Appeal No. UKEAT/0048/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 July 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

COSTAIN LTD — APPELLANT

(1) MR R K ARMITAGE
(2) ERH COMMUNICATIONS LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Pinsett Masons LLP Solicitors 3 Colmore Circus Birmingham B4 6BH
For the First Respondent	MISS HANNAH BOYNES (Solicitor) Lyons Davidson Solicitors Victoria House 51 Victoria Street Bristol BS1 6AD.
For the Second Respondent	MR NICHOLAS SMITH (of Counsel) Instructed by: BPE LLP Solicitors St James House St James Square Cheltenham GL50 3PR

SUMMARY

TRANSFER OF UNDERTAKINGS - Transfer

PRACTICE AND PROCEDURE

Appellate jurisdiction/reasons/Burns-Barke

Costs

Transfer of Undertakings (Protection of Employment) Regulations 2006 – interplay between reg 3(3)(a)(i) "organised grouping of employees" and question of assignment for purposes reg 4 TUPE

Service provision change of purpose of **reg 3(1)(b)** having been conceded, the Employment Judge was required to define the "organised grouping of employees" for **reg 3(3)(a)(i)** purposes and, in the light of that finding, to determine whether the Claimant had been assigned to that grouping for the purposes of **reg 4**. The two issues were analytically distinct, albeit that there was an overlap in that, for the purposes of considering assignment to a putative "organised grouping", it was first necessary to identify what that grouping consisted of, **Eddie Stobart Ltd v Moreman** [2012] IRLR 356, EAT, at paragraph 16.

On the first issue, the concept of an organised grouping implies an element of conscious organisation by the employer of its employees, in the nature of a team, which has, as its principal purpose, the carrying out of the activities in question; there must be "deliberate putting together of a group of employees for the purpose of the relevant client work - it is not a matter of happenstance (**Seawell Ltd v Ceva Freight (UK) Ltd** [2013] IRLR 726, Ct Sess, approving the Judgment of Lady Smith in the EAT in that case [2012] IRLR 802, and **Eddie Stobart** supra).

On the second question, that of a particular employee's *assignment*, the starting point was the ECJ's Judgment in **Botzen and Ors v Rotterdamsche Droogdok Mattschappij BV** [1985] ECR 519. The question of assignment was one of fact for the Employment Tribunal, **Duncan Webb Offset (Maidstone) Ltd v Cooper and Anr** [1995] IRLR 633 EAT, but it was not to be assumed that every employee carrying out work for the relevant client is assigned to the organised grouping, **Edinburgh Home-Link Partnership v The City of Edinburgh Council** UKEATS/0061/11 (10 July 2012, unreported). Whether or not a particular employee was assigned to the "organised grouping of employees" affected by the transfer – and thus entitled to the protection of TUPE – was no mere formality and could only be resolved after a proper examination of the whole facts and circumstances. Being involved in the carrying out of the

relevant activities immediately prior to the transfer will not necessarily mean that the employee was assigned to the organised group, **Argyll Coastal Services Ltd v Stirling & Ors** UKEATS/0012/11 (15 February 2012, unreported).

Adequacy of reasons

When assessing the reasons given by an Employment Judge, it was not for the EAT to read the reasons as if with a fine-tooth comb searching for errors. An Employment Judge was entitled to expect that her Judgment would be read as a whole and with some allowance for the fact that the parties will have been aware of what was in issue and what the evidence was at the hearing. On the other hand, the Judgment would still need to be **Meek**-compliant and meet the requirements of the ET Rules. Parties were entitled to understand why they won or lost and anyone reading the Judgment should be able to understand how the relevant findings of fact and legal principles had been applied in order to determine the issues. In carrying out that exercise, it was not acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons: appellate courts should not uphold a decision which has failed in this basic task, whatever its other virtues, **Anya v University of Oxford and Anr** [2001] ICR 847 CA, per Sedley J at paragraph 26.

In the present case the reasons did not disclose that the Employment Judge had engaged with Costain's case and, if so, what conclusions were reached in that respect. It was, further, unclear whether the Employment Judge had applied the correct test; the reasons given were inadequate to enable the parties to know this for certain and to properly understand what conclusions were reached on central issues (and for what reasons) and, thus, to know when they won or lost.

Appeal allowed and case remitted to differently constituted Employment Tribunal for fresh consideration.

Costs

Upon Costain's application for costs in the Appeal in the sum of the fees paid, pursuant to **rule 34A(2) EAT Rules 1993**, as amended. Adopting the same approach as in **Horizon Security Services Ltd v Ndeze and Anor** UKEAT/0071/14/JOJ, that application was granted in respect of the Second Respondent, ERH, which was thus ordered to pay the Appellant's £1,600 costs in the Appeal.

