



# EMPLOYMENT TRIBUNALS

**First Claimant:** Mrs L Lindley

**Second Claimant:** Miss J Coutts

**First Respondent:** Serco Limited

**Second Respondent:** Southend-on-Sea Borough  
Council

**HELD AT:** Manchester (by CVP)                      **ON:** 12 March &  
15 June 2021

**BEFORE:** Employment Judge Peck (sitting  
alone)

**REPRESENTATION:**

**Claimants:** Ms C Ibbotson (barrister)

**First Respondent:** Mr J Heard (barrister)

**Second Respondent:** Mrs J Bann (solicitor)

## JUDGMENT

1. By consent, the correctly named First Respondent to this claim is Serco Limited.
2. The Second Claimant's claim shall not be dismissed for want of jurisdiction and shall be permitted to proceed.
3. Pursuant to Regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, on 2 July 2020 there was a relevant transfer of an undertaking from the First Respondent, Serco Limited to the Second Respondent, Southend-on-Sea Borough Council.
4. The Claimants were assigned to the organised grouping of resources subject to that relevant transfer. The contracts of employment of the First Claimant and the Second Claimant (the **Claimants**) therefore had the effect, after the transfer, as if originally made with the Second Respondent.

5. The claims being pursued by the Claimants (to be determined at a final hearing) shall be permitted to proceed as follows:
  - a. the claims that their dismissals were automatically unfair under regulation 7(1) of TUPE shall be permitted to proceed against the Second Respondent;
  - b. the claims that their dismissals were unfair under section 98 of the Employment Rights Act 1996 shall be permitted to proceed against the Second Respondent;
  - c. the claims that there was a failure to properly inform and consult representatives under regulation 13 (including the claims that there was a failure to comply with the regulation 14 requirement to elect employee representatives) shall be permitted to proceed against the First Respondent and the Second Respondent.
6. The claim shall be listed for a 1-hour Preliminary Hearing (Case Management) in order that the matter can be listed for a final hearing and appropriate case management orders can be made.

# REASONS

## Claims and Issues

1. This was a public preliminary hearing conducted as a remote hearing by CVP on 12 March 2021, continued and concluded on 15 June 2021. The parties did not object to the case being heard remotely, with all parties being professionally represented.
2. By way of background (being facts not in dispute), the claimants, Mrs L Lindley (the **First Claimant**) and Miss J Coutts (the **Second Claimant**) (together **the Claimants**) were employed by the First Respondent, Serco Limited (**Serco**), the principal operating subsidiary of Serco Group plc. The Claimants were employed as Benefits Officers. The Second Respondent, Southend-on-Sea Borough Council (the **Council**) contracted with Serco for the “*provision of caseworkers for remote processing of benefits*” under a contract dated 22 June 2017 (the **Contract**). The Contract terminated on 2 July 2020. The Claimants’ employment terminated on 3 July 2020.
3. By a claim form presented on 2 October 2020, the First Claimant asserted that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) applied on termination of the Contract and that this amounted to a service provision change under regulation 3(1)(b) and that her employment should have transferred from Serco to the Council as a result. The First Claimant brings claims against both Serco and/or the Council arising out of the asserted TUPE transfer and the termination of her employment.
4. The Second Claimant also asserts that TUPE applied on termination of the Contract and is pursuing claims on the same basis as the First Claimant. The Second Claimant’s claim was not, however, presented on the prescribed ET1 form but was presented by way of particulars of claim annexed to the First Claimant’s ET1 form and particulars of claim.
5. By way of separate response forms, each dated 9 December 2020, Serco set out its defence, its primary submission being that TUPE applied on termination of the Contract and that the employment of the Claimants transferred from Serco to the Council on 2 July 2020.
6. Serco also applied for the final hearing listed for 12 March 2021 to be converted to a preliminary hearing, to determine whether TUPE applied in the circumstances and if so, which of the Claimants’ claims could proceed and against which of the respondents. This application was granted.
7. In respect of the Second Claimant, in addition to its pleaded position regarding the application of TUPE, Serco raised a jurisdiction issue, asserting that the Second Claimant’s claim should not be permitted to proceed because she had not submitted the prescribed ET1 form in accordance with schedule 1, rule 8(1) of the Employment Tribunals (Constitution and Rules of

Procedure) Regulations 2013 (the **Tribunal Rules**). It applied for her claim to be struck out referring to rules 6(b), 10(1)(a) and 37(1)(c) of the Tribunal Rules.

