Appeal No. UKEAT/0301/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 February 2014
Judgment handed down on 21 March 2014

Before

HER HONOUR JUDGE EADY QC

MR D BLEIMAN

MR T STANWORTH

QLOG LTD APPELLANT

MR LEE O'BRIEN & OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

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SUMMARY

TRANSFER OF UNDERTAKINGS

The approach to be adopted by an Employment Tribunal to the identification of a transfer by way of service provision change for the purposes of reg. 3(1)(b) **Transfer of Undertakings (Protection of Employment) Regulations 2006** SI 2006/246.

Upholding the Employment Tribunal's judgment: applying **Metropolitan Resources Limited v Churchill Dulwich Ltd**, **Enterprise Management Services Ltd v Connect-up Ltd** and **Johnson Controls v UK Atomic Energy Authority**, the identification of the "activities" undertaken before and after the provision change was a matter of fact and degree for the Tribunal. It had been entitled to rely on the contractual documentation between the parties and no error of law was disclosed.

Natural Justice

As a subsidiary point, although it would have been preferable if the parties had been afforded the opportunity to make representations on the 2005 Government Consultation document referred to in the Employment Tribunal's judgment, it was not central to the reasoning but merely served to amplify or underline other points that had been the subject of argument in any event. Moreover, had the parties been able to make such representations, this would have made no difference to the outcome. Applying **Stanley Cole Ltd v Sheridan** [2003] ICR 1449, CA, the parties had not been deprived of a fair hearing.

HER HONOUR JUDGE EADY QC

1. This case is about the approach to be adopted by Employment Tribunals to the identification of a transfer by way of service provision change for the purposes of reg. 3(1)(b) **Transfer of Undertakings (Protection of Employment) Regulations 2006** SI 2006/246. As a subsidiary point, it also raises an issue of natural justice in respect of the apparent reliance on additional materials by an Employment Tribunal without prior notice to the parties.

2. This is the unanimous judgment of the Court, to which all members appointed by statute for their diverse specialist experience have contributed.

Introduction

3. We are concerned with an appeal by the Second Respondent in the ET proceedings against a judgment of an Employment Tribunal under the chairmanship of Employment Judge Jones, sitting with members, on 13-15 February 2013 and on 25 February 2013 in chambers, at Manchester and sent with Reasons to the parties on 18 March 2013. The parties were all represented before the Employment Tribunal by the same advocates as before us save that the Second Respondent (Qlog) was then represented by its Solicitor, Mr Rae, but appears before us by Mr Lynch QC.

4. For convenience, we hereafter refer to the two corporate Respondents to the ET proceedings by name, i.e. Qlog and McCarthy as appropriate. We refer to the employees as the Claimants.

5. The seven Claimants had presented claims of unfair dismissal (both automatic – pursuant to regulation 7 TUPE – and under s. 98 **ERA 1996**), failure to consult (contrary to reg 15 TUPE) and unauthorised deductions from wages.

6. At an earlier CMD, the need for a hearing to determine the preliminary issue arising under TUPE was identified and the following questions articulated:

a. Whether there was a service provision change under TUPE.

b. Whether there was an organised grouping of employees; if so

c. Whether that grouping had as its principal activity the activities in question;

d. Whether the individual Claimants, or any of them, were assigned to that grouping.

We are concerned only with the first of these four questions.

7. The ET heard evidence and submissions over three days, with an additional day to deliberate, and considered documentary evidence from an agreed bundle of some 874 pages. Specifically, the ET heard oral evidence from the Claimants Mr Weall and Mr Greaves (both formerly tramper – long-distance/overnight - drivers), from Mr McCarthy (Managing Director of McCarthy), Mr Irving (Transport Manager of McCarthy), Mr Harlow (Managing Director of Qlog) and Mr Barnes (Logistics Manager of Qlog and formerly Transport Scheduler/Account Manager of McCarthy). It also read statements from the other Claimants and from two individuals working for haulage companies providing services to Qlog.

The background facts

8. The following narrative is derived from the ET's findings of fact, as set out at para. 5 of the Reasons.

9. Ribble is an independent convertor and manufacturer of cardboard packaging. Part of its operations necessitated the transfer and delivery of that cardboard packaging from its premises in Oldham to its customers throughout the UK. To this end, in September 2008, Ribble entered into an agreement with McCarthy Haulage Ltd to deliver bulk loads of corrugated products out of Ribble's Oldham premises.

