Appeal No. UKEATS/0023/19/SS
UKEATS/0030/19/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 5th February 2021
Judgment handed down on
25th February 2021

Before

THE HONOURABLE LORD FAIRLEY

(SITTING ALONE)

UKEATS/0023/19/SS

MCTEAR CONTRACTS LIMITED — APPELLANT

(1) MR B BENNETT & 20 OTHERS
(2) MITIE PROPERTY SERVICES UK LIMITED
(3) AMEY SERVICES LIMITED — RESPONDENTS

UKEATS/0030/19/SS

MITIE PROPERTY SERVICES UK LIMITED — APPELLANT

(1) MR B BENNETT & 20 OTHERS
(2) MR O LENNON
(3) MCTEAR CONTRACTS LIMITED
(4) AMEY SERVICES LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

UKEATS/0023/19/SS

For the Appellant	MR N MACDOUGALL (Advocate) Instructed by: rradar 34 St Enoch Square Glasgow G1 4DF
For the First Respondents (Mr Bennett and 20 others)	MR B MCLAUGHLIN (Solicitor) Unionline Scotland Solicitors 4th Floor Fountain House 1-3 Woodside Crescent Glasgow G3 7UJ
For the Second Respondent (Mitie Property Services UK Limited)	MR D DYAL (of Counsel) Instructed by: Pinsent Masons LLP 1 Earl Grey Street Edinburgh EH3 9AQ
For the Third Respondent (Amey Services Limited)	MS J WRIGHT Shoosmiths LLP 1 West Regent Street Glasgow G2 1RW

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For the Appellant	MR D DYAL (of Counsel) Instructed by: Pinsent Masons LLP 1 Earl Grey Street Edinburgh EH3 9AQ
For the First Respondents (Mr Bennett and 20 others)	MR B MCLAUGHLIN (Solicitor) Unionline Scotland Solicitors 4th Floor Fountain House 1-3 Woodside Crescent Glasgow G3 7UJ
For the Second Respondent (Mr O Lennon)	MRS N LENNON
For the Third Respondent (McTear Contracts Limited)	MR N MACDOUGALL (Advocate) Instructed by: rradar 34 St Enoch Square Glasgow G1 4DF
For the Fourth Respondent (Amey Services Limited)	MS J WRIGHT Shoosmiths LLP 1 West Regent Street Glasgow G2 1RW

SUMMARY

TOPIC NUMBER(S):

3 – TRANSFER OF UNDERTAKINGS; service provision change; multiple transferees

A client local authority ("N") re-tendered the work for replacement of kitchens within its social housing stock. All of the work under the previous contract had been carried out by a single contractor ("A"). A group of A's employees had worked exclusively on the contract between N and A. Latterly those employees worked in two "teams", each of which was capable of working independently of the other. When the work was re-tendered, it was split by N on geographical lines into two separate contracts which were awarded to two new contractors.

The Tribunal's decision that there had been a service provision change under Regulation 3 of **TUPE** was not challenged on appeal. The Appellants submitted, however, that the Employment Tribunal had erred in its decision as to the allocation of A's employees between the two incoming contractors. It was submitted that the Tribunal had failed to consider the respective positions of the employees individually and had failed to consider that some or all of the employees may not have transferred at at all. It was further submitted that the Tribunal had placed undue weight on spreadsheets prepared by A which had not been spoken to in evidence by their author.

Between the date of the Tribubal's Judgment and the hearing of the appeal, the Court of Justice of the European Union issued its decision in **Iss Facility Services NV v. Govaerts** [2020] ICR 1115. A further ground of appeal was added by amendment based upon the **Govaerts** decision.

Held:
Whilst the Tribunal had correctly regarded itself as being bound at the time of its Judgment by **Kimberley Group Housing v. Hambley** [2008] IRLR 682 and **Duncan Web (Offset) Maidstone Limited v. Cooper** [1995] IRLR 633, those cases must now be read subject to **Govaerts**. The appeal was accordingly allowed to the extent of setting aside paragraphs 2, 4 and 5 of the Tribunal's Judgment and remitting the case to the same Tribunal to consider the application of the decision in **Govaerts** based upon such further evidence and submissions as may be necessary.

