

The Evidence

4. The Tribunal prior to the commencement of the hearing spent some time privately reading into the witness statements exchanged between the parties and relevant pages in an agreed bundle of documents. This meant that when each witness came to give evidence, he could do so by simply confirming his statement and then be open to be cross-examined.
5. The Tribunal heard firstly from Mr Kevin Townend, called on behalf of the claimant and a Non Executive Director of Advanced. The claimant then gave evidence on his own behalf. The Tribunal then heard from Mr Bruce Grant, Group Operations Director of HLD, the respondent's parent company.
6. Having heard all relevant evidence the Tribunal makes the findings of fact as follows.

The Facts

7. The claimant started employment with Gaffers (Transport) Limited ('Gaffers') in 1996 shunting trailers used for the loading and distribution of bathroom products manufactured by the respondent's predecessor. Gaffers went into administration on 23 December 2003 and from 5 January 2004 the claimant carried out the same role employed by the new hauliers, Viamaster Transport Limited ('Viamaster') engaged by the respondent's predecessor. He also organised and signed paperwork for the loads collected.
8. The shunter used by the claimant was acquired and continued to be leased by the respondent. The claimant was permanently based at the respondent's site and given the use of a locker there by the respondent. From 20 May 2013 another company, Advanced, after success in a tender started to carry full load distribution as the respondent's preferred supplier. The claimant's employment transferred to Advanced. Viamaster continued to load and deliver smaller orders to multiple customers, known as 'groupage'. The claimant's work continued as before in that he would move trailers to and from loading bays as and when required - that still included Viamaster (as well as Advanced's) trailers which might at times be loaded up from empty and then moved off a loading bay prior to collection by a Viamaster driver.
9. The main change to the claimant's duties was that, unlike other hauliers used by the respondent Advanced parked its trailers on the same industrial estate under a mile away. The claimant, in the interests of efficiency, used to move empty trailers in between Advanced's yard and the respondent's. This need fluctuated but two or three trailer movements per day would not be uncommon, each taking around forty five minutes out of the claimant's ten hour working day.
10. The claimant's hours were arranged to cover the period of the respondent's operations. Also the claimant was given the use of a PC by the respondent at its site and his own Astracast email address. He was subsequently supplied with a laptop by the respondent which he used on a daily basis.
11. The Tribunal has seen a draft contract for the services provided to the respondent by Advanced. It makes no reference to shunting activities. However, a further draft dated 1 June 2015 on the respondent's letterhead states that: *"The full load service provider [i.e. Advanced] will provide a shunt driver to operate in the Astracast yard free of charge or the costs to be included*

in the pallet rate. The driver must have hours of work that were within Astracast standard operating hours (existing agreement)."

12. Around July 2015 two of the respondent's warehouse operatives were trained to drive the respondent's shunter. There is no evidence that the shunter had ever been driven by the respondent's employees.
13. Also, from September 2015 the respondent commenced using an associated company, Widdowsons, for haulage services as well as Viamaster and Advanced. The Widdowsons' vehicles were frequently used to deliver another company's goods to Bradford and when empty would pick up the respondent's goods as a backload. If so, Widdowsons' own drivers would simply dock the trailer at the loading bay without any need for the use of a shunter. However the Tribunal accepts the claimant's evidence that this was not always what occurred and on a significant number of occasions Widdowsons' trailers would be parked in the yard and moved by the claimant to the loading bay. The claimant was the person able to give first hand evidence of his tasks to the Tribunal and gave such evidence in a straightforward and convincing manner.
14. Certainly, from September 2015 and indeed shortly before then, the respondent's use of Advanced's services diminished. The respondent's overall production levels reduced, but alternative hauliers came more and more to be used by the respondent for work previously undertaken by Advanced.
15. The respondent emailed Advanced on 14 September 2015 saying that it would no longer need the services of a full time shunter in their yard. Advanced considered that the respondent was intending to carry out shunting themselves directly and sought to assert that there was a TUPE transfer to the respondent of the claimant.
16. A letter from Advanced of 18 September 2015 refers to the claimant's entire role involving driving the respondent's shunter between the respondent's and Advanced's sites. On 5 October Advanced wrote again to say that, on checking with the claimant, he moved trailers on and off bays at the respondent's site and moved other hauliers' trailers under the respondent's direction. The claimant's evidence reflects such wider duties and the Tribunal considers the 5 October letter to be a more accurate statement of the claimant's duties.
17. The respondent replied saying that the claimant did not move trailers for Viamaster and did not move Widdowsons trailers. That was not accurate. The respondent said that the operatives it had trained to drive the shunter had not yet been utilised but could be if deemed necessary.
18. On 26 October 2015 the respondent emailed Advanced to say that the claimant continuing shunting trailers was, as always, a business decision for Advanced. That did not, however, reflect what had been agreed previously between the respondent and Advanced. Whilst the claimant's moving trailers on or off site was a benefit for Advanced in terms of providing an efficient service, Advanced had agreed to provide a shunter in the respondent's yard.
19. On 21 December 2015 Advanced emailed the respondent noting a decline in work and the provision of a dedicated free of charge shunter untenable. The options were stated as the respondent funding the claimant's services or his transfer to the respondent.

