EMPLOYMENT TRIBUNALS

Claimants:	**Case No:**	**Name**
	2413420/2018	Mr A Draper
	2413421/2018	Ms J Kelly
	2413422/2018	Mr S Reader
	2413423/2018	Mr D Lockley
	2413424/2018	Mr T Hayes
	2413426/2018	Mr F McCrae
	2413427/2018	Mr J Annan-Junior
	2413428/2018	Mr F Cicu
	2411665/2018	Miss S Crooks
	3201761/2018	Mr T Whittaker
	2414714/2018	URTU
	2414715/2018	Mr P Balmforth
	2414716/2018	Mr P Barker
	2414717/2018	Mr B Gilmore
	2414718/2018	Mr L Collins
	2414719/2018	Mr K Martin
	2414720/2018	Mr P MacArthur
	2415182/2018	Mr J Lynch
	2415202/2018	Mr G Hill

Respondents:

1. Canute UK Ltd (in Administration)
2. Canute Distribution Ltd (in Administration)
3. George Walker Transport Limited
4. Bibby Distribution Limited
5. James Nuttall Transport Limited
6. Tetrosyl Limited

7. Almtone Limited
8. Canute Haulage Group Ltd (in Administration)

Heard at: Manchester (Crown Square) **On:** 14 - 22 October 2019

Before: Employment Judge Ainscough
(sitting alone)

Representation

Claimants:	Mr B Culshaw (Solicitor) for the first group of claimants and Ms A Sidossis (Counsel) for the second group of claimants
1st Respondent:	Not in attendance
2nd Respondent:	Not in attendance
3rd Respondent:	Ms H Lunney (Solicitor)
4th Respondent:	Ms H Trotter (Counsel)
5th Respondent:	Ms L Smith (Solicitor)
6th Respondent:	Mr D Rogers (Solicitor)
7th Respondent:	Not in attendance
8th Respondent:	Not in attendance

JUDGMENT

The judgment of the Tribunal is that:

1. There was a relevant transfer in accordance with regulations 3(1)(b)(ii) and regulation 3(3) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 of the inter-site shunting activity from Canute UK and Canute Distribution to George Walker. The claimants who transferred were: Mr Draper, Mr Martin and Mr Lockley.

2. There was not a relevant transfer of the yard shunting, night trunking, class 1 day/night delivery driver, class 1 day delivery driver, class 2 delivery driver, or administrative/office based activities. Almtone is liable for the following group of claimants: Ms Kelly, Mr Reader, Mr Hayes, Mr McCrae, Mr Annan-Junior, Mr Cicu, Ms Crooks, Mr Whittaker, Mr Balmforth, Mr Barker, Mr Gilmore, Mr Collins, Mr MacArthur and Mr Lynch.

REASONS

INTRODUCTION

1. The claims of unfair dismissal, deductions from pay, holiday pay, notice pay, redundancy payment and protective award were brought by way of the following claim forms:

(i) Mr A Draper and others – 12th July 2018

(ii) Mr P Balmforth and others – 21st August 2018

(iii) Jonathan Lynch – 21st September 2018

(iv) Sarah Crooks – 14th June 2018

(v) Terry Whitaker – 13th August 2018

(vi) Graham Hill – 21st September 2018

2. The first group of claimants brought individual claims and were represented by Mr Culshaw. Mr Culshaw also represented Ms Crooks and Mr Whittaker at the hearing. The second group of claimants were part of a group claim brought by URTU and were represented by Ms Sidossis. Ms Sidossis also represented Mr Lynch at the hearing.

3. Canute UK, Canute Distribution and Canute Haulage did not provide grounds of resistance. George Walker, Bibby Distribution, James Nuttall and Tetrosyl all denied there was any TUPE transfer. Almtone contended that there was a TUPE transfer to George Walker, Bibby Distribution and James Nuttall.

