Appeal No. UKEAT/0336/13/DA
UKEAT/0337/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 February 2014
Judgment handed down on 13 March 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

UKEAT/0336/13/DA

ROBERT SAGE LTD T/A PRESTIGE NURSING CARE LTD — APPELLANT

MRS S J O'CONNELL AND OTHERS — RESPONDENTS

UKEAT/0337/13/DA

NORTH SOMERSET COUNCIL — APPELLANT

MRS S J O'CONNELL AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Robert Sage Nursing Ltd t/a Prestige Nursing Care Ltd	MR RICHARD REES (Representative) Peninsula Business Services Ltd 2 Cheetham Hill Road Manchester M4 4FB
For North Somerset Council	MR ANDREW MacPHAIL (of Counsel) Instructed by: North Somerset Council Legal Services Department Town Hall Walliscote Grove Road Weston-super-Mare BS23 1UJ
For Allied Healthcare Group Ltd	MS SARA BEECHAM (of Counsel) Instructed by: DGB Solicitors LLP The Captain's House Central Avenue Pembroke Chatham Maritime Kent ME4 4UF
For Mrs J Truman	MR MATHEW PURCHASE (of Counsel) Instructed by: UNISON Legal Services UNISON Centre 130 Euston Road London NW1 2AY
Mrs S J O'Connell and five others	No appearance or representation by or on behalf of Mrs S J O'Connell & five others

SUMMARY

TRANSFER OF UNDERTAKINGS – Transfer

The Employment Judge did not err in holding that a hope and wish that following a service provision change activities would be carried out by a transferee in connection with a task of short term duration was not an intention that they would be so carried out. Accordingly the Employment Judge did not err in holding that the exception in **Transfer of Undertakings (Protection of Employment) Regulations 2006** Regulation 3(3)(a)(ii) did not apply to exclude the transfer of activities from the scope of TUPE.

The Employment Judge erred in holding that a Claimant who was prohibited from carrying out work with a client, X, was assigned to the group of employees working with X which group was subject to the service provision change. **Fairhurst Ward Abbotts Ltd v Botes Building and others** [2003] UKEAT/1007/00/DA and [2004] IRLR 304 and **United Guarding Services Ltd v St James Security Group Ltd and another** [2004] UKEAT/0770/03/RN considered. Decision that the Claimant was not so assigned substituted. Accordingly the appeals in relation to Claimants 1 to 6 were dismissed and that in relation to Claimant 7 allowed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. The Claimants were support workers engaged in the care of a person with severe learning difficulties, X. North Somerset Council ('the Council') are responsible for the provision of her care. From 5 July 2011 until they terminated their contract with the Council on 28 February 2012, Allied Healthcare Group Ltd ('Allied') provided that care. The Claimants were employed by them. From 1 March 2012, by a contract entered into with the Council, Robert Sage Nursing Ltd t/a Prestige Nursing Care Ltd ('Prestige') undertook that work. They did not employ the Claimants who brought claims for unfair dismissal and monetary claims: six Claimants against Prestige and Allied and one Claimant, Mrs J Truman, by a later ET1 against Prestige, Allied and the Council.

2. An issue between the parties relevant to this appeal in relation to all Claimants was whether the change of provider from Allied to Prestige fell within the statutory exclusion from "service provision change" within the meaning of Regulation 3 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE') because the client, the Council, intended that the activities, the care of X, would following the service provision change, be carried out by the transferee, Prestige, in connection with a task of short-term duration. Further, the question of whether Mrs Truman was assigned to the organised grouping of workers who were subject to the transfer within the meaning of Regulation 4 was to be determined.

3. Following a Pre-Hearing Review ('PHR') of the claims by the six Claimants and Mrs Truman, by a judgment sent to the parties on 29 January 2013 Employment Judge Tess Gill ('the EJ') decided that:

> **"There was a relevant transfer of all the Claimants under Regulation 3 of TUPE from the First Respondents Allied Health Care Group Ltd ('Allied') to the Second Respondent ('Prestige') on or about 1 March 2012."**

The EJ further held that Mrs Truman was assigned to the contract to care for X. No finding or Order was made against the Council. References below to paragraph numbers are to those in the judgment of the EJ unless otherwise indicated.

4. By Order sent to the parties on 4 March 2013, the claim of the only Claimant who had named the Council as Respondent, Mrs Truman, was dismissed on withdrawal.

