Appeal No. UKEAT/0241/14/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 30 January 2015
Judgment handed down on 2 September 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

BT MANAGED SERVICES LTD — APPELLANT

(1) MR G EDWARDS
(2) ERICSSON LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADRIAN LYNCH QC (of Counsel) Instructed by: BT Legal, ppA6 BT Plc 81 Newgate Street London EC1A 7AJ
For the First Respondent	MR BRUCE FREW (of Counsel) Instructed by: Irwin Mitchell LLP Solicitors Imperial House 31 Temple Street Birmingham B2 5DB
For the Second Respondent	MR BEN COOPER (of Counsel) Instructed by: Charles Russell LLP One London Square Cross Lanes Guildford Surrey GU1 1UN

SUMMARY

TRANSFER OF UNDERTAKINGS - Service Provision Change

1. Mr Edwards was employed by BT Managed Services Limited ("BTMS") as a Field Operations Engineer. From April 1994 he was originally employed by Orange but his employment transferred by **TUPE** to BTMS from July 2009.

2. He was a member of a team dedicated to a domestic network outsource ("DNO") contract providing operational maintenance for mobile phone networks operated by Orange or EE.

3. The team working on the DNO had its own separate and dedicated structure within BTMS with its own managers, operatives, administrative and other staff, budget and cost centres, and its own operational unit code ("OUC").

4. It has been accepted that this team constituted an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying-out of the activities concerned (the DNO contract) on behalf of the client (Orange) within the meaning of Regulation 3 of **TUPE**.

5. In May 2006 Mr Edwards commenced long-term sick leave by reason of various ailments including, in particular, a cardiac condition that prevented him from carrying-out the strenuous work involved in accessing sites, often on foot, and scaling towers.

6. Unsuccessful attempts were made to provide him with alternative, less strenuous, work. He was regarded from this time as permanently incapacitated.

7. Mr Edwards last worked in January 2008 but he remained an employee of BTMS so that he could continue to enjoy payments under a permanent health insurance ("PHI") scheme. After the liability of the insurers was extinguished, BTMS continued to make payments to Mr Edwards. He remained "on the books" of the DNO grouping and such contact, as he had with BTMS for what might be termed as pastoral purposes, was conducted through the managers of the grouping. Payments to him by BTMS were treated as an expense of the DNO team.

8. If he had been able to return to work it would have been as part of the DNO team. Mr Edwards' OUC at all times was within the code for the DNO contract; his job title never changed and he was never assigned to any other part of BTMS. In December 2012 the DNO contract was transferred after tender to Ericsson, the successful tenderer. The service provision change took place in June 2013. It was accepted that there had been a service provision change and the team employed by BTMS on the DNO contract transferred under **TUPE** to Ericsson; the issue before the Employment Tribunal was whether Mr Edwards was assigned to the grouping affected by the service provision change.

9. At the time of the service provision change in June 2013, Mr Edwards had not worked since January 2008 and there was no prospect of his ever returning to work.

10. The Employment Tribunal held that because he did not contribute to the economic activity of the grouping he was not assigned to that grouping within the meaning of **TUPE** Regulation 4(1).

11. BTMS argued before the Employment Appeal Tribunal that it was wrong for the Employment Tribunal to have treated the question of where Mr Edwards would have been required to work had he been able to do so as one of the criteria to be taken into account in

determining whether he was assigned to the DNO grouping subject to the service provision change at the time of the transfer. The answer to that question was decisive and as Mr Edwards would have been required to work in the DNO team if able to do so, he was necessarily assigned to that team and that participation in the economic activities of the grouping was irrelevant.

12. The Employment Appeal Tribunal held that:

(a) The question whether an employee absent from work at the time of a service provision change was assigned to the relevant grouping was a matter of fact to be determined according to the circumstances of each case.

(b) Although absence from work, even lengthy absence, as at the time of the service provision change would not necessarily mean that an employee was no longer assigned to the grouping, an employee who had no connection with the economic activity of the grouping and would never do so in the future could not be regarded as assigned to that grouping.

(c) There is a clear link between the identification of the relevant organised grouping and the question of who is assigned to that grouping.

(d) As the organised grouping subject to the service provision change is defined by Regulation 3(2) by reference to the economic activities its purpose is to pursue, an employee who plays no part in those activities and will never do so is not assigned to that grouping. Mere administrative connection to that grouping is insufficient to constitute an employee as being assigned to the grouping in the absence of some participation in the grouping's economic activity.

13. The appeal was dismissed.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This appeal concerns the effect of the service provision change provisions inserted in the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"). The issue in the case is simple to set out: was the Claimant, who had been *permanently* unfit for work for some years, a member of an organised grouping of employees situated in Great Britain which had as its principal purpose the carrying-out of the activities concerned on behalf of the client? If yes, by virtue of the service provision changes, his employment would have transferred to Ericsson from BT Managed Services Limited ("BTMS").

2. Unlike other provisions in **TUPE**, the service change provisions were not derived from the **Acquired Rights Directive** ("ARD") (European Council Directive 2001/23/EC as amended).

3. It is helpful perhaps to set out the relevant provisions of **TUPE** at this stage (Regulation 3):

> **"3. *A relevant transfer***
>
> **(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 remains its identity;**
>
> **(b) a service provision change, that is a situation in which -**
>
> **(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");**
>
> **(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or**
>
> **(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously**

been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

(3) The conditions referred to in paragraph (1)(b) are that -

(a) immediately before the service provision change -

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

(4) Subject to paragraph (1), these Regulations apply to -

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a transfer or service provision change howsoever effected notwithstanding -

…"

4. Regulation 4(1) provides as follows:

"4. *Effect of relevant transfer on contracts of employment*

(1) … 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 transferred and the transferee."

5. It is not necessary to set out Regulation 4(2), which provides for the transfer of the transferor's obligations and duties to the transferee.

6. Regulation 4(3) provides as follows:

"(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."

The Factual Background

7. I take this largely from the Decision of the Employment Tribunal.

8. BTMS is a subsidiary of BT PLC. BT is responsible for a small number of large-scale contracts, each performed separately and independently. It is BT's case that although its employees were employees of BT PLC, each contract undertaken by BTMS had its own separate and dedicated structure within BTMS, with its own managers, operatives, administrative and other staff. Each contract had its own budget and cost centres. There was some use of BT PLC's services for such purposes as Human Resources. Each contract had its own operational unit code ("OUC").