HER HONOUR JUDGE EADY QC

1. This is a case arising from what was agreed to be a service provision change amounting to a relevant transfer between two entities, Costain Ltd and ERH Communications Ltd. It raises a question as to the approach to be adopted by Employment Tribunals in respect of the interplay between Regulations 3 (relevant transfer) and 4 (relevantly, assignment) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** and also as to the adequacy of this Employment Tribunal's Reasons.

2. For clarity I refer to the parties as the Claimant and as Costain (that is, the Appellant before me, the Second Respondent before the Employment Tribunal) and ERH (that is, the Second Respondent to this appeal but the First Respondent before the Employment Tribunal.

Introduction

3. The appeal before me is that of Costain against a reserved Judgment of the Employment Tribunal sitting at Wrexham (Employment Judge J C Hoult, sitting alone) on 16 May 2013 and in chambers on 15 August 2013. The Judgment and Reasons were sent to the parties on 3 September 2013.

4. Before the Employment Tribunal and here the Claimant was represented by his solicitor, Ms Boynes. ERH was represented by its solicitor, Mr Manson, before the Employment Tribunal, but now appears by Mr Smith of Counsel, and Costain was represented by Mr Milsom of Counsel both before the ET and on this appeal.

5. The Judgment of the Employment Tribunal was that the Claimant was assigned to an organised grouping of employees immediately before that group was transferred from ERH to Costain and that his employment was automatically so transferred.

6. The Claimant's claims had been of breach of contract and/or unlawful deductions of wages against ERH. Given the conclusions reached on the question of transfer, those claims were dismissed. I understand that the Claimant has subsequently indicated that he does not seek to pursue those claims against Costain.

7. The live issue in these proceedings thus relates to the Tribunal's declaration that there was a relevant transfer of the Claimant's employment.

The background facts

8. ERH is a communications company. It had won the contract for the provision of services for the Welsh Assembly government for what was called the All Wales Regional Maintenance Contract for Road Network Communications and Tunnel Systems ("the AWRMC"). The work related to managing for the client, the Welsh Assembly Government, the programme of planned maintenance and additional works on its highways throughout Wales. It is common ground that there was also a framework agreement between ERH and the Welsh Assembly for additional works, albeit that there was no guarantee as to the amount of such work.

9. Further, in 2008, ERH won a separate ancillary contract with the Welsh Assembly. This was not a fixed price contract, but a framework agreement under which ERH had no guarantee of work but would be required to bid to secure works under any ancillary contracts available. In contrast, the AWRMC provided a guaranteed income stream, and the majority of ERH's

employees' time was allocated to it. Any work under the ancillary contract was recorded separately. Any employee could be required to work on either contract, but no employee was assigned to the ancillary contract.

10. The Claimant started employment with ERH as a Project Engineer on 30 April 2007, based at its Conwy Depot. A 2010 statement of his terms and conditions recorded the Claimant's responsibilities for the total management of all civil-based contracts undertaken by ERH working from the Conwy office. The Employment Judge noted that, under the subheading "Roles and Responsibilities", the Claimant was to liaise on a day-to-day basis with the contract engineer and director for the smooth running of the civil-based additional works.

11. In October 2012, the Claimant was appointed to the position of Project Manager and revised Roles and Responsibilities were sent to him, setting out that he would be responsible for the primary management of projects undertaken by ERH and that the projects would be of varying complexity and value, including additional works instructions arising out of framework or maintenance contracts.

12. The AWRMC came up for tender in June 2012. Costain was the preferred bidder. On 15 October, ERH was notified that it had been unsuccessful. A service provision change in respect of the AWRMC took place on 1 February 2013, whereupon Costain began to provide those services to the Welsh Assembly. The ancillary works contract was not included in the AWRMC and did not transfer.

13. Prior to the change on 1 February 2013, TUPE consultation had taken place, and due diligence was carried out by Costain. In December 2012, the Claimant received information

from ERH, which effectively set out, so far as relevant, its position in relation to him: that is, that he was to be transferred to Costain and that, as far as ERH was concerned, he spent 80% of his time on the AWRMC.

14. On 20 December 2012, the Claimant queried the information he had received, which had made no reference to his appointment to the position of Project Manager and the revised responsibilities he had then received in October 2012.

15. On 21 December 2012 ERH provided a list of the employees it considered subject to transfer; including the Claimant as a Project Engineer, spending 80% of his time on the AWRMC.

16. On 7 January 2013 the Claimant attended an individual meeting with Costain. He took his CV to that meeting, in which he described his position as that of Project Manager for the project-based element of the ongoing AWRMC and the ancillary framework agreement. His CV listed a series of projects between 2006-2007. It did not provide detail of the Claimant's AWRMC work because the Claimant felt that would look less impressive.

17. There was a dispute before the Tribunal as to precisely what was said at that meeting. In any event, it seems that Costain raised the question of the application of TUPE so far as the Claimant was concerned. That was because it seemed that the majority of the Claimant's experience was on projects and Costain was unclear as to where the Claimant sat on the AWRMC team. Costain contended it was given the impression that the Claimant spent the majority of time on one-off ancillary projects. Although he had recently spent an increased amount of time on the AWRMC, there was no reason to think that he had been assigned to it.