8. By way of a response form dated 4 December 2020, the Council set out its defence to the claims of the First Claimant and the Second Claimant, its primary position being that TUPE did not apply on termination of the Contract. The Council further pleaded that, if TUPE was found to have applied, the First Claimant and the Second Claimant were not assigned to the Contract at the date of the transfer such that their employment would not, in any event, have transferred from Serco to the Council. The Council did not raise the jurisdiction issue raised by Serco.
9. At the outset of this preliminary hearing, the issues to be determined were identified:-
  - a. What were the activities performed by Serco under the Contract?
  - b. Were the activities carried on by the Council after termination of the Contract fundamentally the same?
  - c. Immediately before the transfer was there an organised grouping of Serco employees that had, as its principal purpose, the carrying out of the activities on behalf of the Council?
  - d. Was each of the Claimants assigned to the organised grouping of employees?
10. In relation to the claim of the Second Claimant, should her claim be struck out because of her non-compliance with rule 10(1)(a) of the Tribunal Rules?

#### **Procedure, documents and evidence heard**

11. The Claimants were ably represented by Ms Ibbotson. Serco was ably represented by Mr Heard and the Council was ably represented by Mrs Bann. I thank them all for their constructive and courteous approach.
12. I heard oral evidence from each of the Claimants, from Mr J Quigley (Head of Business Support) for Serco and from Ms T Nicola (Benefits Service Manager) for the Council. The parties had prepared and exchanged witness statements in advance.
13. I was provided with an agreed bundle of documents, which ran to 322 pages, to which a small number of pages were added (in the form of screenshots of job adverts) at the outset of this preliminary hearing.
14. I was also provided with an Agreed Facts Statement (of 8 pages), which had been agreed between Serco and the Council.

15. All parties provided me (and the other parties) with written submissions along with copies of relevant authorities, which were supplemented with oral submissions at the close of this preliminary hearing.

### **Findings of Fact**

16. In making my findings of fact, I have taken account of the witness statements, oral evidence and documents that I have had sight of. Where there was a conflict of evidence, I determined it on the balance of probabilities.

### **The Parties**

17. Serco is an international service company which provides crucial business processes for public sector organisations globally, employing approximately 24,000 employees in Great Britain. As part of its activities, it provides outsourced business support services for local government clients across the United Kingdom.
18. The Council employs 1,800 employees and is located at the Civic Centre, in Southend-on-Sea, Essex.
19. The First Claimant was employed by Serco as a Benefits Officer from 6 September 2010. She joined the team working on delivery of the Contract in April 2018. She worked solely on the Contract from April 2018 until the termination of her employment on 3 July 2020. The First Claimant always worked from home (in Cumbria) when working on the Contract.
20. The Second Claimant was also employed by Serco as a Benefits Officer. Her employment commenced on 7 October 2013. She joined the team working on delivery of the Contract in May 2019. The Second Claimant worked solely on the Contract from that date until the termination of her employment on 3 July 2020. The Second Claimant always worked from home (in Birmingham) when working on the Contract.

### **The Contract**

21. Serco first started to work with the Council in 2010, delivering off-site benefits processing. Following a re-tendering exercise, Serco was awarded the Contract with the Council, which it entered on 22 June 2017. The terms of the Contract were set out in the “Articles of Agreement” along with the tender specification, the tender clarifications and responses dated 6-8 February 2017, the tender response dated 17 February 2017, the terms and conditions of contract, the request for information letter dated 23 February 2017 and the award notification letter dated 14 March 2017.
22. The Articles of Agreement document was headed as a “*contract for provision of caseworkers for remote processing of benefits contract*”.
23. The tender specification stated that the Council was seeking to appoint a company “*to provide off site processing resource for Benefits (Housing and*

*Council Tax Reduction)*”, going on to specify that *“the contract will provide the Council with additional resources if and when required to address work pressures so as to minimise the impact on service delivery”*.