9. Mr Edwards was employed by Orange as a Field Operations Engineer from 12 April 1994. Thereafter from 1 July 2009 he worked for BTMS. On 1 May 2006 the Claimant commenced long-term sick leave. He has the misfortune to suffer from a cardiac condition (paroxysmal atrial fibrillation) together with a related anxiety disorder. The Claimant's medical condition leads him to have an irregular heartbeat, nausea, disorientation and faintness. Instances of such occurrences occur with little warning and have prevented the Claimant from carrying-out the strenuous work involved in accessing sites (often on foot over rough ground and scaling towers). Attempts have been made over the years to provide the Claimant with alternative work but these efforts have not been successful. The Claimant last worked in January 2008. At the time of the transfer he was already in receipt of permanent health insurance benefits on the basis that he was now permanently unable to work by reason of ill health.

10. Notwithstanding the Claimant's absence, his managers were not permitted to recruit a replacement and his work was covered by other team members. Mr Edwards' contract with Orange provided for his inclusion in Orange's permanent health insurance scheme ("PHI") and from this time payments were made by the scheme provider (UNUM) to Mr Edwards save for a break for relatively short periods when he was back at work. As at 2009 Orange and later Everything Everywhere ("EE") operated a domestic network outsource ("DNO"), which provided operational maintenance for Orange mobile networks.

11. Orange decided to put the contract out for tender, and on 1 July 2009 DNO works transferred under **TUPE** from Orange to BTMS and Mr Edwards and his colleagues were transferred to BTMS and in particular to BTMS's DNO contract division. The transfer was described as a "lift and shift" of the entire field operations function to BTMS, and everyone in the DNO transferred. The PHI part of Mr Edwards' remuneration package transferred to BTMS.

12. Although unable to work, Mr Edwards remained in contact with BTMS and engaged with its Occupational Health department with a view to facilitating a possible return to work. The original contract was a contract of employment and continued for what might be described as pastoral purposes.

13. BTMS's concern was that if the Claimant was pushed back to work it would have to take responsibility for salary costs whereas if he proved unable to work UNUM might be reluctant about taking the facility back. BTMS understood that Mr Edwards had a contractual entitlement to payment until his retirement. BTMS was not particularly concerned with the position as payments were made to Mr Edwards by UNUM. However, as at 20 December 2013

it became apparent that UNUM's liability under the PHI was only for a period of four years. It would appear that BTMS agreed to pay a sum equivalent to the benefits to Mr Edwards while he continued to satisfy the conditions of incapacity and, possibly, had continued to do so as at the date of the hearing before the Employment Tribunal. I simply do not know. I understand that he did continue to receive some benefits, but it is unclear to me what the contractual position was as between Mr Edwards and BTMS. I was told that payments continued to be paid but I have seen no evidence of this. If payments were made, I do not know if they were *ex gratia* or pursuant to an actual or assumed contractual obligation.

14. On 20 December 2012 Orange undertook a further tender exercise for its DNO works, Ericsson was the successful tenderer, and as from 1 June 2013 BTMS's contract operation in relation to DNO works for Orange transferred to Ericsson, which accepted there had been a service provision change on that date. The question has been whether the Claimant's "employment" transferred. It is clear that BTMS regarded Mr Edwards' employment as transferring and his name was included in a list of "in-scope employees". Ericsson was informed by BTMS of the position of Mr Edwards and that its position was that by virtue of **TUPE** his employment had transferred to Ericsson. Ericsson refused to accept Mr Edwards on the grounds that he had not been assigned to the DNO Contract Division at the time of the service provision change because of his long-term absence. This contention was in due course accepted by the Employment Tribunal.

15. I have already referred to the fact that Mr Edwards's contract with Orange provided for inclusion in Orange's PHI scheme and that UNUM, save for short periods of time when the Claimant was in fact working, made appropriate payments. In due course, by virtue of a **TUPE**

transfer from Orange to BTMS, Mr Edwards' contract and that of others in the relevant unit transferred to BTMS.

16. It is important to note that at the time of the later service provision change on 1 June 2013 Mr Edwards had not worked for some five years (since January 2008) and the Employment Tribunal found there was no prospect of his *ever* returning to work. At all times while in work Mr Edwards had been a member of the DNO team responsible for the Orange works, and after ceasing to work he remained a member of that team for administration purposes and pay.

17. The Judgment does not make clear what Mr Edwards' status was as at the date of the service provision change, although it is said he remained an employee. However, it is quite unclear to me on what terms he remained employed. PHI insurance had been exhausted, and certainly, although at what time I do not know BT had continued to make payments to him in the belief he had a contractual entitlement and this was debited to his OUC, I do not know if this remained the position at the date of the service provision change or of the hearing before the Employment Tribunal. I do not know whether any payments were made pursuant to any contractual arrangement (assuming that payments were made). I was told that the Respondent had continued to pay NIC and pension contributions. The Claimant had been eligible to receive his pension at the age of 65. He is now aged 61. I have seen no documentary evidence or any note of oral evidence given to the Tribunal as to the position and I remain uncertain. BTMS's case has been that the Claimant's employment transferred to Ericsson despite his absence because BTMS had recognised he remained part of that section of BTMS that dealt with DNO works.

The Decision of the Employment Tribunal

18. The Employment Tribunal set out the facts as I have set them out above.

19. I note that at paragraph 3.28 the Employment Tribunal found that during the period BTMS had responsibility for Orange field operations work under the DNO contract, (1) Mr Edwards' job title never changed; (2) he was never assigned to any other part of BTMS; and (3) any contact he had was through managers within the DNO contract. At all times his OUC was within the code for the DNO contract. It was likely that when BTMS started making the equivalent PHI payments it was attributed to the DNO contract. Had there been any chance of a return to work, it would have been discussed and they might possibly have found a role for him within the DNO.

20. The Claimant would never be able to return to work as Field Operations Engineer; although it might theoretically have been possible to cobble together some job for him within the DNO, there was no evidence of a requirement for such a role nor that any consideration had been given to it. The Employment Tribunal noted (see paragraph 3.29) and indeed Mr Stephen Jones (BTMS Delivery Manager) gave evidence to the effect that his understanding at the time of the service provision change was that the Claimant "was not fit for any work". It was also accepted by Mr Carroll (HR Merger and Acquisitions Manager for BT PLC) that the Claimant fell into the category of individuals in receipt of PHI payments "for whom there was no foreseeable return to work".

21. The Employment Tribunal reviewed the law, starting with Regulations 3 and 4 of **TUPE**. The Employment Tribunal accepted (paragraph 4.2) that the transfer from BTMS to Ericsson fell within Regulation 3(1)(a) and/or 3(1)(b)(ii) and it followed that there was an

organised grouping of resources with the objective of pursuing an economic activity and/or an organised grouping of employees having as its principal purpose the carrying-out of the relevant field operations activities on behalf of Orange/EE:

> **"4.2. … The issue is whether the Claimant was assigned to that organised grouping, within the meaning of regulation 4(1)."**

22. The Employment Tribunal noted that apart from the explanation that "assigned" meant "assigned other than on a temporary basis" there was no definition of "assigned" in the **Regulations**.