5. Prestige appeals from the findings of the EJ which had the consequence that the contracts of employment of the Claimants including Mrs Truman were transferred to Prestige under Regulations 3 and 4 of TUPE. Although the Council had lodged an appeal, Mr MacPhail who appeared for the Council rightly recognised that the Council has no standing to be an Appellant. The Council have nothing to appeal against. However having regard to Rule 5 of the **Employment Appeal Tribunal Rules 1993** the Council remained a Respondent to the appeal by Prestige.

6. TUPE Regulations 3 and 4 which are at issue in this appeal provide in material part:

> **"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 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…**
>
> …
>
> **(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…

…

4. Effect of relevant transfer on contracts of employment
(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."

Relevant findings of fact

7. Since 2005 the Council has had in place a substantial package of care for X. There was no issue between the parties that immediately before 1 March 2012 all the Claimants save for Mrs Truman were assigned to the work with X caring for her in her own home. Mrs Truman had been working with X but had been suspended from her duties for some time before that date.

8. All the Claimants had been working with X for some years, first employed by a Trust set up for her care and from 5 July 2011, following a TUPE transfer, employed by Allied.

9. After Allied assumed providing carers for X, it became clear to their Branch Manager that there were severe difficulties with the relationship between the carers and X's family who do not live with her and also with X's behaviour. This made it difficult to deliver care to X in her home.

10. After a serious incident at X's residence on 12 January 2012, Allied decided to give notice to terminate their contract with the Council. They were to cease providing their services on 28 February 2012.

11. The EJ found that by 18 January 2012 the Council had decided that they would in any event pursue an application to the Court of Protection seeking to transfer X to new accommodation in a town further away from her family.

12. Allied informed their staff working with X that the transfer of the package of her care to a new provider would be a TUPE transfer.

13. By 1 March 2012 it had been agreed with the Council that Prestige would cover the care requirements for X on an ad-hoc basis. The EJ held at paragraph 19 that notes of events on 1 March 2012 at X's home showed in respect of the handover:

> **"The staff who were on the rota and present at the premises that day were told they would no longer be required as Prestige were now covering for an interim period before a Court Hearing which was expected to be in four weeks and then X would be moving to [another town]. The Prestige Support Workers then arrived and took over the care."**

14. Allied were maintaining the position that there had been a TUPE transfer and Prestige the contrary.

15. The EJ recorded at paragraph 20:

> **"On 8 March Mr Sage was seeking a memo from the Council:**
>
> > **'…confirming how they see our current care provision (i.e. this is a very a short term emergency package (sic) and outlining what NSC intentions are for X so I can run this passed (sic) our Legal Dept. Hopefully this will satisfy them that even longer than 2 wks and more like 5, it would still be exempt from TUPE?'**
>
> **He received a response from the Brokerage Team Leader of the Council:**
>
> > **'Dear Robert**
> >
> > **I write to confirm that we have commissioned your service as a temporary emergency cover pending the decision of the Court of Protection, due to our dependence on this decision we would expect to provide you with 24 hours notice to cease the package. I trust this clarifies the Council's position.'"**

16. The necessary documents were sent to the Court on 13 March 2012 with a request that they be treated as a fast track application. Proceedings before the Court of Protection did not proceed smoothly or speedily. The earliest hearing date offered was mid July 2012. By the date of the PHR on 12 and 13 December 2012, the application to the Court of Protection had been withdrawn and Prestige were continuing to care for X in her home.

17. Mrs Truman was suspended on full pay on 18 October 2011 and issued with a final written warning on 17 November 2011. This was reduced on appeal on 16 December 2011 to a written warning for six months. Mrs Truman received a letter dated 3 January 2012 from Allied informing her that it would be inappropriate for her to return to the package looking after X. Allied had received a specific request from the Council that she was not to be placed with X. Allied wrote:

> **"We are obligated to adhere to the Council's request therefore you were advised that you would not be returning to this package.**
>
> **As a suitable alternative, you will be offered work within our establishments, with no change to your current terms and conditions of employment."**

Mrs Truman gave evidence to the EJ that she did not want to work in a care home as opposed to working as a Support Worker with an individual user in their home. On 19 January 2012 the UNISON Branch Secretary emailed the Human Resources Officer of Allied to state they had obtained a copy of Mrs Truman's terms and conditions of employment and that these stated:

