Appeal No. UKEATS/0001/17/JW

# EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 10 May 2017
Judgment handed down on 25 September 2017

**Before**

**THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)**

**(SITTING ALONE)**

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MRS O DAFIAGHOR-OLOMU — APPELLANT

(1) COMMUNITY INTEGRATED CARE
(2) CORNERSTONE COMMUNITY CARE — RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR DOUGLAS FAIRLEY<br>(One of Her Majesty's Counsel)<br>Appearing under the Scottish Employment Appeal Legal Advice Scheme |
| For the First Respondent | MR ALASDAIR HARDMAN<br>(of Counsel)<br>Instructed by:<br>Wrigleys Solicitors LLP<br>19 Cookridge Street<br>Leeds<br>West Yorkshire<br>LS2 3AG |
| For the Second Respondent | MS ALICE STOBART<br>(of Counsel)<br>Instructed by:<br>Harper Macleod LLP<br>Alder House<br>Cradlehall Business Park<br>Inverness<br>IV2 5GH |

**SUMMARY**

**UNFAIR DISMISSAL - Reinstatement/re-engagement**

The Employment Tribunal refused orders for reinstatement or re-engagement in respect of both Respondents. In so doing, it erred in relation to the First Respondent. However, so far as the Second Respondent is concerned there was no material error because the Second Respondent is not a successor employer within the meaning of section 235 **Employment Rights Act**.

The appeal was allowed in relation to the First Respondent and the issue of re-employment was remitted to a fresh Tribunal.

**THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)**

**Introduction**

1. By a Judgment initially promulgated on 12 January 2016 and subsequently corrected in February 2016, the Aberdeen Employment Tribunal (comprised of EJ Hendry and members, Mrs McCabe and Miss Main) refused to make any form of re-employment order in favour of Mrs Ochuko Dafiaghor-Olomu, and instead made a financial award to compensate her for her earlier unfair dismissal on 29 May 2013 by her employer, Community Integrated Care ("CIC"). She appeals against that refusal, and is referred to below as "the Claimant" for ease of reference.

2. The Claimant represented herself before the Employment Tribunal. She has had the benefit of legal assistance for the first time on this appeal and provided under the Scottish ELAAS scheme by Douglas Fairley QC, to whom I am particularly grateful.

3. CIC is a charity providing care to vulnerable people in residential homes. During the Claimant's employment and for a short time afterwards, CIC provided services throughout Scotland and south of the border, in England. By the time of a Preliminary Hearing to case manage the remedy issues on 11 August 2014, most of the contracts under which CIC operated in Scotland (including at Sunnyside where the Claimant had worked as the Manager) had transferred to Cornerstone Community Care ("Cornerstone").

4. Cornerstone was joined as a Second Respondent to the proceedings at that stage, there being no dispute that the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") applied to the change in service provider at Sunnyside and that

there was a relevant transfer of the service for the purposes of **TUPE**. Both CIC and Cornerstone resist this appeal.

5. By the time of the final Remedy Hearing on 11 December 2015, CIC no longer provided services in Scotland and was only operating in England (and perhaps Wales). What appears to have been the last care home operated by CIC in Scotland, at Howieson Place in Inverurie, transferred to a third provider in August 2014.

6. A complicating feature in relation to remedy is the Claimant's immigration status. The Claimant is Nigerian and requires a work visa to work in the UK. A consequence of her unfair dismissal was the revocation of her visa, and though the Home Office has been prepared to grant her a visa, it requires an employer to sponsor her application with a Certificate of Sponsorship (or "CoS"). This has caused some difficulty for her and made re-employment an even more attractive remedy than it otherwise might have been.

**The Tribunal's central conclusions**

7. So far as re-employment is concerned, the Employment Tribunal held as follows:

(i) Reinstatement/re-engagement of the Claimant was no longer practicable in relation to CIC because CIC no longer had local services in the north-east of Scotland in which to employ the Claimant having lost the Sunnyside contract and later the contract at Howieson Place in Inverurie. Further, at the date of the Remedy Hearing the Claimant did not have a valid work visa (paragraph 85).

(ii) The Claimant was not employed by CIC at the date of the transfer because of her earlier unconnected dismissal (albeit that it was unfair) and she was not in the

workforce that transferred to Cornerstone under **TUPE** as a consequence (paragraph 87).

