



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4114219/19 (P)

Held on 21 December 2020

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Employment Judge N M Hosie

Mr D T Price

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**Claimant
Represented by
Mr M A S Briggs,
Solicitor**

**Cape Industrial Services Ltd
t/a Altrad Services & Others**

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**1st Respondent
Represented by
Mr K Duffy,
Solicitor &
Legal Adviser**

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Sparrows Offshore Services Limited

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**2nd Respondent
Represented by
Mr S Neilson,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that:-

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1. the claimant did not transfer to the second respondent in terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE");

E.T. Z4 (WR)

2. the complaints against the first respondent, predicated on there having been a relevant transfer of the claimant under TUPE, are dismissed; and
3. the claim against the second respondent is dismissed in its entirety.

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REASONS

Introduction

1. The claim in this case comprises complaints of unfair dismissal and a failure to consult about a proposed transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”). The claim is denied in its entirety by both respondents. In short, while they accept that there was a TUPE transfer from the first respondent to the second respondent, they maintain that, as the claimant was an “ad-hoc employee” he was not part of an “organised grouping of employees” and did not transfer. The dismissal is admitted by the first respondent but they maintain that the reason was redundancy and that it was fair.
2. I conducted a preliminary hearing to consider case management on 9 July 2020. The Note which I issued following that hearing is referred to for its terms. It was agreed that I would consider and determine the issue of whether or not the claimant transferred to the second respondent by reason of TUPE, “on the papers”: on the basis of the parties’ written submissions.

25 Statement of Agreed Facts

3. In accordance with my direction, the parties submitted a “Statement of Agreed Facts”. These were sent to the Tribunal by the second respondent’s solicitor by way of an attachment to his e-mail of 11 September 2020 at 09:55. Accordingly, on the basis of that Statement, I make the following findings in fact, for the purpose of the issue with which I was concerned.

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Relevant work history dates

4. First respondent carried out activities on behalf of BP on a number of North Sea assets. These assets were BP ETAP, BP Andrew, BP Clair Ridge and
5 Glen Lyon.
5. Broadly put, the activities concerned the carrying out of deck operations on these assets. This included receiving, dispatching and moving containers coming into or going out of the assets; the maintenance of the helideck and activities relating to arrival and departure of helicopters from the asset.
- 10 6. The first respondent arranged its deck operating teams into smaller groups of employees dedicated to each asset. Each group had a team leader known as a “deck foreman”. The team leader was responsible for making sure the day-to-day carrying out of the activities was achieved by the group. Below each team leader in the hierarchy was a sub-team leader, and below the sub
15 were a number of deck operatives.
7. Deck operatives and deck foremen who were required to work on a particular asset were known as occupying “core positions” on that asset. In addition to core positions were “ad hoc” staff. Ad hoc staff did not habitually work on one asset, but could be called upon to work at any given asset depending on the
20 first respondent’s need.
8. While the team leaders had supervisory responsibility for the day-to-day activities carried out on the assets, the employees involved in carrying out activities would report for executive, administrative and human resource purposes to David Watson and Karen Thomson. Neither Mr Watson nor Ms
25 Thomson worked on any of the assets.

16 Feb 13 – 7 Dec 15

9. The Claimant worked in a core position on BP ETAP as a deck operator.
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29 Dec 15 – 14 Dec 18

10. The Claimant worked in a core position on BP Clair Ridge as a deck operator.

5 **15 Dec 18 – 31 Mar 19**

11. Claimant is not assigned to any installation. Ad hoc roles are available but not taken up by the Claimant.

31 Mar 19 – 15 Jul 19

10 12. Claimant in ad-hoc position BP ETAP, latterly as annual leave cover for David Jess.

25 Jun 19

15 13. BP awards deck operations contract for BP Andrew, ETAP, Clair Ridge and Glen Lyon from first respondent to second respondent transfer date 1 Aug 19. It was envisioned that after this date, all deck operation activities on these assets would be carried out by the second respondent on BP's behalf. The first and second respondent agree that the change in service provider on each of these four assets amounted to a transfer in terms of reg.3(1)(b)(iii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

1 Aug 19

20 14. Transfer date. The second respondent begins carrying out activities on behalf of BP on the four assets. Claimant does not transfer to second respondent and remains an employee of first respondent.

1 - 15 Aug 19

25 15. First respondent undertakes redundancy process, claimant thereafter dismissed with EDT of 15 Aug 19.

