Appeal No. UKEAT/0440/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 & 9 April 2014
Judgment handed down on 1 August 2014

Before:

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

HOUSING MAINTENANCE SOLUTIONS LTD — APPELLANT

MR JF McATEER AND OTHERS — RESPONDENTS

JUDGMENT

APPEARANCES

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SUMMARY

TRANSFER OF UNDERTAKINGS - Transfer

The Employment Judge erred in law by holding that a transferee assumed responsibility as employer for employees of a transferor as referred to by the Court of Justice of the European Union in **Celtec v Astley** [2005] ICR 1409 when they consulted employees and reassured them that they would be offered employment. Further, the Employment Judge erred in determining the date of the transfer of the undertaking by reference to the date on which he considered that the transferee assumed responsibility for the transferor's employees. The reference in **Celtec** is to responsibility as employer by operation of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** not by the wishes, actions or intentions of the parties. The date of the transfer of the undertaking dictates the date when the contracts of employment transfer not vice versa. Appeal allowed. Case remitted to a different Employment Judge to determine the date of the transfer of the undertaking.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Housing Maintenance Solutions Ltd ('HMS') appeal from the decision of Employment Judge Ryan ('the EJ') on a Pre-Hearing Review sent to the parties on 7 June 2013 ('the 2013 PHR'). The EJ held that "The economic entity that was Kinetic Transferred to HMS on 9 June 2011" within the meaning of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE') regulation 3(1)(a). Alternatively he held that there was a service provision change ('SPC') under TUPE regulation 3(1)(b)(ii) on that date. By a judgment sent to the parties on 11 July 2012 following an earlier PHR ('the 2012 PHR') the EJ held that there was "no transfer of an undertaking, business or part of an undertaking or business being a transfer of an economic entity which retained its identity" for the purposes of TUPE in June 2011 between Kinetics Group Ltd ('Kinetic') and Liverpool Mutual Homes Ltd ('LMH'). LMH is a housing association; it manages over 15,000 homes in Liverpool that formerly comprised Liverpool City Counsel's housing stock. Kinetic carried out repair and maintenance work on those houses for LMH. The EJ originally held that there was an SPC amounting to a relevant transfer for the purposes of TUPE in June 2011 between Kinetics and LMH in respect of the activity of managing the repair and maintenance responsibilities of LMH for City housing stock. In a further finding the EJ appeared to reach a contrary conclusion. By review in the 2013 PHR the EJ revoked the original finding that there was a service provision change between Kinetics and LMH. The conclusion of the 2012 PHR was therefore that there was no transfer of a business or service provision change within the meaning of TUPE between Kinetics and LMH in June 2011. The agreed issues for the EJ to decide at the 2013 PHR were:

> **"11.1. Was there a business transfer from Kinetic to HMS and if so, when?**
>
> **11.2. Was there a service provision change from Kinetic to HMS and if so, when?"**

Unless otherwise indicated, references to paragraph numbers are to those in the 2012 or 2013 PHR judgments.

2. The issues to be determined at the 2013 PHR arose in connection with claims made by individual Claimants for unfair dismissal on 9 June 2011, unlawful deduction from wages for the period between 9 June and 30 June 2011 and a declaration of the identity of their employer in the period of 9 to 30 June 2011. UNITE, UCATT and GMB, made claims for failure to consult in relation to a transfer of an undertaking and collective redundancies on 9 June 2011 and 1 July 2011. Management employees, Mr Ryder and Mr Rowe made claims as individuals. They were not members of any Union. Insofar as the claims were not made directly against HMS they would be liable to meet awards made against Kinetic if there were a transfer to them of an undertaking within the meaning of TUPE on 9 June 2011 in which the individual Claimants were then employed. Further, if the date of a transfer were 9 June 2011, HMS would be directly liable in respect of consultation and pay obligations. At the hearing before the Employment Appeal Tribunal ('EAT') Simon Gorton QC represented HMS, David Campion the individual Claimants supported by the three Unions and the Unions in their own capacity (together 'the Trade Union Claimants') and Colin Bourne the Claimants Mr Ryder and Mr Rowe.

The relevant facts

Facts found in the 2012 PHR judgment

3. The relevant functions of LMH, Kinetic, HMS and the individual Claimants were set out in the 2012 PHR judgment as follows:

> **"2.1. LMH is a housing association; it manages over 15.000 homes in Liverpool that formerly comprised Liverpool City Council's housing stock; it is responsible for, amongst other things, the repair and maintenance, gas maintenance and some cleaning requirements at the properties; it entered into a Framework Agreement in 2009 providing for potential outsourcing of these facilities to a number of companies including Kinetic; pursuant to that agreement LMH entered into a contract with Kinetic in 2009 for the provision of repairs and maintenance services including: Responsive Repairs (emergency**