(iii) Alternatively if wrong about that, re-engagement of the Claimant by Cornerstone was not practicable because through reorganisation the post of Manager at Sunnyside had been removed and replaced by a new post at a higher grade with increased responsibilities managing more than one care home.

8. Each of those conclusions is challenged by the Claimant. In relation to CIC, the Claimant contends that the Employment Tribunal's consideration of the practicability of reinstatement / re-engagement was flawed because:

(a) it failed to recognise that there are two stages at which practicability falls to be assessed; the first, under section 116 of the **Employment Rights Act 1996** ("the ERA") - when the determination on practicability need only be provisional - and the second under section 117, after the relevant order has been made; and/or

(b) the two factors relied on in the section 116 assessment (the fact CIC no longer had local services in the north-east of Scotland, and the Claimant did not have a valid work visa at the date of the Remedy Hearing) were irrelevant.

9. So far as Cornerstone are concerned, the Claimant challenges the Employment Tribunal's consideration of the remedy of re-engagement as erroneous in law by virtue of:

(a) the failure to recognise that the power to order re-engagement of the Claimant under section 115(1) **ERA** included a power to order re-engagement by "the employer or by a successor of the employer", and to find that Cornerstone is a successor irrespective of **TUPE**; and/or

(b) taking into account a factor (the disappearance of the post from Cornerstone's establishment) which was irrelevant to the remedy of re-engagement.

**Burns/Barke procedure**

10. These grounds of appeal proceeded on the Tribunal's reasoned Judgment of 12 January 2016 which was unclear in some significant respects. In particular, at the appeal hearing on 10 May 2017, I was concerned to understand why, in circumstances where both CIC and Cornerstone operate outside the north-east of Scotland (and in CIC's case, throughout the UK) the Employment Tribunal apparently confined consideration of re-engagement to positions within the north-east of Scotland. (Cornerstone operate in Scotland only.) The Claimant's position then and now, was that she placed no such restriction on where she was (and remains) prepared to work under a re-employment order.

11. By agreement between the parties the appeal was sisted and the Employment Tribunal was asked to respond to a series of agreed questions put to it under the **Burns/Barke** procedure.

12. On 29 June 2017, the Employment Tribunal responded to the questions asked. Its Answers contain some new material, and the Claimant has supplemented her grounds of appeal by reference to the Answers. To the extent necessary, I give her permission to do so (no objection having been taken by either Respondent).

13. Among the Answers provided by the Employment Tribunal, the following matters are significant:

(a) "The Tribunal was aware from the merits hearing that the Claimant was settled in Aberdeen where she lived with her husband and young family." (Answer i)

(b) "The Claimant under the heading Re-Engagement made reference to seeking to be re-engaged into a wider variety of roles that were not just based on her experience in the Care Sector. We did not understand that it was being suggested that the roles being sought were outside the North East of Scotland. Given the Claimant's personal circumstances we would have been surprised if that had been the position." (Answer i)

(c) "The Claimant did not specifically discount any establishment outside the North East but neither did she attempt to identify or discuss establishments other than [Thistle Drive and Brimmond Drive] … She did not question Mr Aird about other opportunities." (Answer ii)

(d) "The First Respondents did not give the Tribunal evidence about vacancies throughout the country". (Answer iii)

(e) Neither Respondent provided a list of vacancies within its organisation as at the date of the Remedy Hearing. (Answer iv)

(f) "We concluded that re-engagement to any other positions were [sic] impracticable because the Claimant was apparently settled in Aberdeen and seemed to have accepted that these [positions in Inverurie or Sunnyside] were the only options available. Hence the issues revolved around these establishments and the problems over obtaining a Visa and did not include evidence or submissions about posts that would be considerably distant from her home." (Answer vii)

14. Answer vii) encapsulates the Tribunal's reasons for rejecting re-engagement. Two elements are identified. First, the Tribunal's understanding (derived from the earlier Liability Hearing) of the Claimant's personal circumstances; and secondly, the inference the Tribunal

drew (without the matter being discussed in evidence or submissions) that because of her personal circumstances, she accepted that there were two options only, both in the north-east of Scotland.