> **"(Each employee will be expected to ensure a responsible approach to their participation in ensuring that X is supported effectively across a range of need.) which I believe constitutes a contract solely for this client."**

Mr Rashid, the Group HR Manager emailed back:

> **"Authorised leave with pay until we negotiate her return to the package."**

18. Mrs Truman was invited to attend the TUPE consultation meetings which Allied conducted with the other Claimants. The EJ held at paragraph 25:

> **"It was Allied's position that she was therefore still contracted to work on X's package and they had treated her as part of the group of employees to be so transferred over. Mr Rashid agreed that in the absence of the Council's agreement that she would return to work with X that would not be possible. In the event he had not entered into any negotiations with the Council on this matter and knew of no such negotiations taking place."**

The decision of the EJ

19. On the issue of whether the exclusion from "service provision change" in Regulation 3(3)(a)(ii) applied, the EJ was directed to **SNR Denton LLP v Ms S Kirwan and Others** [2013] ICR 101. The EJ noted that Langstaff P stated that Tribunals are dealing with the "intention of the client" not with an objective standard. She observed:

> **"Further what is short term depends on perspective, but the context is a general employment context and the particular employment relationship under scrutiny (see paras 43-44)."**

The EJ also cited from **Liddells Coaches v Mr J Cook and Others** [2013] ICR 547 para 32. She stated at paragraph 28:

> **"I was also helpfully referred to a definition of intention given in Cunliffe v Goodman [1952] KB 237, 253 where it was said (in the context of a landlord and tenant case) 'an intention' to my mind connotes a state [of] affairs which the party 'intending' – I will call him X – does more than merely contemplate; it connotes a state [of] affairs which on the contrary he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own volition."**

20. The EJ held that the transfer from Allied to Prestige took place on 1 March 2012.

21. The EJ held at paragraph 31 that the "task" within the meaning of TUPE Regulation 3 was caring for X until the Court of Protection gave its approval to her move. The Council submitted to the EJ that:

> **"Because of resistance from X's family the Council had to apply to the Court of Protection. It was initially thought there would be an answer within a couple of weeks. It was only the incredibly drawn processes of that Court (which could not reasonably have been anticipated) that meant the duration of temporary care extended into a few months. It was said that duration was intended to be of short term."**

The EJ held at paragraph 31(1):

> **"It seems to me the difficulty of that submission is that while the Council wished and hoped for the duration to be short term they had no control over the length of time it would take and even more significantly they had no certainty of the outcome when the Court of Protection considered the proposed move and bearing in the mind the resistance of the family. I was not provided with any estimate coming from someone specialising in this area of law and knowing the practice at the Court of Protection which indicated that there was any high probability that the application would succeed. There was no indication from the witnesses and their Counsel that they had obtained such opinions. I therefore conclude that it was a hope and wish that it would be a short duration and did not constitute an intention. This being the case I conclude that TUPE did apply and the employment of the claimants transferred to Prestige."**

22. As for whether Mrs Truman was assigned to the organised grouping of workers subject to the transfer from Allied to Prestige the EJ held:

> **"32. In respect of Mrs Truman while there certainly appeared to be a lack of certainty as to whether or not she was still assigned to the contract to care for X during the course of the disciplinary proceedings once the union had referred the Council to the terms of her contract it appeared that it was accepted that she was contractually bound to the particular package in respect of care for X and was thereafter up to the date of transfer treated as so assigned and called to consultative meetings etc. As the test is essentially a contractual one I conclude despite the Council's and indeed Allied's reluctance to allow her to continue her duties and had her employment with Allied continued no doubt that would have been a good basis for terminating the contract, this had not taken place and she was therefore in the relevant employment at the time of the transfer so that her contract also transferred."**

Submissions of the parties

23. Mr Rees for Prestige advanced two grounds of appeal and adopted with some additions the skeleton argument prepared by Mr MacPhail on behalf of the Council.

Ground 1

24. Mr Rees submitted that the EJ misconstrued the word "intends" in Regulation 3(3)(a)(ii) in determining whether the exclusion from the definition of service provision change of activities which the client intends will be carried out by the transferee in connection with a task

of short term duration. He submitted that "intends" is what was "planned" by the transferor immediately before the service provision change. Further Mr Rees contended that the EJ erred in relying on **Cunliffe** in deciding the meaning of "intends" in TUPE Regulation 3(3)(a)(ii). **Cunliffe** was a landlord and tenant case and does not apply to TUPE.

