EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100017/2018 and 22 others as per attached schedule

Held via Cloud Video Platform (CVP) on 11 May 2022

Employment Judge Robison

(1) Mr B Bennett	**Claimants Represented by Brian McLaughlin - Solicitor**
and 20 others as per attached schedule	
(22) Mr O Lennon	**Claimant Represented by: Mrs N Lennon - Lay Representative**
(23) Mr R Daly	**Claimant Represented by Mr Lawson - Solicitor**
Arney Service Limited	**First Respondent Represented by: Ms J Wright - Solicitor**
McTear Contract Limited	**Second Respondent Not present and Not represented**
MITIE Property Services	**Third Respondent Represented by: Mr K McGuire - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that paragraphs 2 and 4 of the Tribunal's judgment of 14 March 2019 are reinstated as follows:

i) "with effect from 14 August 2017, the employment contracts of each of the claimants listed at appendix B transferred to the third respondent", and

ii) "with effect from 15 August 2017, the employment contracts of each of the claimants listed at appendix A transferred to the second respondent".

REASONS

1. This preliminary hearing was listed following a case management hearing which took place on 14 June 2021 , which in turn followed a decision of the EAT on 25 February 2021.

2. At the hearing on 14 June 2021, consideration was given to next steps in regard to this case, which has been remitted back to this Tribunal from the EAT to reconsider its decision in light of the decision of the European Court of Justice *iss Facility Services NV v Govaerts* [2020] ICR 1115. That decision was published after the Tribunal issued its decision on 14 March 2019,

3. It had been agreed that it was appropriate for the second and third respondents to liaise in order to seek to agree their position. That however has not been possible.

4. I noted that those representing the second respondent at that hearing on 14 June 2021 had since withdrawn from acting. Mr McGuire for the third respondent at this hearing advised that they had sought to engage with the second respondent without success.

5. Shortly prior to this hearing (specifically at 09.38 on 11 May 2022) the Tribunal received an e-mail from Mr K McTear (understood to be for the second respondent) advising that he was unable to attend due to illness. That e-mail was not copied to any of the other parties. He forwarded a statement of sickness for SSP dated 10 May 2022.

6. I decided notwithstanding to proceed with this hearing. That was not least because of the inordinate amount of time since this case was referred from the EAT and the length of time it has taken to get this hearing listed given the number of parties.

7. In the PH note dated 14 June 2021 , it was stated that "It was also agreed that, in the event that it did not prove possible for the second and third respondents to agree their position, Ms Munro would liaise with Mr White [then acting for R2] and all other parties to seek to agree the parameters of any further hearing on the matter, for consideration by the Tribunal, including the witnesses to be heard, the precise issue for determination, and the expected length of the hearing".

8. No proposal was made in regard to any other evidence to be heard, so that this hearing proceeded on the basis of legal submissions only.

9. Mr McGuire had prepared an outline written submission, which he had lodged and circulated to others. It was agreed that it was appropriate to hear from him first, whereafter I heard oral submissions form the other parties, considered now in turn.

Submissions for the third respondent

10. Mr McGuire first made reference to the decision of the EAT. That decision sets aside paragraphs 2 and 4 of the Tribunal's judgment of 14 March 2019, respectively "with effect from 14 August 2017, the employment contracts of each of the claimant's listed at appendix B transferred to the third respondent", and "with effect from 15 August 2017, the employment contracts of each of the claimants listed at appendix A transferred to the second respondent". Mr McGuire noted that this did not extent to include the date, which was accepted as correct, because there are separate findings in fact supporting those dates.

11. He said that the third respondent took no issue with the findings in fact which were not challenged on appeal, nor with the procedural history set out there in the EAT decision.

12. He relies in particular on paragraph 41 of that decision, which is as follows:

"In summary, therefore, I have concluded that *Govaerts* can and should apply when considering the effect, under Regulation 4 of TUPE, of a relevant transfer that is a service provision change in terms of Regulation 3(1)(b). 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(s) 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".

13. Mr McGuire then referenced the case /SS *Facility Services NV v Govaerts* 2020 ICR 1115 (hereafter *Govaerts),* and specifically paragraph 38, which states as follows:

"In light of all the foregoing, the answer to the question referred is that, where a transfer of undertaking involves a number of transferees, Article 391 of Directive 2001/23 must be interpreted as meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that directive, which it is for the referring court to determine. If such a division were impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, under Article 4 of that directive, even if that termination were to be initiated by the worker".

