



EMPLOYMENT TRIBUNALS

Claimant: Mr S Radcliffe

Respondents:

1. Clugston Construction Limited – in administration
2. Clugston Group Limited – in administration
3. CNIM UK Limited

On: 18 and 19 February 2021

Before: Employment Judge D N Jones

This hearing was conducted remotely, by video (V), because of the restrictions arising from the pandemic Covid19.

REPRESENTATION:

Claimant: Mr D Maxwell, counsel

Respondent: Mr R Phillips, solicitor

JUDGMENT

1. The claimant was assigned other than on a temporary basis to the organised grouping of resources, EwF, the economic entity that was transferred to the third respondent.
2. The claimant was employed by the transferor immediately before the transfer.
3. Subject to the transfer of the economic entity of EwF having been the sole or principal reason for the dismissal of the claimant on 6 December 2019, he would have transferred to the third respondent by virtue of regulation 4 of the Transfer of Undertakings (Protection for Employment) Regulations 2006.

REASONS

Introduction

1. The second respondent 'Clugston Group' was the parent company to four trading companies one of which was the first respondent, Clugston Construction Limited, 'Clugston Construction'.

2. Clugston Group was a non-trading entity that held the Group's freehold property and investment interests. It administered the payroll, produced consolidated financial accounts and managed the VAT and tax affairs of its companies.
3. Constructions Industrielles de la Méditerranée ("CNIM") CNIM is the French based parent company of the Third Respondent.
4. Clugston Construction was made up of a regional construction business, an Energy from Waste ("EfW") business and it was contracted to undertake five FM contracts.
5. Clugston Construction and CNIM entered into a series of joint ventures in respect of the delivery of EfW under the auspices of ten limited companies within the Clugston group.
6. The Claimant was employed by Clugston Group, the second respondent, from 5 December 2007 until 6 December 2019 pursuant to the terms of a Service Agreement dated 3 September 2007. His job title was Managing Director of Clugston Construction, the first respondent. He was paid £295,000 gross per annum, together with other benefits. The Claimant was a statutory director of Clugston Group and Clugston Construction from 3 December 2007 and of the ten Clugston-CNIM joint venture companies. Other than under his service agreement, no remuneration was received by the Claimant for holding these directorships.
7. On 6 December 2019 administrators, KPMG, were appointed with respect to both the first and second respondents and the other companies within the Clugston group.
8. Of the nineteen members of staff employed by Clugston Group eleven were made redundant, including four directors, one of whom was the claimant. The other eight, two of whom were directors, were retained by the administrators to assist with the wind down of the Group and to gather information on the Group's financial and other interests.
9. It was not considered financially viable to trade the regional construction contracts of Clugston Construction. Most sites were abandoned immediately following the appointment of the administrators and one was sold.
10. Clugston Construction operated four active EfW projects under construction, (two of which were in a joint venture partnership with CNIM), and eight further projects where the EfW plants had been constructed and were operating. It was not considered financially viable to trade the EfW projects in administration.
11. The administrators liaised with CNIM with the aim of transferring the EfW contracts to CNIM and on 12 December 2019, the third respondent, CNIM UK, agreed to purchase shares in the ten joint venture companies held between CNIM and Clugston Construction. CNIM UK acquired the right to subcontractor information to continue the EfW projects in place of Clugston Construction.

12. Sixty-seven employees of Clugston Construction were included on a list of those who would transfer under the Transfer of Undertakings (Protection for Employment) Regulations 2006 (TUPE) to CNIM UK. This list did not include the claimant. On 12 December 2019 all on the list transferred to the third respondent. They were recognised as having been assigned to the economic entity, the EfW division of Clugston Construction.

13. The claimant issued proceedings for unfair dismissal, for a protective award and for a failure to inform and consult in respect of TUPE on 9 April 2020. He reserved any claim for breach of contract for pursuit in the High Court.

14. Following a preliminary hearing on 8 October 2020, a preliminary issue was identified: had the claimant's contract of employment transferred to the third respondent?

Issues

15. The preliminary issue has been redefined. Because he had been dismissed on 6 December 2019, the claimant's employment could not transfer on 12 December 2019 by reason of TUPE. That is a consequence of the decision in **British Fuels Ltd v Baxendale [1998] 4 All ER 609**. The House of Lords held that a dismissal before a transfer governed by TUPE would not be a nullity. The language of regulation 4(3) caters for this, to include someone who 'would have been so employed if he had not been dismissed'.