18. The Employment Judge found that the Claimant certainly indicated that he did not spend as much as 80% of his time on the AWRMC, although equally he did not put it is as low as 40%, as had been recalled by Costain's witness.

19. On 25 January 2013, ERH sent the Claimant's timesheets for the past three months to Costain, showing, ERH maintained, that the Claimant spent 67% of his time on the AWRMC, although that percentage included any time absent either through sickness or on holiday.

20. At the end of the month it provided further earlier timesheets relating to the Claimant. Having considered the Claimant's timesheets, CV and job description, Costain took the view that the Claimant had not been assigned to the AWRMC and, as such, would not transfer into its employment.

The tribunal's reasoning

21. There was a Preliminary Hearing, at which the issue for the Employment Tribunal was whether the Claimant had transferred from ERH to Costain when there was a service provision change from the former to the latter. It had been agreed by all that, when ERH lost the AWRMC to Costain, there had been a service provision change for the purposes of Regulation 3(1)(b)(ii) **Transfer of Undertakings (Protection of Employment) Regulations 2006**. The issue was whether or not there was an organised grouping of employees to which the Claimant was assigned immediately before the transfer.

22. The Employment Tribunal heard from the Claimant; from Mr Groves, director of ERH, and from Mr Davies, Contracts Manager for Costain. The evidence was taken at the hearing on 16 May 2013, and then there was a series of exchanges of written submissions and responses

which the Employment Judge considered in chambers on 15 August 2013. There was no resumed hearing for oral submissions.

23. The Claimant was prepared to be relatively neutral on the question whether or not his employment had transferred, albeit that he submitted that the majority of his time had been spent on the AWRMC and so his employment should have transferred to Costain.

24. The Employment Judge records Costain's position as being that the Claimant had not been assigned to the AWRMC because he did not spend sufficient time on it. On Costain's case the Claimant had said that he spent 40% of his time on the AWRMC.

25. The Employment Judge rejected that evidence, albeit accepting that the Claimant had said the original figure of 80% was too high. The Employment Judge expressly accepted the Claimant's evidence that he had spent most of his time on the AWRMC. For clarity, I should say that Mr Milsom has rejected the Employment Judge's characterisation of Costain's position below. He says its case was that service provision changes require a focus on purpose rather than percentages of time spent. It was Costain's case that the Claimant was a troubleshooter, responding to projects rather than contracts. Given his role, he was not assigned to any one particular contract. He was a project worker, employed at the risk of ERH. This is a point to which I will return subsequently in this Judgment.

26. In any event, the Employment Judge concluded that it was clear that there was an organised grouping and that the employees concerned were organised by reference to the requirements of the Welsh Assembly in respect of the AWRMC. The Employment Judge found that the Claimant had commenced his employment as a Project Manager in 2007 to

undertake ancillary work on the AWRMC. His 2010 job description referred to day-to-day liaison with the running of the civil-based additional works contracts which formed part of the AWRMC. Up to November 2011, ERH had accepted that the Claimant had worked about 40% of his time on the AWRMC, but thereafter his work on it gradually increased to 67%, albeit that included time spent away from work for holiday or sickness absence. On the evidence, the Employment Judge was satisfied that the Claimant was assigned to an organised grouping of employees, which had as its principal purpose the carrying out of activities concerned on behalf of the Welsh Assembly Government. Accordingly there was relevant transfer pursuant to TUPE in relation to the Claimant when Costain took over the contract.

The appeal

27. The Notice of Appeal puts Costain case under the following heads:

Ground 1: that the Employment Tribunal failed to apply the correct legal test as to assignment;

Ground 2: that the Employment Tribunal applied the wrong burden of proof;

Ground 3: the Tribunal erred in its treatment of the Claimant's sickness and holiday leave;

Ground 4: the Employment Tribunal provided reasons that were inadequate;

Ground 5: the decision reached was perverse.

28. Before me Mr Milsom has focussed his argument on Grounds 1 (approach) and 4 (reasons), fairly accepting that, if he could not win on those grounds, he was unlikely to succeed on this appeal.

29. Considering the appeal on the papers, Recorder Luba QC took the view that the Notice of Appeal disclosed grounds with a real prospect of success. In particular, he thought that the Employment Judge might have simply listed the points weighing either way on the evidence

without then explaining the reasons for the conclusions reached. The matter was therefore listed for a Full Hearing and hence comes before me.

The legal principles

30. The relevant legislative provisions are found within the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (TUPE), starting at Regulation 3, which defines what constitutes a relevant transfer. That will include (see Regulation 3(1)(b)) a service provision change, as was admitted to have taken place in this case.

