



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE FRANCES SPENCER

CLAIMANTS MS L TURNHAM, (1)
MR G WINNISTER, (2)
MR R STURTEVANT (3)

RESPONDENTS SRCL LIMITED T/A ERS MEDICAL (1)
LONDON BOROUGH OF CROYDON (2)

ON: 27-30 NOVEMBER 2017

OPEN PRELIMINARY HEARING

Appearances

For the First Claimant:	Mr. O Tahzib, counsel
For the Second and Third Claimants,	Ms M Stanley, counsel
For the First Respondent,	Mr. A Sugarman
For the Second Respondent:	Mr. S Forshaw, counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that there was a relevant transfer from the First Respondent to the Second Respondent within Regulation 3(1)(b)(iii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

REASONS

1. This was a preliminary hearing set down to determine whether there was a relevant transfer from the First Respondent (ERS Medical) to the Second Respondent (Croydon) for the purposes of the Transfer of Undertakings (Protection of Undertakings) Regulations 2006 (TUPE). On the first day of the hearing and by consent a Third Respondent, South London and Maudsley NHS Foundation Trust, ("SLAM") was discharged as a party to these proceedings.

2. The particular issues in dispute were further defined as follows:
 - 2..1 What are the relevant activities for the purposes of Regulation 3 (1)(b)(iii)? It was agreed by all the parties that these activities were being carried out, until 9th August 2016 by ERS Medical, the First Respondent
 - 2..2 Were they (i) the provision of non-emergency transport services pursuant to the SLAM transport contract and other related ERS work; or (ii) the provision of non-emergency patient transport services to Croydon's (the Second Respondent) daycare centres?
 - 2..3 Were the activities being carried out by ERS Medical (acting as a contractor or subsequent contractor on behalf of Croydon (acting as client)? Did ERS Medical cease carrying out these activities on behalf of Croydon?
 - 2..4 Did Croydon instead carry out these activities on its own behalf?
 - 2..5 Immediately before any service provision change was there an organised grouping of employees in Great Britain which had as its principal purpose the carrying out of these activities on behalf of Croydon?
 - 2..6 Where the activities carried out by ERS Medical before any service provision change and the activities carried out by Croydon after a service provision change fundamentally the same within the meaning of regulation 3(2A)?

The statutory provisions and the law

- 3 So far as is relevant to these proceedings Regulation 3(1)(b) of TUPE defines a service provision change as, a situation in which: -
 - “(i) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”);
 - (ii) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf; or
 - (iii) activities cease to be carried out by the contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,and in which the conditions set out in paragraph (3) are satisfied.
- (2) not relevant

(2A) references in paragraph 1 to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who cease to carry them out.

(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) not relevant.

- 4 Essentially the definition of a service provision change (an SPC) refers to a situation in which activities cease to be carried out by one person and are carried out instead by another. The subparagraphs cover “outsourcing”, a change of contractor and “insourcing”. This case involves insourcing.
- 5 It is settled law that for an SPC to take place the activities before and after must continue to be carried out on behalf of the same client. (Hunter v McCarrick 2103 ICR235). In Horizon Security Services, Ltd v Ndeze 2014 IRLR 859, HHJ Eady said that “the assessment of who is the client in the service provision change case will generally be a matter for the employment tribunal as a finding of fact”. She also noted that they may be more than one client and that in such a situation the employment tribunal would need to see who was “the real client”.
- 6 Jackson LJ said Rynda (UK) Ltd v Rhijnsburger 2015 IRLR 394 “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 4th 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”.
- 7 It is not necessary for all the activities carried out by a putative transferor before the relevant date to be carried out by the transferee. However the activities which do transfer must be “fundamentally the same” (Regulation 2A.) That question is one of fact and degree.
- 8 Regulation 3(3) provides that in order for a service provision change to occur there must be, immediately before the service provision change, “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.” Following Eddie Stobart v Moreman 2012 ICR 919 it is settled law that the mere fact that an employee spends all his time working for a particular client of his employer does not mean that there was an “organised grouping” of employees with the principal purpose of undertaking activities on behalf of that client. The regulation requires that the employees be “organised” by reference to the requirements of the client in question and that requires them to have been organised

intentionally. The fact that a combination of circumstances led to a group of employees working mainly on behalf of a particular client without any deliberate planning or intent, does not constitute an organised grouping of employees.

Evidence.

