Appeal No. UKEAT/0056/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 July 2013
Judgment handed down on 13 November 2013

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

SWANBRIDGE HIRE & SALES LTD — APPELLANT

(1) MR S J BUTLER
(2) GMB & OTHERS
(3) UNITE
(4) KITSONS ENVIRONMENTAL EUROPE LTD & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JONATHAN FREDERICK (Representative) Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FB
For the First and Second Respondents	No appearance or representation by or on behalf of the First and Second Respondents
For the Third Respondent (Unite)	MR ALASDAIR HENDERSON (of Counsel) Instructed by: Thompsons Solicitors LLP Agincourt House 14-18 Newport Road Cardiff CF24 0SW
For the Fourth Respondent (Kitsons)	MR DANIEL TATTON-BROWN (of Counsel) Instructed by: SNR Denton UK LLP The Pinnacle 170 Midsummer Boulevard Milton Keynes MK9 1FE

SUMMARY

TRANSFER OF UNDERTAKINGS – Transfer

The Employment Judge held that there was a service provision change within the meaning of Regulation 3(1)(b)(ii) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** therefore a transfer of an undertaking when the client gave the contract for the work of cladding boilers at a power station to a new contractor. The application of Regulation 3(3)(a)(ii) in the circumstances required findings by the Employment Judge on (1) the intention of the client at the time of the alleged service provision change; (2) whether the activities to be carried out by the new contractor were in connection with a single specific event or in connection with a task, identifying what that event or task was; (3) whether the single specific event or task was of short- term duration. The Employment Judge erred in failing to consider and decide the intention of the client at the time of the change of contractor. The Employment Judge also erred in deciding whether the 'event', as she held it to be, of the insulation and cladding of the boilers was short-term by reference to how long cumulatively the outgoing contractor together with the incoming contractor spent on the work. Where there is no evidence of intention, applying **SNR Denton UK LLP v Ms Kirwan and others** [2013] ICR 101, it may be implied from 'the event'. However, in this case, it appears that there was evidence likely to have been relevant to whether the client intended at the time the new contractor was engaged that their activities would be in connection with a task of short-term duration.

Dicta of Langstaff P in **SNR Denton** that 'of short-term duration' in Reg 3(3)(a)(ii) qualify 'event' as well as 'task' preferred to those of Lady Smith in **Liddell's Coaches v Cook and others** UKEAT/0025/12 that they do not.

Appeal allowed. Case remitted to a different Employment Judge.

UKEAT/0056/13/BA

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Swanbridge Hire and Sales Ltd ('Swanbridge') appeal from the judgment of an Employment Tribunal, Employment Judge Sharp ('the EJ') on a Pre-Hearing Review ('PHR') sent to the parties on 28 September 2012 ('the Judgment'). The EJ found that a relevant transfer by reason of a service provision change under Regulation 3(1)(b)(ii) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE') took place on 5 October 2011from Kitsons Environment Europe Ltd ('Kitsons') to Swanbridge Hire and Sales Ltd ('Swanbridge') in relation to the group of employees undertaking insulation work on five boilers at Pembroke Power Station on behalf of the Shaw Group Ltd ('Shaws'). The consequence of the finding of the EJ on the PHR is that certain liabilities to the employees transferred from Kitsons to Swanbridge and Swanbridge may have incurred liabilities under the information and consultation provisions of TUPE in respect of those employees.

2. Mr Butler and others ('the individual Claimants') brought claims against Kitsons for notice pay, outstanding wages, holiday pay, bonuses and expenses. They also claimed a protective award under section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1978** ('TULR(C)A') for failure to consult them or their trade union, the GMB, before their redundancies. The GMB and Unite brought claims against Kitsons for a protective award under TULR(C)A and compensation under TUPE Regulation 15 in respect of their members. Unite named Swanbridge as an additional Respondent to their claims. Kitsons averred that there was a service provision change from Kitsons to Swanbridge within the meaning of TUPE Regulation 3(1)(b). Kitsons denied breaches of the information and consultation provisions of TULR(C)A and TUPE. Swanbridge denied that there was a transfer of employees under TUPE from Kitsons to them. If there were found to have been a service

provision change and therefore a transfer under TUPE, Swanbridge asserted that the liability to comply with TUPE Regulations 11 and 13 rested with Kitsons and not them.

