EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103836/2020

Held via Cloud Video Platform (CVP) on 25 January 2021

Employment Judge R Gall

Mr I Hamilton	**Claimant** **Represented by:** **Ms A Bowman - Solicitor**
DHL Services Limited	**First Respondent** **Represented by:** **Ms B Clayton - Barrister [Instructed by Ms K Brown – In House Solicitor]**
Pollock (Scotrans) Limited	**Second Respondent** **Represented by:** **Mr A Sutherland - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the employment of the claimant transferred from the first respondents to the second respondents by operation of Regulation 3 (1) b) (ii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

REASONS

1. This Preliminary Hearing ("PH") took place on 25 January 2021. It took place via video conference, using the CVP platform. It was not practicable to hold the PH in-person given the Covid-19 pandemic. Parties agreed to proceed via CVP.

2. The PH was set down to determine whether there had been a transfer of the claimant's employment from the first respondents to the second respondents by operation of the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

3. The claimant did not give evidence. He and his representative, Ms Bowman, were present as observers during the PH. The first respondents were represented by Ms Clayton. The second respondents were represented by Mr Sutherland. A joint bundle or file of documents was available and some of those productions were spoken to at the PH. Those documents are referred to in this judgment as being in "the file". Witness statements had been prepared and submitted for Alan McManus, general manager of the first respondents, Erin Martin, HR Manager for the first respondents and Mark Jackson, operations director for the second respondents. Those statements constituted their evidence in chief and were taken as read.

Facts

4. The following were found to be relevant and essential facts as admitted or proved.

Background

5. Both respondents are involved in work which includes transport and storage of goods. A company based in Coatbridge, Lees of Scotland (**"***Lees***"**), manufacture a product for sale in retail outlets. The first respondents had a contract with Lees for some years prior to 28 February 2020,. That contract was to transport product from Lees' factory in Coatbridge to the premises of the first respondents in Cumbernauld or Bellshill, storing the product at their warehouses there to enable it to reach the retailer. The first respondents also stored raw ingredients at their warehouse facility. They transported some of that raw material to Lees at the start of the working day. After arriving at the Lees' factory with the raw material and unloading it, the loading by Lees of their product onto the first respondents' vehicle would be commenced. That product would then be transported from Lees to the first respondents' warehouses.

6. The activity carried out by the first respondents was the collection and transporting of Lees' stock from Lees' factory to warehouse facilities, with delivery once a day of raw ingredients to the Lees' factory from the warehouse premises.

The Claimant's Role

7. The claimant's employment with the first respondents commenced on 27 April 2009. He was employed as a driver. A copy of his terms and conditions of employment appeared at pages 49 to 58 of the file.

8. The following clauses appear in that document:-

"2.0 JOB RESPONSIBILITIES

2.1 You will be expected to carry out all of the duties which the Company may from time to time direct you to perform and which are reasonably associated with the role of Driver. Any oral instructions and/or written descriptions of your role's duties and responsibilities should serve as a guide to your areas of responsibility.

2.2 Due to the changing nature of the business, your obligations may vary and develop. The Company reserves the right to ask you to perform other duties that may fall outside your normal role responsibilities but which are within your reasonable capabilities.

3.1.1 Shift Work Hours

Your working hours will be based on a standard shift pattern, which will be notified to you in advance by your Line Manager. You may be on a rota to work any day of the week, which, for the purpose of this Statement runs from 0.01 on Sunday to 24.00 on Saturday. You will be required to work all the hours for which you are on the rota."

9. Clause 20 of the terms and conditions dealt with changes which might occur. Any changes would, that clause confirmed, be made known to the employee with reasonable notice and in writing. The claimant received no such written intimation of changes from the evidence before the Tribunal, other than a

change of work location from Coatbridge to Bellshill in January 2017, as detailed below. There was a proposed change in working arrangements in March 2019 as detailed below. That change was never finalised or agreed and was not implemented.

10. The claimant's role with respondents had initially been as a Boots Store Delivery Driver. He had been based at the first respondents' then premises in Coatbridge. Working in that role required the claimant to unload goods at the various Boots stores to which he took goods.

11. The claimant had health issues. At some point before 2014 the claimant moved from work in the role in relation to Boots as just described. It was agreed with him that he would work on the Lees contract. He would drive loads from Lees' factory in Coatbridge to the warehouse storage facilities of the first respondents. He would also take to Lees raw ingredients when he made the first trip of the day to their factory. He fulfilled that role from 2014 until 28 February 2020, save for illness, training and holiday absence. In this role he did not load or unload the raw ingredients. He did not load or unload the product which he collected from Lees' factory and transported to the first respondents' storage facilities. This assisted his health issues.

12. The first respondents formerly had storage facilities at Coatbridge. In early 2017 Boots reorganised their transport arrangements, effective from May 2017. This resulted in the first respondents moving the site of the operation for work, including the Lees contract. This relocation was effective from 30 January 2017. The documentation relative to the consultation with the claimant and others appeared at pages 59 to 64 of the file. The claimant was to be based in Bellshill from that time onwards.