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A

THE HONOURABLE LORD FAIRLEY

Introduction

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1. McTear Contracts Limited ("McTear") and Mitie Property Services UK Limited ("Mitie") have each appealed against a Judgment of an Employment Tribunal sitting at Glasgow (Employment Judge Muriel Robison) dated 14 March 2019. In the proceedings before the Employment Tribunal, McTear and Mitie were respectively the second and third Respondents. I

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will refer to McTear and Mitie together as "the Appellants". The principal Respondent to the appeal is Amey Services Limited ("Amey"). Amey was the first Respondent in the proceedings before the Tribunal. All of the 23 Claimants before the Tribunal were represented at the appeal.

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2. The appeal was heard at a sitting of the Employment Appeal Tribunal in Edinburgh on 5 February 2021. Due to Covid restrictions, the hearing was conducted by video conference. Mitie was represented by Mr Daniel Dyal of the English Bar. McTear was represented by Mr Neil

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MacDougall of the Scottish Bar. Amey was represented by Ms Jennifer Wright, Solicitor. Twenty-one of the Claimants were represented by Mr Brian McLaughlin, Solicitor. Mr Daly – who had previously indicated in writing that he did not oppose the appeals – was represented by

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Mr Lawson, solicitor. In the appeal by Mitie, Mr Owen Lennon was represented by his wife, Mrs Nora Lennon.

Facts

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3. Between 2012 and 2017 Amey undertook the replacement of kitchens within the social housing stock of North Lanarkshire Council ("NLC"). It did so pursuant to a contract with NLC. Under that contract, NLC issued orders to Amey identifying the addresses of properties where

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kitchens were to be replaced. Amey would thereafter carry out the necessary works. During the contract, Amey would install between 18 and 25 kitchens per week across the whole of the NLC

local authority area. All of the Claimants apart from Mr Daly worked solely on the work generated by the kitchen contract between NLC and Amey. Mr Daly worked for 99.9% of his time on the NLC contract and for the remainder on a contract with another local authority. From around March 2017, the work under the Amey / NLC contract was divided between two "teams" of Amey employees. Each team contained the full range of trades (plumber, electrician, plasterer, tiler, joiner etc) necessary to fit kitchens. The teams were thus capable of working independently and generally did so. On infrequent occasions, members of one team would assist the other to cover annual leave, sick leave and the like. The teams were not allocated to a geographical area within NLC's boundary and both worked across the whole of the NLC area, subject to considerations of geographical convenience. Latterly, each of the Claimants, with the exception of Mr Daly (the operations manager) and Mr Lennon (the project surveyor) was allocated to one or other team.

4. The contract between Amey and NLC was due to come to an end in 2015, but was extended on several occasions. As a result, it finally came to an end in July 2017.

5. In February 2017, NLC re-tendered the kitchen installation contract for its local authority area. It decided to split the contract into two "Lots". The Lots were defined by geographical area. Lot 1 was for properties in the north of the NLC local authority area. Lot 2 was for properties in the south. The work involved in each of the Lots remained the same, namely the replacement of kitchens within the NLC's social housing stock. A policy decision was taken by NLC that both contracts should not be awarded to the same contractor. The Lot 1 (north) contract was to be awarded to the contractor with the lowest tender, and the Lot 2 (south) contract was to be awarded to the contractor with the second lowest tender.

6. On 20 July 2017, NLC awarded the contracts for Lot 1 to McTear. On the same day, NLC awarded the contract for Lot 2 to Mitie. On 21 July 2017, Amey was advised that the new

contracts had been awarded to McTear and Mitie respectively. On the same day, Amey gave notices of redundancy to the Claimants. Amey subsequently withdrew those notices on 9 August 2017, having apparently concluded by that time that the **Transfer of Undertakings (Protection of Employment) Regulations, 2006** (**"TUPE"**) would apply.