3. By letter dated 24 June 2013 solicitors for the individual Claimants and the GMB stated that they did not oppose the appeal and did not wish to cross-appeal. They did not intend to or appear at the hearing of this appeal. At the hearing of the appeal Swanbridge was represented by Mr Frederick, representative, Unite by Mr Henderson and Kitsons by Mr Tatton-Brown. Helpfully Mr Tatton-Brown produced a note on the day of the hearing, 3 July 2013, to inform the court that Kitsons went into administration on 1 July 2013 and that the administrator had given consent for the current appeal to proceed. Consent was not given for any further steps in the litigation, (i.e. further steps in the ET) proceeding. Counsel wrote that he understood that in the light of such consent, the existing appeal could proceed as if Kitsons had not gone into administration. After clarification of an indication to the contrary in a letter to the Employment Appeal Tribunal ('EAT') from solicitors for Kitsons, that position was confirmed on 18 October 2013. I propose to deal with the appeal on that understanding.

4. The issue before the EJ which is the subject of this appeal is whether there was a "service provision change" within the meaning of TUPE when Kitsons' contract to carry out work for Shaws on the boilers at the Power station was terminated and Swanbridge took over the work. TUPE Regulation 3 provides:

> **"3.(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 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;**
> **…**
> **and in which the conditions set out in paragraph (3) are satisfied."**

The meaning and application of Regulation 3(3) was in issue before the ET and in this appeal. It states:

> **"(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 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;**
> **…"**

5. At the outset of the hearing before me, Mr Frederick applied for permission to amend the Notice of Appeal in accordance with a draft provided to the EAT on 27 June 2013. Permission to amend was granted and Mr Tatton-Brown served an Amended Respondent's Answer on behalf of Kitsons.

Outline relevant facts

6. Pembroke Power Station was undergoing major works. The main contractor was Alstrom. Alstrom subcontracted the building of boilers to Shaws. By a contract dated 10 December 2010 Shaws subcontracted to Kitsons the provision of the labour to insulate and clad five boilers and pipes. Work on boilers one to three commenced on 4 January 2011.

7. The relationship between Shaws and Kitsons broke down. Shaws entered negotiations with Swanbridge regarding the provision of scaffolding for and then the insulation of the boilers. Swanbridge completed a pre-qualification questionnaire on or around 27 September 2011 to undertake work on boilers four and five. On 28 September 2011 Shaws gave Kitsons seven days' notice that they were going to take over insulation of boilers four and five. Kitsons regarded this as a repudiatory breach and withdrew their employees from the site on 4 October 2011 on basic pay. They did not dismiss them.

8. The EJ found that it was highly likely that Swanbridge completed a pre-qualification questionnaire for boilers one to three on or around 6 October 2011. The questionnaire was completed to obtain the approval of Alstrom for Swanbridge to carry out the work. The EJ recorded at paragraph 9 that:

> **"A contract was entered into between Shaws and the second Respondent [Swanbridge] in January 2012 to cover the insulation of all five boilers together with scaffolding services but it was stated in that contract that it commenced on 5 October 2011."**

The EJ held at paragraph 19:

> **"Combined with the written contract between Shaws and the second Respondent [Swanbridge] which states it commenced from 5 October 2011 and covers all five boilers, the Tribunal sees no reason why it should [go] behind the contract and finds that it indeed commenced on 5 October 2011."**

9. On 5 October 2011 Shaws wrote a letter to Kitsons which was received on 6 October 2011 stating that the whole contract for all boilers was terminated with seven days' notice. On 6 October 2011 solicitors for Kitsons emailed Swanbridge stating that a service provision change under Regulation 3 of TUPE had taken place and every employee on the team working on the boilers was now employed by Swanbridge.

10. On 7 October 2011 Swanbridge interviewed those employees who had been working on the boilers for Kitsons who had indicated an interest in continuing to do so. Swanbridge hired between 37 and 39 members of the team.

