EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4118032/2018 and others

Preliminary hearing held in Glasgow on 28 and 29 August 2019

Employment Judge M Whitcombe

Mr J Higgins (lead claimant)	**Claimants**
MacLay (Civil Engineering) Limited	**First Respondent**
Mac Asphalt Limited	**Second Respondent**

JUDGMENT

The judgment of the Tribunal on the defined preliminary issues is as follows.

(1) At the relevant time there was no service provision change as defined by regulation 3(1)(b)(ii) and (3) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. Therefore, there was no relevant transfer from the first respondent to the second respondent for the purposes of regulation 3 of those Regulations.

(2) It follows that the issue of assignment for the purposes of regulation 4(1) of the same Regulations does not arise.

REASONS

Introduction and background

1. This hearing concerns the employment position of a number of individuals who have worked on contracts for the repair and resurfacing of pavements in North Lanarkshire on behalf of North Lanarkshire Council ("NLC"). That work has for many years been outsourced by NLC and the issue at the heart of this litigation is an alleged transfer between an outgoing contractor and an incoming contractor following a re-tendering exercise.

2. The two respondents are both civil engineering companies carrying out work including the repair and resurfacing of roads and pavements, as well as other infrastructure works it is not necessary to list for present purposes.

3. It is alleged that there was a relevant transfer from MacLay Civil Engineering Limited (the first respondent) to Mac Asphalt Limited (the second respondent) under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE 2006") in the following context.

4. In about April 2018 NLC put the contract for footpath resurfacing and associated work within the geographical boundaries of NLC out to tender. For the purposes of the tender the contract was formally designated "Bitumen Macadam (Bitmac) Repairs 2018-2022 Lot 2". At that time the first respondent had held the equivalent contracts since October 2015 ("Measured term contract for footpaths and associated work 2015-2017" and the same for 2017-2018). The second respondent successfully tendered for the work and began to perform work under the contract in July 2018.

The claims

5. The claims are for unfair dismissal, notice pay, holiday pay and a failure to inform and consult under regulation 13 of TUPE 2006. All three parties are optimistic that the resolution of certain preliminary issues regarding the alleged transfer might enable them to resolve the other issues without the

need for further hearings.

Issues

6. This preliminary hearing was arranged at the direction of EJ Woolfson to determine the following preliminary issues:

   a. whether there was a relevant transfer under TUPE 2006; and if so
   b. who transferred.

The first issue – whether there was a transfer

7. The claimants and the first respondent allege that there was a transfer by way of a service provision change under regulation 3(1)(b)(ii) TUPE 2006. The second respondent denies that there was any such transfer. No one argues that there was a transfer of an undertaking in accordance with regulation 3(1)(a) TUPE 2006.

The second issue – who transferred

8. In this case the question "who transferred" is determined by regulation 4(1) TUPE 2006. Seen in that context, the question effectively becomes "*who was assigned to the organised grouping of resources or employees that is subject to the relevant transfer?*"

9. However, parties were agreed that I should decide this issue only in relation to the following claimants: Joseph Higgins, Joseph McGuigan, Gerard Gow, Michael Sloan and Alexander Forrest. It was agreed that I should not at this stage consider the positions of Thomas Campbell or Robert McMillan because both of those claimants were on long term sick leave at the time of the alleged transfer. Particular issues arise in relation to them which the parties wished to resolve separately, after obtaining appropriate medical evidence.

Applicable law

10. A transfer by way of service provision change under regulation 3(1)(b)(ii) TUPE 2006 is where:

"*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*".

11. It is also necessary for the conditions in paragraph (3) of regulation 3 to be satisfied. Those conditions 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."

12. It is important to note that none of the parties at this hearing suggested that the principles in regulation 3(3)(a)(ii) or 3(3)(b) had any relevance to the facts of this case. There is no question of the activities being "in connection with a single specific event or task of short-term duration" or the supply of goods for the client's use. The key questions all derived from paragraph (3)(a)(i):

a. Was there an organised grouping of employees?
b. If so, did that organised grouping have as its principal purpose the carrying out of the activities concerned on behalf of the client?

