



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Holt (1)  
Ms J Hillhouse (2)  
Mr K Allen (3)  
Mrs J Allen (4)

**Respondents:** Hands Cleaners Limited (1)  
University of Leicester Students Union (2)  
University of Leicester (3)

**Heard at:** Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE

By cloud video platform

**On:** 23 and 24 June 2021

**Before:** Employment Judge Adkinson sitting alone

## Appearances

**For the claimants:** Ms J Wilson-Theaker, Counsel

**For the respondents:** Mr S Jagpal, advocate (1)

Mr N Bidnell-Edwards, Counsel (2)

Ms R Snocken, Counsel (3)

**Judgment** having been sent to the parties on 25 June 2021, and oral reasons having been given to the parties on 24 June 2021, and written reasons having been requested in accordance with **Rule 62(3) of the Employment Tribunals Rules of Procedure 2013**, the following reasons are provided:

## REASONS

### Background

1. By Claim Forms presented on 27 and 28 October 2020, the Claimants brings various claims relating to the termination of their employment. For the purposes of this Hearing, they allege that there has been a transfer of their employment that falls within the **Transfer of Undertakings**

**(Protection of Employment) Regulations 2006 (TUPE).** The transfer is alleged to have happened on or about 1 August 2020 when the First Respondent (Hands) no longer provided cleaning services to the Second Respondent (the Student's Union) and, instead, they were taken inhouse by either the Students' Union or Third Respondent (the University).

2. The Claimants further allege that one of the Respondents is liable to the Claimants for the termination of their employment. They take a neutral position as to who is liable and whether there has been a relevant transfer.
3. Hands allege there has been a relevant transfer of the Claimants' employment to either the Students' Union or the University. Both the Students' Union and the University deny this.
4. This preliminary hearing is concerned only with whether or not there has been a relevant transfer and if so, to whom.

### Hearing

5. The Claimants were represented by Ms J Wilson-Theaker, Counsel; Hands were represented by Mr S Jagpal, an advocate; the Students' Union were represented by Mr Bidnell-Edwards, Counsel, and the University by Ms R Snocken, Counsel.
6. I have heard oral evidence from the following witnesses:
  - 6.1. Mr Darryl Scroby, who is the Operations Director for Hands;
  - 6.2. Kirsty Woodward, who is an employee at the University and at various times was the Interim Director of Commercial Services and Deputy Director of the Commercial and Business Development. She is currently the Director of Campus Services, a post which she has held since September 2016;
  - 6.3. Mr Martin Miller, who is the Head of Campus Service Operations at the University, a post which he has held since 2019; and
  - 6.4. Mr Ambalavanar Kumaran, who is the Director of Membership Services for the Students' Union.
7. The Claimants have not given any oral evidence or adduced any evidence in these proceedings. Given their neutral position I do not believe that has any adverse effect on matters.
8. There has been an agreed bundle put before the tribunal of roughly 670 pages and I have taken into account those documents to which I have been referred.
9. There have been written submissions produced on behalf of Hands and the University which I have taken into account. Each party has made oral submissions at the conclusion of the case which I have also considered.
10. The hearing has proceeded by way of video link. There have been no technical problems of note. In order to accommodate continued screen use and in accordance with the Health and Safety Executive guidelines on the

continuous use of screens, we took a break roughly every hour for approximately 5 minutes. There was an hour's break at lunchtime. There were no reasonable adjustments either required or asked for.

11. No party has complained that there has been any unfairness, and I am satisfied that this hearing has been fair to all parties.

### **Preliminary issue**

12. There was a minor preliminary issue at the start of the hearing as to whether or not the otherwise agreed list of issues should refer to **TUPE Regulation 3(2A)**. Hands objected to its inclusion because they said it was not on the list of issues and had not therefore been covered in their witness evidence. After hearing submissions, I decided that the issue should be considered. The reason is that **Regulation 3(2A)** defines and refines **Regulation 3(1)(b)**. One cannot read **3(1)(b)** without taking **3(2A)** into account. It would be artificial to exclude it. It seemed to me that fairness could be achieved by allowing additional oral evidence-in-chief from Hands to supplement that given in the witness statements to deal with this issue. That is what happened.

### **Issues**

13. The issues were identified by Employment Judge Ayre at a Preliminary Hearing that took place on 5 March 2021 and those still represent the issues before the tribunal at this Preliminary Hearing, subject to the amendment that I have already indicated. These issues are:
  - 13.1. Was there a service provision change within the meaning of **TUPE Regulation 3(1)(b)**?
    - 13.1.1. Was one of the situations specified in **3(1)(b)(i)** through to **(iii)** satisfied?
    - 13.1.2. Immediately before the service provision change, was there an organised grouping of employees situated in Great Britain which had as its principal purpose the carrying out of the activities concerned on behalf of the client?
    - 13.1.3. Immediately before the service provision change, did the client intend that the activities would following the service provision change, be carried out by the transferee, other than in connection with a single specific event or task of short duration?
  - 13.2. Were the activities carried out after the transfer by the Students' Union or the University fundamentally the same as those before the transfer as carried out by Hands?
  - 13.3. Was there a transfer of an undertaking within the meaning of **TUPE Regulation 3(1)(a)**?