> **work), Void Property Works (refurbishing empty properties) and Programmed Maintenance ("the services").**
>
> **…**
>
> **2.3. Kinetic would receive the referred calls from LMH and either instruct subcontractors from a list of approved service providers (that is approved by LMH) or would undertake the work itself using its own operatives; the work was regulated.**
>
> **2.4. At all material times prior to 9th June 2011, and in some cases 14th June 2011, the individual claimants were directly employed by Kinetic; some or all of Kinetic's employees were members of, or otherwise represented by, the Union claimants.**
>
> **2.5. Kinetic operated the contract in respect of the services utilising:**
> **2.5.1. a skilled and uniformed work force dedicated to the LMH contract;**
> **2.5.2. professional expert surveyors and schedulers;**
> **2.5.3. administrative and accounts staff;**
> **2.5.4. an IT infrastructure, management and accounts systems;**
> **2.5.5. depots at which the workforce and a fleet of vehicles were based;**
> **2.5.6. approved suppliers of materials and subcontractors."**

Mr Ryder was employed by Kinetic as Assistant Director of Property Maintenance North. The majority of his time was spent working on Kinetic's repair and maintenance services, sheltered cleaning and gas servicing contracts for LMH, being responsible for 208 staff and operatives. Like Mr Ryder, Mr Rowe was a member of the management team.

4. The EJ held at the 2012 PHR that in 2010 LMH decided to set up a wholly owned subsidiary to take over Kinetic's repair and maintenance services. Accordingly HMS was incorporated. 1 July 2011 was set as the target date upon which Kinetic employees engaged on the provision of services to LMH would transfer to HMS, the date on which HMS would become fully operational.

5. Between January and June 2011 Kinetic had problems, predominantly financial. Throughout this period LMH increasingly instructed subcontractors themselves upon receiving calls from tenants rather than allocating work to Kinetic.

6. The EJ held in 2012:

> **"2.12. LMH was concerned that Kinetic would cease to trade and may go into liquidation or even administration; as a consequence of these fears on 8th June 2011 LMH devised a business continuity plan; HMS was considered to be unready to commence trading in**

June 2011 and was not part of the immediate contingency plan as it was deemed unable to accept contractual responsibility for the provision of the services until July 2011."

On 9 June 2011 LMH served notice of termination of its contract with Kinetic with immediate effect. The EJ further held:

"2.14. …LMH was not in a position to undertake the provision of repair and maintenance services, did not have the required infrastructure, and had a long-term business plan that involved such services being carried out by HMS once it was fully prepared, ready and able to 'go live'…

2.15. Administrators were appointed to Kinetic on 9th June 2011; Kinetic's employees were sent home as it was said that there was no money to pay them…

…

2.17. As at 9th June 2011 neither LMH or HMS had available the necessary infrastructure, facilities and wherewithal to carry out the work undertaken by Kinetic to that point, … neither considered that HMS would be ready and able to operate before 1st July 2011.

…

2.19. Emergency repair work on the social housing stock was referred by LMH to its approved contractors as and when required; all non-emergency work on the social housing stock was put on hold…

2.20. LMH retained its responsibilities to Liverpool tenants and subsequently contracted with HMS to carry out those same activities.

…

2.22. Four members of Mr Ryder's team were recruited by LMH/HMS, (but not formally recognised as employees), … and to assist in the setting up on HMS' systems. … Their role was to assist in the management of the situation facing LMH and with a view to readying HMS.

…

2.24. As LMH insisted that it could not carry out all of Kinetic's activities, and that HMS was not ready to 'go live', the administrators confirmed to Kinetic's employees that their employment with Kinetic was terminated by reason of redundancy. They decided this on 13th June 2011 and notified the affected employees by letter dated 14th June 2011.

2.25. Because less plant and equipment was required HMS 'went live' with cleaning services for LMH on 20th June 2011; HMS 'went live' in respect of repairs and maintenance on 1st July 2011 as planned.

2.26. In the time between deciding to set up HMS and 20th June/1st July 2012 work was undertaken to arrange the affairs of HMS and to prepare for the taking on of Kinetic's activities and its employees…"

Facts found in the 2013 PHR judgment

7. The EJ held:

"16.7. HMS not only wanted but needed Kinetic's employees; its inheritance of Kinetic's workforce was essential to the performance of the required activities under the LMH contract if it was to go live by 1 July 2011…

