Appeal No. UKEAT/0173/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 January 2017
Judgment handed down on 3 March 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

TEES ESK & WEAR VALLEYS NHS FOUNDATION TRUST — APPELLANT

(1) MRS W HARLAND & OTHERS
(2) DANSHELL HEALTHCARE LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

Corrected under Rule 33(3) **EAT Rules 1993**

APPEARANCES

For the Appellant	MR DOMINIC BAYNE (of Counsel) Instructed by: Ward Hadaway Sandgate House 102 Quayside Newcastle Upon Tyne NE1 3DX
For the First Respondent	MR HENRY TRORY (of Counsel) Instructed by: Thompsons Soliciors St Nicholas Building St Nicholas Street Newcastle Upon Tyne NE1 1TH
For the Second Respondent	MS KATHERINE REECE (Representative) Peninsula Business Services Ltd The Peninsula Victoria Place Manchester M4 4FB

SUMMARY

TRANSFER OF UNDERTAKINGS - Service Provision Change

PRACTICE AND PROCEDURE - Preliminary issues

Transfer of Undertakings (Protection of Employment) Regulations 2006 *regulation 3(3)(a)(i) - service provision change - organised grouping of employees - principal purpose*

Preliminary Issues

The Claimants had been employed by the Tees Esk & Wear Valleys NHS Foundation Trust - the Second Respondent before the ET (the Appellant) - as part of an organised grouping of employees put together to look after CE, an individual in the care of the Second Respondent. Over time, CE had improved such that his need for assistance had reduced from seven-to-one to largely one-to-one care. The team put together by the Second Respondent had, however, been retained and had maintained its identity, albeit that the staff concerned were required to undertake work for other service users, also under the Second Respondent's care, in the same location. That remained the position up to 5 January 2015, when the contract to provide care for CE was taken over by the Danshell Healthcare Ltd - the First Respondent in the ET proceedings. The Second Respondent contended this was a relevant transfer (a service provision change) for **TUPE** purposes and that the employees assigned to the team organised to provide care for CE would therefore transfer into the First Respondent's employment. The First Respondent disagreed - as did the employees concerned (who preferred to remain in NHS employment) - but reluctantly agreed to employ those who the Second Respondent was refusing to treat as still in its employment. A number of the employees thus affected brought claims in the ET.

A Preliminary Hearing was listed before the ET to determine (1) whether there was a transfer for **TUPE** purposes, and (2) whether any of the Claimants had been assigned to the relevant organised grouping of employees prior to the transfer. The ET concluded that there was a

change in the provision of the service - care for CE - from the Second to the First Respondent. Furthermore, there was an organised grouping of employees, put together to provide that service, that maintained its identity up to 5 January 2015, and 11 employees had been assigned to that grouping, including the Claimants. Given that the employees concerned undertook other work, however, the ET considered the principal purpose of the grouping had been diluted such that, by 5 January 2015, it was no longer the provision of care to CE. There was, therefore, no service provision change for the purpose of regulation 3(3) **TUPE**. There being no transfer for **TUPE** purposes, the ET further declared that the Claimants were at all times employed by the Second Respondent and not at any time by the First Respondent. The Second Respondent appealed.

Held: *Dismissing the appeal on the question of principal purpose but allowing the appeal against the ET's declaration as to the identity of the Claimants' employer*

The determination of principal purpose (regulation 3(3)(a)(i) **TUPE**) required the ET to answer the question: what did the organised grouping have as its principal purpose immediately before the service provision change? The activities actually performed might be relevant to the determination of purpose, as might the intention behind the organisation of the grouping; neither was necessarily determinative. In the present case, allowing that purpose may change over time, the ET had properly focused on the period immediately prior to the service provision change. By that stage, allowing that the principal purpose need not be the sole purpose, the ET found that the dominant purpose of the organised grouping was the provision of care to other service users; by then, care for CE was merely a subsidiary purpose of the group. Given its primary findings of fact, that was a permissible conclusion for the ET in this case.