- 13.3.1. In other words, was there a transfer from one organisation to another organisation?
- 13.3.2. Was an economic entity transferred?
- 13.3.3. Did the economic entity retain its identity after the transfer?
- 13.4. Is the Second Respondent correct in its assertion that they neither the 'transferor' nor the 'transferee' within the meaning of **TUPE Regulation 2(1)**?
- 13.5. Is the Third Respondent correct in its assertion that there was a change of 'client' and therefore **Regulation 3(1)(b)** is not engaged?
- 13.6. In the alternative, is the Third Respondent correct that there was a cessation in activity such as to interrupt the continuation of services provided by the First Respondent to the Second Respondent?
14. Depending on my conclusions, further case management would then be given to progress the case to a final hearing. I note at this point that the Claimants themselves do not rely on **Regulation 3(1)(a)**.

### **Findings of fact**

15. I begin with general observations about the witnesses. I am quite satisfied that each witness has been truthful in the evidence that they have given to me and that each has done their best to assist the tribunal to come to a correct conclusion. Each witness conceded that there were limits to their knowledge of various events. This was particularly true of Mr Scroby, who fairly acknowledged that he knew little of the arrangements at the Percy Gee Building (to which I will turn in a moment) as he did not himself work there and in particular knew nothing about what has happened between the Students' Union or the University after 1 August 2020.
16. The Respondents' witnesses are also limited as to how much they know about the historic relationship between the Students' Union and the University, though I do not think that such evidence matters.
17. With those observations, I then turn to make the following findings of fact on the balance of probabilities.

### ***The parties***

18. Hands is a company that provides cleaning services to various clients. One of those clients was the Students' Union. The main service Hands provided to the Students' Union was the Claimant's labour as cleaners. The Claimants were their employees assigned by Hands to clean the Students' Union. They had no other relevant duties provided to them by Hands.
19. The University is a higher education institution providing education to graduate and post-graduate level.

20. The Students' Union is a body that provides social and representative functions to students at the University and promotes their general interests as set out in the **Education Act 1994 Part II**. The Students' Union is separate and distinct from the University, albeit that the University has a supervisory role. This was confirmed in the case of **Commissioners of Customs & Excise v University of Leicester Students Union [2002] STC 147 CA** at [32]-[34]. The fact the case was about VAT does not appear to undermine or affect the conclusion of the Court of Appeal on this point. Of particular relevance to this case is the observation by Peter Gibson LJ at [34]:

"[34] I also accept that the university exercises a good deal of control over the union, particularly in relation to financial matters. But that does not establish that the union is not a distinct entity. On the contrary, it points to the union, with its own bankers, investments and auditors being an entity separate from the university which nevertheless has a supervisory role. The fact that the consent of the university is required for certain acts to be done by the union again is a pointer away from the union being part of the university. Further, the agreement between the university and the union over the Percy Gee Building provides a concrete example of the university and the union treating each other as distinct entities."

21. Whatever the historic arrangements, the Students' Union is now set up as both a separate company and a charity in its own right, distinct from the University. The Students' Union was originally located in the Percy Gee building at the University and appears to have been located there since the University became such in the 1940s.

### ***Percy Gee Building***

22. The Percy Gee building is owned by the University – and whatever their previous historic arrangements, whether formal informal, and about which I have insufficient evidence to make any useful determination but which I do not think relevant in any event – it was let to the Students' Union by lease on 14 July 2011 for a term of 25 years (the 2011 lease). In that lease, the University demised to the Students' Union the interior but retained the building's exterior. The lease contained no break clause that allows the University to break it at its own will.

23. The 2011 lease contains a repairing covenant at paragraph 5.1 which says as follows:

"The Tenant must repair keep the premises and for the purposes of clarification the common parts in good and substantial condition and repair except for damage caused by an insured risk. ... provided that the Tenant shall produce or repair the maintenance building improvements required under this clause ... from the Landlord or Landlord's approved contactors as the Landlord may specify from time to time. The Tenant must keep the premises, including the common parts, clean and tidy of all rubbish to the satisfaction of the Landlord. The Landlord may enter the premises to

inspect the cleanliness of them in accordance with clause 5.5 and may give to the Tenant a notice specifying the work reasonably required to remedy any breach of the Tenant's obligations in this clause."