13. Both questions must be answered by reference to the position *immediately before the alleged service provision change* (see regulation 3(3)(a)).

14. A condensed summary of the relevant principles to be derived from authorities such as ***Kimberley Housing Group Ltd v Hambley*** [2008] ICR 1030, ***Churchill Dulwich Ltd (in liquidation) v Metropolitan Resources Ltd*** [2009] ICR 1380 and ***OCS Group v Jones*** (UKEAT/0038/09) is as follows.

a. Service provision change is a wholly new statutory concept of domestic rather than European creation. The circumstances in which one is established are comprehensively set out in regulation 3(1)(b) and 3(3) of TUPE 2006 and the application of those provisions to an individual case is essentially a question of fact.
b. There is no need to adopt a purposive construction as opposed to a straightforward and common sense application of the relevant statutory words (***Hunter v McCarrick*** [2013] ICR 235).
c. The condition in regulation 3(3) cannot be considered until a decision is made as to whether or not there is a service provision change falling within regulation 3(1)(b).
d. The first question for the Tribunal is to identify the relevant activity or activities, since only then can it consider whether those activities cease to be carried on by the contractor on a client's behalf and are carried out instead by another person on the client's behalf (***SNR Denton UK LLP v Kirwan*** [2013] ICR 101). "Activities" should be given its ordinary, everyday meaning, defined in a common sense and pragmatic way without excess generality (***Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust*** [2016] ICR 607, approved in ***Salvation Army Trustee Co v Bahi*** [2017] IRLR 410).
e. Next the Tribunal must identify the employee or employees who ordinarily carried out those activities.

f. Next the Tribunal must consider whether the putative transferor organised that employee or those employees into a "grouping" for the principal purpose of carrying out the relevant activities.

15. It is relevant to set out the principles derived from some additional authorities on the "organised grouping" and "purpose" issues. There must be a deliberate putting together of a group of employees for the purpose of the relevant client work (***Seawell Ltd v Ceva Freight (UK) Ltd*** [2012] IRLR 802). The client work need not be the *sole* purpose of the organised grouping, but it must be the *principal* purpose (***Argyll Coastal Services Ltd v Stirling*** (UKEATS/0012/11). There is no such grouping without deliberate planning and intent – if a group of employees happened to work for a particular client only as a result of a combination of circumstances such as shift patterns and working practices than that will be insufficient (***Eddie Stobart Ltd v Moreman*** [2012] ICR 919). While there may be more than one purpose, the carrying out of the activities in question has to be the principal purpose of the organised grouping, *whether or not it is in fact carrying them out at any particular time*. On the other hand, the activities undertaken may change to such an extent that the principal purpose of the grouping has changed by the date of the transfer (***Tees, Esk & Wear Valleys NHS Foundation Trust v Harland*** [2017] ICR 760). Not every employee who carried out work for the client should be considered – for example an employee assisting on a temporary basis or covering for an absent colleague would not be relevant to the analysis (***Rynda (UK) Ltd v Rhijnsburger*** [2015] EWCA Civ 75, paragraph 43).

16. It is not necessary to say anything about authorities concerned with the question whether the activities carried out by the putative transferor and the putative transferee are fundamentally or essentially the same since it is agreed by all parties in this case that they were.

Evidence

17. The witnesses gave their evidence in chief in the form of witness statements, the accuracy of which they confirmed on oath. The statements then stood as evidence in chief. None of the representatives asked supplementary questions in chief. The witnesses were cross-examined.

    a. The first respondent called Mr Thomas Dickson. He is a quantity surveyor employed by the first respondent.

    b. The second respondent called Mr Jamie Crumlish. He is the managing director of the second respondent.

    c. The claimants called Mr Alexander Forrest. He is one of the claimants and has worked over many years for various employers repairing and resurfacing footpaths in North Lanarkshire and sometimes elsewhere.