> **16.8. If HMS could have gone live in respect of repairs and maintenance before 1 July 2011 then it would have done so. It did so in respect of cleaners, the only reason it did not go live in respect of repairs and maintenance prior to 1 July was a logistical problem referred to in submissions as "a logistical constraint" or "blip", but it was to do with its readiness.**
>
> **…**
>
> **16.11. On 9 June 2011 HMS reassured the Kinetic employees that it would employ them and whilst it had been in consultation for some time, it continued the consultations with the trade union representatives with renewed vigour … HMS could not countenance losing the ready made workforce employed to date by Kinetic. HMS acted as if it were the transferee under TUPE transfer, of Kinetic's employees from 9 June 2011.**
>
> **16.12. Some of the claimants were essential to managing the mobilisation in readiness for 1 July 2011, and all of the claimants were essential for the actual mobilisation for the continuation of service to tenants, but at that time there was no actual repair or maintenance work underway. There was however, managerial work; four of the management team, M. Evans, K Tracy, P Clark and L Isobar, were required to assist in the management function of preparation for mobilisation and to continue work that they had been doing pre 9 June 2011 in that respect. Their duties were specific to how and when the repair and maintenance work would be carried out by Kinetic's workforce from 1 July 2011, then no longer to be known as Kinetic's workforce. Those four, part of Mr Ryder's team, commenced working on this task directly for HMS on 15 June 2011; in due course they were duly paid for their efforts by HMS from 15 June.**
>
> **16.13. By 20 June 2011 HMS was able to go live in respect of cleaners and it did so. Between 9 June and 20 June whilst keeping the other claimants reassured that they were required for work from 1 July 2011, HMS was unable to provide work."**

8. The EJ held at paragraph 16.17 that on 1 July 2011 HMS operated LMH's contract in respect of the provision of repairs and maintenance services. They did so utilising a skilled and uniformed workforce. They used professional experts, surveyors and schedulers, administrative and accounts staff with parts of or similar IT infrastructure management and accounts systems to those previously operated by Kinetic. The EJ held:

> **"16.20. From 9 June 2011 HMS accepted responsibility for the employment of the claimants albeit it did not pay all of them. As soon as HMS was ready it would utilise the Kinetic workforce in full and that planned date was no later than 1st July 2011. It assumed responsibility however from 9 June 2011 via continued consultation and reassurance, by engaging four of the managers as soon as they were ready to take them back into work on 15 June and the cleaners on 20 June and ultimately on or before 1 July, it actively utilised 206 of the 208 Kinetic employees. Only Messrs Ryder and Rowe were excluded from consideration immediately after 1st July 2011.**
>
> **16.21. HMS served the needs of LMH's tenants, that is, its customers, as Kinetic had done. Both Kinetic and HMS serviced LMH's contract. The activities of Kinetic and HMS were essentially and fundamentally the same. The activities were suspended for a time post 9 June 2011, but only for so long as was practically required and desirably to HMS, with the minimum disruption to LMH and tenants. The duration of this suspension was essentially the choice of HMS; it chose to bring in four members of Mr Ryder's team on 15 June; it chose to bring in the cleaners on 20 June and it chose to give active work to the other operatives, the claimants, on [1] July 2011, even though practical work on site was not possible until 4 or 5 July 2011. The period between 1 and 5 July 2011 was utilised in setting up and kitting out all those concerned."**

9. The EJ concluded:

"18.6. Activities previously carried out by Kinetic ceased temporarily; various activities resumed after brief cessation on different dates, for some 15 June, for some 20 June, for some 1 July and for others no later than 4 or 5 July 2011.

18.7. The economic entity that was Kinetic transferred to HMS on 9 June 2011, retaining its identity, notwithstanding a temporary cessation of activity until at latest July 2011, albeit certain activities resumed sooner, (15 June, 20 June); that was a TUPE regulation 3(1)(a) transfer from Kinetic to HMS.

18.8. If my conclusion at 18.7 above is not correct, and whether or not it was correct, there was a service provision change under TUPE Regulation 3(b)(ii). Activities ceased by the contractor (Kinetic) on behalf of the client (LMH); the activity was carried on by a subsequent contractor (HMS) on LMH's behalf. The claimant's (sic) formed part of an organised grouping of employees in Great Britain whose principal purpose were the activities that I have described on behalf of LMH, and LMH intended HMS to carry out those activities, other than in connection with a single specific event or task of short duration. The exception to that regulation regarding the supply of goods is irrelevant. HMS carried on those activities, subject to a temporary cessation as described and assumed that responsibility on 9 June 2011."

The relevant statutory provisions

10. **Transfer of Undertakings (Protection of Employment) Regulations 2006**:

"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 retains its identity;
(b) a service provision change, that is a situation in which—
…
(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
…

…

(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
…

…

(6) A relevant transfer—
(a) may be effected by a series of two or more transactions; and
…

…

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

> **(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—**
> **(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and**
> **(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.**
>
> **(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions."**

The submissions of the parties

11. Mr Gorton QC summarised the issue raised by this appeal as follows:

> **"The ET's decision, properly understood, raised the following issue in this appeal: can there be a relevant transfer when a transferee indicated it will at some point in the immediate future, assume responsibility for the service and act as employer, but before it becomes the employer and assumes responsibility for the service? Or put another way: is a future commitment to being a transferee sufficient to amount to a relevant transfer as at the date when the commitment was given?"**

The challenge therefore is to the date of the transfer or service provision change: the finding that it occurred on 9 June 2011.