20. There is no evidence of any continuance of this correspondence. Advanced continued supplying the claimant and the respondent used his services shunting trailers owned by any of the three haulage companies from time to time in the respondent's yard (Advanced, Viamaster and Widdowsons). The respondent's managers/supervisors would ask him to undertake the necessary shunting work.
21. The Tribunal cannot envisage that the claimant was fully occupied in such tasks. However, there is no evidence that he did any other work either at the respondent's site or elsewhere for Advanced. His workload decreased as Advanced had fewer deliveries to make and his trips to the Advanced yard would be less frequent. However, whatever shunting was required at the respondent's yard he carried out. He continued to arrive there each day, park his car at the respondent's yard and complete each shift. Whilst in an interview with Advanced on 9 August 2016 the claimant said that the respondent was his priority, there is no evidence of him doing any other work for any other 'client' and he also at the same time described himself as dedicated to the respondent.
22. By a letter of 29 July 2016 Advanced terminated its haulage contract with the respondent with immediate effect. There was an assertion, supported at the time by the claimant, that he would transfer to Widdowsons. The claimant told the Tribunal that he thought Widdowsons had taken over the Advanced contract. However the claimant came to believe that the respondent had taken over his work itself.
23. The claimant reported for work with the respondent on 12 August 2016 and was sent away.
24. Since the termination of Advanced's contract, the shunter has been driven by the two operatives of the respondent trained to use it. As before, haulage drivers, if available, will move their own trailers. Otherwise where necessary, again as before, trailers will be moved using the respondent's operatives. These were new duties for the warehouse operatives reflecting their multi skilling and, quite understandably, their use as a flexible resource for the respondent.
25. The requirement for shunting remains quite low as it had been for some time including in the last months the claimant performed the task. In January to February 2016 typically five to seven shunts were carried out each day.

Applicable Law

26. Pursuant to Regulation 3(1)(a) of TUPE: "*... a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity*" constitutes circumstances where the Regulations apply.
27. Alternatively, the Regulations apply to a service provision change which, as relevant in these proceedings, is defined as a situation in which according to Regulation 3(1)(b)(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*". Even if that applies additional conditions need to be satisfied which include that there must be immediately

before the service provision change “an organised grouping of employees ... which has as its principal purpose the carrying out of the activities concerned on behalf of the client”. References to “organised grouping of employees” shall include a single employee.

28. Further, the client must intend 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.
29. The Tribunal is guided by the summary of Peter Clarke HHJ in the case of **Enterprise Management Services Limited v Connect-Up Limited** [2012] IRLR 190. There he set out a recommended approach where a Tribunal’s first task is to identify the activities performed by the contractor’s employees. Next the Tribunal should consider the question whether those activities are fundamentally the same as those carried out by the client on his own behalf. If the activities have remained fundamentally the same the Tribunal should ask itself whether before the transfer there was an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client. Following this the Tribunal should consider whether the aforementioned exceptions apply. Finally the Tribunal must be satisfied that the individual claimant is assigned to the organised grouping of employees.
30. The fact that a relevant activity is subsumed within a wider operation post transfer does not necessarily amount to a fundamental change in the activity. Nor does a diminution in the ‘quantity’ of the activities.
31. The respondent’s primary argument was that the relevant activity in this case was the provision of transport services by Advanced which was not brought in-house. The Claimant’s duties were at best ancillary to that relevant activity but not a relevant activity in themselves. The Tribunal was also referred to the case of *Eddie Stobart Ltd v Moreman* 2012 ICR 919 which makes it clear that the creation of the organised grouping of employees must be conscious and intentional rather than merely circumstantial.
32. Applying the relevant legal principles to the facts as found, the Tribunal reaches the following conclusions.