7. In an attempt to identify which of its employees should transfer to McTear and which to Mitie, Amey undertook an analysis of the geographical areas in which each team had worked during the preceding 12 months. It then compared the results of that analysis to the geographical areas which formed the basis of the new contracts. Specifically, Amey's HR team produced a spreadsheet identifying the locations at which work had been undertaken within the last order placed by NLC during the final period of the Amey contract. The spreadsheet sought to identify the total number of days during which each of the two Amey teams had worked within each of the areas corresponding to each of the two Lots under the new contracts. Taking that broad approach, Amey concluded that team 1 (supervised by Mr Charles Thomson) broadly corresponded to Lot 1 (north) and that team 2 (formerly supervised by Mr Gordon Cuthbert) corresponded to Lot 2 (south). Mr Daly and Mr Lennon had not previously been allocated by Amey to a "team" In relation to Mr Daly and Mr Lennon, Amey "took a pragmatic approach". Because the supervisor of team 2, Mr Cuthbert, had secured an alternative role within Amey, Mr Daley was allocated to team 2, and Mr Lennon was allocated to team 1.

8. Following the awarding of the new contracts to McTear and Mitie respectively, NLC decided that it would be more appropriate for the properties in each of the two Lots to be switched such that McTear would work on the properties in the south and Mitie on properties in the north. The reason for this change seems to have been an understanding that it would lead to the work being undertaken being closer, in each case, to the head office of the company undertaking it. Neither McTear nor Mitie raised any objection to the switch of properties. Confusingly, however, the

A Lots continued to be referred to as Lot 1 (McTear) and Lot 2 (Mitie) notwithstanding the fact that each Lot now contained completely different properties from those described in the tender documents.

B 9. Although McTear and Mitie each took on certain former employees of Amey on new terms and conditions, neither Appellant took on the contracts of employment of any of the Claimants. For their part, Amey continued to maintain that the contracts of the Claimants had transferred either to McTear or to Mitie.

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Procedural history

10. In October 2017, Mr Lennon lodged a claim form (ET1) with the Employment Tribunal directed only against Amey and Mitie in which he sought a redundancy payment and arrears of pay.

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11. In December 2017, Mr Daly lodged an ET1 directed against Amey, McTear and Mitie claiming unfair dismissal, redundancy, notice pay, holiday pay and arrears of pay.

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12. In January 2018, the remaining 21 Claimants (being those represented by Mr McLaughlin) lodged claims against Amey, McTear, Mitie and NLC for unfair dismissal, redundancy pay, notice pay, holiday pay, arrears of pay and protective awards. The claims directed against NLC were later dismissed on 28 June 2018 following their withdrawal.

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13. Amey, McTear and Mitie have each resisted all of the claims brought against them.

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14. Following a case management hearing on 14 August 2018, it was agreed that a preliminary hearing should be fixed. The issues to be considered at that hearing (as recorded by the Tribunal at paragraph 6 of its Reasons) were as follows :-

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> **"The key issue is whether the award of North Lanarkshire Council's contract for the installation and maintenance of kitchens in its social housing stock to Mitie and McTear constituted a TUPE transfer pursuant to the Transfer of Undertakings (Protection of Employment) Regulations, 2006. Specifically:**
>
> **i. Was there a relevant transfer pursuant to TUPE from Amey to either Mitie and / or McTear?**
>
> **ii. If there was, when did that transfer take place?**
>
> **iii. If there was, were the claimants part of the organised grouping of employees caught by the transfer?**
>
> **iv. If so, did each claimant transfer either to Mitie or McTear?**

15. The Employment Tribunal heard evidence over three days on 11, 12 and 13 February 2019, and submissions on 15 February 2019. On 14 March 2019, the Tribunal issued a Judgment in the following terms:

