LITTLETON

(MC)TEARS FOR (TUPE) FEARS: THE SCOTTISH EAT SPICES THINGS UP FOR THE CONTRACTING INDUSTRY

by Martin Fodder

It has been a little while since a juicy service provision change case came along but *McTear Contracts Ltd v Bennett & Ors* ([2021] UKEAT 0023_19_2502 (25 February 2021) (Lord Fairley sitting alone) has more than filled any looming hunger gap. *McTear* is concerned with fragmentation in relation to service provision change transfers. It applies the parting gift[1] of the ECJ to employment lawyers, the decision in *Govaerts.* But is *McTear* correct? And if it is then how many SPC cases will actually be affected by it?

We should start by reminding ourselves of the basics because- as we shall see later- they are critical for an understanding of the extent of the likely impact of *McTear* and whether clients and contractors should be as fearful of it as some of the commentary around the decision suggests.

A Reg 3 (1) (b) type transfer occurs when there is a situation where activities cease to be carried out by 'a client' on its own behalf and are carried out instead by a contractor on the client's behalf or activities cease to be carried out by a contractor on a client's behalf and are carried out instead by 'a subsequent contractor' on the client's behalf[2].

- The *"activities"* carried out by the incoming contractor must be *"fundamentally the same"* as the activities carried out by the person who has ceased to carry them out.
- Immediately before the service provision change there must be an *organised grouping of employees* which has as its *principal purpose* the carrying out of the activities concerned on behalf of the client[3].
- The contract of an employee who is *assigned to the organised grouping* of employees which has that principal purpose will transfer to the incoming contractor.

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1 Shamelessly borrowed from David Reade QC whose recent, more wide ranging, talk on *Govaerts* – "TUPE or not TUPE"- can be enjoyed at *https://vimeo.com/527769643*. I am grateful to him and to Jeremy Lewis, also of Littleton for their thoughts in relation the first draft of this article. "Transfer of Undertakings" (General Editor Jeremy Lewis, published by Sweet and Maxwell to which all three of us contribute) will shortly be updated to include further commentary on *Govaerts* and *McTear*

2 A third possibility is insourcing following outsourcing.

3 Other conditions are that activities must not be intended by the client to be carried out in connection with a single specific event or task of short term duration and must not consist wholly or mainly of the supply of goods for the client's use.

It follows that the close analysis as to what "the [relevant] activities" actually are is of the utmost importance as the starting point for the structured analysis that must be followed as to:

- whether the activities that are continued on the other side of the transaction are fundamentally the same and then;
- which employees are going to be included in the consideration of whether there was an organised grouping which had the principal purpose of carrying on the activities[4] at all and then (*if* there was such a grouping);
- who is to be regarded as belonging to that organised grouping.

The case law establishes that not all of the activities carried on by the incumbent contractor (or the client) have to be carried on by the putative transferee(s). An activity can be "fragmented" with the result that (subject to the comments below) what had been *an activity* carried on by one contractor (the transferor) become *activities* carried on by two or more different contractors (the transferees). In *Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and others* - [2016] ICR 607, Simler P held (at paragraph 17) that there is nothing in the TUPE that expressly requires that the relevant activities carried on by the new contractor should constitute *all* of the activities carried out by the outgoing contractor pursuant to its contract with the client: they may be a subset. So in that case a division along functional lines of the overall service formerly provided by the transferor did not prevent the SPC provisions applying. Nor does a split along quantitative lines matter. In *Kimberley Group Housing Ltd v Hambley* [2009] ICR 700 (EAT) it was held that the tribunal was entitled to conclude that there could be a service provision change where two overlapping contracts awarded to two transferees provided for activities previously provided by a single provider.

Case law also establishes that there are some situations in which the activity was *so* "fragmented" that there would be no transfer at all. *Clearsprings Management Ltd v Ankers* UKEAT/54/08 (unreported) 13 November 2008, EAT. I shall return to this point below.

