EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104831/19, 4104832/19 & 4104833/19

Held on 19 February 2020

Employment Judge N M Hosie
Members Mr K Pirie
Mr A N Atkinson

Mr M Mitchell — **1st Claimant**
Represented by
Mr D Hay – Advocate

Mr A Robertson — **2nd Claimant**
Represented by
Mr D Hay – Advocate

Mr D Morrison — **3rd Claimant**
Represented by
Mr D Hay – Advocate

Ethigen Limited — **1st Respondent**
Represented by
Mr G Millar – Solicitor

SKH Logistics (UK) Ltd — **2nd Respondent**
Represented by
Mr C Edward – Advocate

E.T. Z4 (WR)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that: -

1. there was no transfer, in terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006, from the first respondent to the second respondent; and
2. the claims against the second respondent are dismissed.

REASONS

Introduction

1. The claimants each brought complaints of unfair dismissal and in respect of an alleged failure to inform and consult in the context of what is claimed to have been a relevant transfer between the first respondent and the second respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

2. Each of the three claimants had been employed by the first respondent. The first respondent terminated their employment on grounds of redundancy and denies that there was either an unfair dismissal or any transfer. The second respondent adopts the position of the first respondent and denies that there was a transfer.

3. On 25 September 2019, the claimants' solicitor clarified his position regarding the alleged transfer, as follows: -

"*The claimants' contend that a relevant transfer took place as defined within TUPE. The claimants seek to prove that there was a service provision change in that activities carried out by the first respondent on their own behalf are now carried out by the second respondent (Regulation 3(1)(b)(i). All three claimants bring claims for unfair dismissal (both automatic – pursuant to Regulation 7 TUPE and under s.98 ERA 1996). All 3 claimants also bring claims for failure to consult (contrary to Regulation 15 TUPE).*"

4. The case came before the Tribunal, therefore, by way of a Preliminary Hearing to consider and determine the issue of whether or not there had been a TUPE transfer from the first respondent ("R1") to the second respondent ("R2").

The evidence

5. The claimants' Counsel led evidence from David Morrison, one of the claimants. He gave his evidence in a consistent, measured and convincing manner and presented as credible and reliable.

6. A joint bundle of documentary productions was also lodged on behalf of the parties ("P").

The facts

7. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following findings in fact, relevant to the preliminary issue with which the Tribunal was concerned. Helpfully, the parties had submitted an "Agreed Statement of Facts". This was consistent with Mr Morrison's evidence and the documentary productions. By and large, the facts were either agreed or not disputed.

8. All three claimants were employed as delivery drivers with R1 in the North East of Scotland until their dismissal by alleged reason of redundancy, on 25 January 2019.

9. At the time of their dismissals, all claimants had worked continuously with R1 for two years.

10. The claimants' duties mainly involved driving and delivering generic pharmaceuticals and controlled drugs to R1's chemist and pharmacy

customers based in the North East of Scotland (known by R1 as Own Transport routes).

11. The claimants worked Tuesday to Saturday starting at 6.30am and finishing at around 4pm (or when all deliveries were completed).

12. R1 operates three delivery routes in the North East of Scotland as follows: -

    i) Route 68, serving Aberdeen town centre and Aberdeenshire towns and villages (formerly carried out by C1).
    ii) Route 24, serving Aberdeen town centre and surrounding villages (formerly carried out by C2).
    iii) Route 80, serving Highland and Moray (formerly carried out by C3).

13. R1 also use third party couriers on a daily basis to deliver boxed orders to customers in more geographically challenging locations in the North East of Scotland and throughout the UK, in addition to ad-hoc deliveries to existing Route 68, 24 and 80 customers.

14. R1 have offices and a warehouse/depot in East Kilbride.

R1's North East delivery operation – January 2011 to August 2018

15. R1 used an external contractor, APC, to drive its products from East Kilbride to the North East of Scotland.

16. R1's products were boxed, put on a pallet, covered in shrink wrap and labelled at the East Kilbride depot by R1 staff. Route 51 items were addressed, labelled and lodged in transport cages.

17. R1's products were uplifted from East Kilbride by APC employees and driven in APC branded vehicles to APC's distribution centre in Bellshill.

18. R1's products were then sorted according to their destination/regional route by APC staff at APC's distribution centre in Bellshill.