31. One of the express conditions for a finding of a service provision change transfer is that (see Regulation 3(3)(a)(i)):

> **"(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;"**

32. Even if, as here, it is accepted that there was a service provision change, however, reference needs then to be made to Regulation 4, as to the effect that will have on contracts of employment. Relevantly that provides:

> **"...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), … 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."**

33. Moreover Regulation 2(1), which defines various of the terms used in the Regulations provides that "assigned" means assigned other than on a temporary basis.

34. So, first, there must be an organised grouping of employees dedicated to the client (Regulation 3(3)(a)(ii)) and, second, the employee must be assigned to that grouping. Those questions are "analytically distinct" per Underhill P (as he then was), at paragraph 16 **Eddie Stobart Ltd v Moreman** [2012] IRLR 356. But, as the learned Judge went on, the two points nevertheless self-evidently overlap to a very considerable extent since, for the purpose of considering who is assigned to a putative organised grouping, it is necessary to identify what that grouping consists of.

35. On the first question, the concept of an organised grouping implies that there is an element of conscious organisation by the employer of its employees in the nature of a team, which has as its principal purpose the carrying out of the activities in question. So, there must be a "deliberate putting together of a group of employees for the purpose of the relevant client work. It is not a matter of happenstance.", see the Judgment of the Court of Session in **Seawell Ltd v Ceva Freight UK Ltd** [2013] IRLR 726, approving the Judgment of Lady Smith in that case, reported at [2012] IRLR 802. There will not be an "organised grouping of employees" with the relevant purpose if the employees in question simply happen to be working on that activity at the time of the transfer, perhaps because shift arrangements mean that they are working on a particular contract at a particular time without their actually being dedicated to it, or they are working on that activity, even if for 100% of their time, for some other entirely fortuitous reason, and see the approach adopted by the EAT in the **Eddie Stobart** case and by the Court of Session in **Seawell Ltd**.

36. On the second question, that of a particular employee's assignment, the starting point is generally taken to be the Judgment of the European Court of Justice in **Botzen and others v Rotterdamsche Droogdok Maatschappij BV** [1985] ECR 519, where it was stated:

> **"An employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under [the Directive]... it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned."**

37. That talks of assignment in terms of a business undertaking or part, rather than any service provision change, but the language of assignment remains the same. In approaching that question, it is often tempting to try to establish assignment by reference to the percentage of time an employee is engaged in working in the relevant undertaking or part or on the particular activities in question. That might not be an irrelevant question, but it is not the test. In **Duncan Webb Offset (Maidstone) Ltd v Cooper and Another** [1995] IRLR 633 the EAT observed that the question of assignment is one of fact for the Employment Tribunal, albeit that it might be relevant to look at the amount of time an employee spends on one part of the business or the other, the amount of value given to each part by the employee, the terms of the contract, showing what the employee could be required to do, and how the cost to the employer of the employee's services had been allocated between the different parts of the business (see paragraph 1 of the Judgment of Morison J in that case). What is to be given weight in any particular case will be a matter for the Employment Tribunal as the Tribunal of fact, but it will not be determinative that the different aspects of the employee's work are carried out for the same client. As Lady Smith observed, at paragraph 19 of her Judgment in **Edinburgh Home-Link Partnership v The City of Edinburgh Council** (UKEATS/0061/11 10 July 2012, unreported)),

> **"Regarding the reg 4 issue of assignment, the question has to be asked in respect of each individual employee. It is not to be assumed that every employee carrying out work for the relevant client is assigned to the organised grouping...If, for instance, an employee's role is strategic and is principally directed to the survival and maintenance of the transferor as an entity, it may then not be established that that employee was so assigned."**

38. In **Argyll Coastal Services Ltd v Stirling & Ors** (UKEATS/0012/11, 15 February 2012, unreported) Lady Smith again had to consider the interplay between Regulations 3 and 4, TUPE and offered the following analysis. First, in respect of the question of an organised grouping of employees for Regulation 3(3)(a)(i) purposes:

> **"It seems to me that the phrase 'organised grouping of employees' connotes a number of employees which is less than the whole of the transferor's entire workforce, deliberately organised for the purpose of carrying out the activities required by the particular client contract and who work together as a team.**
>
> **19. Turning to 'principal purpose' there seems to be no reason why the words should not bear their ordinary meaning. Thus, the organised grouping of employees need not have as its sole purpose the carrying out of the relevant client activities, that must be its principal purpose.**
>
> **...**
>
> **21. If a claimant can show that a relevant service provision change occurred, he then requires to satisfy the requirements of regulation 4(1). That involves considering whether or not the claimant was assigned to the organised grouping of resources referred to in regulation 3(3)(a)(i)."**

Then, going on to consider the question of assignment:

> **"The issue of whether or not a particular employee was assigned to the 'organised grouping of employees' affected by the transfer and thus entitled to the protection of TUPE is not a mere formality. It can only be resolved after a proper examination of the whole facts and circumstances. Being involved in the carrying out of the relevant activities immediately prior to the transfer will not necessarily mean that that employee was assigned to the organised group.**

This, of course, picks up on the requirement laid down by Regulation 2(1), that, in order for an employee to transfer, their assignment must be other than on a temporary basis.