15. None of the parties invited me to list a further oral hearing of the sisted appeal but the Claimant expressed a wish to make further written submissions. In the circumstances I made directions for exchange of written submissions between the parties and for lodging final versions with the EAT following exchange, by 4 August 2017.

16. CIC resist the appeal and maintain in light of the Employment Tribunal's Answers that the appeal should be dismissed because there was no error of law in addressing questions of practicability and the Tribunal properly took account of the Claimant's expressed wishes concerning re-engagement. Cornerstone contend that there was no material error in the Employment Tribunal's failure to consider the "successor" provision because it is not a "successor" employer. However, if they are wrong about that, they contend that the matter must be remitted for further evidence on the question of re-engagement to be heard.

**The statutory framework**

17. The power to make reinstatement and re-engagement orders (together referred to as re-employment orders) is provided by sections 112 to 116 **ERA**. Under section 112 a tribunal must enquire whether an unfairly dismissed claimant seeks orders for reinstatement or re-engagement in preference to compensation, reinstatement and re-engagement being required to be considered first. Section 113 provides that such orders may be made. Section 114 defines what is meant by reinstatement, limiting such an order to the employer of the complainant.

18. Section 115 defines re-engagement, and provides that:

> **"(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment."**

19. Section 116 provides relevantly as follows:

> **"116. *Choice of order and its terms***
>
> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement …**
>
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
>
> **(3) In so doing the tribunal shall take into account -**
>
> > **(a) any wish expressed by the complainant as to the nature of the order to be made,**
> >
> > **(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**
> >
> > **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
>
> **(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement."**

20. There is no dispute that the question of practicability in section 116(3)(b) is to be taken account of as at the date when a re-employment order is being considered. This is the first stage of consideration, and as stated in **Timex Corporation v Thomson** [1981] IRLR 522, cited with approval by the Supreme Court in **McBride v Scottish Police Authority** [2016] IRLR 633, the tribunal need only have regard to whether re-engagement is practicable and that is to be considered on a provisional basis only. As Baroness Hale explained in **McBride**:

> **"37. At the stage when it is considering whether to make a reinstatement order, the tribunal's judgment on the practicability of the employer's compliance with the order is only a provisional determination. It is a prospective assessment of the practicability of compliance, and not a conclusive determination of practicability. This follows from the structure of the statutory scheme, which recognises that the employer may not comply with the order. In that event, section 117 provides for an award of compensation, and also the making of an additional award of compensation, unless the employer satisfies the tribunal that it was not practicable to comply with the order. Practicability of compliance is thus assessed at two separate stages - a provisional determination at the first stage and a conclusive determination, with the burden on the employer, at the second: *Timex Corporation v Thomson* [1981] IRLR 522, 523-524 per Browne-Wilkinson J and *Port of London Authority v Payne* [1994] IRLR 9, 14 per Neill LJ.**

> **38. Thus in Ms McBride's case, the ET, when considering whether to make the order for reinstatement, did not need to reach a concluded view on whether Ms McBride would accept her continued exclusion from the excluded duties and avoid confrontation with her employer on that issue. It was sufficient if the ET reasonably thought that it was likely to be practicable for the employer to comply with the reinstatement."**

21. If the second stage is reached, the employer has a further opportunity (under section 117(4) **ERA**) to show why a re-employment order is not practicable if it does not comply with the original order and seeks to defend itself against an award of compensation and/or additional award that might otherwise then be made under section 117(3). At the second stage the burden is clearly placed on the employer to satisfy the tribunal that it was not practicable to comply with the order.

22. Practicable in this context means more than merely possible but "capable of being carried into effect with success": **Coleman v Magnet Joinery Ltd** [1974] IRLR 343 at 346 (Stephenson LJ).

23. In **Small v The Shrewsbury and Telford Hospitals NHS Trust** [2017] EWCA Civ 882, the Court of Appeal held that an employment tribunal had erred in failing to consider the availability to a claimant of damages for "stigma loss" even where no such claim had been advanced by him in his claim form or before the tribunal. The Court noted the importance of a tribunal "taking for itself" points which arise "as a matter of course" in considering remedy or other well-established legal questions, irrespective of whether or not they have been taken by parties before them. This is particularly important where parties are self-represented. The Court noted that whilst the tribunal "may not have had the best evidence on which to decide that question [of stigma loss]", "if it had raised the issue for itself, as … it should have, it may be that the [Respondent] would have raised an objection and/or sought an adjournment … What

A can be said is that the Appellant has lost the opportunity to make submissions on an aspect of his claim which the Tribunal should … have considered … as a matter of course".