11. Mr Woodall, Divisional Director of Kitsons, gave evidence before the EJ that 80% of the work on boilers one to three had been completed whilst little had been completed on boilers four and five. The evidence of Swanbridge was that their negotiations with Shaws were only about work on boilers four and five as the work on the other boilers was believed to have been largely completed.

12. The EJ recorded that Swanbridge gave evidence that they were on site on 10 October 2011, the date on which Alstrom's approval for them to work on boilers four and five was received. They started to prepare to work on those boilers. It was only in mid-October that Swanbridge realised that work was required on boilers one to three. Permission for Swanbridge to work on all five boilers was given on 20 October 2011.

13. The EJ found in paragraph 10:

> **"The work on boilers 1-3 completed in early May 2012, and boilers 4 and 5 in late May/early June 2012. The project in total therefore took 18 months, with 8 months' of work undertaken by the second respondent."**

The Judgment of the EJ

14. The EJ held at paragraph 16 that:

> **"…the economic activity…carried out by the first respondent [Kitsons] prior to 4 October 2012 (sic) was the insulation and cladding of five boilers at the Pembroke Power Station… There was a clearly organised grouping of employees undertaking this activity until the contract was terminated on 4 October 2012 (sic) by the first respondent [Kitsons]."**

The EJ held that because the economic activity was a single specific contract there was not a TUPE transfer under Regulation 3(1)(a) from the First Respondent to the Second Respondent. There is no appeal from that finding.

15. For the purpose of deciding whether there was a service provision change under TUPE Regulation 3(1)(b)(ii) and 3(3), at paragraph 18 the EJ directed herself to consider, whether:

> **"…the activities were in connection with a single event or of short-term duration."**

16. The EJ held that:

> **"19. …the attempt to split the boilers into two groups is a red herring… The work on the boilers carried out by both respondents was fundamentally the same activity…**
>
> **20. …The Tribunal finds…that the relevant transfer took place on 5 October 2011 and that there was an organised grouping of employees with its principal purpose of carrying out insulation work on the five boilers at the power station on behalf of the client immediately before the SPC."**

17. The EJ referred to the DTI Guide and to **Enterprise Management Services Ltd v Connect-Up Ltd** [2012] IRLR 190 in directing herself that "the task or event must be both single specific and of short-term duration". She asked herself at paragraph 21:

> **"Finally, were the economic activities [were (sic)] in connection with a single event and of short-term duration (there being no argument or evidence regarding the client's intentions)?"**

18. The reasoning and conclusion of the EJ on whether on the facts there was a service provision change are contained in one paragraph, paragraph 23:

> **"23. As ever, it all turns on the circumstances of the case. It is the judgment of the Tribunal that the insulation and cladding of five boilers at the Pembroke Power Station was not a single event of short-term duration. The works contract was lengthy and protracted. While the work concerning the boilers could be viewed as a single event, it could not be regarded as short-term in the judgment of the Tribunal, given it took 18 months in entirety to complete and represented 8 months of work for the second respondent alone."**

Accordingly the EJ concluded that a service provision change occurred on 5 October 2011 affecting the employees of Kitsons. Therefore their contracts of employment transferred to Swanbridge.

The submissions of the parties

19. Mr Frederick for Swanbridge submitted that the EJ misdirected herself in three respects in considering the application of TUPE Regulations 3(3)(a)(ii). She failed to consider whether *the intention* of Shaws immediately before the transfer was that the activities to be carried out by Swanbridge were to be other than in connection with an event or task of short-term duration. Second, the EJ misdirected herself when she assessed whether the task was of short-term

duration by reference to the duration of the activities that had been undertaken by both Kitsons and Swanbridge (eighteen months) rather than solely considering the activities that were to be undertaken by Swanbridge. Third Mr Frederick contended that the EJ misdirected herself by considering whether the activities were to be carried out in connection with a single specific event of short-term duration in that "of short-term duration" related to "task" not "event".

