Appeal No. UKEAT/0071/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 May 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

HORIZON SECURITY SERVICES LIMITED — APPELLANT

(1) MR F NDEZE
(2) THE PCS GROUP — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW WORTHLEY (of Counsel) Instructed by: Jay Vadher & Co., 185 Romford Road, Stratford, London E15 4JF.
For the First Respondent	No appearance or representation by or on behalf of the First Respondent.
For the Second Respondent	MS TAHIR PATALA (Solicitor)

SUMMARY

TRANSFER OF UNDERTAKINGS – TUPE 2006 reg 3(1)(b) and (3) - service provision change

(1) Continuity of client

Applying **Hunter v McCarrick** [2013] IRLR 26, CA and **SNR Denton UK LLP v Kirwan** UKEAT/0158/12, "the client" for the purposes of s 3(1)(b) had to be the same client. There was (per Elias LJ in **Hunter**) no basis for seeking to apply a purposive construction to "the client" for these purposes (there was no underlying EU provision requiring a purposive approach; this was a purely domestic provision).

In the present case, on the Tribunal's findings of fact, there was no basis for the conclusion that there was continuity of the client: PCS had been engaged to provide security by Workspace plc whereas Horizon was engaged by the London Borough of Waltham Forest.

Given the facts of this case, it was only possible to conclude that PCS had not met the burden upon it of showing that there was continuity of client for the purpose of demonstrating a service provision change. That being so, the decision of the Employment Tribunal would be quashed and a finding that there was no relevant transfer substituted.

(2) Task of short-term duration

Applying **Swanbridge Hire and Sales Ltd v Butler and ors** [2013] UKEAT/0056/13, the question of intention for the purposes of reg 3(3)(a)(ii) required an assessment of the client's intention immediately before the purported service provision change. The Employment Tribunal in the present case had wrongly focused on the position at the time of the hearing.

The Employment Tribunal had further erred in looking at the activities rather than the task in connection with which they were being carried out. In the present case, the Employment Judge should properly have looked at the intention of LB Waltham Forest immediately prior to its contract with Horizon in relation to the task that was to be carried out. On anyone's case, that

was to guard the premises pending demolition (with a view to the building of a new supermarket). Whether that was "short-term" required an assessment of the period of time envisaged for this task. When assessing whether that (8-9 months) was "short-term", the duration of the past task could be relevant. This was, however, a matter for an Employment Tribunal to determine and more than one outcome was possible. Applying **Jafri v Lincoln College** [2014] EWCA Civ 449, it would not be open to the EAT to simply substitute its view as to the answer to this question.

Order:

The Appeal be allowed and the decision of the Employment Tribunal PHR Judgment be substituted for a decision that the Claimant's employment did not transfer to the Second Respondent.

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment I refer to the parties as the Claimant and either Horizon or PCS, as appropriate.

2. This is an appeal by Horizon against a Judgment of the East London Employment Tribunal, Employment Judge Goodrich sitting alone on 16 September 2013, sent, with Reasons, to the parties on 30 October 2013. The Claimant was represented before the Employment Tribunal by his solicitor, who also accompanied him to the appeal hearing before me but solely as an observer, stating that he did not wish to actively participate in this hearing. PCS was represented at the Employment Tribunal by Mrs Patala, its solicitor, and Horizon was represented by Mr Worthley, of counsel. Mr Worthley and Mrs Patala continued to appear for their respective clients before me.

3. On 15 February 2013, the Claimant presented an ET1 against PCS. In its Grounds of Resistance, PCS asserted that the Claimant's employment had transferred to Horizon and made an application for Horizon to be joined to the proceedings and for a Pre-Hearing Review to determine the correct Respondent. Thus, the matter came before Employment Judge Goodrich; the issue for the Tribunal being whether or not the Claimant's contract of employment had transferred to Horizon under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). PCS contended that it had; there being a 'service provision change' (reg. 3(1)(b) of TUPE). Horizon denied that that was so. The Claimant was neutral.

