



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4106712/2020, 4106549/2020, 4106899/2020, 4105528/2020,
4105527/2020,**

**Preliminary Hearing held remotely by Cloud Video Platform (CVP) on 13 and
14 October 2021**

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Employment Judge J Shepherd

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Mr Ryan Crawford

**Claimant
In person**

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Mrs Agnes Cochrane

**Claimant
In person**

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Mr Thomas Martin

**Claimant
In person**

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Mr Daniel Crawford

**Claimant
In person**

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Eyekon Services (UK) Ltd

**First Respondent
Represented by
Mr George Madden
Director**

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Fernglen Ltd

**Second Respondent
Represented by
Ms Armstrong
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that there was a relevant transfer of the claimants' employment from the first respondent to the second respondent on
5 14 July 2020.
2. The claims against the first respondent are dismissed.
3. The claims against the second respondent will proceed to a full hearing on a date to be fixed.

REASONS

Introduction

1. The claimants all submitted claims to the Tribunal between 15 and 20 October
15 2020 for redundancy payments, unpaid notice and holiday pay, and unpaid wages. Mrs Cochrane also claims unfair dismissal. The claims were initially brought against the first respondent, Eyekon Services UK Ltd ('Eyekon') and the second respondent as Cygnet Properties & Leisure Plc ('Cygnet'). An application was later successfully made by the second respondent, to change the name of the second respondent to Fernglen Ltd ('Fernglen').
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2. A preliminary hearing was fixed to determine whether there was a relevant transfer, under the provisions of Reg 3 of the TUPE Regulations 2006, of the claimants' employment from the first respondent (Eyekon) to the second respondent (Fernglen) and, if so, when it occurred.
- 25 3. The Tribunal heard evidence from Mr George Madden, Director, on behalf of Eyekon and Mr Kiram Virani, Director, on behalf of Fernglen. The Tribunal also heard evidence from each of the claimants: Mrs Agnes Cochrane, Mr Thomas Martin, Mr Daniel Crawford and Mr Ryan Crawford.

4. A joint set of productions was lodged, extending to 175 pages. At the outset of the hearing, Mr Madden indicated that there were a number of additional documents that he wished to rely on and these were later added to the bundle without objection from the other parties. In fact many of the documents were
5 duplications of documents already in the joint bundle. Mr Daniel Crawford also added one document to the bundle, again without objection.

Issues to be determined

5. At the outset of the hearing I discussed the issues to be determined with the
10 parties and it was agreed that this was a case involving a potential service provision change within the meaning of Reg 3(1)(b)(iii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, commonly referred to as an 'in-sourcing' situation. The 'client' being the second respondent, Fernglen Ltd, and the 'contractor' being the first respondent,
15 Eyekon Services UK Ltd.
6. It was agreed that the issues to be determined were as follows:
- a. What were the activities carried out by the contractor, Eyekon?
 - b. Were those activities subsequently carried out by the client,
20 Fernglen, and did they remain fundamentally the same?
 - c. If the activities remained fundamentally the same, was there an organised grouping of employees that had as their principal purpose the carrying out of the activities on behalf of the client?
 - d. Did the exceptions in Reg 3(3)(a)(ii) and (b) apply, namely whether
25 the client intends that the transferee will carry out activities in connection with a single specific event or task of short term duration and whether the contract is wholly or mainly for the supply of goods for the client's use?

- e. If a transfer has taken place, was each individual claimant assigned to the organising grouping of employees?
- f. If there was a relevant transfer, when did it occur?

5 7. Ms Armstrong, on behalf of the second respondent, also stated that there was a further issue to determine, namely the question of whether, through their actions or inactions, the claimants had objected to the transfer as provided for by Reg 4(7) and 4(8).

10 **Findings in fact**

- 8. The Tribunal found the following facts to be admitted or proven.
- 9. The first respondent (Eyekon) is a company supplying cleaning and security services. The second respondent (Ferglen) owns and manages the Callendar Square shopping centre in Falkirk. Cygnet Property & Leisure Plc (Cygnet) is a parent company of which Ferglen is a subsidiary.
- 10. Mrs Agnes Cochrane was a cleaning supervisor who had been working at the shopping centre for approximately 25 years and whose employment had been transferred in accordance with TUPE some 14 or 15 times during that time. Her duties included looking after the cleaning of the shopping centre and maintaining the staff rotas.
- 11. Mr Thomas Martin was a cleaner who had been employed at the shopping centre for 10 years.
- 12. Mr Ryan Crawford was the Security Supervisor at the shopping centre who had been employed at the centre for 11 years. Mr Daniel Crawford was the Deputy Security Supervisor. Their duties included patrolling the common parts of the shopping centre and the car park, manning and monitoring the

CCTV control room, opening up and closing the centre, dealing with staff rotas and responding to alarm calls.

