EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr S Beard	**v**	**Amey Services Ltd (1)** **Kier Ltd (2)**

Heard at: Watford **On**: 25 & 26 October 2018
Before: Employment Judge R Lewis (sitting alone)

Appearances:
For the Claimant: Mr R Dennis, Counsel
For the 1st Respondent: Mr C Armstrong, Counsel
For the 2nd Respondent: Mr J Campbell, Solicitor

RESERVED JUDGMENT

1. The claimant's employment did not transfer from the First Respondent to the Second Respondent.

REASONS

1. By a claim form presented on 3 May 2018 the claimant complained of unfair dismissal, automatic unfair dismissal, and a failure to consult before a TUPE transfer.

2. He also brought claims in relation to notice and arrears of holiday. He stated in the claim form that he did not know which of the two respondents had dismissed him. For clarity, I refer to the First Respondent as "Amey" and the Second Respondent as "Kier."

Procedural

3. The Case Management Order was issued when the proceedings were served on 21 May, and at the request of the parties the hearing was extended from one day to two.

4. The Tribunal had a bundle in excess of 600 pages which was poorly organised: given a 2-day listing, a core bundle would have assisted. There were eight witness statements. I put to the parties the following proposition which emerged readily from my reading. I suggested that at first stage, the approach of the Tribunal should be to use the allocated two days to decide the question,

> "It being agreed that on 22 January 2018 the NOMS contract transferred from Amey to Kier in accordance with the provisions of TUPE, was the claimant immediately before the transfer assigned to the NOMS contract, such that his employment transferred from Amey to Kier."

5. The parties agreed that that question should be determined. Evidence lasted 1.5 days, and Judgment was reserved after closing submissions.

6. The following gave evidence:

   6.1 The claimant adopted his statement and was cross-examined, mainly by Mr. Armstrong, for about an hour. The claimant called the evidence of three former colleagues.

   6.2 Mr. Ian Edmiston did not attend. The Tribunal took his statement (with supporting emails in lieu of a signed copy) as read. He is in his seventeenth year of service with Amey, currently as Compliance Manager. He was the claimant's direct report for about the last eighteen months of the claimant's employment with Amey. His evidence was that they worked together on compliance issues across the Amey business. He wrote,

   > 'Neither Steve or I were much involved in the NOMS contract. The most we worked on it was for one day a week for about 3 months in 2016 … If we worked as much as four hours each on the NOMS contract in the four months before the transfer to Kier on 22 January 2018 I would be surprised.'

   6.3 Mr. Stuart McCabe had been the claimant's line manager until April 2017. He no longer works for Amey. His evidence was that working on NOMS was 'maybe' 15 to 20% of the claimant's work, and that,

   > '[The claimant] was engaged in compliance work across the whole Amey portfolio as and when required'.

   6.4 Mr. James Scully worked with the claimant from January to November 2017. His evidence briefly was that the claimant "spent virtually no time at all" working on NOMS.

   6.5 Mr Armstrong did not suggest (as sometimes is said) that any of the claimant's witnesses had a bad faith or personal motive for supporting the claimant in this hearing. In closing, Mr Armstrong submitted that the claimant's evidence was 'mistaken' about the issue of assignment.

   6.6 Ms. Debbie Gwilliam gave evidence first on behalf of Amey. She was cross examined for over two hours. She is Head of HR within the Amey division where the claimant worked. Her evidence was given little from first-hand knowledge but was based significantly on her understanding and knowledge of Amey's systems; she repeated at length what she had been told by Mr Jeremy Honor (former Operations Director, and no longer employed by Amey), who was the claimant's line manager after Mr McCabe until termination of the claimant's employment in January 2018. Ms Gwilliam also spoke to documentation in the bundle, the great majority of which she had not seen at the time, but which she explained and interpreted to the Tribunal. Ms. Gwilliam's meticulous preparation to give evidence was commendable, but could not make up for the fact

that her evidence was largely second hand, and almost all what I called 'reconstruction' evidence.

6.7 Mr. David Aird gave evidence on behalf of Amey. He is employed as Account Director. A modest part of his evidence was from first-hand knowledge and the remainder fell into the same category as Ms Gwilliam's.