As for ET's declaration as to the Claimant's employment by the Second Respondent, this was not an issue before it at the Preliminary Hearing and the parties had not addressed the point. The declaration could not stand.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises an apparently novel question as to the approach to be adopted to the determination of "principal purpose" under regulation 3(3)(a)(i) **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"). In giving Judgment, I refer to the parties as the Claimants and the First and Second Respondents, as below: the First Respondent before the Employment Tribunal being Danshell Healthcare Ltd; the then Second Respondent being Tees Esk & Wear Valleys NHS Foundation Trust. The appeal is that of the Second Respondent, against a Judgment of the North Shields Employment Tribunal (Employment Judge A M Buchanan, sitting alone on 26-28 October and 20 November 2015; "the ET"), sent out on 18 February 2016. Mr Bayne and Mr Trory represented the Second Respondent and the Claimants then as they do now; Ms Reece appears for the first time on the appeal.

2. Relevantly for this appeal, seven individual Claimants had lodged ET complaints of unfair dismissal, which were resisted by both Respondents. A Preliminary Hearing was listed to determine two issues: (1) was there a relevant transfer from the Second to the First Respondent for **TUPE** purposes? and (2) were the Claimants, or any of them, assigned to the relevant organised grouping of employees for a service provision transfer?

3. It was agreed before the ET that if there was no service provision change, within the meaning of that phrase in regulation 3(1)(b) **TUPE**, there was also no transfer of an undertaking for the purposes of regulation 3(1)(a). Thus focusing solely on whether there had been a service provision change, the ET concluded that there had been no relevant transfer. Key to its conclusion in that regard was the ET's finding that, immediately before the putative transfer,

A the organised grouping of employees, to which the Claimants were assigned, no longer had as its principal purpose the carrying out of the relevant activities that would have been the subject of a service provision change to the First Respondent. It also made a declaration that, there having been no transfer for **TUPE** purposes, the Claimants had at all times remained in the Second Respondent's employment.

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The Facts

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4. From 2005 to 5 January 2015, the Second Respondent was responsible for providing care to a patient, "CE"; CE had suffered severe learning difficulties from birth and needed extensive nursing care. At an earlier stage, CE had lived in Birmingham, where as many as seven members of staff were dedicated to his care throughout the day and most of the night. In November 2005, CE returned to his place of birth, Teeside, where his care was provided by the Second Respondent pursuant to a contract with the NHS South Tees Care Commissioning Group ("the CCG") and its predecessors. The provision of personal care to CE by the Second Respondent initially involved a team of some 27 people, comprising qualified nursing and medical staff, as well as unqualified carers; the Claimants were all unqualified nursing assistants and part of that team.

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5. From 2005 to 2012, CE was housed in a flat within a building known as Bankfields Court. Living in the same building but in different flats, were a number of other service users who required specialist care, albeit to a lesser extent than CE. In 2012, CE moved into a new building at the same location. Within that building, again in separate flats, were 17 other disabled service users.

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6. CE's condition gradually improved with the result that from 2011, he needed only four-to-one care, as opposed to the seven-to-one care previously required. As a result, when CE moved to the new building in 2012, the team looking after him was reduced to the equivalent of ten full-time staff (11 people), who were told to work flexibly: if required, they were to look after other service users within the building. Accordingly, the Claimants found themselves being rostered to work in other parts of the building, caring for other service users.

7. Thereafter, CE gradually improved further. From February 2014, he only required one-to-one care during the day, save for Fridays, when some external activities necessitated two-to-one care for six hours. During the night, he rarely required any assistance at all; he had a bed alarm and, if that was activated, one of the night staff on duty in the building (sometimes, although not necessarily, the carer who had been with him before he went to bed) would attend to his needs, although by February 2014 this was an infrequent occurrence; for the rest of the night shift, the member of staff rostered to care for CE would care for other service users.

8. During the course of 2014, the contract for the care of CE was put out to tender, to which the First Respondent successfully responded, taking over the contract from 5 January 2015. The First Respondent is a large company, holding a number of such contracts, which has sites throughout the country where it provides care for people with severe learning disabilities and autism. It was anticipated that CE would transfer to a new apartment owned by the First Respondent at Hope House in Hartlepool, some distance away.