18. I found all three witnesses to be honest, helpful and straightforward witnesses who gave their evidence to the best of their recollection. When making my findings of fact I have compared their evidence to relevant documents such as timesheets. Where contemporaneous objective evidence was available I gave more weight to that than to the estimates of witnesses. While I am sure that everyone gave their evidence honestly, impressionistic evidence was less persuasive than contemporaneous objective evidence where the two conflicted. Similarly, although the representatives had prepared their own analyses of time sheets in tabular form and invited their own witnesses to adopt them, they were based on certain assumptions that cross-examination revealed to be unreliable. I therefore paid close attention to the primary sources. The tables prepared by representatives were really submissions on issues of fact rather than evidence.

Submissions and authorities

19. All three representatives provided written submissions which I read before they made their oral submissions. I am very grateful to them for their considerable help and for the effort put into those documents. I was also given a joint bundle of authorities including ***Celtec v Astley*** [2006] UKHL 29 and

[2005] ICR 1409, ***Ceva Freight Ltd v Seawell Limited*** [2013] CSIH 59, ***Eddie Stobart Ltd v Moreman*** (UKEAT/0223/11ZT), ***Argyll Coastal Services Limited v Stirling & Others*** (UKEATS/0012/11/BI), ***Tees, Esk and Wear Valleys v Harland*** (UKEAT/0120/16/RN), ***Rynda (UK) Ltd v Rhijnsburger*** [2015] EWCA Civ 75, ***Costain Ltd v Armitage*** (UKEAT/0048/14), ***Mowlem Technical Services (Scotland) Ltd v King*** [2005] All ER (D) 106 and ***Department for Education v (1) Huke (2) Evolution Resource Ltd (in liquidation)*** (UKEAT/0080/12/LA).

20. I raised many of the same cases with the parties myself (sometimes using the versions in the authorised law reports rather than EAT transcripts), as well as ***Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust*** [2016] ICR 607 and ***Salvation Army Trustee Co v Bahi*** [2017] IRLR 410.

Findings of fact

21. Many of the facts were not in dispute, and the parties had prepared an extremely helpful agreed statement of facts. I have already set out some findings of fact in the "Introduction and background" section above. Having heard the evidence and the parties' submissions I made the following additional findings of fact on the balance of probabilities.

History

22. The claimants had transferred to the first respondent's employment under TUPE on 30 November 2015. They transferred as a group from a previous provider of services under the equivalent contract with NLC and had provided similar services to NLC when employed by their previous two employers. The uncontradicted evidence of Mr Forrest is that about 20 or more years earlier, he, Robert McMillan, Thomas Campbell, Joseph McGuigan, Gerard Gow, Joseph Higgins and Michael Sloan all worked together on similar work for Motherwell District Council, the predecessor local authority of NLC.

Internal description

23. While employed by the first respondent, the claimants were informally known as "the TUPE squad", no doubt because of their employment history. The informal name "TUPE boys" is handwritten on some of the time sheets relating to their work.

Terms and conditions

24. When the claimants transferred to the first respondent's employment in 2015 the first respondent honoured their existing terms and conditions of employment and the claimants continued to work under those terms and conditions throughout the duration of their employment with the first respondent. In comparison with the first respondent's other employees, the claimants had more generous sick pay and holiday entitlements, transport to site provided by the first respondent and different start and finish times.

First respondent's intention

25. The first respondent's intention in November 2015 was that it would resource its contract with NLC by using the claimants' labour. That was the evidence given by Mr Dickson, which I am prepared to accept on the balance of probabilities. Even though it was Jock Paterson who had day to day responsibility for the management and organisation of the first respondent's operational workforce, I find that Mr Dickson is likely to be correct about the first respondent's broad intention at the commencement of the contract.