First respondent employees on BP Etap whom the first and second respondent agree transferred to second respondent

NAME	JOB TITLE
Kevin Ferguson	Deck Operator/Multi
David Murray Jess	Deck Operator/Multi
Alexander Donald MacKay	Deck Operator/Multi
Alan Moor	Deck Operator/Level 3 Rigger
Scott Nash	Deck Foreman
Timmy Page	Deck Operator/Multi
Neal Richardson	Deck Foreman
David Taylor	Deck Operator/Level 3 Rigger

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Claimant's submissions

16. The claimant's solicitor sent his submissions to the Tribunal by way of an attachment to an e-mail on 25 September 2020 at 18:34. In support of his submissions he referred to the following cases:-

10 ***Eddie Stobart Ltd v. Moreman & Others*** [2012] ICR 919;

Botzen v. Rotterdamsche Droogdok Maatschappij BV [1985] ECR 519;

London Borough of Hillingdon v. Gormanley UKEAT/0169/14/KN

“Statutory framework”

15 17. The claimant's solicitor submitted “*there are two concepts within TUPE that are relevant for the purposes of determining this preliminary issue. The first is the “organised grouping of employees” within the meaning of Reg. 3(1) and (3), TUPE. The second is “assignation” within the meaning of Reg.4(1), TUPE.*”

18. He then went on in his submissions to examine each of these concepts which he summarised as follows:-

5 *“The task for the Tribunal is therefore, first, to identify an organised group of employees who had as their principal purpose the carrying out of the activities on behalf of BP and second, to determine whether or not the claimant was assigned to that organised group.*

10 *It is important to note however that there is a distinction between the concept of “activities” and “assignment”. The former is not a prerequisite of the latter: that is, just because someone is not carrying out the activities in question does not mean that they are not assigned to the organised group of employees. Employees not carrying out activities may still nonetheless be assigned to the organised grouping of resources.*

15 *Take, for example, a situation where a College (the transferor) runs an employability service on behalf of a local authority (the client). The service is provided of, say 7 careers advisors. The 7 career advisors are supervised by a line manager whose sole responsibility is the line management of the 7 employees. In addition, the 7 career advisors receive administrative support for a dedicated administrative assistant. The local authority terminates its contract with the College and awards it to a social enterprise (the transferee).
20 *The ‘organised group of employees’ in this example must include not only the 7 career advisors but also the line manager and the administrative assistant, despite the fact that the ‘activities’ (that is, the provision of employability services on behalf of the local authority) are only being carried out by the advisors. The fact that the other two employees are carrying out ancillary functions and out (sic) the activities in question is not relevant to whether or
25 *not they are assigned: the employer organised a group of employees with the principal purpose of carrying out activities and these two individuals were clearly part of this group as it had been organised.”***

30 **“Organised grouping of employees”**

19. The claimant’s solicitor referred to the Judgment of Mr Justice Underhill in **Eddie Stobart** in support of his submissions in this regard. He submitted:-

35 *“Large businesses, by their nature will often be Russian doll-like organisational structure: that is they will consist of a number of organised groupings within larger groupings, folding upwards. The task of the tribunal when determining whether or not an SPC occurred is to consider the facts and ask itself whether, when applied to the wording of reg.3(1)(b), TUPE the definition of an SPC has been satisfied. That test is multifactorial and is a matter of fact and degree.*

5 *This leads into an extremely important point in the context of this case: the main existence of small or organised groupings which, on the face of it, satisfy the definition of an SPC does not preclude those smaller groupings themselves belonging to a larger grouping which also satisfies the definition of an SPC. Where such smaller groupings do turn out to be part of a larger grouping which satisfies the definition, it will be anyone assigned to the larger grouping that transfers. The smaller group will simply snap up like a Russian doll, one inside of the other, and transfer part of the larger group rather than on their own.*

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“The transferring group”

20. The claimant’s solicitor submitted that this was, *“where both respondents have fallen to error: the mere fact that they can point to four individual assets in the North Sea where groups have been organised for the principal purpose of carrying out deck services on behalf of BP does not necessarily mean that*
15 *the Tribunal must find there were four separate transfers, one for each asset.*

20 *The first respondent had a group of employees organised with the principal purpose of carrying out deck services on 4 assets on behalf of BP. The first respondent ceased carrying out these activities (deck services) and instead the second respondent began carrying them out on BP’s behalf. The definition of SPC has therefore been made out in relation to the transfer of the four as one larger organised grouping.*