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13. In addition to the claimants there were 5 further employees engaged in the cleaning and security services at the shopping centre. 3 of those employees were security officers, 2 of those employees were cleaners.
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14. Fernglen purchased the Callendar Square shopping centre in December 2017. At that time the cleaning and security services at the shopping centre were being supplied by a contractor, Palmaris. General maintenance duties were also being provided at that time by Property Security & Maintenance Solutions Limited ('PSMS'), which was a company owned by Mr Madden. In around July 2018 the contract for providing the cleaning and security staff and services at the shopping centre was taken over by PSMS. All of the employees, including the claimants, transferred from the employment of Palmaris to that of PSMS.
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15. PSMS were then bought out by another company and it was agreed that another company of which Mr Madden was a Director, Eyekon, would take over the cleaning and security services at the shopping centre. The Tribunal was not provided with any documentation setting out the terms of that agreement between Eyekon and Fernglen. Eyekon commenced providing the cleaning and security services in around March 2019. All of the cleaning and security employees, including the claimants, transferred from the employment of PSMS to that of Eyekon.
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16. At the time that Fernglen purchased the shopping centre the rental income from tenants was just about covering its costs. However, the rental income quickly started to decline. A number of larger retail tenants subsequently moved out with the resulting loss in income. Mr Virani discussed with Eyekon the prospect of reducing the cost of the cleaning and security services at the shopping centre. In an effort to reduce costs, there was some reduction in the working hours of staff in the early months of 2020.
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17. On 23 March 2020 the shopping centre was required to close as a consequence of the national lockdown in Scotland brought about by the coronavirus pandemic. All of the employees at the shopping centre, including the claimants, subsequently agreed to be furloughed.
- 5 18. The coronavirus pandemic and lockdown increased the financial difficulties faced by the shopping centre. More tenants left, with the resulting drop in income.
19. As part of the discussion regarding reducing the running costs of the centre, Eyekon and Fernglen were in discussions about in-sourcing the cleaning and security services and the TUPE transfer of the staff employed at the centre
10 from Eyekon to Fernglen. There was also some discussion about potential redundancies of staff. It was proposed that the transfer of staff would occur when the centre was able to re-open and staff were able to return to work.
20. On 8 April 2020 Mr Virani emailed Mr Madden commenting that Mr Madden
15 had recently done an exercise in relation to the estimated cost of redundancy of staff. He says in that email *'Also, I would guess that we can now start to collate the employment contracts and so on so that we can start the TUPE consultations as soon as we know a date for the world to return to normality...'*
21. On 15 May 2020 Mr Campbell of Eyekon sent to Mr Virani some *'TUPE and
20 redundancy figures'* calculated up to 1 March 2020. On 18 June 2020 Mr Virani emailed Mr Campbell asking for contact information for the staff and asking *'Should we start the transfer process? I guess that when the shops are to open we will need to get them re-engaged at the site. I suspect that we will start off with shorter opening hours because the gym is not yet functional.'* Mr
25 Campbell responded the same day stating *'You need to settle your account in full. Any further cooperation will be dependant on this fact.'*
22. As a consequence of Eyekon failing to provide contact information for the staff in question, Mr Virani took the addresses from the TUPE information he had been provided with in April 2020 and wrote directly to the claimants by letter
30 dated 2 July 2020.

23. Fernglen were aware that the Scottish government were likely to make an announcement that shopping centres were to be permitted to open in the near future. They were under significant pressure from tenants to ensure that the centre reopened as soon as it was able to do so. Prior to lockdown the centre had typically been open from 6am to 10pm as a consequence of the opening hours of the gym that was located on the upper floor of the centre. As the gym would not be opening at that time, it was proposed that there would initially be reduced opening hours. Fernglen were keen to ensure that the staff could return to work as they were mindful that a change in operations would be needed due to the impact of the coronavirus pandemic regarding the cleaning of the centre and also the security staff being required to monitor whether social distancing and mask wearing was being maintained by users of the centre.

24. Mr Virani's letter to the claimants dated 2 July 2020 explained that the centre was due to re-open on 13 July 2020 with reduced opening hours on account of the gym on the top floor being unable to re-open at that time. The letter stated that it was proposed to open the centre from 9am to 7pm Monday to Saturday and 9am to 5pm on Sundays. The letter stated '*In our attempts to reduce costs we have also decided to take the Eyekon team out of the equation. That would save money, and we will rely on all of the team to assist us when we seek opinions and consultations. You would now be a direct employee of Fernglen Limited on the same terms that were in place for you immediately before furlough...We would like you to return to work from Tuesday 14th July in accordance with the rota enclosed...*' The letter invited the claimants to sign a copy and return it to Fernglen to confirm their acceptance of the employee transfer and asked the claimants to call, text or email Mr Virani to confirm that they would be returning and to raise any questions that they may have as soon as possible. The letter attached a Cleaning Rota and a Security Rota that included 7 of the existing 9 employees, including all of the claimants, setting out when each of the employees would be expected to work until the end of July 2020 and stated that '*This will be rota until the end of July, and during this initial period we will*

be able to receive comments. If you cannot attend a shift we would hope that you can arrange a swap'.