- 9 The Tribunal heard evidence from the following witnesses
- Mr. Jonathan Burns, Travel and Transport Manager for SLAM.
 - Each of the Claimants.
 - Mr. Gareth Venables, General Counsel for ERS Medical.
 - Ms Debbie Calliste, Head of HR at Croydon.
 - Ms Helena King, Group Manager at the Marsh and Willow day Centres and interim service manager for both those and the Langley Oaks Day Centres.

10 I had two lever arch files of documents running to over 800 pages

Findings of relevant fact

- 11 The 3 Claimants worked as non-emergency ambulance drivers and assistants. They worked with patients who suffered with mental health problems transporting them from their homes to day centres and back home at the end of the day.
- 12 Prior to 6th April 2015 the Claimants worked for the London Ambulance Service (LAS), which had a contract with SLAM for the provision of non-emergency patient transport services. The Claimants were all assigned to that contract (486-488). In April 2015, all the Claimants were transferred, by virtue of TUPE, to ERS Medical from LAS when ERS Medical took over the SLAM contract. This case concerns the legal consequences when the contract between ERS Medical and SLAM came to an end.
- 13 Mr. Burns gave evidence that since before 2007 SLAM had commissioned non-emergency patient transport services (NEPTS) for a range of patient services including transport for users of services at the Heavers and Langley Oaks Centres which were operated by Croydon Council. These were day centres for users suffering from dementia who were referred by their GP or social worker. The day centres had 2 main purposes. The idea was to prevent the social isolation of dementia service users by giving them an opportunity to get out of the house, engage with other people, and take part in activities. It also provided a break for their carers. Heavers was a facility which provided two daycare centres “Marsh” and “Willow” in the same location and had approximately 36 service users. Langley Oaks was in a different location had another 16 service users. At the Heavers centre there were a number of other facilities, apart from the daycare centres. Those facilities were operated by SLAM and included a memory clinic, liaison services and a community mental health team of older adults.

- 14 Following changes in usage by other Trust units, an assessment by SLAM of their use of NEPT Services between January and May 2015 showed that patient transport to and from Heavers and Langley Oaks Centres accounted for 94% of the cost of the contract and generated 93% of all activity. I am satisfied that the references to Heavers refers in fact to the Marsh and Willow day centres as the number of journeys undertaken to the other SLAM facilities situated at the Heavers site was very small.
- 15 In 2015 there was a tender process for the NEPTS contract which was won by ERS Medical. The purpose of the contract is said to be “to transfer vulnerable adults and children with mental health conditions” to and from outpatient appointments, to and from daycare centres and to and from residential homes to medical outpatient appointments. Mr. Venables unchallenged evidence was that the bid costings were centred on the transfers to the day centres and that ERS had been encouraged to price on the basis of 600 day centre journeys a month as “that was the known core of the contract”.
- 16 The tender process was run by SLAM but Mr. Murray, the Service Manager for Social Services at Croydon, was involved in discussions about the revised tendering process and setting the specifications for the tender. He was invited to participate in the panel which would assess and score the bids. There is a dispute of fact about whether or not Mr. Murray actually attended to help score the bid, Mr. Burns having given evidence that he did and Mr. Murray having presented an email for the purposes of this hearing to say that, although he was invited, he did not in fact attend. On balance, I prefer Mr. Burns’ evidence who attended in person (although I do not find that it is determinative of the issues I have to decide.) What was of more importance was Mr. Burns’ clear evidence that at the time that the contract was being discussed the Heavers and Langley Oaks day centres were the primary users of the NEPT service. That is supported by the tender document which sets out the sites to be covered by the contract and places the Heavers Resource Centre and the Langley Oaks Resource Centre at the top of the list. (134B)
- 17 ERS Medical won the bid and took over the NEPT Service in April 2015. ERS worked with Croydon to provide a booklet for service users and carers about the service. 6 employees TUPE’d across from LAS including the Claimants and after the transfer their work remained unchanged. ERS Medical employed a further 4 employees who were dedicated to the SLAM Contract. Draft contracts between ERS Medical and SLAM were drawn up on standard NHS terms but never signed, although in practice the parties worked to their terms. The contract was supplemented by a Service Level Agreement to address operational performance issues. Croydon is not expressly mentioned in the unsigned contract or in the Service Level Agreement and I accept that Croydon had no rights to enforce the contract. ERS charged SLAM for its services, not Croydon.
- 18 The Claimants gave evidence that they worked in teams of 2, a driver and an attendant. ERS Medical operated 3 vehicles and the Claimants worked

in teams of 2 alternating between driving and attending. Mr. Winnister worked 2 days a week, Mr. Sturtevant worked 4 days a week and Ms Turnham worked 3 days a week. Patients would attend the day centres on fixed days a week and the Claimants all built up a degree of familiarity with the patients as they would be transporting the same patients each week. (The Claimants generally transported all the Langley Oaks Service Users, while at Heavers they transported some service users, but the day centre also used its own staff and vehicles to collect and return service users from their homes.)