20. Mr Frederick submitted that in considering TUPE Regulations 3(3)(a)(ii) an ET must first make a finding of fact and decide whether the client's intention immediately before the transfer was that the activities are to be carried out by the transferee other than in connection with a single specific event or task of short-term duration. The requirement for the ET to make a finding of fact regarding the client's intention was emphasised by Langstaff P in **SNR Denton UK LLP v (1) Ms S Kirwan (2) Jarvis plc (in Administration) and others** [2013] ICR 101. The ET must ask itself the question "Does the client contracting out the activities intend that the transferee will carry those activities out in connection with a specific event or task of short-term or long-term duration?"

21. It was submitted on behalf of Swanbridge that the EJ omitted to consider what Shaws intended because she considered that this was not an issue to be decided as there was no evidence or argument regarding their intention.

22. Mr Frederick submitted that contrary to paragraph 5 of Mr Henderson's skeleton argument on behalf of Unite, an inference could not be drawn that the client's intention corresponded with the event. The evidence before the ET was that under their contract with Shaws the work to be carried out by Kitsons on all five boilers was supposed to be completed in thirty weeks, by 1 August. The EJ erred in not making a finding of fact in this regard. By October 2011 very little work if any had been done on boilers four and five and the work on

boilers one to three had not been completed. The EJ had made no finding of fact as she should that Shaws approached Swanbridge to work on the boilers because Kitsons had fallen behind on the schedule and they wanted to expedite the work. As appears from Kitsons' Notice of Appearance, ET3, if Shaws had intended the work on all five boilers to be completed within thirty weeks, Swanbridge carrying out 20% of the work on three boilers would not have been anticipated to be long-term. If the EJ had drawn an inference regarding Shaws' intention on entering the contract with Swanbridge on the material before her she would have erred in concluding that the intention corresponded with the overall time it took for two contractors to complete the work, eighteen months, or even the time taken by Swanbridge, eight months. In any event the EJ did not make a finding that immediately before 5 October 2011 Shaws intended the work to be performed by Swanbridge to take eighteen months or eight months.

23. By the second ground of appeal, Swanbridge contended that the EJ erred in considering whether the event was of short-term duration in that she considered the insulation and cladding work on the boilers as a whole. The correct approach would have been to consider the intention of Shaws at the time Kitsons ceased to be the contractor, 5 October 2011 and not 10 December 2010, the date of the contract between Shaws and Kitsons. Even if the correct approach were to infer the intention of Shaws from the length of time taken by Swanbridge on the work, the relevant period was eight months. There was no finding that eight months taken on its own was not short-term. The EJ should have taken into account that 80% of the work on boilers one to three had been completed when Swanbridge took over the contract. In any event even if there were a finding that the activities undertaken by Swanbridge took eight months there would have had to be a finding that Shaws intended the "event" or "task" to last eight months. There was no such finding.

24. By the third ground of appeal which was added by amendment, it was submitted on behalf of Swanbridge that the EJ misdirected herself in applying TUPE Regulation 3(3)(a)(ii) by considering whether the "activities" were of short-term duration rather than considering whether they were in connection with a single specific event or a task of short-term duration. The EJ erred in conflating "event" and "activities". The phrase "of short-term duration" in Regulation 3(3)(a)(ii) qualified "task" but not "single specific event". In this regard Mr Frederick relied upon the observation of Lady Smith in **Liddell's Coaches v (1) Mr John Cook (2) Mr William Gold (3) Abbey Coaches Ltd** UKEATS/0025/12/BI in which she held at paragraph 30 that:

> **"…whatever problems there may be with the wording of reg. 3(3)(a)(ii), on no view can it be read so as to qualify the word 'activities' with the phrase 'of short-term duration'. The grammar used does not permit that interpretation."**

Mr Frederick recognised, as did Lady Smith in **Liddell's Coaches**, that Langstaff P had reached a different conclusion in **SNR Denton** when he held at paragraph 41:

> **"If it were relevant to express a preference, mine would be for that advanced by Mr Harris, which is that the short-term duration covers both events, and I would do so because it seemed to me that the point here is essentially of time and duration. …a single specific event might be of very considerable duration."**

25. In this case Mr Frederick contended that the work on the boilers was not a single event. Nor, if it were a task, did the EJ make a finding as to what the task was. The EJ conflated activities and events.