25 *Despite the individual assets being reasonably self-contained and with its own line management structure, staff were still required to report to Mr Watson and Ms Thompson for Human Resource functions. It is clear that despite the relative self-containment of the smaller asset based groups, they were part of a larger group of employees who were carrying out deck services for the first respondent on behalf of BP.*

30 *That is not to say, of course, that if the first respondent had managed to maintain one or two of its BP assets rather than losing all four of them, that there would not have been an argument to say that the two assets that transferred themselves comprised two individual SPCs. Again, it is the nature of SPC that they will occur simply when the plain wording of the statute is made out.*

35 *Again, the role of the tribunal is simply to apply the facts of the case to the wording of the particular SPC provision in question and ask whether or not that provision has been satisfied. The intention or belief of either respondent is not relevant. There is no purposive approach. There is no requirement for the tribunal to seek to read words in or take an approach which achieves any particular outcome. It is simply to give the words of the statute their ordinary*
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English meaning and ask whether the facts of any given case can be applied to them. In my submission, the conclusion in this particular case is inescapably that the four assets comprised one organised grouping, albeit with distinct groupings therein.”

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“Assignment in the present circumstances”

21. In support of his submissions in this regard, the claimant’s solicitor referred to the “test for assignment” as set out in **Botzen** which, he submitted, was approved by the EAT **London Borough of Hillingdon**. He submitted that:-

10 *“The test requires the Tribunal to consider whether: ‘a transfer takes place of the department to which they were assigned and which formed the organisation of framework within which their employment relationship took effect..... An employment relationship is essentially characterised by the link existing when the employee and the part of the undertaking or business to which he is assigned to carry out his obligations’ (my emphasis).*

20 *The test is therefore one of fact and degree for the Tribunal to determine. It is one of judgment. The Tribunal must, in this case, ask itself whether or not the claimant was assigned to the grouping that the first respondent had organised for the purposes of carrying out deck servicing activities on the 4 BP assets.*

25 *This larger (sic) brings the claimant’s role as an ‘ad hoc’ worker into sharper relief. An analogy may be drawn with the role of the ‘unused substitute’ in association football. The rules of association football allow teams to select up to 23 players in their match day squad. Of these 23 players, a maximum of 11 may be on the field for one team at any given time. Once the match has begun, teams are only permitted to make a maximum of only 3 substitutions. Assuming a team is capable of forming its match day squad, at least nine of its players will not participate in any given game. Despite their lack of match participation, these unused substitutes will doubtless still be assigned to their team: they do not enter free agency upon full time, nor can the opposing team elect to bring them on as a substitute for one of their players. Other teams cannot select any of them in their match day squads for the following week. They remain assigned to the team they are under contract to regardless of match participation.....*

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5 Applying this analogy to the present circumstances, the claimant at the date of transfer was simply no more than an 'unused sub' for the staff who had been carrying out the activities on behalf of the client. He is still assigned to that organised grouping regardless of whether or not he carried out any of these activities. As emphasised above, the carrying out of activities is not relevant to question of assignation.

10 The claimant was therefore assigned to the organised grouping and therefore he ought to have transferred by operation of reg. 4(1), TUPE.

15 If however the Tribunal is not with me in respect of the transfer of one large group and finds instead that four smaller transfers occurred, this is not fatal to his claim. The **Botzen** criteria are still made out: immediately before the transfer, the claimant was clearly assigned to an organised grouping. The position of the ad hoc worker cannot simply be that he is a free floating member of staff, and therefore he must have been assigned to **some** grouping of resources. Clearly from the statement of facts, the claimant's relationship with BP ETAP is sufficient to establish some degree of assignation between himself and that asset. The question is one of fact, and in my submission the facts are sufficient to allow the tribunal to make this finding."

"Conclusion"

22. The claimant's solicitor made the following submissions by way of summary:-

25 "(a) The first respondent had a grouping of employees organised for the principal purpose of carrying out deck service activities on four assets on behalf of BP.

(b) The claimant was assigned to this group, albeit as a substitute for sickness cover, etc.

(c) The first respondent ceased carrying out these activities on behalf of BP.

30 (d) The second respondent began carrying out these activities on behalf of BP.

(e) The claimant's contract of employment transferred from the first to the second respondent by operation of reg.4(1), TUPE."