Assuming that the ET finds that fundamentally the same activities (albeit possibly fragmented) *are* still being carried on by the incoming contractor(s) the next question is whether the incumbent contractor had an organised grouping which had as purpose *or at least its principal purpose* the carrying on of the activities now being carried on by the incomer(s).

In a quantitive fragmentation- the same overall service "pie" is split into two or more pieces but each looks much the same as it did before apart from the amount done this may be relatively straightforward. If the incumbent had organised its workforce in two teams to carry out a maintenance activity across an area, one team working "principally" in part of the area and the other working "principally" in the other part then there may be little difficulty (apart from deciding what "principally" means) in arriving at the conclusion that the "organised grouping" requirement is satisfied. The overall *service* has been split – fragmented into two parts- but the activity to which each team was principally purposed is still being carried on.

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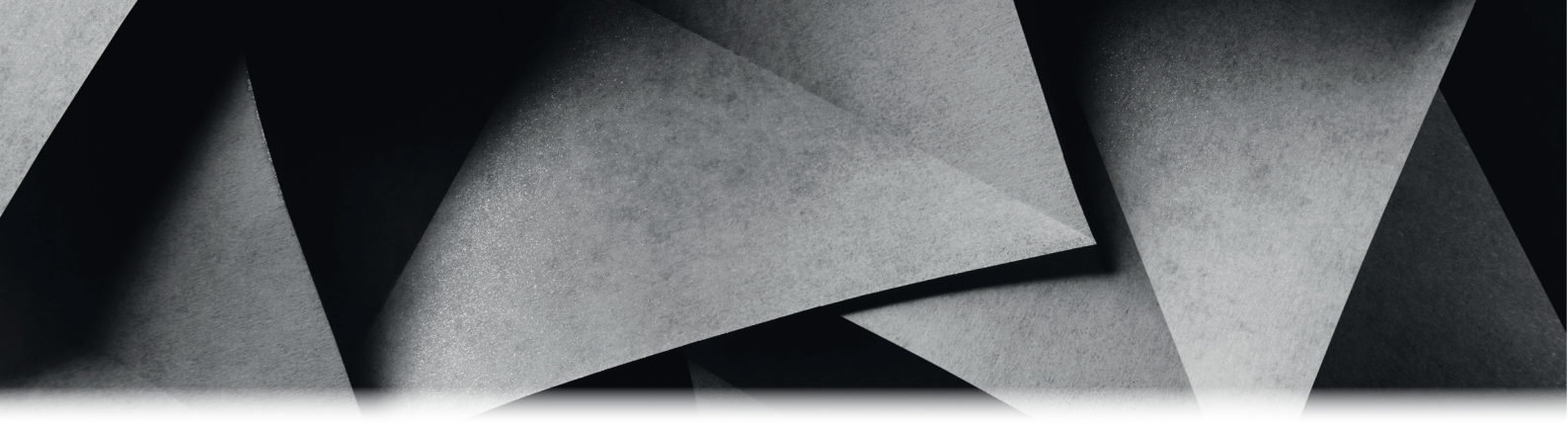
4 Counter intuitively but nevertheless logically it is expressly provided that a single employee can constitute an organised grouping



Where the split is of a functional nature the exercise may be more difficult but it is not always impossible. In *Arch* the EAT upheld a finding that a team manager formed an organised grouping of one. She had been put in place as the team manager of a team performing that role only for a particular local authority. No one else assisted her in that singleton management role. On her own she formed an organised grouping rather than being aggregated into the team. She formed an organised grouping that was performing a distinct activity (managing a particular function) and that activity was continued by the incomer.