- 19 All of the Claimants had long experience of working with patients who suffered with mental health problems. They did not have an NVQ qualification in caring but they did have training in manual handling, first-aid, defibrillation, resuscitation and so forth. Ms Turnham (who was the first of the Claimant to give evidence) came across as a wholly honest and straightforward witness. I accept her evidence, supported by that of Mr. Sturtevant and Mr. Winnister (who were also plainly honest witnesses), that when they collected patients from their home addresses they would spend some time helping the patients. If they had no independent carers of their own the Claimants would go into their homes to help them get into their coats, ensure that their homes were locked up and that they had their keys. From time to time there would be more serious issues such as a patient coming to the door with no clothes on and needing to be dressed or taken to the toilet. Ms Turnham said she had changed incontinence pads. Occasionally a service user would not want to come with them and time and effort had to be spent coaxing them into the transport. Although they would not be able to take a service user who refused to attend Mr. Winnister said that he not recall a time when they had been unable to take a patient unless he or she had been physically unwell while Mr. Sturtevant said he could count on the fingers of one hand the times that they had not been able to take a patient. All of the Claimants would undertake this work. If there were any issues of concern that identified themselves during the transport to the day centres the Claimants would inform the day centre staff. Occasionally they would pass on messages from carers. Day centre staff in turn would pass on essential information about any new patient who they had been asked to collect. No suggestions had ever been made to the Claimants while they worked that something had happened during the journey that they were not qualified to deal with.
- 20 There was produced in the bundle (296) a document headed "Non-emergency passenger transport for Croydon Council dementia's day services. Passenger Transport Protocol". Although not wholly clear it appeared that this protocol had been written by ERS Medical with input from Croydon and SLAM. This set out the booking arrangements and amongst other things provided the following "*The nature of dementia means that sometimes client and carer information may have to be communicated between them and the day centre teams. Any and all such communication should be done between the client/carers and the day centre staff and never through ERS Medical Passenger Transport staff. It is not the role of ERS Medical staff to do so and they have been directed*

not to. If asked to, they are to politely remind clients/carers they cannot and to ask the client/carer to communicate directly with the day centre staff team. They centre staff will never ask the ERS Medical staff to communicate with carers and clients on behalf of the day centre." I accept however the Claimants' evidence that this document had not been provided to them, and that they had never been told that they should not communicate with the day centre staff and the carers. Ms King's evidence was that "from the protocol this [such communication] was inappropriate" but she also accepted that messages were in fact passed on in the way that the Claimants described.

- 21 The Claimants worked from 8 a.m. until 6 p.m. Between 8.30 and 10.30 (and sometimes as late as 11) they would transport patients from their homes to the day centres. From 3 or 3.30 they would transport the patients from the Heavers and Langley Oaks centres back home. Booking arrangements for the day centres were made between the day centre manager direct with ERS Medical and there appeared to be no maximum or minimum number of journeys that could be booked. The day centres assessed the service users for transport and advised ERS Medical of their needs and provided information about access.
- 22 In the middle of the day the Claimants would do other duties. Sometimes the job sheet for the day would require them to transport patients to other clinics operated by SLAM. If there was no other SLAM work indicated on their job sheets they were required to go to Croydon University Hospital where they would be given work for ERS Medical taking patients back home from outpatient appointments. (This latter work was work which ERS had undertaken for Croydon NHS Trust and was outside the SLAM contract.) However, it was understood that the day centre work took priority and the Claimants could decline work if it would prevent them being back at the relevant day centre at 3 (Heavers) or 3.30 (Langley Oaks) to do the afternoon run home. Mr. Venables said that he understood that the Claimant's duties were set out in this way because he had always understood that the primary purpose of the contract was designed to service the day centres. The Claimants all estimated that 90% of their work was transport to and from the day centres although the documentation shows that from April to September 2015 ERS work accounted for between 30% and 33.5% of their time, while SLAM work was less than 5% (559).
- 23 By January 2016, however, the in between work had all dried up and the Claimants were simply doing the morning and afternoon runs. There appeared to be little additional SLAM work and no additional ERS work. Whereas before the Claimants had been told to go and report to Croydon University Hospital, now they were told to park up at the Bethlem and not to go into the Croydon University Hospital control room the reason for this is not clear but Mr. Venables suggested (and it seems likely) that this is because ERS were in dispute with Croydon NHS Trust about the terms of that contract. In this way, the percentage of time spent on day centre work, as opposed to other SLAM or ERS work increased.