16. The question is, therefore, would the contract of employment of the claimant have transferred had he not been dismissed in accordance with the circumstances described in regulation 7, namely where the sole or principal reason for the dismissal was the transfer. The respondent does not concede that the reason for the dismissal related to the transfer. That means the answer to the preliminary issue would depend on a further question concerning the reason for the dismissal, which shall have to be considered at a further date.

17. For the purpose of this hearing, the preliminary issue raises the following questions:

16.1 Was the claimant employed by the transferor immediately before the transfer?

16.2 If so, was the claimant assigned other than on a temporary basis to the organised grouping of resources that was subject to the transfer?

The Law

18. Regulation 3 of TUPE provides:

- (1) These Regulations apply to—*
(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.

19. Pursuant to TUPE regulation 4:

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

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

20. By regulation 2(1) 'assigned' means "other than on a temporary basis".

21. In **Albron Catering BV v FNV Bondgenoten and anor [2011] ICR 373 (Albron)** the CJEU stated:

31. ...if, within a group of companies, there are two employers, one having contractual relations with the employees of that group and the other non-contractual relations with them, it is also possible to regard as a "transferor", within the meaning of Directive 2001/23, the employer responsible for the economic activity of the entity transferred which, in that capacity, establishes working relations with the staff of that entity, despite the absence of contractual relations with those staff.

32. The answer to the questions referred must therefore be that, in the event of a transfer, within the meaning of Directive 2001/23, of an undertaking belonging to a group to an undertaking outside that group, it is also possible to regard as a "transferor", within the meaning of article 2(1)(a) of that Directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment, even though there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment.

22. In **Botzen v Rotterdamsche Droogdok Maatschappij BV 186/83 [1986] 2 CMLR 50** the ECJ stated:

14...the Commission considers that the only decisive criterion regarding the transfer of employees' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and

which formed the organisational framework within which their employment relationship took effect.

15. The Commission's view must be upheld. An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive 77/187 by reason of a transfer within the meaning of Article 1(1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned.

23. In **Duncan Web Offset (Maidstone) Ltd. v. Cooper [1995] IRLR 633** Morison J, in the EAT, said,

“There will often be difficult questions of fact for industrial tribunals to consider when deciding who was 'assigned' and who was not. We were invited to give guidance to industrial tribunals about such a decision, but decline to do so because the facts will vary so markedly from case to case. In the course of argument, a number were suggested, such as the amount of time spent on one part of the business or the other, the amount of value given to each part by the employee; the terms of the contract of employment showing what the employee could be required to do; how the cost to the employer of the employee's services had been allocated between the different parts of the business. This is, plainly, not an exhaustive list; we are quite prepared to accept that these or some of these matters may well fall for consideration by an industrial tribunal which is seeking to determine to which part of his employers' business the employee had been assigned”.

Evidence

24. The tribunal heard evidence from the claimant, Mr Richard Greenwood director of the third respondent and Mr Arnaud Hume, Human Resources Director of CNIM.

25. The parties produced a bundle of documents of 522 pages and a supplemental bundle of 109 pages.

Findings of fact

26. On 28 March 2018 the Board of Clugston Group restructured Clugston Construction into five divisions, one of which was EfW. The 2 most significant divisions were construction and EfW. The claimant was seconded temporarily to lead the new EfW division for six months from 1 May 2018. EfW was regarded as an emerging market which was key to the business of Clugston Construction. To allow the claimant to focus on this responsibility, oversight of the construction division was handed to Mr R Fry, Commercial Director of Clugston Construction. The head of each division was to report directly to Mr Vickers, the Chief Executive Officer (CEO) of Construction Group. Previously the reporting structure had involved him and the other senior executives in Clugston Construction reporting to the claimant. The

claimant retained his substantive post as Managing Director under the new arrangement, notwithstanding this change.

27. The claimant accepted the new role, but expressed his reservations about the restructure in a letter to Mr Vickers on 25th of April 2018. He had concerns about the erosion of his duties and standing in the organisation. He made the point that the position was temporary and he expected to revert his normal duties including oversight of construction.