> **"The Judgment of the Employment Tribunal is that:**
>
> **1. On 14 August 2017 there was a service provision change between the first and third respondents amounting to a relevant transfer in terms of Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations, 2006.**
>
> **2. With effect from 14 August 2017, the employment contracts of each of the claimants listed at appendix B transferred to the third respondent.**
>
> **3. On 15 August 2017 there was a service provision change between the first and second respondents amounting to a relevant transfer in terms of Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations, 2006.**
>
> **4. With effect from 14 August 2017, the employment contracts of each of the claimants listed at appendix B transferred to the second respondent.**
>
> **5. The claims against the first respondent are dismissed [except for any claims under Regulations 13, 14 and / or 15 of the 2006 Regulations].**

16. The words shown in square brackets in paragraph 5 of the Judgment were added following a reconsideration hearing on 9 August 2019. The Claimants listed in appendix B were those who

had previously formed "team 1" with Amey, plus Mr Lennon. The Claimants listed in Appendix A were those who had previously formed "team 2" with Amey, plus Mr Daly.

The Appeals

17. Notices of Appeal were received from both Appellants on 26 April 2019. The Notice for Mitie contained five Grounds of Appeal. The Notice for McTear contained ten Grounds. Following consideration under Rule 3, all Grounds for both Appellant were allowed to proceed to a full hearing.

18. Ground 1 in each of the appeals was superseded by the Employment Tribunal's reconsideration Judgment of 9 August 2019. The remaining Grounds for Mitie (Grounds 2-5) were directed only at paragraphs 2 and 5 of the Tribunal's Judgment. The Grounds for McTear were directed at paragraphs 3, 4 and 5 of the Tribunal's Judgment. Ultimately, however, Grounds 2 and 3 for McTear, each of which challenged the Tribunal's conclusion on the existence of an "organised grouping" immediately before the service provision change and bore upon paragraph 3 of the Tribunal's Judgment were not insisted upon by Mr MacDougall in his oral submissions.

19. In March 2020, the Court of Justice of the European Union issued its Judgment in **Iss Facility Services NV v. Govaerts** [2020] ICR 1115. Shortly before the full hearing in this appeal, Mitie sought leave to add an additional Ground (called Ground 2A) based upon the **Govaerts** decision. In the absence of opposition from any of the other parties to the appeal, I allowed that amendment.

Submissions - Mitie

20. Mr Dyal submitted (Mitie, Ground 2) that, having concluded that there was a relevant transfer under Regulation 3(1)(b)(ii), the Tribunal had then erred in its consideration of the separate and

conceptually distinct issue raised by Regulation 4 by assuming that each of the Claimants must have transferred to one or other of McTear or Mitie. The Tribunal had not considered the possibility that some or all of the Claimants may have transferred to neither. It had not considered the position of each Claimant individually. That had led the Tribunal to accept Amey's position that the allocation of Mr Daly and Mr Lennon could legitimately be the result of Amey's sole choice and, in the case of the remaining Claimants, by a combination of Amey's choice and what the Tribunal itself described (paragraph 230) as the "artificial construct" of the spreadsheets in an attempt to allocate the Claimants between the two transferees. The Tribunal had purported to apply **Kimberley Group Housing v. Hambley** [2008] IRLR 682, but neither **Kimberley** nor any of the other authorities referred to by the Tribunal provided justification for the approach that it had taken. The Tribunal had failed properly to apply **Duncan Web (Offset) Maidstone Limited v. Cooper** [1995] IRLR 633. In any event, the spreadsheets did not justify the allocation that Amey had made. The division of time between properties in the north and those in the south for employees working in team 1 was, for some periods of time, marginal.

21. Mr Dyal further submitted (Grounds 3 and 4) that the Tribunal should have attached no weight at all to the spreadsheets. The only witness who had given evidence about those was Amey's operations manager, Mr Martin White, but he was not the author of the spreadsheets and had no direct knowledge of their accuracy. His evidence about the spreadsheets was hearsay. The author(s) had not been called to give evidence, and there had been no explanation for that. Both Appellants had previously asked Amey to provide the underlying evidence which had been used to create the spreadsheets, but this had not been forthcoming.

