



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr J Griffiths

**Respondents:** (1) ACPOA Limited  
(2) Bournemouth Borough Council

**Heard at:** Southampton On: 19, 20, 21 and 22 November  
2018

**Before:** Employment Judge Gardiner

## Representation:

Claimant: Mr Townsend, Solicitor

First Respondent: Mr Watson, Legal Consultant

Second Respondent : Mr Piddington, Counsel

# JUDGMENT

1. The Claimant's employment did not transfer to the Second Respondent by reason of Regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2013.
2. The Claimant was unfairly dismissed by the First Respondent.
3. The First Respondent is to pay the total amount of £18,760.36 to the Claimant by way of remedy for unfair dismissal, as explained in the breakdown given in the Reasons below.
4. The protected period is from 27 March 2017 until 22 November 2018.
5. The protected amount is £3,538.65.

# REASONS

## Introduction

1. Mr Griffiths brings an unfair dismissal claim against the First Respondent, ACPOA, and the Second Respondent, Bournemouth Borough Council (“the Council”). He had been employed by ACPOA from 2003 until 24 March 2017, latterly in the role of Area Manager (South Coast), a role he had held since 2009.
2. In that role, he supervised several car parks that were managed by ACPOA. Those sites were either leased to ACPOA or ACPOA was engaged on a different commercial basis to operate the car parks. On 24 March 2017, the fifteen-year lease ended on one of those car parks, the Avenue Road car park in Bournemouth. Its owners, Bournemouth Borough Council, had decided that it would operate the Avenue Road itself. This was an insourcing situation. The Council accepts that it was a ‘service provision change’ as that phrase is defined in the Transfer of Undertakings (Protection of Employment) Regulations 2013. There was an ‘organised grouping of employees’ carrying out the service – namely, the two attendants based at Avenue Road, and their supervisor, who was also based at Avenue Road.
3. The Council has always accepted that the employments of each of these three employees transferred under the TUPE regulations, when it took back control of Avenue Road. ACPOA argues that Mr Griffiths was also assigned to this organised grouping. The result, ACPOA argues, is that his employment also transferred to the Council, with effect from 25 March 2017. In response, the Council argues that he was never assigned to the organised grouping, and therefore his employment always remained with ACPOA.
4. This is the essential dispute to be resolved in the case – whether immediately before the transfer on 24 March 2017, Mr Griffiths was assigned to the same organised grouping carrying out the lease with the Council.

## Issues

5. The issues were identified by Employment Judge Ford QC when he conducted a telephone case management preliminary hearing on 18 January 2018. They were as follows :
  1. It is agreed that there was a relevant transfer within the meaning of regulation 3 of TUPE of certain parking operations in Bournemouth from the First to the Second Respondent in March 2017. The precise nature of the operations which transferred will need to be

established at the hearing, because it is relevant to the second issue.

2. Was the Claimant assigned to the organised grouping of resources or employees that transferred to the Second Respondent under TUPE ?
  3. In the event that the Claimant's employment did not transfer to the Second Respondent, was he unfairly dismissed by the First Respondent, whether under regulation 7 of TUPE (dismissal where sole or principal reason is the transfer) or otherwise ?
  4. In the event that the Claimant's employment did transfer to the Second Respondent, was he unfairly dismissed by the Second Respondent, whether under Regulation 7 of TUPE (dismissal where sole or principal reason is the transfer) or otherwise ?
  5. If the Claimant is successful in his claims, what remedy should the Tribunal award ?
6. At the start of this hearing, the parties agreed that these remained the issues to be determined. It was accepted, notwithstanding the drafting of the Claimant's Schedule of Loss, that no claim has been issued for holiday pay nor has a claim been issued for wrongful dismissal in failing to pay Mr Griffiths for his notice period.
7. During closing submissions, the parties returned to the question of the issues for determination. For the first time, Mr Watson, the Legal Consultant representing ACPOA, suggested that the transfer might be a Regulation 3(1)(a) transfer, namely a transfer of an undertaking, rather than a service provision change. Mr Piddington, Counsel for the Second Respondent, objected to this recharacterisation of the issues.
8. The Tribunal does not consider it is now open to ACPOA to argue that there was a Regulation 3(1)(a) transfer for the following reasons :
- a. Firstly, in its Grounds of Resistance, ACPOA had accepted that this was a service provision change within Regulation 3(1)(b). There has never been any amendment to its Grounds of Resistance, which remains ACPOA's pleaded case;
  - b. Secondly, the issues had been agreed at the Telephone Case Management Preliminary Hearing, at which Mr Watson attended on behalf of the First Respondent, as set out above. The wording of the second issue clarified that the reference in the first issue to "a relevant transfer" was a reference to a service provision change, since the formulation in the second issue is only applicable to service provision changes.

- c. Thirdly, Mr Watson confirmed on behalf of the First Respondent at the start of this hearing that these were the issues that were to be determined.
  - d. Finally, no good reason has been given for why this issue was being raised at the conclusion of the case and could not have been raised earlier. Mr Watson referred to new evidence coming to light at a late stage. I do not consider that any of that evidence – which has in any event been disclosed by ACPOA themselves – forms a sufficient basis for reopening the issues for determination.
9. In any event, in *Kimberley Group Housing Limited v Hambley* [2008] ICR 1030 at paragraph 48, the EAT said as follows :

We see no principled reason for there being any different approach in respect of regulation 3(1)(b) service provision changes [to that in relation to a transfer of undertaking under regulation 3(1)(a)]. We note again that a transfer may be one or the other or both and it seems to us therefore that, because their effect is looked at in the same light in regulation 4, no difference of approach should be taken as to the test to determine whether an employee's contract is transferred with any particular part of the undertaking or service provision.