24. The work to be undertaken under the Contract (as set out in the tender specification) was to include (1) *“Basic Revenues associated work which are started as a result of a Benefit change or new claim”* (which I shall refer to as change of circumstances work); and (2) *“Benefits associated work (Housing and/or Council Tax Benefit)”* (which I shall refer to as housing and council tax benefit claims).
25. In its responses provided to the Council during the tender process, Serco stated that *“it should be noted Serco RB Solutions already has a fully trained team on Southend’s processes but we would carry out this exercise again to refresh the training and documents. The intention of this exercise is to ensure our assessors are working to exactly the same processes and procedures as Southend’s assessors”*. It also stated that *“Our breadth of contracts also means if Southend were to reduce a requirement, we could quickly reassign those resources but more importantly we are able to respond quickly to meet increases in requirements”*. It was therefore clear from the outset that the Contract did not provide Serco with a guaranteed amount of work and that Serco understood this to be the case.

#### Benefits Officers

26. To deliver the Contract, Serco employed a team of Benefits Officers who were managed by a team manager and who were all home-based.
27. At the commencement of the Contract in July 2017, 3 Benefits Officers were allocated to work on the Contract, which increased to 11 Benefits Officers in first 6 months of the Contract. Thereafter, during the Contract, between 8 and 13 Benefits Officers were allocated to work on the Contract at any time.
28. Throughout the Contract, the Council and Serco had regular and open dialogue about performance and workload, and both described the relationship in positive terms. As per the unchallenged evidence of Mr Quigley, when the Council anticipated a reduced or increased resource need, it would ordinarily discuss this with Serco and give it advance notice.
29. In practical terms, Serco’s Benefits Officers would be responsible for (1) change of circumstances work and (2) housing and council tax benefit claims. They were given access to the Council’s document management system (Civica), which they could log onto remotely from home. Work that needed to be processed would be in what was known as “the tray” and Benefits Officers would take work from the tray to complete.
30. Benefits Officers were also employed by the Council and as at March 2021, the Council employed 24.1 FTE Benefits Officers. Council Benefits Officers would also undertake (1) change of circumstances work and (2) housing and

council tax benefits claims and when doing so, in practical terms, would adopt the same approach by taking work from the tray to complete.

31. Both Serco employees and Council employees could access the document management system from 7am – 6pm, Monday to Friday.
32. The work in the tray was not specifically allocated to be dealt with by Serco employees or Council employees. Serco employees did not, for example, only take work from the tray once Council employees had been assigned work from the tray. Nor did Serco employees only deal with certain types of tasks relevant to change of circumstances work and housing and council tax benefits claims. Instead, between them, Council employees and Serco employees would work through the work in the tray.
33. From a practical perspective there were some differences between Serco's Benefits Officers and the Council's Benefits Officers, namely that (a) up until March 2020, Serco employees worked from home whereas Council employees were office-based (moving to working from home in response to the covid-19 pandemic); and (b) Council employees would undertake a wider range of tasks than those undertaken by Serco employees. Taking into account the documentary and witness evidence before me, I find that change of circumstances work and housing and council tax benefits claims equated to approximately 20% of the workload of Benefits Officers employed by the Council (this does not mean that 20% of the Council's Benefits Officers did change of circumstances work and housing and council tax benefits claims for 100% of their working time).
34. However, despite these differences, for the duration of the Contract, I find that the way in which Serco employees and Council employees processed change of circumstances work and housing and council tax benefits claims was the same.

#### Termination of the Contract

35. On 19 March 2020, Serco verbally informed the Council that it was terminating the Contract, due to its decision to exit the benefits market and to end its RB Solutions business. At this time, 9 Serco employees were working on the Contract, including both of the Claimants.
36. The evidence of Ms Nicola was that there was no mention of TUPE by Serco during this call. Mr Quigley's witness statement does not specify whether TUPE was mentioned, but during cross examination, he stated that he believed that TUPE was raised as an issue and that this would be a key aspect of any contract exit discussion.
37. Written notice of termination of the Contract was provided on 29 April 2020, following a call on 28 April 2020. In its letter, Serco stated that "*As a key aspect of the exit will be in respect of the employees currently providing the service, I wanted to set out here our understanding of the implications of this in relation to [TUPE]....Based on our current understanding of the scope of*

*the future service...10 members of staff who currently provide services...are in scope to transfer...". 10 Serco employees were at this stage working on the Contract. The Council's position is that this (the letter of 29 April 2020) was the first time that TUPE was mentioned by Serco and according to the oral evidence of Ms Nicola was "the first mention by Serco that they believed TUPE applied".*

38. By email dated 30 April 2020, Ms Nicola responded, stating "*as discussed in our call on the 28<sup>th</sup> April please could you send us the relevant data relating to the 10 people you feel meet the criteria...*". In this email the Council did not state whether it accepted TUPE applied or not.
39. Considering the relevant evidence, including the chronology of events, I find that it is more likely than not that TUPE was referred to in the initial call between Serco and the Council on 19 March 2020. However, it may not have been until the call on 28 April 2020 (as opposed to on receipt of the letter dated 29 April 2020) that the Council clearly understood Serco's position regarding the application of TUPE.