ISSUES

4. The issues to be determined at the Preliminary Hearing were set out by Employment Judge Franey in his Case Management Order of 28 September 2018 as:

(i) Whether there was a transfer of the employment of the claimants under regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, and if so

(ii) The identity of the company to which each of the claimants transferred.

5. The substantive case was listed for a final hearing 27th – 30th January 2020.

EVIDENCE

6. The parties agreed a joint bundle of written evidence running to 900 pages.

7. Anthony Draper (inter-site shunter), Joan Kelly (administrative staff) and Josiah Annan-Junior (yard shunter) gave live evidence on behalf of the first group of claimants; Paul Barker (class 2 delivery driver), Lee Collins (class 1 day/night delivery driver) and Paul McArthur (office staff) gave live evidence on behalf of the second group of claimants. Jonathan Lynch (night trunker) also gave live evidence.

8. The Tribunal was also asked to take into account the witness statements of Keith Martin (inter-site shunter) and Barry Gilmore (night trunker) on behalf of the second group of claimants; neither claimant attended to give live evidence.

9. Mr Reader, Mr McRea, Mr Cicu, Mr Whitaker, Mr Lockley, Mr Hayes, Ms Crooks and Mr Hill have not provided any witness evidence.

10. Jason Scott (Group Operations Director) gave live evidence on behalf of George Walker; John Dickens (Solutions and Optimisation Director) and David Haworth (HR Director) gave live evidence on behalf of Bibby Distribution; Catherine Nuttall (Director) gave evidence on behalf of James Nuttall and Clive Blake (Group Warehouse and Distribution Manager) gave evidence on behalf of Tetrosyl.

11. Canute UK, Canute Distribution, Almtone and Canute Haulage did not submit any evidence and were not represented at the hearing.

RELEVANT LEGAL PRINCIPLES

12. The issues for determination arose under TUPE of which the material parts were as follows.

13. A relevant transfer is defined in regulation 3 as follows:

> **(1) These Regulations apply to –**
>
> **(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;**
>
> **(b) a service provision change, that is a situation in which –**
>
> **(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");**
>
> **(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or**
>
> **(iii) activities cease to be carried out by 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,**
>
> **and in which the conditions set out in paragraph (3) are satisfied.**

> **(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.**
>
> **(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.**
>
> **(3) The conditions referred to in paragraph (1)(b) are that –**
>
> **(a) immediately before the service provision change –**
>
> **(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;**
>
> **(ii) 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.**

14. If there has been a relevant transfer, regulation 4 says that the

> **"…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."**

15. Regulation 3(1)(b) is a purely domestic provision derived not from any European provision but from section 38 of the Employment Relations Act 1999. In **Metropolitan Resources Limited v Churchill Dulwich Limited [2009] IRLR 700**, the EAT (HHJ Burke) described this as a "wholly new statutory concept" which did not give rise to any need for an Employment Tribunal to adopt a purposive construction as opposed to a "straightforward and common sense application of the relevant statutory words to the individual circumstances" (paragraphs 27 and 28). It follows that there is no need for a judicial prescribed multi-factorial approach, but as observed in paragraph 35 of **Kimberley**, when a Tribunal is examining the question whether there is a service provision change or not:

> **"It is of course entitled to, and must, look at all the facts and their implications in the round."**

16. It is necessary to consider in turn each of the elements of regulation 3(1)(b)(ii) before deciding whether the conditions in regulation 3(3) are satisfied.

17. The way in which the issues should be approached was considered by the EAT in **OCS Group UK Limited v Jones & Another [2009] UKEAT/0038/09**. The conditions in regulation 3(3)(a) can only be considered once it has been determined whether or not there is indeed there is a service provision change. It follows from that decision and **Kimberley Group Housing Limited v Hambley & Others [2008] IRLR 682** that the approach can be summarised as follows:

> (1) The Tribunal must consider what the activities were under regulation 3(1)(b)(ii).

(2) The Tribunal must then consider whether those activities have ceased to be carried out by a contractor on a client's behalf and are carried out instead by another person on the client's behalf.