23. It reviewed various authorities in relation to the meaning of "assigned". Firstly, it noted that the **Acquired Rights Directive** was intended to provide for the protection of employees in the event of a change of employer. The Employment Tribunal referred to the **Botzen v Rotterdamsche Droodok Maatschappij BV** [1985] EUECJ R-186/83 case, to which I will come shortly. It noted that the Directive itself did not refer to the concept of an employee being assigned to part of the undertaking transferred and that that concept derived from European jurisprudence in which the European Court of Justice ("ECJ") rejected the contention that only employees working full-time or substantially full-time in the part transferred were protected. The Employment Tribunal continued:

> **"4.3.2. … It held that 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, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned: *Botzen v Rotterdamsche Droogdok Maatschappij BV* [1986] 2 CMLR 50.**
>
> **4.3.3. The question of whether an employee was assigned to the part transferred is a question of fact for the Tribunal. The facts will vary markedly from case to case. Relevant matters may include: 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 has been allocated between the different parts of the business. This is not an exhaustive list: *Duncan Web Offset (Maidstone) Ltd v Cooper* EAT [1995] IRLR 633 per Morison J at para 15; *Edinburgh Home-Link Partnership v City of Edinburgh Council* UKEATS/0061/11/BI per Lady Smith at paragraph 19.**
>
> **4.3.4. The fact that an employee is absent on sick leave does not of itself mean that he is not employed in the part of the undertaking transferred. If he was in fact employed in the part of**

> **the undertaking transferred immediately before the transfer, the fact of his sick absence would not of itself prevent the transfer from including him. A person on sick leave, like a person on holiday, study leave or maternity leave, remains a person employed in the undertaking even though he is not actually at his place of work. The question remains whether he was employed in the part transferred. That is a factual matter: *Fairhurst Ward Abbots Ltd v Botes Building Ltd* CA [2004] ICR 919 per Mummery LJ at para 40."**

24. Reference is made to the Judgment of Mummery LJ in **Fairhurst Ward Abbotts v Botes Building** [2004] IRLR 304; I shall return to this Judgment in due course. The Employment Tribunal then went on to note that it was not the case that every employee who could be linked in some way to the relevant client activity, was to be regarded as assigned under Regulation 4:

> **"4.3.5. … The question always remains whether the particular employee was assigned to the relevant organised grouping prior to the transfer …"**

25. Reference is made to **Edinburgh Home-Link Partnership v City of Edinburgh Council** UKEATS/0061/11, a case to which I will refer in due course. Employment Judge Davies went on to say that:

> **"4.4. … the proper approach is simply to ask the factual question whether the employee was assigned to the relevant grouping, looking at all the relevant circumstances. Where he might have been required to work if not absent on sick leave may be one factor, but it is not determinative."**

26. Applying the law to the facts, the Employment Tribunal expressed itself thus at paragraph 5.1:

> **"5.1. Accordingly, the question for me is simply whether, in the light of the findings of fact set out above, the Claimant was immediately prior to 1 June 2013 assigned to the organised grouping of resources and/or employees the subject of that transfer, i.e. the DNO contract team."**

27. Employment Judge Davies went on to hold the Claimant was not assigned to that organised grouping immediately prior to 1 June 2013. Relevant facts from circumstance included that when the Claimant was transferred to BTMS in 2006 it was as part of the DNO contract and he was at that point assigned to the organised grouping of resources and/or of

employees whose principal purpose was carrying -out the work under that contract. At all times thereafter he had the OUC for the DNO contract and as such he counted against the headcount of the DNO contract and his post could not be back-filled. Any costs associated with his employment were accounted for under the DNO contract. He was never firmly moved or assigned to any other part of BTMS, nor was his role ever changed from Field Operations Engineer. All contact with him, including contact relating to his sick absence, his PHI payments and the relevant transfer in 2013 and the more general keeping in touch, was carried out by managers in the DNO team in whose geographical area he lived. If he had become fit to return to work in some capacity, the starting point may well have been to consider roles in the DNO team and it was possible that some sort of adjusted role could have been created within that team that the Claimant could have done:

> **"5.3.6. There was no medical evidence to the effect he was permanently unable to perform any kind of work."**

28. Employment Judge Davies, however, went on at paragraph 5.4 to take the view that, notwithstanding the features I have just set out, the Claimant in fact ceased to be assigned to the relevant organised grouping of resources and/or employees in 2010:

> **"5.4. … Thereafter, it was essentially by default that such contact as there was with him and such steps as required to be taken in relation to him, were done by the same managers; that he continued to have the OUC for the DNO contract; and that costs associated with his employment were attributed to that contract. However, in view of the other factual circumstances, that did not mean that he was as a matter of fact still assigned to the organised grouping of resources and/or employees.**
>
> **5.5. What seems to me central is the decision that was taken in 2010. As the findings of fact above make clear, an essentially pragmatic decision was taken by Mr Hunt and Mr Gilmour to keep the Claimant permanently absent to continue to receive PHI payments."**

29. Employment Judge Davies went on to express the view that at that stage the Claimant ceased as a matter of fact to be assigned to the relevant organised grouping while there was a historic link between him and that grouping and a link remained for such administrative purposes as arose:

> **"5.6. … he was not assigned to the grouping. It was not contemplated that he would thereafter provide any work or carry out any of the activities under the DNO contract. What was contemplated was simply that he would remain on the books to continue to receive his PHI payments at no cost to BTMSL."**

30. I should also record that the Employment Judge (paragraph 5.7) accepted the submission of Ms Somerville, who appeared on behalf of BTMS, that there was:

> **"5.7. … nothing in the case law that lays down a test of whether there is some likelihood that the employee will economically contribute. …"**

31. The Employment Judge then repeated that BTMS reiterated that the case law required her to give an answer to the factual question, "is the employee assigned at the relevant time to the organised grouping?" She continued:

> **"5.7. … For the reasons set out, in my view once it was contemplated that the Claimant would not thereafter provide any work or carry out any of the activities under the DNO contract, he ceased as a matter of fact to be assigned to the grouping. He was to have no involvement in pursuing an economic activity or carrying out activities under the DNO contract."**

Nothing that happened after September 2010 altered the situation and there was never any suggestion that Mr Edwards was fit or should return to work. BTMS proceeded on the basis that the best course was to leave the Claimant absent and in receipt of PHI.

32. Employment Judge Davies noted that there came a point when BTMS started to incur a cost after the expiration of the PHI benefits but this did not lead to any reconsideration of the pragmatic decision that had been taken. So far as BTMS was concerned, the Claimant continued to be kept permanently absent and continued to receive PHI payments.