#### 4 May and 11 May instructions

40. Soon after receipt of this letter, on 4 May 2020, Lorraine Goldsmith (Benefits Service Manager) of the Council emailed Mr Quigley stating that "*We have been reviewing our case load and we do not need the same level of resource from you. Please can you therefore remove 4 X 37.5 hours off the contract*". I accept the evidence of Mr Quigley that this came as a surprise to Serco and that the Council had not discussed this reduced need in advance, which would ordinarily have been the case.
41. This was followed by an email from Ms Nicola stating that "*we are not clear on the 10 people you think TUPE applies to...We do not feel we will have 10 people at point of transfer, we don't feel we will have need for anyone by that point*" and a further email from Ms Goldsmith on 11 May 2020 stating that "*we now find ourselves with very little work, therefore from Monday 18<sup>th</sup> May we will not need any resource from Serco*". Again, I make a finding that this came as a surprise to Serco, considering that there was no mention of this in the 4 May 2020 email, that the Council knew who was allocated to the Contract and given the extent of the reduction in question, which was inconsistent with previous requests for decreased resource.
42. Ms Nicola's evidence, which reflected the Council's documented position at the relevant time, was that the instruction to remove Serco employees from the Contract was not sent in response to Serco's letter dated 29 April 2020. Her evidence was that "*By the beginning of May 2020, with the full establishment of the automation of UC, the return of 4 FTE Council staff who had been working on the migration of data and the return of 3 FTE Council staff from maternity leave, combined with the general reduction in incoming work meant we had sufficient resource within our permanent staff and had no requirement for the overflow service. As of 4 May 2020, we found ourselves with no work outstanding and no need for additional resource*".



43. Ms Nicola also stated that the Council had the contractual ability to reduce resource allocated to the Contract by Serco and that this was not the first time it had exercised this right.
44. I do not make detailed findings of fact regarding the extent to which the Council was motivated to issue the instruction to Serco regarding the reduction of resource because of the prospect of TUPE applying. If, for example, I was to find that the Council took this step because it believed that TUPE would apply on termination of the Contract and was seeking to avoid liability, that would be of limited assistance to me in determining whether TUPE applied as a matter of law. It could be a mistaken belief on the part of the Council, for example and indeed, in circumstances where both the alleged transferee and the alleged transferor agree about the application of TUPE, that is in no way a conclusive indication of the legal position.
45. I do, however, make the following relevant findings in respect of the reason put forward by the Council for the 4 and 11 May instructions, namely that there was a significant and substantial reduction in processing work. This issue is potentially relevant to determining whether the post-termination activities were fundamentally the same as the pre-transfer activities.
46. First, I make the finding that the introduction of Universal Credit (**UC**) did have an impact on workload and resulted in the Council having a reduced need for processing work. Indeed, from the outset of the Contract, it was anticipated that there could be a decrease in processing work, with the tender specification document stating that *"the above stated caseload may decrease over a period of time due to the introduction of the new state benefit Universal Credit"*. A reduction in workload was therefore consistent with this expectation.
47. I also find that the introduction of automation had an impact on workload. In October 2019, the Council launched an automation system for processing council tax reduction new claims for UC claimants. This automation took 4 months to implement, and 4 FTE Council employees worked on this project, which included the migration of data. The automation process was completed in January 2020 and as a result, certain tasks were no longer required of Benefits Officers.
48. However, I am not persuaded by the Council's assertion that its need for data processing *substantially* reduced, as it purportedly identified in early May 2020. I acknowledge that the nature of the Contract was such that the Council's resourcing requirements would fluctuate. It is not in dispute that during the Contract, the Council had previously instructed Serco to both increase and decrease allocated resource. For example, on 15 October 2019, Ms Goldsmith had emailed Mr Quigley to state *"We have been reviewing our caseload and have decided that we [no] longer [need] the same level of resource from you. We want to give you as much notice as possible therefore sending this email as a 4 weeks' notice period...we need to decrease by 2 full time equivalents which is around 75 hours per week"*.