9. It was during the process of making arrangements for the transfer of CE's care that the Second Respondent advised that there were 11 employees assigned to the contracted care arrangements for CE, who would transfer to the First Respondent under **TUPE**. This was a

surprise to the First Respondent as it had not been something raised in respect of other similar contracts it had taken over. Subsequently, in consultations with the staff concerned, the Second Respondent determined that only seven of the 11 employees would in fact transfer, these being the members of staff who had, in the year prior to June 2014, worked for more than 75% of their shifts (including night shifts) with CE.

10. The Second Respondent's approach led to considerable dissent, not least as the employees did not consider nightshifts should count and felt the Second Respondent was relying on inaccurate records. The consultation process became focussed on disputes as to the percentage of time spent on the provision of care to CE, with the Claimants resisting the argument that their employment should transfer to the First Respondent. For its part, the First Respondent accepted there was a service provision change but did not agree that there was an organised grouping of employees which had the principal purpose of caring for CE; it further observed that the amount of care required by CE should be provided by no more than three full-time equivalent members of staff, not seven from a team of 11 as the Second Respondent contended. Given the Second Respondent's insistence that there was a relevant transfer for **TUPE** purposes, however, the First Respondent reluctantly agreed to employ those Claimants identified as "assigned" to the care of CE. In fact, some of those Claimants were on sick leave at the time of the transfer and then resigned, so never carried out any work as employees of the First Respondent; others transferred over but then left to take up other positions or were made redundant on 1 March 2015; one continued to work for the First Respondent, spending around 50-55% of his working time with CE.

The ET's Decision and Reasoning

11. The ET found that, up to 5 January 2015, the Second Respondent had a contract with the CCG to provide the care required for CE. On 5 January 2015, that contract came to an end and the CCG entered into another contract with the First Respondent for the same purpose; the client of the Second Respondent (CCG) then became the client of the First Respondent.

12. As for the service provided, the ET concluded as follows:

> **"9.6. The service which R2 and then R1 carried out was to provide personal care for CE. I am satisfied that by 5 January 2015 the service provided to CE by R2 was the provision of food and accommodation and the required level of personal care to ensure that he could live as independent a life as possible. I am also satisfied that by 5 January 2015, CE required in the main one to one care during the day and very little care during the night once he had retired to bed. I am satisfied that CE needed at most two to one care on the occasions he left his accommodation in order to have a home visit or to visit his gym of his Job Club. I accept that the care required by CE has been provided by R1 since 5 January 2015 with the equivalent of three full time members of staff including the required level of trained and untrained nursing care and assistance and including the necessary cover for staff illness, training and holiday periods. I conclude that immediately before 5 January 2015 R2 was providing 14 hours of 1:1 care for CE on 7 days each week namely 98 hours. In addition extra care was provided when CE went out on weekly visits which I conclude was 6 hours each week giving a weekly total of care of 104 hours. I add to that sum 20% to cover staff illness, training and leave and reach a total of required care of 125 hours per week which accords with the assessment of R1 from 5 January 2015 onwards. I conclude that level of care provides sufficient cushion for administrative duties for CE to be carried out such as menu planning and the like."**

13. In providing this service, the ET continued:

> **"9.9. The activities carried out by the employees of R2 comprised some limited qualified nursing care but in the main unqualified nursing assistance to CE to enable him to live as independent a life as possible in accommodation provided for CE by R2."**

14. As to whether the Second Respondent organised a team of people to carry out those activities, the ET concluded as follows:

> **"9.12. I conclude that R2 did have an organised grouping of employees. … the putting together of the team to look after CE was not happenstance: far from it, it was a deliberate putting together of a team in 2005 by R2 which had maintained its identity (albeit with differing numbers and identities of employees) and did so up to 5 January 2015. …"**

15. Having thus found that there was an "organised grouping" of employees, the ET turned to the question whether the principal purpose of that grouping remained the care of CE. It

noted that the grouping concerned provided working hours of some 375 against a need for CE of some 125 hours: it was a larger grouping than was required for the provision of the service in question by some 66%.