> **"5.11. The fact that [if he had] hypothetically been fit to return to some kind of work, the starting point may well have been to look for work under the DNO contract, and that it might have been possible to create some kind of a role for him, does not cause me to alter that conclusion. The question where an employee could be required to work if not excused by sick absence is one factor, but is not determinative. In this case, that was an entirely hypothetical exercise in the case of someone who had been absent from work at the transfer date for more than 6 years, and against the background of a concrete decision 3 years earlier to keep him at home on PHI and not pursue a return to work."**

33. Employment Judge Davies rejected BTMS's submission that the approach adopted by him ran counter to the objectives of the **Acquired Rights Directive** and **TUPE**. The case depended entirely upon its particular facts and included not simply the fact that the Claimant was absent and in receipt of PHI payments but "crucially" the fact that a specific decision was taken not to pursue a return to work in his case, but simply to keep him at home in receipt of PHI payments. Furthermore there was then the unusual situation that his contractual entitlement to PHI payments may have expired and the payments were not being met by the insurer. In the Claimant's own case the protection of his rights, as Mr Cooper (counsel for Ericsson) submitted, was a neutral factor. If Mr Edwards' employment did not transfer to Ericsson, then BTMS remained his employer. Accordingly Employment Judge Davies concluded the Claimant was not assigned to the organised grouping the subject of the relevant transfer in June 2013.

BTMS's Notice of Appeal and Submissions in Support

34. Before considering the Notice of Appeal I am bound to complain about the inordinate length of the Notice of Appeal, which could easily double as a skeleton argument if not as a written submission. It is longer than the Judgment of the Employment Tribunal. If the skeleton argument had been lodged after the issue of the recent **Practice Statement** issued by the President of the Employment Appeal Tribunal on Notices of Appeal and skeleton arguments of 13 May 2015, I would not have hesitated to send the Notice of Appeal back to be shortened and resubmitted. To keep to the physiological metaphor, it could well have been characterised as a somewhat obese argument. Nevertheless, it was well thought out and of assistance to me.

35. In effect, the Notice of Appeal raises one principal point: was it necessary for Mr Edwards to be actually involved in some way in the work carried out by the DNO team working

on the Orange contract in order to be assigned to the organised grouping? Mr Lynch QC submitted the Employment Tribunal was wrong to say that Mr Edwards had not been assigned and referred to various errors, each of which in his submission was sufficient on its own to vitiate the Decision of the Employment Tribunal that at the time of the service provision transfer Mr Edwards was not assigned to the organised grouping.

36. In particular the Employment Tribunal misconstrued what was meant by "assignment" by concentrating on what Mr Edwards did and whether he contributed to economic activities undertaken by the grouping, rather than on the question of whether or not he was "assigned" to the appropriate group. There was no authority for there being a requirement that in order to be assigned to the group in question, an employee had to contribute to its economic activities. There was no authority from the courts or in the European Directives.

37. I note that the provisions in **TUPE** relating to service provision changes are not derived from the **Acquired Rights Directive** although the courts in the United Kingdom appear to have accepted they use common terms and fall to be construed in a similar way. It was submitted that the Respondent ignored the employment relationship between Mr Edwards and BTMS and he continued to be protected by **TUPE**. He referred to a decision of the ECJ in **Stringer v Revenue and Customs Commissioners** [2009] ICR 932 but did not in his submissions refer to the case. He suggested that it was authority for the proposition that those individuals who are unable to provide active service remain employees and continue to be "assigned to" the entity which has responsibility for the management, administration and payment of their ongoing employment. I did nevertheless look at the case but found it of little assistance. The issue, however, in the instant case does not relate to those employees whose absence might be regarded as temporary but to Mr Edwards' absence, which can only be regarded as permanent.

38. Mr Lynch QC submitted that the Employment Tribunal erred in law in its application of the "supposed test" of "economic contribution" by confusing the test as to whether an employee is "assigned to" a particular part of an undertaking with a definition of an undertaking for the purposes of Regulation 3(1)(a) and (b). The requirement in Regulation 3(1)(b) that a transfer had to be of the organised grouping of employees with its principal purpose of carrying-out the activities on behalf of the client was a reference to the entire entity or grouping and it was no part of the criteria relevant to determine if an individual was "assigned". Mr Lynch QC suggested that the Employment Tribunal had misinterpreted and misapplied the Decision in **Botes**, to which I will refer in due course. Mr Lynch QC suggested that this case was authority for the proposition that if the question can be answered as to in what part of the undertaking the employee would be required to work if not absent, then the employee is assigned to that part for the purposes of **TUPE**. This was, he submitted, the sole matter to be considered rather than simply one of the matters to be considered, as held by the Employment Tribunal in the instant case. Mr Lynch QC then submitted that while Mr Edwards was working he was part of the DNO; this is not seriously in dispute. Once he became unable to work he remained "on the books", so to speak, and unsuccessful attempts to return him to work were made through Occupational Health.

39. Payments made to Mr Edwards were debited to the DNO division; Mr Edwards continued with the same OUC. His post was not to be filled. Mr Lynch QC then asked rhetorically: if Mr Edwards was not assigned to the DNO contract division, where was he assigned? This was a matter not considered by the Employment Tribunal. If Mr Edwards had been able to return to work, it would have been this division.

40. Mr Lynch QC went on to submit that the Employment Tribunal was bound to consider to which other entity, if not DNO, Mr Edwards was assigned; there was no other candidate. He sought to rely upon **United Guarding Services v St James Security Group** UKEAT/0770/03 as authority for this proposition. Mr Lynch QC made a number of submissions in relation to the decision in **Botes**; I shall return to this case in due course. Mr Lynch QC submitted that the Employment Tribunal had misapplied the case, which he submitted laid down as a general principle that it was necessary in the case of an employee absent as at the time of the service provision change to determine where that employee would have worked if required to do so. This would apply in cases where there was a long absence, such as extended maternity leave and in cases of long-term sickness absence where the employee might be required to work if able. This was an exclusive principle that applied in all cases to the exclusion of other considerations. I observe at this point that in the case of someone permanently unable to work, this seems highly artificial; in such cases the issue is, not so much as to where the employee might theoretically work but, whether he is able to work at all.

41. Mr Lynch QC submitted that if the Employment Tribunal could determine in which part of the undertaking the employee would be required to work if available for work, that determined for **TUPE** purposes to which part of the undertaking he was assigned. In the present case, it was said that the Employment Tribunal had relegated the question of where the employee could be required to work as a factor to be taken into account and not as the decisive criterion in determining whether the employee was assigned to the organised grouping, the subject of the transfer. Mr Lynch QC also submitted that an employee must be assigned somewhere. Mr Lynch referred to **Botzen** where the ECJ had upheld the view of the Commission that the question of assignment to a department was determined by the department which formed the organisational framework within which employment took effect. By

reference to this criterion, Mr Edwards was assigned to the DNO at the relevant time so his employment was transferred to Ericsson on the making of the service provision change.