22. Mitie's Ground of Appeal 5 states that in considering whether the Claimants' contracts had transferred to McTear or Mitie the Tribunal had mistakenly failed to realise that the Claimants sought only compensation and not re-instatement of re-engagement. The relevance of this Ground

of Appeal to any of the issues before the Tribunal was not particularly clear. In any event, Mr Dyal conceded that at section 9.1 of their forms ET1 the Claimants who claimed unfair dismissal had ticked the box seeking reinstatement. He noted also, however, that there might be a tension between, on the one hand, the Tribunal's finding that the Claimants had not been dismissed and its finding on the other hand that notice of redundancy had been served on them by Amey and subsequently unilaterally withdrawn. Again, however the relevance of that point to the particular issues that the Tribunal required to determine at the preliminary hearing was not clear. Wisely, in my view, Mr Dyal did not press Ground 5 with any enthusiasm.

23. In relation to the new Ground 2A added by amendment, Mr Dyal submitted that the Tribunal had regarded itself as being bound by **Kimberley** which had decided that, where an organised grouping splits into two parts each of which is subject to a relevant transfer to a different transferee, liability for individual employees cannot be divided between the two transferees. The Tribunal had relied upon **Kimberley** as authority for the proposition that in such a situation sole liability for each affected employee could transfer only to one or other of the transferees. In light of **Iss Facility Services NV v. Govaerts** that proposition must now be seen to be open to doubt, at least in the case of **TUPE** Regulation 3(1)(a) business transfers. Specifically, in **Govaerts**, the ECJ had held that where a transfer of an undertaking involved a number of transferees, Article 3(1) of the **Acquired Rights Directive** (2001/23) ("**ARD**") meant that the rights and obligations arising from a contract of employment were transferred to each of the transferees in proportion to the tasks performed by the worker, provided that the division of the contract of employment as a result of the transfer was possible and neither caused a worsening of working conditions nor adversely affected the safeguarding of the rights of employees guaranteed by the Directive. If such a division was impossible to carry out or would adversely affect the rights of the employee, the transferees would be regarded as being responsible for any consequent termination of the

employment relationship, under article 4 of the Directive, even if that termination was initiated by the employee.

24. Mr Dyal submitted that **Kimberley** and **Govaerts** were in conflict. He acknowledged that, as **Govaerts** was a decision on the **ARD**, there is no obligation under retained EU law to apply to the purely domestic provisions of **TUPE** Regulation 3(1)(b) which applies to service provision changes. He nevertheless submitted that there were four good reasons why **Govaerts** should be so applied. First, Regulations 3 and 4 of **TUPE** operate as the backbone of a single statutory scheme. Regulation 4 does not distinguish to any material extent between business transfers and service provision changes. It would be odd if Regulation 4 required to be interpreted differently depending on which type of transfer was in issue. Secondly, many relevant transfers will meet the criteria for being both a business transfer and a service provision change. Again, the statutory scheme would lose coherence if different remedies were applicable to each type of transfer. Thirdly, the terms of Regulation 3(1)(b) on service provision changes were inserted pursuant to powers under section 38 of the Employment Relations Act, 1999. Section 38(1) empowers the Secretary of State to make "TUPE-like" provision in relation to the treatment of employees. That is defined in section 38(3) as meaning "provision which is the the same or similar to that made by the main part of the TUPE Regulations" – being that part of the Regulations which implements the **ARD**. Fourthly, the Employment Appeal Tribunal in **Kimberley** had seen no principled reason for taking a different approach to service provision changes and business transfers respectively (see paragraph 48 of **Kimberley** as endorsed in **Hunter v. McCarrick** [2013] ICR 235 at paragraph 22).

25. Mr Dyal accordingly submitted that whilst the Tribunal had been bound by **Kimberley** at the time when it issued its Judgment in 2019, its decision to exclude any possibility of splitting liability between McTear and Amey should be seen, in hindsight, as an error of law.