### Relevant legal principles

10. Regulation 3 of the of the Transfer of Undertakings (Protection of Employment) Regulations 2013 sets out the circumstances in which there is a service provision change :

#### **Reg 3(1)(b)**

a service provision change, that is a situation in which:

...

**(iii)** activities cease to be carried out by a 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.

#### **Reg 3(3)**

The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in

connection with a single specific event or task of short-term duration;  
and  
(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

11. Regulation 4(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2013 defines the employees whose employment transfers to the transferee. It is worded as follows :

**Reg 4 (1)**

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

12. There are two questions to answer. First it is necessary to identify the organised grouping of resources or employees with precision. Secondly, it is necessary to consider whether the Claimant was assigned to the organised grouping of resources or employees immediately before the transfer.
13. The language of assignment within Regulation 4(1) is derived from the leading case of *Botzen v Rotterdamsche Droogdock Mattschappij BV* [1986] 2 CMLR 50, a decision of the European Court of Justice. The Court considered that an employment tribunal must decide whether a claimant alleging that his employment has transferred was assigned to the economic entity transferring. The ECJ made it clear that it was not necessary for a claimant to be wholly engaged in the work to which the transfer applies. In every case it is a question of fact as to whether a claimant was assigned to the entity transferring immediately before the transfer.
14. Because of the way that Regulation 4(1) is drafted, the same test applies to service provision changes as well as to transfers of undertakings : namely was the claimant assigned to the organised grouping of resources or employees carrying out the activity.
15. In *Gale v Northern General Hospital NHS Trust* [1994] ICR 426, CA, the Court of Appeal stated that it was relevant to consider whether a particular employee was “part of the human stock or resources of the part transferred”.
16. In *Duncan Web Offset (Maidstone) Ltd v Cooper* [1995] IRLR 633, Mr Justice Morrison listed some of the factors that may be relevant in deciding whether a particular employee was assigned. These were :
  - a. The amount of time spent on one part of the business or the other;

- b. The amount of value given to each part by the employee;
  - c. The terms of the contract of employment showing what the employee could be required to do;
  - d. How the cost to the transferor of the employee's services was allocated between different parts of the business.
17. These are just some of the potentially relevant factors. It is not sufficient to assess the percentage of the working week spent on the activities that are the subject of the transfer to identify whether more than half of the working week was spent in relation to the transferring activities. As the EAT made clear in *Costain v Armitage* UKEAT/0048/14, the amount of time spent by an employee on a particular part of the business may be a relevant factor in a particular case, but it is not the test. The test is one of assignment. It is important for Tribunals to make detailed findings of fact as to a claimant's involvement with the activity that is potentially transferring, as well as in relation to the other duties that are not the subject of the transfer.
18. At paragraph 19 of her Judgment in *Edinburgh Home-Link Partnership v The City of Edinburgh Council* (UKEATS/0061/11 10 July 2012, unreported) Lady Smith observed :
- “Regarding the reg 4 issue of assignment, the question has to be asked in respect of each individual employee. It is not to be assumed that every employee carrying out work for the relevant client is assigned to the organised grouping ... If, for instance, an employee's role is strategic and is principally directed to the survival and maintenance of the transferor as an entity, it may then not be established that that employee was so assigned.”
19. In *WGC Services Limited v Oladele* UKEAT/0091/14, HHJ Richardson said at paragraph 18 :
- “In particular, it does not follow that, even if there is the requisite group of workers, an employee who is engaged working on the contract in question is necessarily assigned to the group. A Project Manager, as in *Williams*, may work on a particular project without becoming assigned to the requisite group of workers for the purposes of TUPE.”
20. In addition, the Tribunal has been referred to extracts from the IDS Brief on Transfers of Undertakings and to the following cases :
- a. *Mowlem Technical Services (Scotland) Ltd v King* : Decision of the Court of Session on 10 June 2005
  - b. *Argyll Coastal Services v Stirling* UKEATS/0012/11 (2012);
  - c. *Kimberley Group Housing v Hambley* [2008] ICR 1030
  - d. *London Borough of Hillingdon v Gormanley* UKEAT/0169/14

## Findings of fact

21. In making my findings of fact, I have had regard to the oral evidence which has been called. The Claimant gave evidence himself, and called Ian Le Maitre as his witness. The First Respondent, ACPOA, called the following witnesses :
  - a. Adrian Williams, Supervisor of the Portsmouth Port car park;
  - b. Chelsey Smith, HR Manager;
  - c. Mark Watkiss, Regional Manager (at the time), and the Claimant's line manager;
  - d. Glen Horton, HR Director
22. The Second Respondent called the following witnesses :
  - a. Gary Powell, Head of Traffic Management
  - b. Janet Perkins, Human Resources Business Manager
23. I have also had regard to the documents in the agreed bundle, and to further documents that were introduced on the third day of the trial. Documents were adduced on behalf of the Claimant in relation to remedy, and a supplementary bundle of further documents from APCOA on the issue of liability, running to some 54 pages. As a result of these extensive further documents, the Claimant was recalled to give oral evidence, and further evidence was given by Ms Smith and Mr Watkiss. In essence, the reason for the late introduction of the evidence is that ACPOA had not previously appreciated that these documents were relevant, although they had been requested by the Council in correspondence.
24. The Claimant's contract described his role as that of Area Manager (South Coast). His location was described as Portsmouth. He was issued with a Job Description that was the same as other Area Managers at the Respondent.
25. That Job Description contained the following provisions of potential relevance :