Activities and way of working

26. Under their respective contracts with NLC the respondents were responsible for work on paths, driveways, parking lots and roadways in North Lanarkshire. They performed those tasks with manual labour and with specialised equipment. The tasks involved digging out existing paths, laying bitmac and

asphalt on paths and roads, drainage works, minor curbing or edging of roads and paths and the reinstatement of topsoil damaged or disturbed as a result of the works.

27. It was an agreed fact that the nature of the work carried out by each of the two respondents under their respective contracts with NLC was materially the same. It concerned the repair and replacement of surfacing in and around housing estates, tower blocks, footpaths, hard standing, car parks and local offices. It included both "normal response" repairs and "immediate response" repairs. The work was carried out for NLC Corporate Services. It did not include repairs to public roads or footpaths and was *not* carried out for the separate department known as NLC Roads.

28. The work carried out for NLC was largely done by means of manual labour. It generally comprised the jobs which were inaccessible to large machines. As Mr Forrest put it, it was "more pick and shovel work". It did not generally include the bigger road work, which was mainly machine surfacing using plant such as excavators, planers and surfacing machines. The claimants' work did not rely so heavily on maintenance plant and equipment, although some was used as necessary.

29. The contracts between each of the respondents and NLC did not guarantee any particular amount of work.

30. NLC notified the respondents of the services required by issuing work orders from time to time. They were often issued in batches.

31. In the case of the first respondent, work orders from NLC were received by Mr Dickson, quantity surveyor, who passed them to Jock Paterson, contracts manager. Mr Dickson's main responsibility was to manage the contractual and financial side of the projects undertaken. Mr Paterson's responsibility was to manage the first respondent's workers on site and he was therefore a direct point of contact with the claimants. As well as being contracts manager (and apparently also a director) he was regarded as a sort of a foreman too. He

had a hands-on role. It was Mr Paterson who gave direction to the claimants regarding the work they should carry out.

32. Mr Paterson reviewed the jobs and grouped them into geographical areas based on address and local knowledge. Mr Paterson would then arrange for the necessary materials to be ordered and issued the work to the claimants. Each work order would have a plan, sketch or drawing showing the requirements of the job. Those documents were also issued to the claimants. The claimants would work through the work orders given to them by Mr Paterson and would let him know when more work was required. Often Mr Paterson would provide the claimants with a group of jobs at the same time and the claimants would work through those jobs until all were finished. Mr Forrest's uncontradicted evidence was that the squad would normally work through about 4 or 5 jobs before requesting more.

33. The claimants had no set base and it was rare for them to attend the first respondent's premises other than to collect materials. The claimants simply attended the first job assigned to them for the day.

Timesheets

34. Each week timesheets were filled out to indicate the days worked by the claimants. The implication of the statement of agreed facts is that the claimants completed those timesheets themselves but that was inconsistent with the evidence of Mr Forrest who had never previously seen the timesheets put to him in cross-examination. He did not know who filled them out but suspected that it was someone in the office, quite possibly Jock Paterson. I prefer Mr Forrest's evidence since it is not contradicted by anyone else with first-hand knowledge.

Invoices sent to NLC

35. There was no particular pattern to the way in which the first respondent invoiced NLC. Sometimes a single invoice would be raised to cover a number

of work orders.

Downturns in NLC work

36. When there was a temporary downturn in work for NLC the first respondent sometimes redeployed the claimants to do other work for other organisations with which the first respondent held contracts. There are many documents in the joint file evidencing that practice. The extent of that redeployment in terms of the duration of each instance and the proportion of overall working time was a matter of dispute and I deal with it below in my reasoning and conclusions.

37. When the team were deployed on non-NLC work they undertook that work as a team. It was not a case of reallocating some team members but not others. The team was never deliberately split up and always worked together.

