



EMPLOYMENT TRIBUNALS

Claimant: Ms CJ Walker
Respondent: Etex (Exteriors) UK Ltd (1)
Marley Limited (2)

Heard at: Tribunals Hearing Centre, 50 Carrington Street, Nottingham,
NG1 7FG

On: 30 January 2020

Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: Ms K Anderson, Counsel

For respondent (1): Ms M Stanley, Counsel

For respondent (2): Mr C Crow, Counsel

JUDGMENT

The Tribunal concludes that the claimant's employment did not transfer from the 1st respondent to the 2nd respondent pursuant to the **Transfer of Undertakings (Protection of Employees) Regulations 2006**. Therefore, the claimant's claim against the 2nd respondent is dismissed.

REASONS

1. The claimant, Ms Walker, brings claims for disability discrimination and unfair dismissal against the respondents, which the respondents deny. The details of the claim and responses do not matter for present purposes.
2. On 25 September 2019, at a telephone preliminary hearing, the Tribunal identified 2 preliminary issues to resolve. One of those was whether there has been a transfer of Ms Walker's employment from the first respondent ("Etex") to the second respondent ("Marley") that falls with the **Transfer of Undertakings (Protection of Employees) Regulations 2006** ("TUPE"). That was the purpose of today's hearing.
3. There was an issue about proposed amendments to the claim due to be considered today. I postponed those to be dealt with after a further preliminary hearing that is already listed to deal with the issue of disability.

Hearing

4. Ms K Anderson, Counsel, represented Ms Walker. Ms M Stanley, Counsel, represented Etex. Mr C Crow, Counsel, represented Marley.
5. By way of reasonable adjustments, we took breaks for Ms Walker and, once she had given her evidence, we agreed she could come and go as she needed.
6. I heard oral evidence from:
 - 6.1. Ms Walker on her own behalf, and
 - 6.2. Mr P Reed, Chief Operating Officer of a company called Monty Bidco Limited. He was originally employed by Etex. However, his employment transferred under **TUPE** to Marley. Monty Bidco then bought Marley. He gave evidence on Marley's behalf, though Etex also relied on what he said.
7. Each witness had prepared a statement that they adopted as their evidence in chief and each was cross-examined on their evidence. I have considered their evidence when reaching my decision.
8. I am quite satisfied that Ms Walker and Mr Reed have done their best to tell the Tribunal the truth as they believe it to be and to assist the Tribunal to the best of their ability.
9. There was an agreed bundle of documents.
10. On the day of the hearing the claimant sought to add some emails relating to a request for disclosure. After taking instructions, the respondents agreed they could be added to the bundle.
11. There was also a series of documents produced on the day by the respondents. They had not been disclosed before and there was no explanation why they had not been disclosed in accordance with the Tribunal's previous directions or why they were disclosed only on the day of hearing. The claimant objected to their admission. I ruled it was too late to add them to the bundle. The directions for disclosure and agreement of the bundle were clear. There was an absence of an explanation for their lateness. Admitting them would unfairly prejudice Ms Walker and necessitate a delay and possible adjournment. Applying the overriding objective, I concluded that they should not be admitted.
12. In reaching my decision I have considered those documents in the bundle to which I was referred.
13. Each party made oral submissions and referred to previously decided cases from the higher courts ("case law") in support of their position. Marley and Ms Walker also made written submissions. I thank the parties' advocates for those helpful submissions. I have taken the whole the submissions and cases that they referred to into account when reaching my decision. However, I have referred only to the cases that I believe are relevant to understand my decision.
14. Because of the shortness of time and the complexity of the issue, I took time to consider my decision. This is that decision.

Issues

15. While Ms Walker reserved her position that the date of transfer may be different, the realistic position in this case is that any transfer would have taken place on 1 January 2019. The parties' overt positions before me today, evidence and submissions have all focused on this being the relevant date. There is no other date that any party has proposed as possibly being the relevant date. I therefore proceed on the basis that the relevant date is in fact agreed.
16. The parties are also agreed that any transfer of Ms Walker's employment could fall only within **TUPE regulation 3(1)(a)** read with **TUPE regulation 4(1)**.
17. There is no dispute that if there has been a transfer to another person, it was of part of a business that immediately before the transfer was situated in the United Kingdom.
18. The dispute was whether the transfer was of an economic entity that retained its identity and whether Ms Walker was assigned to that entity.
19. Therefore, the issues for me to determine are as follows:
 - 19.1. The transfer issue: Was there a transfer an economic entity which retained its identity from Etex to Marley?
 - 19.2. The assignment issue: If so, was Ms Walker assigned to that entity?