16. The ET considered that it was arbitrary and capricious to try to artificially reduce the size of that grouping by applying the test that had been used by the Second Respondent. It was satisfied that all 11 employees were assigned to the organised grouping and had remained so until 5 January 2015.

17. Turning to the question of the grouping's "principal purpose", however, the ET concluded that the answer was obvious:

> **"9.16. … The grouping was too large and thus the principal purpose of the grouping had fallen away. The principal purpose of the grouping was no longer the care of CE for it had become so diluted as not to admit of the principal purpose. I remind myself that principal purpose does not mean the sole purpose but principal purpose does mean the dominant purpose or the purpose of first importance. With so many people and thus working hours available in the grouping, I conclude the principal purpose had fallen away and the care of CE was no longer the dominant purpose or the purpose of first importance but rather it was a subsidiary purpose and the provision of care to the other service users in Bankfields Court with whom the persons assigned to this group (taken as a whole) spent the majority of their time had become the principal purpose of the organised grouping by the time of the transfer. If the organised grouping had been reduced in size by R2 as the needs of CE reduced and so reflected the number of hours of care required by him then the result would have been otherwise. However, for whatever reason, that exercise was not undertaken and thus I conclude the principal purpose of the grouping had fallen away and that the conditions set out in regulation 3(3)(a)(i) of TUPE were not met immediately before the transfer of the contract to care for CE passed to R1."**

18. Having thus found that there was no transfer for **TUPE** purposes, the ET went on to include in its formal Judgment the following declaration:

> **"2. There was no relevant transfer … and accordingly the individual claimants were at all times employed by the second respondent and not at any time by the first respondent."**

The Relevant Legal Principles

19. The principal issue raised by this appeal concerns the concept of transfer by means of service provision change for the purposes of regulation 3(1)(b) **TUPE**. This is a broader

concept than that of a "transfer of an economic entity" (regulation 3(1)(a)) in that it includes the transfer of an activity alone. That said, for there to be a transfer under regulation 3(1)(b) specific conditions must be met, as provided by regulation 3(3), relevantly as required by regulation 3(3)(a)(i):

> **"(a) immediately before the service provision change -**
>
> > **(i) there is an organised grouping of employees … which has as its principal purpose the carrying out of the activities concerned on behalf of the client;**
> >
> > **…"**

20. In an early consideration of the approach to be adopted to regulation 3(1)(b), in **Metropolitan Resources Ltd v Churchill Dulwich Ltd** [2009] ICR 1380, the EAT (HHJ Burke QC) observed as follows:

> **"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."**

That straightforward adherence to the wording of the regulations relevant to a service provision change transfer was subsequently approved by the Court of Appeal in **Hunter v McCarrick** [2013] IRLR 26 CA (see per Elias LJ at paragraph 22).

21. As for how an ET is to carry out the assessment required of it in determining whether there has been a service provision transfer, four stages were identified by the Court of Appeal in **Rynda (UK) Ltd v Rhijnsburger** [2015] IRLR 394, see per Jackson LJ at paragraph 44:

> **"44. … The first stage … is to identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B**

> **who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a 'grouping' for the principal purpose of carrying out the listed activities."**

22. Focusing more specifically on the fourth step, practical guidance has been provided by Underhill P (as he then was) in **Eddie Stobart Ltd v Moreman and Ors** [2012] IRLR 356 EAT, as follows:

> **"18. … reg. 3(3)(a)(i) does not say merely that the employees should in their day-to-day work in fact (principally) carry out the activities in question: it says that carrying out those activities should be the (principal) purpose of an 'organised grouping' to which they belong. In my view that necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. The statutory language does not naturally apply to a situation where, as here, a combination of circumstances - essentially, shift patterns and working practices on the ground - mean that a group (which, NB, is not synonymous with a 'grouping', let alone an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. The paradigm of an 'organised grouping' is indeed the case where employers are organised as 'the [client A] team', though no doubt the definition could in principle be satisfied in cases where the identification is less explicit.**
>
> **19. I do not regard that conclusion as objectionable on policy grounds. No doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in the specified circumstances they 'go with the work' (though the assumption that in every case that will benefit, or be welcome to, the employees transferred is not universally true). But it remains necessary to define the circumstances in which a relevant transfer will occur, and there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible.**
>
> **20. Indeed the policy considerations point, if anything, the other way. If the putative 'grouping' does not reflect any existing organisational unit there are liable to be real practical difficulties in identifying which employees belong to it. It is important that on a transfer employees should, so far as possible, know where they stand …"**