19. The Route 68 and Route 24 pallets and Route 51 pallets (Aberdeen) were driven overnight by an APC driver in an APC branded vehicle from APC's distribution centre in Bellshill to their Agency depot in Aberdeen, which is owned and operated by Menzies Distribution.

20. The Route 80 pallet and Route 51 items, (Highland and Moray) were driven overnight by an APC driver in an APC branded vehicle from APC's distribution centre in Bellshill to their Agency depot in Inverness, which is owned and operated by Menzies Distribution.

21. C1 and C2 would arrive at the Menzies depot in Aberdeen in their R1 branded vehicles each day at around 6.30am.

22. On arrival at the Aberdeen distribution centres, the APC driver would meet C1 and C2 and R1's Route 68 and Route 24 products were then transferred from the APC branded vehicle to two R1 branded vehicles driven by C1 and C2. Route 51 products would arrive in mixed cages and were sorted and distributed by Menzies drivers.

23. C1 and C2 would then remove the shrink wrap from the pallets, check the products alongside their delivery manifests and ensure that none of the boxes were opened.

24. The Menzies Aberdeen depot had a gated system, front entrance security and CCTV, and was regularly inspected by R1 management.

25. The operation for Route 80 (Highland and Moray) is the same as set out in at 15) to 24) above except the APC driver would meet C3 at the Menzies depot in Inverness and his arrival time would be around 7/7.30am.

R1's North East delivery operation – August 2018 to November 2018

26. In or about August 2018, R1 ceased using APC staff and external company distribution centres for their three own transport delivery operations in North East of Scotland Routes 68, 24 and 80. Deliveries for North East Customers on Route 51, (Courier), were unaffected and continue to be processed as was – even to customers also served by Routes 68, 24 and 80.

27. R1's products were boxed and labelled at the East Kilbride depot by R1 staff.

28. R1's products were collected from East Kilbride by delivery drivers employed by R1 and driven in three separate R1 branded vehicles to two destinations in the North East of Scotland.

Routes 68 and Route 24 (Aberdeen)

29. Two R1 drivers drove from East Kilbride to Aberdeen in R1 branded vehicles with preloaded products for Route 68 and Route 24 deliveries.

30. C1, C2 and the two R1 drivers from East Kilbride met at the Asda, Bridge of Dee in Aberdeen at around 7am.

31. C1 and C2 would drive to Asda in their R1 branded vehicles.

32. At Asda, C1 and C2 would swap their empty vehicles for the loaded vehicles.

33. C1 and C2 then commenced their daily deliveries and the other two R1 drivers drove the empty R1 branded vehicles back to East Kilbride.

Route 80

34. The facts described at paras 29 and 32 above applied, except the R1 delivery driver and C3 met at the Tesco car park in Aviemore.

R1's North East delivery operation post January 2019

35. R1 products are prepared and packaged at R1's depot in East Kilbride for all three routes.

36. Three delivery drivers employed by R2 collect R1's products for all three routes from R1's East Kilbride depot.

37. For Route 80, an R2 delivery driver drives an R2 non-branded vehicle with R1 products to a base belonging to R2 at Shotts.

38. For Route 80, the R2 delivery driver exchanges vehicles with another R2 delivery driver. The second R2 delivery driver then drives north and makes the Route 80 deliveries to the same R1 customers, using the same route and using the same paperwork used by C3.

39. For Route 24 and Route 68 the operation is the same as that described at paras 35 and 38 above, except two R2 drivers drive directly from East Kilbride to Aberdeen to make the Route 24 and Route 68 deliveries (there is no exchange at Shotts).

Claimants' submissions

40. The claimants' Counsel submitted that in January 2019 there had been a "*service provision change"*, in terms of Regulation 3(1)(b)(i). The activities which had been carried out by the claimants were carried out by the second respondent.

41. Immediately prior to that, in the period from August to November 2018 , there had been a service provision change, in terms of Regulation 3(1)(b)(iii), when the first respondent took over the work previously carried out by APC.

42. In support of his submissions, the claimants' Counsel referred to ***Kimberley Group Housing Ltd v. Hambley & Others*** [2008] ICR 1030. He referred, in particular, to the "guidance" in the Judgment of Langstaff J at paras. 24-28.