Facts

20. After considering the evidence, I make the following findings of fact.
21. Before 1 January 2019 it is common ground that the structure of the relevant companies was as follows. This description is based on a diagram that Ms Walker drew during her evidence to explain how she understood the companies to be structured. Mr Reed did not disagree with her diagram.
22. At the very top was a global company that held the various worldwide subsidiaries ("Etex Global"). This was the ultimate owner of Etex, and immediately before transfer of Marley.
23. Below that there were several subsidiary companies around the world. So far as is relevant to this claim, there were 2 companies immediately below the global company. The first was a company that dealt with facades. Parallel to that was Etex itself. Mr Reed ran that company before 1 January 2019. Below Mr Reed, Ms Walker identified 2 divisions that were part of Etex: pitched roofing and profile sheeting.
24. Mr Reed said that, within Etex, there were different sites around the country. Each site produced different products that Etex sold and could be seen as separate entities. By way of example he said that clay tiles were manufactured at Etex's site in Keele, Staffordshire and timber products were manufactured at their site in Gainsborough, Lincolnshire. These sites were overseen by and from Etex's headquarters on Lichfield Road in Branston near Burton on Trent.

25. Etex Global also manufactured products around the world through other subsidiaries.
26. I accept Mr Reed's evidence on all of this. Ms Walker was unable to say whether he was right or not because she did not have the knowledge to do so. However, he was well placed to have knowledge of this information and there is nothing implausible about it or inconsistent with the documents I have seen.
27. Mr Reed explained that while there may be these two divisions within Etex and different sites producing different things, the structure of the company was such that its headquarters provided all the main services to the divisions. For example, the accounts team, human resources team, the IT team, the accounts payable team and the health and safety team whose work and services covered the whole of Etex were based there. The head office also dealt with all the purchases and supplies of all the various products from across Etex, whether described as roofing or profiling. Therefore, for example, whether the customer was one of the profile sheeting division or the pitched roofing division it would be the accounts payable team to whom that customer would pay their money and purchase team at head office who would process the order.
28. I accept Mr Reed's evidence on the role of head office. As the overall manager he would have been familiar with the structure of Etex. His evidence was credible and consistent with documents I saw on the proposed restructure. Ms Walker was asked about these matters but was unable to give any information because she accepted she did not know one way or the other how Etex was structured in relation to these services. There is no reason, to be fair to her, why she would know.
29. The witnesses accepted that some of the customers would take products from across all divisions of Etex, and that some customers would only take certain products.
30. Ms Walker accepted in evidence that when a customer called with a roofing query, it will be directed to a member of the roofing team generally rather than to a specific member of staff with specific knowledge, unless it related to timber because that was dealt with separately. Therefore, as Ms Walker confirmed there will be technical advisers who deal with roofing generally and specific staff who dealt with particular queries in relation to roofing. This arrangement was companywide. Ms Walker said that profile sheeting fell within at the roofing section for the purposes of sales but that there was a different line management. That is reflected in the diagram that she drew and which Mr Reed accepted.
31. Ms Walker explained that the area sales managers who dealt with roofing might receive different communications to those who dealt with profile sheeting and facades. I accept that this is correct because it is inherently plausible.
32. Etex employed Ms Walker as an area sales manager. Though she worked from home, she went into Etex's Lichfield Road office as and when required. Her job was selling roof products. These included clay tiles, concrete tiles,

fibre cement slates and roofing battens. In cross examination she accepted that she also sold the specific roof accessories to use with to the roofs.