49. However, it is simply not feasible that such a significant and substantial reduction in resourcing requirements can have arisen so suddenly. To have no requirement at all from Serco was wholly inconsistent with the Council's requirements for the duration of the Contract. In addition, the factors put forward by the Council as being the reason for such a sudden reduction in workload were all known or could have been anticipated, yet were not discussed with Serco in advance, despite the long-standing, professional and overall positive working relationship between the parties.
50. On this basis, I make a finding that there was not a significant and substantial reduction in processing work in the period from May 2020 and thereafter. It is not in dispute that the Council no longer required Serco to undertake processing work from 20 May 2020. But that is not the same as the work not being required at all.
51. Instead, I find that the Council increased the amount of processing work being undertaken in-house, which is evident from the email sent by Ms Goldsmith on 20 May 2020 in which she stated "*As previously advised there is no requirement for your resource as at 18<sup>th</sup> May 2020...If we need resource from the 1<sup>st</sup> of June or thereafter we will let you know. All work will be transferred to our internal team and your staff access to SBC systems will be suspended from 4pm today*" (my emphasis).
52. On a related point, during this preliminary hearing, attention was given to the data included in the bundle and set out in the Agreed Statement of Facts, this being data produced by the Council to support its assertion that there was a significant reduction in processing work. Perhaps inevitably, Serco's analysis of data produced by the Council differed to the Council's interpretation of that data. The Council said that the data was evidence of a significant reduction in processing work. Serco said that the data supported its assertion that the Council took steps to bring in-house the processing work ordinarily allocated to Serco. I have therefore placed limited weight on the data in reaching my findings, but in any event the picture painted by the data was not sufficiently clear to substantiate the Council's position regarding the asserted reduction in workload.

#### Contract termination

53. From 11 May 2020 onwards, the Council and Serco engaged in a series of communications regarding the application of TUPE via their legal representatives. No agreed position was reached.
54. On 20 May 2020, the Council removed Serco's access to its document management system, the result of which was that no processing work was undertaken by Serco's Benefits Officers after 20 May 2020.
55. On 2 July 2020, the Contract between the Council and Serco terminated, during which time the Claimants undertook no other work for Serco and / or its clients, remaining on standby until the expiry of the Contract.

56. The employment of the Claimants was terminated by Serco on 3 July 2020.
57. I make no findings of fact regarding Serco's communications with the First Claimant and the Second Claimant at this time, or the circumstances of the termination of their employment. These may be matters for a later Tribunal to address on hearing the relevant evidence.

#### Ongoing Processing Work

58. After the Contract terminated, it is not in dispute that change of circumstances work and housing and council tax benefits claims continued to be processed by Council employees. The way this work was processed did not change. Benefits Officers accessed the document management system, would take work from the tray and would complete that work.

#### **The Law**

##### TUPE Regulations

59. The TUPE Regulations apply to a "service provision change", as defined at Regulation 3(1)(b):

*"(b) a service provision change, that is a situation in which-*

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

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

60. As detailed at Regulation 3(2A):

*"(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out."*

Also of relevance is Regulation 3(3):

“(3) *the conditions referred to in paragraph (1)(b) are that-*

(a) *immediately before the service provision change-*

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

(ii) *the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and*

(b) *the activities do not consist wholly or mainly of the supply of goods for the client’s use.”*

61. Both Ms Ibbotson and Mr Heard helpfully drew my attention to the EAT authority of Enterprise Management Services Ltd v Connect-Up Ltd and ors [2012] IRLR 190, being a useful starting point in regards the approach to be taken to applying regulation 3.

62. I was also referred by all parties to the EAT authority of Metropolitan Resources Ltd v Churchill Dulwich Ltd and ors [2009] IRLR 1380 and my particular attention was drawn to the following (at para 30):-

*“The statutory words require the employment tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced...with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or the manner in which the former performs and the latter performs the relevant task. However, it cannot... have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A common sense and pragmatic approach is required...the tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it”.*

63. I comment on further relevant authorities in making my conclusions, below.

### Jurisdiction

64. Rule 8 of the Tribunal Rules sets out that:

*“(1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.”*

65. Under Rule 10 of the Tribunal Rules:

*“(1) The Tribunal shall reject a claim if-*

*(a) it is not made on a prescribed form...”*

66. Rule 37(1)(c):

*“(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-*

*(c) for non-compliance with any of these Rules or with an order of the Tribunal.”*

67. In its grounds of resistance, Serco refers to rule 6(1)(b) of the Tribunal Rules in support of its assertion that the Second Claimant’s claim should be struck out. However, it did not refer to rule 6 at this preliminary hearing and I note, for completeness, that rule 6 does not in any event apply given that the alleged failure to comply with the Tribunal Rules is a failure under rule 8(1).

