Appeal No. UKEAT/0064/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 February 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

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(1) MR M TABBERER
(2) MR D O'GORMAN
(3) MR G ROBERTS
(4) MR D PALSER

APPELLANTS

(1) MEARS LTD
(2) MR M BISSETT (DEBARRED)
(3) MR T WADMAN

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MS LOUISE MANKAU (of Counsel) Instructed by: Prolegal Solicitors Ltd 6 Agar Street London WC2N 4HN
For the First Respondent	MR JEFFREY JUPP (of Counsel) Instructed by: Mears Group plc Legal Department 26-28 Hyde Way Welwyn Garden City Hertfordshire AL7 3UQ
For the Second Respondent	Second Respondent debarred from taking part in this appeal
For the Third Respondent	No appearance or representation by or on behalf of the Third Respondent

SUMMARY

TRANSFER OF UNDERTAKINGS - Varying terms of employment

The Claimants were electricians who had originally been employed by Birmingham City Council ("BCC"); their employment had been subject to a number of **TUPE** transfers, ultimately to the Respondent. Within BCC, electricians had enjoyed payments of Electricians Travel Time Allowance ("ETTA"), albeit that the reasons for this allowance had ceased to exist over the years. Although managers within the transferor company had questioned payment of ETTA, it was an allowance that had continued to be paid until the transfer to the Respondent in 2008. The Respondent first questioned whether there was any contractual entitlement to ETTA. After litigation before the ET and EAT, it was determined that there was (see **Salt & Others v Mears Ltd**). Faced with that determination, the Respondent gave notice that it was bringing this contractual entitlement to an end. The Claimants objected, arguing that the reason for this variation to their contractual terms was a relevant transfer for **TUPE** purposes and therefore void (see Regulation 4(4) **TUPE**). The ET disagreed, finding that the contractual variation was made because ETTA was an outdated and unjustified payment. It further found that, in any event, the Claimants had not met the conditions for payment of ETTA, having not submitted claims - a condition, the Claimants noted, that had not been raised by the Respondent in the **Salt** litigation. The Claimants appealed against both these findings by the ET.

Held: *dismissing the appeal*

The ET had found that the variation of the Claimants' terms of employment was due to the Respondent's conclusion that ETTA was an outdated and unjustified allowance; in the circumstances, it was entitled to find that this was a reason unrelated to the earlier transfer to the Respondent. The **Salt** litigation had not itself been linked to the transfer but, in any event, that was simply the context in which the Respondent made its decision, it was not the reason for it. As for the ET's finding that the Claimants had not, in any event, met the relevant conditions

for claiming an entitlement to ETTA, there had been no finding on this issue in the **Salt** litigation and the Respondent had not been estopped from taking the point. This had, moreover, been expressly raised as an issue in the current proceedings and the Claimants had raised no objection; it was not open to them to take the point on appeal.

A **HER HONOUR JUDGE EADY QC**

Introduction

B 1. This appeal concerns the variation of a contract of employment following a transfer to which the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") applied. It raises the question whether the Employment Tribunal ("ET") correctly approached its task in determining that the variation was not for a reason connected with the C transfer.

2. At the relevant time, Regulation 4(4) of **TUPE** provided as follows:

D > **"4.** ***Effect of relevant transfer on contracts of employment***
>
> **…**
>
> **(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is -**
>
> **(a) the transfer itself; or**
>
> E **(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce."**

3. For the purposes of this appeal, it is common ground that the central question under F Regulation 4(4) is whether the reason for the variation relates back to the transfer, so that the transfer is the sole or principal reason for the change. Although there is some suggestion in **Smith & Others v Trustees of Brooklands College** UKEAT/0128/11 that whilst the reason G for the variation will always be a question of fact, the assessment whether that reason was connected with a relevant transfer will be a matter for legal assessment (see paragraph 29 in **London Metropolitan University v Sackur & Others** UKEAT/0286/06 at paragraphs 21 to 24 and **Carlton Care Ltd v Rooney & Others** UKEAT/112/00 at paragraphs 7 and 8), on this H appeal all parties have adopted the approach that both issues are to be determined as questions of fact. It is, moreover, common ground that the passage of time will not necessarily mean the

causal connection disappears. On the other hand, merely because the variation takes place against the backdrop of a transfer does not mean that it is the reason for that variation; this is not a "but for" test and context alone is not sufficient. The question to be asked is: what is the reason? - What caused the employer to do what it did? (See **Smith** at paragraph 28.)