6.8 Keir called two witnesses. The first was Ms. Laura McPhillips, previously HR Business Partner at Kier, who gave evidence of her involvement in the NOMS transfer, and also interpreted disclosed documents. The second was Mr. Lee Podger, employed by Kier as Head of Business Transition. He gave evidence which largely replicated that of Ms. McPhillips.

7. Closing submissions in writing were given by all three parties. The representatives spoke to their submissions.

8. At the end of the hearing, I invited the parties to agree that depending on my conclusions, a party might be dismissed from the proceedings. Mr Dennis declined to agree, given the uncertainty about how this Judgment might be formulated.

9. I have asked that a telephone hearing be listed for shortly after this Judgment is sent out. At the least, I ask the parties to be ready to deal then with (1) can Kier be released from the proceedings; and (2) the list of remaining issues.

10. The parties are reminded that the option of settling their differences remains open to them.

General observations

11. I preface my findings with general observations.

12. In this case, as in many in the Tribunal, I heard evidence about a wide range of matters. Some of it was given in some detail. Where I make no finding about a matter which was referred to in evidence, or where I do so, but not to the depth to which the parties went, my approach should not be taken as oversight or omission, but as a reflection of the extent to which the point was truly of assistance.

13. Much of the evidence was in the form of email. I approach email evidence in this case, as in every other, with caution. Some of the emails which I saw were parts of trails, and were therefore shown to the tribunal out of full context. Email is not a medium which encourages reflection, or thoughtful or sensitive expression. That is particularly so in a corporate context. When written between colleagues, it often adopts a workplace vocabulary which is clear to those who use the vocabulary, but less so to an outsider.

14. That general problem was compounded by the possibility that some of the emails were written with a view to stating a position at a later stage (such as this hearing). That does not make the content of the email necessarily unreliable, but is a proper caution to be borne in mind when attaching weight to it as evidence.

15. The dispute about assignment meant that the focus of this hearing was on what work the claimant was doing in the last 7 weeks of his employment with Amey. Despite the volume of documentation, there was in the bundle no record or document recording how the claimant actually spent his time. There seemed, therefore, to be no objective source of information about the claimant's work analogous to time recording.

16. The underlying problem which this created for both respondents was that the closest evidence of what work the claimant did that of the claimant. The next closest was that of his closest colleagues, who included Messrs Edmiston, Scully and McCabe. Mr Honor was no longer employed by Amey, and was not called. Neither respondent called any witness who had actually worked closely with the claimant at Amey.

17. All four witnesses for both respondents gave evidence which in the hearing I described as "reconstruction" evidence. I meant by that word evidence in which the witness presented to the Tribunal letters or emails to which he or she was not party, and which he or she might have seen first in the course of hearing preparation; and then gave the Tribunal his or her reconstructed interpretation of the contents. Such evidence was of limited value.

18. Although the claimant had stated in the ET1 that he did not know which respondent had unfairly dismissed him, his position had changed by the start of this hearing. Mr. Dennis put the positive case that he was <u>not</u> assigned to the NOMS contract, and accordingly that his claim was against Amey only.

Setting the scene

19. The claimant was born in 1978. His CV showed a record of twelve years' service in the Armed Forces followed by a career in HSEQ (Health, Safety Environment, Quality) management. That career path has led him to specialise in, broadly, compliance issues. He joined Amey in 2012 in a broad compliance role. He was in that role seconded to work for ALC, which was a joint venture between Amey and another company. In that role, he developed an Integrated Management System (IMS). When that role ended, he was appointed by Amey to work as Technical Solutions Manager within a division known eventually as FMDJ (Facilities Management Defence and Justice). At the time of the events in question he was working in accordance with a contract of 1 December 2015, which gave the above job title, but was silent on his tasks or duties.

20. It was not disputed that the claimant was "a self-starter" who to a great extent worked autonomously, and who had use of an office base, but who like many of the other witnesses was peripatetic.

21. Although I was referred to a variety of corporate acronyms and abbreviations (and their changes) I need only record for present purposes that the respondent is a major corporate service provider in facilities management, with a workforce of over 20,000 employees, of whom about 4,500 were in the FMDJ division.

22. This hearing was concerned with a contract which on Amey's side was serviced under the operating name AMES, working within the FMDJ division.