25. None of the claimants signed and returned Mr Virani's letter. Mr Ryan Crawford received the letter and contacted Mr Virani by email on 8 July 2020 stating that he understood that Fernglen would be keen to have the centre reopened, but as he was employed by Eyekon he would be waiting until he heard from them until he returned to work. He stated that if they were to transfer employment to Fernglen they should have been given notice and had consultations with Fernglen and Eyekon and that as this was the first he had heard about it, he would not be signing anything until proper procedures were followed. He also expressed some concern about working under Marian Azoitei or John Jamieson who were employees of Fernglen employed at the centre. There was no response to this email from Fernglen.
26. Mr Daniel Crawford also contacted Mr Virani by email on 8 July 2020 acknowledging the letter and raising concerns. He also stated that his current contract of employment was with Eyekon and he would await their instructions before returning to work. He also raised concerns about the procedures followed with regard to the TUPE transfer and concerns about working under Mr Azoitei and Mr Jamieson. Mr Crawford did not receive a response to this email.
27. Mrs Cochrane did not receive the letter of 2 July 2020 until she found a copy of it in her locker when she attended the shopping centre on 12 August 2020.
28. Mr Martin received the letter from Mr Virani and, as a consequence, returned to work at the shopping centre as directed on or around 13 July 2020. He was the only one of the claimants, or indeed any of the existing cleaning and security employees, to return to work. On arrival at the shopping centre Mr Martin found that some of the cleaning equipment had been removed. He also found another cleaning contractor carrying out work at the centre. This was a private cleaning company who Fernglen had engaged to carry out a deep clean of the shopping centre prior to re-opening. Mr Martin completed some cleaning work in the basement. He attended 2 shifts for 4 hours each time.

However, he was then informed by Eyekon that he was to be furloughed until the end of July 2020 and so did not return to do any further shifts. Fernglen did not contact Mr Martin further to ask him to continue to attend work.

29. On 14 July 2020 Mr Virani wrote to Mr Campbell of Eyekon stating “As you
5 *have known for some time, we would now like to engage the staff directly. I would suppose that removing the potential liability for redundancy from you would be advantageous. In the circumstances it would also make sense for the transfers to be expedited. I know that you would of course have more experience of TUPE matters, and wonder if you would suggest the appropriate next steps?*” Mr Wilson of Eyekon responded to that email on 22
10 July 2020 stating “*In order for this transfer to occur the following points MUST be completed: 1. All monies owed to Eyekon Services to paid without reservation or prejudice to clear and close the account. 2. All staff will be notified by Eyekon Services that TUPE is being entered into. 3. Once points 1 & 2 are completed TUPE procedure is completed by yourselves in accordance with the ACAS guidelines – The entire workforce are involved in this process. TUPE does not allow for the ‘picking and choosing’ of individuals. Contact either myself or George should you wish any further direction and also to confirm payment and closure of the account 7 days from*
15 *the receipt of this email.*”

30. There then followed an exchange of further emails in which Mr Wilson of Eyekon made it clear that he would not cooperate with Fernglen in the TUPE transfer of staff until such time that Fernglen had cleared their outstanding debt. In turn, Mr Virani made it clear that he would not clear outstanding bills
25 at the outset, but would do so when all matters were concluded. In his email of 23 July 2020 Mr Virani states “*You will be aware that it had been made clear between us (when George was leading discussions) and agreed many months ago that the staff would be coming across to us as soon as the lockdown was concluded. This is why I found it particularly obstructive and frustrating that you blocked a consultation meeting and extended furlough periods while aware that we were then minded to take the staff back on.*” In
30 a further email dated 28 July 2020 from Mr Wilson of Eyekon to Mr Virani he

stated “*You are required to clear your debts to us prior to any TUPE taking place.*”