(3) The Tribunal must then consider whether the condition in regulation 3(3)(a)(i) is satisfied, namely that immediately before the service provision change there was an organised grouping of employees which had as its principal purpose the carrying out of the activities concerned on behalf of the client.

(4) If the other requirements are met, the final question is whether the individual employee was assigned to that organised grouping (regulation 4(1).

18. The Court of Appeal held in **Rynda (UK) Limited v Rhijnsburger [2015] IRLR 394** (paragraph 44) that the process is as follows:

> **"If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within regulation 3 of TUPE. The first stage of this exercise is to identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a 'grouping' for the principal purpose of carrying out the listed activities."**

19. Ultimately, of course, whether a Tribunal adopts either the **OCS** of the **Rynda** approach, the key question is to reach a determination on all the composite parts of the statutory formulation.

Defining the service and activities

20. The regulations do not offer any assistance as to how the relevant service and the activities which give rise to it are to be defined.

21. In **Arch Initiatives v. Greater Manchester West Mental Health NHS Foundation Trust and others (2016 IRLR 406)** the EAT decided that there was nothing in the legislation that the relevant activities should be all the activities carried out by the new contractor. It held that legislation outlines that the "service" part of the "service provision change" could comprise activities and the relevant activities could be a subset of the activities carried out by the transferor – in fact this was the way the legislation was set out. The EAT determined that the used of the word "activities" should be given an ordinary meaning when dealing with the questions at regulations 3(1)(b)(ii) and 3(3) and that it was a fact finding process for the Tribunal. A split in activities was not a bar to the Tribunal making a fact finding decision that there had been a service provision change.

22. In **Metropolitan Resources** (paragraph 36) the EAT was concerned with a situation in which a contract for the provision of accommodation of asylum seekers at premises owned by CD Limited was succeeded by a contract for accommodation to be provided by Mr Limited. It held the decision of the Employment Tribunal that the activities had to be defined relatively broadly by means of a common sense and pragmatic approach. The EAT said at paragraph 30:

> **"…It cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A common sense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the Tribunal in the present case. The Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it."**

23. Similarly, in **Johnson Controls Limited v Campbell & Another [UKEAT/0041/12]** the EAT chaired by Langstaff P said in paragraph 6:

> **"We would add that the identification of 'activity' is critical in many cases. The case before us is an example of that. An activity may be more than the sum of the tasks that are performed in respect of that activity, but a Tribunal must be careful to ensure that it does not take so narrow a view of that which 'activity' consists of, in the case before it, as to forget that the context in which it decides 'activity' is the context in which it is ever likely that employees' continued employment will be affected."**

24. The EAT went on to describe the exercise of identifying the activity as involving "an holistic assessment by the Tribunal". It is not simply to be decided by enumerating tasks and identifying whether the majority of those tasks quantitatively is the same as the majority was prior to the putative transfer.

25. In **Nottinghamshire Health Care NHS Trust v Hamshaw & Others, UKEAT/0037/11**, the EAT (Bean J sitting alone) considered a situation in which a residential care home for adults with learning disabilities was closed and the residents re-housed in their own homes. Their care was transferred to one of two difference companies adopting a different model of care provision. The key differences were the removal of each resident from an institutional setting to his or her own home, the structuring of personally focussed care plans, and the discharge of the former resident from the care of the Trust. The Tribunal decision that the activities by the new providers were not fundamentally or essentially the same as those carried on by the Trust was upheld by the EAT. The same conclusion was upheld by the EAT (HHJ Clark) in **Enterprise Management Services Limited v Connect-Up Limited [2012] IRLR 190** where the exclusion of service cover for curriculum systems in the re-tendering of IT services by an Education Authority, which represented 15% of the work of the staff of the former contractor, was found to mean that the activities carried out by the new contractor were not essentially or fundamentally the same.

Fragmentation

26. Although not a term found in the legislation, some cases have considered what is conveniently termed "fragmentation", where the activities in which the putative transferor is engaged are split between a number of putative transferees. Taken in the order in which they were decided, the relevant authorities can be summarised as follows.

