



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104649/2024

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Held in Glasgow via Cloud Video Platform (CVP) on 18 September 2024

Employment Judge S Cowen

10 **Mr J Stubbs**

**Claimant
Represented by:
Mr L G Cunningham
- Advocate**

15 **The Scottish Ministers**

**Respondent
Represented by:
Ms M Armstrong
- Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

201. The Claimant's application to amend his terms and conditions of employment to reflect a recognition agreement between Serco and Community is dismissed.
2. The Respondent must provide the Claimant with a s.1 ERA letter of terms and conditions which does not include reference to the recognition agreement between Serco and Community.
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REASONS

Introduction

1. This is a claim under s.11 Employment Rights Act 1996 to amend the contract of employment between the claimant and respondent to reflect the agreed terms. The issue of whether this includes the term of a recognition agreement between the transferor predecessor to the respondent and the Claimant's trade union, Community, is central to this claim. The hearing was listed for one day for final hearing.
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2. The Tribunal was provided with an agreed bundle of document, an agreed list of facts, a skeleton argument on behalf of the Claimant, along with a list of authorities and a supplemental list, and a skeleton argument on behalf of the Respondent, along with a list of authorities and copies of the same.
53. The Tribunal heard evidence on oath from Mr Stubbs and from Ms Bowie, the Respondent's HR Business Partner.

Findings in fact

4. The Tribunal makes the following findings in fact:
 - 4.1. The Claimant started working for Serco as a Prison Custody Officer on 17 August 2011 at HMP Kilmarnock. He was provided with a contract of employment which includes at paragraph 30 the recognition of the Prison Service Union ('PSU') for the purposes of collective bargaining rights at HMP Kilmarnock.
 - 4.2. On 1 January 2013 the Prison Service Union ('PSU') transferred all employees, assets, liabilities and membership to Community the Union in accordance with s.98 Trade Union and Labour Relations Consolidation Act 1992 ('TULRCA') and Reg.3 Trade Union and Employers' Association (Amalgamation etc) Regulations 1975. The members of PSU were treated as having continuous membership of Community from the date of their most recent entry to the PSU.
 - 4.3. Community is an independent trade union within the meaning of s.1 of TULRCA 1992
 - 4.4. In 2016, a revised agreement was made, named 'Forward Together', between the Scottish Prison Service ('SPS') (Owned and run by the Respondent) and the Prison Officers Association (Scotland) ('POA(S)'), the Public and Commercial Services Union ('PCS') and Prospect, to recognise these trade unions for the purposes of collective negotiation and bargaining. Neither the PSU, nor Community the Union were a party to that agreement.

- 5 4.5. The Claimant was a member of Community the Union, who entered into a National Recognition and Procedural Agreement ('recognition agreement') with Serco in December 2022. Included in that agreement were terms on recognition, procedure and representation in Scotland, as well as the right to negotiate pay, terms and conditions, we as any changes to established collective agreements. This agreement was reviewed in September 2023 and was continued in agreement with Serco.
- 10 4.6. The Claimant was aware that Community undertook collective bargaining with Serco on his behalf after the transfer from PSU to Community. The Claimant was involved in some of this collective bargaining in respect of pay, due to his role as branch secretary for a couple of years. The Claimant was aware that an increase in pay did not lead to a new contract being issued, but did lead to the pay being increased and continued work in return.
- 15 4.7. On 17 March 2024, the Claimant's employment transferred to the Respondent as part of a Service Provision Change under TUPE Regulation 3(1)(b).
- 20 4.8. An agreement between SPS and the unions who were part of the Together Forward collective entered into an agreement on 12 March 2024, which stated that TUPE Regulations would apply to the Transfer of those who were employed by Serco in HMP Kilmarnock who would transfer to SPS, but that Community the Union would not be joined to the Together Forward group and that employees in Kilmarnock will not automatically fall within the bargaining units of Together Forward as they will not be automatically assimilated to SPS pay bands.
- 25 4.9. An amendment was made to that agreement on 17 March 2024, which then included any senior operational managers who transferred to the Respondent as a result of the TUPE transfer.
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4.10. The Claimant's pay and sickness benefits remain different from those who were existing employees of the Respondent. Although the Respondent is in the process of carrying out a harmonisation project which they hope to have completed by 1 December 2024.