### **Objective of the Role**

- As the Area Manager, you will be responsible and accountable for leading, managing, delivering and achieving the service, financial and commercial development targets and objectives of the contract(s) (lease and management) within your Area;
- To work with the Commercial team to lead and support the Commercial activity in your Area to identify, develop and implement new opportunities and contracts which will increase your Area's portfolio and EBITDA;
- As the owner of each of your contracts' budget, you will be responsible for ensuring that the commercial performance of the contracts meets and exceeds the commercial expectations of the APCOA stakeholders

26. The Main Responsibilities and Accountabilities included reviewing competitor activity, and seeking out and realising opportunities to further expand APCOA's presence in the Area. This was reiterated under the heading 'Business Development' where he was required to "*monitor, react to and create commercial opportunities in the Area*". Given the wording of the previous bullet point, this was not just in relation to the existing contracts, but implied that the Claimant would be seeking to win new contracts within his area.
27. The Claimant was eligible to participate in APCOA's bonus scheme. He was entitled to a bonus of up to 10% of salary providing that the company achieved its legal EBITDA budget for the financial year. The amount of the bonus significantly depended on whether the Claimant achieved personal targets set in his annual performance review.
28. From 2009 until the date of transfer, the Claimant claimed expenses when travelling from the Portsmouth office to another site or office, but did not claim travelling expenses when travelling from home to Portsmouth. There was no explanation given in the evidence for why this remained the case throughout the period up until the transfer if, as ACPOA maintained, he was effectively based in Bournemouth to manage the Avenue Road lease. There was a further office in the Avenue Road car park from which he could work on any of his responsibilities, using his laptop.
29. On 2 December 2016 the Claimant asked Chelsey Smith for a copy of his contract, and was re-sent the same document he was issued when appointed Area Manager. No attempt had been made before that point or thereafter to change the description of his location as Portsmouth.
30. The Claimant had an annual performance review at which he was set his own personal targets for the coming year. Not all annual performance reviews have been produced. The supplementary bundle contained the APRs for 2008 (as conducted in February 2009), 2012 (as recorded in February 2013 and April 2013), the first half of 2014, 2015 and 2016. These documents also contain the objectives for 2009, 2013, 2014, 2015 and 2016.
31. In relation to 2013, he was required to achieve all contract KPIs pass scores for the contracts for which he was managing. At the time, this would have been the Portsmouth Port car park and the Bournemouth Avenue Road car park.
32. In relation to 2015, no specific financial objective was set for the Avenue Road car park. He had a composite financial target in relation to his contracts, an objective to maximise the commercial return by improving the gate income from gate and season tickets across both sites by 5% from the budget figure. He was also given an individual objective in relation to the generation of new business leads "within the Area" resulting in three viable



- deal books being produced across the year. Further individual objectives related to effective PDRs, and Quarterly H&S Audits.
33. In relation to 2016, his objectives were structured in a similar way. There were general financial objectives which were not specific to the Bournemouth Avenue Road contract; there was a business growth target of 2 clear opportunities identified and secured to a particular contractual point of development; and there was a specific objective that the Claimant secure an extension to the Portsmouth contract. In terms of his performance against the targets, it is noted that there had been no real progress in relation to business growth "*hampered by Romford and Dartford focus*". The Claimant had apparently secured an extension to the Portsmouth contract and therefore this target had been 100% achieved. As a result of the company's performance and his own performance he was paid a bonus of £1365 at the end of May 2017. It does not seem as if the Claimant was set any specific targets for 2017, or if he was, then no documents were produced showing those targets.
34. By March 2017, shortly before the end of the Avenue Road lease, the Claimant had responsibility for managing the following car parks :
- a. The Avenue Road car park in Bournemouth. This was one of the two largest car parks in Bournemouth. It was leased to APCOA, enabling APCOA to have considerable autonomy in operating the car park in such a way as to maximise their profit. As well as around 900 car parking spaces, it also had toilets that needed to be cleaned, as well as two offices. There were two attendants and one supervisor;
  - b. The Portsmouth Port car park. This had space for around 500 cars. Unlike the other car parks, the car park needed to be staffed 24 hours a day, 7 days a week, and so there were four attendants including a supervisor;
  - c. A multi-storey car park in Dartford used by shoppers that had about 550 spaces, together with a further 300 spaces in a surface car park;
  - d. A multi-storey car park in Romford, also used by shoppers, that had around 1000 spaces;
  - e. A flat car park in Banstead, with space for around 100 cars.
  - f. The car parks at seven Travel Lodges. There were two such car parks in Bournemouth, a further two in Southampton, one in Canterbury, one in Hastings and one in Tunbridge Wells.
35. The Bournemouth Avenue Road car park was leased to APCOA. The lease describes the permitted use of the car park as "public parking of private motor vehicles and cycles primarily for shopping purposes and for ancillary lavatories and offices (including lost property and enquiry offices)". Clause 20 of the Lease required APCOA to conduct and manage and operate the

Demised Premises as a 24-hour per day and every day per year public car park in an efficient safe and orderly manner and to take such steps as to prevent any misuse of the Demised Premises.