The Background Facts

4. The Claimant had worked as a security guard at a site known as Alpha Business Centre from 12 February 1996. He was so employed for nearly 17 years. Alpha Business Centre was located on a site owned by the London Borough of Waltham Forest. It was managed through a separate entity, Workspace Plc. Alpha Business Centre provided services for small and medium-sized businesses, which could rent office space within the building.

5. During the 17 years he worked at the Alpha Business Centre, the Claimant had four employers; there being various previous transfers of the undertaking. Initially he was employed by 1.6.8 Security Company. He then transferred to Crystal Security. In April 2010, his employment transferred to Virgil Security Management Limited. In November 2011, it transferred to PCS.

6. For approximately a year prior to 25 January 2012, the Claimant had been one of two dedicated security guards at the Alpha Business Centre. His colleague was a Mr Metcalf. They alternated shifts for the 120 hours covered by PCS's contract to provide security services at the Business Centre. Exceptionally, if asked, the Claimant could work at other PCS sites, but that would be in addition to the 60 hours per week he worked at the Alpha Business Centre.

7. Whilst providing those security services, PCS had understood that Alpha Business Centre would be closing; it was intended that the site would be razed and that Morrisons would be taking it over to build a supermarket. On 7 January 2013, a centre manager from Workspace notified PCS that, as from 25 January 2013, Workspace would no longer be providing a management service for Alpha Business Centre on behalf of the London Borough of Waltham Forest and the service that PCS was providing would thus not be required after that date. It was further stated that London Borough of Waltham Forest might be in contact with a view to

continuing the service but would "need to set up a contract in their company name to do so". From that recitation of the history, I understand that, whereas PCS's contract for the provision of security services at Alpha Business Centre was with Workspace, if security services were to continue at the site then the London Borough of Waltham Forest would itself need to enter into a contract in that respect.

8. On or about 9 and 10 January 2013, PCS had meetings with the Claimant. Initially he was told that he would be redeployed to another PCS site in Lewisham. Meanwhile, PCS contacted the London Borough of Waltham Forest, explaining its current contractual arrangements for providing security services at the Alpha Business Centre. About two weeks later, Waltham Forest asked PCS quote to continue to provide those services, albeit with more hours. Meanwhile, Waltham Forest contacted Horizon asking for a quote to cover a period "possibly until September/October 2013". PCS had not been told that the service might be so time-limited and thus quoted on an annual price basis.

9. On 23 January 2013, London Borough of Waltham Forest informed PCS that it had been unsuccessful in its quote. There was then correspondence as to the applicability of TUPE, with PCS contending that TUPE would apply to transfer the staff. The London Borough of Waltham Forest's (singularly unimpressive) response was that it had a little knowledge of TUPE but thought Horizon would employ its own staff.

10. On 24 January 2013, PCS contacted the Claimant, saying that PCS's contract for the Alpha Business Centre would end on 25 January 2013 and that the Claimant would then transfer to the new company and he was given Horizon's details. Somewhat confusingly, however, he was also notified by PCS that he should attend at its office the next day and he would then be given details of the alternative PCS site where he would be redeployed. When

the Claimant did attend PCS's office the next day he was told by another PCS manager that he would now be employed by the London Borough of Waltham Forest and should leave. He then returned to the Alpha Business Centre site but was then told that he had not transferred to Horizon and (again) should leave. His colleague, Mr Metcalf, was retiring on 25 January 2013 in any event.

11. As of 25 January 2013, therefore, the Claimant was left in the unenviable position of having lost his job, with no one taking responsibility for that rather sad state of affairs.

12. In any event, thereafter, as it happened, Horizon did provide a security service at the Alpha Business Centre, now for the London Borough of Waltham Forest. The Claimant and Mr Metcalf were replaced with two other security guards and the Employment Tribunal found that the management structure was similar to that which had previously been operated by PCS.