13. The claimant worked four days a week. Each day lasted 12 hours. During those 4 days he fulfilled the requirements of the Lees contract. He did not carry out any work for any other client of the first respondents. His day started at the first respondents' premises at 6am. He transported raw ingredients to the Lees' factory, arriving there for 7am. He then transported goods from the Lees' factory to the first respondents' warehouse storage facilities, either in

Cumbernauld or Bellshill, as directed by Lees. Others at those warehouses would load and unload the goods, as mentioned. The claimant would then return to Lees for 10am, collecting goods at that point and taking them to the first respondents' warehouse premises. He would repeat those trips between Lees and the first respondents' warehouse during his working day. Pick-ups from Lees were at 7am, 10am, 1pm and 3pm. Having picked up goods at those times he would transport them to the first respondents'' warehouses as mentioned. He operated what was known as a "shunting" service, collecting and moving the stock from Lees to the warehouse facilities.

14. It was very seldom the case that there were no goods to transport when the claimant arrived at Lees at any of the times mentioned. On the very few occasions that did occur, the claimant would "park up" and await further instructions from the first respondents. They might, for instance, ask him to return to the warehouse. If nothing required to be transported from the Lees' factory, the claimant would not however be asked to assist with or work on any other contract or with any other customer of the first respondents. If there was nothing to be done, then he would in those circumstances, if he was not "parking up", be sent home. In either of these circumstances, he would be paid for the full shift.

15. On the fifth day of the working week the claimant was not present at work, having completed his four 12 hour shifts. On that fifth day an agency driver, or occasionally a different employee of the first respondents, would carry out the work on the Lees' contract. The particular agency worker or the other employee doing this role on the fifth day would vary from week to week. This was also the arrangement which applied if the claimant was absent from work through sickness or holiday.

16. The claimant was recognised in the first respondents' workplace and within Lees as the driver on this contract. He wore a uniform badged with the name of the first respondents. He had no Lees lanyard or similar Lees "badging". He was, however, referred to by them by his first name, Ian. That is seen in emails which appeared at pages 65 to 67 of the file. The claimant had no email account, whether with Lees or with the first respondents.

Consultation as to Possible Changes in Working Arrangements.

17. Towards the end of March 2019, the first respondents undertook a review of the shunting operation with Lees. That led to consultation with the claimant in relation to a proposed change to the shift pattern relative to the transporting of Lees' goods.

18. Documents at pages 68 and 69 of the file reflect the start of that consultation. They detail that the operation had, at that time, a dedicated solution. This was based on 12 hour shifts, Monday to Friday. The proposal was that a "*multi user*" solution was brought in. It is stated that this would result in 9.1 hours being covered each day "*with any ad hoc shunts being covered on the backshift or nightshift on an ad hoc basis*". It was anticipated that this arrangement would be effective from 15 April 2019.

19. There was one employee who was identified as being "*in scope*". That is stated to be the claimant. The alternative option was said to be that the impacted driver (the claimant) would revert to his original shift pattern of 5 days per week "*and utilise on other multi-user contracts*" (sic).

20. This consultation did not ever proceed to a conclusion, however. The claimant unfortunately had a heart attack around this time and was absent from work with effect from 8 April 2019. His absence is recorded on "Holiday and Absence Reports" maintained by the first respondents in respect of the claimant. Those appear at pages 138 to 141 of the file. Those reports show the claimant's name as the employee involved. In the heading at the top of the form, in addition to the claimant's name the information "*Contract: Lees of Scotland*" appears.

Claimant's Return to Work, February 2020.

21. The claimant returned to work as detailed below. He was fit for work with effect from 10 February 2020. Given the length of his absence, the claimant required to undergo health and safety training and also to regain his Driver Certificate of Professional Competence ("DCPC") card. That was obtained by 21 February. At that point there were ongoing discussions between the first and

second respondents in relation to the possible transfer of the claimant in terms of TUPE. The first respondents were also exploring possible alternative roles for the claimant within their organisation. The claimant therefore took annual leave until the transfer date. Had he returned to driving duties, given that consultation had not been completed in relation to a change in his hours, he would have resumed on the basis of four 12 hour shifts, working with Lees as detailed above, i.e. back to arrangement applicable before April 2019.

22. The Occupational Health report and advice from November 2019 (page 80 of the file) confirmed this. Similarly emails exchanged internally within the respondents on 21 February, pages 108 and 109 of the file, confirmed that the claimant would return to the Lees contract on a 4 day 12 hour shift basis. The email from the transport manager asked:-

"Are we looking to put him (the claimant) *back on Lees and is he still on a 4 day week on a 12 hour shift pattern?"*

23. The reply from Ms Martin in HR was:-

"Yes remaining on Lees, working the pattern he worked prior to going off sick."

DHL Services Ltd, Pollock Scotrans Ltd and Lees.

24. Whilst the claimant was absent through illness, there had been discussions between the first respondents and Lees. The first respondents explored with Lees options to retain the Lees business. Ultimately the first respondents informed Lees that they would terminate the contract on 28 February 2020. Notice to that effect was given to Lees by the first respondents in September 2019.

25. The second respondents had carried out some work for Lees storing their products for an end user. Lees approached them to see if they were able to store the product which had previously been stored for them by the first respondents. Lees agreed with the second respondents that the second respondents would meet their storage requirements and would transfer stock from Lees' factory in Coatbridge to the storage facilities of the second respondents in Bathgate.