Often the distinct but, in practical terms, overlapping question of whether a particular employee was "assigned" to the organised grouping will not arise. The concept and requirement of "assignment" in TUPE Reg 4 (1) is common to ordinary transfers and SPC transfers albeit that in the former the assignment has to be to the "organised grouping of resources and in the latter to assignment must be to the organised grouping of employees. The ECJ case law is particularly- indeed exquisitely- unhelpful with regard to what "assignment" entails – see *Botzen.* [1986] 2 C.M.L.R. 50, ECJ which really only states that an employee must be assigned to the undertaking or part undertaking which is subject to the transfer without explaining what that means. The two most useful domestic authorities are *Duncan Web Offset (Maidstone) Ltd v Cooper* [1995] I.R.L.R. 633 and *Jones and Kingston v Darlows Estate Agency* (Unreported, 6 July 1998, CA). However it must be acknowledged that in practice the application of the requirement of "assignment" will often be a bodge between evaluating factors which will often pull in different directions: how much time was spent on different parts of the business; how much value was given to each part of the business by the employee; what the contract of employment had to say about what the employee's duties were and how the cost of employing the employee was allocated as between different parts of the business. The task will be particularly difficulty where, in practice, the employee's task was to deal with crises or projects rather than day to day ongoing requirements.

Against that background we can now turn to the decision of the CJEU in *ISS Facility Services NV v Govaerts* C-344/18, 26 March 2020 which was (of course) a decision on the Acquired Rights Directive and not directly concerned with service provision transfers which are an UK bolt on to transfer protection for employees . In *Govaerts* the transferor provided a service cleaning and maintaining various buildings: the service responsibility was divided into three separate lots. On a re-tender two lots were awarded to one new contractor, and the other lot to a different new contractor. Ms Govaerts had been project manager for all three lots. The CJEU held that where a transfer involved a number of transferees, the rights and obligations arising from a worker's contract are transferred to each of the transferees *in proportion to the tasks performed by the worker*.

This was subject to the provisos that

- the division of the contract of employment as a result of the transfer was "possible" and
- the division did not cause a worsening of working conditions nor adversely affect the safeguardingof the rights of workers guaranteed by the Directive.

If the division of the contract was not "possible" or there was a worsening of working conditions then that would not mean that there was no transfer but rather that the transferees would be regarded as being responsible for any consequent termination of the employment relationship.

It is to be stressed that *Govaerts* was a case on "ordinary transfers" and not the special regime that applies in the UK to those situations to which the service provision change transfer legislation applies. But it has nevertheless now been applied to such transfers in *McTear.*

In *McTear* Amey held a contract with North Lanarkshire Council ("NLC") to replace kitchens within NLC's social housing stock. From around 3 months before contract termination Amey divided the work between two "teams". Both teams worked across the whole of the NLC area although this appears to have been subject (at least to an extent) to considerations of geographical convenience.

NLC re-tendered the kitchen installation contract and decided to split the contract into two "Lots". NLC took a policy decision that two resulting contracts should *not* be awarded to the same contractor. Lot 1 was for properties in the north of NLC's area. Lot 2 was for properties in the south. Otherwise the work remained exactly the same. NLC awarded the contract for Lot 1 to McTear and for Lot 2 to Mitie. After initial uncertainty Amey adopted the position that all of the employees who worked on the contract should be regarded as transferring to McTear or Mitie. Amey concluded that the work done by team 1 broadly corresponded to the area covered by Lot 1 and that for team 2 broadly corresponded to Lot 2. Amey's conclusions as to area/team correspondences seem to have been the subject of hot dispute at the ET hearing and were a focus of the subsequent EAT hearing. Reading between the lines there seems to have been ample scope for arguments that Amey had not really divided the work between the teams by reference to the location of the kitchens to be replaced although that played some part in allocation.

The claimants had been members of one or other of Amey's teams but neither McTear nor Mitie took on any of their contracts of employment. At a preliminary hearing the ET decided that there had indeed been service provision change transfers between Amey and further that each of McTear and Mitie and that Amey's former team 1 had transferred to McTear and Amey's former team 2 had transferred to Mitie.