- 24 After ERS took over the contract in April 2015 there were rising activity levels generated by transport to the Croydon day centres. At some point there was talk of needing an additional vehicle. As the contract was on a pay per journey basis this put pressure on the SLAM budget and it reviewed the NEPT Service in September 2015. At this point, SLAM woke up to the fact that the patients being transferred to the day centres were not SLAM patients and that it was not SLAMs responsibility to transport patients to day centres which were operated by Croydon. Effectively Croydon had been receiving a free transport service from SLAM over many years. Initially Croydon indicated that there was an agreement for SLAM to do this on their behalf but no such agreement was identified. Croydon agreed to reduce the number of journeys it booked through ERS (304A).
- 25 Nonetheless, on 22nd October 2015 SLAM notified Croydon (307) that they would cease providing funding for transport to the Heavers and Langley Oaks day centres from 31st January 2016. (It is clear that the reference to Heavers in this context is to Marsh and Willow) Croydon accepted that SLAM had no responsibility to provide transport services to their day centres and began to make contingency arrangements to provide their own transport to service users. Usage of the ERS Medical transport “dramatically reduced in December and January” (364) in preparation for this change. Croydon did however seek an extension of the period before which the funding would cease to 31st March 2016. SLAM refused to do this but said that they would allow Croydon “to continue to use the contract with ERS Medical providing that Croydon paid the cost of the transport to and from its daycare centres at Heavers and Langley Oaks. A breakdown of the costs and activity from the start of the contract in April 2015 to October was provided (320). This breakdown shows that the combined subtotal of journeys from Heavers and Langley Oaks formed about 90% of cost attributable to the whole contract.
- 26 Initially the response of Croydon was to say that they would not pay and that they would cease to use the ERS Medical service. SLAM were informed on 8th December of this decision (322)
- 27 On 11th December Mr. Singh of ERS Medical wrote to Croydon (336B) saying that he understood that Croydon wished to cease using the ERS Medical service and carry out the service with their own employees. Accordingly, ERS Medical believed that TUPE applied and that the 10 employees assigned to the SLAM contract would transfer to Croydon as from 1st February 2015. There was no response from Croydon and Mr. Singh wrote again to Croydon on 24th December 2015. He attached information about the 10 employees and asked for information about the “measures” which Croydon might take in connection with the affected employees.
- 28 The TUPE issue had taken Croydon by surprise and in January Croydon wrote to SLAM to seek an extension of the NEPTs provision which would

give them time to deal with the TUPE issue. It was then agreed that the NEPTS would continue to be provided by ERS Medical until 31st March 2016 and that Croydon would reimburse SLAM for the costs. Croydon noted in passing that they hoped that the costs would be reducing as they had already begun to make their own arrangements for transporting the clients which had previously been transported by ERS. Updated costings were provided to Croydon. Croydon then reinstated the ERS Medical drivers onto their booking system and rotas.

- 29 During February Croydon sought, and ERS Medical provided, further information. Data provided showed that (save in December when the Croydon bookings had been reduced) the Croydon journeys were over 90% of the SLAM contract (404-408). ERS Medical also provided further information about the affected employees. Croydon's position was that ERS had failed to provide them with sufficient evidence to demonstrate that TUPE applied. "Whilst you have identified and organised grouping of employees, you have failed to demonstrate that a fundamental part of the work for each post holder is transferring to the council." (Ms Calliste's evidence was that they took this position because although they had been given a breakdown of costs attributable to the day centre work compared to the contract as a whole they did not know what the employees were doing in the middle of the day.) They also took the position that ERS provided a service to SLAM and SLAM was "the client" for the purposes of the TUPE Regulations (389). There then followed an exchange of correspondence between Mr. Venables, Pinsent Masons (then acting for Croydon) and DAC Beachcroft (acting for ERS Medical) setting out their respective positions on TUPE.
- 30 After various discussions, it was agreed that the contract arrangements would be extended initially until 15th April and then beyond. In April, further information was exchanged and a webinar meeting took place at which ERS Medical prepared a set of slides explaining its position on TUPE and setting out details of a typical day for each of the affected employees, information on the allocation of their time and the regularity of the service provided to the day centres.
- 31 In the meantime, no doubt because it now had to pay, Croydon was reducing the number of journeys that it undertook using ERS Medical staff. In March 2016, they had used 431 journeys but by June had booked only 292 (574). In June Croydon and SLAM agreed that SLAM would contribute 50% towards the monthly cost of the service backdated to 1st February. Croydon also asked SLAM to request a continuation of the existing service "at the same activity levels and costs" until 31st March 2017 and recognised that activity levels needed to be maintained or there was a risk the ERS would terminate the contract.
- 32 However, before those discussions could come to fruition ERS gave SLAM a months' notice to terminate the contract, asserting that SLAM was in repudiatory breach (573) given the stark reduction in journeys. This had made the contract unsustainable from a commercial perspective. On the