14. Mr McGuire submitted that the facts in this case are similar to that case post transfer, where the contract was divided into three, with two to one company and another.

15. With regard to the judgment of the Employment Tribunal, Mr McGuire drew attention to certain findings in fact, namely that the claimants had prior to the transfer worked in two teams, which were not allocated to a geographical area

but worked across the whole of NLC area (paragraphs 22 and 23). He pointed out in regard to the tendering process that post transfer there were two lots, but the same transferee would not be awarded both. The contract was therefore designed to go to two transferees.

16. Mr McGuire submitted that based on the facts found by the Tribunal and a proper application of *Govaerts* to those facts, that the Tribunal should find that:

i) The contracts of employment of each of the claimants transferred to McTear [R2] on a 50% basis and to Mitie [R3] on a 50% basis, failing which

ii) The previous findings made by the Tribunal in relation to which employees transferred to McTear and Mitie should continue to apply.

17. He confirmed that any decision which would be made would be based on these findings in fact. He argued that post transfer it was not realistic to then divide the contract so that one employee was transferred to a transferee in the North and another in the South. He submits that does not reflect the factual situation pre transfer. He submitted that an important point about *Govaerts* is that if two or more organisations come in and perform the contract, the employee can be seen as an employee of both if that will more realistically reflect the situation. Here in practical terms the employees worked on only one contract before so * that there was pre-transfer homogeneity and they were not split across relevant teams, with any individual employee worked across the whole contract. The attempts by R1 to identify which employee worked in which area was only done for the purposes of the transfer; but both before and after the transfer they worked across the contract. There was limited evidence heard by the Tribunal about what happened after the transfer and what number were not taken on, so that the correct approach was to look at the situation before and then what was intended. The pragmatic approach which was taken by R1 was not needed post *Govaerts.* He pointed out that Mr Lennon and Mr Daly had certainly worked across the whole contract and the other employees were in the same position, such that it cannot be said that they transferred to one or the other.

18. He submitted that there will be no practical difficulties post transfer if the employee is deemed to be split between the two. In any event he submitted how it works in practice is not relevant in the present case because the focus is only on apportionment of liability which is 50% split. This submission was based on Mr McGuire's understanding was that this is not a situation where any of the claimants were employed either by R2 or R3 immediately following the transfer. He submitted that liability can be based on the schedules of loss provided and liability split 50% each to R2 and R3; it is just a matter of who pays the compensation so it is an arithmetical calculation he said. Even if they still continued to work for either, in regard to the claims, it is just a question of deciding how much compensation is due.

19. Mr McGuire submitted that this was a "classic" case where *Govaerts* would apply, where no additional work was added in post transfer, because the work was simply divided in two. The benefit of the *Govaerts* approach is that R1 would not have had to work out artificially who worked on lot 1 or lot 2 the most; if two transferees come in then they must accept equal liability.

Submissions for the first 21 claimants

20. Mr McGlaughlin submitted that the status quo should be pertain; and thus that paragraphs 2 and 4 of the Tribunal's judgment of 14 March 2019 should be reinstated. He advised that he was content with the reasoning of the ET on how the transfer was determined and that no evidence had been led other than submissions to change the position on that.

21. He referenced the note following the case management hearing in 14 June 2021 , that the expectation was that if matters could not be agreed between R2 and R3 then they should advise the Tribunal what further evidence would require to be heard. There has been no further evidence to support the submissions of R3 which could have answered the question how in practice the contracts should be split There is no evidence before the Tribunal to determine how practically that would work. There has to be evidence for the Tribunal to deal with the issues raised by the EAT in paragraph 41 but there is no challenge to the Tribunal's finding in facts.

22. He did however suggest that if all 21 claimants that he represents had their schedule of loss split equally between R2 and R3 there is no prejudice to them; assuming they received 50% compensation from R2 and 50% from R3.

Submissions for claimant 23

23. Mr Lawson in respect of his client agreed with Mr McGuire that the rights and obligations should be split equally between R2 and R3. In support of that submission, he referenced the following paragraphs of the ET decision of 14 March 2019, including:

24. Paragraph 27: "Ryan Daly, who was the operations manager, worked 99.9% of his time on this contract. He also worked on a contract for Clackmannanshire Council, attending no more than two meetings per year to stand in for the operations manager while he was on leave."