A 26. Mr Dyal submitted that it was not clear what would have happened had the Tribunal applied the approach suggested by **Govaerts** in preference to that in **Kimberley**. Accordingly, he submitted that the appeal should be allowed and the matter remitted. Given the passage of time since the preliminary hearing, and the issue of "second bite" described in **Sinclair Roche & Temperley v. Heard** [2004] IRLR 763, he submitted that such remit should be to a different Tribunal.

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C **Submissions - McTear**

27. Mr MacDougall adopted the submissions made by Mr Dyal and indicated that he did not wish to add anything. In particular, and as I have already noted above, Mr MacDougall did not seek to advance Grounds 2 and 3 of the McTear Grounds of Appeal challenging the Tribunal's conclusion that the Claimants all formed part of an "organised grouping of employees" in terms of Regulation 3(3)(a)(i) immediately prior to the transfer. Standing the findings in fact made by the Tribunal about the way in which the work under the NLC contract was carried out by Amey, that seemed to me to be an entirely appropriate position for Mr MacDougall to take.

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Submissions - Amey

F 28. Ms Wright produced and distributed a speaking note which formed the basis of her submissions.

29. In relation to Ground 2, she submitted that paragraphs 211 – 234 of the Tribunal's Reasons disclosed no error of law in its approach. The Tribunal's consideration of issue iv. had to be set in context. By the time the tribunal came to consider that issue, it had already concluded that the conditions required for a service provision change had been met. That being so, it was the correct approach to look for a way to allocate the Claimants to the new service providers. This was in keeping with the common sense and pragmatic approach urged in **Metropolitan Ltd v.**

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A **Churchill Dulwich Ltd** [2009] ICR 1380 at paragraphs 28 and 30. It was also in keeping with the purposive approach which should be given to **TUPE** (**Kimberley** at paragraph 43; **Govaerts** at paragraph 25) and the focus upon safeguarding the position of the employees. She submitted that, in a case such as this, it would be out of step with the purpose of **TUPE** to find that the conditions for service provision change were met but that none of the claimants could then benefit from the protections which **TUPE** provided in such a situation. If the assignment and allocation of staff had proved unduly difficult, there would not have been a finding of a service provision charge in the first place.

30. In relation to Grounds 3 and 4, Ms Wright submitted that it was a proper approach for Amey to have taken simply to divide its organised grouping of employees into two equal groups and to allocate one group to each incoming contractor. If that was correct, the use of the geographical spreadsheets was of little practical significance to the outcome. In any event, the weight to be attached to the evidence about the spreadsheets was a matter for the Tribunal unless its conclusions were perverse, which was not the case here.

31. Ground 5 related to the issue of remedy, which was not an issue before the Tribunal at the preliminary hearing. In any event, the Claimants had sought reinstatement.

32. On Ground 2A, Ms Wright expressed broad agreement with the propositions advanced by Mr Dyal about the applicability of **Govaerts** to cases involving service provision changes in terms of Regulation 3(1)(b). Notwithstanding the Tribunal's many references to **Kimberley**, she submitted that the pragmatic approach of the Amey – as endorsed by the Tribunal – had been broadly in line with **Govaerts**, albeit that the **Govaerts** Judgment had not been available to the Tribunal.

Submissions - Claimants

33. Mr McLaughlin and Mrs Lennon each indicated that they had nothing further to add to what had been said. Mr McLaughlin expressed broad agreement with the submissions of Ms Wright. As noted above, Mr Daly had previously intimated that he did not oppose the appeals.

Discussion and decision

34. The most important and potentially far-reaching question raised by these appeals is whether the **Govaerts** decision should apply to relevant transfers which are service provision changes in terms of Regulation 3(1)(b) (Mitie's Ground of Appeal 2A). The two main participants in this appeal hearing – Mitie and Amey – both submitted that it should. McTear, by its adoption of Mitie's submissions, also aligned itself with that position. None of the Claimants submitted otherwise. In these circumstances, I was presented with an uncontradicted and apparently unanimous submission that **Govaerts** should apply to Regulation 3(1)(b) transfers.