26. If it is found that the "activities" are to be carried out in connection with an "event" the duration of the "event" is not material. In this case the event was said by the EJ to be the switching on of the power station although there were different events along the route to that event.

27. Mr Frederick submitted that the conclusion of the EJ in paragraph 23 was based on the errors he identified.

28. At the outset of his submissions, Mr Henderson rightly pointed out that the EJ did not determine whether the claim by Unite against Kitsons under TUPE Regulation 15 or TULR(C)A section 188 had been presented within three months of the transfer or of dismissal of the employees by Kitsons or within such period as the ET considered reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of the period of three months. The ET1 lodged by Unite was stamped as received on 9 January 2012. In paragraph 5.2 Unite alleged that their members' employment was transferred to Swanbridge by operation of TUPE between 11 and 16 October 2011. The EJ found that the transfer took place on 5 October 2011. Accordingly an ET would have to make a ruling on their jurisdiction to hear the claim by Unite.

29. Mr Henderson stated in his skeleton argument that Unite took a neutral stance on the issues raised in the appeal. Their position was that either Swanbridge or Kitsons are potentially liable for the underlying claims.

30. As for the grounds of appeal, Mr Henderson pointed out that the only express reference to intention is in paragraph 21 of the judgment. Whilst recognising that the EJ could perhaps have spelled out her reasoning more fully, unlike the ET in **SNR Denton** it is clear that the EJ in the present case was fully aware that the correct question under Regulation 3(3)(a)(ii) was what the client's intentions were. This is evident from the observation in paragraph 21 that there was no direct evidence or argument as to the client's intentions. Further it was submitted that the EJ was entitled to draw an inference that the client's intention corresponded with what occurred: that the work on the boiler took eighteen months in total and eight months from the

point at which Swanbridge took over. It is difficult for Swanbridge now to raise the issue of intention when it appears there was no evidence or argument on it before the EJ.

31. As for the second ground of appeal, Mr Henderson submitted that whether an event was of long-term duration was to be judged in context. It is not clear on what basis the EJ considered the issue. She gave two reasons: that the work took eighteen months in total and eight months for Swanbridge alone. However the key consideration was that the works contract was lengthy. Mr Henderson said he was making the simple point that the EJ did not err in law.

32. Mr Henderson questioned the analysis of Mr Frederick that the "event" considered to be such by the EJ was the opening of the power station. It may be difficult to view the carrying out of project work as a single event rather than a task. However the question is whether the project is long or short-term.

33. Mr Henderson referred to the judgment of the EAT in **Metropolitan Resources Ltd v Churchill Dulwich Ltd** [2009] IRLR 700 in which HHJ Burke QC held of the provisions in TUPE Regulation 3(3):

> **"27. …In contrast to the words used to define transfer in TUPE 1981 the new provisions appear to be straightforward and their application to an individual case is, in my judgment, essentially one of fact."**

34. Mr Tatton-Brown for Kitsons observed that Swanbridge did not submit that the EJ should have relied on the contract between them and Shaws in order to determine the client's intention at the time of the transfer.

35. The EJ referred to the contract entered into by Swanbridge and Shaws in January 2012. Mr Tatton-Brown submitted that the contract entered into in January 2012 did not necessarily reflect Shaws' intentions in October as to how long they intended the task to take.

36. Helpfully Mr Tatton-Brown produced at the hearing before the EAT the ET3 lodged on behalf of Kitsons. Kitsons stated that the labour only contract between Shaws and Kitsons entered into on 4 January 2011 was for an initial thirty week period to run up to and including 8 August 2011. For various reasons completion of the work on the boilers was delayed. Owing to delays Shaws notified Kitsons that they wished them to complete work on boilers one to three but that they would be taking away the work on boilers four and five.