25. Paragraph 50: "Although Ryan Daly and Owen Lennon worked across the whole of the kitchen installation contract for NLC, the first respondent, on the bais of their understanding that TUPE would apply, and that they were both "in scope to transfer", "took a pragmatic approach". Since the supervisor of Team 2 (Gordon Cuthbert) had secured an alternative role in the employment of the first respondent, that pragmatic approach meant that they slotted Mr Daly into the group allocated to the second respondent. The first respondent took the view that Mr Lennon should therefore be allocated to the third respondent, so that there was a "broadly equivalent" number of employees going to each of the transferees.".

26. Paragraph 221: "In *Kimberley* then the division of activities involved a quantitative split. Unlike that case however, there was no lack of clarity over the proportions being undertaken by the transferees in this case. Here the facts are that the split was 50:50, given that the new contracts were to install 420 kitchens each. That points to 50% of those employed on the contract going to the second respondent and 50% going to the third."

27. Mr Lawson submitted, by reference to the *Govaerts* judgment, at para 38, the assessment is to divide the contract in proportion to the task performed by the worker concerned. Here his client worked essentially 100% for the transferor

and therefore should be found to be entitled to compensation of 50% from R2 and 50% from R3.

28. With regard to practical considerations, he stated that employees and employers require to identify pre-transfer what the split will be because they cannot rely on hindsight. All an employer can do is to look at the position pre-transfer and intention post transfer.

29. Mr Lawson pointed out that the ECJ in *Govaerts* highlighted three caveats, which require to be taken into account if contracts of employment were to be split, namely: (1) provided a division of the contract as a result of the transfer is possible (2) that it does not cause a worsening of working conditions; (3) nor adversely affect the rights of that worker.

30. Mr Lawson submitted by reference to (1) that there is no indication that division of the contract would not be possible. He pointed out by reference to paragraph 41 of the EAT's judgment, that it is envisaged that that there might be a split on a geographical basis.

31. Mr Lawson submitted that it would be for R2 or R3 to put evidence before the Tribunal to support (2) or (3), and further there cannot be a finding of no transfer to either. If transferees seek to argue there is a reduction in working conditions, it is for them to make the argument and there is no such evidence here.

32. In *Govaerts,* the ECJ states that an employee can still claim that any dismissal is unfair for an ETC reason. While that is not argued in this case, any party could seek to amend their pleadings to add such an allegation.

33. In this case, his client worked 100% on the whole contract as a supervisor and he could therefore have performed his duties separately for each transferee. He did not however secure employment with either transferee so any compensation would be split between R2 and R3.

34. He concluded by submitting that the rights and obligations of and to his client should be divided in equal shares between R2 and R3.

Submissions for claimant 22

35. Mrs Lennon adopted the submissions of Mr Lawson vis-a-vis her husband who was in a similar situation to Mr Daly.

Submissions for the first respondent

36. Ms Wright stated that her position on this point is neutral, the claimants having transferred to one or other but not to R1, and nothing that is said would mean that there was no transfer. The decision her clients made was a pragmatic one which may be reconsidered in the light of *Govaerts* but she is of the view that *Govaerts* is complicated in its application and in regard to how two part-time contracts might work. Here R1 had no visibility regarding what happened following the transfer.

Deliberations and decision

37. The EAT has referred this case back to this Tribunal to consider whether the decision in *Govaerts* subsequent to this Tribunal's original decision of 14 March 2019 means that decision should be remade in certain respects.

38. At paragraph 43, the EAT stated that, having found *Govaerts* to be relevant in principle, "given the fact sensitive nature of the inquiry that is necessary under *Govaerts,* a remit of the case is inevitable... it will be necessary for [the same] Tribunal - having heard such further evidence and submissions as are thought necessary - to consider the application of *Govaerts* to each of the claimants individually".

39. Crucially in my opinion, I did not hear any further evidence. No party chose to lead any further evidence regarding the circumstances of the individual claimants. Mr McGuire was clear that R3 took no issue with the facts as found. He considered that a decision could be made on the basis of the facts as found, and he referenced the relevant facts to be relied on, as did Mr Lawson, who supported his submissions.

40. Mr McGlaughlin took another view. He submitted that without further evidence, the original decision of the ET should stand, noting that the Tribunal had invited further evidence but no further witnesses had been called.

41. Mr McGuire in response submitted that there was very little other useful evidence to be advanced. He submitted that even had *Govaerts* been decided by the time of the hearing, the fundamental questions remain the same, namely was there a SPC, were they assigned and who did they transfer to. He submitted that the judgment deals with all that.