12. Mr Campion rightly pointed out in his skeleton argument that HMS have not sought on appeal to challenge the EJ's conclusion that there was a standard business transfer under TUPE Regulation 3(1)(a) from Kinetic to HMS. The appeal therefore concerns the date of the transfer. The same challenge is made to the alternative finding of a service provision change. By their Respondents' Answer the Trade Union Claimants rely on the EJ's reasons for his decision and additional grounds. By paragraph 25 it is requested that if any part of the appeal is successful the EAT remit the case to the same EJ:

> **"…to determine whether there was a transfer effected by a series of two or more transactions, an issue that was before the Employment Tribunal but which was not determined."**

13. By their Respondents' Answer, Mr Ryder and Mr Rowe also rely on the EJ's reasons and additional grounds. Further if any part of the appeal were to succeed Mr Ryder seeks to uphold the decision of the EJ on the basis that pursuant to the findings of fact there was a transfer effected by a series of two or more transactions. In addition to relying on the grounds for resisting the appeal advanced by Mr Ryder in his Respondents' Answer, Mr Rowe relies on that lodged on behalf of the Trade Union and trade union represented Claimants.

The grounds of appeal

Ground 1

14. Mr Gorton QC contended that:

> **"31. First, on the previous findings of the ET that (a) HMS was not ready to carry out the maintenance and repair service previously carried out by KGL until 1/7/11 (b) that there was no carrying out of that activity until after 1/7/11, (c) HMS were not in a position to employ the vast majority of the staff until on or after 1/7/11 and did not do so until then, it simply was not open to the ET to find that there had been a relevant transfer to HMS on 9/6: the economic activity was not continued and responsibility as employer was not continued or resumed until at the earliest 1/7/11."**

15. The EJ stated in paragraph 16.1 of his judgment on the 2013 PHR that he was relying in part on his findings of fact in the earlier reserved judgment as reviewed. The findings of fact set out in the First Ground of Appeal were undisturbed on Review and were to be applied in the 2013 PHR. Mr Gorton QC contended that these findings were incompatible with the conclusion reached in paragraph 18.8 that HMS assumed responsibility on 9 June 2011 for the activities previously carried out by Kinetic for LMH.

16. The EJ had found that HMS was only ready to 'go live' on 1 July 2013. Whilst a small group of managers started working for HMS before then, on a review of his 2012 PHR judgment the EJ held that he should not have divided Kinetic's activities between management and operatives. Just as there was no transfer of management functions to LMH on 9 June 2011 there was no transfer of other functions on that date. The engagement of cleaners on 20 June

2011 did not affect the date when HMS assumed responsibility for the activities previously carried out for LMH by Kinetic.

17. Mr Gorton QC pointed out that it had been the Claimants' case at the 2012 PHR that there was a transfer of an undertaking on 9 June 2011 from Kinetic to LMH not to HMS. The EJ rejected this argument. The Claimants then changed their position to asserting a transfer to HMS on that date. It was established that HMS was not ready to 'go live' in performing the relevant activities until 1 July 2011. Their actions before then were taken in preparation for assuming the undertaking of those activities on that date.

18. Mr Gorton QC contended that the finding at paragraph 16.20 that HMS accepted responsibility for the employment of the Claimants from 9 June 2011 was also incompatible with the findings of fact at the 2012 PHR. The operatives did not start work for HMS until after July 2011. The "continued consultation" by HMS of Trade Unions and potential employees after 9 June 2011 relied upon by the EJ to reach this conclusion showed that HMS was a potential not an actual transferee. No contracts of employments were entered into to take effect from 9 June. They were to take effect from 1 July.

Ground 2

19. Mr Gorton QC contended that the EJ appears to have confused the issue of whether a transfer takes place with when it takes place. He submitted that if there is a suspension of activities of the business transferred on cessation by the transferor, the date of the transfer "is when the economic unit retains its identity by the relevant activity being continued or resumed by the new employer". In this case that could be no earlier than 1 July 2011 and could not be 9 June 2011. Mr Gorton QC contended that the authorities in the Court of Justice of the European Union ('CJEU') on suspension of activities were concerned with whether a transfer

of an undertaking had taken place when there had been a suspension of activities rather than when it had taken place. He relied upon the judgment of the CJEU in **Celtec v Astley** [2005] ICR 1409 and in the House of Lords [2006] 1 WLR 2420 as a case in which the issue was the date when a transfer took place.

20. In support of the proposition that the date of the transfer is that on which a transferee starts carrying out a transferred activity, Mr Gorton QC relied upon the judgment of the EAT in **Metropolitan Resources Ltd v Churchill Dulwich Ltd** [2009] ICR 1389. The EAT, HH Judge Burke QC, held:

> **"38. The issue in Celtec was not whether there had been a TUPE transfer but when it took place and in particular whether it had taken place over a period; see paragraphs 5 and 6 in the speech of Lord Bingham of Cornhill and paragraph 24 in the speech of Lord Hope of Craighead.**
>
> **39. The tribunal in a case in which the date of the alleged transfer is in issue, must, in my judgment, determine the date at which the essential nature of the activity carried on by the transferor ceases to be carried on by him and is instead carried on by the transferee."**

21. Mr Gorton QC submitted that in this case the activities previously carried out by Kinetic were not resumed by HMS until 1 July 2011 at the earliest. The date of the transfer could not have been before that date.