26. The method by which the second respondents were to fulfil their agreement with Lees was not by way of dedicated vehicle and driver shuttling backwards and forwards between factory and storage, that being the method utilised by the first respondents. Rather than so proceeding, when an uplift from the factory was intimated to them by Lees as being required, the traffic operations team of the second respondents would at that point allocate the vehicle nearest to the Lees factory at Coatbridge. That vehicle would then go to the Lees' factory to pick up stock and to transport it to storage. The second respondents therefore implemented the contract by allocating vehicles, and hence drivers, to Lees collections and deliveries as required. The identity of those vehicles and drivers varied on a daily basis. They are drawn from the entire pool of vehicles and drivers available to the second respondents. In relation to employees, any driver could therefore carry out this work. The specific driver is determined by the time an uplift/delivery is required and by the proximity of vehicles at that point to the Lees' factory.

27. In course of discussions between the first and second respondents in the period prior to the SPC, the first respondents expressed the view that there was I employee who, in their view, would transfer to the second respondents' employment by application of TUPE. No name was given to the second respondents by the first respondents. The second respondents enquired with Lees as to this situation. Lees recognised which individual was being talked of. They were aware that it was the claimant. In replying to the second respondents Lees did not reveal the claimant's name. They said to the second respondents that the driver involved was off sick. This was when the claimant was off sick. Lees therefore in this discussion were able to identify the claimant as being the employee involved in the fulfilment of the contract and therefore potentially the employee who might be transferred to employment of the second respondents by operation of TUPE.

28. The second respondents started work on this basis in relation to Lees from 1 March 2020.

The issue

29. The issue for the Tribunal was whether the employment of the claimant had transferred from the first respondents to the second respondents by virtue of the operation of TUPE.

Applicable Law

30. The situation involved in this case was that of a Service Provision Change ("SPC"). Regulation 3(1)(b) of TUPE deals with that circumstance. The SPC potentially engaged in this case was that in Regulation 3 (1) (b) (ii), that is where:

"(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf;"

What was involved in this case was a change of contractor.

31. Regulation 3 (2A) provides that "activities" in Regulation 3 (1) (b) (ii) carried out by another person (in other words a subsequent contractor), are activities which require to be "*fundamentally the same*" as activities carried out by the person who has ceased to carry them out, in other words the original contractor.

32. ***Enterprise Management Services Ltd v Connect-Up Ltd and others*** 2012 IRLR 190, EAT ("***Enterprise***"), saw the Employment Appeal Tribunal ("EAT") set out guidance as to how a Tribunal should approach a matter of this type. In paragraph 8 of that Judgment, the EAT said, relevant to this case:-

*"(2) The expression 'activities' is not defined in the Regulations. Thus the first task for the Employment Tribunal is to identify the relevant activities carried out by the original contractor: see Kimberley (**Kimberley Group Housing Ltd v Hambley** [2008] ICR 1030 para. 28; Metropolitan (**Metropolitan Resources Ltd v Churchill Dulwich Ltd** [2009] ICR 1380), paras. 29–30. That was the issue on appeal in*

*OCS (**OCS Group UK Ltd v Jones** UKEAT/0038/09) where the appellant's challenge to the activities identified by the Employment Tribunal failed.*

(3) The next (critical) question for present purposes is whether the activities carried on by the subsequent contractor after the relevant date, here 1 April 2009, are fundamentally or essentially the same as those carried on by the original contractor. Minor differences may properly be disregarded. This is essentially a question of fact and degree for the Employment Tribunal (Metropolitan, para. 30).

(5) Even where the activities remain essentially the same before and after the putative transfer date as performed by the original and subsequent contractors an SPC will only take place if the following conditions are satisfied:

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

(6) Finally, by reg. 4(1) the Employment Tribunal must decide whether each Claimant was assigned to the organised grouping of employees"

33. In examining the activities of the original and subsequent contractors with a view to establishing whether they are fundamentally or essentially the same, a Tribunal is involved in an exercise of fact and degree. The case of ***OCS*** is relevant.

34. Minor differences can be disregarded. Regard should be had to any contractual documentation available, although what actually happens in reality is properly considered by a Tribunal.

35. A Tribunal should consider carefully the question of whether a different mode of carrying out the activities means that there is no SPC. An SPC is not precluded by there being a different mode of the activities being undertaken The case of ***Qlog v O'Brien and others EAT 0301/13 ("Qlog")*** is a case of relevance in relation to this point. In that case the activity was "*the transfer of*

goods from the client's premises to its customers". ***Qlog*** carried out the deliveries in a different way to the way in which they were carried out by the original contractor. That was held, on the facts, not to matter in that case. There was an SPC.

36. A further relevant case on this point is that of ***Anglo Beef Processors UK v Longland UKEATS/0025/15 ("Anglo Beef")***. In that case the task was found to be much the same, and sufficient for there to be an SPC, albeit the subsequent contractor mechanised much of the process involved.

37. Each case in this area turns on its own facts. Principles emerge, however. A change of location is unlikely on its own to mean that there is no SPC ***(Metropolitan)***. A Tribunal should not simply list the tasks and consider if the majority of those are the same pre and post transfer. The comparison between activities pre and post the alleged SPC should not be too generalised or pedantic, neither should be the approach of the Tribunal to categorisation and identification of the activities involved. ***(The Salvation Army Trustee Company v Coventry Cyrenians Ltd 2017 IRLR 410 ("Salvation Army"))***.

38. ***Nottinghamshire Healthcare NHS Trust v Hamshaw and others EAT0037/11 ("Nottinghamshire")*** found that the activities were not fundamentally the same. Provision of care for vulnerable adults was involved. Care had been provided at a residential institution. After the change of contractor individuals were supported in their own homes. They were expected to achieve greater independence in cleaning, for example, of their own homes than was the case in the institution.