23. Having determined whether there is an organised grouping (and, if so, what that consists of), the ET needs then to determine whether the employees in question have been assigned to that grouping; an analytically distinct step although one that may well have been answered when defining the "organised grouping", see per Underhill P in **Eddie Stobart** at paragraph 16. Drawing upon the case law relevant to these questions, in **Costain Ltd v Armitage** UKEAT/ 0048/14/DA (2 July 2014, unreported), I identified the following principles: (1) for an organised grouping to exist, the employer must have deliberately put the employees together into a team in order to carry out work for the client; (2) when deciding whether an employee has been assigned to a group, it should not be assumed that every employee who carries out

work for that client is part of the transferring group; (3) the fact that an employee was working on the transferring activities immediately before the transfer is not, on its own, sufficient to show assignment to the grouping (see paragraphs 35 to 36 **Costain**). Additionally, I note the further guidance provided by Slade J in **Amaryllis Ltd v McLeod** UKEAT/0273/15/RN (9 June 2016, unreported), who observed that, when looking at whether the condition at regulation 3(3)(a)(i) is satisfied, the assessment is not to be carried out on a historic basis: the ET is concerned with the position *immediately before* the service provision change.

24. The practical effect of focusing on the existence and purpose of an organised grouping of employees has, further, led the EAT to conclude that there is no requirement that the grouping in question must actually be carrying out the relevant activities immediately before the service provision change; thus a temporary cessation of work would not, of itself, mean that a grouping of employees can no longer be organised for the purpose of regulation 3(3)(a)(i), see **Inex Home Improvements v Hodgkins** UKEAT/0329/14/JOJ, per HHJ Serota QC at paragraph 58, and **Mustafa v Trek Highways Services Ltd and Ors** UKEAT/0063/15/BA, per Simler P at paragraph 42.

The Appeal

25. The Second Respondent's appeal is put on two bases: (1) the ET erred in its approach to the determination required under regulation 3(3)(a)(i) **TUPE**, impermissibly inserting a further requirement into the determination of a service provision change transfer; and (2) even if the ET had been entitled to find there was no transfer, it erred in holding that the Claimants remained employed by the Second Respondent: that had not been identified as an issue to be determined at the Preliminary Hearing and was not something the ET could assume. Both grounds of appeal are resisted by the Claimants and the First Respondent.

Submissions

The Second Respondent's Case

26. As the ET had acknowledged, this was a difficult case, in which (unusually) the employees were seeking to argue that there was no transfer because they preferred to remain in the employment of the NHS, rather than moving to the First Respondent.

27. The question raised by the first ground of appeal was whether - having already found there was an organised grouping and that the Claimants were assigned to that grouping - it was open to the ET to find that, immediately before the service provision change, the grouping no longer had the relevant principal purpose?

28. Crucially the ET had found that the Second Respondent did have an organised grouping of employees: a team which was put together to look after CE. That was a finding not just of the existence of an organised grouping (the ET rejecting the Claimants' argument that this had fallen away after 2012) but also of its purpose. The ET had further found that all 11 employees had been assigned to that grouping and remained so up to 5 January 2015. Notwithstanding those findings, however, the ET then concluded that the principal purpose of the grouping had changed, arriving at that conclusion by considering the amount of time the employees spent on particular activities. Allowing that this issue was fact-sensitive, the ET had here permitted happenstance to determine principal purpose (contrary to the guidance provided in **Eddie Stobart** and **Costain**); as the case law made clear, the focus was to be on the mind of the employer - its intention in organising the group of employees - which defined purpose. Furthermore, the ET had wrongly inserted an extra stage into its reasoning - which did not appear in regulation 3 - contrary to the approach adopted in **Hunter v McCarrick** and **Rynda** and inconsistent with the EAT's decisions in **Inex** and **Mustafa**.