68. Rule 15 should also be noted:

*“(1) Unless the claim is rejected, the Tribunal shall send a copy of the claim form, together with a prescribed response form, to each respondent with a notice which includes information on-*

*(a) whether any part of the claim has been rejected; and...”*

### **Decision and Reasons**

#### What were the activities performed by Serco under the Contract?

69. I have been taken to several references in the documentation, describing the activities to be provided by Serco to the Council, including those referred to in my findings of fact. I have considered these, as well as applying my mind to what happened “on the ground” (Lorne Stewart plc v Hyde, Crowley and Planned Maintenance Engineering (2012) UKEAT/0408/12).

70. Ms Ibbotson, on behalf of the Claimants, submitted that the activities should be defined as “*the processing of Housing and Council Tax Reduction benefits*”. Mr Heard, on behalf of Serco submitted the same.

71. Mrs Bann, on behalf of the Council, submitted that the activities should be defined as the *“provision of additional resources to support the Council with processing (Housing and Council Tax Reduction) if and when required to address work pressures”*.
72. The *“processing of housing and council tax reduction benefits”* is clearly an activity that was undertaken by Serco under the Contract and as per my findings of fact, the processing in question involved Serco dealing with (1) change of circumstances work and (2) housing and council tax benefits claims, which it did by accessing the Council’s document management system, taking work from the tray and then completing such work.
73. But what about the lengthier definition of activity put forward by Mrs Bann (which has the effect of more narrowly defining the activity)? Is the ad hoc / overflow nature of the arrangement of relevance and a necessary aspect of the definition of activity in this case? Is the activity *“the processing of housing and council tax reduction benefits if and when required and to address work pressures”*, or simply *“the processing of housing and council tax reduction benefits”*?
74. I conclude that it is the latter and to adopt Mrs Bann’s definition would go against the guidance of the EAT in Johnson Controls Ltd v Campbell and anor EAT 0041/12 in which it cautioned *“An activity may be more than the sum of the tasks that are performed in respect of that activity, but a Tribunal must be careful to ensure that it does not take so narrow a view of that which “activity” consists of, in the case before it, so as to forget that the context in which it decides “activity” is the context in which it is ever likely that employee’s continued employment will be affected”*.
75. In my view, the fact that the amount of support required from Serco during the Contract could (and did) fluctuate is not of relevance when defining the activity in the circumstances of this case. Indeed, many outsourced arrangements are put into place to achieve flexibility and if it was possible to always avoid the application of TUPE on the exit of a contract by outsourcing on an “ad hoc” basis, this would risk undermining the protection that TUPE is intended to afford to employees.
76. I conclude that the activity in this case was, therefore, the processing of housing and council tax reduction benefits on behalf of the Council.

Were the activities carried out by Council employees on its own behalf (after the transfer) fundamentally the same?

77. In determining this issue, I am guided by the EAT in Enterprise, which made clear that *“minor differences may properly be disregarded”* and that addressing this question is *“essentially a question of fact and degree for the employment tribunal”*.