10. McCarthy Haulage Ltd ("McCarthy") is a haulage company. As stated, in September 2008, it entered into a contract with Ribble, which provided (relevantly) as follows:

> **"Ribble wishes to engage the services of McCarthy for the transport of goods and McCarthy has agreed to provide such services …"**

By Schedule 1 of that agreement, the service to be provided was defined as:

> **"1.1 The delivery of all bulk loads of corrugated products manufactured by Ribble from the premises to destinations on the UK mainland.**
>
> **1.2 Where required by Ribble, the collection of reels, pallets, packaging or machinery from customers and suppliers of Ribble and delivery of same to the premises."**

11. Other provisions within the agreement appeared to contemplate the possibility of sub-contraction of some of the services McCarthy had contracted to provide, but para.9 precluded such sub-contracting without Ribble's written agreement (providing such agreement was not unreasonably withheld).

12. In any event, McCarthy did not sub-contract the services but allocated some 15 vehicles to this contract, left at Ribble's premises in Oldham when not in use. It also employed drivers on contracts that stated that they would "normally be required to work from

Ribble Packaging site". In this manner, McCarthy employed all the Claimants up to 19 September 2011, the date of the putative transfer.

13. In addition to the drivers, McCarthy employed a Transport Manager (Mr Barnes) and four shunters. Mr Barnes had worked for McCarthy since July 2010 and was variously described as the Transport Scheduler or Administrator or Transport Manager. His responsibilities included assigning particular deliveries to McCarthy's trailers and he would supervise the four shunters, who were responsible for moving trailers about the Ribble site and assisting in the loading of the trailers. The employment of these five individuals transferred to Qlog Ltd in September 2011, under the provisions of TUPE.

14. Qlog Ltd ("Qlog") is a company of logistics engineers (or, to use the jargon apparently adopted in the industry, a fourth party logistics platform operation). It owns no haulage vehicles and employs no drivers to transport deliveries. It acts as "middle man" tendering between the customer and hauliers who actually undertake the deliveries and collections on behalf of the customer.

15. During the summer of 2011, McCarthy was told by Ribble that it would not be extending its contract but would be looking elsewhere to facilitate the delivery of its goods. On 24 August 2011, McCarthy was told that the new provider would be Qlog. In the subsequent correspondence between McCarthy and Qlog regarding the applicability of TUPE, Qlog conceded that the shunters and Mr Barnes would transfer but contended that no transfer arose in respect of the HGV drivers as it would not be providing the transport services as such but sub-contracted transport delivery services, with individual haulage providers bidding for each specific delivery required by the client.

16. The contract between Ribble and McCarthy expired on Friday 17 September 2011 and the services provided to Ribble by Qlog commenced on Monday 19 September 2011. At that time, there was no written agreement defining the service to be provided by Qlog. Qlog informed the employees that there were two separate contractual aspects to the service provision: warehousing and distribution. It would employ those associated with warehousing (as it would continue to provide that service in the same or a similar manner), but it took the view that there were fundamental and essential differences in the way in which the distribution aspect was to be provided such that McCarthy remained the employer of the drivers.

17. Subsequently, by a written agreement between Ribble and Qlog, dated 14 November 2012 but stated to be an agreement made on 15 September 2011, it was recorded that:

> **"[Ribble] wishes to transfer the provision for part of its transportation, delivery and distribution services from its incumbent provider of such services to [Qlog].**
>
> **[Qlog] has expertise in the provision of supply chain management services and is in a position to supply the services to [Ribble]."**

18. "Services" were defined as the transport and logistics services to be provided by Qlog. "Logistical services" were said to mean the services relating to the logistics of arranging the transport services as more particularly set out in Schedule 1. "Transport services" were defined as the services relating to the physical carriage and distribution of goods as more particularly set out in Schedule 1.