Ground 3

22. Mr Gorton QC contended that the EJ erred in finding that HMS accepted responsibility as employer for former employees of Kinetic from 9 June 2011. Such a conclusion could not be reached on the facts found by the EJ. Informing and consulting staff as to its future intention to employ them on or about 1 July 2011 is not the same as HMS acting as their employer before that date. All that HMS did was to keep relevant representatives informed of their future intentions. All the relevant staff were employed and paid by HMS from 1 July 2011 and not before.

23. Mr Gorton QC referred to the fact that the EJ had found in the 2012 PHR that the administrators confirmed to Kinetic's employees that their employment was terminated by reason of redundancy. The affected employees were notified by letter dated 14 June 2011 of termination of their employment with effect from 9 June 2011. On 11 May 2011 the Senior HR Advisor of HMS wrote a TUPE "Measures Letter" to Kinetic informing them of measures it envisaged taking in relation to transferring employees. The proposed transfer date was 1 July 2011 for repairs and maintenance work. On 15 June 2011 Mr Worthington managing director designate on behalf of HMS emailed Union representatives about a draft contract of employment. It is clear from the email that the draft had not yet been agreed. Mr Worthington stated that he was planning arrangements to "go live on the 1st July". He wrote:

> **"If the contract arrangements are approved and we are in a position to move forward with staff recruitment next week."**

The final version of the draft showed that employment by HMS of former Kinetic employees was to start on 1 July 2011. Letters and emails were sent by Mr Worthington to Union representatives stating that HMS intended to "go live" on 1 July 2011. Employees would be offered employment with HMS on the same terms as they had previously but it was asserted that TUPE would not apply.

Ground 4

24. Mr Gorton QC contended that in any event the employment of staff without the resumption or continuation of the relevant activity cannot be decisive as to when a transfer takes place. The transfer takes place when both the staff are employed (or not employed for a reason connected with the transfer) and when the activity resumes or is continued.

25. Based on his proposition that the transfer of the undertaking only took place when HMS resumed the activities previously carried out by Kinetic, Mr Gorton QC relied upon **Rotsart de**

Hertaing v J Benoidt SA [1997] IRLR 127 to submit that the transfer took place on 1 July 2011. The CJEU held at paragraph 26:

> **"…the transfer of the contracts of employment and employment relationships pursuant to Article 3(1) of the Directive necessarily takes place on the date of the transfer of the undertaking and cannot be postponed to another date at the will of the transferor or transferee."**

26. In any event the EJ found that activities resumed over different dates: 15 June, 1 July and no later than 5 July. Mr Gorton QC contended that even on the EJ's own analysis, there could not have been a relevant transfer on 9 June when no activities whatsoever were carried out by HMS. On the finding of the EJ at paragraph 16.17 it was on 1 July 2011 that HMS operated LMH's contract in respect of repairs and maintenance services. The EJ found that HMS did so using a skilled and uniformed workforce. It was only a few managers on a "voluntary" basis and some cleaners who had started working for HMS before that date: the managers on 15 June 2011 and the cleaners on 20 June 2011.

27. In his Reply, Mr Gorton QC slightly modified his submissions. He stated that he was not saying that there could be no transfer until HMS started its operations or took on staff. When staff were taken on was a very important factor in deciding the issue. However Mr Gorton QC submitted that if HMS said they were taking over earlier but did not then start carrying out activities previously carried out by Kinetic there would not be a transfer on that date.

28. Mr Gorton QC submitted that the EJ did not give reasons why there was a transfer of a business or service provision change ('SPC') on 9 June 2011. Unlike the transferee in **Wood v Caledon Social Club** [2010] UKEAT/0528/09, HMS did not take over responsibility for the service on 9 June 2011. There was neither a business transfer nor a SPC on that date.

29. Mr Campion for the Trade Union Claimants contended that the challenge being made by HMS to the decision of the EJ is of perversity. Accordingly HMS have to show that no reasonable EJ properly directing him or herself could have concluded that HMS assumed responsibility on 9 June 2011for providing housing repair and maintenance services for LMH previously carried out by Kinetic. Mr Campion referred to the well known case of **Foreningen Af Arbejdsledere I Danmark v Daddy's Dance Hall** [1988] IRLR 315 to submit that there is a transfer of an undertaking when there is a change in the natural or legal person responsible for operating the undertaking. It was submitted that HMS had been responsible since 9 June 2011 for the repair and maintenance services previously carried out for LMH by Kinetic. Counsel asked rhetorically "If HMS was not responsible for the undertaking what was it doing offering contracts" to former employees of Kinetic in the period from 9 June 2011? Mr Campion referred to **Sarker v South Tees Acute Hospitals NHS Trust** [1997] ICR 673 in which the EAT held that the mere fact that duties would only be performed on a date subsequent to a contract having been entered into did not take it outside the concept of a contract of employment. He submitted that there was no doubt that the four management employees referred to in paragraph 16.12 were employed by HMS from 15 June 2011.