39. Lady Smith was emphasising that an Employment Tribunal needs to take care to consider the whole facts and circumstances in which a particular employee worked in order to answer the assignment question. It is not a question that will be answered simply by reference to the percentage of time worked by the employee on a particular contract unless the factual context demonstrates why that would be relevant test in the particular circumstances. Simply stating that an employee spent 100% of their time on the contract in question would not be sufficient. That might simply have represented a snapshot of the position at a particular moment in time,

not an assignment to the organised group. Similarly, there might be cases where a Tribunal finds that an employee is assigned to the organised group, but at a particular period spent less than 50% of their time on that work.

40. Where an Employment Tribunal has correctly approached its task and carried out the full factual analysis required, it would not be for this court to interfere with the conclusion reached unless it was demonstrably perverse or without any evidential foundation. As is well-known, a perversity challenge has to meet a high test to be upheld in this court (see **Yeboah v Crofton** [2002] IRLR 634 CA).

41. Moreover, when assessing a Judgment of an Employment Tribunal for these purposes, it is not for the EAT to read the Tribunal's Reasons as with a fine-tooth comb, searching for errors. An Employment Judge is entitled to expect an appeal court to read her Judgment as a whole and with some allowance being made for the fact that the parties will have been aware of what was in issue and the focus of the evidence at the hearing. On the other hand, a Tribunal's Judgment still needs to be **Meek**-compliant (**Meek v City of Birmingham District Council** [1987] IRLR 250 CA) and to meet the requirements of the Employment Tribunal Rules: here, the **Employment Tribunal Rules 2013**. Parties are entitled to understand why they have won or lost, and anyone reading the Judgment should be able to understand how the relevant findings of fact and applicable law have been applied in order to determine the issues. In carrying out that exercise, as it was put by Sedley LJ in **Anya v University of Oxford** [2001] ICR 847, at paragraph 26:

> **"The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."**

The Submissions

For Costain

42. By way of background Mr Milsom observed that ERH, in its ET3, had stated that:

> **"The amount of time the Claimant spent on each contract varied depending on need and budget allocation..."**

The Claimant's written submissions had also recorded ERH's witness's evidence, accepting "It was difficult to say without the percentages exactly where the Claimant's focus was."

43. Accepting that percentages had been part of the relevant evidence before the Employment Judge, Mr Milsom submitted that this was really very much in response to how ERH had put its case. The Employment Judge had wrongly summarised Costain's argument. Costain's position was that there was a purpose-based test.

44. Turning to his submissions on the particular grounds of the Notice of Appeal, Mr Milsom stressed grounds 1 and 4. On ground 1, that the Tribunal had failed to apply the correct legal test as to assignment, the correct test was the principal purpose test, as laid down by Lady Smith in **Edinburgh Home-Link Partnership**. Putting the focus on the question of an organised grouping with the relevant principal purpose provided the greater certainty, seen as desirable in TUPE cases, see **Key2Law (Surrey) LLP v De'Antiquis, Secretary of State for Business, Innovations and Skills Intervening** [2012] ICR 881, CA per Rimer LJ at paragraphs 21 and 103, and also per Underhill J (as he then was), in **Eddie Stobart** at paragraphs 18 and 20.

45. There is, he submitted, good reason for what could be described as the "bright lines" approach to the question of assignment. A focus on the amount of time spent on a given

contract failed to provide the requisite certainty. What was required was some form of conscious organisation on behalf of the client or putative transferor. Without the requisite principal purpose being shown, even if an employee spent 100% of their time on the contract, they would not be subject to the transfer (per Lady Smith in **Seawell**, as confirmed by the Court of Session). Furthermore the phrase "immediately before the transfer" should be interpreted as having regard to the purpose of the organised grouping of employees not to the percentage of time spent. The facts of this case showed why the percentage test was unhelpful. There were changes in the Claimant's position. A different picture was given at different times. The Employment Tribunal failed to engage with the material with this approach in mind. In these circumstances, it was not for the EAT to make good the ET's default (**Anya**).

46. A not unrelated point was that made by ground 3 of the Notice of Appeal: the Tribunal had erred in its treatment of the Claimant's annual leave and sick leave. It seemed, Mr Milsom submitted, that the Employment Judge had adopted ERH's approach to that leave: i.e. allowing it to be included in the percentage of time spent on the AWRMC, although he acknowledged that it was entirely unclear from paragraph 5.16 as to whether the Employment Judge had indeed reached this conclusion in terms of the correctness of the approach. In any event, he submitted, it should have been regarded as irrelevant.