Both McTear and Mitie appealed. Subsequently Mitie obtained permission to add a ground based upon *Govaerts* following that decision being handed down by the ECJ. We have already referred to the decision in *Kimberley.* The issue in *McTear* was whether another aspect of the EAT's reasoning in *Kimberley* was correct in the light of *Govaerts*. In *Kimberley* the EAT had rejected the suggestion that liability for the individual contracts of the claimant employees could be split in some way between two incoming contractors. The sole contractor, Leena, had done the work from Stockton and Middlesbrough. On re-tender the work was split between Kimberly and Angel. The conclusion was that the primary purpose of the organised grouping to which employees worked was the performance of the work carried out by Kimberley.

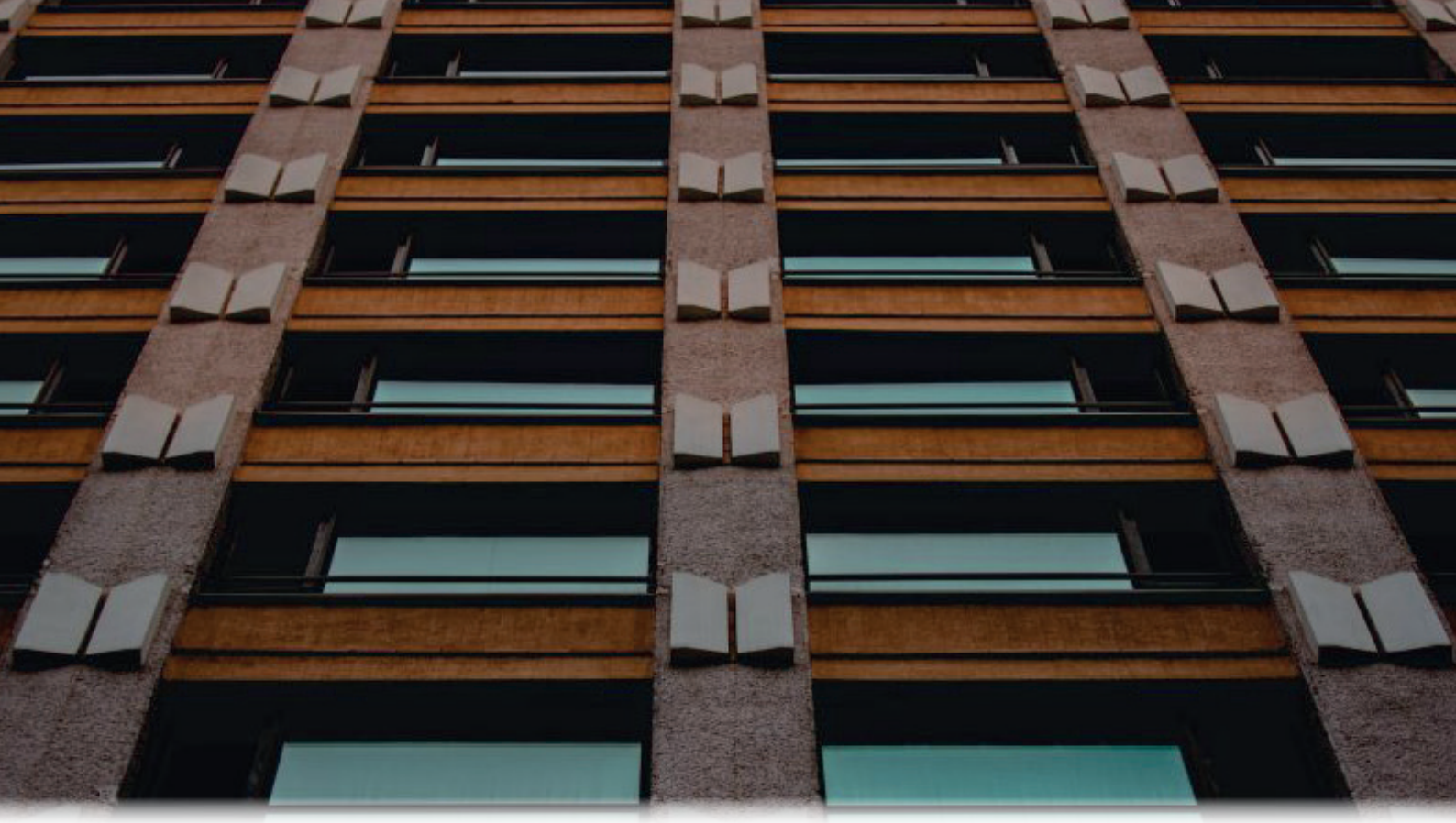
It is worth noting that the findings of the ET were that Kimberley got 97% of the Stockton work and 71% of the Middlesbrough work (i.e. in overall terms 84%). Angel got the balance (3% and 19%- in overall terms 16%). The result of the ET's approach (upheld by the EAT) was that Kimberley got 100% of the employees (and therefore the costs associated with their employment) but only 84% of the work/income from it. Angel got only 16% of the work but it also got a fresh start with new employees and of course the ability to enter into different terms from those that would have applied had the contracts with Leena transferred. If Govaerts were applied then each employee would presumably have been on separate contracts with Kimberly (for 84% of their working week) and Angel (for the remaining 16% of their time) with the terms and conditions with Leena carried over into those contracts.