36. At one point, the toilets were being used by drug addicts to take drugs. The Claimant was required to take steps to stop the toilets being misused in this way.
37. By contrast, the Portsmouth Port car park was much quieter. It's location meant that it tended to be used almost exclusively by those using the port to board cruise ships or taking a ferry as a foot passenger for a long weekend. This meant that there were lengthy periods with minimal activity, but then busy periods when boats had arrived or were about to depart.
38. The day-to-day operation of each of these car parks was the responsibility of the supervisors at each car park. This included opening and closing the car parks, emptying the payment machines on a daily basis, basic machine repair and cleaning, and dealing with any collisions between cars and barriers.
39. The staff at Bournemouth were also responsible for emptying the machines at the two Travel Lodges in Southampton, and the two machines in Bournemouth. There was a similar arrangement for collecting the money from the other three Travel Lodges, in that this would have been done by other members of staff and this was not the Claimant's direct responsibility. However, the mileage forms record occasional visits in the same day to Canterbury/Hastings and Tunbridge Wells. 28 hours a month were allocated in ACPOA's financial documents to servicing the Southampton and Bournemouth travel lodges. This included the Claimant's time, but the apportionment between the Claimant and the three staff based at Bournemouth has not been made clear. The Travel Lodges formed part of a larger national contract, and there was a contract manager dedicated to that contract with overall responsibility for how it operated.
40. In relation to each of these car parks, apart from the Travel Lodges, Mr Griffiths retained responsibility for dealing with complaints, liaising with the car park owner, addressing strategic issues, such as setting the parking charges, ordering stock (such as rolls of tickets for the ticket machines) as well as more substantial maintenance issues, such as addressing the dilapidation concerns in the last few months of the Bournemouth Car Park contract.
41. The car parks in Dartford, Romford and Banstead had been inherited from another Area Manager in May 2016 when that person had retired on grounds of ill health. As with the Portsmouth Port car park and the Avenue Road car park in Bournemouth, there was a supervisor for the Dartford and Romford car parks. Whilst no more qualified or experienced than the Portsmouth and Bournemouth supervisors, the single person supervising both Dartford and Romford was not rotaed to carry out car park attendant duties. As a result, that person was able to provide more assistance to

- resolve operating problems in the car parks, and would often deal with customer complaints.
42. However, Mr Griffiths was expected to, and did, travel to Dartford, Romford and Banstead. In Autumn 2016, he was required to spend significant additional time at Romford to deal with structural and safety issues caused by a vehicle fire in the car park. This exemplified a general pattern in which particular issues on individual sites could take up more of the Claimant's time at particular periods. For instance, in 2013, the Claimant spent more time on the Portsmouth Port car park as the contract was approaching renewal time. He was successful in ensuring that the contract was renewed for a further five years.
  43. In return for taking on these additional duties at Romford, Dartford and Banstead, the Claimant was paid an additional £250 per month. Internal emails described this arrangement as a secondment but that label was never used to the Claimant. The arrangement was open ended with no end date stipulated for this work. He was still performing some duties in relation to these three sites shortly before the date of the transfer and he continued to receive the supplement of £250 per month in return right up until the end of March 2017.
  44. These duties had not been formally reallocated to another Area Manager before the Claimant was expected to be involved in the particular issues prompted by the ending of the Avenue Road lease. No document has been disclosed showing when responsibility for Banstead, Romford and Dartford passed from the Claimant. There is an email from the Claimant to Mr Watkiss suggested that there could be a meeting in Romford/Dartford on Thursday 9 March to hand over to another Area Manager, Stuart Marchant. By this stage, the Claimant had been told by his employers that he would be transferring to Bournemouth Borough Council. Mr Watkiss responded that Mr Marchant was on holiday until 20 March 2017, and said he had set up a meeting on 21 March 2017 so that a handover for each site could be done then.
  45. According to the mileage records, he visited Dartford and Romford on 21 March 2017. On the balance of probability, given the preceding email, on this date he handed over responsibility to Mr Marchant, three days before the date of the relevant transfer. Notwithstanding this, he continued to be paid his additional monthly allowance until the end of March. However, on the balance of probabilities, the handover occurred because it had been determined that the Claimant would no longer be retained and therefore it was necessary to transfer his other duties to other employees. Mr Marchant had been an employee since about November 2016. If Mr Marchant had been taking over responsibility for managing these contracts in any event regardless of whether the Claimant was potentially leaving, this would have occurred sooner than three days before the date of the transfer.
  46. In addition to his management responsibilities for each of these car parks, on an occasional basis the Claimant was asked to carry out audits at other

car park sites across the country. During the period for which there are records in the bundle, he visited Leeds, Birmingham, Kettering, Thurrock, and Wembley Stadium. On the balance of probabilities most if not all of these trips, being outside his area, were to carry out audits on APCOA's behalf of sites managed by other managers.

47. In addition, the Claimant was also responsible for business development. He was encouraged to participate in the Bournemouth Business Improvement District. Whilst this may have had some benefit in terms of his existing Avenue Road site in Bournemouth, in terms of raising APCOA's profile locally and enabling them to spot revenue opportunities in relation to the Avenue Road car park, the main advantage for APCOA was to identify other business opportunities in the Bournemouth area. There was a particular emphasis on considering further opportunities in Bournemouth because ACPOA already had one of the two largest car parks in Bournemouth, and an office there. Finding other sites might allow economies of scale to be enjoyed, given the existing workforce already based in Bournemouth.
48. He also visited several other sites within the South Coast area to see if they were potential sites to be developed into car parks. He had been set targets for business development from new sites as well as increasing revenue from existing sites.
49. Finally, the Claimant attended meetings on an infrequent basis at Uxbridge, where ACPOA had its headquarters, or at Leicester where training was provided.
50. The Claimant did not complete any time sheets recording the time that he spent on each of the contracts for which he was responsible. The only documentary evidence of any assistance is his mileage record. These documents noted the destination to which he was travelling when he made a claim for travelling expenses. In addition to visits to places for audits or meetings, and visits to Romford, Dartford, Banstead, and also to Tunbridge Wells, Hastings and Canterbury (where the Travel Lodges were based) the records show that he was a frequent visitor to Bournemouth.
51. However, these records do not identify the total time he spent on Avenue Road issues, nor even the total time spent in Bournemouth. From his Bournemouth office, he would have been just as able to address issues on any of the contracts he managed as if he had been working from the Portsmouth office. Nor can it be assumed that on any particular date on which he visited Bournemouth he was inevitably involved to any extent on the Avenue Road site, given that part of his role was to source new business opportunities, with a specific focus on the Bournemouth area.
52. There was a dispute on the evidence as to the total proportion of his work that the Claimant spent on activities in connection with the Avenue Road car park. Mr Griffiths' own evidence is that he spent about 25% of his working week at the Avenue Road car park, and about 40% of his total