47. Turning the focus on to ground 4 - that the Tribunal's Reasons were inadequate - Mr Milsom accepted that an Employment Tribunal's Reasons must be seen from the perspective of those present, thus allowing for some familiarity with the issues and the evidence. They were, further, not be picked over with a fine-tooth comb. On the other hand "It is always unacceptable for a Tribunal to assert its conclusion in a decision without giving Reasons", see per Morison J in **Tchoula v Netto Foodstores Ltd** (EAT unreported, 6 March

1998) referred to in **Anya** at paragraph 24, and also **Anya**, paragraph 26 and **Tran v Greenwich Vietnam Community** [2002] IRLR 735 CA at paragraph 17.

48. In this case, the court could not be certain that the Tribunal had had regard to the relevant case-law. There was no reference to Regulation 4 or to any of the cases to which the parties had made reference in the extensive written submissions. The reasoning was not **Meek**-compliant. There was no apparent engagement with the central submission made by Costain that, applying the principal purpose test, the Claimant was in fact a troubleshooter engaged on projects as a Project Manager and unassigned to any particular contract. Costain remained unclear as to the rationale for the conclusion reached as to why it had lost.

49. The remaining grounds were dealt with more shortly in Mr Milsom's submissions. On the burden of proof he contended that the Employment Judge appeared to have failed to apply the burden of proof properly, and more generally contended that the conclusion reached was perverse, albeit that that was an argument which did not sit easily with his more basic criticism that the Tribunal had failed to state relevant findings, applying the correct approach to the question before it.

ERH

50. Appearing for ERH, Mr Smith first observed that the parties had agreed that there had been a service provision change. That necessarily meant that Costain had conceded that there was an organised grouping of employees with a relevant principal purpose. It was notable that there was a significant emphasis in the Tribunal's Reasons on Regulation 3 notwithstanding the concession made as to the existence of a service provision change. That reflected the focus in Costain's written submissions. In any event, the Tribunal's reasoning demonstrated that the

Judge had applied the correct approach. Paragraphs 5.5 and 5.7 showed the Tribunal's conclusion on the question of organised grouping. The Employment Judge then turned to the question of assignment and confirmed his conclusion in that regard at paragraph 5.19.

51. On the question of organised grouping for Regulation 3 purposes, it was clear that the Judge had found there to have been an organised grouping of employees situated at ERH's Conwy office, which had the principal purpose of carrying out activities on behalf of one client, the Welsh Assembly, whether that was the AWRMC or additional works. The only issue was whether the Claimant was assigned to that organised grouping.

52. There needed to be a clear analytical distinction between the two questions: organised grouping of employees and assignment. That said, Mr Smith recognised that answering the first question would go a long way to answering the second. The requirement for a bright lines policy rationale set down in **Eddie Stobart** did not read across into the question of assignment. Crucially the issue of assignment was one of fact for the Employment Tribunal. It was accepted that that was not simply a matter of percentages and, even if an employee spent 100% of their time on a contract, that may not be the answer. Given, however, the finding as to organised grouping of employees in this case, it was unsurprising that the parties and therefore the Employment Judge had focused on the question of the percentage of time spent on particular contracts and a large part of Costain's written submissions had addressed that question. Whether that was the right approach or whether it was right to give that degree of weight to the point was all about the particular facts of the case. That was all a matter for the Employment Tribunal (see **Duncan Webb Offset**). Although the Employment Judge had not expressly referred to Regulation 4 or the case-law on the question of assignment, Mr Smith contended it was plain from the reasons provided that the Employment Judge had had the

relevant tests in mind. Those were woven into the Reasons, e.g. at paragraph 2.17 and following, where the Tribunal referred to Costain's argument on the Claimant's position as Project Manager.

53. Further, at paragraph 5.3 the Employment Judge had specifically found that the Claimant had spent most of his time on the AWRMC. That was a finding of fact which was not susceptible to challenge on appeal and went most of the way to answering the assignment question on the facts of this case, having in mind how the parties had put their cases below.

54. The Tribunal had conducted a thorough review of the relevant evidence, not simply on the amount of time spent on the contract but in identifying the principal purpose of the Claimant's role. Reading the Judgment in full, it was apparent that the Judge had identified and made relevant findings on the following questions: the amount of time spent on the contract; the Claimant's roles and responsibilities; the job description; the nature of communications and the content of information between the parties; the Claimant's CV; the extent to which the Claimant sat in the team; the timesheets; the number of employees transferred and those retained by ERH; and the decision to allocate time away from work for whatever reason to the RMC. As such, the Judge had carried out a broad spectrum analysis of all the potentially relevant factors. Here the real picture was that the organised grouping of employees were established with the setting up of this office to service the Welsh Assembly AWRMC and additional works contracts.