28. That did not happen. The role did not cease on 1 November 2018. The reporting structure continued beyond that date. The claimant raised a grievance about this on 25 November 2018. He stated his authority and personal standing had been eroded and undermined. He gave the example of the loss of seven senior managers who had previously reported directly to him and his responsibility for each of their departments which now been taken over by the group CEO or its commercial director. He complained that although he had been assured that his substantive post as managing director would remain, his responsibilities had reduced. Specifically, he referred to a lack of involvement or consultation in business planning, overhead structure and allocation, regional divisional reviews, a cross divisional business development meeting and the investigation of potential financial reporting irregularities. He stated that his role as a director on the Board of Clugston Group had also notably reduced. He queried whether this was intended to force him to resign and demanded a full reinstatement to his position responsibilities.

29. On 25 January 2019 Mr Vickers wrote to the claimant to confirm that his temporary secondment to EfW would end on 30 April 2019 and in the meantime he would remain Managing Director of Clugston Construction. He stated that the claimant would resume full day-to-day management of Clugston Construction from 1 May 2019 along with all other roles and responsibilities as managing director. An announcement was posted on 30 January 2019 to those in the Clugston group confirming this and welcoming the claimant back. He had been absent through ill health for 9 weeks which the claimant attributed to stress arising from these matters.

30. The claimant accepted the resolution to the grievance, as summarised in Mr Vickers' letter. A series of action points to resolve the grievance had been prepared by Mr David Clugston, a director of Clugston Group, on 24 January 2019.

31. In June 2019 Mr Vickers left. He was replaced by Mr Glynn Thomas on 5 July 2019.

32. Although the claimant had returned to his role as Managing Director of Clugston Construction, in reality the majority of his energies were directed at the EfW business. This is reflected in a snapshot of email traffic which the claimant has retrieved for 2 periods between 10 June and 29 June 2019 and 13 August 2019 and 16 August 2019, a 16 day period, 90% of which related to EfW work. There was a paucity of documentation available, because of the subsequent administration and closing down of the server. Nevertheless, I accepted the claimant's evidence about this, because it is reflected in the complaints he raised about the diminution in his role and status as managing director of Clugston Construction.

33. Mr Thomas discussed the future of the business with the claimant at a dinner on 6 August 2019. He informed the claimant that he wished to reaffirm the claimant's position as MD of EwF with a focus on 3 main contracts, which presented financial difficulties. The position was confirmed in a letter of 19 August 2019. Mr Thomas wrote, "*We can discuss what your title is over the coming days, I'm pretty relaxed about what you want that to be. This arrangement will last until your retirement, which confirmed to me last week would be by your 65th birthday next year*".

34. The claimant tendered his resignation by letter of 31 August 2019. He gave 12 months' notice, as required by his contract, to end on 31 August 2020.

35. On the same date, the claimant wrote to Mr Thomas to express his dissatisfaction with the decision to maintain his position in charge of EwF. He stated that the actions which had been promised by Mr David Clugston in resolution of his grievance had not been honoured. As to the reference by Mr Thomas to his title, going forward, he wrote, "*having been Managing Director of Clugston Construction for over 11 years, it would be with some disappointment to lose this title, I would see this as demotion, as I believe would others. However to continue with the title of Managing Director prolongs the ambiguity of my position in the company and the confusion this brings to others in the business. I would also need to consider the obligations that the title of Managing Director brings*".

36. On 30 October 2019 Mr Thomas published an announcement to inform staff that the claimant was to leave at the end of August 2020. He wrote, "*With this in mind, Steve shall step down as Managing Director of Clugston Construction Ltd and statutory director at the end of December 2019. I am delighted that Richard Greenwood will step into an executive divisional role for EfW on 2 January 2020. Steve will work with Richard until 31 March 2020 in order to provide handover of the EfW division and thereafter continue to provide support in the background where appropriate until 31 August 2020*".

37. On 5 December 2019 draft terms for a prearranged administration transaction were prepared including a proposal for a sales and purchase agreement (SPA) whereby the third respondent would acquire the 50% shareholding owned by Clugston Construction in the joint EwF projects and subcontracts.

38. The SPA was prepared on 6 December 2019. It included a list of those employees engaged on CNIM-Clugston projects.

Discussion, analysis and conclusions

Was the claimant employed by the transferor immediately before the transfer?