- 5 31. Fernglen did re-open the shopping centre on 14 July 2020 in line with the government directions. The Centre Manager, employed by Fernglen, helped out with some of the cleaning and security work, but Fernglen also engaged 4 or 5 temporary staff to cover the cleaning and security work from 14 July 2020 onwards.
- 10 32. By letters dated 5 August 2020, Eyekon wrote to the claimants informing them of the start of the TUPE transfer process from Eyekon to Cygnet Properties & Leisure PLC. The letter included information on how to object to the transfer. The letter invited the claimants to confirm in writing whether or not they agreed to the transfer of their employment by using an attached reply slip. The claimants all completed that reply slip stating that they agreed to the transfer and returned it to Eyekon.
- 15 33. On 6 August 2020 Eyekon emailed Fernglen stating that they were aware that temporary workers had been employed to allow the shopping centre to open and operate and that they considered this action endorsed the authorisation of the TUPE process to begin. The email stated that all staff had been informed of the start of the TUPE process, that the process could be concluded almost immediately on the agreement of all parties and proposed a transfer date of 12 August 2020. In response to this email on 11 August 2020 Mr Virani, on behalf of Fernglen stated “*It seems that it is now too late. We did attempt in earnest to have the staff transfer to us, we arranged meetings and we wrote to the staff but this was blocked. Right at the time of attempting to engage the staff, you saw fit to extend the relevant employees’ furlough while aware from the correspondence that the centre was already about to re-open. I am advised that as these actions precluded our attempts to transfer the employees we do not carry liability under the terms of their employment contracts. In any case, the centre will now be closing imminently.*”
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34. On 14 August 2020, Eyekon issued P45s for all of the Claimants stating their leaving date as 1 August 2020.
35. At the beginning of August 2020 Fernglen were considering the possibility of closing the shopping centre due to the financial difficulties it was in. On 12 August 2020 the Falkirk Herald ran a story that the shopping centre would be closing its doors for good the following week. In mid August 2020, Fernglen were in discussions with someone to take on a lease of the centre as a whole but that relationship was never formalised.
36. Mr Virani invited the Council to discuss with shopkeepers and business owners that were tenants of the shopping centre the measures that may be taken for them to find alternative premises.
37. In fact, the shopping centre did not close in August 2020 and has remained open until the present day.
38. On 12 August 2020 Mrs Cochrane met with Mr Virani at the shopping centre and asked him about when she could return to work, and if she was not returning to work, would there be redundancies? By that stage Fernglen had already taken on temporary staff and were not prepared to consider bringing the claimants back to work. Mrs Cochrane was told by Mr Virani that the centre would be closing on 31 August and he wasn't sure what the situation would be with their jobs.
39. On 18 August 2020 Mr Ryan Crawford emailed Mr Virani asking for a definitive answer to the staff's current employment situation, stating *'Eyekon have told us that as temporary workers were appointed in the centre, that we no longer work for them because this forced us to be tupted to Cygnet. As they no longer employ us, we are no longer furloughed and we would have been working for Cygnet from the 1st August, but we have still not had any consultations with anyone from Cygnet, we are unsure of when to return to work, when we will be paid, if we will be paid from the 1st as we were not informed to return to work, we would like some clarification on this. Also, following the recent announcement that the centre would be closing permanently, which we were*

not even informed of from yourself or a representative of Cygnet but later learned from the Falkirk Herald, we are even more confused about our future, does this mean we will be made redundant?’ Mr Virani responded to this email on 21 August 2020 apologising for the delay and stating that he was taking legal advice. The email states “You will however recall that over a month ago I did try to re-engage you but Eyekon said that you could not come in, and at that point they put you on a further month’s furlough. Please would you give me a week to get to the bottom of things?” There was no further response to Mr Ryan Crawford from Mr Virani.

40. On 7 September 2020 Mr Virani wrote to Eyekon stating “...you will be aware that conversations took place between each of myself and my father, with George, where it was made clear that we would be taking over the staff directly as soon as the lockdown ended.’

41. On 14 September 2020 Ryan and Daniel Crawford contacted ACAS and subsequently issued their claims on 15 October 2020. Mr Martin contacted ACAS on 20 October 2020 and issued his claim on 21 October 2020. Mrs Cochrane contacted ACAS on 16 September 2020 and issued her claim on 20 October 2020.

Second Respondent’s submissions

42. Ms Armstrong, on behalf of Fernglen, set out her submissions orally. She asserts that no transfer occurred, nor ought to have occurred. Firstly, she asserts that the activities carried out by Fernglen were not fundamentally the same as those carried out by Eyekon and were also significantly reduced after the shopping centre re-opened in July 2020. Secondly, she asserts that the re-opening of the shopping centre was tantamount to a task of short duration. She accepted that the claimants formed part of an organised grouping of employees.

43. In the alternative she submits that, if there was a transfer, it would have occurred on 14 July 2020, that being the date when the centre re-opened and the temporary staff were engaged, but that the claimants objected to the transfer. Further, in the alternative she asserts that, if there was a transfer, it

occurred mid August when the lease of the entire shopping centre was taken on by a new contractor and that the employees transferred to the new contractor. That latter point was not raised in Fernglen's ET3 and was put forward on the basis of evidence given by Mr Virani at the hearing.