27. In **Kimberley** a contract held by L Limited with the Home Office to provide accommodation and support services for Middlesbrough and Stockton was re-

tendered and split between two new providers. In Stockton K Limited won 97% of the work; in Middlesbrough K Limited won 71% of the work and A Limited won 29%. Three former employees of L Limited in Middlesbrough and another three from Stockton brought complaints against K Limited and A Limited complaining of unfair dismissal and seeking a redundancy payment. The EAT upheld the decision of the ET that there had been a service provision change to each of the new contractors, although it considered the Tribunal had erred in law in deciding what the effect of that transfer would be. The EAT rejected an argument that a transfer of activities to more than one transferee ruled out there being a service provision change at all (paragraph 33), although it recognised in paragraph 35 that:

> **"It may be that there are some circumstances in which a service which is being provided by one contractor to a client is in the event so fragmented that nothing which one can properly determine as being a service provision change has taken place. This Tribunal considered whether that was the case here and concluded it was not. We think that since there are two overlapping contracts now providing for activities which were previously provided by one provider that the Tribunal was entitled to come to that view."**

The end result was that the employees were held to have transferred to K Limited.

28. **Clearsprings Management Limited v Ankers & others [2009] UKEAT/0054/08** concerned the provision of accommodation for asylum seekers and their dependants. The service had been provided in North West England by four private contractors, but following a re-tendering exercise that was reduced to three providers. The claimants had been employed by one of the old providers who failed to secure one of the new contracts. The Employment Tribunal identified the activity as the provision of accommodation and pastoral care to asylum seekers, but found that the activity carried on by the former contractor had been so fragmented that no service provision change took place. The EAT upheld this decision, noting the decision of the Court of Appeal in **Fairhurst Ward Abbotts Limited v Botes Building Limited [2004] ICR 919**, in a case under what became regulation 3(1)(a) in which the separation of a single contract into two separate and different contracts won by different bodies did not prevent there having been a transfer of undertaking in relation to each separate part.

29. In **Enterprise Management** the EAT found that the Employment Tribunal had been entitled to conclude that the provision of services formerly provided by Enterprise had been so spread amongst six other providers that no service provision change had taken place (paragraph 15).

30. Finally, in **Johnson Controls** the single role of acting as a taxi administrator for a particular client was found not to have been subject to a service provision change when that role was taken back in-house by the client and dispersed amongst a number of individuals with other duties. The effect of spreading the work around in that particular case was that the essential function of a central co-ordinated service no longer existed.

<u>Organised grouping/principal purpose</u>

31. If the Tribunal is satisfied that there has been a service provision change in that the activities which cease to be carried out by a contractor on behalf of the client were now carried out instead by a subsequent contractor, the question then

becomes whether the conditions set out in regulation 3(3) have been satisfied. In this case the pertinent condition was whether there was an organised grouping of employees which had as its principal purpose the carrying out of the activities concerned on behalf of the client.

32. In **Kimberley** (paragraph 29) the EAT said that the word "principal" did not require any arithmetically quantitative approach but only a question of distinguishing between a principal purpose and one which is merely ancillary.

33. As for the requirement for there to be an organised grouping, the most recent and most authoritative decision in this jurisdiction is that of the Court of Appeal in **Rynda**. In delivering the judgment of the Court, Jackson LJ approved the two key previous authorities on this, being **Eddie Stobart Limited v Moreman [2012] IRLR 356**, a decision of the EAT, and **Seawell Limited v Ceva Freight (UK) Limited [2013] IRLR 726**, a decision of the Court of Session in Scotland. In **Stobart** the EAT said that the phrase "organised grouping":

> **"Necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. The statutory language does not naturally apply to a situation where, as here, a combination of circumstances – essentially, shift patterns and working practices on the ground – mean that a group (which, NB, is not synonymous with a 'grouping', let along an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client."**

34. A Court of Session took the same view in **Seawell**, holding that the concept of "organised grouping" implied that there was an element of conscious organisation by the employer of the employees into a grouping of the nature of a team which had as its principal purpose the carrying out of the identified activities.