5 4.11. Any new recruits to HMP Kilmarnock are recruited on SPS contracts and terms and conditions. Likewise, any internal moves within HMP Kilmarnock leads to a new SPS contract. The Claimant believed that he was currently restricted from applying for jobs in other SPS sites around Scotland. However, this was mistaken as the Respondent's
10 witness said that there had been no such restriction since SPS took over the prison.

Claimant's submissions

15 4.12. The Claimant submitted that due to the change in employer the Claimant was entitled to request a copy of his new terms and conditions and that any such document should contain a note of the collective agreement which applies to the contract. He said that in order to be a collective agreement it need only to deal with one aspect of s.178(2).

20 4.13. The Claimant relied on the fact that the agreement between Serco and Community referred to consultation between them in relation to changes to contract terms. Mr Cunningham pointed to a number of places within the agreement document, which he asserted fulfilled the requirements of s.178 TULRCA.

25 4.14. The Claimant submitted that the evidence of the Claimant was that this agreement was used to negotiate and agree wages and that therefore it was relevant at the time of the TUPE transfer and hence part of the contract which transferred due to clause 30 of his contract.

30 4.15. The Claimant asserted that Reg 5 TUPE applied and means that post transfer the recognition agreement should be treated as though it was made by the Respondent.

- 5 4.16. The Claimant also asserted that this was a service provision change and that under Reg 6(1) TUPE where the entity maintains its separate identity post transfer, then 6(2) outlines that the recognition will transfer and continue to apply to the new employer. The Claimant relied on the fact that the employees are on a separate rate of pay, and other elements of their identity as HMP Kilmarnock.
- 10 4.17. The Claimant referred to Southern Cross Healthcare v Perkins [2010] E WCA 1142 and asked the Tribunal only to identify the terms that should be contained in the contract. The Claimant was not asking the Tribunal to interpret the terms.
- 4.18. Mr Cunningham distinguished Kaur v MG Rover Group [2004] EWCA 1507, which deals with implied terms. This case, he said deals with the express term of clause 30.
- 15 4.19. Finally, he said that Eagland v British Telecom [1992] IRLR 323 states that it is not for the tribunal to force the parties to include terms. But in this case the recognition of Community was an existing term and that the Claimant was not asking the tribunal to make up a term of his contract.

Respondent's submission

- 20 4.20. The Respondent asserted that the Claimant's application had moved away from the content of the ET1, as it was not claimed there that he required a s.1 statement, as had been originally pleaded.
- 25 4.21. The Respondent asserted that s.1(4)(j) ERA is not a document which affects the individual contract, as a collective agreement is about how the union and the employer will negotiate, not about the terms of the Claimant's contract itself.
- 4.22. The Respondent referred to clause 2.9 of the agreement which said "*....It should be noted that it is the local collective bargaining arrangements and negotiations that produce substantive agreements*

affecting the Employees pay, terms and conditions of employment in Scotland”.

5 4.23. Ms Armstrong said that this was about collective bargaining process and not about terms which are enforceable by an individual. She emphasised the use of “directly” in s.1 ERA and said that this amounts to terms which are specifically between the employer and employee and not about terms which take into account the collective bargaining between them. She relies on the fact that the use of the word ‘directly’ signifies the difference between a recognition agreement and a collective agreement.

10 4.24. The Respondent’s secondary position was that under s.11 (2)(b) ERA, the Tribunals powers are limited, as it cannot construe the contract or impose terms which are not agreed. Ms Armstrong asserted that there is no power of the Tribunal to compel the Respondent to recognise the union.

15 4.25. The Respondent’s third position was that under Reg 6 TUPE HMP Kilmarnock has not maintained a distinct identity. Relying on *Federacio de Servicios Publicos de la UGT v Ayuntamiento de la Linea de la Concepcion* and others [2010] ICR 1248, the requirement there was that the organisation maintains autonomous powers. The respondent asserted that SPS now control HMP Kilmarnock and the way in which it works. Harmonisation is underway by SPS and that recruitment and training is carried out by the SPS College. A number of other changes have occurred to the way in which work is being done.