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First respondent's submissions

23. The first respondent's solicitor made submissions by way of attachment to his e-mail on 24 September 2020 at 16:23.

24. In support of his submissions he referred to the following cases:-

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Eddie Stobart

Ceva Freight (UK) Ltd v. Sewell Ltd [2013] CSIH 15

Amaryllis Ltd v. McLeod & Ors [2016] UKEAT/0273/15

Edinburgh Home-Link Partnership & Ors v. The City of Edinburgh Council & Ors [2012] UKEATS/0061/11

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Argyll Coastal Services Ltd v. Stirling & Ors [2012] UKEATS/0012/11

Rynda (UK) Ltd v. Rhijnsburger [2015] EWCA Civ7.

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25. He set out the relevant law first of all in his submissions. He referred in particular to Regs. 2(1), 3 and 4 of TUPE and to various passages from the case law he had referred to. He then went on to make the following submissions under the heading "Discussion":-

"The first respondent accepts that claims such as the instant claim are particularly fact sensitive.

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The first and second respondent agree that the change in service provider amounted to a transfer in terms of Reg. 3(1)(b)(iii) TUPE 2006. Eight employees of the first respondent indeed transferred to the second respondent.

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The first respondent submits that the relevant question in the instant claim is: Was the claimant a part of the '.....organised grouping of employees' in terms of Reg. 3(3)(a)(i) TUPE 2006 or not?

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*The first respondent submits that the answer to this question is no, due to the ad-hoc nature of the claimant's position. Following **Eddie Stobart**, there was no deliberate planning or intent on the part of the first respondent for the claimant to be part of an organised grouping. Yes, he was carrying out activities for the BP Plc client but that is not sufficient.*

*In terms of **Sewell**, the first respondent submits there was no conscious organising of the claimant into an organised grouping of employees in the longer term, so as to activate TUPE 2006.*

5 *The first respondent refers to the four steps outlined by Lord Justice Jackson in **Rynda**. The answer to the question posed by the first step is “deck operations”, as detailed on page 1 of the Statement of Agreed Facts.*

10 *The list of activities sought under the second step includes receiving, despatching and moving containers coming into or going out of the asset; the maintenance of the helideck and activities relating to arrival and departure of helicopters from the asset.*

*Under the third step, the first respondent submits that the claimant – as part of his ad-hoc position – had been **temporarily** carrying out those activities and was not **ordinarily** doing so. This ceased when Mr Jess returned to his role.*

15 *It therefore follows, in terms of the fourth step, that the claimant was not so organised into that particular grouping of employees. It just so happened that on the transfer date, the claimant was covering this position for a core employee – Mr Jess – who indeed did transfer to the second respondent.*

20 *The first respondent relies upon the dicta of Lady Smith in **Edinburgh Home-Link Partnership** and **Argyll Coastal Services**, where an employee who is helping out on a “.....**temporary basis**” should not form part of the organised grouping. The first respondent submits that this is squarely on point with the instant claim.*

25 *As such, the first respondent submits that the claimant is not “.....**a person so employed immediately before the transfer**”, in Reg.4(3) TUPE 2006, and therefore should not transfer.*

30 *The first respondent understands that the claimant is retrospectively challenging his bilateral agreement to move from ‘core’ to ‘ad-hoc’. The first respondent denies that said change occurred in an improper manner. In any event, the first respondent submits that this is irrelevant for the purposes of this discreet TUPE 2006 question. The simple matter is that he was ad-hoc at the transfer date.*

35 *Further, the first respondent also understands that the claimant feels his situation is akin to a “football substitute” on the ‘subs bench’. The first respondent would dispute this analogy. A football substitute is only expected to cover for a player on one team. The claimant, by contrast, could be asked to provide temporary cover for many teams on many assets. Between 15 December 2018 and 31 March 2019, the first respondent made various ad-hoc positions available to the claimant but he did not take them up. Again, it just so happened that he was on a temporary cover position for Mr Jess on the transfer date. Taken to its logical conclusion, the claimant’s argument would entail that Mr Jess should not have transferred, or perhaps both of them. This would be an absurd situation.”*

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“Summary”

26. Finally, the first respondent’s solicitor made the following submissions by way of summary:-

5 *“The first respondent submits that the claimant should not and did not transfer to the second respondent. He was not part of the “.....organised grouping of employees” in terms of Reg. 3(3)(i) TUPE 2006, and was therefore not “....a person so employed immediately before the transfer”, in terms of Reg.4(3) TUPE 2006.*

10 *It is the position of the first respondent that the claimant was dismissed by reason of redundancy, with an EDT of 15 August 2019.*

The first respondent concurs with the position of the second respondent, as stated at paragraph 9 of the second respondent’s ET3 ‘Grounds of Resistance’. Namely, that the claim against the second respondent should be dismissed.”