42. This seems contrary to Lord Fairley's pronouncement that *Govaerts* necessitated a fact sensitive enquiry. Further, I did not agree with Mr McGuire that pre and post *Govaerts* the fundamental questions are the same. While they might be in some cases, this was not one of them. In my view, a additional matter which required to be considered, and which required evidence to found on, was whether the claimant's contracts could be split, that is whether the rights and obligations under them could and should properly be split between two transferees. It is a different matter to say whether the contracts between the R2 and R3 vis-a-vis NLC could be divided (which as Mr McGuire pointed out was the intention, although that was when the law did not permit contracts of employments to be split). It is yet a different matter to say whether or not the work which was being undertaken by the claimants could be split, and the question of whether the contracts of employment of these claimants can be split between two transferees.

43. I considered that I needed evidence to allow me to determine that question and I heard no further evidence to support such a submission, the evidence heard and findings in fact made having supported the decision which was made on the facts found.

44. I noted that parties did not appear to accept that the practical consequences of any alternative split in liability were relevant Mr McGuire was labouring under the assumption that none of the claimants actually went to work for either of the respondents.

45. I queried that understanding with Mr McGIaughlin. Mr McGIaughlin seemed to agree that the practical consequences were not relevant but confirmed that some had been taken on what he called new terms and conditions.

46. However, unless I am misunderstanding the consequences of a decision that there has been a service provision chance such that there is a relevant transfer, it is my understanding then that the contracts of employment of the claimants would not terminate but would transfer to the relevant transferee. The rights, powers duties and liabilities would transfer from the transferor to one or other (or now potentially both) transferees. This is the import of regulation 4 of the TUPE Regulations.

47. I noted in particular from the findings in fact at paragraph 63 of the decision of 14 March 2019 that one of the claimants (John Craig) actually commenced work with the second respondent on 15 August 2017 which was the date of the transfer, and that a number of others followed. I understood then that the employment of several of the claimants would have transferred to the relevant transferee.

48. Although on reconsideration the findings in fact were adjusted to indicate that "the second respondent took on the following claimants on new terms and conditions (Mr McTear having understood that was with their continuity of service maintained)'' the outcome of the decision was that the rights and obligations under their contracts of employment *transferred* from the date of transfer.

49. As an aside, it seems to me to be relevant to point out that notwithstanding that adjustment to the findings in fact that was the unchallenged evidence of Mr McTear from his witness statement. That represented Mr McTear's erroneous understanding of the circumstances which did not represent the correct legal position, it having subsequently been decided by this Tribunal, and that not having been challenged on appeal, that there was a relevant transfer between R1 and R2 or R3.

50. Admittedly a number of the claimants were not taken on by either R2 or R3, but I could not say that the practical consequences of any decision that I might make was entirely irrelevant, not least given the *Govaerts* caveats, discussed further below. It seemed to me that a decision that there was a service provision change such that those claimants' contracts transferred to the

relevant respondents would have significant practical implications for them, not least in regard to continuity of employment.

51. Mr McGuire urged "caution in looking for difficulties which are not there", because, in his view, it was a simple case of dividing liability but that even if they were taken on by one of the respondents, here the contracts of employment were amendable to being split on a 50/50 basis.

52. I heard submissions about practical consequences and I heard submissions based on the facts found about whether the contract with NLC could be split or whether "work" could be split (or liability for the consequences of dismissal following a relevant transfer) but I did not hear any evidence about whether the rights and obligations, that is whether the contracts of employment, could be split.

53. Mr McGuire and Mr Lawson reference at paragraph 221 the conclusion of the Tribunal that the contract was split 50/50. That however is the ratio of the split of the contracts between the two respondents and indicates that each respondent would fulfil 50% of the contract which had previously been one contract with R1.

54. I did not understand Mr McGuire's argument that this all the more supported his position. However, if I understood him correctly he suggested that if

- employee x is working on an address in lot one then 50% of his time would be with that transferee and if an address in lot two then 50% of his time with that transferee; this is because post transfer each were allocated an amount approximating to 50%. That did not seem to be to be at all straightforward when it came to an individual's employment rights with each transferee.

55. I could only conclude when I considered the practical implications that Mr McGuire had not thought that through because of his erroneous understanding that none of the claimants had gone on to work for the transferee. I did not understand what that meant for the individual claimant but in any event if it were possible to split their time between the two respondents from a work point of view - say one week or one month or whatever on lot 1 and then one week or one month or whatever on lot 2 - I

did not see how this necessarily meant that their rights and obligations could easily be split to deal with that. To take one simply example, how would an individual's holiday entitlement be dealt with? So even if it was possible to split the work, I did not accept that it was possible to split the contracts.