55. Specifically the Employment Judge reached conclusions as to the organised grouping (5.5); that the Claimant had commenced employment as a Project Engineer to undertake ancillary work on the AWRMC (5.6); that ERH thought that the Claimant was assigned to the

AWRMC (5.7); that ERH's evidence had been that all employees were assigned to the AWRMC (5.8); and that the client was the same (5.9 and 5.12). Those findings demonstrated the Employment Judge had fulfilled his function, made relevant findings of fact and reached a conclusion that was entirely open to him.

The Claimant's Case

56. The Claimant, as Miss Boynes made clear before me, relied on the reasons provided by the Tribunal, adopting a neutral position as to the submissions made on this appeal. His interest was in the resolution of this matter, without taking sides as between the two corporate entities.

Costain's Reply

57. In reply for Costain, Mr Milsom observed that what were described as findings of fact or conclusions on the part of the Employment Judge appeared in many instances to be references to the views of the witnesses or the parties. Moreover, as to Costain's position before the Employment Tribunal, whilst his written submissions had included a detailed table on the percentages relied on by ERH, Mr Milsom contended that was simply in response to ERH's position and Costain had then gone on to put its positive case, as it does in this appeal. As for the reference to the establishment of the Conwy office as being the bright line in this case, there were no relevant findings of fact in respect of the setting up of the office - as to when it was set up or the circumstances - and that was not a point open to ERH to take at this stage.

Discussion and conclusions

58. I bear in mind the need not to take an overly critical approach to the Judgment and Reasons given by an Employment Judge. I fully appreciate the pressures on the Employment Tribunal system and facing Employment Judges, particularly when returning to a case (even

after a relatively short time) and addressing arguments that have been put in writing rather than orally, and also when given a limited time to produce written Judgments. I further understand that Judgments have to be read as a whole and that I need to bear in mind that the parties will be aware of what the issues were and how the evidence played out, and should not be permitted to take nit-picking points when the overall reasoning will in truth be clear to them.

59. That all said, in my judgement, Recorder Luba QC got it right with his initial consideration of this appeal. The Employment Judge has listed, albeit not in a very structured way, the points weighing either way on the evidence and then has stated a conclusion without giving an explanation for how that has been arrived or as to the view taken on the evidential points that precede it.

60. What was required was, first, the setting out of the findings of fact. Even if the historical narrative was not particularly in issue, it was an important part of the picture. From what I have been able to glean from the submissions made before me, that provided by the Employment Judge may not be correct. It is certainly not user-friendly in terms of working through the factual background to this case.

61. Next, the Employment Judge was required to turn to the question whether there was an organised grouping of employees dedicated to the client (Regulation 3(3)(a)(i), not so much in order to determine whether there was such a grouping (the concession that there had been a service provision change necessarily meant that there was), but to define what that grouping consisted of. The conclusion on this question might seem to be that stated at paragraph 5.19 that there was an organised group of employees "which had as its principal purpose the carrying out of activities concerned on behalf of the Welsh Assembly Government". That, however, is

only part of the answer. It is simply too broad a statement to explain the actual conclusion reached on the facts, which seems to be set out at paragraph 5.5, as follows:

> **"It was clear that there was an organised grouping and that they were organised by reference to the requirements of the Welsh Assembly in respect of the RMC."**

62. Given that the distinction between the AWRMC and the other works (carried out under the ancillary framework agreement), was an important distinction, the loose language at paragraph 5.19 is, to put it neutrally, unhelpful. The finding at paragraph 5.5 is significant because it differentiates, as the Employment Judge was bound to do, between the AWRMC (which was the subject of the service provision change) and the ancillary works contract (which was not).

63. Even if I was wrong on that point, and it could be said that the Employment Judge had properly identified and set out a clear definition of the organised grouping in this case, the next step was to answer the question whether the Claimant had been assigned to that grouping.

64. The first difficulty on this point is that it is impossible to understand from the reasons provided what is a recitation of the evidence and what a finding by the Employment Judge. Paragraph 5, headed "Decision", should be the engine-house of the Judgment - the explanation how the relevant findings of fact and the relevant principles of law have been applied in order to determine the issues before the Employment Judge. What Mr Smith, for ERH, relied on as conclusions drawn from the facts by the Employment Judge seem in most cases to be recitations of the evidence or the position of the parties below, in particular the position of ERH. That may not be so, but that is how much of paragraph 5 reads.

65. Moreover, it is unhelpful (although not necessarily fatal), that there is no reference to Regulation 4 or to any of the relevant case-law. Of greater concern is that the Employment Judge's focus seems to have been on the question of percentages. I can understand how that might arise from the evidential background; understandably, it formed a focus for management when trying to work out who would transfer and who would not. I have, however, seen the way in which Costain put its case below, in particular as set out in the written closing submissions, and it would have been wrong to conclude that its argument had been put solely on the basis of a percentage approach. Indeed it seems apparent that Costain engaged with the percentage point, in answer to ERH's case and the evidential background, but put its case on a broader basis, referring to the relevant case-law as I have set out above.