39. Mr Phillips submitted that the claimant was not employed by the putative transferor immediately before the transfer. That is because EfW was a division of Clugston Construction. The economic entity, EfW, was transferred from Clugston Construction to the third respondent. The claimant was employed by Clugston Group not Clugston Construction. Mr Phillips recognised that the CJEU had ruled, in **Albron**, that the Acquired Rights Directive would apply to an individual who had been assigned to the economic entity which transferred even though that individual were employed by another company within the group, so that the absence of any

direct contractual employment relationship would not defeat a transfer. However, he said there is no clear domestic authority on the point.

40. TUPE must be read consistently with the Acquired Rights Directive and I am satisfied that the principles in **Albron** can be applied without any offence to the language of the domestic legislation. Indeed, in **Duncan Webb Offset (Maidstone) Ltd v Cooper [1995] IRLR 633**, Morison J proposed three examples for analysis of whether an employee had been assigned for the purpose of TUPE. The third example was one in which an employee had been assigned to a business in another part of the corporate group. That would not defeat a transfer: *“This simply recognises that the contract of employment test is not the only matter for consideration. In other words, an employee might be employed by one company but be assigned to the business of another. Again, tribunals keep in mind the purpose of the Directive and the need to avoid complicated corporate structures from getting in the way of results which gives effect to that purpose”*.

41. I find the claimant was employed immediately before the transfer by the putative transferor, notwithstanding his contract of employment was with Clugston Group and not Clugston Construction. It is noteworthy that all the respondents were parties to the SPA.

If so, was the claimant assigned other than on a temporary basis to the organised grouping of resources that was subject to the transfer?

42. The question of whether or not a person has been assigned to the organised grouping of resources subject to the transfer cannot be answered simply by determining whether he was wholly engaged in that part of the business, an approach rejected by the ECJ in **Botzen**. Focus must be given to the link between the employee and the transferring part of the undertaking or business and the organisational framework within which the employment relationship took effect. The claimant did not work exclusively for EfW but continued to discharge some of the managing director duties for Clugston construction, albeit on a significantly reduced basis to that which had existed prior to 1 May 2018.

43. A number of authorities were cited by Mr Phillips and Mr Maxwell which concerned employees who did not work exclusively in the economic entity which was transferred but also in another part of the business. In such cases the question will depend upon a number of considerations, for example the time spent on one part of the business or another, the amount of value given to each by the employee, the terms of the employee’s contract with respect what he is required to do, the cost to the employer of allocating the employee to different parts of the business. The list is not exhaustive. The respondent suggests that the functional purpose of the work and where it sits in the organisational framework is a further relevant consideration. Although the legal authorities are of interest and helpful by way of illustration, ultimately each case will turn upon its own facts.

44. Mr Phillips submitted that the claimant’s remuneration was significantly greater than would be appropriate for the divisional leader of EfW. Mr Greenwood, the construction director who reported to the claimant in the EfW division, had a salary of £130,000 significantly less than half that of the claimant’s.

45. Moreover, he drew attention to the claimant's contract of employment, which specifically provided for the allocation of the claimant to work on a temporary basis for any of the group companies or its divisions and was in broad terms:

- “2.2 *You are required to carry out any duties which this job normally involves but in addition to your normal duties you may (from time to time) be required to carry out:—*
- *other duties which are necessary for the proper performance of your job; and/or*
 - *any duties which are necessary to meet the needs of the Company's business and are within your capability;*
- 2.3 *You may also be required to work on a temporary basis for any other company under the control of or associated with the Company or any of its trading divisions and your obligations under this Agreement will extend to such company or companies”.*

46. Pursuant to those contractual duties, Mr Phillips submitted that the claimant was required to focus his attention on an important part of the business, EfW, which had been expanding but was undergoing a financially turbulent period. At no stage was the title of Managing Director of Clugston Construction removed during his employment (although, coincidentally, that was to happen at the end of the month when he was dismissed) and he argued there was no demotion in rank. Simply by doing work for a particular part of the company in which he was the managing director was not sufficient to constitute an assignment.