Conclusions

33. Clearly, Advanced carried out a haulage service for the respondent which ceased and was not ever taken over as an in-house operation.
34. The claimant had already of course carried out a shunting role employed by alternative haulier companies prior to Advanced’s contract with the respondent. The claimant’s continuance in such activity was not necessarily dependant on him working for any particular haulier. The activity of shunting was a standalone activity which was carried out in moving whatever trailers in the respondent’s yard required moving. If Advanced was the preferred supplier then inevitably the bulk of the claimant’s work involved their trailers and indeed his role altered in that he moved now trailers to and from their nearby yard.
35. He was however involved in shunting, whenever required, trailers belonging to Viamaster and Widdowson – effectively Advanced’s competitors. The respondent’s supplier contract document dated 1 June 2015 reflects the

separate provision of a shunter in the respondent's yard and, in practice, that shunting was of whatever trailers were required to be moved.

36. This shunting activity was a much smaller operation in terms of value than the distribution of goods for the respondent to its customers. Indeed it carried with it no separately defined charge. It was not, however, merely ancillary to Advanced's transport activities performed under its contract with the Respondent.
37. It can be and is viewed by the Tribunal as an independent relevant activity for the respondent's benefit across a number and range of haulage arrangements it had. Indeed in the months prior to the termination of the Advanced contract the claimant's work on Advanced trailers diminished and he was utilised, albeit by no means filling all his hours of work (although he did no other work), as a shunting service whenever required in the respondent's operation. The shunting activity did not involve the participation of any other employees, nor a wider grouping of employees who carried out other activities. The claimant was not part of a team that delivered services to a number of clients.
38. As the respondent admits, if this was a distinct service, it could have been taken in-house by the end of 2015 and performed by its two warehouse operatives. It was indeed a distinct service and came to be taken in-house, not at that stage, as the respondent chose to continue to utilise the claimant's services - no doubt because he was there, experienced, and did not cost them any additional fee – but when Advanced terminated its contract. There was therefore a relevant activity of trailer shunting which remained fundamentally the same when subsequently carried out from July 2016 by the respondent's warehouse operatives.
39. Of course by July 2016 the claimant's movement of trailers to and from Advanced's yard had diminished such that the lack of the respondent now undertaking such movements cannot be viewed as a material change to the activity.
40. It is still necessary for there to have been an organised grouping of employees with the principal purpose of carrying out the relevance activities. A single employee can constitute an organised grouping. The claimant's principal purpose was to shunt trailers to ensure that trailers were docked at the respondent's loading bays and removed from them if not ready for immediate despatch by a haulage lorry. He did no work other than for the respondent and regardless of whether or not his employer was the haulier whose trailers needed to be shunted. The claimant can be said to be an 'organised' grouping. Advanced took the claimant, as he had been with Viamaster, as an individual in a unique position who was solely assigned to the respondent's business. There was no accident or chance in his allocation. He was a trained and experienced shunter driver who carried out the task for many years. Indeed there was a strong degree of integration of the claimant into the respondent's business evidenced by the provision of a locker, IT equipment and his own email address with the respondent and the direction given to him by the respondent in his work.
41. The claimant was certainly assigned to the relevant activity, he reported to the respondent's site directly every morning and did no work beyond that required in the relevant activity. The claimant's employment did therefore transfer to the respondent pursuant to TUPE effective from 29 July 2016.

42. The Respondent accepted that it must follow that the claimant had been unfairly dismissed by it and in breach of contract. The Claimant had been offered and accepted new employment with Advanced immediately on the respondent refusing to accept him into its employment. Over the period of his 12 week notice entitlement due from the respondent he had earned a net sum of £44 less with Advanced in his new role than if his employment had been continued by the respondent.
43. In terms of compensation for unfair dismissal, the claimant's employment with Advanced was without any break in his continuity of service such that no award to reflect loss of statutory rights was appropriate.
44. The Claimant accepted a proposition that had he transferred to the respondent he would have been fairly dismissed after a period of consultation which would have taken no longer than four weeks. Given his continued employment with Advanced since the transfer date he has suffered no additional loss of earnings and, if he had transferred to the respondent, he would have been made redundant in circumstances where there was insufficient work for a dedicated shunter and that work could be absorbed by the two warehouse operatives as an addition to their core duties in the warehouse of which the claimant himself had no experience. In a selection exercise from a pool comprising the claimant and the warehouse operatives, the claimant would inevitably have lost out. The claimant on that basis did not press for any compensatory award in addition to his agreed basic award entitlement of £8,622. Since the claimant is entitled to a basic award any entitlement to an additional statutory redundancy entitlement does not arise.

Employment Judge Maidment

Date: 12 April 2017

Sent on: 13 April 2017