"Relevant activities"

43. So far as the "first step" was concerned, Counsel submitted that the "relevant activity" in the present case was, **"the delivery of medical supplies provided by the first respondent to its customers in the North East of Scotland".**

"Organised grouping"

44. So far as the "second step" was concerned, namely whether there was an "organised grouping", Counsel referred to para. 29 of the Judgment in ***Kimberley***. He referred to the period from August to November 2018 and submitted that the "organised grouping" comprised, **"those staff engaged in the cascade (ferrying) of supplies from East Kilbride to ultimate customer destinations which included the three claimants and their respective routes".**

45. Counsel also referred to the guidance of Langstaff J that all the facts should be considered in the round. He submitted that an "organised grouping" could comprise one employee.

46. In the present case, the three claimants were part of a grouping which had as its purpose the carrying out of the activity. Fundamentally, the same activity was taking place between the first and second respondents. There were no different clients; there were no different medical supplies; there were no different routes. It was submitted that how the first respondent made arrangements for this activity was, "*secondary if relevant at all".* It was a change in the structure of the way things were done.

47. Counsel also referred to ***Metropolitan Ltd v. Churchill Dulwich Ltd & Others*** [2009] ICR 1380 in support of his submissions. He referred in particular to the following passages from the Judgment of Judge Burke QC:-

"*29. In a case in which Regulation 3(1)(b) is relied upon, Employment Tribunals should ask itself simply whether, on the facts, one of the three situations set out in Regulation 3(1)(b) existed and whether the conditions set out in Regulation 3(3) are satisfied.*

30. The statutory words require the Employment Tribunal to concentrate upon the relevant activity; and Tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs that the latter performed the relevant tasks. However, 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 task 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."

48. He submitted that the method of transportation was still the same; it involved the delivery of medical supplies; and there was still a need for drivers.

49. He submitted that, *"the housekeeping of supplies and security was not sufficient to deprive the claimants of their employment".*

50. He submitted, therefore, that in the present case the "relevant activity" was well within the definition of a service provision change.

51. Counsel also submitted that there was an "organised grouping". The claimants' sole function was the delivery of supplies to customers from the pickup points either in Aviemore or the Bridge of Dee, Aberdeen. Any other duties they might have had, so far as checking the deliveries and security, were ancillary.

52. Counsel confirmed his position that there was a similar activity before and after the second respondent became involved. He assumed that the respondents would submit that there was a fundamental difference in the activity, but they had not led any evidence or challenged this by way of cross-examination.

53. He submitted that it was "surprising to say the least" that it was being maintained that an enterprise which involved the delivery of medical supplies and controlled substances would not involve any contractual documentation between the first and second respondent. Nor had any details been given of any resources provided by the second respondent to the first respondent to carry out the activity of deliveries to the North East of Scotland.

54. It was submitted, therefore, that in light of this and having regard also to the agreed facts and Mr Morrison's evidence, that *"any assertion that there was a change in activity should be afforded slight weight".*

55. In conclusion, Counsel submitted that the activity had been identified and it was carried out by an organised grouping. The service provision change resulted in the activity now being carried out by the second respondent. It was an activity in which the claimants clearly had been engaged.

56. It was submitted, therefore, that there had been a TUPE transfer which included the three claimants.

First respondent's submissions

Relevant activities

57. The first respondent's solicitor submitted that there had been a *"glaring omission"* in the claimants' submissions, namely the significance of the part which the first respondent's depot in East Kilbride played in the activities.

58. He referred to the activities which were carried out in the three periods namely, from January 2011 to August 2018; August 2018 to November 2018; post January 2019.

59. He submitted that ultimately three drivers were doing what had been done by five or six drivers previously.

60. He submitted that a "common sense approach" was required.

61. In support of his submissions he referred to ***The Salvation Army Trustee Company v. Bahi & Others*** [2016] WL 05484859. He referred, in particular, to the following passages from the Judgment of the EAT, which he submitted was "exactly the issue" in the present case: -

"*22. The words of Regulation 3(1)(b), including the word "activities" are to be given their ordinary, everyday meaning (see Arch Initiatives at paragraph 19). In the context of Regulation 3(2), the activities must be defined in a common sense and pragmatic way (see Metropolitan Resources Ltd v. Churchill*

Dulwich [2009] IRLR 700 at paragraph 36). On the one hand, they should not be defined at such a level of generality that they do not really describe the specific activities at all. Thus it would be wrong to characterise a fully catered canteen as merely the provision of food to staff (see OCS Group at paragraph 22). On the other hand, the definition should be holistic, having regard to the evidence in the round, avoiding too narrow a focus in deciding what the activities were (see Arch Initiatives at paragraph 38). A pedantic and excessively detailed definition of "activities" would risk defeating the purpose of the SPC provisions.