38. While the second respondent suggested otherwise in its cross-examination of Mr Dickson, I do not accept the basis of that suggestion. The second respondent highlighted blank sections in time sheets and invited me to draw the inference that the individual concerned must have been working on other contracts. I decline to draw that inference because there are many potential explanations for a blank row in a time sheet, including sloppy or incorrect completion. While it is true that sickness was often explicitly marked, it seems entirely possible that absence might not always have been recorded correctly. For example, Mr Thomas Campbell was sometimes on the sheets without being *marked* absent even though he was absent due to long term sickness throughout the whole of the period for which he was employed by the first respondent. The lack of any particular entry against his name recording that absence does not mean that he was working on other, non-NLC contracts. He was not working at all. I heard no evidence from anyone who had responsibility for completing the relevant time sheets and who might have been able to explain some of the anomalies. In cross-examination Mr Crumlish accepted the possibility that these points might be explained by errors in the completion of time sheets. Given that Mr Dickson and Mr Forrest

corroborate each other's evidence I find on the balance of probabilities that the team was not at any point split up, such that one or more of its usual members worked on non-NLC work.

39. As for the converse position, I find no evidence that any of the first respondent's other squads or teams were ever allocated to carry out NLC work *in preference* to the claimants' team. If there was work to do under the NLC contract then the claimants' team were always involved. Occasionally, if workload required it, other squads might be brought in as an additional (but not substitute) resource on NLC work. As Mr Forrest put it in cross-examination, "it was a given that when there was [NLC] work to be done, we would be doing it." I accept that evidence.

Award of the contract to the second respondent

40. NLC awarded the contract to the second respondent on or about 19 June 2018. The first respondent learned of that decision on 20 June 2018.

41. On 27 June 2018 Mr Crumlish, managing director of the second respondent, emailed to his counterpart Charles McLaughlan, managing director of the first respondent, attaching a letter dated 26 June 2018 in which he asserted that TUPE could not apply to the claimants in relation to their move to the second respondent. His points were that the employees had not been employed for a sufficient number of hours on the contract and must therefore be carrying out work for the first respondent on other contracts. He also asserted that the work issued through the contract was not sufficiently "continuous" to justify having employees employed for the purpose of carrying out work solely under that contract.

42. The first respondent replied on 28 June 2018, asserting that TUPE did apply, stating also that the claimants had transferred three times in the preceding 17.5 years. He indicated that the claimants had been told to report to the second respondent's premises on 2 July 2018.

43. On 2 July 2018 some of the claimants attended the second respondent's

premises in Paisley together with a representative of Unite. Following that meeting Mr Crumlish emailed Mr McLaughlan stating that it was not clear that TUPE applied, and that no transfer would occur until 23 July 2018 at the earliest because no work had yet been awarded under the contract.

44. In further correspondence dated 4 July 2018 Mr Crumlish stated an opinion that TUPE was likely to apply, but that the "transfer point" had not yet been reached because NLC had not yet issued any works under the contract.

45. The first respondent made its last payment of wages to the claimants on 5 July 2018.

46. The second respondent had a "pre-start meeting" on 23 July 2018. No work was done under the contract before that and I find that the pre-start meeting represents the assumption by the second respondent of responsibility for work under the contract. NLC allocated work to the second respondent from 23 July 2018 onwards.

Reasoning and conclusions

Client

47. There is no doubt that the "client" for the purposes of regulation 3(1)(b)(ii) of TUPE 2006 was NLC.

Contractors

48. The first and second respondents were the "contractor" and "subsequent contractor" carrying out activities on behalf of NLC for the purposes of the same provision. Again, I did not understand this point to be at all controversial.

Activities

49. Applying the ordinary, everyday meaning of "activities" required by ***Arch Initiatives*** (above) and ***Salvation Army Trustee Co*** (above), I find that the

relevant activities were as described above in paragraphs 26, 27 and 28 of my findings of fact. I will not add to the length of these reasons by reproducing them here.