The other parts are not relevant to this case.

24. There has been no suggestion that the lease itself is a sham. The University accepted that if the Students' Union breached it, they would have a right to act on that breach like any landlord. They said they would do this by having a polite word with the Students' Union, but it is quite clear from reading the lease that the University ultimately would have a claim for damages and/or equitable remedies and could possibly treat the lease as being brought to an end by a fundamental breach.

***Maintenance grant***

25. The University paid to the Students' Union a maintenance grant that was described as 'substantial' to enable the Students' Union to comply with its obligations under clause 5.1 and any other maintenance obligations or maintenance needs that the Students' Union might have.
26. It was a matter for the Students' Union to decide how to spend the money allocated under the maintenance grant, how it was going to comply with the various obligations under clause 5.1 and to pay any monies due to Hands.

***The contract between Hands and the Students' Union***

27. On 7 June 2011, Hands and the Students' Union entered into a contract for the provision of cleaning services. The University was not a party to that contract and there is no suggestion or evidence that there is any umbrella agreement involving the University, Students' Union and Hands.
28. The role of the cleaners provided by Hands was to clean agreed areas to a standard that had been agreed with the Students' Union. There is no suggestion by Hands or the Students' Union that that contract was itself a sham.
29. Under the terms of the contract agreed between Hands and the Students' Union, there is no expectation or requirement on the Claimants (or anyone else provided by Hands for that matter) to do services such as lock or unlock the building at the end or beginning of the day as may be; to set up the rooms for the activities taking place in them or to clear the rooms after the activities had been completed or to install or maintain the signage or the hand sanitisers that came to be ubiquitous following the COVID-19 pandemic. There was no requirement for the cleaners to work in buildings other than the Percy Gee building or to work in areas not demised to the Students' Union within the Percy Gee building. Hands did not provide portage services generally to the Students' Union or any services to the University.
30. At the time that the contract was entered into, the Students' Union building essentially was a social area and within it there was a nightclub called the 'O2'. Though occasionally facilities within Students' Union, such as the O2,

were used for exams when there was no space elsewhere and there was an urgency, the Students' Union was not a teaching area nor did any part of it form part of any academic department. This is entirely consistent with the fact that the Students' Union has an obligation to promote welfare rather than education and is separate and distinct from the University.

### ***The expansion plans and agreement***

31. In 2017, the University wanted to expand its facilities. It decided that the Percy Gee building should therefore be extended by the addition of three floors on the top of the extant structure. It also wanted to take back the areas used in the Percy Gee building at the time by the Students' Union to and repurpose them for academic use by adding, amongst other things, a computer laboratory, lecture theatres, offices, social spaces and various academic areas such as laboratories.
32. The Students' Union's occupation therefore would have to decrease. It was expected it would have to decrease by approximately 50%. The lease would also have to renegotiated. Discussions ensued with the Students' Union regarding the arrangements.
33. The University and Students' Union agreed that the University's proposals would be put into effect. Part of that arrangement was that the catering facilities offered by both the Students' Union and the University would be amalgamated into a separate, albeit jointly owned, company called 'Leicester Services Partnership Ltd'.

### ***Commencement of construction***

34. The construction work on the Percy Gee building began on 1 March 2018. It has taken about 3 years to complete. This is because it ran into a number of problems. Although I have not seen the detail (and do not think seeing it would have shed any light on the issues in this case), the theme of the problems appears to have been problems with the foundations which had not been anticipated. It is also apparent that from the start of 2020, the COVID-19 pandemic had some adverse effect also, though the work continued through the pandemic in any event.

### ***30 August 2018 supplemental deed***

35. On 30 August 2018, the University and Students' Union entered into a supplemental deed. This varied the 2011 lease to allow the University's workers to enter the areas demised to the Students' Union in order to carry out the building works to extend the Percy Gee building and to carry out the conversions to the interior. The deed did not revoke clause 5.1 in the 2011 lease.

### ***Discussions about future service requirements***

36. On 1 May 2019, Mr Kumaran sent an email to Kirsty Woodward and other people regarding a meeting that had just taken place. In that email, Mr Kumaran said as follows:

“We also discussed the services currently being provided by the Student Union operations and I have summarised our current thinking below.

“Portering requirements to be incorporated into University portering.

“Cleaning to be managed through Freddie [a University employee] and have a single provider for the whole building, ideally the same as the rest of the campus.

“Tender exercises. Plans for the new contractor will be ready when the project is completed. We need to complete the space demarcation exercise for the finished building.

“Repairs and maintenance to be incorporated into the University repairs and maintenance may require conversation with relevant staff.

“Building related health and safety to be incorporated into the University health and safety.