B 24. This important principle is relied on by the Claimant on this appeal.

**The appeal in relation to CIC**

C 25. Mr Fairley QC, on behalf of the Claimant, contends that having actively sought the primary remedy of re-employment without placing any express restrictions upon where she would be prepared to accept such re-employment, the issue of re-engagement by CIC outside the north-east of Scotland arose naturally and as a matter of course. Her position (which, he D accepts, does not appear in the Judgment or in the Tribunal's Answers) is that she advised the Employment Tribunal that both Respondents were large organisations with a presence in various locations throughout Scotland and the UK, employing thousands of staff, and that E accordingly one of them ought to be able to re-employ her at one such location. It was therefore incumbent upon the Tribunal expressly to raise with the parties the issue of re-employment outside the north-east of Scotland, to make such factual inquiry on that issue as was appropriate as at the date of the Remedy Hearing, and expressly to invite submissions from F the parties on the issue. The failure to do so before rejecting re-employment as "impracticable" was a material error of law.

G 26. Further, Mr Fairley challenges the Tribunal's assumed finding that she resided with a husband and young family in the north-east of Scotland as being wholly unsupported by any evidence and perverse because the Claimant and her husband separated some years before the H Remedy Hearing and she has no children. He says on instructions, and without express challenge from either Respondent, that the Claimant says:

> **"… my family life was never discussed in the remedy hearings. *I have been separated from my husband since 1 June 2010 and I do not have any children.* The only time my family life was mentioned was during the hearing of the unfair dismissal claim in January 2014, when the ET judge asked what brought me to Aberdeen and I informed him that I relocated from London to Aberdeen in 2009 to join my husband." (Emphasis added)**

27. Mr Hardman on behalf of CIC resists those submissions. He relies on the Employment Tribunal's confirmation that it took account of whether it was practicable for CIC to comply with an order for reinstatement, and, as to re-engagement, that it considered not only whether an order for re-engagement was practicable, but also the wishes expressed by the Claimant as to the nature of the order to be made. Accordingly this is not a case like **Small v Shrewsbury and Telford Hospitals NHS Trust** where the Tribunal failed to consider a matter not raised by the Claimant. Rather, the only question is whether the Employment Tribunal acted correctly in making the assessment it did under section 116 **ERA**. He submits that it did because the Tribunal "took into account what they were led by the Claimant to believe were her wishes as to the nature of the order to be made" before turning to whether such an order was practicable, exercising the discretion appropriately in deciding not to make any re-employment order. The Tribunal could not have been expected to take into account wishes which the Claimant did not express. He submits that the Claimant did not express any wish to be re-engaged outside Aberdeenshire, and relies on the Claimant's admission at the Reconsideration Hearing that her evidence at the Remedy Hearing concentrated on re-engagement to a role within the Aberdeen area.

28. Although the Liability Hearing took place in January 2014, the Remedy Hearing at which the assessment of practicability occurred did not take place until nearly two years later, in December 2015. Nonetheless, as appears from Answer i) the Tribunal took no steps during the Remedy Hearing to check whether its understanding of the Claimant's personal

A circumstances, derived from something apparently said (but not recorded, and therefore not capable of correction) two years earlier, was or remained correct.

B 29. Furthermore, as is clear from the Answers, neither Respondent provided a list of vacancies available in their organisation (whether within or outside the north-east of Scotland) at the date of the Remedy Hearing, and the Claimant appears to have done her best with the limited information she was given by them. It was for the Respondents to produce evidence as C to what vacancies existed at the time of the Remedy Hearing. This was information within their knowledge and not within the Claimant's knowledge. Had this been done, as it should have been, both sides would then have been in a position to adduce evidence about the suitability of D those vacancies, both in terms of their geographical location and the job role involved. Without this, I cannot see how it can be said that it was for the Claimant to adduce evidence or make specific submissions as to vacancies outside the north-east of Scotland that she knew nothing about. I do not think it fanciful to suppose that there may have been vacancies suitable for the E Claimant outside that limited area. It is particularly unfortunate in these circumstances, that the Tribunal relied on an impression that the Claimant "appeared to have accepted" (Answer vii) that the positions at Sunnyside and Inverurie were the only options available, without making F any inquiry whatever to clarify whether this was correct or not.