25. Mr Rees contended that the Council intended that Prestige provide care for X in what was anticipated would be the short period before the Court of Protection gave their consent to her move to another location. This is what was planned. However Mr Rees made it clear that Prestige was not challenging the findings of fact in paragraph 31(1) that the view of the Council on entering into the agreement with Prestige to provide care for X:

> **"…was a hope and wish that it would be a short duration and did not constitute an intention."**

Ground 2

26. By the second ground of appeal it was contended on behalf of Prestige that answering the question of whether an employee is assigned to an organised grouping of transferring employees within the meaning of TUPE Regulation 4(1) requires the application of a two stage test as explained by HH Judge Burke QC in **Fairhurst Ward Abbots v Botes Building Ltd and Ors** [2003] UKEAT/1007/00/DA. At paragraph 78. HH Judge Burke QC held:

> **"The appropriate test in our judgment, was whether he was employed to work in Area 2 immediately before the transfer i.e. whether Area 2 was his contractual place of work and that is where Botes would have required him to work immediately before the transfer had he not been excused from attendance."**

This approach was approved when the case reached the Court of Appeal ([2004] IRLR 304, 210 paragraph 41). The approach of HH Judge Burke QC was described by counsel in **United Guarding Services Ltd v St James Security Group Ltd and another** [2004]

UKEAT/0770/03/RN in paragraph 38 as a "two stage test". This was approved by Hooper J (as he then was) in that case.

27. Mr Rees contended that the EJ erred in holding at paragraph 32 that the test for whether an employee is assigned to a grouping of employees is essentially a contractual one. He submitted that the EJ should have applied a two stage test of which the contract is only the first stage. The EJ erred in failing to hold that Mrs Truman was not assigned to the grouping of workers engaged in the care of X because she would not have been required to work with X if she had not been suspended.

28. Mr MacPhail for the Council is in the curious position of making submissions as a Respondent to the appeal by Prestige in Mrs Truman's case yet he advances arguments to support it.

29. Rather than advancing an argument that "intends" means "planned", Mr MacPhail contended that the finding of the EJ that the Council hoped and wished that the task of looking after X in her home by Prestige would be short term should be judged in its factual context. If that had been done, the hope and wish should have been found to have been an intention. At the time of the service provision change, the Council were going to apply to the Court of Protection for approval to transfer X to residential care in a different location.

30. Mr MacPhail contended that the EJ set the bar for "intention" far too high. TUPE Regulation 3 does not require that the object of an intention should be objectively achievable. The Regulations require a finding of fact assessing the intention of the client, in this case the Council. The EJ erred in applying an objective test of whether the object of the Council's

intention was achievable. Mr MacPhail made reference to the judgment of Langstaff P in **SNR Denton** at paragraph 45:

> **"[the tribunal is] not dealing with an objective standard. It is dealing with the anticipation or intention of the client."**

Therefore the EJ erred.

31. Mr MacPhail, as did Mr Rees, made it clear that his client was not challenging findings of fact by the EJ that it was a hope and wish of the Council that the task of Prestige providing care for X in her own home would be of short term duration.

32. As for the second ground of appeal, Mr MacPhail contended that the EJ applied the wrong test in deciding whether Mrs Truman had been assigned to the grouping of employees the subject of the transfer. The EJ should have applied a two stage test of which the second is whether immediately before the service provision change the worker would have been required to work at the relevant location. In this case on the facts it is clear that Mrs Truman would not have been required to care for X. She would have been prevented from doing so.

33. As for the first ground of appeal Ms Beecham for Allied contended that the EJ did not err in deciding that it had not been established that the Council intended the task of looking after X by Prestige to be of short term duration.