19. Under Schedule 1, logistic services were further defined as:

> **"The brokering of appropriate transport and distribution services by [Qlog] on behalf of [Ribble], whereby [Qlog] will engage hauliers on its own account or on a sub-contracted basis in order to provide the transport and distribution services to [Ribble]."**

20. As to transport services, Schedule 1 provided a definition of collections from and to Ribble's site, including hours of collection and delivery, and stated:

> **"[Qlog] shall:**
>
> - **arrange for the safe and timely shipment of goods throughout the territory to, from and between [Ribble], [Ribble's] sites, the client sites and any warehouse at which the goods are stored; and**
> - **arrange for the transportation of returnable goods (including pallets, layer pads and other packaging materials) from the client sites to the relevant [Ribble] site."**

21. There were other provisions relating to particular requirements in respect of the vehicles to be used to deliver the goods and there were key objective and performance measures. There was also specific provision acknowledging that time was of the essence for Ribble and Qlog provided various warranties to the effect that it would exercise all reasonable skill and care in providing the services, ensuring that suitably qualified and experienced persons would be used and that the services would be performed in accordance with good industry practice, complying with all relevant laws and regulations. There was separate provision for the "risk in goods", which was stated to pass to Qlog at the time that the goods were loaded onto Qlog's (or its sub-contractors') vehicles and would remain with Qlog until the goods were accepted at a customer's site.

22. In September 2011, there were only three or four haulage sub-contractors used on the Ribble deliveries by Qlog. It would invite those hauliers to quote a price for each delivery and developed a software package to ensure that it could rapidly evaluate the quotes for each delivery. This system then enabled Qlog over time to increase the number of hauliers to

whom it sub-contracted the work so that, by the time of the ET Hearing, it was using some 30 hauliers in this regard.

The Employment Tribunal's conclusions and reasons

23. Having made its findings of fact, the ET considered the relevant provisions of TUPE and the various cases addressing the identification of a service provision change for these purposes (see its self-direction at paras.6-11). No specific challenge is made to this recitation of the legal principles.

24. At para. 12, however, the ET made the following further observations:

> **"Further the Tribunal has noted that in September 2001 the Government initially proposed that there would be an exclusion from the new service provision change rules where an incoming contractor envisaged carrying out the activities in question in a new or innovative manner. In other words, the transfer rule would not apply if the activities were carried out differently post-transfer. That proposal did not find its way into the regulations. Tellingly, the 2005 consultation document explained why. It said, "If the incoming contractor intends to carry out the service activities in a novel manner – for instance using a computerised process in place of a previous manual one – it is likely that some of the employees who have been performing the activities for the old contractor … will lack the necessary skills and will have to be made redundant. There are, however, clear advantages in providing for the organised grouping of employees to transfer to the new contractor before any redundancies are made … If the employees remained with the old contractor, the likelihood is that they would all have to be made redundant … Some, however, may be able to retain their jobs with the new contractor, if they happen to have the skills necessary to adapt to the new working method, or can be easily retrained, or can be reallocated to other parts of the new contractor's business. This would be in line with the employment protection aim of the Regulations, and would also be likely to assist the new contractor in reducing recruitment and training costs. Additionally, and importantly, treating all contractors – including those making "innovative bids" on an equal footing would contribute towards the key policy objectives of creating a "level playing field" in tendering exercises, and increase certainty and confidence for all concerned."**

25. It is a matter of record that the 2005 consultation document had not been referred to by any of the parties before the Tribunal and they had not been invited to comment on its relevance (or otherwise) prior to the promulgation of the judgment in this matter.

26. At paras. 13-17, the ET then set out its conclusions. At the outset, the ET identified that its interpretation of the "activities" which had been carried out by McCarthy and those

"activities" Ribble intended to be carried out by Qlog was "critical" to the question whether or not there was a service provision change for reg 3(1)(b) purposes (para. 13).

27. It acknowledged that Qlog had a very different mode of operating to that of McCarthy: "It is a very different business". Recognising that Qlog neither had vehicles nor employed drivers, the ET was clear that this could never have been a case requiring the transfer of an economic entity for reg 3(1)(a) purposes (para.13).

28. Asking whether or not this was a service provision change, the ET looked at "what activity it was that Ribble wished to be carried out" and "what obligations it imposed upon [Qlog] to carry out those activities" (para. 14).