30. I have come to the conclusion that, in the particular circumstances of this case, where G the Claimant sought re-employment without placing any express limitation on geographical location, and referred expressly to the fact that CIC operate throughout the UK and, critically, the Employment Tribunal relied almost entirely on her assumed personal circumstances as a factor militating against such an order, that it was incumbent upon the Tribunal to explore this H directly, raising it as a matter of course irrespective of the parties' failure to do so, rather than

basing its decision on assumption or speculation. True it is that the Claimant focussed on specific positions known to her in the north-east of Scotland, but that is entirely understandable in the circumstances. By itself, it did not mean that she would not cast her net wider if those positions were not available. Moreover, it seems to me that the Claimant could not have known that her assumed personal circumstances weighed with the Tribunal as they did, because this was never expressed until receipt of the Answers. In fact, the Claimant's reconsideration application makes express reference to a number of job applications she had pursued south of the border, and a statement by her dated 12 October 2015 (and therefore available at the Remedy Hearing) headed "Evidence of Job Applications and Interviews Attended" lists interviews attended by her in Peterhead and Wolverhampton prior to the Remedy Hearing. If the Tribunal had tested its silent understanding of the Claimant's expressed wish to be re-employed in order to take account of such wishes (as required pursuant to section 116(3)(a)) it is likely that this evidence would have emerged clearly and at an early stage.

31. Had the Tribunal made relevant inquiries at the Remedy Hearing it would, at the very least, have become apparent that the Claimant has no "young family", has not lived with her husband since 1 June 2010 and accordingly, that there was nothing in her personal circumstances that made it impracticable for her to be re-employed outside the north-east of Scotland. Moreover, she would have had the opportunity to make submissions on an aspect of her case for re-employment which the Tribunal should in my view have considered on the basis of the material before it "as a matter of course". In all these circumstances, the Tribunal's failure to do so was in error of law.

32. That conclusion is reinforced by that fact that the Employment Tribunal was engaged on a provisional (and not a final) assessment of what was or was not practicable for CIC. It did not

need to reach a concluded view on whether the Claimant would accept relocation from Aberdeen, or would obtain a work visa. Provided both were possible outcomes (as appears on the face of it to be the case) and the Employment Tribunal reasonably thought that it was likely to be practicable for CIC to comply with reinstatement or re-engagement that would be sufficient. If the Claimant subsequently refuses to relocate or is unable to obtain a visa, or for some other reason re-employment is impracticable, that will be a matter for final assessment under section 117 **ERA**.

33. It follows, in my judgment, that this part of the appeal must be allowed. The case will have to be remitted for reconsideration of re-employment by CIC on a wider geographical basis than that hitherto erroneously considered by the Tribunal.

**The appeal in relation to Cornerstone**

34. This part of the appeal depends entirely on the Claimant being able to show that Cornerstone is or may be a successor employer to CIC for the purposes of re-employment. Cornerstone accepts that while **TUPE** was addressed, no consideration was given to this issue by the Tribunal. However, Ms Stobart for Cornerstone, contends that even if the Tribunal had considered this question, it would inevitably have concluded that Cornerstone was not a successor employer so that there is no material error of law and no reason to remit in relation to Cornerstone.

35. A successor employer is defined by section 235(1) **ERA** for the purposes of section 115 **ERA** as:

> **"… a person who in consequence of a change occurring (whether by virtue of a sale or other disposition or by operation of law) in the ownership of the undertaking, or of the part of the undertaking, for the purposes of which the employee was employed, has become the owner of the undertaking or part"**

A It is common ground that there is no guidance in any authority as to the meaning of the phrase "change in the ownership of the undertaking".