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Second respondent’s submissions

27. The second respondent’s solicitor made submissions by way of attachment to his e-mail on 24 September 2020 at 20:18.

20 28. In support of his submissions he made reference to the same case law as the first respondent’s solicitor. He also agreed with the first respondent’s solicitor that the initial test and issue with which the Employment Tribunal was concerned was:- *“whether or not the claimant was assigned to the organised grouping of employees immediately before the transfer – in accordance with the provisions of Reg. 3(a)(i) and Reg.4(1) and 4(3) of TUPE.”*

25 **“Facts & discussions”**

29. The second respondent’s solicitor made the following submissions under this heading:-

“It is not disputed that there was a relevant transfer as defined under TUPE.

30 *It is not disputed the claimant was assigned to work as part of the core team on BP Clair Ridge as a deck operator in the period from 29 December 2015 to 14 December 2018. Thereafter there was a period of 3½ months when he*

was not assigned to any installation – despite being offered various ad-hoc roles.

In the period from 31 March to 15 July 2019 the claimant was working on an ad-hoc basis on BP ETAP – latterly as annual leave cover for a David Jess. This was a temporary assignment. He was not fulfilling a permanent role.

The claimant had ceased to work on BP ETAP as at 15 July 2019.

Accordingly, as at the date of transfer – 1 August 2019 the claimant was not permanently assigned to BP ETAP and was not working on the installation. The claimant was working on a temporary basis on BP ETAP up until 15 July and was not working at all on BP ETAP or any other installation as at the transfer date.

The second respondent submits that in accordance with the authorities referred to the following factors are relevant:-

The claimant was working on an ad-hoc basis from December 2018;

The claimant was not permanently assigned to the BP ETAP installation in the seven month period prior to the transfer;

The claimant was not working at all on the BP ETAP installation immediately prior to the transfer.

There was an organised grouping of employees operating on BP ETAP. The issue is whether or not the claimant was assigned to that organised grouping of employees. A temporary assignment is not sufficient – per Lady Smith in **Argyll Coastal Services Ltd**. Clearly the claimant in this case – if he was assigned at all was assigned only on a temporary basis and that assignment had ceased as at 15 July.

To follow the approach in **Rynda** as set out by the first respondent at paragraph 10 of their submissions:-

Identify the services:- the services are deck operations;

What are the activities:- ‘broadly put, the activities concerned the carrying out of deck operations on these assets. This included receiving, despatching, and moving containers coming into or going out of the assets; the maintenance of the helideck and the activities relating to arrival and departure of helicopters from the asset’ –Joint Statement of Facts.

‘Who ordinarily carried out these activities’? – the permanent deck operating team – consisting of the ‘core employees’

Was the claimant organised into the grouping on BP ETAP for the principal purpose of carrying out the activities? No – it was the permanent deck operating team who were organised on that basis. The very fact that the

claimant was ad-hoc and had ceased to be involved as at 15 July is evidence of the fact that he was not part of the organised grouping.”

“Summary”

30. Finally, the second respondent’s solicitor made the following submissions by way of summary:-

“It is the second respondent’s submission that the claimant was not assigned to the organised grouping of employees immediately before the transfer and that accordingly his employment did not transfer to the second respondent under TUPE.

Accordingly, the claim against the second respondents should be dismissed.”

First respondent’s further comments

31. The first respondent’s solicitor commented further on the claimant’s submissions by e-mail on 20 October 2020 at 16:17. He disputed the following submission by the claimant’s solicitor:-

“9. The task for the Tribunal is therefore first, to identify an organised group of employees who had as their principal purpose the carrying out of the activities on behalf of BP and second, to determine whether or not the claimant was assigned to that organised group.”