The Law

20 4.26. S.1 ERA states:

“*(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.*”

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... (j) *any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made”.*

4.27. S.11 ERA states:

5 (1) *Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to determine what particulars*
10 *ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.*

(2) *Where—*

(a) *a statement purporting to be a statement under section 1 or 4, or a pay statement or a standing statement of fixed deductions purporting to comply with section 8 or 9, has been*
15 *given to a worker, and*

(b) *a question arises as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part, either the employer or the*
20 *worker may require the question to be referred to and determined by an employment tribunal.*

4.28. Schedule 2, s.7B ERA states:

“7B

(1) *Where an existing employee (as defined in paragraph 7A(1)) or a*
25 *pre-TURERA employee (as defined in paragraph 7(1)) at any time—*

(a) *on or after 6 April 2020, and*

(b) *either before the end of the employee’s employment or within the period of three months beginning with the day on which*

the employee's employment ends, requests from the employer a statement under section 1 of this Act, the employer shall (subject to section 5 and any other provisions disapplying or having the effect of disapplying sections 1 to 4) be treated as being required by section 1 to give him a written statement under that section not later than 1 month after the request is made and section 4 of this Act shall (subject to that) apply in relation to the employee after he makes the request.

...

- 10 (4) *An employer is not required to give an existing employee or a pre-TURERA employee a statement under section 1 pursuant to subparagraph (1) on more than one occasion.”*

4.29. s.178 TULRCA and s.235(1) ERA define collective agreements with the same definition:

15 “s.178 –

- (1) *In this Act “collective agreement” means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and “collective bargaining” means negotiations relating to or connected with one or more of those matters.*

(2) *The matters referred to above are—*

- (a) *terms and conditions of employment, or the physical conditions in which any workers are required to work;*
- 25 (b) *engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;*
- (c) *allocation of work or the duties of employment between workers or groups of workers;*

- (d) *matters of discipline;*
- (e) *a worker's membership or non-membership of a trade union;*
- (f) *facilities for officials of trade unions; and*
- (g) *machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures."*

4.30. Reg 5 TUPE:

- 10 "5. *Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by regulation 4(1) above, then*
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- 15 (a) *without prejudice to sections 179 and 180 of the 1992 Act (collective agreements presumed to be unenforceable in specified circumstances) that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application in relation to the employee, by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee; and*
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- 25 (b) *any order made in respect of that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if the transferee were a party to the agreement."*

4.31. Regulation 6 TUPE:

"6.—

(1) *This regulation applies where after a relevant transfer the transferred organised grouping of resources or employees maintains an identity distinct from the remainder of the transferee's undertaking.*

(2) *Where before such a transfer an independent trade union is recognised to any extent by the transferor in respect of employees of any description who in consequence of the transfer become employees of the transferee, then, after the transfer—*

(a) *the trade union shall be deemed to have been recognised by the transferee to the same extent in respect of employees of that description so employed; and*

(b) *any agreement for recognition may be varied or rescinded accordingly.”*

Decision

5. The Claimant is entitled under s.1 ERA to receive a copy of the terms and condition of his employment, where he has requested them. There was no evidence before me to suggest that prior to the ET1 he had made such a request. Notwithstanding that, the ET1 should be read as making the request and the Respondent has not provided one which includes reference to the recognition agreement with Community, hence the claim under s.11 ERA is a valid one.

6. The Tribunal has taken into account the cases which were referred to by both parties and acknowledges that it cannot impose a term on the parties which was not agreed as part of the terms of employment. It therefore considers the terms as they were in the terms provided by the predecessor employer, and as they have evolved when the union was transferred from PSU to Community.

7. Under Schedule 2 s.7B ERA, the Claimant is entitled to receive a copy of his terms and conditions from his employer. As he has not received any since the transfer of his employment by way of TUPE to the Respondent, the Respondent must now provide such a document to the claimant.