4. In this Judgment, I refer to the parties as the Claimants and the Respondent, as below. This is the Full Hearing of the Claimants' appeal from a Judgment of the ET sitting at Birmingham (Employment Judge Woffenden, sitting alone over three days in March 2016 with a further two days in Chambers), sent to the parties on 10 May 2016. Representation below was as it has been on this appeal. By its Judgment, the ET dismissed the Claimants' claims of unauthorised deductions relating to the non-payment of Electricians Travel Time Allowance ("ETTA"). It was the Claimants' case that the non-payment of ETTA arose from a contractual variation made in 2012 for a reason connected with an earlier **TUPE** transfer.

5. On appeal, the Claimants' challenge to the ET's Judgment was permitted to proceed to this Full Hearing on the following two grounds:

(1) In finding that the 2012 variation of contract was not for a reason connected with the transfer but was by reason of the adverse judgment in earlier proceedings involving the Respondent (see **Salt & Others v Mears Ltd** UKEAT/0522/11), the ET ignored the fact that the entire subject matter of **Salt** was related to the transfer and non-payment of ETTA following the transfer and thus the reason for variation was still a reason connected with the transfer; the ET thus adopted an approach that would render the protection under **TUPE** ineffective if it could so easily be avoided; it further failed to explain why the Claimants were not paid for the period between the transfer and the decision to vary their contracts.

(2) Further, and in the alternative, the ET erred in concluding that the submission of a claim was a prerequisite to entitlement to ETTA.

The Relevant Background and the ET's Decision and Reasoning

6. The Respondent's core business is the provision of repairs and maintenance services for social housing. The Claimants are all electricians; along with some 15 others, they were employed by the Respondent on a contract between it and Birmingham City Council ("BCC"). Originally, the Claimants were employed directly by BCC, but over the years their employment transferred a number of times, each time constituting a relevant transfer for **TUPE** purposes. As of 1 April 2008, their employment transferred to the Respondent ("the Mears transfer").

7. When working for BCC, the Claimants were entitled to be paid ETTA. That had been in existence since 1958 (before any of the Claimants commenced employment); its original purpose being to compensate electricians for the loss of a productivity bonus caused by the need to travel to different depots. At that time, BCC had 30 to 40 depots across Birmingham but over the years depots had been closed so that, by the time relevant to these claims, only one remained - at Kings Road. Furthermore, since 2006, electricians had been allocated jobs on handheld computers and used vans to travel to those jobs. Productivity bonuses had also been phased out.

8. The Claimants had been told about ETTA by their managers, colleagues, or trade union representatives. Subject to the submission of a form, setting out the time claimed, and the authorisation of the claim by the appropriate line manager (see paragraph 7.4 of the ET's reasoning), ETTA would be paid automatically, and BCC plainly considered itself contractually bound to do so. As the ET found, the contractual entitlement thus provided that:

> **"31. … if an electrician had to work from a depot other than his home depot this triggered the payment of ETTA subject to the submission of a form … and the authorisation of that form by a line manager."**

9. Given the changes in the electricians' working practices, however, the ET considered there was a lack of certainty as to the applicable rate of ETTA; it rejected the contention advanced by the Claimants that there was a change to a fixed daily rate. As for the Claimants' alternative suggestion that "*each claimant had his own understanding of what he was entitled to claim for and for each claimant that was the relevant term*", the ET accepted only that payments of ETTA had continued to be made to those employees who had submitted forms claiming it (ET, paragraph 34). Thus, it found that the only entitlement to ETTA was dependent upon the individual submission of a claim; unless that had been done, there could be no payment due.