He submitted that:- *‘Assignment’ and ‘organised grouping’ are not mutually exclusive concepts and are part of the same principle. There is not even a “**distinction**”, as averred at paragraph 10 of the Preliminary Issue Written Submission. The respondent again relies upon the ratio of Lord Justice Jackson in the Court of Appeal in **Rynda** for the four ‘stages’ of consideration to be undertaken. See paragraph 10 of the Submissions for First Respondent.*

The first respondent further submits that the claimant’s submissions are long on analogy but short on specific legal rebuttal of the points raised by both respondents. In particular, but not limited to, the points raised at paragraph 25 of the submissions for the First Respondent regarding the dicta of Lady

*Smith in both **Edinburgh Home/Link Partnership and Argyll Coastal Services.***

5 *Finally, it is the first respondent’s position that the claimant has pulled the rug from under his own feet with his averments at paragraph 27 of his Preliminary Issue Written Submission when he states: “.....the **position of the ad-hoc worker cannot simply be that he is a free-floating member of staff, and therefore he must have been assigned to some grouping of resources.**”*

10 *The response to that sentence is – yes – he simply was a free-floating member of staff. That is the inherent nature of an ad-hoc employee. He had been offered various temporary assignments in the months leading up to his annual leave cover role on BP ETAP. It is worth re-iterating that this temporary role ceased on 15 July 2019, some two weeks prior to the transfer date on 1 August 2019. Had the second respondent not won the deck services contract, and it remained with the first respondent, then the claimant*

15 *would have been offered other ad-hoc positions and ‘free-floated’ between as– and–when required.”*

Discussion and decision

32. It was not in dispute in the present case that there had been a relevant

20 transfer from the first respondent to the second respondent in terms of TUPE because of a “service provision change” (a “SPC”).

Relevant law

33. The extension of the definition of a “relevant transfer” to cover a “SPC” was introduced by TUPE in 2006. So far as the present case was concerned, the

25 following provisions were relevant:-

“3. A relevant transfer

(1) These regulations apply to:-

(a).....

(b) a service provision change, that is a situation which –

(i) activities cease to be carried out by a person (a client) on his own behalf and are carried out instead by another person on the client’s behalf (a contractor);

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

10 (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

15 and in which the conditions set out in paragraph (3) are satisfied.

(2)

(3) The conditions referred to in paragraph (1)(b) are that –

(a) immediately before the service provision change –

20 (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.

.....

30 **4. Effect of relevant transfer on contracts of employment**

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources of employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, and any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.”

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Organised grouping

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

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

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

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

37. In **Eddie Stobart** the EAT held that, for Reg. 3(3)(a) to apply, the organisation of the grouping must be more than merely circumstantial. The employees must have been organised intentionally. The Employment Judge had held that merely because the employee spent all or most of their time on tasks related to the particular contract did not mean that there was an “organised

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grouping". At the EAT, Mr Justice Underhill agreed. He said that the statutory language, "*necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question*". He distinguished between a group and an "organised grouping", pointing out that
5 a group of employees, "*may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client*". Thus, this decision limits the reach of the service protection. It would appear that this decision limits a SPC to employees who can be said to have been organised so as to form part of a dedicated client team. Mr Justice
10 Underhill also said that, "*there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve a transfer in as many situations as possible.*"

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

Present case

15 39. So far as the present case was concerned, it was common ground that there was a "SPC" and a TUPE transfer from the first respondent to the second respondent. It was common ground that there was a "an organised grouping of employees" comprising the first respondent's "core employees" who transferred. The issue was whether the claimant, as an "ad-hoc employee",
20 was part of, assigned to, that grouping.

40. This requires a distinct consideration, as opposed to determining whether there is an organised grouping of employees dedicated to the client for the purpose of Reg.3(3)(a)(ii), such as to constitute a transferable entity.

41. It is possible to find, as the respondent's solicitor submitted, that a particular
25 employee is not assigned to the grouping. It is necessary, therefore, to consider whether the particular employee is assigned to the service provided by the transferor. In ***Edinburgh-Link Partnership*** the EAT said that where there is a SPC it is not to be assumed that every employee carrying out work for the client is "assigned" to the organised grouping. For example, an
30 employee might only be helping out on a temporary basis. It was necessary,

therefore, to consider the claimant's role within the first respondent's organisational structure, including their contractual obligations, in accordance with the ECJ's ruling in **Botzen**.

5 42. As an "ad-hoc" employee, the claimant could be assigned, contractually, to work on projects other than the BP contract which was the subject of the transfer in the present case. The claimant had "core" positions when he was assigned to BP installations up to 14 December 2018. However, thereafter, he was "ad-hoc" until 31 March 2019, but was not assigned to any installations despite positions being available.