In *McTear* Mitie (and McTear) argued that the ET should have considered whether liability for and in respect of the claimant employees should have been split/apportioned between them rather than being divided by reference to the teams. Whether the resulting particular legal game would be worth the candle is another point: presumably it was thought by each of the contractors that it would. One of them must surely be wrong about this.

It is important to note that it does not seem to have been disputed (at least at EAT level) that:

- the activities before and after the implementation of the re-tender by NLC were not fundamentally different;
- there had been two organised groupings which had as their principal purpose the carrying on of those activities;
- there had indeed been an SPC transfer.

It could be argued that *McTear* might have been resolved in a different, rather more simple, way. As we have seen the EAT has supported ETs in arriving at what might be regarded as some fairly stretching conclusions as to the nature and interrelationship of and between "activities" and "organised groupings". Without more detailed knowledge of the evidence



presented in *McTear* any suggestions must be a little tentative but it sounds as though it might have been arguable that the "activities" consisted of the provision of kitchen installation across the *whole* of North Lanarkshire. And each Amey team appears to have worked (at least to a considerable extent) across the whole of North Lanarkshire. On that basis the primary purpose of each team would have been to carry work- the activity- across the whole area. The activities after retender were, at least arguably, to carry out the work in the northern part (on the one hand) and in the southern part (on the other). It still involved kitchen installation but it was now fundamentally different with regard to the area in which those installations were carried out.

Now it could undoubtedly be retorted that in *Metropolitan Resources Ltd v Churchill Dulwich Ltd and others* - [2009] ICR 1380 (from which Parliament drew the "not fundamentally different" principle into TUPE in 2014) said that a difference in the location from which the transferee performs the relevant activities instead of the transferor is highly unlikely, of its own, to be determinative against the existence of a service provision change. It added that it was likely that a situation in which a replacement service provider carries out an activity instead of a predecessor but from a different location will frequently arise—as, for example, in the case of building maintenance contracts which have historically been an area in which the existence of a TUPE transfer has had to be considered."

However, unlike the building maintenance contracts referred to by the EAT in *Metropolitan Resources*, *McTear* was not concerned with the location *from* which the service was to be provided but the *area across which it was to be provided*. It may be tempting to say that it does not make if fundamentally different for a contractor/its employees to travel around half of the area they previously travelled around. But on any view it must be more doubtful to suggest that the converse would be true.

A similar approach ought to apply in functional split cases. To adapt the facts of *Arch* slightly: If the single person organised grouping had been carrying out the management of not just one function but two and after retender that management function was divided between two new contractors then the activity of managing both functions would not be "continued" because post transfer the management activity would be fundamentally different. If, on the other hand, the single person organised grouping had been (at least) *primarily* concerned with the management of one function- the activity- and only a rather lesser degree concerned in the management of another function and only the management of the first function carried across then then the single person organised grouping would surely transfer with the first activity?