10. More specifically, the ET found as a fact that the Fourth and Fifth Claimants had not submitted any claims for ETTA since 2001 and, in the absence of their having done so, they had no entitlement to ETTA: ETTA payments were not wages properly payable to them for the purposes of section 13 of the **Employment Rights Act 1996** (see the ET at paragraph 34). In contrast, the other Claimants had made claims for ETTA (at a daily rate of either one hour or for an hour and a half) and those had been submitted, authorised and paid without a query or variation over a substantial period until the transfer to the Respondent. The ET concluded:

> **"36. … by the time of the Mears Transfer each of the first second third and sixth claimants were contractually entitled to payment of ETTA at a daily rate of either one hour (the third claimant) or an hour and a half (the first second and sixth claimant[s]) subject to the submission of a form and the authorisation of that form by a line manager either because of acceptance inferred by conduct or custom and practice regularly applied over a number of years. …"**

11. The ET's finding was, however, only of an entitlement that arose on the submission of a claim form. As the Second and Third Claimants had not submitted forms since the transfer to

A the Respondent, and the Sixth Claimant had not submitted a form since 2012, ETTA payments were not wages properly payable to them (see the ET's conclusion at the end of paragraph 36).

B 12. Prior to the transfer to the Respondent, managers had questioned the continued payment of ETTA but when the issue had been raised with Human Resources in 2006 the advice had been that claims should continue to be paid - the then employer did not wish to have a dispute with trade unions at a time when it was negotiating an extension to its contract with BCC. C Thereafter, it appears that payments continued to be made because that employer - the transferor - had considered that there was a legal requirement for it to do so.

D 13. When the contract transferred to the Respondent, it was, accordingly, unsurprising that the previous managers were unable to explain the continuing basis for ETTA (see the ET at paragraphs 7.12 and 7.13) and had described it as no longer applicable given the changed ways of working (see the ET at paragraph 7.14). E In the circumstances, the Respondent decided to stop making payment of ETTA as from 1 April 2008, for reasons it explained in a letter of 21 July 2008, as follows:

> **"38. … as a result of the then working practices of the electricians the respondent did not believe they were met [sic] what the respondent understood to be the eligibility criteria for entitlement to ETTA and decided no payments of ETTA would be made until the electricians could prove they were so entitled. …"**

F

14. Stopping payment of ETTA as from 1 April 2008 did not, however, bring the matter to an end. G On 9 July 2008, the trade union had raised a grievance on behalf of 10 electricians - which included the First, Second and Third Claimants - but that was rejected by the Respondent, and litigation had then ensued under the title of **Salt & Others v Mears Ltd**.

H

15. The Respondent's position in **Salt** was that there was, in fact, no contractual entitlement to ETTA in any event. The ET in that case disagreed, holding there had been unauthorised deductions of wages in respect of the non-payment of ETTA by the Respondent to the particular Claimants in that litigation since 1 April 2008. The Respondent appealed, but the ET's decision was upheld by the EAT (see its Judgment of 1 June 2012), and permission to appeal further was refused by the Court of Appeal.

16. The **Salt** proceedings having been determined against it, the ET found that the Respondent was faced with an unpalatable fact: contrary to its contention, it had been held that the Claimants in **Salt** had a contractual entitlement to ETTA. It was in that context that, on 30 July 2012, the Respondent wrote to the electricians - including each of the Claimants - observing that both the ET and EAT in **Salt** had recognised in their Judgments that the ETTA payments were "*outdated*" and "*prehistoric with no resemblance to modern times*", and giving notice as follows (see the ET at paragraph 7.23):