10 43. In the period 31 March 2019 to 15 July 2019, he had an ad-hoc position at BP ETAP, as annual leave cover for a David Jess. However, he was not assigned permanently to BP ETAP. He was only deployed there on a temporary basis and, as the first respondent's solicitor submitted, with reference to the Judgment of Lady Smith in **Argyll**, "a temporary assignment
15 *is not sufficient*". In that case Lady Smith said this at para.46:-

*"I have no difficulty in acceding to Mr Napier's submission that the Tribunal erred in determining that the claimants' contracts of employment had transferred without considering whether or not the requirements of Reg. 4(1) were satisfied. The issue of whether or not a particular employee was
20 assigned to the "organised grouping of employees" affected by the transfer and thus entitled to the protection of TUPE is not a mere formality. It can only be resolved after a proper examination of the whole facts and circumstances. Being involved in the carrying out of the relevant activities immediately prior to the transfer will not necessarily mean that the employee was assigned to
25 the organised group. It is not difficult to think of circumstances where it will not be possible to conclude that an employee was assigned to the organised grouping such as where he was only working on that matter on a temporary basis – to provide cover for a member of the group who is on leave, for instance. An employment tribunal has to take care to be satisfied that the
30 particular claimant was in fact assigned to the relevant organised grouping prior to the transfer before it can reach what is a highly significant conclusion for both claimant and putative transferee, that the contract of employment transferred across when the client changed their service providers. It is self-evident that to consider the issue raised by Regulation 4, consideration of the
35 whole facts and circumstances in which the claimants worked will be required and I am satisfied that needs to be carried out afresh particularly since the remit will be a new Tribunal."*

44. In the present case, of course, the claimant was working latterly on the BP ETAP, providing cover for David Jess who was on annual leave. He was only working there on a temporary basis. As an ad-hoc employee the claimant could be moved to work elsewhere, at any time, and he was when Mr Jess returned. Unlike the claimant, David Jess was a “core employee” and he transferred to the second respondent. I was not persuaded, therefore, that the claimant was, “assigned to an organised grouping of employees”, as required by Reg 4(1).
45. Further, and in any event, in terms of Reg 4(3) for an employee to transfer he or she must be employed by the transferor “*immediately before the transfer*”. In the present case, the claimant’s “assignment” (using that term in a neutral sense) ended some two weeks before the transfer date on 1 August 2019. Applying the guidance in **Argyll** and considering the whole facts and circumstances in which the claimant worked, rather than taking a snapshot of his position at a particular moment in time, I arrived at the view that the claimant was not employed by the transferor “immediately before the transfer”.
46. I was also directed by the respondents’ solicitors to **Rynda** in which the Court of Appeal opined that a four-stage test for determining whether there has been an SPC transfer, within the terms of Reg. 3, could be distilled from the authorities. One of the “tests” is to identify the employee or employees of the transferor who *ordinarily* carried out the activities the transferor performed in order to provide the service to the client. Employees who, “*ordinarily carried out those activities*” were the first respondent’s “core employees”, such as Mr Jess, all of whom transferred to the second respondent and not the “ad-hoc” employees” such as the claimant.
47. A further “test”, identified by the Court of Appeal in **Rynda**, was whether the transferor organised that employee or those employees into a “grouping” for the principal purpose of carrying out the listed activities. Again, it was the “core employees”, the permanent deck operating team, who were organised on that basis and not the “ad-hoc employees”, such as the claimant, who

could be deployed elsewhere at any time to suit business demands. As the second respondent's solicitor submitted, *"the very fact that the claimant was "ad-hoc" and ceased to be involved as at 15 July is evidence of the fact that he was not part of the organised grouping"*.

5 48. For all these reasons, therefore, I was satisfied that the claimant was not assigned to the "organised group of employees who had as their principal purpose the carrying out of the activities on behalf of BP". I was satisfied that, by and large, the submissions by the respondents' solicitors were well-founded.

10 49. Accordingly, all complaints predicated on the basis that the claimant transferred under TUPE are dismissed. The claim is dismissed in its entirety, therefore, against the second respondent. This leaves, I believe, the unfair dismissal complaint against the first respondent, in terms of s.98 of the Employment Rights Act 1996. However, for the avoidance of doubt, **I direct**
15 **that a case management preliminary hearing now be fixed by telephone conference call to identify the exact nature of the remaining complaint(s) and the outstanding issues, and to determine further procedure.**

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Employment Judge Hosie

Dated: 20 January 2021

Date sent to parties: 20 January 2021

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