workload was connected to that site in some way – excluding his time involvement in the Business Improvement District. Mr Watkiss put the figure at 60-70%. He himself was not working alongside Mr Griffiths, given that he line managed around 10 other Area and Contract Managers. However, he bases this on his regular conversations with Mr Griffiths and his knowledge of the demands of the contracts for which Mr Griffiths was responsible. Mr Horton puts the figure at around 70%. This is based on his experience of working as the HR Manager for the Claimant's region until 2013; and his overall impression given that Avenue Road was one or the seven or eight leased contracts that offered the greatest financial rewards for ACPOA's business.

53. In the months leading up to the end of the Lease, Mr Griffiths spent somewhat more time on the Avenue Road site in Bournemouth, because the dilapidations were extensive and these needed to be fixed before the end of the Lease. There were disputes with the Council over the dilapidations that needed to be addressed. This meant that he attended the site more frequently, and that the issues that he was dealing with were more complex and more time consuming.
54. The mileage records show that of the twenty-one working days in January 2017, there were nine days when he travelled to Bournemouth and a further day on which he travelled to Bournemouth and Petersfield. This is just under 50% of his working days – however as already stated, it is not clear whether the whole day was spent in Bournemouth nor whether it was all spent on Avenue Road business. The mileage records note that mileage is computed based on the miles travelled from the postcode of the Portsmouth Port car park office, rather than on the miles travelled from his home postcode. The inference from the mileage document, not displaced by oral evidence, is that he was travelling from his Portsmouth office to Bournemouth, and therefore had spent time in the Portsmouth office.
55. In February 2017, of the twenty working days, twelve involved travelling to Bournemouth. This is 60% of the total working days. Again the mileage is calculated from the Portsmouth office, rather than from his home address. In March 2017, there were eighteen working days until the date of the transfer and twelve involved travel to Bournemouth. On a further day he visited both Bournemouth and Romford, covering over three hundred miles.
56. This shows that the number of days spent travelling to Bournemouth was increasing over the last three months of the contract. This is what would be expected given the need to address all the issues surrounding the ending of the Lease.
57. In his witness statement, Mr Horton says that Mr Griffiths told him that approximately 70% of his work was at the Bournemouth site. I accept that there would have been a conversation between the two about the amount of work that Mr Griffiths was doing at Bournemouth. This was because Mr Horton had taken it upon himself to draft a letter for Mr Griffiths to send to the Council in an attempt to persuade the Council to accept that his

employment should transfer to the Council. However, on the balance of probabilities, I do not consider that Mr Griffiths told him that on average 70% of his working hours were spent on Avenue Road car park matters. Firstly, Mr Griffiths was clear in his evidence that he did not say that to Mr Horton, and I accept his evidence. Secondly, the letter drafted by Mr Horton for Mr Griffiths to send is worded as follows :

*“Had you taken the time to ask me some simple questions I could have confirmed that I spend in excess of 50% of my time spent on the Bournemouth car park”.*

58. This is the best contemporaneous evidence of what Mr Griffiths would have told Mr Horton about his time spent on Avenue Road car park issues. There is no good reason to think Mr Griffiths amended Mr Horton’s draft. Even if he did, then this was because the wording he used was more reflective of the time he was spending at the end of the contract.
59. Mr Griffiths now says that his suggestion of more than 50% was an overestimate, and he was encouraged to record that a higher percentage of his total time was being spent on the Avenue Road car park in order to secure his future employment with the Council. This was in circumstances where ACPOA had made it clear they were unwilling to keep him after the Lease ended.
60. I accept that the amount of time spent on issues in connection with the Avenue Road car park was generally around 40% in the period from May 2016 onwards, at least until the last few months before the ending of the Lease. Although it was only one of several car parks for which he was responsible in his role as Area Manager, it generated significantly more income than the other car parks, and therefore would have merited more of his focus.
61. Before May 2016, when he acquired car parks in Romford, Dartford and Banstead, a greater proportion of the Claimant’s working time would have been spent on the Avenue Road site. The proportion of time spent on the Car Park increased again in the first three months of 2017, once fire damage in the Romford car park had been repaired in the last few months of 2016. That had required several visits to Romford, as the mileage records show.
62. During the final three months of the Lease, a little more than 50% of his time would have been spent on the Avenue Road car park issues, in order to fix the extensive dilapidations and deal with other issues prompted by the imminent ending of the Lease.
63. In her witness statement, Chelsey Smith argues that there came a time when “he was moved away from his primary base in Portsmouth to look after the management and delivery of the Bournemouth site”. Later, she says that “it was a natural choice therefore to move Jim’s focus to the Bournemouth site”. However, she has no direct knowledge of this nor does

she base this on any particular documents. Rather this was apparently her understanding from what she had been told by others. Mr Watkiss started as Regional Manager in 2012 and accepted in evidence that the demands of the Bournemouth Avenue Road site and the Portsmouth Port site had remained broadly the same during his time as Mr Griffiths' line manager. If Mr Griffiths had been moved in the way that Ms Smith describes, then this must have occurred before Mr Watkiss' time.