Assignment

35. If it is established that immediately before the service provision change there was an organised grouping of employees which had as its principal purpose the carrying out of the activities concerned on behalf of the client, the question of whether any individual employee will transfer to a new employer which then undertakes those activities will depend upon whether that employee is assigned to that organised grouping under regulation 4(1). This concept applies of course both to the transfer of an undertaking and a service provision change, and in relation to the former the European Court of Justice considered in **Botzen v Rotterdamsche Droogdok Maatschappij BV [1985] ECR 519** that establishing the part of the undertaking or business to which the employee was assigned will be decisive. That was applied by the EAT in **Duncan Web Offset (Maidstone) Limited v Cooper [1995] IRLR 633** where three employees of a company with three different locations were found to have been transferred to the new owner of the Maidstone operation since they spent 80% of their time working for the Maidstone operation and only 20% of their time working for two different operations. Morison J recognised that:

> **"There will often be difficult questions of fact for Industrial Tribunals to consider when deciding who was 'assigned' and who was not. We were invited to give guidance to Industrial Tribunals about such a decision, but declined to do so because the facts will vary so markedly from case to case. In the course of argument a number were suggested, such as the amount of time spent on one part of the business or the other; the amount of value given to each party by the employee; the terms of the contract of**

> **employment showing what the employee could be required to do; how the cost to the employer of the employee's services had been allocated between the different parts of the business. This is, plainly, not an exhaustive list; we are quite prepared that these or some of these matters may well fall for consideration by an Industrial Tribunal which is seeking to determine to which part of his employer's business the employee had been assigned."**

36. In **Kimberley** the EAT regarded the overall principle as clear: what is to be focussed upon is essentially the link between the employee and the work or activities which are performed.

37. As was recognised in paragraph 16 of **Stobart**, this question overlaps to a very considerable extent with the question of identifying the organised grouping required if there is to be a relevant transfer at all. However, the two stages are analytically distinct.

38. In **Argyll Coastal Services Limited v Stirling & Others UKEATS/0020/11**, the EAT (the Honourable Lady Smith) noted in paragraph 46 that:

> **"Being involved in the carrying out of the relevant activities immediately prior to the transfer will not necessarily mean that that employee was assigned to the organised group."**

39. A simply reliance on the fact that an employee spent 80% of his time on the contract which was transferred was found to be an error of law by the EAT in **Costain Limited v Armitage & Another [UKEAT/0048/14]**. A focus on percentages without considering the whole facts and circumstances was not the correct approach.

RELEVANT FINDINGS OF FACT

40. Tetrosyl is a manufacturer of products which include car care products such as de-icer. The remaining respondents operate haulage firms providing logistic services to customers. From 1999 until October 2017 Bibby Distribution had provided Tetrosyl with a logistics service to facilitate the delivery of products to the customer and employed the majority of the claimants in these proceedings.

41. In September 2017 Canute UK and Tetrosyl signed an agreement transferring the provision of the logistics service from Bibby Distribution to Canute UK and subsequently the employees who worked on the Tetrysol contract. Canute UK agreed to create and maintain a logistics system for Tetrosyl to deal with all of its transport requirements from all sites, customers and suppliers. The claimants who had worked for Bibby Distribution on Tetrosyl's contract were employed by Canute Distribution.

42. Canute UK provided delivery to outbound customers of chemical and non-chemical (ADR/non ADR) full and part-loads, inter-site shunting and outbound trunking between the Tetrosyl manufacturing site and the distribution centre and controlling and scheduling of vehicle arrivals with a tracking system. Canute UK used Class 1 delivery drivers who could carry loads up to 44 tonnes and Class 2 delivery drivers who could carry loads up to 26 tonnes. Those involved in shunting and trunking also had to hold a Class 1 licence. A delivery driver would also need an ADR licence to carry an ADR load.