5 44. Ms Armstrong referred me to **Department for Education v Huke and Evolution Resource Ltd UKEAT/0080/12** in which Lady Smith stated at paragraph 21 "*Put shortly, an employment tribunal requires to recognise that the first task in a case such as the present is to identify the relevant activities and then ask whether the activities carried out by the alleged transferee*
10 *immediately after the transfer were essentially or fundamentally the same as those which the organised grouping employed by the alleged transferor required to carry out immediately before it. It follows that minor or trivial differences are to be ignored – we agree with HHJ Peter Clark's observation to that effect in the **Enterprise Management** case referred to in footnote 2 –*
15 *but, equally, it cannot be a matter of simply asking whether activities carrying the same label continue after the alleged transfer. In the factual assessment which the tribunal requires to carry out, it seems plain that they must consider not only the character and types of activities carried out but also quantity. A substantial change in the amount of the particular activity that the client*
20 *requires could, we consider, show that the post transfer activity is not the same as it was pre transfer."*

45. Ms Armstrong asserted that, due to the loss of tenants from the shopping centre, and the fact that the gym had not been permitted to re-open, when the shopping centre re-opened in July 2020, the need for cleaning and security
25 services was significantly reduced compared to the need prior to March 2020. In particular she asserted that due to the gym remaining closed, the shortened opening hours of the centre meant that it was open for 44 fewer hours each week.

46. In support of her assertions in relation to tasks of short term duration, Ms
30 Armstrong referred me to **Swanbridge Hire & Sales Ltd Butler and others UKEAT/0056/13** and **SNR Denton UK LLP v Kirwan and another [2012]**

IRLR 966 in submitting that the focus should be on the client's intention at the time of the alleged transfer. She refers to the fact that as at 12 August 2020 it was envisaged that the shopping centre would close the following week and that Mr Virani at that time didn't envisage that the shopping centre could continue to trade long-term. Ms Armstrong asserts that temporary staff were engaged to keep the centre open long enough for consultations with the Council to end and that this was therefore in relation to a task of short term duration.

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47. Ms Armstrong submits that the claimants, through their actions, objected to the transfer in terms of Regulation 4(7). She asserts that their employment with Eyekon would therefore have terminated as at 14 July 2020 as a result of Reg 4(8), but that the staff were then immediately re-engaged by Eyekon. In respect of objection to the transfer, Ms Armstrong referred me to **Hay v George Hanson (Building Contractors) Ltd [1996] IRLR 427** in which the EAT held that the word 'object' means an actual refusal to consent to the transfer and that state of mind must be communicated to either the transferor or the transferee, before the transfer takes place. There is no particular method whereby that state of mind must be brought to the attention of either the transferor or the transferee. It can be by word or deed, or both. What is intended is to protect the right of an employee not to be transferred to another employer against his will. It should not be difficult in most cases to distinguish between withholding of consent and mere expressions of concern or unwillingness, which may still be consistent with accepting the inevitable. Thus, a protest in advance of a transfer will not amount to an objection unless it is translated into an actual refusal to consent to the transfer which, in turn, is communicated to the relevant persons before the transfer takes place. Fernglen's position is that the claimants, through their actions or inaction, made it clear they were objecting to the transfer.

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48. Finally, a point that arose from Mr Virani's evidence on the second day of the hearing, it was submitted that from mid August 2020, aside from a manager on site, Fernglen did not employ anyone at the shopping centre because a new contractor took over the lease and responsibility for the temporary staff

transferred to that new contractor. Ms Armstrong asserted that this engaged a Reg 3(1)(b)(ii) situation, outsourcing the staff to a new contractor. Ms Armstrong therefore asserts that, if there was any TUPE transfer, it occurred between Eyekon and the new contractor in mid August 2020.

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First Respondent's submissions

49. Mr Madden, on behalf of the first respondent, set out very short oral submissions. He started by pointing out that he is not legally qualified. He asserted that the second respondent's submissions were based on the evidence of Mr Virani whom he had no respect for as Mr Virani had asked for services that he had then refused to pay for. Mr Madden asserted that Mr Virani's evidence could not be substantiated. He asserted that Fernglen had been underhand and duplicitous. It is the first respondent's case that there had been a TUPE transfer of the claimants' employment to the second respondent, but Mr Madden did not address me on the details of why he asserted that to be so.

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Claimants' submissions

50. Mrs Cochrane stated that, between Eyekon and Fernglen, the staff had been led astray. She explained that the claimants did not know who was telling the truth and that she felt that it would be the claimants who would be the losers out of this situation. She stated that Mr Madden and Mr Virani appeared to have had a vendetta between them and that it would be the claimants who would suffer.

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25 51. Mr Martin did not have anything to add to that which Mrs Cochrane had said.

52. Mr Daniel Crawford stated that the claimants had previously been through a lot of TUPE transfers with other companies when procedures had been properly followed and information shared. He felt that neither Eyekon nor Fernglen had understood the procedures to be followed in a TUPE transfer situation.

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53. Mr Ryan Crawford wished to echo what Mr Daniel Crawford had said and stated that he felt they were caught in the middle of people who did not understand the process for a TUPE transfer and that they were paying for it.