47. Mr Maxwell submitted that the claimant's duties as managing director were eclipsed by the overwhelming majority of his working life which was devoted to leading EfW after 1 May 2018 and, although that had been intended to be temporary, it became permanent on any view from the beginning of August 2019.

48. In respect of time spent on respective duties, I accepted the evidence of the claimant that 75 to 80% of his work from 1 May 2018 until the end of his employment was for EfW. Although this is criticised as being impressionistic and not backed up by concrete evidence, it was nevertheless credible. The absence of documentation consequent upon the administration created difficulties for the parties in measuring work by reference to records. The limited amount of email correspondence which the claimant has been able to retrieve, albeit for only sixteen days, supported his assessment. It is significant that the June correspondence was at a time the claimant was supposed to have reverted to his full-time role as managing director of Clugston Construction. 90% of it was EfW work. Although this was a very small amount of material which, of itself, would have limited value, it ran with the grain of the detailed information provided by the claimant in his witness statement about activities discharged for that part of the business. It is unnecessary to recite sections of that statement, but I have no doubt the claimant spent the time he described with EfW in staffing and recruitment, procurement, progress and progress reporting, temporary works, cash flow and milestone payments, problems and issues solving, client relationships and contractual matters, citing one particular contract which generated a significant loss, LX engineering and the M and E subcontract.

49. I also accepted the claimant's evidence in respect of the reduced role he had in managing Clugston Construction as a whole. That had been his principal role throughout the first ten years of his employment. The changing reporting structure which eliminated him from oversight of and responsibility for all senior managers¹ other than those in EfW reflected a seismic change. While he continued to attend board meetings of both the first and second respondent, his responsibilities had significantly changed and been devolved onto others, such as Mr Fry, or taken over by the CEO or Commercial Director of Clugston Group.

50. The respondent suggested the claimant had overstated the change and relied upon the evidence of Mr Greenwood who had worked for Clugston Construction from 1991. He worked for many years in the predecessor to EfW, the energy and waste business unit, where he became business unit manager in 2010 leading all energy for waste projects. On 1 May 2018 he was promoted to construction director. He was led to believe by Mr Vickers that he was leading EfW, but it was clear from the documents that Mr Greenwood was taken to during his cross examination, that the claimant had held the lead role throughout. Mr Greenwood acknowledged that. However, he said that the claimant had emphasised in discussions that he was still the managing director of Clugston Construction and, from Mr Greenwood's perspective, he spent significant periods of time in that role and as a director of Clugston Board.

51. Reminding Mr Greenwood that he was managing director of Clugston Construction was, I am satisfied, more a reflection of the claimant's insecurity about his diminished role, as seen in his correspondence before the inception of the new division, in his grievance and ultimately at the time of his resignation. I therefore did not consider his remarks in this respect to Mr Greenwood of particular significance in assessing what he was doing for both parts of the business respectively or the value of that work to Clugston Construction.

52. Mr Greenwood had a little direct knowledge of the work the claimant was undertaking as managing director, for example at Monday morning opportunity reviews and bimonthly results meetings which were established under the claimant's leadership. However, the majority of Mr Greenwood's work did not provide first hand insight into the claimant's. I find his assessment less persuasive than the account provided, in significant detail, by the claimant.

53. The grievance raised by the claimant in November 2018 and the dissatisfaction he expressed about being required to maintain his position as leader of EfW in August 2019 was corroborative of the seriously diminished involvement which he had as managing director of Clugston Construction. This correspondence was created at a time when the claimant could not have foreseen its significance for the issue which arises for my determination and adds authenticity to the claimant's point. Mr Vickers, Mr David Clugston and Mr Thomas did not contradict what the claimant had said, supported with examples.

54. The most telling evidence that for the last few months of his employment his role as managing director had become for the most titular, is the exchange of

¹ HR Director, Marketing Director, Preconstruction Director, H&S Manager, Quality & Technical Manager, Head of IT, Financial Controller.

correspondence about what job title the claimant would have. The claimant was concerned about the loss of the title, but recognised how ambiguous the position had become and did not reflect the proper hierarchy. Mr Thomas stated he was relaxed about the job title. This betrayed the lack of substance in the post the claimant, by then, held but a willingness to help him save face. The public announcement that the claimant would hand over responsibility and cease to be managing director at the end of December 2019 was a compromise of mainly presentational significance.