37. Mr Tatton-Brown submitted that it is apparent from paragraph 21 of the Judgment that no evidence or argument was adduced before the EJ on the issue of Shaws' intention. The submission now being made on intention should have been made to the EJ. The position before the EJ was that considered by Langstaff P in **SNR Denton**. In the absence of express evidence of intention the only way in which it could be determined was by reference to how long work in connection with the event or task took to complete. Like Mr Henderson, Mr Tatton-Brown recognised that the reasoning of the EJ was not fully spelled out. However, although the EJ did not expressly state that she inferred that Shaws' intention corresponded with the event, this is the conclusion which she must have reached.

38. Mr Tatton-Brown submitted that the EJ did not fail to focus on the eight months that it took Swanbridge to complete the work on the boilers. The EJ did not base her conclusion that the event was not short-term on the total time of eighteen months taken by Kitsons and Swanbridge to complete the work. The EJ referred to the time Swanbridge worked on the boilers and reached her conclusion on that basis.

39. Mr Tatton-Brown echoed Mr Henderson's submission relying on the dictum of Langstaff P in **SNR Denton** at paragraph 44 that the question of whether an event or task is short-term is a question of fact and degree and that:

> **"…providing the tribunal has regard to the words of the paragraph and the general context within which to place the particular facts of the case, a finding of fact and degree is unlikely ever to be wrong."**

The EJ did not err in considering that activities carried out by Swanbridge for eight months viewed in the context of the overall duration of eighteen months for the boiler cladding project was not of short-term duration.

40. Mr Tatton-Brown submitted that the phrase "short-term" in TUPE Regulation 3(3)(a)(ii) governs both an "event" and a "task". The approach of Langstaff P in **SNR Denton** is to be preferred to that of Lady Smith in **Liddell's Coaches**. An event is not necessarily "located in a restricted period of time". Mr Tatton-Brown gave the example of the siege of Leningrad, an event which lasted 900 days.

41. Further, in the Amended Response, Mr Tatton-Brown submitted that the EJ should have concluded that the carrying out of insulation and cladding of the five boilers was a task not an event. The task was not of short-term duration as it represented eight months' work.

Discussion and conclusion

42. The application of TUPE Regulation 3(3)(a)(ii) in the circumstances of this case required findings by the EJ on the following issues:

(1) the intention of Shaws at the time of the service provision change to Swanbridge, 5 October 2011;

(2) whether the activities to be carried out by Swanbridge were in connection with a single specific event or in connection with a task, identifying in each case what that single specific event or that task was;

(3) whether (subject to the question of the application of the qualifying phrase which is considered below) that single specific event or task was of short-term duration.

43. The duties and liabilities of the client and transferee to employees and trade unions in the situation of a change in provider of services depend upon the application of TUPE Regulation 3. All parties to and affected by such a transaction need to know at the time whether it is a service provision change within the meaning of TUPE Regulation 3.

44. As Langstaff P observed in **SNR Denton** at paragraph 45:

> **"The governing words in paragraph 3(a)(ii) are 'the client intends'; therefore the primary finding of fact that the tribunal is called upon to make is as to the intention of the client."**

Lady Smith explained in **Liddell's Coaches** in a passage at paragraph 30 which was unaffected by **SNR Denton**, the question to be considered is not whether the client intended the *activities* to be carried out by the transferee to be of short-term duration but whether the client intends the activities to be carried out in connection with a *task* – and here Langstaff P would add *event* – of short-term duration.

45. A criticism made by Mr Frederick of the judgment is that the EJ conflated "activities" with "event". If, as in my judgment is rightly contended by Mr Tatton-Brown, the insulating and cladding of the boilers was a task and not an event as found by the EJ, the elision of task and activities would not be material. The issue was whether that task on which Swanbridge was to carry out activities was to be of short-term duration.