The tribunal proceedings and reasons

13. As already stated, the Claimant's initial claim was against PCS alone. PCS applied to join Horizon to the proceedings. There was, thus, a Preliminary Hearing to determine whether or not there had been a transfer of the Claimant's employment from PCS to Horizon. In this regard, it is relevant to note how PCS and Horizon put their respective cases in their responses to the Tribunal proceedings. In its Grounds of Resistance, PCS explained the position thus:

> **"The Respondent carried out the security services at the Alpha Business Centre on behalf of their client, Workspace Plc. The contract to Workspace had been awarded by Waltham Forest Council to provide management services."**

When submitting its response Horizon did not substantively disagree:

> **"In its provision of security services the First Respondent [the PCS Group] was not providing services on behalf of LBWF but was rather providing services on behalf of a different company called Workspace Plc."**

14. Having made that point Horizon contended that the activities carried out by it and PCS before and after the puditive transfer were carried out for different clients, Workspace and London Borough of Waltham Forest respectively. Thus there was not the same client as would be required by regulation 3(1)(b) of TUPE. Horizon also contended that it had taken on a six- to seven-month contract for manned guarding, which meant that the circumstances did not meet the requirement of Regulation 3(3)(a)(ii) of TUPE; that is, that the client intended that the activities would, 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.

15. The Employment Tribunal heard from the Claimant and also from the Operations Director of PCS and the Contract Manager from Horizon. Relevantly, the Tribunal found:

> **"14. The Alpha Business Centre provided services for small and medium size businesses who could rent office space within the building. It was not made clear to me whether or not Workspace had any contractual agreement and, if they did, what that agreement was for the provision of services to the organisations taking up office space within the Alpha Business Centre.**
>
> **15. The security services provided by PCS at the Alpha Business Centre included the provision of two dedicated security guards […]**
>
> **17. When the Alpha Business Centre was open to visitors and contractors the Claimant and his fellow security guard would direct them where to go, take telephone calls on behalf of Workspace and their clients and receive letters to occupants in the building and answer the telephone. After the offices were closed to visitors the security guards carried out patrols and safeguarded the building."**

16. The Employment Judge's conclusions are not separately rehearsed but are also contained within the section of the Reasons headed "Findings of Fact". On the question of "activities" and "client", the Employment Judge concluded that the activities - the providing of security services at the Alpha Business Centre - were carried out by PCS and Horizon for the same client; the London Borough of Waltham Forest. Crucially, the Employment Judge set out the reasoning behind this conclusion at paragraph 40, thus:

> **"From all the evidence provided to me, including that set out above, were the activities carried out by the First Respondent, and subsequently the Second Respondent, carried out for the same client? I find that they were. The client for the security services at Alpha Business Centre, on whose behalf the services were provided, was the London Borough of Waltham Forest. The London Borough of Waltham Forest owned the building in which the Alpha**

> **Business Centre were situated. They were the client on whose behalf the services were provided by PCS till 25 January 2013 and then by Horizon up to the date of this hearing, and it is envisage until at least January/February 2014."**

17. The Employment Judge further found there had been an organised grouping of workers assigned to the transferred activities and that these were fundamentally or essentially the same before and after 25 January 2013. Moreover, the client – that is, the London Borough of Waltham Forest - intended that the activities would, 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. On this point, the crucial reasoning is at paragraph 44 of the Judgment, as follows:

> **"I find that the activities are not in connection with a single specific event or task of short-term duration. Exactly when an activity stops being of a short-term duration is difficult to quantify, as reflected upon by Langstaff J in the Denton case. In this case the Claimant at least had been providing a security service at the other Alpha Business Centre for over 16 years. Although there is, apparently, and intention for the building to be demolished and replaced with a supermarket, no definite date has been given for when this will occur. At the very least Horizon was expected to provide the service for eight months and both they and PCS submitted tenders on at least that basis. PCS's tender being an annual charge for the service. The contract has been extended and may be again. A continuous service was requested rather than a single specific event."**

The appeal

18. Horizon appeals against the Employment Tribunal's conclusions in respect of (1) the conclusion as to the "same client", and (2) the "task of short-term duration" issue.

19. Horizon's first Ground of Appeal contended that the Tribunal erred in applying a purposive construction in its approach to the "same client". Applying the correct legal principles (see **Hunter v McCarrick** [2013] IRLR 26, CA) there was no finding that there was a continuity of client: PCS had been engaged to provide security by Workspace, whereas Horizon was engaged by its client, the London Borough of Waltham Forest.