Relevant law

5 54. The **Transfer of Undertakings (Protection of Employment) Regulations 2006** provide as follows:-

Reg 3 A relevant transfer

10 (1) These Regulations apply to-

...

(b) a service provision change, that is a situation in which-

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

20 (ii) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf; or

25 (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied.

...

(3) The conditions referred to in paragraph (1)(b) are that-

(a) Immediately before the service provision change-

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

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(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

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Reg 4 Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

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

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

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

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...

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

5 (8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

10 55. In **Enterprise Management Services Ltd v Connect-Up Ltd [2012] IRLR 190** Judge Peter Clark summarised the previous authorities on service provision changes and set out the principles to be applied in determining whether a transfer had taken place in the case of a service provision change. The first task for the employment tribunal is to identify the relevant activities
15 carried out by the original contractor. The next (critical) question is whether the activities carried on by the subsequent contractor (or client in an in-sourcing case) are fundamentally or essentially the same as those carried on by the original contractor. Minor differences may properly be disregarded. This is essentially a question of fact and degree for the tribunal. Even where
20 the activities remain essentially the same before and after the putative transfer date as performed by the original and subsequent contractors, a service provision change will only take place if the following conditions are satisfied (i) there is an organised grouping of employees in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of
25 the client; (ii) the client intends that the transferee, post-SPC, will not carry out the activities in connection with a single event of short-term duration; (iii) the activities are not wholly or mainly the supply of goods for the client's use. Finally, by reg 4(1) the employment tribunal must decide whether each Claimant was assigned to the organised grouping of employees.

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Decision

What were the activities carried out by the contractor, Eyekon?

56. Eyekon were carrying out all of the cleaning of the common parts of the shopping centre, including cleaning the floors and other surfaces, the toilets, and the walkway between the multi-storey carpark and the shopping centre.
5 The cleaning staff needed to also be alert to any spillages or other cleaning issues in the shopping centre, were required to monitor and address and cleaning issues as they arose, and to take responsibility for monitoring the stock room for cleaning supplies and materials. Eyekon were also providing all of the security services at the shopping centre, including the patrolling of
10 common parts of the shopping centre and car park, manning and monitoring the CCTV control room, the opening up and closing of the centre on a daily basis and responding to alarm calls.

57. These services were carried out by a number of employees working on a rota during the normal opening hours of the shopping centre which, prior to the
15 lockdown in March 2020, had been 6am to 10pm which was dictated by the opening hours of the gym located on the upper floor of the shopping centre.

58. In early 2020 there had been a reduction in the working hours of staff due to changes made to the provision of services in order to reduce costs. For example, where the toilets had previously been cleaned 4 times a day,
20 cleaning was reduced down to 2 times a day. Mr Virani described this as 'trimming away any fat in the system'.

Were those activities subsequently carried out by the client, Fernglen, and did they remain fundamentally the same?

59. When the shopping centre re-opened on 14 July 2020 as a result of the easing
25 of lockdown restrictions, Fernglen themselves made arrangements for the cleaning and security services to be carried out. The common parts of the centre still required to be regularly cleaned. Mr Virani referred in his evidence to the importance of the cleaning regime in the shopping centre in light of the pandemic. With regard to security services, the shopping centre still needed
30 to be patrolled by security guards, with the added requirement to check that social distancing and mask wearing was being maintained by users of the

centre. The CCTV control room was still being manned and monitored. The centre needed to be opened and closed and alarm calls responded to.

5 60. The opening hours of the centre were reduced on account of the gym's absence and were instead to be 9am to 7pm Monday to Saturday and 9am to 5pm on Sundays.

10 61. However, there had already been a reduction in staffing hours prior to the shopping centre being closed in March 2020, and the proposed rotas sent to the Claimants by Mr Virani on 2 July 2020 required all of the claimants to attend work from 14 July 2020 to carry out both the cleaning and security services.

62. Further, Fernglan recruited 4 or 5 temporary staff to carry out the cleaning and security services from 14 July 2020 onwards, in addition to the Centre Manager employed by Fernglan who also 'pitched in' with cleaning and security.

15 63. I find that here was no substantial change in the amount of work to be carried out after 14 July 2020 such that the post transfer activity could be said to be different to the pre-transfer activity as in the **Huke** case. I am not satisfied that the need for cleaning and security services from 14 July 2020 was significantly reduced in comparison with the need immediately prior to March 2020, when those services had already been pared back in order to reduce costs.

20 64. I am satisfied on the evidence before me that the activities that had previously been carried out by Eyekon were carried out by Fernglan on their own behalf from 14 July 2020 and that they were fundamentally the same, with only minor differences in the amount of hours required to be worked as a result of the reduced opening hours of the opening centre in the initial period after re-opening.