same day ERS also wrote to Croydon informing them that the contract would come to an end on 14th August and reiterating their position on TUPE.

- 33 On 19th July solicitors acting for Croydon disputed the application of TUPE. They stated that ERS Medical had been unable to demonstrate that the employees were assigned to an organised grouping of employees which had the principal purpose of providing services to the council. Secondly there could be no service provision change *“because when your contract with SLAM terminates the council will not be providing patient transportation services of the kind you currently perform for SLAM under the NEPTS contract. The daycare services offered to any Croydon clients (some of whom are also patients of SLAM) and who use the Heavers and Langley Oaks day centres will therefore be fundamentally different. The council’s approach will be to assign a key worker to the client and arrange for the key worker to collect the client, work with them all day and return to their home; thus, providing a wraparound client-centred service. The key workers all have social care qualifications as well as knowledge and first-hand experience of the services provided to the client at the daycare centres. You will agree that this is wholly different in character to transportation any service that ERS has provided to SLAM”*. This was the first time that Croydon had suggested that the service was different, notwithstanding that it had always transported its service users both via ERS medical and in its own vehicles.
- 34 The SLAM contract came to an end on 14th August 2016. The Claimants were informed that their employment would transfer under TUPE to Croydon but that Croydon were disputing it. Staff assigned to the SLAM contract were offered alternative employment within ERS and some chose to take this offer. The Claimants wished to transfer to the council. On 15th August they attended at Croydon’s premises but were turned away.
- 35 Miss King gave evidence in support of Croydon’s case that the service provided by Croydon was a “wraparound” service which was different to the service provided by the Claimants. (see also 752) Even when ERS Medical were providing transport services the centres had also used their own staff to collect and return service users. This use had fluctuated over time. Use of ERS Medical transport had dramatically declined in November and December 2015 (as set out above) in anticipation of the termination of the contract and had then risen again before declining once Croydon was required to pay for the service.
- 36 As set out above, the letter from Croydon’s solicitors said that the wraparound service was different to that provided by ERS Medical because the council would *“assign a key worker to the client and arrange for the key worker to collect the client, work with them all day and return to their home.”* However, it was apparent from Ms King’s evidence that this is not what happened. Croydon employed some 12 or 13 staff to work at the Marsh and Willow day centres. Although each service user had a key worker who was primarily responsible for each service user, while at the

centre service users would be interacting with all the employees, or some of them, depending upon which activities they were engaged with. Equally all of the staff, other than the day centre manager, would be placed on the rota to do the transport to and from the centres. Marsh and Willow had four vehicles which would each transport 7 or 8 service users. 2 staff were assigned to each vehicle but the same staff did not collect the same service users each day. A service user could be picked up by different staff on each day on which they attended the centre. May Beard for example was picked up by Dan and Edith on Monday, Rosaline and Vanessa on Tuesday, Danny and Alison on Thursday and Jane and Victor on Friday. Other examples could be given. It was simply not the case that the same key worker would always accompany each user.

- 37 Ms King sought to differentiate the service provided by ERS Medical and Croydon by saying that their employees would, if required, provide care to service users in their home, for example helping them to get dressed if they were not ready, whereas ERS drivers would only wait for the service user to be ready and would have to leave if they were not ready within 10 minutes. However, I accept the evidence of the Claimants that, while in theory they were required to leave if the service user was not ready, in practice they did not (and were not required by ERS) do so and also that in practice they provided considerable practical assistance to service users when they collected them. I am also satisfied that the ERS drivers became familiar with each of the service users as they picked up the same service users each week. Ms King suggests that a distinguishing feature was that the centre staff could also transport friends and carers, whereas the Claimants would have had to call to seek permission to do so, but did not give evidence as to how often in practice this occurred.
- 38 In practice, all Croydon day centre staff had an NVQ2 qualification and they were also qualified to give service users medication, which the Claimants were not. The NVQ qualification was a desirable attribute for day centre staff though not essential. Undoubtedly the NVQ2 was desirable for the day centre staff in dealing with the activities that the centre provided to the service users but was not necessary for the transport to and from the day centres. Croydon would have continued to use the ERS Service until March 2017 had ERS Medical not terminated it which does not indicate that there was any issue with the quality of the transport provided by the Claimants through ERS Medical or that they considered that the ERS service was fundamentally different to the service provided to those service users who were picked up by the day centre staff.
- 39 I was quite satisfied that the service provided by the Claimants and that provided by the day centre staff during the period of the day when the users were being transported was fundamentally the same.