20. Ground two asserted that the Tribunal had erred in failing to consider whether the intention of the London Borough of Waltham Forest immediately before the transfer was that the activities were to be carried out other than in connection with a short-term event or task of limited duration (see **Swanbridge Hire and Sales Ltd v Butler and ors** [2013] UKEAT/0056/13).

21. The third Ground asserted that the Tribunal had erred in considering whether the activity was of short-term duration by reference to the fact that the activities were ongoing at the time of the hearing rather than having regard to the intended duration of the task prior to transfer.

22. Next, it was contended that the Tribunal had erred in failing to consider the question of short-term duration in the light of the particular circumstances of the case. The Employment Judge had looked at the past 16 or 17 years and had then conflated that with the intended duration of the task for the future. The correct approach would have been to have contrasted the short-term nature of the future task in the light of the long-term nature of the task in the preceding years (see, again, **Swanbridge Hire and Sales Ltd**).

23. Lastly, the mischief this provision was intended to address was very different from the circumstances of this case. PCS was a large company providing security services for contracts of long-term duration. It had been replaced by a small company that specialised in providing guarding services for short-term periods.

Submissions for Horizon

24. In addressing his client's arguments before me, Mr Worthley first submission was that there was no continuity of client. There had to be a continuity of client as a matter of fact for there to be a service provision change transfer. Here, there was a question of procedural justice.

PCS's initial response to the claim had been to join Horizon. Horizon, in turn, had made it clear that it was arguing that there was no continuity of client. PCS had thus been put on notice that it would need to establish who the client was. In PCS's own ET3, it had described the client as Workspace Plc and it had put forward no evidence to contradict that initial assertion.

25. PCS's case before the Employment Tribunal had effectively been that this was a subcontractor case; it was not suggested that Workspace had acted as agent for the London Borough of Waltham Forest. The Employment Tribunal's findings of fact - at paragraph 14 - had recognised that there was no contractual evidence put before it to show the relationship between the London Borough of Waltham Forest and Workspace or Workspace and PCS. Having thus found that there was no evidence of the contractual relationship, the Employment Judge was obliged to accept the way in which PCS had put its case in its ET3, i.e. that its client was Workspace Plc.

26. To justify a finding that PCS's client had been other than Workspace Plc, PCS would have had to put forward evidence to establish that. It did not. What the Employment Judge was effectively doing was inferring that the owner of the building constituted the client (see paragraph 40). Once one understood that the Tribunal's reasoning was inadequate then there could be only one conclusion. Applying the burden of proof - which was on PCS, to demonstrate that there had been a relevant transfer - the finding would have to be that Workspace Plc had been the original client and the identity of the client had changed. At paragraph 14, one could see that the Employment Tribunal had erroneously sought to bridge the gap in the evidence by adopting a purposive approach, which was not permitted in relation to the service change provision part of Regulation 3.

27. Ground two related to the short-term duration point. In truth, all the remaining grounds of appeal were really aspects of this issue. The first argument under this heading related to the question of intention. The crucial question was: what was the client's intention? On the findings of fact at paragraph 22 (which recorded PCS's assumption that the building would be shut down and the site prepared for a new supermarket), and paragraph 44 (which recorded the intention that the building would be demolished and replaced with a supermarket), it was apparent that the evidence was that this was, in fact, intended to be a task - the providing of guarding or security services in the interim - of short-term duration.

28. In making good this point, Mr Worthley put forward what he described as three levels of critique on the authorities, particularly drawing upon the guidance set out in the **Swanbridge Hire and Sales** case. First, the issue was not whether the activities were in connection with a single specific event or task of short-term duration, the question was: what was the intention of the client? (see paragraph 42 of **Swanbridge**). The Employment Judge here failed to reference the intention. There was a particular problem in this case in that (building on the first ground of appeal), having failed to properly define the client, the Employment Judge was not in a position to properly define the client's intention.