> **"With the clarity provided by the ET and EAT that the scheme is outdated and having fully reviewed the needs of the business, I can confirm that a decision has been taken that not only is the allowance … inappropriate, but also it fails to support our business needs going forward and it is wholly unfair on the remainder of the workforce who operate in exactly the same way as the [electricians] and who have not presented any claim to travel allowances.**
>
> **Regardless of whether or not you have or are currently attempting to exercise any right under this allowance, we can confirm that irrespective of whether the entitlement is an express or implied terms [sic] in your employment, this letter is notice that we no longer intend to be bound by it and we are therefore giving you a formal notice of the removal of this allowance from your Terms and Conditions of employment.**
>
> **Again, regardless as to whether or not the allowance is enforceable any entitlement to the allowance will cease on 01 September 2012 and the allowance will no longer form part of anyone's Contract of Employment.**
>
> **If you have not been submitting monthly claims for travel allowances since the transfer to Mears in 2008, you will not notice any difference as a result of this decision and your terms and conditions remain largely unaffected."**

17. Noting that there had been no cross-examination of the author of that letter as to its content, the ET found as follows:

> **"39. … I infer from its contents that once a tribunal and the EAT had found against it, the respondent decided to ensure that any such contractual entitlement was brought to an abrupt end because it believed that it was outdated in the light of the (by then very longstanding) working practices of the electricians. It would not countenance having to maintain a contractual entitlement to a fixed rate daily allowance to electricians the historic rationale for which had long since disappeared; the electricians did not lose productivity bonuses because of time spent travelling to a depot other than their home depot because there were no productivity bonuses and there was only one depot. This decision (to vary the contract by stopping the contractual entitlement) was not the same decision as the earlier decision to cease making ETTA payments some four years before nor was it taken for the same reasons, albeit the respondent's view that the ETTA payment was outdated is a common thread. I conclude the operative reasons for the variation (the adverse findings of the tribunal and EAT and the respondent's belief that the ETTA payments were outdated) were not the transfer itself or a reason connected with the transfer."**

18. Having thus concluded that the principal reason for the contractual variation was not the transfer to the Respondent under **TUPE**, the ET found that any contractual entitlement to ETTA had indeed ceased with effect from 1 September 2012 and duly dismissed all of the Claimants' claims of unauthorised deductions.

The Parties' Submissions

Ground 1

The Claimants' Case

19. The Claimants' first point of challenge is to the ET's finding that the 2012 variation of contract was not for a reason connected with the transfer. The Claimants contend that, on the ET's findings, the operative reasons for the variation were twofold: (1) the adverse findings of the ET and the EAT in **Salt**; and (2) the Respondent's belief that ETTA payments were outdated (see the ET at paragraph 39). Accepting these were findings of fact, the issue was whether the reasons for the variation, as thus found by the ET, were connected to the transfer.

20. Taking the first of the reasons found by the ET - the adverse judgment in **Salt** - the Claimants contend it was perverse for the ET to find this was not connected to the transfer:

(1) This ignored the fact that the entire subject matter in **Salt** was the **TUPE** transfer on 1 April 2008 and the relevant Claimants' entitlement to payment of ETTA following the transfer; the reason for the variation was thus still connected with the transfer - there was a clear and continuing link between **Salt** and the transfer and the current claims.

(2) The ET had adopted an interpretation of **TUPE** such as would render the Regulations wholly ineffective and open to easy avoidance: any earlier adverse judgment brought under **TUPE** could subsequently be relied on as itself providing the reason for a later variation of contractual terms and could be used as a device by employers seeking to avoid the difficulties otherwise posed by Regulation 4(4).

(3) The ET failed to take any account of the clear harmonisation intent contained within the Respondent's letter varying the Claimants' contracts which had stated:

> **"… not only is the allowance inappropriate, but also it fails to support our business needs going forward and it is wholly unfair on the remainder of the workforce who operate in exactly the same way as the [electricians] and who have not presented any claim to travel allowances."**

(4) Yet further, the ET failed to explain why the Claimants were not paid ETTA between the day the transfer occurred on 1 April 2008 and the decision to vary their contracts with effect from 1 September 2012. That suggested there was a continuing connection between transfer and non-payment.