35. The end of the "transition period" for the United Kingdom's exit from the European Union was 31 December 2020. The **Govaerts** decision was issued prior to that date. To the extent, therefore, that it relates to aspects of the Acquired Rights Directive which are incorporated into domestic legislation by **TUPE**, **Govaerts** is "retained" EU law in terms of section 6 of the **European Union Withdrawal Act, 2018** (as amended). As such, it must still be applied by the Employment Appeal Tribunal to cases involving relevant transfers falling within Regulation 3(1)(a).

36. Whilst there is no requirement to apply Govaerts to the purely domestic provisions of **TUPE** – including Regulation 3(1)(b) which deals with service provision changes – I saw considerable force in Mr Dyal's unchallenged submission that it would be undesirable for there to be a difference in the approach taken to the application of Regulation 4 dependent upon whether the "relevant transfer" in question was a business transfer under Regulation 3(1)(a) or, alternatively, a service provision change under Regulation 3(1)(b). In **Kimberley**, the Employment Appeal Tribunal considered that very question. At paragraph 48, Langstaff J stated:

> **"We see no principled reason for there being any different approach in respect of regulation 3(1)(b) service provision changes. We note …that a transfer may be one or the other or both and it seems to us therefore that, because their effect is looked at in the same light in regulation 4, no difference of approach should be taken as to the test to determine whether an employee's contract is transferred with any particular part of the undertaking or service provision."**

37. In **Kimberley**, the transferor had provided accommodation and related services for asylum seekers pending the determination of their applications for asylum. There were 140 properties in Middlesbrough and 50 properties in Stockton to accommodate a fluctuating number of asylum seekers. In 2006, the transferor lost the contract and Kimberley and another contractor were awarded the right to succeed it. Under the new arrangements, Kimberley was to perform 71 per cent of the service in Middlesbrough and 97 per cent of the service in Stockton. The Employment Tribunal's finding that there was a service provision change was held to be correct. The Employment Appeal Tribunal was critical, however, of the Tribunal's conclusion that there could be a transfer of individual contracts of employment to two employers in proportion to the volume of work taken on by each transferee, stating (at paragraph 36):

> **"We are somewhat surprised that this was put forward for serious consideration let alone adopted by the Employment Tribunal. First, there is no warrant for the approach the Tribunal took of dividing the liabilities under a contract between two transferees on a percentage basis. There is no warrant for this in statute nor in common law. There is no precedent for it. It is truly novel. … [It is] well established that an employee could not be the servant of two masters at the same time in common law. That would be especially true here where the parties were in competition."**

38. A case from Northern Ireland where similar views were expressed was **Hassard v. McGrath** [1996] NI 586. That case was not referred to in oral submissions, but was one of the authorities provided by parties within the joint bundle. In **Hassard**, the Northern Ireland Housing Executive had outsourced the maintenance of its housing stock in two modules to separate contractors, Devlin and McGrath. Mr Hassard had had spent 73.39 per cent of his time in the previous year on the work that was transferred to McGrath, and about 25 per cent of his time on the work transferred to Devlin. The Northern Ireland Court of Appeal rejected the suggestion that there could be a transfer of Mr Hassard's contract to both employers, split pro-rata. The Court noted that if such a proposition was correct:

> **"...it would follow that [the] contract of employment with the [transferor] became two contracts of employment and [Mr. Hassard] was after the transfer employed by both contractors in differing proportions. We do not consider that such a situation is envisaged by the Directive or the Regulations, and it seems to us wholly at odds with the Botzen decision. Indeed, it might give rise to insuperable difficulties. If his employment was split in such a fashion, the new employers could find themselves unable to agree over the allocation of his time between them. One of them might terminate his employment and one would have to ask then whether that employer's proportion of the employee's time automatically passed to the other. These considerations seem to us strongly to support the proposition that an employee is only protected under the Directive or the TUPE Regulations if before the transfer he was assigned solely to one part of the undertaking transferred to a transferee."**

39. **Laugher v. Pointer** (1826) 5 B & C 547; [1824–34] All ER Rep 388 is sometimes cited as an early example of the common law principle that a contract of employment may not be split between two employers. More recent expressions of the principle are seen in **Dacas v. Brook Street Bureau (UK) Ltd** [2004] EWCA Civ 217 and **Cairns v. Visteon UK Ltd** [2007] ICR 616. An exception, apparently on policy grounds, is the allowance of dual vicarious liability in the case of alleged negligence by the employee (see, for example **Viasystems (Tyneside) Ltd v. Thermal Transfer (Northern) Ltd** [2006] ICR 327 and **Hawley v. Luminar Leisure Ltd** [2006] IRLR 817).