78. It is my determination that the activities carried out by Council employees on its own behalf after termination of the Contract were fundamentally the same as the activities performed by Serco during the Contract.
79. Council employees continued to process change of circumstances work and housing and council tax benefits claims and this was an activity that, when in contract with Serco, Serco employees would also have performed in the same way.
80. In reaching this view, I have carefully considered Mrs Bann's submission that, as a result (as the Council asserted) of there being a significant reduction in the amount of processing work, the services required after termination of the Contract were not fundamentally the same as during the Contract. I have also applied my mind to Mrs Bann's submission that the way in which the work was done following termination of the Contract was fundamentally different to the way in which it was done during the Contract, because of automation and the reduction of manual data input. But I am not persuaded by these submissions.
81. I note the EAT guidance in Department for Education v Huke and another UKEAT/0080/12 (at para 21), referenced by Mrs Bann: "*In the factual assessment which the tribunal requires to carry out, it seems plain that they must consider not only the character and types of activities carried out but also quantity. A substantial change in the amount of the particular activity that the client requires could, we consider, show that the post transfer activity is not the same as it was pre-transfer*". However, the EAT in this case refers to there being a substantial change in the quantity of an activity, which I have not found to have been the case, as a matter of fact. Furthermore, even if I found the change in quantity to be substantial, that only could (not would) show a difference in post transfer activity.
82. I do not accept that the automation of certain tasks meant that TUPE did not apply. As I have found, this was a factor that resulted in a reduction in processing benefits work. However, this did not mean that the way in which the work was done by the Council after 2 July 2020 was fundamentally different than during the contract with Serco. Indeed, this automation was in place and operational in January 2020, several months before termination of the Contract.
83. I am therefore satisfied that the activities undertaken by the Council after 2 July 2020 were fundamentally the same as the activities undertaken by Serco and that there was a service provision change upon the contract between Serco and the Council terminating on 2 July 2020. I am further satisfied that, in drawing this conclusion, I am not stretching TUPE to "*achieve a transfer in every situation a contract terminates*" (Eddie Stobart Ltd v Moreman [2012] ICR 919 (at para 19)).

Immediately before the transfer was there an organised grouping of Serco employees that had, as its principal purpose, the carrying out of the activities on behalf of the Council?

84. I conclude that there was an organised grouping of Serco employees and that Serco had an “*identifiable team*” working exclusively for the Council under the Contract.
85. Whilst the Serco employees were not carrying out any processing work in the period from 20 May – 2 July 2020, I conclude that they retained their identify during this period. This cessation of work arose because of Serco’s IT access being removed by the Council, which in view of my findings of fact, was not a step taken because of a substantial downturn in work.

Was each of the Claimants assigned to the organised grouping of employees?

86. As per my findings of fact, the First Claimant exclusively carried out processing of benefits on behalf Council from April 2018 until her dismissal on 3 July 2020, save for a period during which she was on maternity leave. The Second Claimant exclusively carried out processing of benefits on behalf Council from May 2019 until her dismissal on 3 July 2020.
87. It is therefore my conclusion that each of the Claimants was assigned to the organised grouping of employees.

Should the Second Claimant’s claim be struck out?

88. On behalf of the Second Claimant, Ms Ibbotson explained that her instructions were that an online ET1 form had been completed and uploaded for the Second Claimant and the “multiple claimants” option had been selected online. In the absence of any evidence regarding the steps taken by the Second Claimant’s solicitor when filing her claim, I cannot take properly take account of this information offered by Ms Ibbotson.
89. In any event, Ms Ibbotson further submitted that both the claim of the First Claimant and the Second Claimant had been accepted by the Tribunal, had been given separate case numbers and an Acknowledgment of Claim had been issued.
90. Mr Heard’s submission was that the application of rule 10 is strict and that the Tribunal is obliged to reject the Second Claimant’s claim for her failure to complete and submit a separate claim form. He also submitted that, once rejected, any application by the Second Claimant for reconsideration would be “*doomed to fail because C2 would not satisfy the reconsideration criteria*”.
91. The Second Claimant’s claim was not rejected by the Tribunal but was accepted, evident by the case file chronology and the fact that a copy of the Second Claimant’s claim was sent by the Tribunal to both Serco and the Council. It is not in dispute that both Serco and the Council were in receipt of the particulars of the Second Claimant’s claim, fully understood the nature of



the claims being brought against them and were able to respond accordingly. There is no suggestion that there is a substantive defect with the Second Claimant's claim.

92. Whilst rule 10(1) mandates the Tribunal to reject a claim if it is not made on a prescribed form, that does not in my view extend to the rejection of a claim that has already been accepted by the Tribunal. The claim is not, therefore, struck out for want of jurisdiction.
93. I have also considered whether to strike out the Second Claimant's claim under rule 37(1)(c), for non-compliance with rule 8, but my decision is that the Second Claimant's claim shall not be struck out, which is a decision made giving effect to the overriding objective in rule 2.

Employment Judge Peck  
13 July 2021

JUDGMENT SENT TO THE PARTIES ON  
13 July 2021

FOR THE TRIBUNAL OFFICE

Notes

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.