30. It was submitted that since responsibility for the undertaking transferred to HMS on 9 June 2011 it was made clear by the judgment of the House of Lords in **Celtec** paragraph 54 that the contracts of employment of the employees employed in the undertaking transferred by operation of TUPE to HMS on that date. Another example of the operation of this rule was provided by **Capita Health Solutions v McLean** [2008] IRLR 595.

31. Mr Campion submitted that the basis for the decision of the EJ that responsibility for the activities previously carried out by Kinetic for LMH transferred to HMS on 9 June 2011 was set out in paragraph 16.20 of the judgment. The key elements of the reasoning were that HMS

promised to take on former Kinetic employees and that they engaged four managers. They engaged in consultation with the employees and their Trade Unions and gave them reassurance that they would employ them.

32. Mr Campion contended that there was no ground of appeal alleging that the EJ had erred in failing to find when responsibility for the operation previously carried out by Kinetic transferred. It was said the finding at paragraph 16.8 that:

> **"If HMS could have gone live in respect of repairs and maintenance before 1 July 2011 then it would have done so."**

was fatal to the appeal. Even if the EJ erred in his reasoning in paragraph 16.20, the finding in paragraph 16.8 supported his decision, which was said to be plainly and unarguably correct.

33. Mr Campion submitted that Mr Gorton QC was in error in contending that an undertaking only transfers when work on activities of the undertaking are resumed. He further erred in submitting that there could not be a SPC on 9 June 2011 because the activity previously carried out by Kinetic was not carried out by HMS until early July and at that time there was not an organised grouping of workers engaged in the transferred activities. Mr Campion referred to **Lorne Stewart plc v Hyde and Others** [2013] UKEAT/0408/12/GE. The EAT held at paragraph 35:

> **"It was not in law necessary for [the Claimants] or anybody else actually to be carrying out the type of work that was said to have been subject to the service provision charge on the day or in the days before the transfer and on the day or during the days after the transfer."**

In **Hunter v McCarrick** [2013] ICR 235 Elias LJ pointed out at paragraph 11 that many SPCs also constituted standard transfers. They are not mutually exclusive. Mr Campion submitted that it would be wholly unsatisfactory if the date of SPC transfers were determined in a different manner than standard transfers.

34. For Mr Ryder and Mr Rowe, Mr Bourne pointed out that before the EJ HMS had resisted the contention that there had been a transfer of an undertaking to them on 9 June 2011 because there was a period of inactivity from that date. The EJ did not determine the submission by the Claimants that if there was not a transfer on one date, 9 June 2011, the transfer was effected by a series of transactions starting on that date.

35. Mr Bourne relied on the reasoning of the EJ and the arguments advanced on behalf of the Trade Union Claimants in support of the decision that there was a transfer of a business from Kinetic to HMS on 9 June 2011. The fact that emergency work was not to be carried out by HMS during June was not material to the question of whether there was a transfer of an undertaking on 9 June 2011. Emergency work had been carried out by other contractors and not Kinetic before that date yet Kinetic continued operating the undertaking. It was said that it was important to look at the findings as a whole: HMS had engaged managers in mid June 2011 to carry on activities previously carried out by Kinetic and cleaners from 20 June 2011. The date of transfer cannot be determined by when HMS chose to take on employees. Mr Bourne referred to an email sent to Mr Ryder on 20 May 2011 in which Mr Worthington said that it was "great to have you on board". HMS gave Mr Ryder and Mr Rowe jobs to do. Mr Bourne submitted that taking all the findings of fact together meant that HMS assumed responsibility on 9 June 2011for the activities previously carried out by Kinetic. Mr Bourne referred in this regard to paragraphs 2.22 and 2.23 of the judgment following the 2012 PHR.

36. Mr Bourne submitted that the EJ drew the inference that HMS was taking on responsibility from 9 June 2011 for the business previously carried out by Kinetic for LMH. Such an inference was not perverse on the facts before the EJ.

Discussions and conclusion

37. The challenge made in all the Grounds of Appeal is that the EJ erred in holding that a transfer of an undertaking within the meaning of TUPE, whether a business transfer or a SPC, took place on 9 June 2011.

38. As is well established, the objective of the Acquired Rights Directive 2001/23 (previously 77/187) is to ensure as far as possible the safeguarding of employees' rights in the event of a transfer of undertaking and to allow them to remain in the service of the transferee on the same conditions as they had been employed by the transferor. TUPE is the domestic implementation of the Acquired Rights Directive.

39. The judgment of the CJEU in **Spijkers v Gebroeders Benedik Abbatoir CV and Another** [1986] 2 CMLR 296 made clear that in reaching a decision as to whether an undertaking is transferred all the relevant circumstances of the transaction are taken into account.