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30 *If the activities remained fundamentally the same, was there an organised grouping of employees that had as their principal purpose the carrying out of the activities on behalf of the client?*

65. There was no dispute between the parties on this issue. Ms Armstrong, on behalf of Fernglen, accepted that the claimants formed part of an organised grouping of employees that had as their principal purpose the carrying out of the activities on behalf of Fernglen. I find there was an organised grouping of employees that had as their principal purpose the carrying out of cleaning and security services on behalf of Fernglen.

When did the transfer occur?

66. I find that the transfer occurred on 14 July 2020 when the centre was re-opened. It was on that date that the cleaning and security activities ceased being carried out by Eyekon and started to be carried out by Fernglen on their own behalf and this therefore amounted to a service provision change within the meaning of Reg 3(1)(b)(iii) occurring on 14 July 2020.

67. Although Eyekon had furloughed the claimants and they continued to receive furlough payments until 31 July 2020, this did not affect the operation of the TUPE Regs. Fernglen having brought the cleaning and services in house as of 14 July 2020, albeit being carried out by temporary staff other than the claimants, meant that the claimant's contracts of employment had effect after 14 July 2020 as if originally made between the claimants and Fernglen in accordance with Reg 4(1).

68. The assertion that another contractor took over the cleaning and security services in mid August 2020 after taking over the entire lease of the shopping centre had not been referred to in any of Fernglen's responses to the claimants' claims, nor was the Tribunal shown any documentary evidence to substantiate this.

69. Having found that the service provision change occurred on 14 July 2020, I am not satisfied on the evidence before me that there can have been any transfer of the claimants' employment in mid August 2020 from Eyekon to the employment of another, unnamed, contractor. The claimants' employment transferred from Eyekon to Fernglen on 14 July 2020.

Did the exceptions in Reg 3(3)(a)(ii) and (b) apply, namely whether the client intends that the transferee will carry out activities in connection with a single specific event or task of short term duration and whether the contract is wholly or mainly for the supply of goods for the client's use?

5 70. It was submitted on behalf of Fern Glen that the cleaning and security services that were carried out by Fern Glen from 14 July 2020 onwards were tasks of short term duration.

71. The authorities I have been referred to make it clear that I must focus on the client's intention at the time of the alleged transfer. It is clear from the
10 correspondence between Eyekon and Fern Glen in the lead up to the re-opening of the shopping centre on 14 July 2020 that the intention of both parties was for the claimants to transfer to the employment of Fern Glen upon their return to work once the shopping centre was able to re-open. At that time, and as at the time of the re-opening of the centre, there was no
15 suggestion that a permanent closure of the centre was imminent. To the contrary, Mr Virani was clear in his evidence about the amount of pressure he was under from tenants to ensure that the centre re-opened on the first day that it was able to in line with government guidance. It was not until after the re-opening, in August 2020, that discussions started to take place about the
20 potential closure of the centre.

72. I was not satisfied, on the evidence before me, that any decision had been taken by Fern Glen to close the centre permanently either at the time of re-opening on 14 July 2020 or thereafter. In his evidence Mr Virani described the permanent closure of the Centre as at mid July 2020 as only 'a possibility.'

25 73. I was referred to an article that appeared in the Falkirk Herald on 12 August 2020 with the headline 'Falkirk shopping centre will close its doors for good' in which it was suggested that the centre would be closing for good the following week. The article states that Mr Virani had told the journalist that he would make no comment on the matter until he first talked to tenants of the
30 centre face to face.

74. During his evidence Mr Virani stated that it was whilst he was having those conversations face to face with the tenants that Fernglen found someone who was prepared to take on the entire lease of the shopping centre, however those arrangements were never formalised.

5 75. Although Mr Virani was telling the claimants and others that the centre was to close by the end of August, the centre did not close. I am not satisfied that the insourcing of the cleaning and security services was in relation to a task of short term duration. As at 2 July 2020 Mr Virani was making plans for the re-opening of the centre on 14 July 2020 and had put in place a rota for an 'initial
10 period' until the end of July 2020. At the time the centre was re-opened on 14 July 2020 the permanent closure of the centre was only a possibility, not a confirmed intention.

If a transfer has taken place, was each individual claimant assigned to the organised grouping of employees?

15 76. There is no dispute between the parties that each of the claimants were assigned to the organised grouping of employees and I find that they were so assigned.

*Whether, through their actions or inactions, the claimants had objected to the
20 transfer?*

77. The first time the claimants were informed of a potential TUPE transfer between Eyekon and Fernglen was in the letter of 2 July 2020 from Mr Virani. They received no notification from their current employer, Eyekon, as to a potential transfer until the letter of 5 August 2020.