64. Mr Griffiths was not cross-examined about any such move. I find that his primary base, so far as his contract was concerned, remained the Portsmouth office. This was where the contract stated he was located and this was from where his mileage expenses were calculated. There was never a point in time when he was specifically asked to be predominantly responsible for the Avenue Park site. This is not recorded in the documents from his personnel file that were disclosed on the third day of the hearing, nor has there been any persuasive evidence to that effect.
65. On the third day of the hearing, documents were disclosed showing that for budgetary purposes the entirety of Mr Griffiths's salary was allocated to the Bournemouth contract. 50% of the £250 increase he received for looking after Dartford and Romford was allocated to Dartford and 50% to Romford. For whatever reason, no salary cost was allocated to the Portsmouth Port car park. This issue was not addressed in the correspondence at the time of the transfer, nor in the pleadings or the witness statements.
66. Apparently it was standard practice that the entirety of an Area Manager's salary would be allocated to their most significant client. So in the case of the Area Manager based at Northwick Park, the entirety of his salary was apparently allocated to the Northwick Park contract. This was his most valuable contract even though he was also managing 21 other contracts.
67. APCOA met with the affected employees on either 28 February or around 3 March 2017 to discuss the ending of the Lease and the implications for their employment. The precise date is immaterial in relation to the issues that require determination. There then followed lengthy correspondence between APCOA and the Council in which there was a dispute as to whether the Claimant's employment would transfer to the Council. APCOA made it clear that they considered that his employment would transfer.
68. There was a group and individual meetings between Ms Preston from the Council and the three employees who would be transferring on 17 March 2017. Mr Griffiths was present at the outset of the group meeting but did not participate and was not offered an individual meeting by the Council. During the meeting APCOA told the Council that the Claimant was responsible for only two sites, Bournemouth and Portsmouth, which was not correct.
69. As part of this process, APCOA created a document headed "Jim Griffiths – Bournemouth Site Accountability". This document was not already in existence. It was drafted just before 3pm on 21 March 2017, three days

before the date of the transfer. It focused on his responsibilities at Bournemouth but did not deal with his other responsibilities.

70. APCOA advised him to report for duty at the Council's offices on 27 March 2017. When he did so, he was sent home and told that he would not be offered employment with the Council.
71. Around the time that the Lease was ending, APCOA had won a new contract at the St Mary's Hospital at Newport on the Isle of Wight. This was a security and parking contract that the Claimant had been involved in securing, visiting St Mary's Hospital on 14 December 2016, as recorded in the time sheets. There would be a need for a contracts manager to manage this contract. The oral evidence was that this would need to be a dedicated contracts manager, although no documents were disclosed detailing the precise start date or the precise skillset required for this contracts manager.
72. APCOA's accounts department regarded this new client relationship as going live on 1 April 2017. That meant that APCOA could incur costs and allocate those costs to the St Mary's contract. This would have allowed staffing costs to be allocated to the contract from 1 April 2017 onwards, including costs associated with the incoming contracts manager.
73. After the transfer, management of the Avenue Road car park was assumed by the Parking Manager already employed by the Council to look after other car parks in Bournemouth owned by the Council and also to look after on street parking.

## **Arguments**

74. ACPOA's essential argument is that the Claimant was assigned to the Avenue Road contract because it was his most significant contract. Reference is made to the budget allocation in the Profit & Loss account recording that all of his salary was allocated to the Avenue Road contract. ACPOA relies on the evidence from Mr Watkiss that the majority of the Claimant's time was spent on the Avenue Road contract.
75. Despite the Claimant's title being Area Manager, ACPOA argues that this title was misleading. He was given this title because he was responsible for more than one contract. In truth, he ought to have been referred to as a contracts manager.
76. Therefore it is argued that he must have been assigned to the Avenue Park contract and his employment must have been transferred to Bournemouth Borough Council.
77. By contrast, Bournemouth Borough Council argues that the Claimant was never assigned to the Avenue Road Car Park, even if at times he spent more than half his working time on issues in connection with that contract. There was no such express assignment, contrary to what Ms Smith stated in her evidence. Nor should assignment to the Avenue Park contract be



inferred from all the circumstances. Rather, he was assigned to his area, as exemplified by the targets he was set for business development across his area, the extent of the other contracts he was managing, the reference in his contractual offer letter to his location as being Portsmouth and the calculation of mileage for expenses purposes from Portsmouth rather than Bournemouth, and the number of other car parks for which the Claimant was responsible in addition to the Avenue Road car park.

78. The Council argues that the manner in which APCOA conducted themselves in the weeks leading up to the transfer was deliberately misleading, and designed to dump the Claimant on the Council by encouraging them, wrongly, to see the Claimant as assigned to the Avenue Road activities when his remit was far broader than this.
79. The Claimant supports the arguments advanced on behalf of the Council in contending that he was not assigned to the service provision which was reverting to being provided by the Council. Although the Claimant was bound to succeed against one or other of the Respondents, it does not follow that he has no vested interest in identifying the particular Respondent against which his claim succeeds. His remedies are potentially different against each Respondent, as will become apparent.