21. As for the second reason found by the ET, it was perverse for the ET to find that the Respondent's belief that payments were outdated was not a reason connected with the transfer:

(1) Because it had found the same view as to the outdated nature of ETTA had been formed in 2006 (two years pre-transfer) but payment of ETTA had continued until the day of transfer (1 April 2008) (see the ET Judgment at paragraphs 7.12

and 7.14); it was not an answer to say this was due to the wish to avoid a dispute with trade unions at a sensitive time, as the ET had found that the payments had then continued because of a sense of legal obligation (see paragraph 36).

(2) The ET had further found that the Claimants' working practices had been the same since at least 2006 (see the ET at paragraphs 7.3 and 7.12). The only thing that had changed was the fact of the transfer; describing the Respondent's managers as bringing "*a fresh pairs of eyes*" to the issue (see the ET at paragraph 7.14) was simply connecting this to the fact of the transfer.

(3) The ET had found that the decision to stop payment of ETTA was made "*at the point of the Mears transfer*" (see paragraph 7.14). The reason relied on by the Respondent for ceasing to pay ETTA had remained the same, thus linking the 2012 decision back to the 2008 transfer.

22. The Claimants thus contend that the September 2012 variation was simply the official implementation of the decision taken at the time of the transfer and was therefore still connected with it. That was why the Claimants did not receive ETTA payments for the period from the transfer on 1 April 2008 to the variation on 1 September 2012 - the reason identified by the ET for the variation (that ETTA was outdated) was the same reason given by the Respondent for cessation of ETTA payments at the time of transfer; the fact of the delay (the variation taking place four years after transfer) did not negate that (see **Smith** at paragraph 15). Moreover, there was a clear chronology of events continuing to connect the transfer to the variation. Payment of ETTA had ceased on the day of transfer, and there had been a trade union grievance on behalf of 10 electricians in July 2008 regarding this non-payment; that had only concluded in June 2009, and thereafter the **Salt & Others** electricians had submitted their ET claims which were resulted in the Judgment in their favour in June 2012. It was only then

A that the Respondent varied the contracts, but that was less than two months after the EAT's Judgment in **Salt**.

B 23. The Claimants were not seeking to be better off as a result of the transfer, but the fact was that they had been worse off since and, on their case, because of the transfer.

The Respondent's Case

C 24. For the Respondent, it was observed that the determination of the reason for a variation (as with the reason for a dismissal) was a question of fact for the ET; that was also the case for the determination whether the reason was connected to the transfer (see **London Metropolitan** D **University v Sackur** at paragraphs 22 to 23 and, further, **Carlton Care Ltd v Rooney** at paragraphs 7 and 8). To the extent that the EAT in **Smith** (at paragraph 29) suggested otherwise, **Sackur** was to be preferred. Even if that were not the case and the issue was one of E legal interpretation, it was a question on which the decision of the primary fact finder was entitled to considerable respect (see **Serco Ltd v Lawson** [2006] ICR 250 at paragraph 3). The appeal on this first ground was now being put squarely as a perversity challenge and thus the EAT's ability to interfere was necessarily limited (**Yeboah v Crofton** [2002] IRLR 634 CA). F This had been a somewhat complex case carefully considered by the ET, which had reached permissible conclusions of fact that could not properly be challenged on appeal.

G 25. The reason for the variation was identified by the ET at paragraph 39. Accepting the Respondent's explanation of its reasons for the variation was genuine, the ET found it was because the Respondent believed ETTA was an outdated allowance in light of the longstanding H working practices of the electricians; it did not find that the Respondent's decision had been reached following the rejection of the appeal to the EAT in **Salt**. It had been for the Claimants

to show the reason for this decision in July 2012 was connected with the transfer that had taken place in April 2008. Given the decision in **Salt**, upheld by the EAT, the Respondent had had to choose whether it would continue to pay ETTA or whether it would unilaterally end that contractual entitlement. Deciding on the latter course, it could have achieved that either by dismissal and re-engagement or by giving clear notice of the variation; it chose the latter. The Claimants' position as employees remained the same regardless of any prior transfer under **TUPE**: **TUPE** did not put employees into a better position than they would otherwise have been and see, by way of analogy, **Enterprise Managed Services Ltd v Dance** UKEAT/ 0200/11.