46. As explained by Langstaff P in **SNR Denton** at paragraph 45, a tribunal must show that it recognises that:

> **"…it is dealing with an objective standard. It is dealing with the anticipation or intention of the client; not the transferee, but the client."**

The intention of the client as to how long a task should take may be expressed. Indeed it would be surprising if the client carrying out a building project did not do so. If the completion date is not expressed in a contract its intended duration is to be determined by inference. The material from which the inference can be drawn depends on the evidence before the ET. It can be drawn from documentary evidence as well as oral evidence. Where no such evidence is adduced, as in **SNR Denton**, depending upon the circumstances:

> **"…the only grounds for drawing any inference would be that the intention corresponded with the event."**

It is unlikely that Langstaff P was intending in this passage to lay down a rule of universal application that the intended duration of a task is to be determined retrospectively by how long it took. Each case is fact specific. Material such as contracts giving completion dates or complaints about or even penalties for overrunning completion dates may well be relevant to determining the intention of the client as to whether the task was to be short-term.

47. EJ Sharp made no finding about the intention of Shaws regarding the duration of the task to be undertaken by Swanbridge. As counsel pointed out, the only reference in the Judgment to intention is in paragraph 21 in which the EJ held:

> **"21. Finally were the economic activities were (sic) in connection with a single event and of short-term duration (there being no argument or evidence regarding the client's intentions)?"**

The passages in the Judgment which followed were directed to considering and deciding whether the carrying out of insulation work on the five boilers was an event or task of short-term duration. Giving the Judgment the most generous reading, in my judgment it cannot be understood as considering let alone deciding whether the intention of Shaws was that Swanbridge's activities, following their commencement of work on the boilers, were to be carried out by them other than in connection with a single specific event or task of short-term duration.

48. Although there was no oral evidence from Shaws as to their intentions, it appears that there was documentary evidence before the EJ which is likely to have been material to the issue of Shaws' intention in entering the agreement with Swanbridge as to the duration of the task upon which they were to be engaged. Swanbridge took over the work of insulating the boilers from Kitsons. The ET3 lodged by Kitsons set out a full account of their contractual arrangements with Shaws. The contract was envisaged to generate a turnover of £1.5 million. It was said to have been entered into on 4 January 2011 for an initial thirty week period to run up to 8 August 2011. Difficulties arose which were alleged to have been caused by Shaws which were said to have led to delay. It was said that because of the delay, Shaws took away from Kitsons work on boilers four and five.

49. The ET3 lodged by Kitsons refers to Mr Woodall and Mr Wint, Contracts and Operations Director of Swanbridge, being involved in discussions on 6 October 2011. Both men gave evidence at the hearing before the EJ. The Judgment mentions material letters and emails passing between Shaws and Kitsons and to emails from Swanbridge to employees. A contract was entered into between Shaws and Swanbridge in January 2012 to cover the insulation work on all five boilers which Swanbridge took over on 5 October 2011. It is therefore likely that there was evidence before the EJ relevant to determining the intention of

Shaws when entering into a contract with Swanbridge for them to take over on 5 October 2011 activities in connection with insulating the boilers. No findings of fact were made on this material nor was it said whether the material assisted in drawing an inference regarding the intentions of Shaws at the time it was agreed that Swanbridge were to work on the boilers.

50. Even if there had been no argument advanced on behalf of the parties regarding Shaws' intention regarding the duration of the task on which Swanbridge was to be engaged, in my judgment it was incumbent on the EJ to make a finding on their intention. This was a necessary first step in determining whether there was a service provision change within the meaning of TUPE Regulation 3. Even if it could be inferred that the EJ had made such a finding on intention in paragraph 23 of the Judgment, such a finding would have been based on consideration of the length of time in total it took Kitsons and Swanbridge to complete the work. Even if it had been reasonable to consider the length of time taken by Swanbridge to complete the work as the sole basis from which to draw an inference of the intention of Shaws on Swanbridge taking over the work, the EJ erred in relying on her observation that the work concerning the boilers could be viewed as a single event, work on which was lengthy and protracted. In context it is likely although not clear that in making these comments the EJ treated the "single event" as one of eighteen months duration. That period included ten months spent by Kitsons on the work. That period is not relevant to determining the intention of Shaws with regard to the duration of the task to be undertaken by Swanbridge. The relevant intention is that at the time when Shaws decided to give the contract for the work on the boilers to Swanbridge, not in December 2010 when Shaws engaged Kitsons to carry out the work. Further, against a background of previous delays on the project, it may be particularly unsafe to rely on time taken on the work from which to infer the intention of Shaws as to the duration of the task Swanbridge were being asked to undertake on the service provision change.