The grouping of employees immediately before the SPC

50. The next issue is the identity of the employees in the relevant grouping. This hearing examined the position over the whole of the period during which the first respondent held the contract, but the relevant question for the purposes of regulation 3(3)(a) of TUPE 2006 is whether there was an organised grouping of employees *immediately before the service provision change*. While the answer to that question may to some extent be *informed* by historical factors, it is important not to forget that the regulations are ultimately concerned with the position immediately before the service provision change. Many cases have emphasised that point, and they are summarised in paragraph 23 of the judgment of HHJ Eady QC in ***Tees, Esk and Wear Valleys NHS Foundation Trust v Harland*** [2017] ICR 760.

51. Assessed in that way, my finding is that the employees comprising the grouping at the relevant time were Joseph Higgins, Joseph McGuigan, Gerard Gow, Michael Sloan, Alexander Forrest, Mr E Craig and Mr J Whitefield.

52. That list of seven employees includes all of the claimants save for the two claimants who were absent due to long term sickness, Thomas Campbell and Robert McMillan.

53. Messrs E Craig and J Whitefield are not claimants but also formed part of the grouping.

54. I make those findings because they are the consistent and stable picture emerging from the time sheets relating to the period between Easter 2018 and the moment immediately before the transfer.

55. When questioned about Messrs Craig and Whitefield Mr Dickson referred to

them being hired to "supplement" or "work with" the squad. If that answer was intended to draw a distinction between membership of that squad and supplementing or working with it then I reject the distinction on the evidence I have heard. They were not simply covering for the temporary absence of another team member (see ***Rynda***, above) or providing temporary additional resource for some other reason. They had consistently been members of the team for a significant period by the time of the transfer.

Organised grouping and principal purpose

56. I turn to the "organised grouping" issue, bearing in mind that there must be a deliberate putting together of the group for the *principal* (and not necessarily *sole*) purpose of doing work for the client, NLC. There must be deliberate planning and intent. See once again the authorities cited above.

57. The first respondent's submissions on this point have not been assisted by its failure to call evidence from witnesses who had responsibility for the organisation and deployment of squads/teams, whether strategically, or on a day to day basis. Mr Dickson is a quantity surveyor and accepted that he had no personal involvement in those matters, although he struck me as an honest witness whose views on the practices and policies of his company should nevertheless be given some weight. When asked whether it was just coincidence that the "TUPE squad" worked on NLC work, he said "the NLC footpath contract is the one they were employed for". While the transfer of those employees under TUPE was by operation of law rather than a deliberate decision to hire for a particular purpose, Mr Dickson's evidence supports the theory that it was no coincidence that, having transferred, the squad worked on the contract with NLC. It would have been open to the first respondent to use them on entirely different work if it had wished to do so. He supported that proposition in another way by saying, "it is the type of work they had always done, they had more knowledge about it, they had worked with the same people in the past". That tends to suggest a deliberate putting (or keeping) together for particular reasons. The implication is that the principal purpose of that putting (or keeping) together was to service the NLC

work.

58. It is also possible to draw inferences from the objective facts. Although other individuals worked temporarily with the "TUPE squad" from time to time, or joined the squad on a more permanent basis (Messrs Craig and Whitefield), the claimants represented the consistent core of the team. They transferred to the first respondent under TUPE at the same time that the first respondent acquired the NLC contract. They worked largely on the NLC contract from the outset. I cannot accept that it was mere chance or coincidence or that it was merely a consequence of unrelated factors. I infer that the first respondent made a conscious decision to deploy the squad on the type of work they had previously been doing - NLC work. They were accordingly a grouping of employees deliberately organised for that principal purpose.

59. The composition of the team was fairly stable and I am satisfied on the balance of probabilities that it was put together by the first respondent deliberately. It was an organised grouping of employees. The fact that additional personnel also worked with the team on a temporary or permanent basis does not mean that there was no team, or that it was not deliberately organised for a particular purpose. Its distinct identity was also reflected in its name ("TUPE squad" or "TUPE boys"), which appears on some of the time sheets. While those informal terms do not refer explicitly to NLC work, there is a clear link to the transfer and therefore to the NLC contract.