39. In relation to whether there is an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client, one employee can constitute such an organised grouping ***(Ceva Freight (UK) Ltd v Seawell Ltd 2013 IRLR 726 ("Ceva"))***.

40. The organisation of the grouping with that principal purpose must be intentional. That was confirmed in ***Eddie Stobart Ltd v Moreman and ors 2012 ICR 919 ("Eddie Stobart").*** In that case the EAT said that the employee(s) involved must have been organised with the principal purpose of

carrying out the activities in mind. That was not so in that case, in that shift patterns and working practices meant that in practice, but without any deliberate intent or planning, a particular group of employees worked on tasks for a particular client. The organised grouping was said to be best illustrated as being the case where employees were organised as "*the (client A) team*". The definition could be met, however, where identification was less precise. Some element of conscious organisation is required ***(Ceva)***. There must therefore be intentional organisation of employees rather than happenstance. The decision in ***Rynda (UK) Ltd v Rhijnsburger 2015 ICR 1300 ("Rynda")*** also confirms that one employee can be an organised grouping. In that case the employer had also taken a conscious decision as to the work to be done by the employee.

41. It should therefore be a positive decision of the employer for the employee to be assigned.

42. The "*principal purpose*" is of significance in that Regulation 3 requires that immediately before the SPC there is an organised grouping of employees situation in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client.

43. In terms of that Regulation the organised grouping of employees referred to must exist immediately before the SPC. There is no requirement that the employee(s) constituting the grouping must in fact be carrying out the activities immediately before the SPC. ***Inex Home Improvements Ltd v Hodgkins and ors 2016 ICR 71, ("Inex")*** was a case in which employees in the grouping had been laid off at time of transfer. The Tribunal held that as they had not been working immediately before the transfer there was no organised grouping at that point and therefore no transfer in terms of TUPE. This was overturned on appeal. The EAT considered it appropriate to adopt an interpretation it regarded as being in accordance with the general objective of TUPE, namely protection of employment. The Tribunal should consider the purpose nature and length of cessation.

Submissions

Submissions for the first respondents

44. Ms Clayton had helpfully prepared a written skeleton argument. She submitted that on the morning of the PH and spoke to it. She then replied briefly after Mr Sutherland had made his submissions for the second respondents. What follows is a summary of the skeleton argument as spoken to.

45. Ms Clayton set out the law to which the Tribunal should have regard. She detailed the background and the terms of TUPE in relation to SPCs. The elements set out in ***Enterprise*** were highlighted by Ms Clayton as being the areas which should be addressed by the Tribunal.

46. It was a matter of fact and degree, Ms Clayton submitted, as to whether there was an SPC. She referred to ***Metropolitan, Johnson Controls Ltd v Campbell UKEAT/004/12, Department of Education v Huke UKEAT0080/12, Nottinghamshire, SNR Denton UK LLP V Kirwan UK UKEAT/0158/12, Salvation Army, Anglo Beef*** and ***Qlog.*** Those cases illustrated that minor differences in the activities should be ignored and that a change of location was not likely to prevent there being a transfer. The Tribunal in looking at activities should not be too pedantic or generalised.

47. ***Qlog*** was particularly helpful, Ms Clayton submitted. A difference in delivery of the contract or service did not mean that the activities were not fundamentally the same.

48. Ms Clayton said that ***Eddie Stobart*** was of significance, as were ***Ceva*** and also ***Rynda.***

49. She detailed the position set out by Lord Justice Jackson in ***Rynda,*** when he said:-

"If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within regulation 3 of TUPE. The first stage of this exercise is to identify the

service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a "grouping" for the principal purpose of carrying out the listed activities."

50. A temporary absence from work did not deprive an employee of their status as being involved in the relevant activities as part of the organised grouping of employees. Ms Clayton referred to ***Inex*** in this regard.

51. The Tribunal should look at the principal rather than any ancillary purpose. There should be a link between the employee and the part of the business to which he is assigned. Ms Clayton cited ***Botzen v Rotterdamsche Droogbok Maatschappij BV 1985 ECR 519.***

52. In this case the activity was the moving of stock. The first respondents had ceased that activity. What was involved was the delivery of raw materials to the Lees site and collection of products for storage and sale. Mr Jackson of the second respondents had, in cross examination, accepted that the second respondents were doing the same work for Lees as had been the case before transfer.

53. The claimant was in reality at the beck and call of Lees. That was also the case for the second respondents in that the nearest driver would be allocated to meet the need to move stock as and when Lees required that. Accordingly, whilst the second respondents were not allocating a particular driver to the contract, the same thing was happening, namely moving of stock for Lees.

54. Ms Clayton referred to ***Anglo Beef,*** and ***Qlog.*** In particular paragraphs 54 and 55 of the latter case were of significance, she submitted. In that case the actual activity had remained the same. That was also the position in this case, said Ms Clayton.

55. As to there being an organised grouping, the claimant had spent 100% of his time on the contract. He had worked on the Lees contract since before mid

2014 according to Mr McManus. The consultation documents at pages 59 and 60 of the file showed a clear reference to the claimant and his role as the Lees driver. He was known as the Lees driver. He said in the claim form that he worked 6am till 6pm 4 days a week, going to Lees for 7am, 10am, 1pm and 3pm to collect goods. If there was nothing available he would be sent home but would be paid for the full shift. His sickness and absence record contained a clear reference to the Lees contract. There were emails showing the interaction between the first respondents and Lees in which the claimant was known by name and referred to as such. This all confirmed that he was the Lees driver.