34. Ms Beecham submitted that the challenge by Prestige conflated "hope" and "wish" with "intention". They are different. The meaning of intention is clearly more than a hope or wish. Ms Beecham referred to the dictum of Asquith LJ in **Cunliffe** at page 253 in which he held:

> **"Nor, short of this, can X be said to 'intend' a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents and cross-currents of circumstance that, not merely is it quite likely not to be achieved at all, but, if it is achieved, X's volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which predominately determine its occurrence. If there is a sufficiently formidable succession of fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X 'intended' that result."**

There must be a reasonable prospect of achieving the object of the intention. In this case neither the outcome of the decision of the Court of Protection nor when it would be taken were within the control of the Council. In any event Ms Beecham contended that a purposive interpretation should be adapted to the construction of "intend" in TUPE Regulation 3. The Regulations are in place to protect the interests of employees in the event of a service provision change. An unscrupulous employer could intend the unachievable in order to defeat the operation of the Regulations and the preservation of employment. A purposive construction of "intends" would result in the same approach to that of Asquith LJ in **Cunliffe**.

35. Further, Ms Beecham contended that the natural meaning of "intends" imports some reasonable prospect of the intended act being achievable. Although the Council's case pleaded in the ET3 was that if the Court of Protection refused permission for the proposed move of X to other care, the necessary arrangements for long-term provision of support to X would be put in hand, that case was not advanced at the hearing before the EJ. It was not said that if the Court did not permit moving X, other arrangements than care by Prestige would be put in place. In the event Prestige continued to provide care for X after the application to the Court of Protection was withdrawn.

36. As for Ground 2 Ms Beecham submitted that the EJ found that Mrs Truman was contractually obliged to work on caring for X although at the time of the service provision

change she was suspended from work. Ms Beecham agreed that the Council did have the power to prevent Allied from sending Mrs Truman to work with X.

37. For Mrs Truman, Mr Purchase pointed out that neither Prestige nor the Council challenge the finding of fact by the EJ that the Council's approach to assigning the task of caring for X until the Court of Protection gave its approval to her move was a hope and wish that it would be of short duration. He submitted that it is only if the EJ erred in law in holding that a hope and wish is not an intention within the meaning of TUPE Regulation 3(3)(a)(ii) that her decision on this issue can be overturned.

38. Mr Purchase dealt briefly with the argument of the Council that an intention can be a hope or a wish. It was submitted that "intention" is the pursuit of some achievable objective. Mr Purchase submitted that the finding of the EJ in paragraph 31(1) on intention does not rely on the reasoning of the Court of Appeal in **Cunliffe**. However Asquith LJ in **Cunliffe** gave "intention" its ordinary meaning. The EJ would not have erred in law if she had based her construction of "intention" on **Cunliffe**.

39. Mr Purchase submitted that the purposive approach to the construction of "intention" in TUPE is required if there is an ambiguity in its meaning. In doing so, regard must be paid to the context of the legislation. The general purpose of TUPE is to protect employees. Regulation 3(3)(a)(ii) provides an exception to the general rule regarding service provision change. Accordingly "intend" in the Regulation must be given a narrow meaning and the burden is on the party seeking the benefit of the exception to establish that it is made out.

40. As for Ground 2, it is not correct to say that a two stage test is to be applied in determining whether an employee is assigned the grouping of workers the subject of the service provision change. Whether an employee is assigned to the part of an undertaking transferred is a question of fact to be determined having regard to all the circumstances. A two stage approach is not required as a matter of law.

41. Mr Purchase pointed out that up to her suspension Mrs Truman was working with X. But for her suspension she would have been assigned to the work with X. Applying the approach of the Court of Appeal in **Botes** page 310 paragraph 40, just as a person who was not at work because of sick leave or holiday, Mrs Truman was assigned to looking after X. Mr Purchase accepted that if her employer said that she could not work with X she could not do so. However, it was not her employer who did not wish her to work with X. The Council's decision on whether she could work with X could have been reviewed. The employer's position was that Mrs Truman's return to working with X could be negotiated. Accordingly the EJ did not err in holding that Mrs Truman was assigned to the group of workers caring for X at the time of the service provision change.

Discussion and conclusion

42. The provision in TUPE Regulation 3(3)(a)(ii) that the cessation by A and assumption by B of activities carried out on a client's behalf will not be regarded as a "service provision change" within the meaning of TUPE Regulation 3(1)(b)(ii) and 3(3) if the client intends that the activities will be carried out by the transferee in connection with a task of short-term duration is an exception to the general rule that the cessation by A and assumption by B of such activities is a "service provision change" within the meaning of TUPE. Accordingly it is for the

party relying upon it to establish that the exception applied. There is no special definition of "intends" in TUPE. It should be given its ordinary meaning.