23. This, to my mind, is precisely the approach that the Employment Judge followed: see paragraph 12 of his Reasons, which steers a correct course between the twin dangers of over generalisation and pedantry…… The Employment Judge reached a conclusion that was entirely permissible. It was a question of fact and degree for his decision."

62. The first respondent's solicitor submitted that the activity whereby the medical supplies were delivered from East Kilbride to the end users was *"fundamentally different between before and after*".

63. He submitted that just considering the activity to be the transport of medical supplies from A to B would be *"an over generalised view".*

64. He also referred to ***Johnson Controls Ltd v. Campbell & Another*** UKEAT/0041/12/JOJ. He referred, in particular, to the following passage from the Judgment of the Honourable Mr Justice Langstaff (President): -

"**Discussion**

18. We have already identified that the issue for our consideration is whether the Judge was entitled to come to the conclusion he did. The question of approach is thus important. In our view, the Tribunal, faced with the question, which is its initial and critical question as identified by **Kimberley** *has to decide what an activity is. Mr Brittenden, who appears for UKAEA, argues that Mr Rose's analysis is an over-analysis where it seeks to separate the how from the what. He points to the fact that small differences quantitively between a service provider before a putative transfer and that occurring after can be critical, as they were in the* **Enterprise Management** *case, where the description adopted by the Tribunal was 15 per cent of the work no longer being carried on after as it had been before. We accept that identifying what an activity is involves an holistic assessment by the Tribunal. The Tribunal is trusted to make that assessment. Its evaluation will be alert to possibilities of manipulation, but it is not simply to be decided by enumerating tasks*

identifying whether the majority of those tasks quantitively is the same as the majority was prior to the putative transfer."

65. The first respondent's solicitor submitted that there was a, *"fundamental change in activity*" and that was why he took the third claimant, Mr Morrison in evidence to the, *"Route Comparison – Ethigen to SKH"* (P.80). He submitted that this demonstrated the considerable difference in hours worked, responsibilities and the numbers of drivers.

66. He submitted, therefore, that there was not a SPC.

Organised grouping

67. The first respondent's solicitor submitted that, as it was accepted by the claimant's Counsel that there was, *"one driver for one group, his submission that there was an organised grouping was based on deliveries in the North East of Scotland".*

68. He submitted that the first respondent is a large organisation and there was no evidence that the claimant's line manager was the delivery manager for the North East.

69. He found difficulty understanding, *"why three drivers with no day-to-day interaction who were all doing different routes comprised an organised grouping; even if there is a holistic approach from East Kilbride to the ultimate destinations".*

70. After January 2019, there was no stop off in Aberdeen or in Inverness. From August 2018 to November 2018, a driver employed by the first respondent drove the first part of the route from East Kilbride to Aviemore and Mr Morrison then took over and completed the deliveries. It was submitted,

therefore, that the "organised grouping", if there was one, would be those two drivers.

71. It was submitted that the three claimants were not the organised grouping.

72. After the putative transfer, Route 80 did not stop at Aviemore or Inverness as it had done before, but rather started and finished at East Kilbride.

73. It was submitted, therefore, that not only was there was a fundamental difference in the activity before and after the putative transfer, but also there was not an organised grouping as the only "grouping" involved those engaged on a particular separate route.

Second respondent's submissions

74. The second respondent's Counsel adopted the submissions by the first respondent's solicitor and took no issue with the relevance of the case law to which he had referred.

Relevant activities

75. Counsel submitted that these were not the same before and after the reported transfer.

76. The activities before the transfer involved vehicles travelling from East Kilbride to Aberdeen or Inverness and then on to the first respondent's customers.