29. The second error was when the Employment Judge asked whether the activity was of short-term duration. That was not the right question. The issue was whether the client intended the activities to be carried out in connection with a task of short-term duration (**Swanbridge**, paragraph 44). The Employment Judge's reasoning did not properly engage with the client's intention. It was not simply that everyone intended the building to be demolished at some point but what the client intended in terms of the task. In this case, this was that the security services would be provided in connection with the task of guarding the premises for a particular period.

30. The next error on this question arose from the Employment Judge's focus on the fact that, at the time of the hearing, there was an ongoing provision of services on the part of Horizon. That was an error. The Tribunal needed to look at the intention of the client at the time of the purported transfer (see paragraph 50, **Swanbridge**). It was not relevant to look at the position at the time of the Tribunal hearing (as a matter of fact the building had not been demolished). Had the Tribunal properly directed its focus, it was apparent that the client's intention was for the task to be carried out for a particular period, namely eight to nine months.

31. Mr Worthley recognised that, in determining intention, it would not be enough to merely demonstrate a hope or a wish (see **Robert Sage Ltd T/A Prestige Nursing Care Ltd v O'Connell & Ors** UKEAT/0336/13). In this case, however, there was a definite and planned event: the demolition of the building. That was a certainty, not simply a hope or wish. The fact that, in the Tribunal's findings, the word "possibly" was included did not matter; an intention can be realistic. It simply allowed for the possibility of other real-world events.

32. The Tribunal further failed to consider the entirety of the period in assessing whether the duration of the task in question was short-term. The Tribunal needed to contrast the 16 years of the past as compared to the future short-term provision that the London Borough of Waltham Forest was looking for, i.e. eight to nine months. This was analogous to the case of **Liddell's Coaches v Cook & Ors** [2013] ICR 547, where the past background of long-term contracts of between three - five years was contrasted with a future short-term contract of one year. Paragraph 44 in the present case simply conflated the period overall and that was an error.

33. Finally, having regard to the mischief the service provision change possibility was entitled to address, that was not this case. PCS was a large security company dealing with big,

long-term contracts; Horizon was a small company picking up security work for small, short-term contracts, i.e. where they were of specific and short-term duration.

The Second Respondent's case

34. On behalf of PCS, Ms Patala made very short submissions, at the heart of which was her contention that the Judge had made a correct judgment on the evidence.

35. On the continuity of client point, Horizon was simply wrong in its interpretation of the **Hunter v McCarrick** case. The difficulty in that case was, in working out who was the correct client against the background of an insolvency situation. In this case, PCS would say that the client was the London Borough of Waltham Forest and Workspace was the subcontractor. The provider may have been different but ultimately the client was the same. Where the building was occupied by another party and that party contracts separately for security arrangements Ms Patala conceded that the ultimate owner of the building may not be the client. In this case, however, she contended that the findings of fact meant that it was different; the Tribunal's findings of fact included those set out at paragraph 40, which should be upheld.

36. As for the short-term duration point, PCS relied on paragraph 44 of the Judgment. The Employment Judge had found that a continuous service was being requested. There was also evidence that PCS had not been asked to bid on the basis of eight- to nine-month period. Moreover, eight to nine months was not short-term. In particular, PCS's prior contract had only been for a year. In any event, ultimately, that was for the Employment Judge to decide on the facts of the case. PCS sought to rely on and uphold the decision of the Tribunal.

Reply

37. In reply, Mr Worthley observed that putting the case as a subcontractor situation might mean that it fell within regulation 3(1)(b)(ii) - one contractor to another - but that did not assist PCS on the single client point. It continued to beg the question as to who was the client. As for the suggestion that paragraph 40 included a finding of fact as to who PCS's client was, that could not be the case. It was merely setting out an inference. PCS had put its case on the basis that it was a subcontractor relationship but had put forward no further evidence to support that. It had stated that its client was Workspace and the Employment Judge was plainly drawing an inference from ownership of the buildings to the definition of the client. If paragraph 40 was said to be a finding of fact then Horizon would argue that was simply perverse.