23. AMES on behalf of Amey had had a contract for the provision of building and engineering maintenance services to three entities, the Home Office, the National Crime Agency and the National Offender Management Service (NOMS).

24. By August 2016 the contracts for the Home Office and the NCA had been re-tendered and awarded elsewhere. That left the AMES contract servicing NOMS only. That contract was re-tendered during 2017. By July 2017 it was known that the NOMS contract would not re-awarded to Amey (73), and by about autumn 2017, that it would be awarded to Kier.

25. The facilities management sector is one where TUPE transfers are a frequent occurrence. I accept that every witness had experience of TUPE, operationally or as an HR professional.

26. There was disagreement about what the claimant did after December 2015 and before about July 2017. There was also disagreement about how the tribunal should approach that working history. In Mr Anderson's closing submission, he wrote,

> 'The vast majority of the evidence led on C's behalf deals panoramically with C's entire working history. It would be an error for the Tribunal to have regard to that, at the expense of granular focus on the point of transfer.'

27. It seems to me useful to take an overview of the history, as setting the scene for the events in the second half of 2017.

28. I attach relatively little weight to the precise job title in the claimant's contract, or to how the claimant was costed for internal costing purposes. (It seemed that he was costed to the NOMS contract). Neither of these is a reliable indication of the functional tasks undertaken by the claimant immediately before the transfer.

29. It was common ground that the division had a large number of contracts: Ms Gwilliam put the figure as high as about thirty, and the claimant at twenty. I find that the claimant had a broad general role, which included advising, assisting and problem-solving in any compliance aspect of any contract which might come within his experience and expertise. I also accept that he had a role in developing the IMS work which he had done at ALC, and applying it within Amey.

30. In so finding, I attach particular weight to the evidence of Mr McCabe, who had been the claimant's line manager from when the claimant joined Amey until Mr McCabe left Amey in April 2017. He set out a number of contracts on which the claimant worked, and added that the claimant was the lead on compliance 'across the whole of Amey.' Mr Anderson put a formal challenge to this broad assertion, but did not cross examine Mr McCabe for more than a matter of minutes.

31. I accept also Mr McCabe's evidence that the claimant assisted in what was called 'demobilisation' of contracts. That meant the procedure for checking that a contract was compliant and ready for transfer from Amey to another provider as part of the run-up to a TUPE transfer. It follows, as plain common

sense, that that process ended on a particular contract on the date of transfer.

32. I accept that as a peripatetic self-starter, working in the above fashion, there was little or nothing to be found in a document in which Mr McCabe (or another manager) formally allocated the claimant to a task or location or assignment.

33. I attach some weight to the claimant's self-written email signature, in which he designated himself 'Strategic Compliance & Improvement, FMDJ' (251), without reference to any specific contract or task within the division. Even allowing for the potential creativity of a self-designation, the claimant would not have given himself a signature which colleagues could challenge as misleading.

34. After Mr McCabe left Amey, Mr Honor became the claimant's line manager. He was not called by any party. Ms Gwilliam in evidence said that she had spoken to Mr Honor, and that parts of her evidence were based on what she understood as a result. The bundle contained email trails between Mr Honor and the claimant which were of importance.

35. My overarching finding for avoidance of doubt is that it has not been shown that in the period until July 2017 the claimant worked mainly or significantly on the NOMS contract. I accept that he undertook tasks on the NOMS contract, in the same way as he undertook tasks on any other contract.

The second half of 2017

36. It was common ground that from about July 2017 onwards, and until mid-November 2017, the claimant's largest single task was to work on Amey's London Boroughs contract. The claimant asserted that that work represented up to 80% of his working time; Ms Gwilliam's evidence was that Mr Honor had told her that 50% was the more accurate estimate.

37. I find also that during the same period, the claimant continued to work on IMS. Mr Aird expressed scepticism about this in evidence; however, it seemed to me very likely that in the knowledge of change within Amey, the claimant wanted to complete a piece of work which he regarded as a demonstrable personal achievement.

38. My finding is that over a period of about four months (ie July to November 2017) the claimant worked on both the London Boroughs and on IMS, to the exclusion of almost all other work. I accept that he assisted on some demobilisation work, and that he knew that the NOMS contract was an area of work which had been lost to another provider, and which would therefore require demobilisation in due course.

