Appeal No. UKEAT/0007/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 July 2014

Before

MR RECORDER LUBA QC

BARONESS DRAKE OF SHENE

MRS M V McARTHUR BA FCIPD

ALHCO GROUP LTD — APPELLANT

(1) MR H GRIFFIN AND OTHERS
(2) MJT MECHANICAL SERVICES LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR A J HOWS (Solicitor) Morgan Denton Jones Park House Greyfriars Road Cardiff CF10 3AF
For the First Respondents	MISS ROBIN WHITE (of Counsel) Instructed by: Taunton & District Citizens Advice Bureau St Mary's House Magdalene Street Taunton Somerset TA1 1SB
For the Second Respondent	No appearance or representation by or on behalf of the Respondent Debarred

SUMMARY

TRANSFER OF UNDERTAKINGS - Service Provision Change

A local authority changed to a new contractor for gas servicing work on its council houses. The new contractor accepted that some staff transferred from the old contractor but not all. The remaining employees brought unfair dismissal claims alleging that they had transferred under the TUPE regulations.

The Employment Judge found that those employees had been assigned to an organised grouping and that the activities on which they had been engaged had transferred.

On the new contractor's appeal, held:

1) The Judge had been entitled to find that the relevant activities has passed from old contractor to new; but
2) The Judge had failed to give adequate reasons as to why he considered that the relevant employees were assigned to an organised grouping in relation to the transferred work.

Matter to be remitted to the same Judge for determination on the 'organised grouping' point.

MR RECORDER LUBA QC

Introduction

1. Taunton Deane Borough Council is a landlord of some 6,000 council houses. Many of those properties have gas installations for heating, hot water and the like. The Council has legal obligations to regularly inspect such gas installations and to carry out any necessary maintenance and repairs to them. For some 14 years, the contract to undertake that work was let to a company known as MJT Mechanical Services Ltd, whom we will call MJT. However, in Autumn 2011 the contract was re-tendered. MJT were not the successful bidders. The new contract was let to ALHCO Group Ltd to start in April 2012. We shall call that company "ALHCO". ALHCO accepted that some of the staff who had worked for MJT had transferred over so as to become its employees, but that was not the position in relation to the present Claimants, who are some eight former MJT employees. ALHCO took the view that they were not transferred over. Accordingly, the Claimants brought proceedings in the Employment Tribunal in support of their contention that they had become employees of ALHCO.

2. The essential issue in the claims was whether, in respect of those Claimants, there had been a "service provision" change for the purposes of the **TUPE Regulations 2006**. That issue fell for determination by Employment Judge Roper. He considered it at a Pre-Hearing Review that he conducted at Exeter on 28 August 2013. For reasons that he promptly gave in a reserved Judgment, he concluded that there had been a service provision change and that, accordingly, the Claimants had become employees of ALHCO on 1 April 2012.

The Relevant Statutory Provisions

3. The **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("the **TUPE 2006 Regulations**") provide, by Regulation 3(1)(b) that they apply where there has been a "service provision change". That is defined by the Regulations as arising in a situation where: (1) activity ceased to be carried out by a contractor on a client's behalf and are carried out instead by another person ("a subsequent contractor") on the client's behalf, and (2) three further conditions are satisfied. Those three conditions are as follows: (1) immediately before the service provision change 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; (2) 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; (3) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

4. As is obvious from the language used in the Regulations, where there has been a change by a client such as a local authority from use of one contractor to another, then among the key questions to be answered in determining whether the statutory definition is satisfied are the questions: (1) were the activities carried out by the previous contractor and the activities expected to be carried out by the new contractor the same; and (2) whether, prior to the change, there had "an organised grouping" of employees of the previous contractor who were carrying out those activities on behalf of the client.

5. On this appeal, it is contended by ALHCO that the Employment Judge erred in law in respect of his conclusions both as to "activities" and as to whether there had been an "organised grouping". Those two issues can be conveniently considered separately in that sequence.