43. Mr Rees sought to equate "intend" with "planned" and Mr MacPhail with a "hope and wish" strengthened by their context. For their part Ms Beecham and Mr Purchase relied to a greater or lesser extent on the dicta of Asquith LJ in **Cunliffe**. Asquith LJ observed at page 253 that an "intention" connotes a state of affairs in which the party "intending" does more than merely contemplate. Further, Asquith LJ observed that a person cannot be said to "intend" a result which is wholly beyond the control of his will. A person cannot intend that it will be a fine day tomorrow: "at most he can hope or desire or pray that it will".

44. Applying the ordinary meaning to the words, in my judgment a person may hope or wish for something which is unachievable or uncertain. A vain hope is still a hope. However intending to do something which is not reasonably achievable is meaningless. A person may hope to run a marathon but it is meaningless to say he intends to do so if he has never run more than a mile. It is unnecessary for the purpose of determining this appeal to decide whether the approach of Asquith LJ in **Cunliffe** to the meaning of "intention" is to be applied to "intention" in Regulation 3 of TUPE. However, adopting the ordinary meaning of the work "intend" results in the dichotomies referred to by Asquith LJ. An "intention" is more than merely to contemplate. An "intention" is directed to an objective which is a possibility. By contrast a person may hope for or desire something which is unachievable. Neither is it necessary for the purpose of determining this appeal to have a fully worked definition of "intends" within Regulation 3 of TUPE. All that is necessary is to decide whether the EJ erred in holding that a hope or a wish is not an intention within the meaning of TUPE Regulation 3(3)(a)(ii).

45. Even if "intend" is to be equated with "planned" as submitted by Mr Rees, a "plan" does not have the same meaning as a "hope" or "wish". The finding of fact by the EJ that the length of the task given to Prestige of caring for X would be short term was a "hope or wish" was not challenged. Accordingly the argument advanced by Mr Rees for challenging the decision on TUPE Regulation 3(3)(a)(ii) cannot succeed.

46. Despite the valiant efforts of Mr MacPhail, in my judgment the terms "hope" or "wish" do not become an "intention" depending upon the factual background against which the terms are used. The terms have different meanings and are not to be elided. The words are to be given their ordinary meaning. A hope and a wish are not an intention.

47. I agree with the submission made by Mr Purchase that the answer to Ground 1 of the appeal is straightforward. Neither Prestige nor the Council challenge the finding of fact by the EJ that it was "a hope and wish" of the Council that the duration of care of X to be provided by Prestige until the Court of Protection gave its approval to the move would be short term. The observation by the EJ that the Council had no control over the length of time it would take and indeed whether the Court of Protection would give their approval to the planned move of X was not challenged. In my judgment on those facts the EJ did not err in concluding that the hope and wish of the Council did not constitute an "intention" within the meaning of TUPE Regulation 3. Accordingly even if Mr MacPhail's submission that, depending upon the relevant facts, a hope and wish could constitute an intention, on the unchallenged facts of this case the EJ did not err in holding that they did not.

48. Pursuant to TUPE Regulation 4(1), it is the contracts of employment of those employees employed by the transferor and assigned to the organised grouping of employees that is subject

to the relevant transfer which have effect as if made between the employee and the transferee. By Regulation 4(3) any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of employees subject to a relevant transfer is a reference to a person so employed immediately before the transfer. The grouping of employees in this case was those employed by Allied to care for X in her home. The question for the EJ was therefore whether Mrs Truman was assigned to that grouping immediately before the transfer to Prestige on 1 March 2012.

49. The approach to the issue of whether an employee who was not at work immediately before a transfer was assigned to the part transferred was considered in **Botes** in the EAT by HH Judge Burke QC and members, upheld in the Court of Appeal. In **Botes**, the courts considered whether an employee, Mr Salih, who was away from work because of ill health was assigned to the part of the business transferred. By paragraph 78 of their judgment the EAT remitted to the Employment Tribunal ('ET') the question "where Mr Salih would have been required to work had he been fit to do so" in order to decide whether he was assigned to the part of the business transferred. At paragraph 41 Mummery LJ in the Court of Appeal held:

> **"As explained by the Appeal Tribunal (paragraph 78) the tribunal had not asked or answered the factual question where Mr Salih would have been required by Botes to work, had be been fit to do so."**

Whilst earlier in the paragraph Mummery LJ referred to where the employee "could" be required to work, he approved paragraph 78 of the judgment of the EAT in which the question posed on remission was where the employee "would" have been required to work. In any event on this appeal no point was taken on this linguistic difference of one word in paragraph 41 of the judgment of the Court of Appeal. Further, Allied could not employ Mrs Truman to work with X if, as was the case, the Council considered it to be inappropriate for her to return to

working with X after the conclusion of the disciplinary proceedings which were taken against her.