39. I approach the next point neutrally and in outline only, and with caution, as I appreciate that Amey wishes to reserve its position as to a Polkey defence. There came a time in the second half of November 2017 when the claimant permanently left the London Boroughs work. I make no finding as to the circumstances or reasons.

40. By the time he did so, Amey was in the course of demobilising the NOMS contract, and preparing for a TUPE transfer of NOMS-assigned employees to Kier. I approach this point in outline only, and with caution, as I appreciate that it may the subject of a detailed finding of fact at a later stage in these proceedings. Amey notified affected employees by letter of 27 October (238): it was common ground that the letter was not sent to the claimant.

41. By 16 November, the claimant told Mr Honor that he was considering resignation (80). On 21 November he submitted his written resignation (158). It seems that he had become disaffected from Amey. I make no further findings about his resignation or the reasons for it.

42. Following discussion with Mr Honor the claimant was allowed to withdraw his resignation. The claimant's evidence was that Mr Honor explained to him that as he was costed to NOMS, he was on the TUPE transfer list to Kier; and that if he did not resign, he would continue with Amey for a short period and then transfer.

43. I regarded the email exchanges at pages 80 to 82 about this as critical documents in the case and I quote them as follows. On 1 December the claimant wrote to Mr Honor (81),

> 'After our discussion and understanding I am on AMES TUPE I would like to exercise my right to TUPE, therefore rescind my email of resignation as discussed and as said exercise my right to TUPE now further understanding my rights, and having conformation [*sic*] I am on the TUPE list having previously being advised I wouldn't be...'

44. The bundle did not contain a direct reply to this. On 18 January, Mr Honor wrote to colleagues (120), and in a different context referred to below,

> 'the retraction of his resignation was accepted on the basis his role was part of the transfer...'

45. On 4 December, Ms Bean of HR wrote to Mr Miller about the claimant's withdrawal of his resignation,

> ' .. [Mr Honor] appears to have discussed TUPE with [the claimant] who is now rescinding his resignation with a view to transferring – I have let [Ms Gwilliam] know.
> For the time being, until [Ms Gwilliam] tells me otherwise I would see that this now means he is wholly assigned to the NOMS account ..'

46. There was no evidence of what action, if any, was taken in response to this. The quoted emails seem to me powerful evidence of a fix agreed between the claimant and Mr Honor, who thought that TUPE would help them. I find that neither understood in depth at the time how TUPE might affect the claimant, and there was no evidence that either took any specialist advice, or HR guidance. The effect of the fix was, as they then understood it, to preserve the claimant in a job, and for a painless transition from Amey (which he wanted to leave) to Kier (which he may not have wanted to join, but which was a fresh secure start). While I accept that that was their understanding as individuals, Mr Honor, as Operations Director and the claimant's line

manager, was acting on behalf of Amey. He had access to HR and other professional support.

47. The fix was the withdrawal of claimant's resignation, followed by a short nominal assignment of the claimant to the NOMS project, on the clear understanding that within a few weeks he would be off Amey's books and on to Kier's. While it was clear that Ms Bean understood that the claimant was to be 'wholly assigned' to NOMS between 4 December and the date of transfer, I do not think that either the claimant or Mr Honor gave any thought to the question of assignment at that stage, because they did not think it mattered.

48. There was a major dispute about what the claimant actually did after Monday 4 December 2017 and up to the end of Amey's contract on 21 January 2018. This gave rise to the evidential difficulty which I have referred to above.

49. In the course of a skilful cross-examination, Mr. Dennis put to Ms. Gwilliam a wide range of emails which he submitted were indications that the claimant was in that period engaged in activity other than that of NOMS. They were all dated on and after 4 December, and all related to work other than NOMS contract work. Ms. Gwilliam was not in a position to deny that that was how the emails appeared, but did not concede that they were evidence of work done by the claimant.

50. Mr Dennis' questions about emails of this type lasted some 40 minutes until I suggested that the point had been made at sufficient length. I find that the line of cross-examination was well founded and I find that the emails referred to in cross-examination were evidence that the claimant was engaged in activity other than NOMS. (For reference, and without setting them out, my notes indicate emails at the following pages of the bundle: 254, 255, 258, 282, 287, 293, 296, 305, 308, 315, 323, 324, 278, and 444).