Submissions and conclusions

40 It is the contention of ERS Medical and the Claimants that the Claimants' employment has transferred to Croydon and that on the termination of the SLAM contract there was a service provision change under TUPE. Croydon on the other hand resist that submission on the basis that:

- Croydon has never been ERS' client. There could not therefore be insourcing from contractor to client as required by Regulation 3 (1) (b)(iii).
- The Claimants did not form part of an organised grouping of employees with the principal purpose of carrying out the relevant activities. Instead the principal purpose of the team of employees maintained by ERS Medical of which the Claimants formed part, was to provide a range of services to SLAM.
- The activities undertaken by the team of employees of which the Claimants formed part, did not remain fundamentally or essentially the same after 15th August 2016.

I deal with these 3 questions separately.

The client question.

41 Mr. Forshaw refers to Horizon Security Services Ltd v Ndeze 2014 IRLR 859, Jinks v London Borough of Havering UKAEAT/0517/14 and Nottinghamshire Healthcare NHS Trust v Hamshaw 2011 UKAEAT/00 37/11. In Hamshaw Bean J noted that the definition of "client" in Regulation 3 was to "*the person who is carrying out the activities before or after the transfer as the case may be and on whose behalf (not for whose benefit) the activities are carried out.*" In this case, he submits that Croydon was the person for whose benefit the activities were carried out but not the person on whose behalf the activities were carried out. Mr. Forshaw also refers me to the definition of client in the Solicitors Act 1974 which includes the person who retains the solicitor and is liable to pay the solicitors costs.

42 Relying on those authorities Mr. Forshaw submits broadly that Croydon was not a client of ERS because, inter alia:

- Croydon was not a party to the SLAM Transport Contract.
- Croydon was not mentioned in that contract and had no obligations.
- Croydon was not party to the service level agreement which set out the terms on which the work was carried out including the invoicing terms, the data reporting requirements and the key performance indicators.
- Croydon had not been involved in negotiating the contract.
- Croydon had no rights under the contract. It could not terminate the contract and could not require SLAM to continue the contract or to fund the contract.
- The SLAM contract was not simply for transport to the Croydon day centres but for a range of other services unrelated to Croydon.

- Croydon was not even really a beneficiary of the provision of ERS services. Croydon did not accept that it was under a duty to provide transportation services to the service users. At best Croydon, could be said to be a “gratuitous beneficiary” like the service users in Hamshaw.
- 43 Against that both ERS Medical and the Claimants submit that Croydon was in fact the client. Ndeze had made it clear that the strict legal or contractual relationships do not necessarily determine who the client is. Mr. Sugarman for ERS Medical submitted that the real client was Croydon as that was the entity on whose behalf the NEPT service was being operated. Alternatively, there were two “real clients”, Croydon and SLAM. In Ottimo Property Services Limited v Duncan 2015 ICR 859 it was made clear that there could be more than one client.
- 44 Ms Stanley and Mr. Tahzib for the Claimants also submitted that Croydon was the client. It was not necessary for there to be a contract between the purported contractor and the client; the Tribunal should take into account the situation “on the ground” (Lorne Stewart plc v Hyde and others EAT/0408/12) and have regard to the overall picture. (See also CT Plus (Yorkshire) CIC v Black UKAEAT/00 35/16). If the tribunal did not consider that Croydon was the client, then an alternative analysis was that at the time of termination SLAM was acting as Croydon’s contractor. SLAM entered into a contract with ERS, who were acting as subcontractor servicing Croydon’s requirements as regards day centre transportation.
- 45 There is no clear definition of “client” in Regulation 3. Instead at subparagraph (1)(b)(i), a client is defined as a person who has carried out activities on his own behalf. Equally in subparagraph (iii) references are to activities ceasing to be carried out by a contractor on a client’s behalf and being carried out instead by the client on his own behalf. The issue is “on whose behalf” were the activities carried out before and after the transfer. The Regulation does not refer to the person who is responsible for payment or to the person who has contractual rights and responsibilities. The definition is kept deliberately simple. The client is the person on whose behalf the activities are carried out.
- 46 I am satisfied that in this case the entity on whose behalf the activities were carried out was Croydon. The transport service which the Claimants provided was for Croydon’s service users. It goes without saying, and was not disputed, that the day centre operation could not be operated without a transport service. The fact that Croydon received this service for free for many years (courtesy of SLAM) does not alter the true position which was that the service was being provided for Croydon. The reality of that situation is reinforced by the fact that when the contract came to an end Croydon still needed to transport its service users to and from the day centres. To that extent, evidentially at least, this question is tied up with the activities question which I deal with below.