## Conclusions

### ***First issue – the precise nature of the operations which transferred***

80. The operation which transferred was the provision of car park services to car users in Bournemouth wanting to use the Avenue Road multi-storey car park. This is clear from the terms of the Lease where the permitted use of the car park is described in the following terms :

“the public parking of private motor vehicles and cycles primarily for shopping purposes and for ancillary lavatories and offices (including lost property and enquiry offices).”
81. Under “tenants covenants” the tenant covenanted to conduct and manage the demised premises as a 24 hour per day and every day per year public car park in an efficient state and orderly manner and to take reasonable steps to prevent any misuse of the Demised Premises.
82. The operation which transferred was an operation that had been carried out on a commercial basis by APCOA. It was important that the car parking services were carried out efficiently, making best use of available resources. In order to achieve this, there was a management aspect to the operation above and beyond the duties carried out by the supervisor at the Car Park.

### ***Second issue – was the Claimant assigned to the organised grouping of resources or employees that transferred to the Second Respondent ?***

83. The Tribunal's conclusion is that Mr Griffiths was not assigned to the organised grouping of resources or employees that transferred to Bournemouth Borough Council when the Lease on the Avenue Road car park ended and the work was brought back in house.
84. Addressing each of the *Duncan Webb Offset* factors in turn, although noting that these are not the only relevant factors here :

*a. The amount of time spent on one part of the business or the other;*

On an average basis, the Claimant spent a total of around 40% of his time on the Avenue Road contract. Thus more than half of his time was spent on other duties in relation to the geographical area he covered and the other activities to which he had been assigned.

*b. The amount of value given to each part by the employee;*

In terms of everyday operation, the Claimant added some value to the successful day-to-day operation of the activity that transferred. However, that activity was principally provided by the two attendants and their supervisor, who ensured that the car park operated in an efficient manner, and that the barriers and the ticket machines were in full working order. Evidence has been given as to the specific operational tasks that the Claimant provided to the Avenue Road site, namely dealing with complaints from customers, carrying out performance reviews of the staff there, occasional health and safety audits, taking steps to prevent drug use in the toilets, and dealing with dilapidations at the end of the contract. However, these are generally one off issues that were carried out as part of a much wider portfolio of responsibilities.

*c. The terms of the contract of employment showing what the employee could be required to do;*

There is no specific reference in the Claimant's contractual documentation to the Avenue Road site. Rather he is described as the Area Manager for the South Coast, with a location at Portsmouth. Clause 4 states that he may be required to work at any other location from time to time as required by the Company. Clause 7 describes the post as a management post. There were restrictive covenants that prevented him from competing with ACPOA within six months of the date on which his employment ended, as well as dealing with any existing or prospective client of ACPOA.

The job description expected that he would be managing more than one contract (as he was) and also had a role in business development. In 2015 he had a specific objective to secure three new contracts within his area; and in 2016 he was expected to secure two new opportunities.

*d. How the cost to the transferor of the employee's services was allocated between different parts of the business.*

The entirety of the Claimant's salary was allocated to the Avenue Road contract. However, this was standard practice in relation to all APCOA's Area Managers, even where it was accepted they were genuinely working as Area Managers such as the area managed by Mr Dirk based at Northwick Park.

85. Despite having some duties in relation to the Avenue Park car parking operation, he was assigned to the geographical area of the South Coast and across all the contracts for which he had responsibility. His duties were much more extensive than his responsibility for the Avenue Road car park. He had strategic responsibility for an important aspect of APCOA's commercial operations :
- a. He had responsibility for three other multi storey car parks (Portsmouth, Dartford and Romford), one flat car park (Banstead) and seven car parks at Travel Lodges. The effect of the handover of the car parks at Dartford and Romford on 21 March 2017 was not to re-assign him to Avenue Road in circumstances where he had not previously been so assigned. It was done so that there could be a smooth transition of those car parks to someone else's management in circumstances where it was anticipated that the Claimant would be leaving the business three days later;
  - b. In addition to line managing the supervisor at the Avenue Road car park, he also line managed three other supervisors at the other car parks, namely (1) the supervisor at the Portsmouth Port car park (2) the supervisor at Romford, and (3) the supervisor jointly responsible for Dartford and Banstead;
  - c. His bonus was assessed against more general financial indicators than just the specific performance of the Avenue Road car park. I attach particular weight to the way in which his goals were formulated in his annual targets, and the lack of any specific reference in those targets to the Bournemouth site;
  - d. He was also responsible for business development within his area, and would spend time on the Bournemouth Business Improvement District Board with that aim in mind, as well as visiting potential sites on which car parks could be built;
  - e. The restrictive covenants in his contract of employment show that his remit was far wider than predominantly to deal with one particular contract or one particular client.
86. I also place weight on the fact that APCOA repeatedly sought to downplay the extent to which he was involved in duties other than the Bournemouth Avenue Road car park in the documents, and to exaggerate the extent of his involvement with that site. This is apparent from the failure to refer to him as an Area Manager in the Employee Liability information, the

description of him at a meeting on 17 March 2017 as responsible for only two sites, Bournemouth and Portsmouth, and the creation of a document shortly before the date of the transfer over-emphasising the extent of his responsibilities at Avenue Road and failing to provide any details about the extent of his other responsibilities.