77. After the putative transfer, there was no use of the *"local depots"* in the North East.

78. Accordingly, the activities were not the same: *"You can't just say activities are the same if they get to the same customers, but the ends are the same".*

Organised grouping

79. Counsel reminded the Tribunal that, at the outset of the Hearing, the claimant's Counsel clarified his position that the organised grouping was, *"those staff involved in the cascade (ferrying) of those supplies from the first respondent's depot in East Kilbride to its customers in the North East of Scotland, comprising, Routes 68, 24 and 80".* He also confirmed that the "grouping" carried out the activity from East Kilbride and that the grouping was, *"only the staff involved in these three Routes".*

80. Counsel submitted that based on this clarification, *"the claimants' Counsel had failed to prove his case".*

81. In his support of his submissions, Counsel referred to ***Eddie Stobart Ltd v. Moreman & Others*** [2012] ICR 919.

82. While Counsel accepted that the facts of that case were slightly different in that the customers were not clients, he submitted that the following passage from the headnote was apposite to the present case:-

"*Held, dismissing the appeal, that it was not sufficient, for the purpose of establishing that an "organised grouping of employees" satisfying the requirements of Regulation 3(3)(a)(i) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 existed, merely to show that a group of employees in fact mostly worked on tasks for a particular client; that the wording of Regulation 3(3)(a)(i) required that the employees should be organised by reference to the requirements of the client and did not naturally apply to a combination of circumstances whereby shift patterns meant that a group of employees might in practice be found working on tasks which benefited a particular client; and that, accordingly, there had been no service provision change for the purposes of regulation 4.*"

83. He also referred to the following passages: -

"*17. In her skeleton argument Ms Woodward summarised the pleaded grounds of appeal under three headings; but in her oral submissions she accepted that the essential question was whether it was sufficient for ES to show that there was a group of employees who did, as a matter of fact, mostly work on tasks required by the Vion contract or whether, as the Judge held, it*

was necessary that the employees in question be organised as, in effect, members of a "Vion team". She submitted that the former approach was correct, for the following reasons……..

18. I do not accept those submissions. I believe that the judge came to the right answer for the right reasons. Taken it first and foremost by reference to the statutory language, regulation 3(3)(a)(i) does not say merely that the employee should in their day-to-day work in fact (principally) carry out the activities in question: it says that carrying out those activities should be the (principal) purpose of an "organised grouping" to which they belong. In my view that 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 necessarily 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 identification is less explicit."

84. Counsel also referred to a case which followed the ***Eddie Stobart*** case namely, ***Ceva Freight (UK) Ltd v. Seawell Ltd*** [2013] SC596

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85. He referred, in particular, to the following passage from the rubric at page 597 and stressed the use of the word *"collaboration": -*

"*Held that:- (1) whereas there was no dispute that a "service provision change" had occurred, that could only constitute a "relevant transfer" if the condition set out in reg.3(3) had been met (para. 28); (2) in addressing the matter it was first necessary to identify the scope and nature of the activities before considering how the activities were carried out (paras. 29, 30); (3) where, as in this case, the activities were carried out by the* ***collaboration*** (Counsel's emphasis)*, to varying degrees of a number of employees who are not organised as a grouping having as their principal purpose the carrying out of the activities for the client, it was not legitimate to isolate one of that number on the basis that the employee in question devoted all, or virtually all, of his or her working time to assisting in the collaborative effort (para. 33); (4) the conditions of reg.3(3) had not been met, that ET proceeded upon an error of law and that EAT had been correct to reverse the decision (para. 35); and the appeal refused.*"

86. Counsel submitted that this was exactly what was being claimed by each of the claimants in the present case.

87. While it was accepted that each claimant had a dedicated route which involved travelling *"from home to home"*, that was normal for a delivery driver. However, he submitted that was insufficient to establish that there was an "organised grouping".

88. In support of that submission, he referred further to the following passages in ***Ceva***: -

"[31] *Having regard to that consideration we agree with the view expressed by the EAT in its Judgment in Eddie Stobart Ltd v. Moreman & ors* (para. 18) *that the concept of an organised grouping implies that there be an element of* ***conscious organisation*** (Counsel's emphasis) *by the employer of his employees into a grouping – of the nature of a 'team' – which has at its principal purpose the carrying out de facto of the activities in issue…….*

[33] It appears to us to follow from the structure and wording of the TUPE Regulations that where the activities are carried out by the collaboration, to varying degrees, of a number of employees who are not organised as a grouping having as their principal purpose the carrying out of the activities for the client, ***it is not legitimate to isolate one of that number on the basis that the employee in question devoted all, or virtually all, of his or her working time to assisting in the collaborative effort*** (Counsel's emphasis). *Counsel for* ***Ceva*** *invoked the document describing Mr Moffat's "Role and Personal Profile" as a matter to which the EAT had paid too little regard. Where the job description contained in that document indicates that Mr Moffat was employed for the purpose of enabling the contract with Seawell to be performed, we do not consider that the fact of his being so employed relevantly distinguishes him from an employee who, as one of a number engaged in carrying out the activities, de facto devotes all, or virtually all, of his or her working time to contributing to the carrying out of the activities.*"

89. Counsel reminded the Tribunal that what was being claimed in the present case was that the grouping was, "*those staff involved in the cascade……".* He submitted that must include, prior to the alleged transfer, the drivers who drove from East Kilbride, along with the three claimants.