B 36. Mr Fairley contends that the phrase "change in ownership of an undertaking" in section 235 is to be interpreted as including all situations where **TUPE** applies, including a service provision change. He submits that the rights under a contract are ownership rights for these purposes and that a service provision change is a species of transfer of ownership. He relies on

C **Dines and Others v Initial Healthcare Services Ltd** [1995] ICR 11 CA where the **TUPE Regulations 1981** ("TUPE 1981") were construed so as to give effect to Council Directive 77/187 so that where one company took over the provision of cleaning services from another

D company as a result of competitive tendering without any transfer of assets, the cleaning services were held to have transferred as an undertaking for the purposes of **TUPE 1981**. He submits that the 'undertaking' here is the basket of rights and obligations that are transferred

E and given that there was a transfer under **TUPE** from CIC to Cornerstone, there was a relevant change in ownership by operation of law for the purposes of section 235.

F 37. I do not accept these submissions. I agree with Ms Stobart that it is important to consider the meaning of successor employer for the purposes of sections 115 and 235 in light of the drafting history of these provisions. Section 115 **ERA** derives from section 69 **Employment Protection (Consolidation) Act 1978**. A "successor" in the **1978 Act** is defined

G in section 153 of that Act as having the meaning given to "successor" by section 30(3) and (4) **Trade Union and Labour Relations Act 1974** ("TULRA"). The definition provided by section 235 **ERA** remains in almost identical terms to that provided by section 30 **TULRA**.

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38. In other words the definition of "successor employer" dates back to 1974, and pre-dates **TUPE 1981**. The broad definition of "undertaking" and the wide scope of a relevant transfer that has emerged since 1981 for employment protection purposes, was not in contemplation in 1974. Further, the definition of "successor employer" has remained unchanged since the introduction of **TUPE 1981** and its successor provisions in 2006.

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39. Considered in that context, I do not agree that the requirement in section 235 of a "change in the ownership of the undertaking" is to be interpreted as coextensive with a relevant transfer under **TUPE** or as including all situations where **TUPE** applies, including a service provision change. Under **TUPE** no change in ownership of the undertaking is required to effect a relevant transfer. **Dines** reinforces this point: the 'undertaking' passed from the transferor back to the local authority and then to the transferee, and there was no contractual relationship between the two service providers. In my judgment, section 235 requires a change in legal ownership of the undertaking itself. That is reinforced by the ways in which the change can occur: by sale or other disposition or by operation of law. However wide the term "undertaking" may be, a mere change in the legal or natural person who is responsible for carrying on the undertaking is not enough. There must be a change in legal ownership however that occurs.

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40. That is consistent with the purpose of sections 115 and 235 **ERA** which impose obligations on successor employers to re-employ former employees who may have been dismissed considerably earlier, but limit these onerous obligations to situations where there has been a change in ownership of the undertaking in question. Without that limitation the liability of successor service providers to re-employ employees no longer employed at the time of transfer would be potentially unlimited and difficult to cater for (for example by warranty,

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indemnities or contract). Where there is a change in ownership of an undertaking (or part of an undertaking) for the purposes of which an employee is employed, then the risk of a dismissed employee of the former employer bringing a claim against the new owner of the employing undertaking can be regulated by contract. In the case of a change in the provider of a service there is generally no contractual relationship between the former provider and the new provider and it is only in the context of **TUPE** or a change in ownership that liability for employees of the former employer can sensibly be regulated for between these parties.

41. Here, Aberdeen City Council terminated the service provided by CIC and awarded the service contract to Cornerstone. There was no change in the ownership of the service from CIC to Cornerstone. There was simply a change in contractors with ownership remaining with Aberdeen City Council. Cornerstone is not a successor employer within the meaning of section 235 **ERA** for the purposes of sections 115 and 116 **ERA**.

42. In light of that conclusion, it is unnecessary to address the remaining arguments in relation to Cornerstone.

**Conclusion**

43. The appeal is accordingly allowed in relation to the refusal to order re-employment by CIC. The appeal in relation to Cornerstone is dismissed.

44. The question of re-engagement by CIC must be remitted for reconsideration. The final question is whether that should be to the same or to a differently constituted Tribunal. Having regard to the criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, I consider that it would be unsatisfactory for the same Tribunal to hear the matter on remission in

light of the approach it has adopted and that the interests of justice are best served by remission to a different Tribunal. Fresh evidence and submissions will have to be heard on the question of re-engagement, and I do not consider that a speedier resolution is more likely if the same Tribunal rehears the case, than if a fresh Tribunal hears it.

45. Finally I am grateful to all advocates for their helpful oral and written submissions in this case.