40. Mr Gorton QC is right to emphasise that this appeal concerns when the transfer of an undertaking takes place not whether it takes place. At the heart of many of his submissions and of Grounds 1, 2 and 4 of the Notice of Appeal is the proposition that an undertaking does not transfer until the transferee starts carrying out the transferred activities. I do not accept this proposition. The authorities clearly establish that an undertaking is transferred when the transferee assumes responsibility for carrying on the business. Questions were referred to the CJEU by the House of Lords in **Celtec** to determine the meaning of "date of transfer" in Article 3(1) of the Directive 77/187. The CJEU stated at paragraph 33:

> **"33. It has been held on several occasions that Directive 77/187 applies where there is a change in the legal or natural person who is responsible for carrying on the business…**

> **34. To establish whether there is a transfer within the meaning of Directive 77/187, it is necessary to assess whether the unit in question retains its identity, which follows in particular from the fact that its operation is actually continued or resumed by the new employer with the same or similar economic activities…**
>
> **35. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of Article 1(1) of Directive 77/187 is whether a new employer continues or resumes the operation of the unit in question retaining its identity.**
>
> **36. In those circumstances, the date of a transfer in Article 3(1) of Directive 77/187 must be understood as referring to the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee."**

The "responsibility as employer" there referred to is responsibility by reason of operation of the Directive as implemented in TUPE. At paragraph 39 of **Celtec** the CJEU referred to paragraph 26 of the judgment in **Rotsart de Hertaing v J Benoidt SA** [1997] IRLR 127 in which the court held that:

> **"…the transfer of the contracts of employment … pursuant to Article 3(1) of the Directive necessarily takes place on the same date as that of the transfer of the undertaking and cannot be postponed to another date at the will of the transferor or transferee."**

Accordingly when the CJEU in **Celtec** stated that the term "date of transfer" must be understood as the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee they were not referring to the date or dates when the transferee entered into contracts of employment with the employees. It was when by operation of Article 3 the business was transferred with the effect that the contracts of employment of former employees of the transferor engaged in the business were transferred to the transferee by operation of law. This is put beyond doubt when **Celtec** returned to the House of Lords. Lord Bingham noted that Celtec long accepted that September 1990 was the date of effective transfer to them of activities previously carried out by the Department of Employment. Employees from the Department were seconded to Celtec. They were the core of the business. They did not think that they became employees of Celtec in September 1990 and it was not intended that they should become employees then. However they became employees of Celtec in September 1990 by reason of the transfer of the activities from the Department to Celtec. It was for this reason that Lord Hope with whom the majority agreed, held at paragraph 54:

> **"The transfer took place in September 1990 when responsibility as employer for carrying on the business of the unit transferred moved to the TECs from the DoE."**

Accordingly the date of the transfer of the undertaking determines when responsibility of the transferee for employees employed in the undertaking transfers. The treatment by a transferee of employees employed in the undertaking as his employees does not determine the date of transfer of the undertaking. It is the date of the transfer of the undertaking which determines when responsibility for employees employed in it transfers. Whilst the engagement of employees employed in a labour intensive business may be a weighty factor in deciding whether there has been a transfer of that business and the date of transfer being when such employees are employed, it is the date of the transfer which is the determinant of the date their contracts are transferred by operation of TUPE. It is self evident that the questions of whether and when an undertaking is transferred are closely related. A transfer takes place when all the necessary elements are established.

41. The CJEU decided in **Landsorganisationen I Danmark v Ny Mølle Kro** [1989] ICR 330 that:

> **"19. …the temporary closure of an undertaking and the resulting absence of staff at the time of the transfer do not of themselves preclude the possibility that there has been a transfer of an undertaking within the meaning of Article 1(1) of the Directive…"**

Article 1(1) envisages the transfer of a business as a going concern. All the circumstances must be taken into account:

> **"22. …including, where appropriate, the temporary closure of the undertaking and the fact that there were no employees at the time of the transfer, although these facts alone do not preclude the applicability of the Directive, especially in the case of a seasonal business."**

It is clear from **Ny Mølle Kro** that there can be a transfer of a business at a time when no employees are working and no activities are carried out. What is relevant is whether and when there is a:

> **"…change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking…"**

42. The submission by Mr Gorton QC that where there is a suspension of activities the date of a transfer cannot be at the start of or during such suspension but must be when activities are resumed is contrary to the judgment of the CJEU in **Ny Mølle Kro**. It was held in that case that suspension of activities is a factor to be considered in deciding whether a transfer of an undertaking has taken place. It is clear from paragraph 22 of the judgment in that case that a transfer can take place in a period of suspension of activities. The court envisaged that there could be a transfer when there were no employees engaged in the undertaking: hence the reference to "no employees at the time of the transfer". In **Wood v Caledon Social Club Ltd (Debarred) and Another** UKEAT/0528/09/CEA 12 March 2010 the EAT held that a TUPE transfer of an undertaking took place during a period of temporary suspension of activities of a social club.

43. Since neither employment of staff nor resumption or continuation of activities are determinants of the date on which an undertaking is transferred, Grounds 1 and 4 of the Notice of Appeal do not succeed.