56. It was not happenstance that the claimant did the Lees work, it was submitted. Mr McManus had said that the decision was taken due to the lighter duties involved and the fact that the role was driving duties only. It was a deliberate decision to put the claimant on this contract.

57. The claimant was also assigned to the grouping immediately before transfer. He was going to be coming back after absence to his four 12 hour shifts each week. That was referred to in the Occupational Health report at page 80 of the file. The email exchange at pages 108 and 109 of the file also confirmed this. The reason the claimant had not immediately commenced on the Lees contract on returning to work was that he required to regain his DCPC and to have a refresher session on health and safety. The email at page 96 of the file also confirmed that.

58. Ms Clayton said that the second respondents might point to the contractual documentation, the consultation documents referring to a change in the way the Lees contract was to be carried out. The fact was, however, that the changes had not been signed off by the claimant or by his union. The process was paused as the claimant went off sick.

59. Accordingly, as at 29 February 2020 the claimant remained employed under the “old” terms and conditions, working four 12 hour day for Lees. He did not work for any other clients.

60. Further, the claimant was not on sick leave at time of the transfer. Ms Clayton said the case was similar to ***Inex***. If, for example, 20 people had been involved and 3 people were off sick at the time of actual transfer, all 20 would be transferred, not the 17 at work at that point. It was no different for the claimant, she submitted.

61. There therefore was an organised grouping. The claimant was assigned to it. The activities for the second respondents were fundamentally the same as those carried out by the first respondents. Just because the second respondents did not have an organised grouping after transfer date did not mean that the claimant was not an organised grouping pre transfer. The Tribunal should therefore find there to have been a transfer.

Submissions for the second respondents

62. Mr Sutherland commenced his submissions by confirming that he took no issue with the law and relevancy of cases specified in the submissions from Ms Clayton.

63. The position of the second respondents, Mr Sutherland said, was that there was no organised grouping of employees which, immediately before the SPC, had as its principal purpose the carrying out of the activities concerned on behalf of the client. Further, the claimant was not assigned to any such group at that time. In addition, it was argued that the activities, before and after the SPC were not fundamentally the same.

64. ***Eddie Stobart*** was a case which was of significance, Mr Sutherland submitted. There the employees in question had worked in a warehouse. The shifts on which they worked meant that they had worked mainly in relation to one client. That was not enough for there to be a relevant transfer, however. That those employees worked on matters for the client in question had been happenstance. That was the situation here. There was no evidence other than that of Mr McManus of any deliberate decision to place the claimant on the Lees contract. Mr McManus had not been present at the time. He was only able, therefore, to say what he believed had happened. That was that the claimant had been injured and so required lighter duties. The contract on

which he happened to be placed was the Lees contract. The reason the claimant had been doing this work was therefore a combination of circumstances – happenstance.

65. There was, Mr Sutherland highlighted, no written document specifying the organised grouping. The first respondents' witnesses had both confirmed that the claimant was a driver as set out in his contract. His terms of employment meant that his shifts could change, he could be asked to do additional hours and the location of his work could alter. There was no subsequent document confirming his hours or that he was the Lees driver or dedicated to their work.

66. Although the first respondents had produced emails from Lees referring to the claimant by his first name, that did not greatly assist. Firstly they were from some time ago, December 2018. Secondly knowing someone's first name or using it did not indicate much, Mr Sutherland said. He himself would know the first name of someone who came to his office in relation to supply of water cooler bottles for example. That did not signify anything therefore. The claimant did not have any Lees lanyard or distinguishing elements of uniform, for example, associated with Lees. That would have been expected if there was an organised grouping. There was no contractual document between the first respondents and Lees referring to a particular driver. The contractual documentation between Lees and the first respondents had not been produced.

67. The consultation documents showed proposed changes to the Lees contract. Those were the documents art page 68 and 69 of the file. The proposed change was to bring about multiple drivers being involved, with the claimant being used on a multi-client basis. Mr McManus had accepted that the contract was not functioning efficiently. In addition, after April 2019 various agency drivers had been involved in the Lees contract.

68. In summary, even if there was one driver before April 2019, that was not the position in reality, or as proposed, after that.

69. It was also the case, Mr Sutherland stated, that others were involved in the service given to Lees. There was a team. Case law confirmed that the team

had to be considered as a whole. The claimant had relied on support for loading and unloading. There had been a transport manager involved. If the team was not an organised grouping with the principal purpose of carrying out the activities, then one member of the team and his circumstances were of no relevance, Mr Sutherland said.

70. Looking at what he said was an *esto* position, Mr Sutherland turned to whether the claimant was assigned to an organised grouping at the time immediately before the SPC.

71. The claimant had not driven between April 2019 and 8 February 2020. Immediately before the transfer, therefore, those carrying out the Lees contract were agency drivers. An absence of 10 months went beyond the circumstance in ***Inex*** of a temporary lay-off. By the time the claimant returned on 8 February the first respondents were fully aware that the Lees work would be disappearing at the end of that month.

72. The bottom line, Mr Sutherland submitted, was that the last work by the claimant on the Lees contract was in April 2019. He was not therefore assigned to an organised grouping at the relevant time in February 2020.