29. It answered these questions as follows:

> **"… the activities which were carried out were principally the transportation of Ribble's goods from its premises to its customers. The mode of carrying out that activity was very different after 19 September 2011 but the actual activity which [Qlog] had agreed to provide remained the same. … Had [Qlog] not wished to have any responsibility for the actual delivery of the goods it could have restricted its obligations to acting as a broker, or agent, to obtain the best possible price for each delivery required by Ribble. Individual contracts for delivery could then have been entered into between the haulier and Ribble and [Qlog] could have made a charge for its service as such a broker. That is clearly not the arrangement which Ribble wishes for following the cessation of the services of [McCarthy]. It wanted to turn to one provider who would have the legal responsibility to ensure that its goods were delivered. That is what the agreement of November 2012 spells out. The definition of transportation services and the obligations which [Qlog] undertook in that respect were, in our judgment, highly material to the continuation of the activity which was being provided both before 19 September 2011 and thereafter for the client Ribble. The recital to the agreement speaks for itself and is compelling evidence of the intention of the client, to which we must have regard under Regulation 3(3)(a)(ii): "[Ribble] wishes to transfer the provision for part of its transportation, delivery and distribution services from its incumbent provider to [Qlog]"**

The appeal

30. Qlog seeks to challenge the ET's conclusions on appeal, its grounds falling to be considered under two heads:

30.1 First, the ET's approach to the identification of a service provision change for the purpose of reg 3(1)(b) TUPE.

30.2 Second, an issue of natural justice arising from the ET's reference to a 2005 Government Consultation document when that had not been canvassed with the parties and they had not had the opportunity to make submissions thereon.

31. In opposing this appeal, the Claimants and McCarthy essentially rely on the ET's reasoning and contend that the reference to the 2005 Government Consultation document made no difference to the conclusion reached – there is no point of substance arising from the natural justice point raised.

The legal principles

32. The relevant provisions of the legislation are found in the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"), relevantly:

> **"Regulation 2:**
>
> **"Relevant transfer" means a transfer or a service provision change to which these regulations apply in accordance with regulation 3 and "transferor" and "transferee" shall be construed accordingly and in the case of a service provision change falling within 3(1)(b) "the transferor" means the person who carried out the activities prior to the service provision change and "the transferee" means the person who carried out the activities as a result of the service provision change.**
>
> **Regulation 3**
>
> **A relevant transfer**
>
> **(1) These regulations apply to-**
>
> **…**
>
> **(b) a service provision change, that is a situation in which-**
>
> **…**
>
> **(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities have 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 …; …**
>
> **…**
>
> **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 task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use."

33. One of the earliest guideline cases on the meaning of "service provision change" was that of **Metropolitan Resources Limited v Churchill Dulwich Ltd** [2009] ICR 1380, EAT (HH J Burke QC), where, in up-holding the decision of the ET at first instance, the following observations were made:

"**27 "Service provision change" is a wholly new statutory concept. It is not defined in terms of economic entity or of other concepts which have developed under the 1981 Regulations or by Community decisions on the Acquired Rights Directive prior to April 2006 when the new Regulations took effect. The circumstances in which service provision change is established are, in my judgment, comprehensively and clearly set out in regulation 3(1)(b) itself and regulation 3(3); if there was, immediately before the change relied upon, an organised grouping of employees which had as its principal purpose the carrying out of the activities in question, the client intends that those activities will be carried out by the alleged transferee, other than in connection with a single specific event or a task of short term duration, and the activities do not consist totally or mainly of the supply of goods for the client's use, and if those activities cease to be carried out by the alleged transferor and are carried out instead by the alleged transferee, a relevant transfer exists. In contrast to the words used to define transfer in the 1981 Regulations the new provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact.**

…

30 The statutory words require the employment tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However, it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A common sense 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. The answer to that question will be one of fact and degree, to be assessed by the tribunal on the evidence in the individual case before it.

…"

34. So, in considering the question as to whether there is a service provision change, and an assumption of "activities" by another person from the original service provider, the question is whether the service provided after the change is fundamentally or essentially the same as that provided before; the answer to that question is a matter of fact.

35. In **OCS Group UK Limited v Jones** UKEAT/0038/09, the ET at first instance had held that the activities in question were substantially different following a service provision changeover and thus, that reg. 3(1)(b) did not apply. In that case the canteen service within a factory was replaced by dry goods kiosks selling pre-prepared sandwiches and salads. The EAT (HHJ Ansell presiding) upheld the decision of the ET because the activities after the changeover were "wholly different" from the previous contractor's activities. As the EAT recorded, at para. 22:

> **"It seems to us that once the Tribunal had correctly identified the activity not merely as the provision of food for staff but, as they described it, a full catering service, they were on the facts entitled to come to a view whether there were substantial differences in the new contract. That was an issue of fact for them and once they had made up their minds on the activity and we are not persuaded that there is any fault in that approach."**

36. In the **OCS** case, the EAT confirmed that the correct approach in such cases was to first consider the relevant activities under 3(1)(b), then to consider whether those activities had, indeed, been transferred over and, lastly, to consider whether the conditions in reg 3(3)(a) had been satisfied (see paras. 12-14).