51. I was on the contrary not referred to parallel documentation in the same period showing the claimant's engagement with NOMS at that time.

52. The first strand for decision is what the claimant actually did at work in the period between 4 December 2017 and 21 January 2018. I bear in mind the reality, which was that he felt that he was marking time for a few weeks with an employer whom he was glad to be leaving. I find that he carried on with the broad framework of trouble shooting advisory work which he had always done, and that some of that work is indicated by the emails referred to at paragraph 50 above. I find that he also continued with his work on IMS, even if that was unsupervised work conducted alone. I find that he undertook some work on demobilising the NOMS contract. I do not find that he was managed or supervised within the NOMS work. I have no evidence on which to find the proportion of time or work which he undertook on NOMS demobilisation. It stands to reason that the demobilisation work was work to run down the NOMS contract, which would end with the transfer.

53. Meanwhile, Kier undertook pre-transfer inquiries. During that process, it came to dawn on Mr Honor, and the claimant, as well as on others within Amey that what I have above described as a fix was not going to work as originally intended.

54. I deal with the latter point first. I attach weight to two emails. The first was one written by Ms Gwilliam on 10 January to a number of managers. Its purpose was to set Amey's stance, although at the time Ms Gwilliam used more robust language (92):

> 'I thought it prudent to outline the company's position as regards [the claimant] .. so everyone is aligned.'

55. The aligned position was that the claimant's 'substantive position' (a phrase used three times in the email) was with AMES, which was the contract which was to transfer to Kier; and that the claimant's work at the London Boroughs had been temporary. That position begs several questions. It is not clear that Ms Gwilliam considered any evidence of what the claimant had done since 4 December 2017, or what that evidence showed her. The stance was inconsistent with the email exchanges between the claimant and Mr Honor at the beginning of December; and it was not the case which Amey put to the tribunal.

56. The second important email was Mr Honor's of 14.45 on 18 January (120-1), briefly referred to above. It should be read in full. The material portions read,

> 'So the options as I see it are now:
>
> - We push back on the grounds Steve role does meet the requirements of TUPE and continue on these grounds ..
>
> - If there is nothing .. the role will be put at risk of redundancy and follow that process –
>
> We then get saddled with the cost which was avoidable – (What's the liability here)
>
> One other option but I'm not sure on the legality of it, would be to revert to his original resignation on the basis that was part of the transfer when clearly as Steve now tells us it's not?'

57. I take that email as evidencing Mr Honor's belated realisation that the fix which he thought he had agreed in December could not achieve its intended objective. It shows no recognition that he (and through him, Amey) might have fallen short in their responsibilities as employer. Instead, he unashamedly seeks to displace both blame and liability on to the claimant.

58. Turning to Kier's inquiries, I attach weight to Mr Podger's brief evidence, in which he described his one to one with the claimant on 10 January 2018, at which the claimant candidly said that he did no work on NOMS. As Mr Dennis pointed out, the claimant had no reason to give an untruthful answer to Kier, if the consequence was that he would not transfer to Kier, and would be stuck working at Amey, which he plainly wanted to leave.

59. Mr Podger's evidence was consistent with Ms McPhillips' letter of 17 January to Mr Gage (of Amey HR) in which she wrote that Kier had not received 'any evidence' to support the claimant's inclusion in the group to transfer to Kier (107). In reply to questions from the tribunal about what that evidence might have been, Ms McPhillips said that while she acknowledged the difficulties in

a functional role such as the claimant's (unlike for example plumbers or engineers) she would have expected to find records of time allocated to jobs, notes of meetings attended, and material to demonstrate physical work as part of a day to day role, not just a cost centre, and not just work on demobilisation. The following day, 18 January, Mr Gage wrote to Mr Honor and others to state that likewise he found no evidence to the same effect (121).

60. I attach very considerable weight to Mr Honor's email sent in reply quoted above (120). His language seems to me to imply recognition that he had thought that he could fix things with and for the claimant by the mechanism of reinstating him at Amey, to a job within the NOMS contract, which would then transfer to Kier; that he had come to realise that that was wrong; and that where it was wrong was that he knew that the claimant had not in fact gone to work on the NOMS contract after 4 December. It was striking that Mr Honor did not write that as the claimant had in fact gone to work on the NOMS contract on 4 December, any problem had been overcome.