55. I am satisfied that not only was the bulk of the claimant's time taken up with his leadership of EfW, but that reflected its value to the respondent. Mr Phillips' submission that the claimant was paid far more than his leadership role of EfW was worth was initially attractive. The remuneration package reflected that of a senior executive with a panoply of responsibilities. There were substantial differences between the claimant's service agreement and the other employees' less favourable terms and conditions, including notice periods and benefit packages.

56. However, having regard to how the claimant came to be where he was, I did not accept the submission. The Board made a decision to redirect its resource, in terms of the claimant, to one particular part of its business, EfW, and to remove a large part of his other duties. The decision to maintain that position after the first secondment changed from being temporary to permanent was a commercial one for the Board of the Group. If the Board wished to use the human resource of the claimant in this way at that cost for the last 2 years of his employment, the level of remuneration cannot defeat the link which unquestionably existed, and had become embedded, between the claimant and EfW. Within the organisational framework, by December 2019, the claimant was firmly and principally within and at the top of EfW. Mr Phillips rightly said in his closing submission that where the claimant sat within the operational framework was similar to the value the employee provided, but it foundered for the same reasons. The Board of the claimant was placing him at the top of EfW and it was prepared to pay him the same as it had paid him with the broader range of responsibilities he had discharged for more than 10 years as Managing Director of Clugston Construction. By 6 December 2019, those functions and duties had largely gone, and those which remained were to flicker out and extinguish by the end of the year.

57. Mr Phillips drew attention to the number of directorships held by the claimant including on the Clugston Group and the duties he had to discharge as a statutory director. I was satisfied that his involvement in the Board of the Clugston Group had significantly changed, as his authority and influence had faded. The discharge of his statutory duties, which included signing the audited accounts, attending board meetings and ultimately appointing administrators on 6 December 2019, was not a significant part of his role and was shared with others.

58. Although the contract of employment of the claimant entitled the Group Board to task the claimant in a particular way, that envisaged a temporary period under clause 2.3. The initial devotion to the EfW division was temporary, which of itself would preclude an assignment under regulation 4. That changed; by extension of the six-month secondment to a year and then becoming permanent for the remainder of the claimant's employment. By that stage the definition of the claimant's role was clear, being very firmly in the heart of EfW with a vestigial number of

functions in the other parts of the business. I do not regard clause 2.2 of the service agreement as involving the reduction or removal of a large number of functions of the managing director as in fact occurred.

59. The parties invited me to consider whether there may have been a financial motive to exclude the claimant from the transfer on the one hand, or for the claimant to change his stance and seek a transfer on the other. I did not find this helpful, on the facts of this particular case. Whether or not the claimant had been assigned to an organised grouping of resources turned upon an assessment of what he had been doing, the functional purpose of it, his contractual obligations, the value he was contributing to different parts of the business and where he sat in the organisational framework. Mr Hume had been called to address how the claimant's name had not been on the transfer list and the concerns raised after the transfer, but he could not assist on the above factual issues concerning assignment.

60. For all of the above these reasons, I am satisfied that the claimant was assigned to the organised grouping of resources or employees of EfW, the economic entity, immediately before its transfer.

Postscript

61. At the previous preliminary hearing before Employment Judge Shepherd, it had been suggested this would dispose of the claimant's involvement in the multiple claim for a protective award. This needs to be reviewed in the light of the fact the dismissal on 6 December 2019 was not a nullity, as addressed at paragraph 15 above.

62. The claimant's employment did not transfer, but there remains a question as to whether or not the reason for his dismissal was the transfer. If it was, it would seem to me that any right or liability in respect of the dismissal would transfer to the third respondent and that would include any protective award. If it was not, he would still be able to claim a protective award but the liability would not transfer.

63. A number of questions may arise in respect of the claimant's case, separate and apart from other claimants. That may be about which establishment he worked at and whether it had more than 20 employees. Additionally, if a protective award is made in his case, would it be just and equitable to make it for any period at all, and if so, how long? He was one of the statutory directors upon whom responsibility for collective consultation lay and, notwithstanding his role as managing director of Clugston Construction had been significantly hollowed out, should any award not reflect his own breach of the duty?

64. These further issues shall be addressed at the forthcoming hearing in the multiple action

Employment Judge D N Jones
Date: 3 March 2021

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