26. In any event, contrary to what the Claimants sought to argue, the **Salt** decision had not been wholly concerned with the transfer, but rather with whether the Claimants in that case could establish a contractual entitlement to ETTA. The ET's decision, moreover, did not render **TUPE** ineffective, albeit that such cases will always, inevitably, involve a transferee Respondent, which might find it difficult to point to pre-transfer evidence of attempts to change the term. There would obviously be cases falling either side of the line, but here the ET had reached a permissible decision that the reason for the variation was genuine and not connected to the transfer. Indeed, there was no reason to think that if there had been no relevant transfer to the Respondent, the earlier employer (the transferor) would not itself have gone on to change the contract in the same way.

27. As for the criticism that the ET's decision failed to explain why the Claimants were not paid for the period between transfer and the decision to vary their contracts, that was apparent from the fact that the Respondent had made clear that it was not satisfied there was any contractual entitlement to ETTA. That was a different position to that taken by the Respondent

when the EAT had ruled in **Salt** that there was such a contractual entitlement (see the ET at paragraph 39). In any event, even if the Respondent's reasoning was the same in 2012 as in 2008, that would still not necessarily mean it was connected with a relevant transfer.

Ground 2

The Claimants' Case

28. The second substantive point of challenge was to the ET's conclusion that the submission of a claim was a prerequisite to entitlement to ETTA. On this point, the Claimants accepted that it would be hard to mount a perversity challenge; this was really being put as a reasons challenge. Specifically, the Claimants objected that this had not been how the Respondent had put its case in **Salt** - it had not then been the Respondent's case that the completion and submission of a claim form had been a pre-condition of entitlement to claim ETTA. Moreover, the Respondent was effectively benefiting from its own discouragement of the submission of claim forms: the Claimants had given evidence that they had been discouraged from putting in claim forms and told they would be ignored if they did. Indeed, as the ET recorded (see paragraph 7.16), the Respondent had made it clear to the Claimants that ETTA would not be paid, rendering the submission of such sheets futile, and when overtime sheets were submitted they were ignored (see the Judgment at paragraph 7.26). At least one Claimant had been told that future forms would simply be binned (see the Judgment at 7.31).

29. It was, further, not enough to say that it was for the Claimants to assert their contractual rights or to be taken to have waived them; there could be no unilateral variation, as that would be in breach of **TUPE**, and so proper regard should be had to the reality of the position and the Respondent's case in **Salt** or, at least, the ET needed to address these matters in its reasoning on this point. The ET's decision in this respect was thus inadequately explained.

The Respondent's Case

30. For the Respondent, it was contended that this was a straightforward finding of fact by the ET with which the EAT could not interfere. Even if it had not been a point taken by the Respondent in **Salt**, that did not mean it was not open to the Respondent and the ET in the present proceedings. Indeed, as the point had not been taken in **Salt**, there could be no question of issue estoppel in this regard; it was simply not a point in that litigation. In any event, the point had certainly been put in cross-examination in the present case and featured in the Respondent's closing submissions without objection on the part of the Claimants.

31. Whilst it was accepted that the Respondent had made it clear that submitting forms would be futile after its contractual variation in 2012, its early position had been to require the Claimants to demonstrate the contractual entitlement and the condition that forms be signed by managers was entirely appropriate, and, as the ET had found, a prerequisite to payment. In any event, it could not be the case that the Claimants understood there was no point to submitting claims, as at least one Claimant had continued to submit claims until 2012.