Ground 1 - Activities

6. The Employment Judge dealt with this question, or element of the statutory rubric, at paragraphs 9-12 of his Judgment. The terms of those four paragraphs are as follows:

> **"9. There were three discrete parts of the contract services carried out by MJT, and somewhat semantic arguments have been proposed with regard to the meaning of 'installation'. The first part of the contract related to the annual servicing and responsive maintenance (including labour and materials) to gas-fired multi-fuel and solid fuel boiler and heating systems. This was effectively guaranteed work to maintain and service a substantial number of these heating systems. This did not involve any installation as such, and I refer to this aspect of the services as 'Repeat Servicing'. In the course of this work it often became necessary to replace or upgrade broken or obsolete parts or other elements of these heating systems. To this end an agreed Schedule of Rates was also written into the contract. Although there was no guarantee of this work, provided the prospective quote from MJT was within the agreed Schedule of Rates, TDBC had no need to go out to tender for this work. MJT effectively raised a purchase order/pro forma invoice for this work for approval by TDBC. During the existence of the MJT contract, this work was always approved by TDBC, and MJT did this work exclusively. Although technically it might not have been guaranteed work under the contract, nonetheless it was an integral and repeat part of the delivery of services by MJT. This work involved the installation of new parts and various other aspects of the heating systems, and I refer to this aspect of the services as 'Repeat Installation' work. The third part of the services can be referred to as 'New Installation' work. This would arise where there was a more significant new project, such as the decommissioning of heating systems if a row of properties were to be demolished, or equally the installation and commissioning of new systems where new council properties had been built. This did require TDBC to go out to tender for each such project, and there was no guarantee that TDBC would award this work to its otherwise appointed contractor.**
>
> **10. As part of the Repeat Servicing aspect of the contract, the contractor had to maintain a sufficiently large pool of employees so as to respond in good time to repair and maintain these heating systems. Winter was obviously a very busy time and TDBC needed to ensure that its council tenants had access to prompt and efficient response from its appointed contractor. In addition, this Repeat Servicing work included checking smoke alarm systems, and also solid fuel and/or oil fired appliances in a small number of council properties.**
>
> **11. ALHCO's position is that it has successfully tendered for and been awarded by TDBC only the first part of these contract services, namely the Repeat Servicing. It states that there is no guarantee under its contract that it would ever be engaged to do any Repair Installation work, and that similarly as before any New Installation work was not guaranteed and had to be put out to tender by TDBC. Although that appears to be the position at first glance under the contract, nonetheless it is clear from the evidence which I have heard, and I so find, that ALHCO continued to undertake Repair Installation work in the same way as MJT had undertaken it, and in accordance with an agreed Schedule of Rates. ALHCO generally decided to engage subcontractors to complete this work, but I find that this second aspect of the contract, namely the Repair Installation work, was awarded by TDBC to its main contractor without a tendering process in essentially the same manner and in approximately the same quantities as had been the case with MJT.**
>
> **12. I find therefore that there were certain activities, by which I mean Repeat Servicing and Repair Installation services, but not New Installation services, which ceased to be carried on by MJT on behalf of TDBC and from 1 April 2012 were carried on instead by a subsequent contractor, namely ALHCO. I also find that these activities carried on by ALHCO are fundamentally or essentially the same as those previously carried out by MJT."**

7. In those paragraphs, the learned Employment Judge divides into three discrete parts the types of services that the Council was contracting - for in relation to gas services. The

Employment Judge labelled them as, respectively: repeat servicing; repair installation; and new installation. For convenience, in the course of argument before us, those three categories were simply described as classes 1, 2 and 3.

8. Having made the findings set out at paragraphs 9-12, the Employment Judge expressed his conclusions in this way in paragraph 33. He said:

> **"...I find that there has been a service provision change under Regulation 3(1)(b)(ii). There were certain activities, namely Repeat Servicing and Repair Installation services, but not New Installation services, which ceased to be carried on by MJT on behalf of its client TDBC and from 1 April 2012 were carried on instead on behalf of the same client TDBC by a subsequent contractor, namely ALHCO."**

9. In short, the Judge decided that the classes of work he mentions, and that we have described as classes 1 and 2, were activities which passed from the old to the new contractor. ALHCO contends that, on this issue of "activities", the Employment Judge erred in law. That is because, in order to determine whether the activity described as "repair installation", or class 2, had been transferred, he looked at what had in fact occurred on the ground post - 1 April 2012 instead of focussing on the contractual documentation and on the position at or immediately before the transfer date of 1 April 2012.