60. The second respondent is certainly right to point out that the team sometimes worked on other non-NLC work. However, it spent the clear majority of its time on NLC work. The time sheets are not susceptible to an overly precise analysis, but even on the second respondent's analysis the squad were working for about 2/3 of their time on NLC work during 2017. That is a clear majority of their time. The proportion was even higher in 2016.

61. Further, I accept the uncontradicted evidence of the first respondent and Mr Forrest that the team would only work on non-NLC work if there was a shortage of NLC work at a particular time. If there was NLC work to be done,

then the "TUPE squad" did it. That is a highly relevant factor, quite apart from the proportion of the TUPE squad's time that was spent on NLC work. Given also the comments of Mr Dickson already referred to above, I am satisfied on the balance of probabilities that the first respondent did put (or perhaps more accurately *keep*), the "TUPE squad" together as an organised grouping of employees for the principal purpose of servicing the NLC contract and doing those activities for the client, NLC.

62. Although strictly unnecessary to do so, for the sake of completeness I will also mention aspects of the first respondent's argument which I do not accept. I do not accept that the fact that the claimants had different terms and conditions from other employees of the first respondent demonstrated that they were an organised grouping with a particular principal purpose. Their rather different terms and conditions were merely a consequence of the fact that they had transferred *to* the first respondent's employment under TUPE. It was a legal consequence of the applicability of TUPE in 2015, and it is not an indicator of the applicability of TUPE in 2018. Further, the first respondent's argument in relation to terms and conditions fails to deal with the position of Messrs Whitefield and Craig who I have also found to be part of the organised grouping. My rejection of this strand of the argument is unimportant given my conclusion that for other reasons there was an organised grouping for the principal purpose of undertaking NLC work.

Change or dilution of purpose

63. The second respondent's submission was that even if (as I have found) the "TUPE squad" were once organised for the principal purpose of NLC work, that purpose later became so diluted that it was no longer the principal purpose of the organised grouping immediately before the service provision change (see e.g. ***Department for Education v Huke and another*** (UKEAT/0080/12) and ***Tees, Esk and Wear Valleys NHS Foundation Trust v Harland*** [2017] ICR 760).

64. However, the second respondent did not rely on the weeks between the final work done by the first respondent in the week ending 1 July 2018 and the commencement of work by the second respondent under its contract on 23 July 2018. All parties regarded that as a temporary cessation of work, and the second respondent does not argue that the temporary cessation was necessarily inconsistent with a service provision change. That is consistent with the guidance given by HHJ Eady QC (as she then was) at paragraph 24 of ***Tees, Esk and Wear Valleys NHS Foundation Trust v Harland*** [2017] ICR 760.

65. I bear in mind that the core of the organised grouping had been working together for a very long time, carrying out essentially the same work on NLC footpaths for a number of different employers. Those employers included the predecessor local authority of NLC and several contractors following that local authority's decision to outsource the work. The principal purpose of the team had been established for almost 20 years and it was to carry out work on NLC footpaths, whoever the team might have been employed by at the particular time. The fact that the principal purpose of the organised grouping of employees was so well established over so many years is a factor I take into account when assessing whether that purpose had changed prior to the alleged transfer in this case.

66. I also bear in mind that there is no evidence of a deliberate decision to re-organise the grouping of employees for a different principal purpose. I heard no evidence to suggest that a conscious decision to that effect was ever taken by the first respondent. However, the authorities do not set the bar that high, and it seems that a dilution of purpose can indicate or amount to a change of purpose, even without a conscious decision on the part of the relevant contractor. Neither the claimants nor the first respondent submitted that evidence of a deliberate decision on the first respondent's part to alter the principal purpose of the organised grouping of employees would be necessary in order for the second respondent's argument on dilution of purpose to succeed.