44. As for Ground 2 of the Notice of Appeal, the EJ listed as agreed issues for determination whether and when there was a business transfer of a business or an SPC from Kinetic to HMS. Leaving aside the question of whether the EJ directed himself correctly in deciding the issue, in my judgment he did consider when a transfer took place as well as whether it did so. I do not accept the proposition in Ground 2 of the Notice of Appeal that the EJ decided that the date of the transfer was determined by reference to when the period of activities commenced. The basis for the decision of the EJ that the date of the transfer was 9 June 2011 is set out in paragraph 16.20 of the judgment. The start of the period of suspension

of activities was not relied upon as fixing the date of the transfer. Ground 2 of the Notice of Appeal does not succeed.

45. Ground 3 of the Notice of Appeal challenges the conclusion of the EJ that there was a relevant business transfer on 9 June 2011 because on that date HMS "accepted responsibility for the claimants as employer". This finding is challenged as being in error and/or perverse.

46. Paragraph 16.20 leads to the necessary inference that the EJ reasoned that because, in his judgment, HMS assumed responsibility for employees engaged in activities to be transferred, therefore the date of the assumption of responsibility for their employment was the date of the transfer. In my judgment the EJ erred in law in treating the alleged date of acceptance by HMS of responsibility for the Claimants as employer as determinative of the date of the transfer of the undertaking. It is the assumption of responsibility by the transferee as employer for previous employees of the transferor by reason of the operation of TUPE which is referred to in **Celtec.** That assumption of responsibility occurs on the date of the transfer of the undertaking not vice versa. The belief of the parties or their actions into entering or not entering contracts of employment do not dictate the date of the transfer of an undertaking. The matters relied upon by the EJ in paragraph 16.20 to conclude that HMS accepted responsibility on 9 June 2011 for the employment of the Claimants was "via continued consultation and reassurance". The other matters referred to were events which took place after 9 June 2011: the engagement of four managers on 15 June 2011 and cleaners on 20 June 2011 and on or before 1 July 2011 "it actively utilised 206 of the 208 Kinetic employees".

47. The EJ applied the multifactorial test in **Spijkers** in determining that an undertaking was transferred from Kinetic to HMS. He held:

> **"16.17. On 1 July 2011 HMS operated LMH's contract in respect of the provision of repairs and maintenance services, including responsive repairs, emergency work, void**

property works, the refurbishing of empty properties, and programmed maintenance; they are collectively the services previously provided by Kinetic. HMS did so utilising a skilled and uniformed workforce dedicated to the LMH contract, professional experts, surveyors and schedulers, administrative and accounts staff utilising parts of or similar IT infrastructure, management and accounts systems, as previously operated by Kinetic, at depots at which workforce and vehicles were based, and relying on approved suppliers of materials and necessary sub-contractors.

16.18. Kinetic's and then HMS' activities were labour intensive activities; both companies were engaged in the same business conducted in the same form.

16.19. HMS did not take on tangible assets from Kinetic."

The engagement by a transferee of the staff previously working in a transferred labour intensive activity could lead to a conclusion that there has been a transfer of an undertaking within the meaning of TUPE. As explained in **Celtec**, the date of the transfer is when responsibility for the activities of the undertaking is assumed by the transferee by operation of TUPE. However the facts relied upon by the EJ in paragraph 16.20 do not support the conclusion that there was a transfer of an undertaking from Kinetic to HMS on 9 June 2011. Nor do those set out in paragraphs 16.17 to 16.19.

48. The decision of the EJ that the date of transfer of the undertaking of carrying out repair and maintenance work on LMH housing stock was 9 June 2011 is set aside. The appeal is allowed.

49. Whilst the EJ misdirected himself in concluding that the undertaking was transferred on 9 June 2011, it has not been established that the decision was perverse. It has not been shown that no reasonable EJ directing himself or herself could have concluded that the undertaking was transferred on 9 June 2011. Nor can it be said that the decision was plainly and unarguably right notwithstanding the misdirection.

50. The alternative finding of the EJ that there was a SPC on 9 June 2011 which is also challenged on appeal cannot stand in the light of the misdirection in paragraph 16.20 in

determining the date of the transfer of the business previously carried out by Kinetic for LMH. It too is set aside.

51. By TUPE regulation 3(6)(a) a relevant transfer may be effected by a series of two or more transactions. It appears from paragraph 15 of the judgment that the Claimants contended that the transfer from Kinetic to HMS may have been effected by way of a series of transactions. The EJ did not decide this issue. Ground 5 of the Notice of Appeal challenges the conclusion of the EJ on the basis that a relevant transfer can only take place on one date but he identified a series of dates on which HMS assumed contract activities.

52. The case is remitted to a different Employment Judge to determine the date of the transfer of an undertaking from Kinetics Group Ltd to Housing Maintenance Solutions Ltd. At the remitted hearing the EJ should consider all possible dates for the transfer including 9 June 2011. Further the EJ can also consider whether the transfer was effected by a series of two or more transactions.