37. Further guidance was provided in **Enterprise Management Services Ltd v Connect-up Ltd** [2012] IRLR 190, EAT. The case involved the provision of IT services to schools in Leeds. In up-holding the decision of the Employment Tribunal, to the effect that there had

been no transfer in that case, His Honour Judge Peter Clark laid down the following principles to be derived from the case-law in this regard:

> **"(2) The expression 'activities' is not defined in the Regulations. Thus the first task for the Employment Tribunal is to identify the relevant activities carried out by the original contractor: … That was the issue on appeal in *OCS*, where the Appellants challenge to the activities identified by the Employment Tribunal failed.**
>
> **(3) The next (critical) question for present purposes will be whether the activities carried on by the subsequent contractor after the relevant date […] are fundamentally or essentially the same as those carried on by the original contractor. Minor differences may properly be disregarded. This is essentially a question of fact and degree for the Employment Tribunal (*Metropolitan*, para. 30).**
>
> **(4) Cases may arise … where the division of services after the relevant date, known as fragmentation, amongst a number of different contractors means that the case falls outside the service provision change regime, ….**
>
> **(5) Even where the activities remain essentially the same before and after the putative transfer date as performed by the original and subsequent contractors, an SPC will only take place if the following conditions are satisfied:**
>
> > **(i) there is an organised grouping of employees 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 transferee post-service provision change will not carry out the activities in connection with a single event of short-term duration;**
> >
> > **(iii) the activities are not wholly or mainly the supply of goods rather than services for the client's use. […]**
>
> **(6) Finally, by reg 4(1) the Employment Tribunal must decide whether each Claimant was assigned to the organised grouping of employees."**

38. That guidance was approved by a differently constituted division of the EAT (Langstaff P presiding) in **Johnson Controls v UK Atomic Energy Authority** UKEAT/0041/12 and 0042/12, again up-holding the decision of the ET in that case, adding (at para. 6):

> **"… the identification of "activity" is critical in many cases. The case before us is an example of that. An activity may be more than the sum of the tasks that are performed in respect of that activity, but a Tribunal must be careful to ensure that it does not take so narrow a view of that which "activity" consists of, in the case before it, as to forget that the context in which it decides "activity" is the context in which it is ever likely that employees' continued employment will be affected. If for instance the activity performed by a given employee is after a service provision change to be performed by two or three employees in the transferee or, in a 3(1)(b)(iii) situation, by the client itself, then it may well be that the approach of the Tribunal should recognise that the same activity may well be carried on, though it is performed now by three people rather than by the one person who earlier performed it. These questions are, however, fundamentally questions of fact and degree."**

39. We were also referred to another decision of the EAT (HHJ Burke QC) in **Lorne Stewart plc v Hyde and ors** UKEAT/0408/12, where, in upholding the decision of the ET, it was observed the questions identified by HHJ Peter Clark in **Enterprise Management**:

> **"… focus the attention of the Tribunal on what was actually being done before and after the claimed service provision change; whether the work being done before the transfer was work which the client was bound to give to the contractor or the contractor bound to accept if offered it is not a relevant consideration. To put it in the vernacular, the focus must be upon what was actually going on "on the ground"."**

40. On the second ground of appeal - the natural justice point - we were referred to **Albion Hotel (Freshwater Ltd) v Maia** [2002] IRLR 200, EAT, and **Stanley Cole Ltd v Sheridan** [2003] ICR 1449, CA. The latter case usefully summarises the approach laid down in **Albion Hotel** and **Nelson v Carillion Services Ltd** (unreported) 26 June 2002, EAT, and suggests that the following issues will be relevant to determining whether there has been a breach of natural justice in circumstances where an Employment Tribunal has referred to materials in giving its judgment (there, two authorities) without providing the parties with an opportunity to make submissions thereon:

a. The material in question must be shown to be central to the decision and not peripheral to it. It must play an influential part in shaping the judgment. If it is of little or no importance and serves only to underline, amplify or give greater emphasis to a point that was explicitly or implicitly addressed in the course of the hearing, then no complaint can be made (para. 31).

b. Moreover, the hearing will not have been unfair if it has caused no substantial prejudice to the party claiming to be aggrieved. It must, therefore, also be shown that a material injustice has resulted (para 34.)

c. The vital question is whether it would have made any difference to the outcome. That is a question the appeal court can answer. It is not a matter that must be referred back to the original tribunal.