42. After conclusion of the parties' submissions I drew the attention of counsel to a number of authorities which I considered might throw some light in determining whether Mr Edwards had in fact been assigned to the DNO department at the time of the service change. I shall refer to these authorities in due course, but they included **Rynda v Rhijnsburger** [2015] EWCA Civ 75, **Argyll Coastal Services v Stirling** UKEATS/0012/11, **Eddie Stobart v Moreman and Ors** [2012] IRLR 356 and **London Borough of Hillingdon v Gormanley** [2014] UKEAT/ 0169/14. Mr Lynch QC provided detailed written submissions on these authorities. He submitted that these authorities were not of help in relation to Regulation 4 but all related to Regulation 3, which he submitted was concerned with defining the type of entities that exist in the hands of potential transferors and which can be transferred to potential transferees. He submitted that transfers can extend beyond economic activities and would encompass such matters as management structures, budgets, and extend beyond work and pay, and extend to caring responsibilities for the protection of the rights of employees not to work by reason of illness, maternity, sickness protection and would also encompass accounting arrangements and HR.

43. The first question to be determined is the identity of the organised grouping subject to the transfer; the next and distinct question is who is assigned to the part transferred. Mr Lynch QC submits that the question is distinct and to be decided by different criteria as to whether there is a relevant entity that can be and is transferred. Regulation 3 of **TUPE** deals with the first question. Regulation 4 deals with assignment. Mr Lynch recognises that in order to define who is assigned it is necessary to identify what is being transferred. The test for determining if

an employee is assigned is more inclusive if the test to be applied was that in order to be assigned an employee had to have connection with active service that would exclude those on long-term leave; I am unable to agree with this submission in each case. Assignment will be a question of fact and degree and persons on long-term leave, say for sickness or maternity, may continue to be assigned to a grouping provided the absence is temporary, and in the case of long-term leave for sickness or maternity or temporary cessation of activity (for example where there is a short-term lay-off caused by absence of work) employees in those conditions would not, in my opinion, be severed from the organised grouping. Mr Lynch, however, stressed that in his submission the critical question was the test set out in **Botzen** and the essential question was to identify the organisational framework within which the employee in question fell.

Ericsson's Submissions

44. Mr Cooper's response was brief and to the point; Ericsson was content to rely upon the reasoning of the Employment Tribunal. It was conceded by Ericsson that there had been a service provision change and that the question whether the Claimant at the time of the service provision change was assigned to the relevant grouping was one of fact. Mr Cooper, therefore, characterised the appeal by BTMS as an appeal on the ground of perversity required to meet the very high threshold referred to in **Yeboah v Crofton** [2002] IRLR 634. BTMS had taken the conscious decision to keep the Claimant permanently absent to receive PHI payments. This decision had been taken by September 2010 and after that date nothing occurred to review, reconsider or change that decision or attempt to secure the Claimant's return to work. The Claimant's cardiac condition was such that even if he had hypothetically become fit to return to work in some capacity, he would not have been able to return to his original role as a Field Operations Engineer. As at the date of the service provision change on 1 June 2013, the Claimant had not worked for six years according to my calculations (rather than the nine years

as submitted by Mr Cooper). In all the circumstances, Mr Cooper submitted, the Employment Tribunal was correct to find that as the date of the service provision change, Mr Edwards was no longer assigned to the organised grouping subject to the service provision change.

45. The question of assignment or not to an organised grouping is essentially an issue of fact. It was important to define the entity subject to the transfer and then the important question is whether the employee actually works (assuming he works) in that entity. Assignment to a grouping will depend on different factors, including for example whether an employee is assigned to a particular manager or a particular cost code for budgeting purposes. But there has to be an assignment to the organised grouping of employees subject to the service provision change. This necessarily requires an examination of the nature of the entity transferred. He also relied upon the Judgment of Slade J in **Robert Sage Ltd v O'Connell** [2014] IRLR 428 in which she referred to a core substantive link. It was necessary to establish that link and proper to focus on the link or the absence of the link between Mr Edwards and the DNO contract. The overarching point was that the Employment Judge was entitled to conclude, on the facts before her, that Mr Edwards as at the date of the service provision change was not assigned to that group. Mr Cooper submitted that BTMS's problem was the finding of fact that the decision had been taken to keep Mr Edwards permanently absent initially at least to enable him to continue to draw PHI. That is, it is submitted, an insuperable barrier to the argument that the Employment Judge should have identified where Mr Edwards should have been required to work if he had not been absent. The Employment Judge was entitled to conclude that the link between Mr Edwards and the organised grouping subject of the transfer was insufficient for a finding that he was assigned to that grouping because the link, such as it was, was merely administrative and historic or by default. It was for the Employment Tribunal to assess the relevant significance of the factors relevant to the determination of whether Mr Edwards had

been assigned or not; reliance was placed upon **Duncan Webb Offset v Cooper** [1995] IRLR 633 and **Botes**.

46. In relation to contribution to economic activities undertaken by the grouping the Employment Judge, it was submitted by Mr Cooper, was entitled to consider that as work for pay is at the core of the employment relationship even though the employment relationship may extend beyond work. The Employment Judge regarded it as a central point in her conclusion that a decision had been taken by BTMS to keep Mr Edwards permanently absent. Mr Cooper also noted that the Employment Judge did consider it to be a relevant (although not a determinative) factor as to where Mr Edwards might be required to work if he was not absent by reason of his disability. The burden of proof that **TUPE** applies is on the party who asserts it did (here, BTMS), and reference is made to **Lom Management v Sweeney** UKEATS/ 0058/11. This point does not appear to be controversial, and I accept it to be correct.

47. The Employment Tribunal had correctly summarised the law including the **Botzen** case, which was authority for the proposition that the only decisive criterion regarding the transfer of employees' rights and obligations was whether or not the transfer takes place of the department to which they were assigned and which formed the organisational framework within which their employment relationship took effect. Ericsson had no issue with the proposition that in cases of temporary absence (sickness, maternity and the like) the question of where an employee temporarily absent as at the date of the service provision change was assigned would depend on where he should be deployed if and when able to do so. Further, the Employment Judge was correct to hold that administrative attachment was a factor to be taken into account in determining to what department an employee was assigned but it was not a determinative one. Reliance was placed upon a decision of HHJ Reid QC in the Employment Appeal Tribunal in

Omwuka v Spherion Technology UKEAT/0253/06. It was submitted that this case supported the proposition that an employee could become detached from his department and that the crucial focus should be on the purpose of employment and activities that are the purpose of the organised grouping. An assignment to an organised grouping requires there to be a link between the employee in question and the economic activity which the organised grouping had the objective of pursuing.