The legal principles

38. The relevant provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 are set out at regulation 3(1)(b) and 3(3):

> **"3. (1)**
>
> **[…]**
>
> **(b) a service provision change, that is a situation in which—**
>
> **(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");**
>
> **(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf: or**
>
> **(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,**
>
> **and in which the conditions set out in paragraph (3) are satisfied.**
>
> **[…]**
>
> **(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 short-term duration; and**
>
> **(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use."**

39. In approaching the construction of regulation 3(1)(b) I do so considering strictly the wording of the regulation itself. As was observed by the Court of Appeal (see per Elias LJ) in **Hunter v McCarrick**:

> **"22. […] there is no room for a purposive construction with respect to the scope of regulation 3(1)(b) itself. So far as that is concerned, there is in my view no conflict between a straightforward construction and a purposive one: the natural construction gives effect to the draftsman's purpose. There are no underlying EU provisions against which the statute has to be measured. The concept of a change of service provision is not complex and there is no reason to think that the language does not accurately define the range of situations which the draftsman intended to fall within the scope of this purely domestic protection."**

I further note Elias LJ's approval of the observation of Underhill J (as he then was), in the case of **Eddie Stobart Ltd v Moreman & Ors** [2012] IRLR 356, paragraph 19 (with respect to identifying whether there is a relevant transfer):

> **"No doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in the specified circumstances they 'go with the work' (though the assumption that in every case that will benefit, or be welcome to, the employees transferred is not universally true). But it remains necessary to define the circumstances in which a relevant transfer will occur, and there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible."**

40. The first question in this appeal is whether the services, which were being carried out on *the* client's behalf, were subsequently carried out by another person on *the* client's behalf. That is *the same* client, see **Hunter v McCarrick** and **SNR Denton UK LLP v Kirwan & Or** [2012] IRLR 966.

41. The particular facts of **Hunter** and **Denton** do not greatly assist and it must be right that the assessment of who is the client in a service provision change case will generally be a matter for the Employment Tribunal as a finding of fact. Further, it may well be that there will be situations where might appear to be more than one client, perhaps in an agency situation. In

such cases, however, the Tribunal would need to ask (as in the **Denton** case) who was the real client. In **Denton**, because of the obligations owed by the administrators to creditors, under the **Insolvency Act 1986**, it could not simply be assumed that the real client was the company in administration.

42. Asserting, as PCS has done, that there is a subcontractor relationship does not answer the question. Regulation 3(1)(b) plainly recognises subcontractor cases and the possibility of a service provision change in such circumstances is thus envisaged under (iii). That, however, is about the change in provider; it does not define the client.

43. As to the question of short-term duration, helpful guidance was laid down in the **Swanbridge** case. First, it is relevant to ask what was the intention of the client. That could be expressed by the client or inferred by the Tribunal. In either event, the question is to be answered looking at the intention as at the time of the service provision change. Moreover, the intention must relate not to the activities but to the task to be carried out.

44. As to what would be short-term, that must be a question of fact and degree for the Employment Tribunal and will depend on context and the factual circumstances of the case. Where the task has been carried out for a number of years in the past and the task for the future is a matter of months, then that might well be relevant (see the **Liddell's Coaches** case).

Discussion and Conclusions

45. Looking first at the continuity of client issue; I agree with Ms Patala that the facts of the **Hunter** and **Denton** cases do not greatly assist in answering that question for the purpose of the present case. Initially, I had thought that the simple answer to this Ground of Appeal might, however, be that this was purely a question of fact for the Employment Tribunal, which had

here found this to be the London Borough of Waltham Forest. On scrutiny, however, the position is not so straightforward.

46. Here the Employment Judge made few findings as to the role of Workspace; that is unfortunate. From the way in which the cases were presented to the Employment Tribunal, however, and from the findings of fact that were made, the following conclusions can be drawn:

(1) First, PCS's contract was with Workspace. That is why it referred to Workspace as its client in its grounds of resistance and that is why it was Workspace that gave notice to PCS that it would no longer need PCS to provide the security services.

(2) Second, Workspace let out the office spaces within the Alpha Business Centre and those who rented those offices were, as the Employment Judge concluded, Workspace's clients. Thus, during office hours the security guard on duty would direct visitors and contractors where to go and take telephone calls on behalf of Workspace and its clients (see paragraph 17).