10. To make good that proposition, ALHCO particularly relies on the sentence in paragraph 11 extracted above in which the learned Judge says this, in response to ALHCO's case that there was no contractual obligation for it to be offered or to undertake the class 2 work:

> **"Although that appears to be the position at first glance under the contract, nonetheless it is clear from the evidence which I have heard, and I so find, that ALHCO continued to undertake Repair Installation work in the same way as MJT had undertaken it, and in accordance with an agreed Schedule of Rates."**

11. Mr Hows for ALHCO submits that the structure of the TUPE Regulations strongly suggests that the focus must be on what activities are going to be carried out by the new contractor: i.e that the position must be determined prospectively and not retrospectively. He contended that a key function of the TUPE Regulations was to enable appropriate measures to be taken in relation to staff before a new contract commences so that everyone knew where they stood. His contention was that it is impermissible to ascertain what activities transferred for the purposes of the Regulations by looking not at what the parties had contracted for but rather at what had in fact occurred after the former contract had ended and the new one had begun. That, he submitted, was the error into which the Employment Judge had fallen. The Judge had found that the class 2 activity transferred because it had been carried out by the new contractor, whereas the proper question was whether, at the time immediately prior to the new contract commencing, the new contract placed the burden of undertaking that activity with the new contractor.

12. In the course of his submissions, both in writing and orally before us, Mr Hows came very close, as he recognised, to making the submission that had been made for the new contractor in the case of **Lorne Stewart plc v Hyde and Ors**, heard by HHJ Jeffrey Burke at this Appeal Tribunal on 6 February 2013, with Judgment handed down on 1 October 2013. That case, as Mr Hows' submissions recognised, was factually relatively close to the present case. The submission Mr Hows made, which resonates with the submissions made in **Lorne Stewart**, was that the contractual documents themselves should be taken to answer the activities question posed by Regulation 3 of the **TUPE Regulations**.

13. In the event, that precise submission, having been recorded by HHJ Burke at paragraph 25 as having been made on behalf of the contractor in that case, was not pursued.

Nevertheless HHJ Burke expressed his view upon it, and that view was adverse to it (see paragraph 32 of his Judgment).

14. The reasons why HHJ Burke rejected that submission are given in paragraphs 33 and 34 of his Judgment. Recognising that his submissions were very close to, if not identical to, those rejected by HHJ Burke, Mr Hows first invited us to distinguish this case from that on the basis that in that case there had been expressly an acknowledgment by the client, the local authority, that the situation was "largely unchanged from previous years". We do not consider that a sufficient basis on which to distinguish the **Lorne Stewart** case. Moreover, the point of distinction on which Mr Hows relies is not a distinction relevant to his argument. His argument or proposition, that the documents themselves answer the statutory question, is not assisted by what the local authority or other client did or did not say. If the case could not be distinguished, Mr Hows invited us nonetheless not to follow what was said by HHJ Burke on the basis that what the learned Judge in that case was obiter.

15. We have considered those submissions, which were made succinctly and clearly by Mr Hows, with care. We are unable to accept them. It seems to us that that **Lorne Stewart** covers the point and that the reasoning of HHJ Burke is sound. Indeed we accept, in particular, Miss White's submissions in reply that there is nothing in Regulation 3 that expressly limits the approach to "activities" to such description as is given in a contractual documents.

16. Indeed, as she submits, and we accept, the TUPE Regulations could potentially operate in relation to transfer of activities which were not the subject of any written agreement at all. But even if we had accepted Mr Hows' submissions, that would not have availed him on the facts of this case. In this case, both parties took us to what might be described as the before and after

contractual documentation insofar as it addressed the activity that we have been describing as class 2 work. There is no dispute between the parties that the activity falling under the description 'class 1' did pass between the contractors, and it is likewise agreed that the 'class 3' work did not. Everything in the case turned on the 'class 2' work.

17. As to that work, the old documentation, that is to say the documentation governing the arrangements between the council and MJT, said as follows:

> **"Appliance renewals under this contract ordered by the contract adminstratror shall be charged at, or pro rata to, the rates for the following items without prejudice to the employer's right to seek alternative quotations."**

18. Those words appear in a Schedule to the contract, in which there would in due course have been entered appropriate rates expressed in monetary terms. The work they described, it is common ground, is the class 2 work. It will be seen from that wording that, under the old arrangements, the contract administrator (i.e the Council) could order the class 2 work to be done and the contract provided the cost which would be charged by the contractor for doing it. But, as Mr Hows correctly submitted, this contained no obligation, in express terms, upon the Council to place class 2 work with the class 1 contractor.

19. In relation to the current contractual documents, that is to say those which commenced on 1 April 2012, the relevant wording governing class 2 work was in these terms. We are here quoting from paragraph 4.6.1, headed "Specification":

> **"4.6.1.1 When ordered by the *Employer's representative* the *Service Provider* will be required to undertake additional works as detailed in this section or other similar works.**
>
> **4.6.1.2 All works in this section are to be priced individually in the relevant part of the pricing schedule. There is no guarantee as to the level of this work that will be required."**

20. As Miss White submitted, and Mr Hows apparently accepted, this wording made even more explicit the fact the class 2 work could be ordered by the Council from the class 1 service provider and the class 1 service provider would have to undertake it at the prices set out in the pricing schedule. Again, this cast no commitment on the Council to look to the class 1 service provider to provide the class 2 type of service.