90. Mr Morrison's evidence regarding the drivers he met was that they were temporary drivers and then full-time members of the first respondent's staff. There was no evidence about the drivers from East Kilbride to Aberdeen, but they were not the same drivers every day, There was no evidence before the Tribunal, therefore, that it was the same people who did that work every day.

In any event, there was no evidence of the required, *"conscious organisation"* into a grouping.

91. Counsel concluded with the analogy that a "group" comprises people waiting for a bus at a bus stop, but that is not a "grouping" by anyone.

Response by the claimants' Counsel

92. The claimant's Counsel responded first to the submission by the first respondent's solicitor regarding whether or not there was an "activity". He submitted that there is, *"a difference between the how of an activity and the what".* He submitted that the first respondent's solicitor had focused on the *"how"*, which is a matter for analysis at a later stage in the case but not at this stage and not on the *"what"*. The activity, at this stage, should focus on the *"what"* and not on the "*how".*

93. Counsel also referred to para. 18 of the Judgment in ***Johnson*** and the possibility of *"manipulation*".

Organised grouping

94. Counsel submitted that although it was asserted that there was a disparate and separate group, the respondents had not led any evidence in this regard. He submitted that the organised grouping which he had proposed was clearly limited to the activity, *"and that's what matters".* He submitted that there might be individuals involved in the grouping but that does not mean that there is not an organised grouping. Counsel did not agree that it could only be an organised grouping if the same people were involved all the time. He submitted, *"that sets the bar too high; one can be assigned to an organised grouping without spending all the time there."*

95. Counsel also submitted that the Tribunal should*, "not lose sight of the facts in the **Eddie Stobart** case".* He referred to the fact that, *"an application to strike out the claims against was made on the basis that the claimant's witness statements disclosed no case that they were assigned to any particular client….."* Counsel referred to the following passage from the Judgment: -

"The *facts in outline and the procedural history*

4. ES are a well-known "logistics" business; that is, they provide warehousing and transport services. The operation at Manton Wood consisted of warehousing meat in bulk, both processed and unprocessed, on behalf of suppliers and delivering it either to the sites where it would be processed or to retail outlets. ES bought Manton Wood in early 2008. Originally there were five suppliers who were major clients – Parkhams, Bakkover, Dawn Meats, Forza and Vion. The first three, however, had been lost by early 2009; and at the time of the closure the only two left were Forza and Vion. Forza supplied meat only to ASDA. Vion had a number of customers, principally but not only the big supermarket chains. Different retailers had different agreed times during the day by which they would place orders for next-day deliveries. In the case of ASDA, the timing of its orders was such that all or most of the products destined for it had to be "picked" principally by the night shift; but in most other cases products could be picked by the day shift. The result was that night shift employees worked principally on tasks required by the Forza contract, whereas day shift employees worked principally on tasks required by the Vion contract."

96. Counsel submitted that this had more similarity to the "ad hoc arrangement" Mr Morrison spoke about, as opposed to regular clients. Counsel submitted that in the present case there was, *"a fixed manifest to regular clients, supplemented by ad hoc clients".*

97. So far as the ***Ceva Freight*** case was concerned, Counsel submitted that this was "*of "limited assistance"*, as there was an attempt to make a special case for one individual. Counsel submitted that that was not so in the present case. If it had been, evidence would have been led by those who organised the resources.

98. Counsel submitted that the respondents were, *"labouring the geography of East Kilbride".* While it was some distance away, it was the first respondent's

principal base, which he submitted was a factor which supported his submissions.

First respondent's response

99. The first respondent's solicitor reminded the Tribunal that the onus of proof lay with the claimants. While the claimants' Counsel had referred to the fact that the respondents had not led any evidence, the onus was on the claimants to prove that they were part of an "*organised grouping"* and there was nothing in the pleadings in that regard.