Discussion and Conclusions

Ground 1

32. In determining the Claimants' claims of unauthorised deductions, the ET had to ask whether the reason for the cessation of ETTA - the contractual variation in issue - related back to the transfer, such that the transfer had been the sole or principal reason for the change. It thus had to first find - as a question of fact - what had been the reason for the variation. The Claimants contend that the ET's finding was that the reason was twofold: (1) the outcome of the **Salt** litigation, and (2) the Respondent's belief that ETTA was outdated.

33. I disagree, however, with the premise of the Claimants' argument in this regard. It seems to me plain that the ET's finding was that the outcome of the **Salt** litigation was the context for the Respondent's decision, *not* the reason for it. That is apparent from the ET's first statement of its finding in this respect within paragraph 39. Although subsequently (towards the end of paragraph 39) the ET refers to "*the adverse findings of the tribunal*", that, as I read it, is a reference to the observations of the ET and the EAT in **Salt** as to the outmoded nature of ETTA. The reference to the ET's "adverse findings" thus relates to the nature of the entitlement claimed; it is not a reference to the ET's findings adverse to the Respondent that there was such an entitlement. What the ET clearly found was that the reason, or principal reason, for Respondent's decision to ensure that contractual entitlement to ETTA was brought to an end was because it believed that entitlement was outdated; that was a finding of fact open to the ET on the material before it.

34. In any event, as Mr Jupp has observed, having been told by the ET, and then the EAT, in **Salt** that it was wrong in its contention that there was no contractual entitlement to ETTA, the Respondent had to decide what course it should take; to the extent that the **Salt** litigation was in any way relevant to the Respondent's decision, it was because it set the context or forced the issue. That was not because **Salt** was, in itself, inextricably linked with the transfer, but because **Salt** determined the electricians' contractual entitlement to ETTA regardless of any transfer. If **Salt** formed any part of the Respondent's reason for the variation, it was because it was the confirmation of a contractual entitlement to an outmoded payment; it did not create a connection to the transfer.

35. As for whether the Respondent's reasoning, in any event, linked back to the transfer, the ET was entitled to see it as relevant that when managers had faced this issue previously (see the

findings as to what had taken place in 2006) the decision had been taken to continue to pay the claims for ETTA, notwithstanding management's view that these were unjustified. Initially, that had been because there was a desire to avoid a dispute with the trade unions; thereafter it appears that the previous employer (the transferor) considered there was a legal obligation that it do so. The important point was that the operative reasoning - the belief that the payment was outdated and unjustified - did not arise purely on the occasion of, let alone because of, the transfer; it was a pre-existing belief or state of affairs. Upon the Respondent coming onto the scene, it faced the same dilemma. Although it is right to say that the Respondent was presented with this problem upon the occasion of a transfer, that simply explains how the Respondent came into the picture at all; it does not explain why it questioned the payment of ETTA. This was a dilemma that had confronted management regardless of any transfer, which had continued from 2006, through 2008, and into 2012. The Respondent initially questioned whether there was any contractual entitlement to ETTA (see paragraph 7.14) but by 2012, it knew, courtesy of the ET and the EAT in **Salt**, that electricians could claim a contractual entitlement to ETTA, even if it seemed entirely unjustified.

36. Even if the ET is to be taken to have found that the **Salt** litigation was part of the Respondent's reasoning, I am, therefore, unpersuaded of the Claimants' case. The Judgment in **Salt** told the Respondent there was a contractual entitlement to ETTA and there is no reason to think the outcome of that litigation would have been any different if it had preceded the transfer. It was an adjudication on the electricians' contractual entitlement that would have been the same regardless of any transfer under **TUPE**; the decisions of the ET and EAT in **Salt** can be seen as entirely **TUPE**-neutral. After the litigation had been resolved, the Respondent was then faced - as management had been over many years - with an entitlement that made no sense, given the changes to working practices. It had initially questioned whether ETTA was