21. In respect of these contractual documents, we accept Miss White's submission that what we essentially have in respect of the class 2 work, in both forms of document, is a call-off or draw-down facility. The Council is under no obligation to turn to its class 1 works contractor for that class 2 work, but if it does, the class 1 contractor must do the class 2 work and do it at the previously arranged rates as set out in the schedule to the contracts. Indeed, it might be said that the position was made even more strongly or clearly in the new contract. We accept Miss White's pithy analogy that this was not unlike a zero-hours employment contract. The Council was not obliged to offer any class 2 work, but if it did the contractor had to provide it.

22. Against that background, we accept Miss White's submission that, if anything, the contractual position as between the Council and its provider was more explicit as to the Council's intent in the post 1 April 2012 contractual documents. Against the background of those documents, we consider that that the question for the Employment Judge was whether there was any evidence that the Council was going to shift its position, from almost exclusively using its class 1 work contractor to do the class 2 work, to a different position. On that point there was no direct evidence from the Council. The best material that was available to the Employment Judge was an e-mail sent by the Council long after the new contractual arrangements had been entered into and which had been sent to one of the Claimant's

representatives in May 2013. For the reasons he explained at paragraph 3 of his Judgment, the Tribunal Judge felt unable to place any weight or emphasis on the content of that document.

23. In those circumstances, the question becomes whether it was impermissible to look at what had happened both before and after 1 April 2012 to see if it threw any light on whether the Council's intent in relation to the activities had changed. Miss White submitted that no error had been made by the Employment Judge. He had looked at the position after the change, but he had not, in doing so, been treating the significant date as the date of the hearing before him. He had correctly been directing himself to the position immediately prior to the change and asked himself rhetorically whether any change in arrangements was envisaged by the client with the new contractor. The contract documents were virtually identical in content, so the issue was not whether any contractual material spoke to the question one way or the other. The Employment Judge was perfectly entitled, and we accept, to look at the position as it stood on the ground before the relevant date and then again after it.

24. In support of her submissions Miss White referred us in her Skeleton Argument to a passage in another of HHJ Burke's Judgments, this time the passage in **Metropolitan Services Ltd v Churchill Dulwich Ltd** [2009] IRLR 700, in which at paragraph 30 the Judge said:

> **"A commonsense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the Tribunal in the present case. The Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor."**

25. In our case it is plain that that is the question that the Judge asked and answered. He says in terms in paragraph 33:

> **"I also find that these activities carried on by ALHCO are fundamentally or essentially the same as those previously carried out by MJT."**

26. For our part, we can find no error in the Employment Judge's approach on the 'activity question'. He had to determine whether the Council intended any change in arrangements for the delivery of the class 1 and 2 activities by its main contractor. The documents suggested no change. There was no direct evidence from the Council of any intended change. In those circumstances the Judge was entitled to look at what happened on the ground to test the proposition that there had been some change in relation to what would be expected of the new contractor. The Employment Judge simply found, as a matter of fact, that matters in relation to the class 2 work had been dealt with through the new contractor in exactly the same way as the old. He held that that demonstrated that there had been no intention to change and that the class 1 and class 2 activities had transferred. These were matters of fact for him, and we can detect no error in his approach or his conclusion. It follows that this appeal fails on ground 1, and the appeal on that ground will be dismissed.

Ground 2 – "organised grouping"

27. The Employment Judge clearly identified the question of whether there had been, at MJT, an organised grouping of employees assigned to carry out the activities for the Council that subsequently became the subject of ALHCO's contract. In paragraphs 14 through to 21 of his Judgment he considered in turn the factual situation relating to each of the eight Claimants. He found that, while working for MJT, all of them had spent the majority of their time on work for the Council, which was within the scope of what he had found to be the relevant activities. He then said this, at paragraph 22:

> **"The TDBC contract was by far the most important and largest aspect of the services carried out by MJT. MJT had an organised grouping of employees which was assigned to carry out this work. MJT ensured that there was a sufficient amount of staff available to respond to emergency callouts including at the busiest times. This mainly consisted of the Repeat Servicing and Repair Installation aspects of the work undertaken for TDBC. This included plumbing and heating engineers, mostly fully qualified, but others who were not fully qualified who nonetheless worked under the TDBC contract assisting where appropriate those who supervised them. It also included Mr Gibbs, the first port of call as the contract manager, and Mrs Cossey a full-time administrator. For the reasons set out above I find that each of the eight claimants was assigned to this organised grouping of employees."**