29. As for the second ground, the issues to be determined at the Preliminary Hearing had been agreed in advance and were recorded at paragraph 4 of the ET's Reasons; they did not include the consequences for the parties of there being no transfer. Notwithstanding this - and the fact that the parties had neither adduced evidence nor made submissions on the point - the ET had concluded that the individual Claimants were at all times employed by the Second Respondent. Given the particular facts of this case and that none of the Claimants had reported for work with the Second Respondent after 5 January 2015, this was not an assumption the ET was entitled to make: it had wrongly purported to adjudicate on a contentious issue, which was not properly before it at the Preliminary Hearing.

The Claimants' Case

30. The ET's approach was not inconsistent with cases such as **Inex** and **Mustafa**, it had not simply focused on the work performed by the employees *immediately* before the service provision change but had found that since February 2014, at the latest, the team providing care to CE spent the majority of its time dealing with other service users. Against that background, the ET was entitled to conclude that *immediately before* the transfer, the principal purpose of the team was not to provide care to CE in particular, but to other service users - the provision of care to CE being a subsidiary purpose.

31. In arriving at that conclusion, the ET had conspicuously followed the guidance of the Court of Appeal in **Rynda** and had not inserted an extra stage into the test: as regulation 3(3) made clear, for there to be service provision change, immediately before the transfer, there must be an organised grouping of resources which has as its principal purpose the carrying out of the transferring activities; in determining the principal purpose of the team immediately before the service provision change, the ET was entitled to examine how much time had been spent

providing care to CE, rather than on other activities, and the case law did not suggest otherwise. Specifically, the EAT in **Eddie Stobart** had not said that it was irrelevant that the employees carried out the activities in question as a matter of fact, simply that it was not determinative; it was also necessary to look at why the employees had been put together. Whilst that was so, the employer's subjective intention was not the only relevant question; the actual work done by the employees was also potentially relevant. Ultimately it was a question of fact and inference for the ET, see **Amaryllis** at paragraph 30. The ET had, further, not strayed from the wording of the regulations, contrary to the guidance in **Hunter**. It had given the wording of regulation 3(3) its natural meaning; when looking to see whether there was in fact an organised grouping, the ET was obliged to look at the employer's intention, but when looking at the question of principal purpose it also needed to look at what the employees were actually doing.

32. More generally, the purpose which the Second Respondent sought to place upon regulation 3(3) was contrary to the purpose of **TUPE**: it could not have been the intention that transferees would be saddled with a number of employees far in excess of those required to carry out the transferring activities in question, which would simply create a situation where the vast majority of the employees would be made redundant.

33. As for the second ground of challenge, whilst it was accepted that the issue of whether the Claimants were ever employed by the First Respondent was not specifically identified to be determined at the Preliminary Hearing, if there was no transfer it inevitably followed that the Claimants continued to be employed by the Second Respondent.

The First Respondent's Case

34. In reaching its finding as to the existence of an organised grouping, the ET had expressly not made any finding as to principal purpose at that stage. It had then legitimately taken into account that the working hours of the organised grouping were, by 5 January 2015, more than three times the hours needed for the provision of care to CE and had concluded that, by maintaining an organised grouping at a level beyond that required to fulfil its purpose, the principal purpose of the group had been compromised. Correctly observing that the principal purpose need not be the sole purpose, the ET noted that the employees assigned to the grouping were also spending time on duties for other service users, as the Second Respondent had intended; it was not solely concerned with the percentage of time the employees spent on different activities and had been entitled to find that the provision of personal care for CE had become a subsidiary purpose. In carrying out this assessment, the ET had not inserted an extra stage into its reasoning; it had made a factual finding that there was no principal purpose as of 5 January 2015.

35. As for the second ground, it had been agreed that if it was found that there had been no transfer then the contracts would not have transferred; the ET's finding did not go beyond that which was agreed (it was making no finding in respect of any time period beyond the date of the transfer); the Second Respondent was not prejudiced by its Judgment in this regard.