25 78. In response to the letter of 2 July 2020, Mr Martin returned to work as directed by Mr Virani on or around 13 July 2020. He carried out two shifts. It cannot be said, in those circumstances, that Mr Martin objected to the transfer of his employment. The parties did not appear to dispute that the only reason Mr Martin did not continue to attend for work thereafter was because Eyekon had
30 informed him that he was to be furloughed until the end of July 2020. I have

not been taken to any evidence to show that Mr Martin was informed by Fernglen that he should nevertheless continue to attend for work, or that if he failed to attend, he would be taken to have objected to the transfer. I accepted Mr Martin's evidence that, when he received the letter from Eyekon dated 5 August 2020 inviting him to sign and return the reply slip accepting the transfer of his employment, he duly did so. I am satisfied that neither this, nor any action or inaction on the part of Mr Martin was sufficient to amount to him objecting to the transfer of her employment to Fernglen.

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79. I accepted the evidence of Mrs Cochrane that she did not initially receive the letter of 2 July 2020 from Mr Virani inviting her to accept the transfer of her employment to Fernglen and to return to work on 13 or 14 July 2020 and only saw it when she retrieved a copy from her locker on 12 August 2020. By that time, she had also received the letter of 5 August 2020 from Eyekon inviting her to accept the transfer of her employment, which she had duly signed and returned to Eyekon in acceptance. I am satisfied that neither this, nor any action or inaction on the part of Mrs Cochrane was sufficient to amount to her objecting to the transfer of her employment to Fernglen.

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80. In his email to Mr Virani of 8 July 2020 Mr Ryan Crawford explains that he is employed by Eyekon and will be waiting to hear from them before returning to work. He points out that if his employment were to transfer to Fernglen he should have received notice and consultation with both Fernglen and Eyekon and that he will not sign anything until proper procedures are followed. This was only sufficient to amount to an expression of concern or, at most, unwillingness, in relation to the transfer of his employment. It did not amount to a refusal to consent to the transfer. I am satisfied that neither this, nor any action or inaction on the part of Mr Daniel Crawford, was sufficient to amount to him objecting to the transfer of his employment to Fernglen.

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81. Mr Daniel Crawford raised similar concerns in an email of 8 July 2020, stating that his current contract of employment was with Eyekon and that he would await their instructions regarding a return to work. He also raises the issue of TUPE and that he should have had notice and consultations with both Eyekon

and Fernglen. I am satisfied that neither this, nor any action or inaction on the part of Mr Daniel Crawford was sufficient to amount to him objecting to the transfer of his employment to Fernglen.

5 82. None of the claimants refused to consent to the transfer. Fernglen did not respond appropriately to the concerns raised by the claimants and neither Eyekon or Fernglen engaged appropriately with the claimants to keep them informed of the transfer process, resulting in the Claimants understandably being confused and concerned about their predicament.

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Conclusion

15 83. Regretfully for these claimants, Eyekon persisted in withholding information from Fernglen and failing to cooperate in the transfer process in an effort to exert pressure on Fernglen to settle outstanding monies owing to them. They did not keep the claimants appropriately informed as to the potential transfer of their employment. Equally regretfully, Fernglen persisted in failing to resolve their dispute with Eyekon, and also did not make sufficient efforts to engage with the claimants or keep them informed as to the potential transfer
20 of their employment. The conduct of both respondents resulted in a stalemate between them. Both respondents prioritised a commercial dispute over the interests of the employees concerned.

25 84. On 14 July 2020, when the Callendar Square shopping centre re-opened following the lockdown, Eyekon ceased carrying out the cleaning and security activities at the shopping on behalf of Fernglen and those activities were carried out instead by Fernglen themselves, by their existing manager at the centre and a number of temporary employees engaged specifically for that purpose. This amounted to a service provision change within the meaning of Reg 3(1)(b)(iii) as Fernglen had insourced those services.

85. Immediately prior to that service provision change on 14 July 2020, there was an organised grouping of employees situated in Great Britain which had as its principal purpose the carrying out of cleaning and security services on behalf of Fernglen. The claimants were all assigned to that organised grouping.

5 86. At the time of the transfer on 14 July 2020, Fernglen did not intend that those cleaning and security services would be carried out as a task of short term duration.

87. There was therefore a relevant transfer of the claimants' employment from Eyekon Ltd to Fernglen Ltd on 14 July 2020. The claimants did not object to that transfer.
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88. The claimants' claims therefore proceed against Fernglen Ltd. The claims against Eyekon Ltd are dismissed.

Directions for final hearing

89. If the claims are not otherwise resolved between the parties, they will proceed to a final hearing, to be listed for 2 days on a date to be fixed. Standard directions will be provided to the parties with the notice of hearing.
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90. By **Friday 26 November 2021**, the Claimants must each set out a schedule of loss setting out all of the sums claimed in respect of each of their claims.

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Employment Judge: Jude Shepherd
Date of Judgment: 01 November 2021
25 Entered in register: 02 November 2021
and copied to parties