Discussion

61. TUPE provides so far as material,

    61.1 Regulation 4(1) states that … *"a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transfer or and assigned to the organised grouping of resources or employees that is the subject to the relevant transfer …"*

    61.2 Regulation 4(3) states that … *"any reference … to a person employed by the transfer or/and assigned to the organised grouping of resources or employees … is a reference to a person so employed immediately before the transfer …"*

    61.3 Regulation 2(1) provides that "assigned" means assigned other than on a temporary basis.

62. In closing submission, I was referred to a number of authorities, notably, Costain v Armitage UKEAT/0048/14, Botzen 1986 2CMLR 50, and Duncan Webb Offset v Cooper 1995 IRLR 633. It was common ground that no guidance on the meaning of 'assigned' is to be found in the Regulations. I have understood the authorities to offer guidance on matters which might, or might not, be material; however, they lead to the proposition that the question of whether an employee was assigned is a multi-factorial question of fact for the tribunal. It is therefore evidence-specific. I understand the question to be whether the employee was assigned 'immediately before' the relevant transfer. I agree with Mr Anderson that on the facts of this case the focus must be the period between 4 December 2017 and 21 January 2018. That does not in my view require me to ignore the period before July 2017 if I find that it contains relevant background evidence.

63. In finding that the claimant was not assigned to the NOMS contract I rely on the following matters, which are not exhaustive or in order of priority:

63.1 Mr Dennis asked me to apply weight to the intention of the parties. That was a curious submission. Had I accepted it, my conclusions might not have assisted Amey. If I were to make a finding about intention, I would find that the claimant was not truly assigned to NOMS in early December 2017, in the sense that he was not placed on the NOMS contract to work as a participant in it. He was placed there as an expedient, which he and Mr Honor thought would solve a problem.

63.2 I however prefer Mr Dennis' submission that when deciding if there was an assignment, the intention of the parties is a matter of little relevance. That seems to me in accordance with two matters of general approach: first that the tribunal must interpret events objectively, and secondly that the labels which parties apply to their working relationships are not necessarily determinative of real status.

63.3 I find that it has not been shown, as a matter of background only, that the claimant undertook a predominant or significant proportion of his work or tasks on the NOMS contract in the period before December 2017 (or indeed, before July 2017).

63.4 I have considered whether the claimant's purported assignment from 4 December could be designated a sham. The point was not put in that language, and so it would not be right to reach a conclusion to that effect. It is sufficient to find that Mr Honor (and the claimant) thought that mere use of the language of assignment would suffice to achieve their common objective of transferring the claimant to Kier.

63.5 I find that it has not been shown that between 4 December 2017 and 22 January 2018 the claimant undertook work to any material degree on the NOMS contract. I accept that he undertook peripheral tasks on the NOMS contract, but that his main duties were supporting and servicing other tasks and projects on which he had worked, including notably the IMS project.

63.6 I find that it has been shown through cross examination that in contrast during that period the claimant undertook significant work on matters other than the NOMS contract.

63.7 I attach weight to the emails and letters of 17 and 18 January 2018, in which first Ms McPhillips and then Mr Gage write that there is no evidence of the claimant's activity on the NOMS contract. I accept that that there was their view at the time, formed specifically in response to a focussed inquiry for such evidence. I saw no evidence to the contrary.

63.8 I attach weight to the claimant's own assertions (notably to Mr Podger) that he had not worked on the NOMS contract: he did not at the time know how matters would proceed, and he certainly did not expect those remarks to be the subject of a tribunal hearing nearly a year later. I accept that no only had he no reason to lie, it could be said that by saying what he did, he damaged his own interests by undermining his ability to transfer to Kier.

64. I find in conclusion that the claimant was not assigned to the NOMS contract, and that his employment did not transfer to Kier. It follows that I need make no finding on whether any assignment was temporary. If I had found that the claimant was indeed assigned to NOMS on 4 December 2017, I would have found that the assignment was limited to a fixed period (to 21 January 2018); and to complete a finite task (demobilisation), which by definition was a form of close down. I would have found the assignment to be temporary.

_____
Employment Judge R Lewis

Date: …15 November 2018..

Sent to the parties on: 15 November 2018

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For the Tribunal Office