Oral argument

41. Each of the parties to this appeal provided us with helpful skeleton arguments and addressed us orally, with those responding to the appeal relying on each others' submissions in order to avoid repetition. Our summary of the arguments presented to us inevitably fails to do full justice to the lengthy submissions we received.

Qlog's submissions

42. For Qlog, Mr Lynch QC submitted that a service provision change only exists where the "activities" carried out by the transferor for the client cease to be carried out by the transferor and those "activities" are "carried out" by the transferee. Thus, he submits: (1) the central focus is on the activities actually carried out by the putative transferor for the client and the activities actually carried out by the putative transferee for that client; and (2) whether that putative transferee is indeed carrying out the activities for the client that had previously been carried out by the putative transferor for that client.

43. This was not a perversity appeal. The error of law lay in the ET's failure to carry out a detailed examination as to the "activities" actually carried out by Qlog. The ET instead merely looked at Qlog's ultimate contractual – or "meta-level" – responsibilities.

44. As for the second ground of appeal – the ET's apparent reliance on the 2005 consultation document - Mr Lynch QC contended that this did indeed result in substantial

prejudice to Qlog and was a material injustice. It was apparent that the document was of clear significance to the ET in its reasoning, and there were substantial submissions Qlog could have made in response.

45. On this second point, Mr Lynch QC contends first that, properly considered, the relevant part of the 2005 consultation document does not support the interpretation placed upon it by the ET. Second materials post-dating that document are clear that the "activities" "carried out" by the putative transferor and putative transferee do have to be fundamentally or essentially the same for there to be a service provision change transfer. Finally, as the commentary in *Harvey on Industrial Relations and Employment Law* makes clear, there is in fact a difference between the consultation document and the case-law that the ET apparently failed to recognise.

The submissions of the Claimants and McCarthy

46. For the Claimants and McCarthy, it was essentially contended that this was really an attempt to re-argue the case before the ET and/or to dress up a perversity appeal as one raising an error of law.

47. Underlying the appeal was the assumption that, because activities are not being carried out by Qlog directly and/or because it could not provide jobs for the employees, there could be no service provision change. This was incorrect. A TUPE transfer can arise from a sequence of steps and the augmentation of a service by a putative transferee does not mean that there cannot be a service provision change. The key policy point was correctly identified in **Johnson Controls** at para. 6: essentially the workers must follow the work.

48. Ultimately, the ET correctly set out and applied the legal principles to its findings of fact. Asking what the activities were, the ET was entitled to find these to be the carrying out of transportation and delivery services for Ribble. It was equally entitled to take the view that, beyond that, anything else touched on method of delivery, not the activity as such.

49. It could not be wrong for the ET to have regard to a detailed contractual regime, entered into by the parties over a year after the arrangements started and reflecting the reality of those arrangements since the outset of the agreement. As that documentation showed, the substance of the transaction was that Qlog would secure the delivery of the services wanted by Ribble; how it did so was a matter for it (and Qlog was not simply an IT company but employed Mr Barnes as a Logistics Manager and warranted that it had "expertise in the provision of supply chain management" and was "in a position to supply the services to the customer"). The ET, having heard all the evidence, obviously found that compelling.

50. As for the natural justice issue, when properly considered (looking at the proceedings as a whole) the consultation document was an anecdotal amplification, appearing after the ET had already engaged with the authorities, hence the opening at para.12: "Further, the Tribunal has noted …".

51. In any event, there was no prejudice. If Qlog had had the opportunity to put its case on this document, it would essentially have said that it was irrelevant as it simply was not undertaking the same activities in question. The ET was already fully cognizant with how Qlog put its case and had rejected its arguments applying its (non-contentious) self-direction on the case-law to its primary findings of fact.