- 47 I do not think the analogy with the definition of client in the Solicitors Act is helpful. Mr. Sugarman more usefully provides the definition of client from the Cambridge dictionary as “a customer or someone who receives services”. The council were involved in the tendering process as it was recognised that the day centres, which Croydon operated were the primary beneficiaries. The quote from Hamshaw on which Mr. Forshaw relies (distinguishing between “behalf” and “benefit”) does not assist because I am satisfied that the services were provided on behalf of Croydon, though that may also entail a benefit, in the sense of assisting them to provide services to their users. In Hamshaw Mr. Justice Bean was trying to make the point that the end user could not be the client in the same way as no one has suggested in this case that the service users could be the client.
- 48 It was accepted by all parties that the circumstances in this case were unusual in that, for historical reasons, (SLAM having been of the view that they had some obligation towards these day centres) Croydon was receiving services for which it did not pay. For those historical reasons, Croydon was not a party to the contract. Mr. Forshaw places much reliance on this and it was his best point, there being no direct authority for a situation such as this.
- 49 In Jinks (above) the EAT noted at paragraph 24 that the strict legal or contractual relationships do not necessarily answer the Regulation 3 question. The issue was who was the “real client”. That was supported in CT Plus (Yorkshire) CIC (above) where HHJ Richardson said that the service provision change provisions should not be determined narrowly. *“They can apply even where a person carrying out activities has no direct relationship with the putative client, at least if that person is a subcontractor; ...”* (Although HHJ Richardson qualified the reference to having their being no need for a direct relationship to a subcontractor situation, it does not appear to be to be an exclusive reference.) Also, as Mr. Sugarman helpfully submits, in Ottimo HHJ Eady said that *“I can also see that legal mechanism under which those activities are carried out will not always be determinative of whether there is a service provision change or not.”* This is a case in which focus on the contract deflects attention from the reality of the situation which was that the service was being provided for the benefit of Croydon, or to put it another way the real client was Croydon.
- 50 In any event, while it is true that there was no direct contractual relationship between ERS Medical and Croydon (even when Croydon started to pay for the service it did so via SLAM) it cannot be said that there wasn’t a very significant relationship between them. ERS Medical was at all times aware that transport to and from the Croydon day centres was the principal purpose and prime focus of the SLAM contract. No booklets were devised for any other recipients of the NEPT Service. The day-to-day aspects of the relationship (other than invoicing) demonstrate that the relationship operated as if ERS was the provider of the service and the council was its customer. It was the council who booked the transport, provided the information about the users, liaised between

service users and ERS in the event of delay or cancellation and attended regular quality assurance meetings. Croydon also controlled the volume of work that ERS performed when it made bookings. From February 2016, it was also contributing to the cost.

- 51 I am satisfied that the real client in these circumstances was Croydon. There is no need to adopt the alternative analyses submitted by Mr. Sugarman and Ms Stanley of there being 2 clients or a subcontractor relationship.

The activities question.

- 52 This question can be subdivided into a number of questions. First, what were the relevant activities for the purposes of Regulation 3(1)(b)(iii)? Secondly were the activities carried out by ERS Medical before 14th August 2016 fundamentally the same as the activities carried out by Croydon thereafter?
- 53 Mr. Forshaw submits, on behalf of Croydon, that the relevant activities were the servicing of the SLAM Transport contract as a whole, (though he also says that it is for ERS Medical to suggest which of these formulations it relies on). On the other hand, the Claimant and ERS Medical contend that the relevant activities were the provision of non-emergency patient transport services to Croydon's daycare centres. Mr. Forshaw made his closing submissions on that basis, but on the basis, that the activities post transfer had changed.
- 54 The activities referred to in Regulation 3(1)(b)(iii) are the activities which cease to be carried out by a contractor on a client's behalf. Here the activities which ceased to be carried out by ERS Medical on Croydon's behalf were the provision of non-emergency patient transport services to Croydon's daycare centres.
- 55 Were the activities carried out by ERS Medical before 14th August 2016 fundamentally the same as the activities carried out by Croydon thereafter? I have dealt with that question at paragraphs 35 to 39 above and I find that they were. The service which ERS Medical was providing to Croydon was transport to and from its day centres including a significant amount of care and assistance as set out above. After the transfer transport to and from its day centres was provided by the care workers employed in the day centres. While engaged in transporting the service users the transport and assistance activity that the Croydon staff undertook was fundamentally the same as activity provided by the Claimants. The fact that the care workers had NVQ2 qualifications or were able to administer medication does not change the fact that while collecting and returning service users to their homes the service was fundamentally the same as that provided by the Claimants.