87. APCOA had been asked in the correspondence in advance of the date of the transfer to provide the Claimant's timesheets. They did not provide the only available documentary evidence, his mileage records, until much later as part of these proceedings.
88. This indicates that APCOA were attempting to persuade the Council that the Claimant should transfer but were not confident that the full factual picture would support their argument when the full extent of the Claimant's other responsibilities was understood.
89. The important annual performance documents were only disclosed on the third day of these proceedings, although they had been requested several months earlier. They confirm, so far as 2016 is concerned, that he had a focus on Romford and Dartford and had been set and achieved a specific target of renewing the Portsmouth contract during 2016. These documents undermine APCOA's argument that the Claimant was assigned to the Avenue Road operation.
90. Accordingly, the Claimant's employment did not transfer to Bournemouth Borough Council. It remained with APCOA. When APCOA refused to allow the Claimant to continue with his role as Area Manager, it dismissed him. That dismissal was an unfair dismissal contrary to Regulation 7 of the TUPE regulations in that the principal reason for the dismissal was in connection with a TUPE transfer.

## **Remedy**

91. I have reviewed the correspondence between APCOA and the Council during the period from 3 March 2017 to 20 April 2017. There is no financial claim between the Respondents on the ground that there has been a failure to provide employee liability information. Accordingly I do not have to determine whether there is merit in the Council's contention that the information provided was misleading as to the Claimant's true role. Nor do I have to consider APCOA's motive for providing the details that they did, and whether this amounts to a deliberate attempt to dump the Claimant on the Council with the associated staffing costs.
92. As a result, the Claimant is entitled to a remedy for unfair dismissal from APCOA. The basic award has been agreed by the parties as £9340.50, and a further sum of £250 for loss of employment rights.
93. The size of the compensatory award depends on what would have happened to the Claimant's employment in the event he had remained an

employee of APCOA but the Avenue Road contract was no longer managed by APCOA.

94. This requires a degree of speculation on the Tribunal's part as to what would have happened in this scenario. The Tribunal's difficulty is that the evidence is extremely scant as to what would have happened to the Claimant's employment had he not been dismissed by APCOA on 24 March 2017. He was clearly at risk of redundancy given that APCOA had lost the biggest contract for which he was responsible. However, none of APCOA's witness statements consider this issue and no documents have been disclosed to assist the Tribunal on whether there was any possibility that APCOA might find the Claimant suitable alternative employment.
95. In oral evidence, Mr Watkiss and Mr Horton have both indicated that there would not have been sufficient work to have kept him in the role of Area Manager once the Avenue Road contract had been lost. They argue that he would have been given notice within about 6-7 weeks of the date of the transfer.
96. Against that, there are the following factors :
  - a. There was still a need to discharge the Claimant's remaining duties, which took up 60% of his time on average. This included a focus on winning new work within the South Coast area – made all the more urgent as a result of the loss of the Avenue Road contract;
  - b. There was a potential opportunity for the Claimant to be involved in helping to set up the Isle of Wight parking contract from the start of April 2017 onwards. Within the accounts department, there was the potential for costs, including a proportion of his salary costs, to be allocated against the potential revenue stream from this new client. The Claimant could potentially have been appointed as the contracts manager for this contract, although there was apparently a security aspect to the contract and Mr Griffiths did not currently have security accreditation. There was no specific evidence about the need for security accreditation on the St Mary's contract, nor as to how readily such accreditation could have been obtained;
  - c. At one point in his evidence, Mr Horton said that lots of sites were coming on and off around this time. Mr Griffiths had shown himself willing to travel long distances to attend sites in the past, and presumably would have been willing to travel in the future to manage new contracts if it enabled him to keep his job. In any event, significant aspects of the management could be carried out by email or over the telephone without requiring regular personal attendance;
  - d. Whilst Mr Watkiss said in evidence that he had considered whether there may be potential work available for the Claimant and concluded there was none, this evaluation is not evidenced by any documents. On a more formal assessment as part of a redundancy process involving

HR and other aspects of the organisation, potential job opportunities may have emerged.

- e. Finally, there was no discussion with the Claimant as to whether he would have been prepared to accept a lower salary in return for reducing his responsibilities in order to keep his job. It is unclear from the evidence whether this is an opportunity that the Claimant would have been prepared to explore.
97. Doing the best I can, I consider that there was a 100% chance that the Claimant would have retained his existing role for the next seven weeks whilst a redundancy process was initiated and followed. There was thereafter a 50% chance that he may have secured some other role instead of or in addition to his existing duties at the same rate of pay. In so assessing the chance at 50% of securing the same salary, I have build in an allowance for the chance that he would have secured lower paid work with APCOA instead.
98. Had I been wrong about whether the Claimant's employment transferred to the Council, I would have found that he would have been made redundant by the Council within 7 weeks of the date of the transfer. As Mr Townsend accepted on behalf of the Claimant in closing submissions, the Avenue Road car park would inevitably have been managed by the Parking Manager who was already managing the other public car parks and on street parking within Bournemouth.
99. The following breakdown is provided in relation to the financial remedy payable by the Claimant. This has been agreed between the Claimant and ACPOA :

Basic award	£9340.50	
Loss of statutory rights	<u>£250</u>	£9590.59
Compensatory award		
7 weeks @ 100% ACPOA salary	£3,538.15	
80 weeks @ 50% ACPOA salary	£19,965.67	
45 weeks 1.2.18 to 3.10.19	<u>£11,372.85</u>	
		£34,876.67
Loss of pension		
132 weeks @ £42.66 per week	<u>£5,631.12</u>	
		£40,507.79

LESS

Earnings received to 24.11.18	£19,965.17	
Earnings received from 1.12.18 to 3.10.19	<u>£11,372.85</u>	
	£31,338.02	<u>£9169.77</u>
		£18760.36

**Employment Judge Gardiner**

18 February 2019