The EAT has supported findings that the activities had become too fragmented for there to be an SPC transfer in various case. The most frequently cited example is *Clearsprings Management Ltd v M Ankers & Ors* [2009] UKEAT 0054_08_2402 which (like *Metropolitan Resources* concerned the provision of accommodation for asylum seekers and their dependants). The ET, which reached its decision before the EAT's judgment in *Kimberley,* proceeded on the basis that where no single transferee could be identified as having taken over the activity the Regulations could not be said to operate. However it then went on to hold that the service users for which each of the relevant claimants were responsible transferred to two, or all three of the putative transferees. The ET also accepted the argument advanced on behalf of the putative transferees that none of those claimants fell into an organised grouping of resources or employees that were the subject of any relevant transfer so that no division exercise could be performed. None of them were dedicated to that part of any service which transferred to the relevant new service provider as their roles involved delivering a service to asylum seekers service users who were transferring to other new service providers and they were also dealing with properties which were transferring to other new service providers or being retained by Clearsprings and being utilised for other purposes.

The EAT said that it was not persuaded that the ET had limited its reasoning to the simple proposition that an SPC could not take place where there was more than one putative transferee of the activities carried on by the transferor, *Hambley* having decided that there could be. But, following *Hambley*, that left the separate question of 'fragmentation'.

The EAT referred to the factual matrix in *Hambley* (which is set out above). It then referred to *Duncan Web Offset* where about 80 per cent of the claimant's employees' time was devoted to that part of the business which was transferred to Duncan Web Offset and a relevant transfer of their contracts of employment had been held to have taken place.

The activity carried out by *Clearsprings* had been the provision of accommodation and pastoral care to asylum seekers allocated in the North West. 425 service users had been taken on by one incoming contractor (Priority) and 175 by another (UPM), leaving 154 with Clearsprings. The allocation of service users to individual claimants showed "no discernible pattern of re-allocation to the incoming contractors". On their findings of primary fact the ET had, said the EAT, been entitled to conclude that the activity carried on by Clearsprings was so fragmented that no relevant transfer took place.

Whatever the position may be in relation to ordinary transfers under TUPE 3 (1) I would

suggest that it will be a rare case where *Govaerts* is a problem in a 3(1) (b) case. Exceptions might arise but there is a finding that the activity of an organised grouping has been split in such a way that the approach in *Govaerts* would fall to be applied will be unusual because of the organised grouping/principal purpose requirement.

This article is already rather longer than a Littleton case comment usually is. Further discussion in relation to the problems that *Govaerts* will cause (including those that will arise in cases which fall within 3 (1) (a) and, of course, the problems that will be found elsewhere (see above). However it is worth highlighting some complications which have not, thus far, attracted much attention. If an ET does apply *Govaerts* and decide that liability to be split two (or possibly more than two) incoming contractors then:-

- What happens about the rights to object to transfer under Reg 4 (7), 4 (9) and to the right to bring a claim for constructive dismissal which is preserved by Reg 4 (11). An employee might elect to bring such claims against under 4(9) or for constructive dismissal one of his or her new employers but not all of them. What happens then?

- Could the transferor who retains part of a service be regarded as a transferee if the work done by a particular employee can be regarded as having been split?

- Can an employee object to transfer under Reg 4 (9) because the split of his/her contract will necessarily mean that there has been a substantial change in working conditions to his/her material detriment?

- How are basic and compensatory awards to be worked out if there are two or more transferees? In particular would an employee to be entitled to two (or more basic awards) as against the transferees. If not then why not? What about the statutory caps on compensation?

- How is liability for failure to consult to be distributed as between transferees?

The problems generated by *Govaerts* do indeed promise to be fruitful source of work.

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