50. Whilst the terms of the contract under which an employee is employed at the material time are relevant to determining whether he or she is assigned to a part of the business transferred, as is illustrated by **Botes** and the judgment of the EAT in **United Guarding Services**, the question is primarily to be answered by deciding where the employee would be required to work immediately before the transfer.

51. Whilst counsel in **United Guarding Services** referred to applying the "two stage test" in **Botes**, it was the test formulated by HH Judge Burke QC approved by the Court of Appeal which was adopted by the EAT in **United Guarding Services**. As in this case, in **United Guarding Services** the claimant's contractual place of work differed from that where she would have been required to work. Because she was not allowed to work at her contractual place of work, the EAT in **United Guarding Services** held that the ET were not entitled to hold that the claimant was not assigned to that place which was the part of the business transferred.

52. In my judgment the EJ erred in holding that the test of whether Mrs Truman was assigned to working with X in her own home was "essentially a contractual one". The EJ should have determined the issue by reference to where Mrs Truman would have been required to work immediately before the transfer. Whilst the contract plays a role answering this question, in this case as in **United Guarding Services** the contractual place of work was superseded by a prohibition on working there.

53. I have considered whether it is necessary to remit the case to an EJ to determine the issue of whether Mrs Truman was assigned to the group of employees caring for X in her home at the time of the transfer.

54. The EJ made the following relevant findings of fact:

> **"24. …Mrs Truman was suspended on full pay on 18 October 2011 … on 16 December 2011 … she was given a written warning for a period of six months. She received a letter dated 3 January 2012 from Allied informing her that it would be inappropriate for her to return to the package looking after X. It was stated Allied had received a specific request from North Somerset Council that she was not to be placed to work with this service user going forward:**
>
> > **'We are obligated to adhere to the Council's request therefore you would not be returning to this package.**
> >
> > **As a suitable alternative, you will be offered work within our establishments, with no change to your current terms and conditions of employment.'**
>
> **…On 19 January UNISON Branch Secretary emailed the Human Resources Officer to state they had managed to obtain a copy of Mrs Truman's terms and conditions of employment and that it stated:**
>
> > **'(Each employee will be expected to assume a responsible approach to their participation in ensuring that X is supported effectively across a range of need.) Which I believe constitutes a contract solely for this client.'**
>
> **Mr Rashid, the Human Resources Manager … emailed back:**
>
> > **'Authorised leave with pay until we negotiate her return to the package.'**
>
> **25. …Mr Rashid agreed that in the absence of the Council's agreement that she could return to work with X that would not be possible. In the event he had not entered into any negotiations with the Council on this matter and knew of no such negotiations taking place."**

55. At paragraph 32 the EJ concluded that as the Council and Allied were reluctant to allow Mrs Truman to work with X:

> **"…had her employment with Allied continued no doubt that would have been a good basis for terminating the contract…"**

56. On the findings of fact by the EJ, Mrs Truman was not permitted to return to work with X after 3 January 2012. The only possible conclusion on those facts is that immediately before the service provision change on 1 March 2012 Mrs Truman would not have been required to care for X. She was not assigned to the grouping of employees subject to the relevant transfer

from Allied to Prestige and her employment did not transfer to them. Accordingly a finding to that effect is substituted.

Disposal

57. These are the reasons for the decision announced at the conclusion of the hearing to dismiss Ground 1 of the appeal and to allow Ground 2. The appeal by Prestige from the decision of the EJ that there was a relevant transfer on 1 March 2012 from Allied to Prestige affecting the contracts of employment of Mrs O'Connell, Mrs Lovell, Miss Burrows, Mrs Askey, Mrs Sampson and Mrs Hartman was dismissed. Accordingly the contracts of employment of those employees transferred to Prestige. The appeal by Prestige from the decision that immediately before the relevant transfer Mrs Truman was employed in the grouping of employees subject to the transfer was allowed. Accordingly the contract of employment of Mrs Truman did not transfer to Prestige.