73. Mr Sutherland then turned to the question of activities. He referred to ***OCS***. He agreed that ***Salvation Army*** confirmed that there was a spectrum from the point of view of the Tribunal in looking at what constituted activities. The Tribunal should not be too generalised in categorising the activities. ***OCS*** had seen the definition of "*provision of food*" as being too wide. The Tribunal should also not be too pedantic in considering what it regarded as the activities.

74. When Ms Clayton had referred to the activities as being delivery of stock, that was far too general, said Mr Sutherland.

75. The first respondents shuttled or shunted goods between Bellshill and Cumbernauld, where they were based, and Coatbridge, where Lees were based. Mr McManus confirmed that and also confirmed that if there was

nothing to shuttle, the claimant would park up and potentially return to the first respondents.

76. This contrasted with Mr Jackson's description of how the second respondents carried out their contract. There were no raw ingredients being transported. Goods were mostly delivered from storage on to England There was no evidence of deliveries being undertaken by the claimant except in a reference in the claimant's ET1. Customers would collect goods from the second respondents in some instances. When the second respondents delivered to customers, they billed Lees for the transport.

77. There was therefore a much more overarching delivery service to Lees from the second respondents.

78. This case could be distinguished from ***Qlog***, Mr Sutherland said. The Tribunal was entitled to consider and weigh the way in which the second respondents operated the contract and carried out the work. It was recognised that, if consideration of manner of delivery was the only element to be considered, there would be a danger of avoidance of TUPE. Here, however, there was a real difference in the activities, in the manner of delivery. The first respondents operated a shuttle service. The second respondents slotted in the Lees work, involving the nearest driver from some 20,30 or 40 vehicles in their existing network. The activities were fundamentally different.

79. There should therefore be found to have been no TUPE transfer in relation to the employment of the employment.

*Brief reply for the first respondents***.**

80. Ms Clayton replied briefly to the submissions from Mr Sutherland.

81. There had been criticism of the first respondents and reference by them to emails from 2018. Those emails were however only 4 months before the claimant went of work through illness. They were therefore representative of the position just before that sick leave.

82. In addition, in relation to timeframes, the second respondents had referred to the claimant's contract. That went back to 2009. They had also referred to the consultation documentation regarding the claimant's change of work location. That was in 2017.

83. Whilst it was true that the first respondents had not produced contractual documentation between themselves and Lees, the second respondents had not produced any such documentation relative to their contract with Lees. In fact all the documentation in the case had come from the first respondents.

84. Ms Clayton referred to ***Eddie Stobart***. She took no issue with what Mr Sutherland said in that regard. She referred however to paragraph 18 of that decision specifically. The question which was thought to be of some importance was asking whether there was a "client A" team. If that was asked here, it would be answered by saying that the claimant was the Lees team for the first respondents, in that he would be referred to by Lees and the first respondents as doing the work. ***Eddie Stobart*** therefore supported the first respondents.

Discussion and decision

85. There was relatively little evidence before me in this case. That is not a criticism of either party. It reflects the fact that there was a very focussed area involved in this PH. The way in which each of the first and second respondents carried out delivery of their agreement with Lees was explained. Cross examination took place, not in reality to challenge the credibility or reliability of the witnesses, but to explore the differences or similarity between the pre and post 1 March position in relation to transport of Lees products from Coatbridge to storage.

86. In my view, that is what this case turns on, the arrangements for transport to storage made with Lees in relation to products manufactured in Coatbridge. There was reference to customers coming to the second respondents' premises to collect some element of the product. There was reference to delivery of the product by the second respondents from storage to England. That may be what happened once the product was with the second

respondents for storage. That evidence was mentioned almost in passing. The arrangement in question relevant to this case was that of the transport from manufacturer to storage, however. Although no contractual documentation between themselves and Lees was produced by either party, the transport from factory to storage was what the first respondents' contract extended to, it appeared. That was certainly the work the claimant carried out. The transport of raw ingredients from the first respondents to Lees at the start of the day was also something the claimant did.

87. In cross examination of witnesses, they were taken to paragraph 13 of form ET1. That is at page 15 of the file. That contains the element below. It appears in the narrative of the claim set out in the ET1 after the collection of goods from the factory and timing of the first collection has been mentioned, and just before the details of return visits to factory each day to pick up stock are set out:-

"The claimant would deliver the client's stock across the central belt of Scotland".

88. It is difficult to know what to make of that statement. None of the evidence I heard, however, suggested that the claimant did anything other than shuttle to and fro, between Coatbridge and either Cumbernauld or Bellshill. He was referred to as "shunting goods" between those locations. There was no evidence in chief from Mr McManus or Ms Martin suggesting that the claimant delivered good to customers. This was not touched on in their cross examination either. It may be that instructions from the claimant and the description of his work as understood by his solicitors at time of presentation of form ET1 were not entirely clear. It may be an instance of inelegant pleading in that the reference to delivery across the central belt might be a reference to the delivery to Cumbernauld or Bellshill.

89. Either way, or indeed if there is a different explanation, it does not seem to me to be of significance to the question I have to determine on evidence I heard and documents to which I was taken. They all proceeded on the footing that the claimant's role was to pick up product from the factory and deliver it

to the first respondents for storage, returning to the factory to pick up more product.

90. That was what discussion had focussed upon when the point arrived at which the first respondents terminated their contract and then when the second respondents entered an agreement with Lees.

91. There was reference to the claimant taking raw ingredients to the factory on the first trip there in the morning. It appeared from what Mr Jackson said that the second respondents may not undertake that function. Mr Jackson said he was unaware of the second respondents transporting raw ingredients to the factory. He was not therefore definitive on this point, as I noted and understood his evidence.