48. Mr Cooper then referred to **Botes**. He submitted that the rationale of **Botes** was that absence from work as at the date of transfer was not of itself sufficient to cause an employee to become detached and a nominal attachment was sufficient. Whether an employee is assigned is a factual matter, and a paper exercise is not to be regarded as an assignment. The Court of Appeal did not accept that a contractual provision was determinative. Mr Cooper went on to submit that there had to be a link between the purpose of employment of the employee in question and the purpose of the focus should be on examining that matter. So far as the present case was concerned, the Claimant had become detached from the DNO group and had not been assigned elsewhere. In so far as he remained an employee, he was not assigned to any part of the business but was simply retained as an employee of BTMS as a whole and would remain an employee until termination of his contract. The Employment Judge was correct to find that Mr Edwards' only link with the DNO department was administrative and historic and that there was no longer any work connection.

The Law

49. I now turn to consider the law. I start with some general observations. Although the service provision change provisions in **TUPE** are not derived from the **Acquired Rights Directive** Council Directive 2001/23/EC as subsequently amended, they have been construed in

the same manner as those parts that are derived directly from the Directive. The service change provisions are treated as part of a seamless whole.

50. Underhill J in **Eddie Stobart v Moreman** observed that there was no rule that the natural meaning of the language of the **Regulations** should be stretched in order to achieve transfer in as many situations as possible. He did not, however, intend to exclude the well-recognised canons of statutory interpretation developed by English law, in particular that a statutory provision should be construed so as to give effect to the express purpose of the enactment. In the case of **TUPE** it is clear from its very title that its purpose is to protect *employment* (**Transfer of Undertakings (*Protection of Employment*) Regulations** (my italics)). **TUPE** should thus be construed so as to give effect to this purpose. I have already set out the relevant service provision change provisions in **TUPE**, and I do not propose to do so again. There is some authority for the proposition for an employee to be assigned to a particular grouping, he must be engaged in the relevant group activity at the time of the service provision change; save in cases where there has been a temporary absence, sickness or what have you, or a temporary cessation of work leading to a temporary lay-off.

51. The starting point is the Judgment of the ECJ in **Botzen**. The relevant passages are helpfully set out in the Judgment of Slade J in **Gormanley**. Slade J had this to say:

> **"36. In my judgment EJ Jack erred in failing to consider the contractual duties of each Claimant and their role in the organisational framework of RG Ltd. The judgment of the CJEU in [*Botzen*] remains the source of European Law guidance on the meaning of 'assigned to' a part of an understanding or now to an organised grouping of employees for the purposes of TUPE. Maatschappij BV claimed that**
>
> > **"13 … only employees working full-time or substantially full-time in the transferred part of the understanding are covered by the transfer of employment relationships …**
> >
> > **14 On the other hand, 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 organizational framework within which their employment relationship took effect."**
>
> **The CJEU held that the Commission's view must be upheld. It is therefore material to consider the way in which the organisation is structured and the Claimant's role within it in**

order to determine whether for the purposes of TUPE he or she is assigned to the organised grouping of employees carrying out relevant activities."

"Article 3(1) of directive no 77/187/EEC must be interpreted as not covering the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, although not employed in the transferred part of the undertaking, performed certain duties which involved the use of assets assigned to the part transferred or who, whilst being employed in an administrative department of the undertaking which has not itself been transferred, carried out certain duties for the benefit of the part transferred." (See *Botzen*)

52. I note two points: firstly, **Botzen** made clear that employees providing administrative support for the undertaking transferred that were not employed in that part would not be regarded as assigned to that part of the undertaking; and secondly, Slade J interpreted the service change provisions by reference to authorities construing provisions of **TUPE** derived directly from the Directive.

53. I also draw attention to Slade J at paragraph 28:

"28. Mr Salter rightly submitted that the question of whether there was an organised grouping of workers whose principal purpose is that of carrying out the activities concerned on behalf of a client is closely related to that of whether the Claimants were assigned to that group. This proposition is supported by the observation of Underhill P (as he then was) in paragraph 16 of [*Moreman*] that the two points self-evidently overlap to a considerable extent."

54. I have also derived assistance from two Judgments of Lady Smith in the EAT: **Edinburgh Home-Link** and **Stirling**. Lady Smith made clear that the question of assignment could not be satisfied simply by showing some link between the employee and the work undertaken for the client. At paragraph 42 in **Edinburgh Home-Link** she said this:

"42. The appeal also proceeded on the basis that if a link can be shown between the claimant employee and the client work, then TUPE must apply. It is not, however, the law that every employee who can be linked in some way to the relevant client activity is to be regarded as assigned under reg 4. If that were so then a person employed, for example, as a handyman at the transferor's Head Office keeping the building in a suitable condition for client work to be administered from it or as a cook there to maintain the nutritional status of the directors thereby enabling them to work efficiently, would fall to be regarded as assigned even although he/she may be wholly unaware of the identity of the client or the activities for which the client has contracted and it could not be said that they would have been "organised" into the group providing the client service. Put shortly, the fact that a causal chain can be shown does not determine the issue. Rather, the question is: was the particular employee, prior to the transfer, assigned to the organised grouping of employees which was organised to have as its principal purpose the carrying out of the activities for which the client contracted, on the

> **client's behalf? That is a question which, on the evidence and facts found, the Tribunal Judge was unable to answer in favour of the Claimants' case and he explains, intelligibly, why that is so. In particular, he was not able to conclude that the relevant client activities - those set out in paragraph 6 above - were ones to which, as a matter of fact, Mr McAleavy and Ms Morrison had been assigned. That was partly because he could not reach any conclusion as to how much of those activities they had been carrying out but principally because the substance of their jobs required them to carry out other activities, ones which were not those for which the client had contracted to have carried out on its behalf."**

55. The Judgment of Lady Smith supports the view that while a clear link between the employee and the work carried out is sufficient in itself to constitute an assignment to a relevant organised grouping, something more is required than some participation in the activity (I would add even if at the time of the service provision change there has been a temporary suspension). In **Stirling**, an authority to which I referred counsel, Lady Smith also stressed the importance of considering all relevant facts and circumstances. The case was unusual. The Claimants were crew members of a vessel, the Sir Brandan, employed by Guernsey Ship Management, which provided the crew to a company JAG, which had charted the vessel to the Ministry of Defence for work in the Falklands. Following a tendering process the contract was lost to a Dutch company, Van Wijngaarden Marine Services BV, which charged another vessel, the Tamar, from Argyll to carry out the work previously performed by the Sir Brandan. The issue was whether there had been a service provision change. Lady Smith said at paragraph 46:

> **"46. I have no difficulty in acceding to Mr Napier's submission that the Tribunal erred in determining that the Claimants' contracts of employment had transferred without considering whether or not the requirements of regulation 4(1) were satisfied. The issue of whether or not a particular employee was assigned to the "organised grouping of employees" affected by the transfer and thus entitled to the protection of TUPE is not a mere formality. It can only be resolved after a proper examination of the whole facts and circumstances. Being involved in the carrying out of the relevant activities immediately prior to the transfer will not necessarily mean that that employee was assigned to the organised group. It is not difficult to think of circumstances where it will not be possible to conclude that an employee was assigned to the organised grouping such as where he was only working on that matter on a temporary basis - to provide cover for a member of the group who is on leave, for instance. An employment tribunal has to take care to be satisfied that the particular claimant was in fact assigned to the relevant organised grouping prior to the transfer before it can reach what is a highly significant conclusion for both claimant and putative transferee, that the contract of employment transferred across when the client changed their service provider. It is self evident that to consider the issue raised by regulation 4, consideration of the whole facts and circumstances in which the Claimants worked will be required and I am satisfied that that needs to be carried out afresh, particularly since the remit will be a new tribunal."**

56. This Judgment was approved by the Court of Appeal in **Rhijnsburger**, to which I also referred counsel. Jackson LJ said at paragraph 44:

> **"44. I would summarise the principles which emerge from the authorities as follows. If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within regulation 3 of TUPE. The first stage of this exercise is to identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who *ordinarily carried out those activities.* The fourth step is to consider whether company B organised that employee or those employees into a "grouping" for the principal purpose of carrying out the listed activities." (My italics)**

57. I also draw assistance from the Judgment of Morrison J in **Duncan Webb Offset v Cooper**. In that case the Employment Appeal Tribunal was invited to give guidance to Industrial Tribunals on matters to be considered when deciding who was "assigned" but declined to do so because the facts would vary so markedly from case to case:

> **"15. … X has a business in which he employs a number of people. X transfers part of his business to Y. In order to determine which employees were employed by X in the part transferred it is necessary to ask: which of X's employees were assigned to the part transferred - [*Botzen*]. In *Gale* [*v Northern General Hospital NHS Trust* [1994] IRLR 292] it was suggested that the question might be asked whether a particular employee was 'part of the … human resources' of the part transferred, which is the same thing put another way. The contracts of employment of those who were so assigned will, unless the employees object, pass over to the transferee, thus giving effect to the purpose of the Regulations and the Acquired Rights Directive, pursuant to which they were made, that an employee should not forfeit his job because of a change in the identity of his employer. 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."**

58. I now refer to **Eddie Stobart v Moreman**, a decision of the Employment Appeal Tribunal, Underhill J presiding, the case concerned whether to qualify as an assignment to an organised grouping under Regulation 3(1)(a)(i) it was sufficient for an employee to have spent the majority of time working on a particular activity in the absence of his being a member of a dedicated group or team. Underhill J noted that there were separate and distinct questions

relating to the existence of an organised grouping and assignment of employees to that grouping. The organised grouping must in effect be a distinct team (I have already observed the comment Underhill J made in relation to construction of **TUPE**). Some assistance is to be derived from paragraph 18, where he considered the purpose of the grouping and its relation to individual employees:

> **"18. … I believe that the judge came to the right answer for the right reasons. Taking it first and foremost by reference to the statutory language, reg. 3(3)(a)(i) does not say merely that the employees should in their day-to-day work in fact (principally) carry out the activities in question: it says that carrying out those activities should be the (principal) purpose of an 'organised grouping' to which they belong. In my view that necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. The statutory language does not naturally apply to a situation where, as here, a combination of circumstances - essentially, shift patterns and working practices on the ground - mean that a group (which, NB, is not synonymous with a 'grouping', let alone an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. The paradigm of an 'organised grouping' is indeed the case where employers are organised as 'the [client A] team', though no doubt the definition could in principle be satisfied in cases where the identification is less explicit."**

59. Underhill J clearly links the question of whether an employee is assigned as to whether he is carrying on those activities that are the principal purpose of the organised grouping. It might be said in the present case that the Claimant could not be said in his day-to-day work to have *any* connection with the activities of the group.

60. **Botes** is a service provision change case, and the Court of Appeal approved a two-stage test to determine whether an employee is assigned to the organised grouping *et cetera*. Firstly, was the employee employed in the part transferred immediately before the service provision change; and, but for temporarily absence, could he have been required to work as part of the relevant organised grouping? In that case the Claimant had been absent sick at the time of the service provision change (for a few months only), and there was nothing to suggest that his absence was either long-term or permanent so far as I can deduce from the report. In the Court of Appeal Mummery LJ made it clear that absence on a temporary basis by reason of sickness was insufficient to detach an employee from an organised grouping. The essential question was

where, if not excused by sickness absence, he could have been required to work. This case is a further example of **TUPE** provisions that did not derive from the **Acquired Rights Directive** being construed in the same manner as the rest of the **Regulations**. Mummery LJ considered the appeal against a finding that an employee had been away sick for several months to have been detached from the remainder of the workforce at the days of transfer so that he was "not in fact employed in the part transferred" immediately before the date of the transfer. It was the case that it had been found by the Employment Tribunal even though the employee had been contractually bound to work on the work subject of the transfer had he been fit to do so. Mummery LJ had this to say at paragraph 40:

> **"40. … If he was in fact employed in that part of the undertaking for the purposes of [the 1981 Regulations], the fact that he was away from work because he was sick would not of itself prevent the transfer from including him. A person on sick leave, like a person on holiday, on study leave or on maternity leave, remains a person employed in the undertaking, even though he is not actually at his place of work.** ***The question is whether he was employed in the part transferred. That is a factual matter."*** **(My italics)**

61. Mummery LJ stressed that the crucial issue was where Mr Salih would have been required to work by Botes had he been fit to work. May LJ added at paragraph 61 that one can determine whether an employee is assigned to the organised grouping *et cetera* subject to the service provision change (who is not working at the time of the transfer) by answering the question where he could be required to work if able to do so. In my opinion, this principle may be of great assistance in cases of some temporary absence or cessation of work but has little resonance in the case of an employee who does not and will never work.