43. In April 2018 Tetrosyl decided to review how it would obtain a logistics service for the delivery of its goods. Tetrosyl decided to split its logistical requirements between George Walker, Bibby Distribution and James Nuttall. On 4th May 2018 Tetrosyl terminated its agreement with Canute UK.

44. On 26 April 2018 George Walker and Tetrosyl entered into an agreement with a commencement date of 8 May 2018 to deliver all palletised ambient goods for groupage consignment and comprehensive shunting between Tetrosyl's manufacturing site and distribution centre. Groupage consignment in that agreement was defined as 13 pallets or less, excluding full loads of 14 pallets or more.

45. On 4 May 2018 Bibby Distribution and Tetrosyl entered into an agreement with a commencement date of 8 May 2018 for full load units to be delivered to end customers. Full load units in that agreement was defined as 14 pallets or above.

46. On 8 May 2018 James Nuttall and Tetrosyl agreed that James Nuttall would transport general and hazardous ADR waste from Tetrosyl's depot.

47. On 8 May 2018 Canute UK told the claimants that Canute UK had lost the contract to provide a logistics service to Tetrosyl but they would all transfer from employment with the Canute Distribution under the Transfer of Undertakings (Protection of Employment) Regulations 2006 to employment with George Walker, Bibby Distribution, James Nuttall or Tetrosyl.

48. On 9th May 2018 Canute UK wrote to the claimants and advised that the inter-site shunters, yard shunters and night trunkers would transfer to George Walker; the route planner, class 1 day/night and day delivery drivers would transfer to Bibby Distribution; the class 2 delivery drivers would transfer to James Nuttall and the office/administrative staff would transfer to Tetrosyl.

49. On 12th May 2018 the remaining employees of Canute UK and Canute Distribution transferred to employment with Almtone On Canute UK and Canute Distribution going into administration, Almtone took over the existing contracts and remaining workforce.

50. On various dates throughout May and June 2018 George Walker, Bibby Distribution, James Nuttall and Tetrosyl disputed that a relevant transfer of employment had taken place.

SUBMISSIONS

Claimants' submissions

51. The claimants collectively submitted that the division of the contract did not change the service required by Tetrosyl. It was argued that there was in fact a change in the mode of the delivery of the service but the activities remained fundamentally the same.

52. It was contended that George Walker took on the shunting and trunking activity and the claimants that performed these roles should transfer. It was also contended that Bibby Distribution took over the largest activity performed by the class 1 delivery drivers, and those claimants together with the route planner and

administrative support should similarly transfer. Finally, it was submitted that James Nuttall took over the activity performed by the class 2 delivery drivers and the claimants performing these roles should transfer. In respect of each group it was submitted that they formed an organised grouping for the purposes of a transfer.

Respondents' submissions

53. The respondents collectively submitted that the activities performed by George Walker, Bibby Distribution and James Nuttall for Tetrosyl from May 2018 were not fundamentally the same as the activities performed by Canute UK and Canute Distribution. It was also submitted that George Walker, Bibby Distribution and James Nuttall performed the activities in such a different way that it was more than a change in the mode of how the activity was performed.

54. It was submitted that Canute UK and Canute Distribution provided a dedicated service that in particular required the support of office and administration staff, yard shunters and night trunkers. It was contended that none of these support roles were required by George Walker, Bibby Distribution and James Nuttall.

55. The respondents argued that there were no organised groupings immediately before the transfer. Instead Canute UK and Canute Distribution had attempted to fit the claimants into artificial groups and assign the groups to the respondents in order to prove that there had been a relevant transfer.

DISCUSSION AND CONCLUSIONS

Activities performed before May 2018

56. Tetrosyl originally required the provision of a complete logistics service. The activities that had been performed by Canute UK for Tetrysol were:

(a) ADR full load deliveries;

(b) ADR part load deliveries;

(c) Non ADR full load deliveries;

(d) Non ADR part load deliveries;

(e) Inter-site shunting;

(f) Yard Shunting;

(g) Night Trunking

(h) Office/administrative duties.