66. In this case I simply cannot be certain that the Employment Judge approached the question of assignment after a proper examination of the whole facts and circumstances. It was a crucial part of Costain's case that the Claimant was a Project Manager, who became engaged on particular projects on a troubleshooting basis. As put in Mr Milsom's written submissions before the Employment Tribunal, "[The Claimant's] role was responsive to the needs of a wide variety of projects". Thus, the fact that he might have been more heavily involved in the AWRMC just before the transfer did not mean that he had been assigned to it in the sense required. I simply cannot tell, from the reasons given, whether the Employment Judge engaged with this argument and, if so, what conclusions were reached in this regard. Accepting that Costain was present and represented during the Tribunal hearing, and would thus have been aware of what had been the focus of the case presented before the Employment Judge, this was plainly a central issue and I have to allow that Costain would not be able to know why it had, as it apparently did, lost on this point.

67. That is not to say that it would be perverse to find that the Claimant had been assigned to the AWRMC in these circumstances. That is a question of fact for the Employment Tribunal. It is, however, a question of fact to which I cannot find the answer in this Judgment and - to paraphrase Sedley LJ in **Anya** - it would not be for me to go back through the entirety of the Employment Judge's reasoning to try to piece together the answer. In any event, I have not been able to do so.

68. So, ultimately I cannot be certain whether the Employment Judge has applied the correct test, but I can be certain that the Judgment and the Reasons are inadequate to enable the parties to know this for certain, to properly understand what conclusions were reached on central issues and for what reasons, and thus to know why they won or lost.

69. Given the view I have formed, effectively on grounds 1 and 4 of the Notice of Appeal, I do not need to descend into the remaining grounds and I do not express a particular view on them. I allow this appeal for the reasons I have stated.

70. Having given my Judgment in this matter, I allowed the parties further opportunity to make submissions on the question of disposal. Costain had originally, in its earlier submissions, sought to encourage me to substitute own findings, but Mr Milsom fairly accepted that unless there was a finding that the Decision was perverse, the matter would have to be remitted. He urged, however, that it should be remitted to a different Tribunal, the failings with the Judgment in this case being such that it would be inappropriate to send it back to the original Employment Tribunal. Having heard my Judgment in this matter, Mr Smith accepted that the appropriate course would be for this case to be remitted to a new Employment Tribunal for a fresh hearing, and the Claimant maintained a neutral position.

71. I remind myself of the guidance laid down by the EAT in **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763. Bearing in mind the guidance given there and the positions of the parties, it seems to me appropriate that this case should be remitted for a fresh Employment Tribunal to consider the matters. Hopefully it should take no longer than a single day and, given that the evidence has already been rehearsed once, it would be hoped that submissions could also take place on the same day, so the Tribunal hearing the case has the benefit of the oral exchange, not just written submissions.

72. Having given my Judgment and dealt with the question of disposal, Mr Milsom applied for reimbursement of his client's fees in this case. That has been met with resistance by those responding to the appeal. Miss Boynes for the Claimant observes that he took a neutral position on the appeal and that whatever position he had adopted, even if he had sought to agree with Costain, the appeal would necessarily have gone ahead because ERH was resisting it. For ERH Mr Smith accepted that, in the new world of fees, Costain was entitled to ask for reimbursement of these costs, but contended that the award should be split between those responding to the appeal and should not lay entirely against ERH.

73. As I indicated in an earlier Judgment last month of **Horizon Security Services Ltd v Ndeze & PCS Group** UKEAT/0071/14/JOJ, the new world in which we live since the introduction of fees means that the EAT can award a party costs in the sum of any fee paid under Rule 34A(2A), **EAT Rules 1993** as amended, without there being any requirement that the usual thresholds laid down under Rule 34A(1) need to have been crossed. That being so, although costs still do not simply follow the event in the EAT and whilst the EAT retains a broad discretion in any case, parties now need to be alive to the fact that fees will generally be recoverable pursuant to Rule 34A(2A).

74. In the present case, I have regard to the fact that the Claimant had been put in the unenviable position of having to effectively wait whilst the arguments between these two corporate entities are resolved before knowing what the true position is as to liability for the termination of his employment. I do not have detailed information as to his means and do not know whether, had he been an Appellant, he would have been entitled to remission of fees. In any event, however, I accept Miss Boynes' point that, whatever the position he adopted on this appeal - even if he had agreed wholeheartedly with Costain - the appeal would necessarily have gone ahead and costs would have been incurred because ERH resisted the appeal in its entirety.

75. That being so, it seems to me that this is a case where I should not make an award as against the Claimant. In respect of ERH, that is a party that actively sought to resist the appeal, as it was entitled to do so. That entitlement must, however, be tempered with the expectation that those actively resisting the appeal may be obliged to meet the cost of any fee incurred by the Appellant. I have no reason to think that ERH would not be in a position to pay the sum of £1,600 and so I allow the application. ERH is ordered to pay costs in the sum of £1,600 to Costain.