33. Of the products that she sold, Ms Walker accepted in cross-examination and with some hesitation that the fibre cement slates comprised about 20% of sales. Mr Reed confirmed the figure was about right. I accept it was about 20% because there was broad agreement. Mr Reed explained that some products were more popular in some geographical areas than others. I accept that also because again his position would expose him to that information and it sounds inherently plausible. Nothing that Ms Walker said caused me to doubt that assertion.
34. To assist her with her role she had access to several brochures and booklets. Some of those documents would be product specific and some of those would be more general but focused on roofing.
35. In 2018, Etex Global decided that it wanted to sell parts of Etex's roofing division. To give effect to that sale it created Marley. As part of that process Mr Reed prepared a presentation for Etex Global's executive board. As part of that presentation, he went through the employees of Etex and identified which ones might transfer to Marley and which ones should remain with Etex. He said that his aim was to ensure that Marley had enough resources to be sellable but that Etex would be left with sufficient resources to continue the remaining business. I have considered the documents prepared for Etex Global's board by Mr Reed and they are consistent with his evidence on this point. That is why I accept it.
36. Etex Global's executive board agreed with his proposals and so the process began.
37. On 28 June 2018 Mr Reed wrote to Ms Walker. In that letter he explained about the new businesses. He said:
"Etex will combine its clay, concrete and components residential roofing activities in Europe and South Africa in a newly created business unit. [That unit became Marley.]
"Etex will also adapt its organisation to combine the fibre cement activities of Etex roofing and Etex facade into a new business unit [which is in fact Etex itself]
"
"
"In the UK, separation of the business units will be achieved by creating a new legal entity, into which all other trade and assets relating to the concrete, clay and components will be transferred. This means that all employees assigned to this new legal entity,..., may transfer pursuant to [TUPE]. Appropriate information will be provided to the transferring employees.
"
"
38. On 13 September 2018 Mr Reed wrote another letter to Ms Walker in which he confirmed that the clay, concrete and components residential roofing activities would be transferred to Marley and that Etex will combine the fibre cement activities and the facade business into Etex. He said:

“as a result of the proposals, the directors believe that [TUPE] will apply to a number of employees currently employed by [Etex].

“The operation of **TUPE** will mean that a number of employees, who the directors are identified as assigned to the Etex residential roofing business unit, will have their employment transfer to a new company, [Marley]. As a result, this is an announcement to all current employees of [Etex] in relation to this process.

“ ... ”

39. The letter went on to explain that he would contact those employees who were “in scope to transfer”. The claimant was not one of those employees whom he contacted.

40. On 18 December 2018 the respondents entered into the transfer agreement. Clause 13.8 confirmed the agreement was to be covered by English law and interpreted in accordance with English law.

41. Clause 9.1 of the agreement provided as follows:

“9.1 the parties acknowledge and agree that the sale of the Business from the Seller to the Purchaser is a “relevant transfer” within the meaning of TUPE triggering the automatic transfer of the Employees from the Seller to the Purchaser.”

42. The terms in capitals are defined in the agreement at schedule 8 of the agreement (so far as relevant) as follows:

“**Business** means the clay and concrete tiles and fitting and roofing components business and operations as carried on by the Seller at the Properties as at the Closing Date, excluding the Excluded Assets and the Excluded Liabilities and including the Assumed Liabilities and the Business Assets;

“ ... ”

“**Closing Date** means 1 January 2019;

“ ... ”

“**Employees** means all the employees of the Seller who are immediately prior to the Closing Date engaged in the Business as listed in schedule 4;

“ ... ”

“**Properties** means the property’s short particulars of which are set out in Part B of schedule 7, including (without limitation) each and every part of them and relevant Property shall be construed accordingly;

43. The properties in schedule 7 included the Lichfield Road site at Branston.

44. The agreement was put into effect on 1 January 2019. The effect of the transfer was that fibre cement products remained with Etex, whereas the clay and concrete tiles, profile sheeting, fitting and roofing components business did transfer to Marley. The focus of the transfer agreement is on properties rather than a business stream.

45. The site of the headquarters transferred but not all the staff or functions that formed part of the headquarters.

46. Although I do not have copies of the letters sent to those who did transfer from Etex to Marley, Mr Reed conceded, and I accept, that they were told their transfer was pursuant to **TUPE**. Whatever the validity of the criticisms about disclosure, the concession in my judgment means that resolution of that issue would provide me with further assistance to determine the issues before me.

Law

47. It is common ground that if there is a “relevant transfer” for the purposes of **TUPE**, then generally and in simple terms the employees transfer from the former employer (“the transferor”) to the new employer (“the transferee”). Their continuity of employment continues and the transferee assumes liability for the employees’ rights and any liabilities towards them.
48. The regulations set out what amounts to a “relevant transfer”. **TUPE regulation 3** provides so far as relevant:
- “3.— A relevant transfer
- “(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;
- “ ...
- “(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.”
49. **TUPE regulation 4** provides so far as relevant:
- “4.— Effect of relevant transfer on contracts of employment
- “(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.
- “ ... ”
50. In **Spijkers v Gebroeders Benedik Abattoir CV (24/85) [1986] 2 CMLR 296 ECJ**, the Court said that the EU directive to which **TUPE** gives effect (i.e. Directive 77/187/EEC) was to be interpreted as envisaging the case in which the business in issue retained its identity. To determine if such a transfer had occurred, it is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern, as would be indicated, amongst other things, by the fact that its operation was actually continued or resumed by the new employer with the same or similar activities.