> **"61. … His contractual assignment was to that part [subject of service provision change] and the proper inference is that he would have been working there apart from his sickness. Mr Swift accepted that a person who is contractually employed in an undertaking which is transferred is part of the undertaking for the purposes of the Directive and the Regulations, and that the fact that they may be away from work on account of sickness does not alter this. …"**

62. In **Robert Sage Ltd v O'Connell** Slade J considered the case of Mrs O'Connell and other Claimants who were support workers employed by Allied Healthcare to provide care to X, a person with severe learning difficulties. One of the Claimants, Mrs Truman, was

suspended on full pay after the local authority had sent Allied a specific request that she not be placed with X, and Allied informed her that it would be inappropriate for her to return to looking after X. At about this time Allied came to see there were severe difficulties with the relationship between the carers and X's family, and Allied accordingly gave notice to terminate its contract with the local authority. In due course the care of X was transferred by the local authority to Robert Sage. The Employment Appeal Tribunal was satisfied that there had been a service provision change and transfer of all the Claimants apart from Mrs Truman but that Mrs Truman had not been assigned to the relevant grouping of employees as at the date of the transfer; so, her employment did not transfer to Robert Sage. Slade J had this to say at paragraph 52:

> **"52. In my judgment the EJ erred in holding that the test of whether Mrs Truman was assigned to working with X in her own home was 'essentially a contractual one'. The EJ should have determined the issue by reference to where Mrs Truman would have been required to work immediately before the transfer. Whilst the contract plays a role answering this question, in this case as in *United Guarding Services* the contractual place of work was superseded by a prohibition on working there."**

63. But for the intervention of the local authority as at the time of the service provision change Mrs Truman would have been required under the terms of her contract to work with X. However, whatever may have been the contractual place of work, by reason of the prohibition on her working there she had ceased to be a member of the relevant organised grouping.

64. A similar factual scenario is to be found in the decision of the EAT (Hooper LJ) in **United Guarding Services v St James Security Group**. In that case a security guard who had been assigned to a unit at the premises of clients in The Broadway, Westminster however had difficult relations with the site manager and was deployed elsewhere to avoid contact with the manager. The decision by the Employment Tribunal was that at the time of a service provision change he was no longer assigned to The Broadway. It was argued by United Guarding and the employee that the finding that the employee was not assigned to The Broadway involved the

conclusion that she must either have been assigned somewhere else (which she had not) or that she was a floating guard. St James submitted that it was not necessary to decide her status. The Employment Appeal Tribunal agreed:

> **"39. … The only question which the Tribunal had to ask themselves was whether or not she was assigned to 50 The Broadway. It is our unanimous view that, as she was not allowed to work "at all" at 50 The Broadway under the St James contract at the relevant time, [she] was not assigned to 50 The Broadway.** ***In these circumstances it was open to the Employment Tribunal to conclude that Miss Hermoza [the employee] was not so assigned without a finding as to where she was assigned.*** **(My italics)**

65. I was referred to the decision of HHJ McMullen QC in the EAT in **Compass Group v Burke** UKEAT/0623/06, 15 May 2007, in support of the proposition that in deciding whether there has been a relevant transfer of an undertaking the finding of facts by the Employment Tribunal are subject to an overall assessment that raises a question of law. I do not find this principle to be controversial. I was referred to **Omwuka**; I did not find this case of assistance and see no need to refer to it.

66. I derived the following from the authorities. In order for an employee to be assigned to a particular grouping, within the meaning of Regulation 4(3) of **TUPE**, something more than a mere administrative or historical connection is required. The question of whether or not an individual is "assigned" to the organised grouping of resources or employees that is subject to the relevant transfer, will generally require some level of participation or, in the case of temporary absence, an expectation of future participation in carrying-out the relevant activities on behalf of the client, which was the principal purpose of the organised grouping. Whether an employee is assigned to a particular grouping is a question of fact that must be determined by taking into account all relevant circumstances, none of which individually can be determinative; in particular, in the case of an employee being absent through ill-health at the date of the service provision change where he might be required to work when able to do so. Mere administrative connection of an employee to the grouping subject to the service provision change in the

absence of some participation in the carrying-out of the economic activity in question, although a factor to be taken into account, cannot be determinative of whether or not for **TUPE** purposes the employee was assigned to the grouping at the time of the service provision change. It is not necessary to determine where the employee was assigned at the time of the service provision change if he was not assigned to the organised grouping engaged in the relevant activity and subject to the service provision change.

67. I reject the submission that the ECJ in **Botzen** recognised that employees who might be permanently unable to work might still be assigned to the entity subject to the service provision change. Permanent inability should be distinguished from temporary inability. I am not able to accept the submission that the Employment Tribunal is bound to consider to what other entities Mr Edwards was assigned if not to the DNO. The identity of an organised grouping *et cetera* subject to service provision change is partly defined by the work it carries out; so, almost by definition a person who plays no part in the performance of that work cannot be a member of the group and thus is not "assigned" to the grouping.

Discussion and Conclusions

68. This case is quite unlike any other that I have seen related to a service provision change, because the Claimant's connection with the grouping subject to the transfer was a very limited administrative connection that was not based on the present or future participation in economic activity. I reject the suggestion that the universal criterion in all cases is to determine the question of whether an employee (not in work at the time of the service provision change) is assigned to a particular grouping is to be found in the answer to the question to which grouping he could be required to work if able to do so. This criterion is useful in cases where an employee is able to return to work at the time of the service provision change or is likely to be

able to do so in the foreseeable future, assuming the employee has not been transferred to other work. The principle has no resonance or applicability in a case such as the present where the employee in question is *permanently* unable to return to work and has and can have no further involvement in the economic activity performed by the grouping and the performance of which is its purpose. There is a clear link, as I have already observed, between the identification of the organised grouping and the question of who is assigned to that grouping. If the grouping is to be defined by reference to performance of a particular economic activity, the absence of any participation in that activity will almost, by definition, exclude persons in the position of the Claimant.

69. This case was decided on its facts by the Employment Tribunal, there has been no misdirection of law, and the conclusion of the Employment Tribunal was justified by the evidence. The authorities relied upon by BTMS, on where the Claimant might be required to work if able to do so, must be seen in the context of employees temporarily absent from work and who were not in effect retired, rather than those who were not working at the time and would never do so in the future. I regard it as impossible to say that someone in the Claimant's position could have been assigned, in any meaningful sense understood by employment lawyers, to the DNO. Mr Edwards' case is quite different to those cases where employees have not participated in economic activity at the time of a service provision change or indeed of any **TUPE** transfer who are regarded as assigned to the relevant grouping provided that there are reasonable grounds for the belief they will return to work in due course or after a temporary lay-off. Similarly, in the cases of persons on long-term sick leave or maternity leave the absence of such employees might be regarded as temporary and cannot be equated with Mr Edwards' permanent absence. Mr Edwards is even less likely to qualify as assignment to the group in the examples given by Lady Smith in **Stirling**.

70. In these circumstances I consider that the decision of the Employment Tribunal was correct and reached after a proper evaluation of the facts and of the law, and in those circumstances the appeal must fall to be dismissed. It only remains for me to thank counsel for their assistance.