange of correspondence seeking to clarify whether the Claimant indeed did wish to take on any work with the Third Respondent. Having sent the further employee information to the Third Respondent on the 13th, the same date of the meeting with him and h is grandfather, on the 16th March 2020, Mrs Batters did then assert for some reason that she now believed that legally there could be a transfer to more than one employer. That is stated in an email, but she has no recollection, she says, of where that information came from or why she completely changed her position from that clearly stated on legal advice as of 24 February. But because of that confusion as to what the claimant actually wished to do, Mr Asangwe undertook to make direct contact with him and that he did eventually on the 27th March 2020. Once again the contemporaneous record of that conversation sent to Ms Batters on the same day, and indeed a further communication to the claimant on 3 April and yet another further communication to his union representative shortly afterwards, all repeat Mr Asangwe's assertion that at that meeting on the telephone to seek to clarify the position he was told in no uncertain terms that the Claimant was not going work for the Third Respondent. That may have been based upon a common misunderstanding that the application of Kimberley precluded such a transfer,

even if it would have been the desire of the claimant to keep those hours if at all possible, but that was their agreement at that time.

50. But finding as a fact, as we do, upon our having to make an assessment of the respective credibility of the recollection of these witnesses, that Mr Asangwe is right and he was indeed told that, that we conclude means that there was no dismissal. As at what would have been the putative date of transfer applying Govaerts and McTear, on 1 April 2020, the Claimant has stated he was not going to work for the Third Respondent. Shortly after that on 3 April the Claimant was however in communication with the Third Respondent asserting that in fact there had been an unfair dismissal. We do not have that email. We have Mr Asangwe's reply to it, and that is one of those communications where he asserts unequivocally his recollection of the conversation on the 27th. But following that the Claimant and Mr Asangwe did engage in discussion about the possibility of him being in fact re-employed to work the same schedule as he had for Kingdom or also possibly with in the future some additional work that had been acquired under a further contract obtained by the Third Respondent. That offer was put on the basis of 27 hours. The actual hours worked in the eastern region as set out in the schedule at page 122 and 123 were 16.5. And in addition there would of course be travelling time. We have evidence in the bundle that Mr Asangwe actually carried out an exercise of driving up Wharfedale from Linton to Grassington, to Kettlewell then on to Buckden and the combination of the total journey time was just 31 minutes but he was prepared to allow an hour for that journey up the Dales.

51. So the offer of 27 hours was on the face of it generous to allow for at present only 16.5 hours actual cleaning time plus travel time up the dale. The Claimant having initially indicated that he would accept that offer as an attempt to mitigate his loss however then through his union quite clearly and unequivocally rejected it. On a basis that is still unclear to us he believes that his actual contractual hours allocated to the western region under his original contract were 35. We do not see how he can conceivably get to that figure on 16.5 hours cleaning work plus travel within the dale. We pause to observe that on the fragmentation of the contract of this nature not necessarily all the terms and conditions of a single unitary contract could transfer because no new employer would be responsible for travel between the regions so some of the travel time within that 79.5 hours may necessarily have been lost, but even this could not account for the discrepancy between the Claimant s figure and the reality.

52. What that does mean is that even if we were wrong and there had been a dismissal so as to give rise to an unfair dismissal claim, the Claimant has totally and completely failed to mitigate his loss by not accepting that offer of alternative employment that more than compensated for the actual hours worked and travelled that he would have lost from the Kingdom contract.

Summary

53. So that in conclusion resolves our explanation of this somewhat convoluted and hypothetical situation. It does mean that the Second Respondent, though we have sympathy for them, in law falls liable to pay a statutory redundancy payment calculated as we have indicated on apportionment on the tasks done on that part of the total. The First Respondent is absolved from any responsibility for any alleged failure to inform or consult because on the facts it did provide all the requisite information and is entitled to rely upon the

exemption that it did all that was reasonably required of it. It was not reasonably practicable for it to have given information about a contract transfer that only became possible after the event, and in a situation where it would have been an absolute nonsense for it to have to embark on a technical election of representatives in circumstances where the Claimant was already actively and personally involved in discussions and was engaging his union to do so on his behalf as well. The Third Respondent, on our findings of fact as to the credibility of the witnesses as to what was said, did not dismiss the Claimant. And of course it is for the Claimant in alleging unfair dismissal or redundancy to prove that he was in fact dismissed as opposed to a termination by this mutual agreement, even if based on a common misunderstanding not surprising the circumstances that Kimberley still applied.

Employment Judge Lancaster

Date 28th September 2021