51. In **Botzen v Rotterdamsche Droogdok Maatschappij BC CMLR [1986] 50 ECJ** the court said:
- “[14] On the other hand, the Commission considers that the only decisive criterion regarding the transfer of employees' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organisational framework within which their employment relationship took effect.
- “[15] The Commission's view must be upheld. An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive 77/187 by reason of a transfer within the meaning of Article 1(1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned.”
52. There may be a fragmentation which creates different parts that need not necessarily be identified in advance: **Fairhurst Ward Abbotts Ltd v Botes Building Ltd [2004] IRLR 304 CA**.
53. However, EU law decided since **Botes Building** still makes it clear that there must be an “entity” beforehand that keeps its identity after being transferred: **Amatori v Telecom Italia SpA aors (C-458/12) [2014] IRLR 400 CJEU**. In **Amatori** the CJEU said.
- 53.1. “Any organised grouping of persons and of assets enabling the exercise of an economic activity pursuing a specific objective, and which is sufficiently structured and autonomous, constitutes such an entity” at **[31]**;
- 53.2. “the economic entity concerned must have a sufficient degree of functional autonomy, the concept of autonomy referring to the powers granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly, to give instructions and allocate tasks to subordinates within the group, without direct intervention from other organisational structures of the employer”: **[32]**;
- 53.3. “The use of the word 'preserved' in the first and fourth subparagraphs of Article 6(1) means that the independence of the entity transferred must, in any event, exist before the transfer.”: **[34]**;
- 53.4. “Thus, in the main proceedings, if it should prove that the entity transferred did not, before the transfer, have sufficient functional autonomy, which it is for the national court to ascertain, that transfer would not be covered by Directive 2001/23. In such circumstances, there would be no obligation arising under that directive to safeguard the rights of the workers transferred.”: **[35]**
54. It is a question of fact for the Tribunal to determine if there was a relevant transfer. In **Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 EAT**,

Lindsay P set out the factors a Tribunal should consider in paragraphs **[10]-[11]**:

“[10] From those four cases we distil the following. We shall attempt, although it is not always a clear distinction, to divide considerations between those going to whether there is an undertaking and those, if there is an undertaking, going to whether it has been transferred. The paragraph numbers we give are references to the numbering in the IRLR reports of the ECJ's judgments. Thus:

“(i) As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective... It has been held that the reference to ‘one specific works contract’ is to be restricted to a contract for building works....

“(ii) In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible...

“(iii) In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower...

“(iv) An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity...

“(v) An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it...

“[11] As for whether there has been a transfer:—

“(i) As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed...

“(ii) In a labour intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity...

“(iii) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation.... However, whilst no authority so holds, it may, presumably, not be an error of law to consider “the decisive criterion” in (i) above in isolation; that, surely, is an aspect of its being “decisive”, although, as one sees from

the “inter alia” in (i) above, “the decisive criterion” is not itself said to depend on a single factor.

“(iv) Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended....

“(v) In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on....

“(vi) Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets....

“(vii) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer....

“(viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer....

“(ix) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor....

“(x) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship....

“(xi) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer....

“(xii) The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub-contractor and the start by the successor....”

55. The test in **Botzen** applies to determining if a person is assigned or allocated to the part transferred: **Peters v Farnfield [1995] IRLR 190 EAT**.
56. Substantial involvement – and so by analogy mere involvement– is not enough to amount to an assignment for the purposes of **TUPE**: There must be effective assignment to the part transferred: **Williams v Advance Cleaning Services Ltd aors UKEAT/0838/04 EAT**.