92. I did not see that as a critical point. Firstly, the evidence from Mr Jackson was not, in my view, definitive that this did not happen. Even however if it did not happen, that would not, of itself, render the activities fundamentally different in my view. I have considered this element as part of the overall picture.

93. On the cases as pled and on the evidence given, the biggest focus was on the assertion by the second respondents that they were engaged in a way of working which was fundamentally different to that utilised by the first respondents. The differences all centred around there being a dedicated driver doing the “shunting” to and from the factory on the one hand and on the goods being picked up at the factory by the nearest truck from the fleet when a request for collection was made, on the other.

94. I had little or no evidence as to what happened in relation to customers receiving the goods from the first respondents’ premises, whether through delivery or collection. Similarly, whether the first respondents were involved in deliveries of product to England was not made known to me. These were not areas raised in evidence in chief or in cross examination of the first respondents’ witnesses. I had limited reference from Mr Jackson to customers of the second respondents in England and also to collection from storage by customers of the second respondents.

95. I mention these aspects as they were touched on in passing in evidence. I did not however see them as relevant to the point I have to determine. I did not have a clear setting out in evidence or documentation of the arrangements for product getting to the customers from the storage facility of both respondents. Similarly, I did not have such evidence or documentation as to deliveries to customers in Scotland or in England.

96. In reality the key point was as to the activities involved in fulfilling the contract. I did not have the benefit of either of the contracts themselves and so base my view upon the evidence I did have.

97. The contract had as its purpose the collection and transporting of manufactured product from the Lees factory in Coatbridge to warehouse storage. Thereafter events would happen with which the contract, and this case, was not concerned, namely onward delivery or collection by those retailing the product.

98. The activities involved were the collection of manufactured product from the Lees factory at various times each working day and transporting of that product to premises for storage.

99. My view on the evidence was that the activities carried out by the respective respondents were fundamentally the same.

100. There was certainly a different method of execution of the contract. The first respondents had a dedicated resource going backwards and forwards. There was no other function involved in that exercise. If no product was available, the claimant would park up, return to the first respondents' premises or, by agreement with the first respondents, go home. He would in any of those instances be paid at the appropriate rate for the full shift. The second respondents adopted a different means of fulfilling the contract. They would direct a vehicle from their fleet to the Lees factory when product was ready such that a collection was appropriate.

101. Mr Jackson, the second respondents' witness and their operations director, was questioned in cross examination about any difference. I have the questions and answers noted as follows:-

Question: *"You were essentially doing the same job DHL did before transfer?"*

Answer: *"I believe so."*

Question: *"The only difference was that there was no driver allocated, the driver nearest would be allocated to do the Lees collection?"*

Answer: *"The nearest available, the nearest at the time of the collection, yes"*

102. Cases illustrate that in this area it is a matter of fact and degree. It is almost inevitable that a new contractor will carry out the activities in a way which differs to some degree from that of the previous contractor. The manner in which the activities are carried out will regularly feature as something which enables the subsequent contractor at least to argue that there is a fundamental difference in the activities from those of the original contractor. The issue is whether, on the evidence, the activities in this case as carried out by the second respondents are fundamentally the same as those which were carried out by the first respondents.

103. I should say that I do not regard the passage of evidence set out above as being conclusive. It is, nevertheless, instructive. It requires to be weighed with all the other evidence given and documentation spoken to.

104. I keep in mind that a common sense and pragmatic approach is to be adopted. Minor differences are not of particular significance. This approach is confirmed in ***Metropolitan***. Of course, there may be minor differences which, taken together, might mean that the activities are not fundamentally the same.

105. Given that cases are fact sensitive there is unlikely to be an earlier decided case directly in point. So it proved here. Looking however at the type of situation where it either has or has not been found to be the case that activities

are fundamentally the same enables the approach properly applied to be discerned. Assistance as to application of the legal provision to the facts can be obtained.

106. In ***OCS*** the activities changed from provision of a full restaurant and bar service to provision of kiosks providing sandwiches and salads. The activities were not fundamentally the same.

107. In ***Qlog*** the facts were not too far removed in some elements from the facts of this case. The activities were the transfer of goods from the client's premises to its customers. ***Qlog*** was the subsequent contractor. Rather than doing the deliveries itself, as had previously occurred, it subcontracted that work on a job by job basis. The Tribunal found that it did not matter that the deliveries were carried out in a different way, the activities were fundamentally the same. The EAT upheld that view.

108. ***Anglo Beef*** illustrated that work was regarded as being fundamentally the same before and after the change of contractor in circumstances where the new contractor altered the means of carrying out the job so that where an employee had carried out the work, the main part of the job would now be carried out by electronic technology. This change did not mean that activities were not fundamentally the same, the Tribunal found. A challenge to this at the EAT was unsuccessful.

109. In ***Nottinghamshire*** the change was from care in an institutionalised setting to support in their own homes being provided to the vulnerable adults involved. That was not fundamentally the same activity, it was held.

110. I was satisfied that in this case the activities being undertaken were fundamentally the same, looking at the situation in respect of the first respondents on the one hand and the second respondents on the other. They each took the product from the factory to storage. They did this in line with production and demand. The first respondents had chosen to have a dedicated shunting facility with predetermined pick up times. The second respondents would direct a nearby vehicle to call in for the pick up when

required. The activity was achieved through different means. The activity was however fundamentally the same.