57. Mr Collins and Mr Reader were Class 1 day/night delivery drivers and Mr McRea, Mr Cicu and Mr Whitaker were Class 1 day delivery drivers. Mr Hayes and Mr Barker were Class 2 delivery drivers.

58. Mr Collins was of the view that before May 2018 he did performed ADR and non ADR deliveries. He said he could do palletised loads up to 900 kilos and that

was the vast majority of his work. He also described doing night deliveries, and whilst he always delivered Tetrosyl's products, he would often do backloads for other customers and that became more prevalent.

59. At paragraph 48 of his statement, Mr Collins confirms that Class 2 could be up to 16 pallets. Mr Collins said it was possible for him to have done Class 2 weight limits and he, when understanding the definition of full load, said that a Class 2 driver would do more than 14 pallets: Class 2 drivers were restricted by the weight limit rather than the number of pallets. Mr Collins said there was no reference when he worked for Canute UK to a 13 pallet limit. He was not aware of any of the groupings that have been identified since 8th May 2018. Mr Collins described his employment with the Canute Distribution as being "chaotic with no uniformity" and he did not know what he was doing from one day to the next.

60. Mr Barker's evidence was that he is a Class 2 driver. He would sometimes do nights out and he could do more or less than 14 pallets. At paragraph 12 of his witness statement he said that he would do 14-16 pallets when he worked for Bibby Distribution, and at paragraph 22 he says that the type of work that he did at Canute UK did not change. He said that he would do 70% ADR but, he acknowledged that every driver had an ADR certificate. He also said that the 25 tonne wagons he drove could take up to 16 pallets.

61. Mr MacArthur was the route planner for Canute UK and confirmed in his evidence that size and weight determined who did what and he used whoever was available to get a particular job done. Mr MacArthur said Class 1 and Class 2 could be made up of ADR and non ADR, and that no specific group transported hazardous goods. He also said that Class 2 could do more than 14 pallets. He confirmed that Canute UK did not identify who should do the job by the number of pallets that could be carried by the drivers.

62. Mr Balmforth, Mr Gilmore and Mr Lynch worked on Tetrosyl's contract as night trunkers.

63. Ms Kelly, Ms Crooks and Mr MacArthur, worked in the Canute UK's office on the contract with the Tetrosyl.

64. Mr Annan-Junior gave live evidence that he and Mr Lockley were yard shunters.

65. Mr Draper and Mr MacArthur state Mr Lockley was an inter-site shunter and I prefer their evidence to that of Mr Annan-Junior who said Mr Lockley was a yard shunter. All three, Draper, Martin and Lockley were inter-site shunters.

66. Whilst Mr Draper did say he did some subcontractor work whilst working at the Canute UK, it was his evidence that 95%-97% of his work was on the contract with Tetrosyl. Mr Martin's statement states he worked exclusively on Tetrosyl's contract.

67. Mr Blake gave evidence that once Tetrosyl became aware that Canute UK were at risk of insolvency, it decided to split that service into three parts as Tetrosyl did not want to be totally reliant on one provider.

ADR full and part load deliveries after May 2018

68. James Nuttall provided Tetrysol with full and part load ADR deliveries after May 2018. The evidence that was given on behalf of this respondent was that whilst Class 1 deliveries were not originally envisaged, now it was more likely that a Class 1 double-deck trailer would be used to transport 50 pallets a day. There is no shunting: there is just a collection from the distribution centre and then delivery to the customer.

69. James Nuttall confirmed that it uses the Hazchem and pallet line network for distribution. Mr Blake on behalf of Tetrosyl confirmed that Tetrosyl had no objection to the use of delivery networks because what distributors did once they collected the product was up to them so long as it was delivered.

70. The activity transferred to the James Nuttall was full and part load ADR deliveries. There was no organised group which had as it's principle purpose the delivery of full or part load ADR deliveries.