57. In **Duncan Webb Offset (Maidstone) Ltd v Cooper [1995] IRLR 633 EAT**, the Employment Appeal Tribunal said (after considering **Gale v Northern General Hospital NHS Trust [1994] IRLR 292 CA**) that while the following may be relevant things to consider (the amount of time spent on one part of the business or the other, the amount of value given to each part 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) there was no definitive list of criteria to consider.
58. There was a dispute about whether the fact the employer thought **TUPE** applied and had said so could be relevant or determinative. In my view the view expressed by a party may be relevant in that it may shed light on the true nature of whether there was an economic entity or whether an employee was assigned to it. However, I accept the argument it cannot be determinative. The regulations are self-contained and either apply or they do not. I do not accept the regulations can be made to apply when a transfer otherwise does not fall within them.
59. Marley suggested that the Tribunal could derive assistance on the meaning of “organised grouping of resources” in **regulation 3(2)** from the case law concerning **regulation 3(1)(b)** which deals with service provision changes and in which that phrase is used. I agree. The use of the same phrase suggests that the concept is meant to be the same. So in **Eddie Stobart v Moreman [2012] ICR 919 EAT**, Underhill J at **[18]** said
- “The statutory language does not naturally apply to a situation where, as here, a combination of circumstances—essentially, shift patterns and working practices on the ground—mean that a group (which, NB, is not synonymous with a “grouping”, let alone an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. The paradigm of an “organised grouping” is indeed the case where employers are organised as “the [Client A] team”, though no doubt the definition could in principle be satisfied in cases where the identification is less explicit.”
60. Applying that idea to the case of the type before me, I agree with Marley that there must be a deliberate grouping of which the claimant is part, not a mere coincidence.
61. When interpreting an agreement, the question is what the words in an agreement would convey to a reasonable person acquainted with the factual matrix within which that parties concluded that agreement: **Arnold v Britton and others [2015] AC 1619 UKSC**.

Conclusions

62. Applying the law to the facts my conclusions are as follows

The transfer issue

63. I conclude that there was not a transfer of an economic entity that retained its identity from Etex to Marley. My reasons are as follows.

64. There was not an organised grouping that could be said to amount to having a specific objective. While there may have been a roofing division it was not structured or autonomous.
- 64.1. It depended on Etex's headquarters for the most basic elements of a business that sold products to others, e.g. even for processing the orders and collecting the money. This is also true of other features like human resources, IT and the like. While it is conceivable that a division could be set up in a way that internally it consumes services from headquarters (e.g. an internal market-type structure) there is no evidence of such an arrangement in this case. It is questionable whether legally that would make a difference in any event.
- 64.2. It sold a range of products manufactured from with Etex and not just a specific product from specific sites.
- 64.3. Technical support was general in nature with referral to specialists only as and when required. It covered all parts of the business – those moved to Marley and those retained by Etex.
- 64.4. Ms Walker was not assigned to a specific task of selling a particular roofing product but to roofing products generally.
- 64.5. On proper interpretation of the transfer agreement, I conclude that a reasonable person would read it as a transfer of properties and some (but not all) roofing products from the roofing division from Etex to Marley, and at the same time the creation within Marley of parallel business structures that hitherto had been undertaken by Etex's head office.
- 64.6. There was no sufficiently defined entity with Etex whose operation could be said to have continued or resumed. After the transfer Etex was still selling some of the products that fell under "roofing" and its headquarters was still providing the same services as before. The effect of the creation of Marley and transfer to it was simply that some, but by no means all, products moved to it.
- 64.7. What transferred was some of Etex's properties at which it manufactured some of its products and sites at which they were produced. However, it is clearly possible to remove some of the products and still continue sell roofing products from what remained.
- 64.8. There is no evidence that customers were transferred to the new entity and could continue to buy products from both respondents. If they chose not to then I see no reason to conclude anything other than it was down to the customer's choice rather than the creation of Marley.
- 64.9. There is some similarity between what the respondents did after transfer: they both sold roofing products and traded simultaneously.

65. Ms Walker has therefore failed to show that there was a distinct sales team or a distinct sales team linked to the parts of the business that moved from Etex to Marley. Products and their means and place of production moved. The need to sell the remaining products remained. She was responsible before 1 January 2019 for selling for Etex and her role of selling for Etex continued after that date.

Assignment issue

66. If, contrary to my conclusions above, there was a transfer of an organised grouping that could be said to amount to having a specific objective, I cannot conclude Ms Walker was assigned to the entity transferred. She worked from home and went to the headquarters only as necessary. She sold several products, some of which transferred and some which did not. The 20% sales of fibre cement cannot be described as incidental or de minimis. Whatever the division in sales, her task was to sell all of Etex's products. The need for salespeople continued after the transfer and so the need for her to continue to sell all of Etex's remaining products. There is no obvious entity to which she could be said to be assigned on the facts that I have found.

67. Finally, I have considered the issue of the correspondence. Whether or not it correctly describes the legal status and mechanism of those transferred it did not assist me in relation to Ms Walker's case. On the facts she does not fall with **TUPE**. A written letter cannot change that. The letters do not point to a relevant economic entity within the meaning of **TUPE** or towards and assignment within their meaning.

Employment Judge Adkinson

Date: 07 February 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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