111. It seemed possible that the second respondents did not convey raw material to the Lees factory. The first respondents did that once per day, at the outset of the day. I did not see that however (assuming there was indeed this difference) as being sufficient to mean that I should reach a view that the activities were not fundamentally the same. I have considered the overall picture, including this element, The key element in those activities was the transport from the factory to storage. That involved, in the case of the first respondents 4 trips per day.

Organised Grouping with Principal Purpose of Carrying out of the Activities for the Client, and Assignation of the Claimant to that Organised Grouping.

112. As confirmed by ***Ceva,*** an organised grouping can consist of one employee. The claimant might therefore be an organised grouping.

113. The argument in this area turned upon the type of issue raised and discussed in the ***Eddie Stobart*** case. Who might be seen as the "*Lees team*"? Was it happenstance that had resulted in the claimant carrying out the activities?

114. I was satisfied that the claimant cleared this hurdle. He was known as the Lees driver. He worked on this contract 4 days per week, his entire working week. He worked on no other business or contract for the first respondents. When he was absent, whether on holiday or through illness, his duties were largely covered by agency drivers. Those agency drivers were different, one to the other, on each occasion. Occasionally a full time employee would "cover" for the claimant in his absence. Again, there was no regular substitute when that did happen.

115. Lees clearly regarded the claimant as the regular driver, the person who would be scheduled to appear when uplifts were due to occur. That is apparent from the emails at pages 65 and 66 of the file.

116. It is true that the claimant did not have a Lees uniform, Lees lanyard or Lees email account. He also did not have an email account with the first

respondents. He was going backwards and forwards from the premises of the first respondents and was their employee. It would perhaps have been slightly unexpected had he worn a Lees uniform.

117. The first respondents had marked his holiday and absence report quite clearly showing him as on the Lees contract.

118. The consultation which the first respondents commenced just prior to the claimant going off on sick leave in April 2019 concerned a different way of potentially delivering the Lees contract. It referred to the claimant as being the person in scope and therefore the impacted driver. It had not been a matter decided upon, and was certainly not something implemented, when the claimant went off through ill health.

119. It is also true that others were involved in carrying out of the contract. There would be those who loaded at Lees and those who unloaded at the first respondents' premises. There was no reference to there being particular people involved in that on the evidence I heard at the PH. I concluded that the claimant alone constituted the organised grouping.

120. Of further note is the fact that when the second respondents were informed by the first respondents that there was one employee involved as a possible TUPE transferor, the evidence at the PH was that they did not know the name of this person but had raised the point with Lees. Lees had immediately identified who this was. Whilst they did not mention the claimant by name, they had informed the second respondents that the driver was off sick at that point. This underlined that the question being asked as to who was in the (*client A team*"), as mentioned in the ***Inex*** case, would see the claimant being given as the answer.

121. I considered the argument of the second respondents that the claimant had become involved in the contract with Lees by happenstance. The argument, as I understood it, was that he was moved to be the driver on this contract due to health issues and the need for him to carry out lighter duties.

122. Factually it certainly seemed to be the case that the claimant had become the Lees driver in those circumstances. That did not however in my view align his situation with that of the employees in ***Eddie Stobart***. In ***Eddie Stobart*** the employees were engaged on work for the client purely as a result of being on particular shifts at particular times. They did not have as their principal purpose the carrying out of the activities for the client. The claimant on the other hand was dedicated to the Lees business and contract being met. That was so every day of his working life with the first respondents after some time early in 2014. He had not been specifically employed to carry out the Lees contract work. That work had however become his sole task by his being given that driving role. He was closely involved with the activities, such that they were his principal purpose.

123. I therefore concluded that the claimant was an organised grouping with the principal purpose of carrying out of the activities on behalf of the client.

Was that the case immediately before the SPC?

124. I concluded that this was so. The claimant had been off sick from April of 2019. He remained employed by the respondents as a driver. The Lees contract remained "his" in that the driving in his absence was undertaken by various agency drivers and, to an extent, by various permanent employees of the first respondents.

125. Consultation had been commenced as to changing the way in which the Lees contract would be delivered, with consequent changes to the working role of the claimant. That consultation process had been frozen, however. The emails at pages 108 and 109 of the file confirmed that the claimant was to return in February 2020 to his pre illness pattern of four twelve hour shifts, on the Lees contract. Throughout his absence he therefore remained the Lees driver.

126. The claimant would have recommenced driving on the Lees contract on his return on 8 February. He required, however, to renew his DCPC and to attend refresher training on health and safety.

127. In these circumstances I did not regard his absence, albeit for a period of some 10 months, as meaning he was not an organised grouping as detailed in Regulation 3 (3) (a) of TUPE immediately before the SPC.

128. As the claimant was the organised grouping he was clearly and as a matter of logic, assigned to that grouping.

Conclusion

129. For the reasons given above I concluded that the employment of the claimant transferred from the first respondents to the second respondents by operation of TUPE as a relevant transfer had taken place in terms of the provisions governing SPCs.

130. I believe the case may now be set down for hearing on the merits. A case management PH would appropriately be fixed in my view to discuss the hearing arrangements. The Clerk to the Tribunals is asked to set down such a case management PH to be conducted by telephone and to last for one hour. It need not be before me.

Employment Judge: Robert Gall
Date of Judgment: 1st February 2021
Entered in Register: 16th February 2021
Copied to Parties