The Second Respondent in Reply

36. To extent it was being said that it was not enough to identify the principal purpose of the organised grouping but it was also necessary to look at what the individual employees were doing, that was wrong: what the employees were actually doing might be a relevant consideration but it was not necessary that they were carrying out the activities in question

(hence **Mustafa**); that was how the ET had erred here. As for the argument that **Stobart** and other cases were only really concerned with the organised grouping issue, it was to be noted that at paragraph 44 in **Rynda** the fourth step identified required consideration of whether the transferor had organised the employees into a grouping "for the principal purpose" in question. That did not preclude an ET from finding that the principal purpose had changed but the ET had not made that finding of fact in this case.

37. As for Ms Reece's argument on ground two, she had not appeared below but in fact the agreement recorded by the ET at paragraph 9.4 was simply that if there was no service provision change then there was also no business transfer; a point confirmed by Mr Trory.

Discussion and conclusions

Principal Purpose

38. It is helpful to start by summarising the ET's conclusions in the light of the four stages identified in **Rynda**. First, as the ET found, the service provided by the Second Respondent for the CCG was to provide personal care for CE. Second, the activities carried out by its employees to provide that service were identified as, in the main, unqualified nursing assistance to enable CE to live as independent a life as possible. Third, the ET concluded that there were 11 employees who ordinarily carried out those activities; seven of whom were Claimants in the proceedings. Fourth, the ET was satisfied that the 11 employees concerned were organised into a grouping: this was not by happenstance but was "*a deliberate putting together of a team*" by the Second Respondent, which it maintained up to 5 January 2015.

39. The ET had further made a clear finding as to *why* the Second Respondent had organised the grouping of employees: this was for the purpose of looking after CE. It was

satisfied that the grouping had continued from 2005 until January 2015, but went on to find that its main purpose had changed over time: its principal purpose had fallen away, it was no longer predominantly concerned with the care of CE.

40. In reaching this conclusion, it is apparent that the ET was influenced by its calculation of the number of hours of care provided to CE by January 2015 (so, *immediately before* any putative transfer to the First Respondent), some 66% more than CE continued to require. In focusing on the position going into 2015, the ET was plainly correct: the purpose for which any grouping of employees is utilised may change over time; regulation 3(3)(a) requires an assessment of the position *immediately before* the service provision change and that might not be the same as the principal purpose at an earlier stage in the history (**Amaryllis**). The question raised by the appeal is, however, whether the ET fell into error by looking at what was actually happening - the actual activities being carried out by the employees concerned - rather than the continued intention behind the retention of that group.

41. For the Claimants and the First Respondent, it is said that the ET was entitled to look at the actual activities carried out by the employees: whilst the facts on the ground might not be determinative of the existence of an organised grouping (the fact that a group of employees were engaged in activities involved in the provision of the service would not be sufficient, they would need to be *organised* - something that would require some deliberate planning or intent; per **Eddie Stobart**) but they could provide the answer to the question as to its principal purpose. The Second Respondent counters that whilst the actual activities carried out by the grouping might be a relevant factor, they could not be determinative of purpose; that still required consideration of the transferor's intention in the organisation of that group.

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42. It seems to me that there is not necessarily a bright-line between these positions. The fact-sensitive nature of the enquiry required inevitably makes it hard to rule out the potential relevance of what is actually being done by the employees assigned to the particular organised grouping. That said, the actual performance of particular activities cannot be determinative of the question of purpose; after all, the work in issue might be subject to a temporary cessation at the relevant time but that would not prevent the condition laid down by regulation 3(3)(a)(i) being satisfied (**Inex** and **Mustafa**). Equally, however, the question of purpose gives rise to a question of fact: the regulation does not ask what is the subjective purpose of the putative transferor but what did the organised grouping have as its principal purpose - a question of fact, albeit that the employer's intention may well be relevant to its determination. How then is "principal purpose" to be determined?