A contractual, which explains why it decided not to make payments of ETTA in 2008. ETTA was confirmed as a contractual entitlement in **Salt**, which meant that the Respondent either had to continue that entitlement or take contractual steps to bring it to an end. From the Respondent's perspective, **Salt** had changed the factual position in that it now knew that ETTA was contractual. It was in that context that it took the decision that it would not continue a contractual term that (as the ET in **Salt** had recognised) was outmoded and could not be justified; that was what the ET found was the real reason for the variation in July 2012. That was a permissible finding of fact as to what was the Respondent's reason for the variation: this was the set of facts or beliefs that informed its decision, per Cairns LJ in **Abernethy v Mott, Hay & Anderson** [1974] ICR 323. That, however, was not the end of the ET's task. It then had to go on to ask whether that was a reason connected to the transfer. For the Claimants, it is contended that it was inextricably linked to the transfer, as it had informed the Respondent's reaction to what it had found to be the transfer of terms back in April 2008. That, however, is confusing context with reason. The Respondent had learned of this apparently entirely unjustified payment at around the time of the transfer, but that would be no different to a new manager coming into the workplace and learning of such an entitlement (as the ET found had happened in 2006); as it happened, this was on the occasion of a relevant transfer, but that was not why the Respondent considered ETTA should cease to be paid.

37. The Claimants further object that the ET failed to take account of the Respondent's reference in its letter of 30 July 2012 to unfairness in the workforce. They contend this evidenced a desire to harmonise terms inherited through the transfer. That, however, is a mischaracterisation of the letter. It referred to the need for workplace fairness given that electricians were enjoying a benefit that had no justification and that other categories of workers did not. This was not a reference to the need to harmonise terms and conditions within

an occupational group - typically a concern arising on, and related to, a transfer - but the need for fairness across different job groups, regardless of transfer.

38. In the circumstances, I am clear that the ET here reached an entirely permissible conclusion that the variation in issue was not for a reason connected with the transfer. I therefore dismiss this first ground of appeal.

Ground 2

39. The second ground has really narrowed down at this hearing to an adequacy of reasons challenge; the Claimants are seeking to challenge the adequacy of the explanation for the ET's conclusion that there had to be an actual submission of a claim for ETTA to be paid.

40. Although, as the Claimants observe, this condition had not been raised by the Respondent in the **Salt** litigation. I cannot see, however, that the ET was bound to find this was determinative of the issue. It was a point that had neither been raised nor decided; the bigger issue - and, thus, the focus for both parties in **Salt** - was the entitlement to ETTA, rather than the precise conditions of entitlement. Moreover, although not clearly signposted in the Respondent's response in the present proceedings, it is not disputed that it was a point taken during the hearing - raised in cross-examination and in the Respondent's closing submissions - without objection by the Claimants. If the Claimants wished to object to the Respondent's apparent change in position (as compared to the **Salt** litigation), that was an objection they ought to have taken before the ET; it is not a point they can take for the first time on appeal.

41. In the circumstances, I am satisfied that this was a point that was live before the ET (and I note it is expressly identified in the issues at paragraph 5.2), on which it then made detailed

findings of fact as to the way in which ETTA had been claimed. That is, by the submission of timesheets and then by overtime forms (see the ET at paragraph 7.4 and then paragraph 30). Given the ET's findings, it was plainly open to it to reach the conclusion it did in this regard (see paragraphs 31 and 36); that is, that entitlement to ETTA was conditional upon the submission of a relevant claim form. It was a conclusion that was, further, adequately explained - the conclusions reached by the ET following its earlier findings of fact. To the extent that the position may have been confusing to the Claimants because of the Respondent's reluctance to pay an allowance when it did not understand its contractual basis - the position between 2008 and 2012 - it cannot be said that they could not have understood what they needed to do to assert the entitlement they claimed for (after all, some of the Claimants did continue to submit forms). Again, the ET was entitled to reach the conclusion it did in this respect, which - the ET having carefully considered the case of each Claimant - was adequately explained. I therefore also dismiss the second ground of appeal.