Discussion and conclusions

52. Addressing first the criticism of the Employment Tribunal's conclusion that this was a service provision change, we note that there is no objection to the Tribunal's identification of the key issue being its "interpretation of the 'activities' which had been carried out by [McCarthy] for Ribble and those 'activities' Ribble intended to be carried out by [Qlog] after 2011" (see para. 13). We would respectfully agree. As all the case-law is at pains to stress, the identification of the "activities" is a matter for the Employment Tribunal and reg. 3(2)(a)(ii) directs a Tribunal to consider the intention of the client.

53. Applying the guidance in the case-law, the first task was for the ET to identify the relevant "activities" carried out by McCarthy. This it did, finding that it was engaged in the transport of goods for Ribble, pursuant to the terms of the agreement it had entered into of 11 September 2008. It then asked what "activities" were carried on by Qlog and concluded that this was similarly "principally the transportation of Ribble's goods from its premises to its customers".

54. In assessing whether the activities carried on by Qlog were fundamentally or essentially the same as those carried on by McCarthy, the ET had due regard to the very different mode of carrying out the activity in question but concluded that "the actual activity which [Qlog] had agreed to provide remained the same" (para. 14). That was a question of fact and degree for the ET, albeit that it needed to be careful to ensure that it did not take so narrow a view of that which "activity" consists of to forget the underlying purpose of the regulations (**Johnson Controls**). Had the ET simply concentrated on the different modes of operation, it might have been open to criticism that it had failed to have regard to the

substance of the activity performed by Qlog, i.e. the transportation and distribution of Ribble's goods to its customers.

55. In this case, we consider that the Employment Tribunal was entitled to take the view that what the client (Ribble) intended accurately reflected the reality of the situation. In our judgment it is unfair to criticise the ET for relying on the contractual documentation between the parties. This did not reflect a failure to consider the detail of how Qlog went about its day-to-day operation of the contract; that was apparent to the ET and acknowledged by it. In characterising the "activities" undertaken by Qlog, however, the ET was, in our view, entitled to have regard to the way in which these were set out in the contractual documentation, not least as this was a document written up by the parties after the arrangements between them had been in existence for over a year and was apparently seen as accurately reflecting the reality of their relationship since September 2011 (see the ET's finding at para. 5.19).

56. Further, the Employment Tribunal also had the benefit of other documentation and of the witness testimony before it. Having weighed that evidence, it plainly formed the view that, in defining the "activity" carried out by Qlog, it could rely on the terms it agreed with Ribble as set out in the November 2012 document.

57. In so doing, the ET was entitled to have regard to the way in which Ribble and Qlog had chosen to describe the transport services Qlog was to provide and to the fact that the risk in the goods to be transported passed to Qlog until the point of delivery. That is not to say that a differently constituted Employment Tribunal might not have reached a different conclusion in this case; we acknowledge that the facts are somewhat unusual but we cannot say that this Tribunal was not entitled to reach the conclusion that it did.

58. Turning to the second ground, we start with the observation that it would have been better if the ET had invited representations from the parties on the 2005 consultation document before making reference to it in its reasoning. So much should be obvious. That said, the first question we need to address is whether the document really played an influential part in shaping the Tribunal's conclusion or whether it served only to amplify a point that was already apparent during the hearing. In our judgment, this is a case that falls on the latter side of this balance. The Employment Tribunal had already (correctly) set out the legal principles and the reference to the consultation document at para. 12 is very much by way of amplification or emphasis of points already made. Similarly, the ET's reasoning at paras. 13 and 14 sits independently of any reference to the consultation document and the subsequent reference to it is merely by way of underlining the conclusion already formed.

59. Even if we were wrong about this, we cannot see that any material injustice resulted or that inviting representations from the parties would have led to any different outcome. We have had the benefit of the submissions of Qlog on this document. Essentially it would have contended that the document was of no relevance to the ET's decision-making and that, in any event, it took nothing away from basic requirement that the "activities" had to be essentially the same (the point made by the later response to consultation document and by the case-law). We do not consider, however, that the ET lost sight of these points. It understood how Qlog was putting its case and its recitation of the legal principles to be derived from the case-law has not been criticised. Had Qlog made its submissions on the 2005 consultation document to the ET (as it has to us), it may be that the ET would indeed have concluded that it added nothing. Removing all references to the 2005 consultation

document would not in our reading of the ET's reasoning, impacted in any way upon the conclusion reached.

60. For the reasons we have given, we dismiss this appeal.