Second respondent's response

100. The second respondent's Counsel referred the Tribunal to the wording of the Regulations and the requirement for an *"organised grouping of employees*". It was not, *"an organised group of employees and resources".*

101. Counsel also reminded the Tribunal that the onus proof lay with the claimants.

Discussion and decision

102. The issue for the Tribunal in the present case was whether there had been a relevant transfer in terms of TUPE, because of a "service provision change" ("SPC").

103. The extension of the definition of a "relevant transfer" to cover a SPC was introduced by TUPE in 2006. So far as the present case was concerned, the following provisions were relevant: -

"***3 A relevant transfer***

(1) These Regulations apply to –

(a) .....

(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 been previously 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) ……..

(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."

104. As Regulation 3 is a creation of domestic law, rather than being EU derived, the "multi-factorial" approach to whether there has been a TUPE transfer, which continues to apply in a standard TUPE transfer does not apply to a SPC. This was confirmed by Judge Burke Q.C. in ***Metropolitan Resources***. In his view, the circumstances in which a SPC is established are *"comprehensively and clearly set out in reg 3(1)(b) itself and regulation 3(3):-*

The introduction of Reg. (3)(1)(b) enables a transfer to be established in any of these three situations if the activities previously carried out by client or

contractor have ceased to be so carried out and, instead, are carried out by a contractor or a new contractor or by the client.……. …….

If there was immediately before the change relied upon, an organised grouping of employees which had as its principal purpose the carrying out of the activities in question, the client intends that those activities will be carried out by the alleged transferee, other than in connection with a single specific event or a task of short-term duration, and the activities do not consist totally or mainly of the supply of goods for the client's use, and if those activities cease to be carried out by the alleged transferor and are carried out instead by the alleged transferee, a relevant transfer exists. In contrast to the words to define transfer in the 1981 Regulations the new provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact……..there is no need for a judicially prescribed multi-factorial approach……..

29. In a case in which regulation 3(1)(b) is relied upon, the employment tribunal should ask itself simply whether on the facts, one of the three situations set out in regulation 3(1)(b) existed and whether conditions set out in regulation 3(3) are satisfied."

Relevant activities

105. Following the guidance of the EAT in ***Kimberley***, the first issue which we considered was "relevant activities". Reg. 3(2)(A) provides that the activities being carried out by another person must be *"fundamentally the same"* as the activities carried out by the person who has ceased to carry them out; the greater focus of the case law has been on the question of whether activities remain the same in the hands of the new contractor.

106. When considering this issue, we were again mindful that in ***Metropolitan Resources*** Judge Burke Q.C. emphasised that when comparing the activities of the alleged transferor and transferee, detailed differences will be inevitable and it could not have been intended that the *"new concept"* of a SPC should not apply because of "*some minor difference*". In his view, "*a common sense and pragmatic approach is required.*"

107. Also, in ***Salvation Army***, HH Judge David Richardson, in the EAT, expressed the same view: "*the activities must be defined in a common sense and*

pragmatic way……on the one hand, they should not be defined at such a level of generality that they do not really describe the specific activities at all…..on the other hand, the definition should be holistic, having regard to the evidence in the round, avoiding too narrow a focus in deciding what the activities were….A pedantic and excessively detailed definition of 'activities' would risk defeating the purpose of the SPC provisions."

108. Further, in ***Johnson Controls***, The Honourable Mr Justice Langstaff (President) said that, "*identifying what an activity involves is an holistic assessment by the Tribunal. The Tribunal is trusted to make that assessment. Its evaluation will be alert to possibilities of manipulation, but it is not simply to be decided by enumerating tasks and identifying whether the majority of those tasks quantitively is the same as the majority one prior to the putative transfer.*"

109. What then of the present case? The claimants' Counsel maintained that the activity was, "*the delivery of medical supplies, including controlled drugs, on behalf of the first respondent, to customers of the first respondent, in the North East of Scotland*."

110. The question for us was whether the activities before and after the purported transfer were fundamentally the same and that question was one of fact and degree.

111. We did not find this issue easy to determine. On the one hand, there was a change in the activities in that the delivery routes did not involve a stop and transfer of drivers and loads in Aberdeen and Inverness; and only three drivers were required after the purported transfer as opposed to six (P.80).

112. However, on the other hand, the method of transport was the same; the customers and their locations were the same; and the goods being delivered were the same.