Non-ADR full and part load deliveries after May 2018

71. George Walker provided Tetrysol with delivery of part-load, non ADR services, which by definition of the agreement was 13 pallets or less. Mr Scott gave evidence that George Walker only dealt with ADR loads when performing the shunting activity.

72. Bibby Distribution provided Tetrysol with delivery of non ADR full load products of 14 pallets or more. Evidence was given that such loads would be on single deck articulated lorries or rigid lorries.

73. The activity transferred to Bibby Distribution was full non ADR loads. The activity transferred to George Walker was part non ADR loads of less than 14 pallets. Prior to the transfer there was no organised group which carried out each of these activities as their principal purpose. Class 1 could do less than 14 pallets and/or ADR; Class 2 could do more than 14 pallets and/or non ADR. The principal purpose of the delivery drivers was to deliver varying weights and size of Tetrosyl's products.

74. As a result none of the delivery drivers transferred to George Walker, Bibby Distribution or James Nuttall and remain employed by Canute Distribution/Almtone.

Inter-site Shunting after May 2018

75. George Walker provided Tetrysol with inter-site shunting between Tetrosyl's manufacturing site and distribution centre.

76. It was Mr Scott's evidence that the shunting that takes place at George Walker is between Tetrosyl's manufacturing site and distribution centre. It was Mr Blake's evidence that George Walker now carries out the inter-site shunting work on behalf of the Tetrosyl.

77. Inter-site shunting for Tetrosyl requires three drivers. George Walker lost this activity to the Canute UK in March 2018. Whilst the three drivers from George

Walker did not transfer over to Canute UK that is not to say that the reverse could not apply. Immediately before the service provision change, the principal purpose of the inter-site shunters was to transport goods between Tetrosyl's manufacturing site and distribution centre.

78. This is fundamentally the same activity that was performed by Canute UK before May 2018.

79. Mr Draper, Mr Martin and Mr Lockley were an organised group with the principle purpose of the activity of inter-site shunting and should have transferred over to George Walker.

Yard Shunting after May 2018

80. Yard shunting was not an activity that transferred over, and as a result Mr Annan-Junior could not have transferred to George Walker but remained in the employment of Canute Distribution/Almtone.

Night Trunking after May 2018

81. Mr Scott gave evidence that the night trunking is not done by George Walker and this activity is not provided for in the agreement with Tetrosyl. Mr Blake confirmed that yard shunting and night trunking is not required by Tetrosyl. Mr Blake was of the view that both activities belong to an old model and an old way of working. Mr Blake also gave evidence that the admin/office functions are no longer required because none of the respondents provide a dedicated service to Tetrysol.

82. Mr Scott and Mr Blake provided evidence that night trunking is no longer required - it is certainly not provided for in the agreement between George Walker and Tetrosyl, and it is not something Mr Blake said was needed in this new model. The activity of night trunking did not transfer over and therefore Mr Balmforth, Mr Gilmore and Mr Lynch remained in the employment of Canute Distribution/Almtone.

Office/administrative duties after May 2018

83. Mr Blake, Mr Scott, Mr Denkins and Ms Nuttall all gave evidence that the office roles are no longer required because there is no longer a dedicated service provided to Tetrosyl. These claimants therefore remain employed by Canute distribution/Almtone.

CONCLUSION

84. Canute UK/Canute Distribution tried to assign groups of employees to the split of activities that had been created by the Tetrosyl in order to absolve themselves of liability. The only organised group identifiable before a service provision change was the inter-site shunters. The remaining claimants must pursue their case against the Canute Distribution/Almtone.

Case No: 2415202/2018

85. Mr Hill did not attend at the preliminary hearing and did not instruct any of the legal representatives to present his case. In accordance with Rule 47 of the

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 his claim will be struck out and will be dismissed.

Employment Judge Ainscough

Date: 18 November 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 December 2019

FOR THE TRIBUNAL OFFICE