40. In both **Cairns v. Visteon UK Ltd** and **Patel v. Specsavers Optical Group Ltd** UKEAT/0286/18, a further important exception to the general principle was noted. Specifically, whilst there is a clear line of authority that a servant cannot have two masters at the same time on the same work, that does not prevent the employee from having different employers on different jobs. The potential difficulties identified in **Hassard** are less obviously applicable to that situation. Clearly much may depend upon the facts of each case, and the very fact of there being two contracts may give rise to administrative issues including *inter alia* about how the employee's time is to be allocated. Again, however, and as was noted in **Cairns**, those issues are not necessarily insurmountable. Much will depend upon the type of work and the way in which it is carried out.

41. 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.

42. The Employment Tribunal, when it issued its Judgment of 14 March 2019, did not have the benefit of the guidance provided by the ECJ in **Govaerts**. Understandably, the Tribunal regarded itself as being bound at that time by **Kimberley** and **Duncan Web (Offset)**. The Tribunal, at paragraph 218 of its Reasons, took the law to be that liability could not be divided between transferees and the rights and liabilities in respect of each affected employee could only transfer to one or other of those transferees. That was a correct understanding of the law at the time of the

A Tribunal's Judgment. For the reasons noted above, however, **Kimberley** and **Duncan Web (Offset)** must now be read subject to **Govaerts**. Of the four agreed issues which the Tribunal was asked to determine (per paragraph 6 of its Reasons), number iv. will, therefore, require to be reconsidered. I agreed with Mr Dyal's submission that it could not be said that paragraphs 2 and 4 of the Tribunal's Judgment would necessarily have been the same had it been aware of the clarification of the law by the ECJ in **Govaerts**.

C 43. So far as paragraph 5 of the Tribunal's Judgment is concerned, it might be thought unlikely in the circumstances of this case that liability for any of the claims will remain with Amey. Since, however, a reconsideration of the position of each employee on an individual basis in light of **Govaerts** could – at least in theory – disclose circumstances where rentention of liability by Amey was a possible outcome (for example, if a particular employee was assigned to the organised grouping only on a temporary basis in terms of Regulation 2(1)), I have come to the view that paragraph 5 of the Tribunal's Judgment should also be set aside.

E **Disposal**

44. The appeal is therefore allowed under Mitie's Ground 2A to the extent of setting aside paragraphs 2, 4 and 5 of the Employment Tribunal's Judgment of 14 March 2019. Given the fact-sensitive nature of the inquiry that is necessary under **Govaerts**, a remit of the case is inevitable. There is no reason why that remit should not be to the same Tribunal. It will be for that Tribunal – having heard such further evidence and submissions as are thought necessary – to consider the application of **Govaerts** to each of the Claimants individually.

45. So far as the remaining Grounds of Appeal are concerned, Ground 2 now falls away as the issue of whether or not the Tribunal correctly applied **Kimberley** has been overtaken by **Govaerts**. Had it been necessary to decide the matter, I would have refused the appeal insofar as

based upon Grounds 3 and 4. The weight to be attributed to the evidence of the spreadsheets was entirely an issue for the Tribunal. In any event, however, the factual issues arising from the spreadsheets will now need to be revisited by the Tribunal, possibly after hearing further evidence, in order to consider the application of **Govaerts**. Finally, I saw no merit in Ground 5 given the concession that at least some of the Claimants who claim unfair dismissal seek reinstatement. The issue of remedy is, in any event, not relevant to this appeal.