113. We were satisfied that the contention by the claimants' Counsel that the relevant activities were, *"the delivery of medical supplies including controlled drugs on behalf of the first respondent to the first respondent's customers in the North East of Scotland"*, was well-founded.

114. Albeit with some hesitation, bearing in mind the caution in the case law against taking too general a view and not being "pedantic", we decided, unanimously, taking what we considered to be a "common sense approach", that there were relevant activities which were "fundamentally the same" before and after the alleged SPC.

Organised grouping

115. The Regulations only apply to some changes in service provisions. They only apply to those which involve, "*an organised grouping of employees which has as its principal purpose the carrying out of the activities on behalf of the client.*"

116. The Department for Business Innovation & Skills Guide January 2014, states that this requirement, "*is intended to confine the Regulations' coverage to cases where the old service provider (i.e. the transferor) has in place a team of employees to carry out the service activities, and that team is essentially dedicated to carrying out activities that are to transfer on behalf of the client (though they do not need to work exclusively, on these activities, but carrying them out for the client does need to be their principal purpose). It would therefore exclude cases where there was no identifiable grouping of employees or where it just happens in practice that a group of employees works mostly for a particular client. This is because it would be unclear which employees should transfer in the event of a change of contractor, if there was no such grouping. For example, if a contractor was engaged by a client to provide, say, a courier service, but the collections and deliveries were carried out each day by various different couriers on an ad hoc basis, rather than by*

an identifiable team of employees, there would be no service provision change and the Regulations would not apply.

It should be noted that a "grouping of employees" can constitute just one person as may happen when the cleaning of a small business premises is undertaken by a single person employed by a contractor."

117. The claimants' Counsel clarified his position in his submissions that the organised grouping was, "*those staff engaged in the cascade (ferrying) of supplies from East Kilbride to ultimate customer destinations which included the three claimants and their respective routes.*"

118. It is clear from the case law that it is necessary to consider whether a grouping existed and, if so, whether it had been intentionally formed.

119. In ***Eddie Stobart*** the EAT held that, for Regulation 3(3)(a) to apply, the organisation of the grouping must be more than merely circumstantial. The employees must have been organised intentionally.

120. The Employment Judge had held that merely because the employee spent all or most of their time on tasks related to the particular contract did not mean that they was an "*organised grouping*". At the EAT, Mr Justice Underhill agreed. He said that the statutory language, "*necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question.*" He distinguished between a group and an "organised grouping", pointing out that a group 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.*" Thus, this decision limits the reach of the service protection. It would appear that this decision limits a SPC to employees who can be said to have been organised so as to form part of a dedicated client team. Mr Justice Underhill also said that, "*there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible.*"

121. The Court of Session approved and applied that analysis in ***Ceva Freight*.**

122. So far as the present case is concerned, although the three claimants were doing the same type of job, there was no collaboration between or among them. As the first respondent's solicitor put it, there was, *"no day-to-day interaction between them".* We did not hear any evidence about them being directed by the same line manager; none of the three claimants was dependant on another to enable him to carry out his work; they each had different dedicated routes.

123. There was no evidence of the necessary "*intentional grouping"* and, as the second respondent's Counsel submitted, the reference to the *"cascading"* of supplies from the first respondent's depot in East Kilbride by the claimants' Counsel in support of his assertion that there was an organised grouping meant that included, prior to the alleged transfer, the drivers who drove from East Kilbride to Aberdeen and Inverness along with the three claimants. The drivers from East Kilbride were temporary drivers at first and then employees of the first respondent. There were not the same drivers every day. No evidence was led about the drivers from East Kilbride. There was no evidence therefore, that it was the same people who did that work every day.

124. In any event, he submitted that there was no evidence of a conscious organisation into a grouping.

125. We were satisfied that those submissions by the second respondent's Counsel and the submissions by the first respondent's solicitor that there was no "organised grouping", were well-founded.

126. We arrived at the unanimous view, therefore, that there was not an organised grouping. That being so, there was no TUPE transfer to the second respondent and the claims against the second respondent are dismissed.

127. As the claims against the first respondent remain. The parties' solicitors are directed to make representations to the Tribunal, within the next 21 days as to further procedure.

Employment Judge:	***Nicol Hoise***
Date of Judgment:	***01 June 2020***
Date Sent to Parties:	***05 June 2020***