28. On this aspect of the appeal ALCHO pursues what is essentially a 'reasons challenge'. It contends, again through the clear and helpful submissions of Mr Hows, that the Employment Judge has failed to identify the extent of the grouping. He has failed to indicate how the relevant grouping was organised or how it came to be described by him as an organised grouping. He has failed to address how and in what sense he satisfied himself that each of these eight particular Claimants had been assigned to that organised group. Mr Hows submitted that the inference to be drawn from the structure of the Judge's Judgment is that the Judge simply thought that what he had to do was to identify whether each of the eight Claimants spent most of their time, whether by happenchance or otherwise, on the Council-related work. If they did, the Judge appeared to direct himself that it necessarily followed that they had been assigned to an organised grouping.

29. To make good the proposition that this was an insufficient approach, Mr Hows took us to the Judgment of Underhill J, a former President of the Employment Appeal Tribunal, in the case of **Eddie Stobart Ltd v Moreman** [2012] IRLR 356. He reminded us, in particular, of the passages in paragraphs 16, 18 and 20 of that Judgment, in which the learned President identifies the importance of a Tribunal ascertaining and determining whether there had been a group, whether it had been an organised group for the purposes of the TUPE Regulations, and whether the particular Claimants had been assigned to it. Put up against those requirements, Mr Hows submitted, the Employment Judge's Judgment did not survive scrutiny. He had failed to ask and answer the relevant questions, but had moved immediately from a finding that most of the employees worked on the Council work to a conclusion that they were part of, or formed, an organised grouping.

30. Miss White, for her part, in equally pithy and succinct submissions, asserted that paragraph 22 of the Judge's Judgment did enough, particularly when read together with paragraphs 33 and 34, in each of which, sequentially, he found that there was an organised grouping and that each of the Claimants were assigned to this organised grouping.

31. However her efforts were, in our judgment, in vain. It is our assessment that this is a plain case in which the Employment Judge has failed to adequately explain the reasons for his decision. He does not identify the parameters of the organised grouping. Was it all the previous MJT staff or just some of them? If some of them, which of them, and how defined? He does not explain how any such group was organised or became separately identifiable. He says nothing at all about how it is demonstrated that any of these eight particular Claimants were assigned to whatever the grouping was.

32. In those circumstances, we have no hesitation in finding that this second ground of appeal is made out. On the organised grouping point, the appeal must be allowed.

33. What then follows? The first possibility is that this Tribunal might simply invite the learned Judge to provide further elucidation of his Judgment and stay or adjourn final determination of the appeal. Mr Hows submitted that that would be an inappropriate course because the paucity of the Judge's reasoning on the point showed that he had not really grappled with the issues, so that this was not an appropriate case in which to simply invite some further elucidation. Mr Hows suggested that the matter had to be remitted so that it could properly be dealt with by the Judge.

34. We are satisfied that those submissions are correct. It would not be appropriate for us to keep this appeal alive and invite further exposition from the Employment Judge. That would only cause this appeal to be revived and reviewed in the light of what had been said. The better, more proportionate course, in our judgment, is that the learned Judge be invited to consider the matter again.

35. But before reaching a final conclusion on that proposition, we entertained the submissions of Miss White. She invited us not to deal with the matter by way of remission but to decide the organised grouping point ourselves. She invited us to find, on the material before us, that the MJT staff working on the Council contract were a grouping and that the eight Claimants were assigned to that grouping because they were on the staff of MJT.

36. Tantalisingly simple and attractive as that course seemed, we found ourselves unable to pursue it. Not least, we noted, that in her answer to the appeal, at least one of the eight Claimants had indicated that it was "the Claimants" who were clearly organised "as a team". In other words that there was some sub-class, of all employees, that constituted the organised grouping. Even if we had been minded to embark upon the exercise of considering the matter for ourselves, that passage in the Respondent's answer from one of the Claimants indicated that it would not be safe to do so.

37. The proper course is for the organised grouping question to be dealt with by the same Employment Judge, after hearing the relevant evidence and determining the questions, armed with the benefit of such submissions and authorities as might be put before him.

38. Accordingly, our order will be that the appeal on ground 1 is dismissed. The appeal on ground 2 is allowed. The question of whether the Claimants were persons assigned to an organised grouping for the purposes of Regulation 3 of the **TUPE Regulations 2006** is remitted to Employment Judge Roper to determine.