56. Even if I am wrong about that, I heard no evidence to address the second and third of the so-called *Govaerts* caveats. I did not agree with Mr Lawson that it was for the transferees to adduce evidence in that regard.

57. Without evidence to suggest otherwise, it seemed to me that it was inevitable that claimants whose contracts of employment were split could find themselves with worse conditions and with implications for the safeguarding of their rights. Claimants could perhaps work part-time for each of the respondents, presumably 50% each, but, how could it be ensured that they worked 50% for lot one and 50% for lot 2; and over what period would that happen; how would rights to holiday and sick pay be managed. These are just some of the practical implications which I considered were relevant to the legal test about which I heard no evidence.

58. I did not accept Mr McGuire's submission that this was a "classic" *Govaerts* scenario. It appeared that the majority of the claimants to be in the position of the cleaning/maintenance operatives whom I assumed that Ms Govaerts project managed and whose contracts as I understand it were not split.

59. I do accept that the position of Mr Lennon and Mr Daly was perhaps closer to the facts of the claimant in *Govaerts,* and it might have been possible to split their contracts, given they were peripatetic so split their time between the two respondents. However as I did not hear any further evidence to allow me to make any additional findings in fact, I found that I did not have any findings to support a conclusion that their rights and obligations under their contracts of employments could or should be split equally between the two respondents, even if that were simply to result in a split of compensation.

60. Thus I did not consider that I had any evidence to address the Govaerts test. Further, I did not hear any evidence which could allow me to determine the provisos which Lord Fairley had enumerated, specifically whether the "work

attributable to each contract is clearly separate from the work on the others and identifiable as such".

61. In the circumstances therefore, notwithstanding that I accept that in principle the contracts of employment could be split, I came to the view that there were no findings to support a conclusion in this case. I conclude therefore, based on the findings in fact made, which were not disturbed by the EAT, that paragraphs 2 and 4 of the judgment of 14 March 2019 should be reinstated, and the various claimants' contracts of employments transferred as set out in the appendix to that judgment, attached also to this for ease of reference.

62. I considered that to do otherwise without hearing any further evidence would be arbitrary, not least because the decision that the claimants should be allocated as set out in the appendices was made after long and careful consideration of the facts found in this case.

Protective award claim

63. With regard to the protective award claims, which remain live for determination, Ms Wright suggested that there may require to be a full evidential hearing relating to the issues which the protective award claim raises. She stated that she may seek further particulars of the basis of the claimant's claims and that she would consult her clients in that regard and what witnesses she might call.

64. Since the outcome may well be joint and several liability between transferor and transferee and therefore that the outcome of this hearing would not impact on the scope to issues to be determined or be contingent on the decision on this matter.

65. All parties agreed that the present issue for determination is separate from the question of protected award. Mr Lawson confirmed that for regulation 15(9) liability is joint and several; that any award is punitive, and it would be the same award for all claimants; which would be split 50/50 either way.

66. Mr McGuire added that a complication might be that there would require to be a remedy hearing on the unfair dismissal claims and therefore that it would be

more sensible to know the outcome of those before any protective award hearing.

67. Given that and the fact parties were not is a position of proposed dates for any subsequent remedy or final hearing (on the protective award) I decided that, in order to ensure progress and to avoid a repeat of the last delay in listing, that a case management preliminary hearing should take place by CVP on 17 June 2022 at 10 am to list this case for a remedy and/or final hearing on protective award and make any other relevant case management orders.

Employment Judge: Muriel Robison
Date of Judgment: 26 May 2022
Entered in register: 26 May 2022
and copied to parties

Appendix A - Transfer to second respondent

1. Ryan Daly
2. William Ferris
3. Steven Young
4. John Hannah
5. John Craig
6. Hugh Lees
7. Gregor Abbott
8. Derek Tinto
9. Christopher McDougall
10. Alan Beattie

Appendix B - Transfer to third respondent

1. Owen Lennon
2. Shellie O'Connor
3. Paul Ryan
4. Norman Kellett
5. Michael Murphy
6. Liam Wilson
7. Kenneth Thomson
8. John Sinclair
9. John Lees
10. John Bell

11. Colin Stewart

12. Charles Thomson

13. Ben Bennett