(3) Third, outside office hours the security guards carried out patrols and safeguarded the building but they did that pursuant to PCS's arrangements with Workspace.

Thus, on the Employment Judge's findings of fact I can see no basis for concluding that PCS had any relationship with the London Borough of Waltham Forest prior to 25 January 2013. Its relevant relationship was with Workspace.

47. Paragraph 40 represents a conclusion founded upon an inference not a finding of fact. It could not be a finding of fact because it would simply be inconsistent with the earlier finding

(at paragraph 17) as to the security guards carrying out activities for Workspace; having thus found, it would be inconsistent to then find that they were carrying those activities out for the London Borough of Waltham Forest. What the Employment Judge has done is apparent from paragraph 40; that is, to infer that the client was effectively the owner of the building and, thus, that made the London Borough of Waltham Forest the client. That, however, is not an inference that can properly be drawn on a straightforward application of regulation 3(1)(b) to the facts of this case.

48. Here, the identity of PCS's client was set out in its ET3; that was Workspace Plc. Further, on the findings of fact made, there is no basis for an alternative conclusion. If looked at strictly in terms of the burden of proof then PCS did not discharge the burden upon it to demonstrate that there was the same client, so as to mean that there was a relevant transfer in this case.

49. That being so, in my judgment, the appeal must be allowed on the first ground. Further, PCS having failed to demonstrate that its client was any other than Workspace (as identified in its ET3), it seems to me that the only permissible conclusion that can be drawn is that PCS and Horizon had different clients (Workspace and LB Waltham Forest, respectively): there was thus no service provision change for the purposes of regulation 3(1)(b) of TUPE.

50. For completeness, however, I turn to the second issue; the question whether or not this was a task of short-term duration. I follow the approach laid down by this Court in **Swanbridge**.

51. Here, it seems to me, the Employment Judge erred in failing to have regard to the intention of the client. That intention was - on the Judge's findings of fact - to provide security

services for a specified period, eight to nine months, with the intention that the Business Centre would be demolished to make way for the building of a supermarket.

52. Further, I consider that the Employment Judge erred in taking into account an irrelevant fact, i.e. what was happening at the time of the Employment Tribunal hearing. That was not the question. The relevant question was: what was the client's intention at the date of the purported service provision change? Had the Employment Judge maintained focus on that question, the findings of fact suggest that the answer would have been that this security service would be carried out for a limited period of time pending the demolition of the premises.

53. Thirdly, I also agree that the Employment Judge erred in focusing on *the activities* for the provision of security service rather than *the task* to be carried out, i.e. what those activities were in connection with. Whereas previously the task had been the provision of security services in relation to a business centre managed by Workspace Plc, now the provision of those activities (albeit still security services) was in connection with a different task, that is the guarding of the site pending the demolition of the buildings and the building of the supermarket.

54. I then turn to the question whether or not the only possible conclusion must be that this task was short-term in duration. In my judgment that would be a question of fact and degree for the Employment Tribunal.

55. Having said that, I accept Horizon's further submission that the Employment Judge failed to contrast what had happened in the past with what was proposed for the future. In this respect, I can also see that, if the conclusion was that the task had previously gone on for some 16 years whereas it was only likely to last for some eight to nine months in the future, it may well be that it would be concluded that it was intended to be short-term in duration.

56. The position is, however, more complex. As Ms Patala pointed out, it might be necessary to have regard to the previous contracts, not simply the entire 16-year period. Specifically, in relation to PCS's contract, it is unclear to me that the contrast between that period and the duration of the task undertaken by Horizon would be such that only one answer would be permissible.

57. Allowing that the contrast between what had happened in the past and what is intended to happen in the future is likely to be relevant (see **Liddell's Coaches**), I do not consider that I am in a position to substitute my view for that of the Employment Judge as to what might be "short-term" for these purposes. It seems to me that more than one answer is possible on this question. That being so, that is an issue that would need to be remitted to the Employment Tribunal. Given, however, my ruling on the first Ground of Appeal, that is unnecessary. I therefore allow this appeal, quash the decision on the PHR Judgment and substitute my Judgment that the Claimant's employment did not transfer to the Second Respondent.