The organised grouping question

- 56 Immediately before the 15th August 2016 was there an organised grouping of employees which had as its principal purpose the carrying out of these activities on behalf of Croydon? That purpose must be assessed at the point immediately before the change of provider and not historically (Amaryllis Ltd v McLeod EAT/0273/15) (although the historic position is bound to be of relevance in assessing purpose.)
- 57 On behalf of Croydon Mr. Forshaw submits that ERS Medical had organised its workforce to service the SLAM Transport contract and not to service Croydon's service users. The principal purpose for which the 10 employees were organised together was to service the SLAM contract and not any particular part of it. There had always been a team of employees undertaking this work which had transferred from South East Shared Services Partnership to LAS, and then from LAS to ERS Medical, notwithstanding changes in the composition of the work over the years.
- 58 It is correct that the 10 employees were part of a group assigned to the SLAM contract and not to any particular part of it. Nonetheless that fact does not assist Croydon because the issue is whether there is there was an organised grouping of employees which had "as its principal purpose" the carrying out of the activities concerned. From the commencement of the contract with ERS Medical the activities concerned, namely the transportation of the service users from their homes to the daycare centres and back again, comprised the vast majority of the Claimant's workload and the rest of their work was organised around it. That remained the position until immediately before the SPC, as demonstrated by the data for August 2016 (605L).
- 59 Mr. Forshaw submits that I should not focus on the percentage of the Claimant's workload which was devoted to the daycare centre work and refers to the Eddie Stobart case. He submits that the issue of time spent is not the governing criterion. The issue is one of organisation. He says there was never Team Croydon, there was only ever a Team SLAM. When the ERS and other SLAM work stopped in 2016 (resulting in a higher percentage of journeys being for Croydon), this was a matter of happenstance not organisation.
- 60 However it is clear that throughout the life of the contract the work and the team were deliberately organised in such a way that the Croydon day centre work came first. When ERS Medical took over the contract in April 2015 the principal work was the provision of transport and assistance to the daycare centre users. That is amply demonstrated by the data which showed that from January to May 2015 the day centre work comprised more than 90% of the NEPTS work. Although that percentage fluctuated over time it was always the vast majority of the work. (Excluding ERS work, the Croydon work nearly always exceeded 80% of the SLAM contract work (539)) The employees were assigned to the SLAM contract but the principal activity and purpose of that contract was the day centre work. This was also demonstrated by the way that the work was organised. The day centre work was regular, occurring every day at

regular times. The other work was organised around the day centre requirements and was irregular, differing from day to day. As set out above, Mr. Venables unchallenged evidence was that the bid costings were centred on the transfers to the day centres and that ERS had been encouraged to price on the basis of 600 day centre journeys a month “that was the known core of the contract”.

- 61 As the EAT said in Argyll Coastal Services Ltd V Sterling EAT/0012/11, and is clear from the wording of Regulation 3, the organised grouping of employees need not have as its sole purpose the carrying out of the relevant client activities, provided that those activities are its principal purpose. The employees who transferred to ERS Medical in April 2015 amounted to “an organised grouping of employees situated in Great Britain which had as its principal purpose” the transport and care during transit of service users for the day centres” on behalf of Croydon and that position remained unchanged when the contract came to an end in August 2016.
- 62 It follows that there was a relevant transfer from ERS Medical to Croydon within Regulation 3 of the TUPE Regulations. The Claimants’ claims for breaches of their employment rights lie against Croydon.

Next steps.

- 63 The case is listed for a 5-day hearing commencing on 10th September 2018. There will be a case management conference by telephone on 13th February 2018 at 10 a.m. The Claimants and Croydon should liaise to agree directions to be sent to the Tribunal not later than 6th February 2018.

Employment Judge F Spencer
6th December 2017