43. In my judgment, the best way to answer this question is to return to the words of the regulation. Adopting that approach, it is apparent that it is not simply the carrying out of the activities that means that the existence of the organised grouping meets the relevant condition; the carrying out of those activities has to be the principal purpose of that grouping, whether or not it is in fact carrying them out at any particular time. If the grouping in fact carries out other work, that might well point to its organisation being for a purpose other than the activities relevant to the service provision change. Similarly, if the grouping comprises far too many employees than would be necessary for the activities in question, that might suggest either that not all the staff concerned were in fact assigned to it or that the real purpose behind the organisation of the group was other than the carrying out of the relevant activities for the client. These are possibilities that an ET might properly consider relevant to its assessment, but it would not be sufficient to identify the actual activities being carried out by the organised grouping without determining its principal purpose.

44. In the present case, the ET had made a finding as to the initial purpose of the organised grouping: that was to look after CE; the grouping did not come about by happenstance but was intentionally brought together for that purpose. I do not, however, read the ET's reasoning at paragraph 9.12 as amounting to a finding of *principal* purpose relevant to the position going into 2015. Rather, as the ET's findings of fact make clear, over time the requirement for employees to carry out activities caring for CE had diminished and, whilst the team had been reduced to 11, by 2012 it was still larger than was necessary for the care of CE. Notwithstanding CE's reduced need for personal care, the ET was satisfied that the Second Respondent had still retained the grouping as an identifiable team. It was unsure of the reason for this but allowed that at least part of the purpose - a subsidiary purpose - continued to be the provision of care for CE; what it did not accept was that the *principal* purpose of the grouping was the provision of that care. In reaching that conclusion, the ET kept in mind that the principle purpose need not be the sole purpose; it was satisfied, however, that, immediately before the change in service provision, the grouping's dominant purpose was in fact providing care to other service users in Bankfields Court.

45. Given the ET's primary findings of fact as to how the organised grouping of employees was utilised in the period up to January 2015, this was a permissible conclusion. It was, furthermore, the result of a precise application of the regulation. Regulation 3(3)(a)(i) does not ask what was the transferor's intention (although this will be relevant to determining whether or not there is an organised grouping and may suggest its purpose) but what was the principal purpose of the organised grouping of employees. Addressing this question the ET found that, at the relevant time, this was the carrying out of activities other than those which were to be the subject of the service provision change.

46. In reaching this conclusion, the ET had regard to what was in fact needed for the provision of the service in question (125 hours) as compared to the resource (in terms of employee hours) provided by the organised grouping (375). To the extent that this might suggest the application of some kind of objective test, I can see some merit to the Second Respondent's criticism that it would import a further stage in the assessment, not required by regulation 3(3)(a)(i). I do not, however, consider this would be a fair characterisation of the ET's reasoning. Having referenced the discrepancy between the resource available and the actual service need, the ET turned to the real question it had to address: the dominant purpose which the organised grouping had at the relevant time. In answering that question, the ET concluded that this had become the provision of care to service users in Bankfields Court in general; care for CE was subsidiary to that. Whilst allowing that the provision of care for CE still informed the organisation of the team (that was why it had been put together and it had retained its identity), the ET was satisfied that it was no longer the principal purpose. Keeping the language of regulation 3 firmly in mind, that was a permissible assessment of the dominant purpose. As such, there is no basis on which I could properly interfere with the ET's conclusion and I must dismiss this ground of appeal.

Employment

47. The question raised by the second ground is essentially one of fair hearing. In making the declaration that the Claimants were at all times employed by the Second Respondent and not at any time by the First Respondent, the ET had purported to determine an issue that had not been identified as before it at the Preliminary Hearing and, accordingly, had not been addressed by the parties. The Claimants contend that this poses no real difficulty as the ET made no actual findings on the question of employment; it is a point that thus still falls to be determined. For the Second Respondent, Ms Reece had understood that there had been a concession before

A the ET that permitted its declaration in this respect. This is, however, not the recollection of either counsel appearing below.

B 48. It seems plain that the declaration in the ET's formal Judgment goes further than was permitted by the actual scope of the Preliminary Hearing. Given that it is not an issue that the ET addresses in its reasoning, it is also apparent that it is something that remains to be determined, after full consideration of evidence and submissions by the parties. In the C circumstances, this part of the ET's Judgment cannot stand. I duly allow the second ground of appeal and set aside the ET's formal declaration as to the identity of the Claimants' employer, directing that this is a matter that still needs to be determined.

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