67. The claimants and the first respondent argue that the explanation for the diminution in the proportion of time spent working on NLC work was the fact that the contract was coming to an end, a new contractor would be taking over, and NLC were holding back work to give to the incoming contractor. That was not proved by any direct evidence from NLC, but it is an inference I am prepared to draw, up to a point.

68. However, that inference does not go far enough to explain the wider trend, which began long before the re-tendering exercise. The explanation is unclear. There could be many explanations including budgetary constraints affecting NLC, the clearance of a backlog of maintenance work or a decision on the part of NLC simply to require less work under the contract. The contract did not guarantee that any particular amount of work would be provided to the contractor. Whatever the reason, it is clear from the time sheets that the team did a significantly reduced amount of work for NLC over the final year of the first respondent's tenure.

69. Mr Dickson accepted that from 22 June 2017 to 29 October 2017 there were 16 consecutive weeks during which the team was not working on NLC work. In my judgment that is an extremely significant factor, since it represents a lengthy period of more than a quarter of a year in which no NLC work was done by the team at all.

70. The team then worked on NLC footpath work until the week ending 18 February 2018, a period of around three and a half months. There were then 3 weeks and a further part week of non-NLC work (work in Port Glasgow and snow clearing). The week ending 1 April 2018 was mostly spent on non-NLC work. The time sheet for the next week is missing but the time sheet for week ending 15 April 2018 suggests work split between NLC work and non-NLC work. The following week appears to be all NLC work but the week ending 29 April 2018 is again split between that and non-NLC work. Several weeks of NLC work follow before more than 2 weeks of non-NLC work in the weeks ending 27 May 2018, 10 June 2018 and part of the week ending 17 June

2018. The final two weeks prior to the transfer were spent on NLC work.

71. I have assessed matters in the round and bear in mind that the authorities describe this as being primarily an issue of fact.

72. Having weighed all of the factors listed in the immediately preceding paragraphs I have come to the conclusion that the second respondent's submission is well-founded. I think that the picture painted by the time sheets is telling. When assessed as at the moment immediately before the transfer, it could no longer be said that the principal purpose of the organised grouping was to carry out work for NLC. That had certainly once been the principal purpose of the organised grouping of employees, but it had become so diluted that it was no longer the principal purpose for which the team was organised.

73. The mere fact that the team would carry out NLC work if any were available is insufficient to maintain that as the principal purpose of the team given the very significant amount of time spent working for other clients from the summer of 2017 onwards.

74. I do not ignore the fact that the team spent the final two weeks of the contract on NLC work. That is insufficient to alter my overall conclusion that, by then, the purpose of the organised grouping had been diluted to the point that it was no longer *principally* NLC work. That dilution did not simply begin in the final weeks of the contract since the team did no NLC work at all during a continuous 16 week period in 2017. The amount of work done on NLC footpaths in the final weeks of the contract was insufficient for me to conclude that NLC work had been re-established as the principal purpose of the organised grouping.

75. I accept the second respondent's submission that by the time of the alleged service provision change the purpose of the organised grouping was simply to carry out "pick and shovel" type work on whatever contracts the first respondent considered expedient. While that certainly included NLC work when available, it was no longer the *principal* purpose.

Overall conclusion

76. My conclusion is therefore that the situation that the claimants found themselves in when the second respondent assumed responsibility for the NLC footpath contract was different from the one they had found themselves in at the conclusion of previous contracts. They no longer formed part of an organised grouping which had as its *principal* purpose the carrying out of work on behalf of a single client, NLC. By then, the principal purpose was simply to carry out a certain sort of work for whichever clients the first respondent considered appropriate.

77. My conclusion must therefore be that there was no service provision change because the conditions in regulation 3(3)(a)(i) of TUPE 2006 were not met. It follows that the issue of assignment, and the broader question "who transferred" does not arise.

Employment Judge M Whitcombe

20 September 2019

Entered in register and copied to parties **25 September 2019**