8. The issue between the parties is whether the s.1 statement should refer to the recognition agreement referred to in the Claimant's contract, and whether it has transferred to the Respondent.
9. S.1(4)(j) refers to any "*collective agreements which directly affect the terms and conditions of the employment*". The first issue is whether the recognition agreement between Serco and Community amounts to a 'collective agreement'.
10. A 'collective agreement' is defined by s.178 TULRCA and s.235(1) ERA in the same way. The definition refers to "*any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to....*
- (a) *terms and conditions of employment, or the physical conditions in which any workers are required to work;*
 - (b) *engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;*
 - (c) *allocation of work or the duties of employment between workers or groups of workers;*
 - (d) *matters of discipline;*
 - (e) *a worker's membership or non-membership of a trade union;*
 - (f) *facilities for officials of trade unions; and*
 - (g) *machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures."*
11. S.178 therefore envisages that a collective agreement may be an agreement on the machinery for negotiation, including recognition of the

right of a trade union to represent workers”. By this definition a recognition agreement could be defined as a collective agreement.

12. However, a further analysis is required as s.1(4)(j) refers to a collective agreement which “directly affects the terms and conditions of employment”.
5 The definition of ‘directly’ therefore needs to be considered.
13. The purpose of s. 1 ERA statement is to allow an employee to know the terms of their employment. A recognition agreement which deals with the mechanism for negotiation would not spell these out to them. At best it would explain how the terms of their employment will be negotiated between
10 the parties. It will not specify the result of that negotiation or enlighten the employee as to what the agreed terms are.
14. Using the everyday definition of the word ‘directly’, as set out in s.1(4)(j) indicates that it must influence the individual employee’s terms and conditions, as opposed to the type of collective agreement which sets out
15 the mechanism for establishing these.
15. The distinction is therefore an important one. A recognition agreement which sets out purely the way in which negotiations between management and union will be carried out (or the fact that they will be carried out between these parties) is not one which is required to be contained in the contract of
20 an individual employee and does not indicate to the employee the terms on which they are employed.
16. A term which is set out in a collective agreement or recognition agreement which sets out the results of those negotiations would be eligible to be contained in the individual terms.
- 25 17. If for any reason, I am considered to be wrong in my application of the word ‘directly’, I have also considered the secondary line of argument in this case.
18. Regulation 6 TUPE says that recognition of an independent union only transfers where “*after the relevant transfer, the transferred organised grouping of resources or employees maintains an identity distinct from the*
30 *remainder of the Transferee’s undertaking*”.

19. The evidence of the Claimant indicated that HMP Kilmarnock is now controlled directly by SPS. He is required to wear the uniform, name badge and lanyard of SPS. He also agreed that the signage around the prison had been changed to that of SPS and that staff were aware that the prison was managed by SPS. He also admitted that some services, such as the provision of dogs was different since SPS took over. Ms Bowie also told the Tribunal that the Chief Executive of SPS reports directly to the Scottish Government. The Operations Director of SPS has responsibility for the management of Prisons and the governor of HMP Kilmarnock reports to them. She also mentioned that various software was discontinued when Serco left the prison and has had to be replaced with SPS systems.
20. All of these factors indicate that HMP Kilmarnock has been assumed into the organisation of the Scottish Prison Service. Other than the pay regime, which is due to be harmonised by 1 December 2024, there is nothing which indicates that HMP Kilmarnock is autonomous, self-governing, or outside of the control of SPS. Taking into account *Federacio de Servicios Publicos de la UGT v Ayuntamiento de la Linea de la Concepcion* and others [2010] ICR 1248, the Tribunal finds that HMP Kilmarnock has not maintained an independent identity and therefore Reg 6 TUPE does not apply and the recognition of Community has not transferred.
21. The Respondent is therefore ordered to provide the Claimant with a s.1 ERA letter of his terms and conditions, which does not include the recognition agreement between Serco and Community.

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S Cowen

Employment Judge

15 November 2024

Date of Judgment

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Date sent to parties

22 November 2024