51. The failure of the EJ to decide the primary finding of fact, the intention of Shaws, with regard to the duration of the task of insulating the boilers following the service provision change to Swanbridge is sufficient to dispose of the appeal. The decision of the EJ cannot stand for this reason alone but I will consider the other issues also raised by this appeal.

52. Since an ET is required to determine whether the single specific event or task referred to in TUPE Regulation 3(3)(a)(ii) is of short-term duration, it is necessary for the ET to determine what is the single specific event or the task in connection with which the putative transferee is to carry out activities.

53. At paragraph 23 the EJ stated that:

> **"…the work concerning the boilers could be viewed as a single event. …it took 18 months in entirety to complete."**

It is apparent that the EJ identified the "single event" as the work carried out on the boilers not just by Swanbridge but also by Kitsons. In my judgment Mr Tatton-Brown is correct to submit that work on the boilers is a task not an event. Given their ordinary meaning the words "a single specific event" are not apt to describe a project. They are not apt to describe insulation work on five boilers. Further, TUPE Regulation 3(3)(ii) requires consideration of whether the event or the task in connection with which the client intends activities to be carried out is short-term not whether the activities are short-term.

54. By the time Swanbridge took over, work on boilers one to three was 80% complete and work on boilers four and five had not been started. Their activities were in connection with completing work on boilers one to three and undertaking all the work on boilers four and five. In my judgment it is that task in connection with which Swanbridge were to carry out activities

on behalf of Shaws. The issue to be determined by the ET was therefore whether the task on which Shaws intended Swanbridge carry out activities was of short-term duration.

55. Having regard to the conclusion that in my judgment the EJ erred in categorising the work on the boilers as a single specific event rather than the insulation and cladding the boilers as a task, it is not necessary to decide whether the phrase "of short-term duration" qualifies "event" as well as "task". However, like Langstaff P in **SNR Denton**, my inclination would be that "of short-term duration" qualifies "event" as well as "task". With due respect to Lady Smith in **Liddell's Coaches**, in my view a single specific event is not self-evidently short lived. The leak of an oil pipe line is an event. The leak may continue for a considerable period of time. That single specific event may not be of short-term duration.

56. In my judgment the EJ erred in her approach to considering whether the task of insulating the boilers was of short-term duration. It was the work remaining on the boilers which was the task to which Swanbridge's activities were directed not the entirety of the insulation of the boilers. The relevant task did not take Swanbridge eighteen months to complete. Although it is not clear from her Judgment, it appears that the EJ regarded the "single event" as the entirety of work on the boilers rather than the task in connection with which Swanbridge was to carry out activities.

Disposal

57. The appeal by Swanbridge succeeds and the decision of Employment Judge Sharp set aside. The case is to be remitted to an Employment Judge to determine whether there was a relevant transfer under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** Regulation 3(1)(b)(ii) from Kitsons to Swanbridge. The findings of the EJ in paragraphs 16 and 20 of her Judgment of 28 September 2012 are to remain in place.

58. Mr Frederick for Swanbridge contended that if the matter is to be remitted it should be to a different Employment Judge. Mr Henderson and Mr Tatton-Brown submitted that the remission should be to the same Employment Judge, Employment Judge Sharp. Having regard to **Sinclair Roche and Temperley (a firm) v (1) Heard and (2) Fellows** UKEAT/0637/05/LA 21 November 2006 in circumstances in which in addition to the misdirection in law in failing to address the first and fundamental question under TUPE Regulation 3(3)(a)(ii) of the intention of Shaws in my judgment there were a number of other errors of law in the approach of EJ Sharp to TUPE Regulation 3(3)(a)(ii), the case is remitted to a different Employment Judge.

59. As Mr Henderson rightly pointed out the issue of jurisdiction of the ET to hear Unite's claims by reason of the date of lodging the ET1 will have to be determined. Whether that will be at the remitted Pre-Hearing Review or at a subsequent substantive hearing should be the subject of directions by the Employment Judge.