“Fire safety responsibility to transfer to University. [This would include fire tests and the like]

“Waste management to become part of the University provision.”

37. The portering duties would cover things like setting up rooms for teaching or events and clearing them away afterwards and attending to general maintenance. After COVID1-9 it would also include related signage and both provision and maintenance of hand sanitation stations. Porters also have to open up the buildings at the start of the day and close them up at the end. Hands did not provide these services and were never expected to because they go well beyond cleaning simpliciter.

38. On 25 May 2020, Ms H Crispin sent an email to Mr Kumaran and Ms K Woodward, amongst other people. The email was preceded by correspondence enquiring about the TUPE situation involving Hands. Nothing turns on that earlier correspondence. Ms Crispin wrote as follows:

“Dear Kumaran

“Apologies for the delay but I’m able to provide the following. Legal advice confirming there are no TUPE issues with the Students’ Union giving notice to Hands cleaners and passing the responsibility over to the University.

“Currently the Students’ Union has engaged [Hands] contractors to undertake the cleaning of the Percy Gee building and as such [Hands] are providing these services to the Union as their client.

“Going forward, the Union will have no requirement for cleaning to be undertaken and the University will be taking over the use of the building and accordingly the University will be providing all cleaning services for the Percy Gee building after it is relaunched. This means that no cleaning service will be provided by the Union but potentially to the University. As such, there is no service provision under TUPE.



“In the service provision changes, TUPE only applies if the client to whom the same services are provided remain the same which is not happening in this case. The Students’ Union should manage the end of the contract with Hands in line with the terms agreed during the procurement of services. ...”

**COVID-19**

39. In mid to late February 2020, the COVID-19 pandemic reached the United Kingdom and resulted in the closure of many workplaces under emergency measures imposed by Her Majesty’s Government. The use of the Percy Gee building by the Students’ Union came to a halt. In particular it was closed to users from 23 March 2020 until 23 August 2020, after which it opened in a limited way in the run up to Christmas 2020.

***Hands puts claimants on furlough***

40. On 30 March 2020, Hands placed the Claimants on furlough.
41. The events transpired such that the Claimants never cleaned the Percy Gee building again because of the closure due to COVID -19.
42. There was a suggestion that the Claimant’s absence from the site caused by Covid-19 might a relevant factor to deciding if there were a relevant transfer or not. I find the following facts relevant to this conclusion. The closure was clearly unanticipated by all parties. The evidence shows that the closure due to COVID-19. This has played no part in the University or Students’ Union’s relationship with each other, their relationship with Hands or their thinking about the future relationship between Hands and the other respondents. I believe it has no relevance whatsoever.

***Agreement to waive clause 5.1 of the 2011 deed.***

43. The Students’ Union and the University agreed on 1 August 2020 that the Students’ Union would no longer be bound by clause 5.1 and that the University therefore would be responsible for all maintenance and cleaning.
44. This is not document. However, I have come to that conclusion based on the following. I accepted the oral evidence that I have heard from the Respondents’ various witnesses on the issue. Their evidence has been consistent with each other. It is also consistent with the building works and the project. It is also consistent with the fact that the project would involve the Percy Gee building being used substantially by the University rather than by the Union and the proposed arrangements for the new lease that would result in the Students’ Union’s demise being reduced by approximately 50%. It is consistent with the building work taking place at the time and the University’s eventual takeover. It was also consistent with the fact that there would be little point in insisting on strict compliance with clause 5.1 of the 2011 lease because of the building works, redevelopment, and conversion to academic use. It also tallies with the emails of 1 May 2019 and 25 February 2020. It is also evidenced by the letter of 1 August 2020, which I set out below. In my opinion they clearly evidenced that the arrangements between the Students’ Union and the University was that the

need for the Union to secure compliance was going to come to an end and the responsibility for cleaning of the Percy Gee Building was being subsumed into the University's portering services. Since the University had by this time pretty-much taken over the building the need for the Students' Union to clean the building had pretty much come to an end.

45. I note Hands' points that:

45.1. there has been no formal deed waiving the Students' union obligations under clause 5.1 of the 2011 lease,

45.2. the Students' union and University entered into a formal deed to allow the University access to the Union's demise,

45.3. they could have waived the obligation on the Students' Union under clause 5.1 of the 2011 lease in that deed, or that they could have done it in a separate deed, but

45.4. they did not do either.

However, it must be trite law that if a landlord chooses to say to a tenant that he need not comply with a clause, he is effectively saying he will forebear from suing. The landlord would later be estopped from insisting that the tenant should have been complying with the clause after all: see e.g., **Hughes v Metropolitan Railway (1879) 2 App Cas 439 UKHL**.

46. I do not agree therefore that the lack of deed relating to the suspension of clause 5.1 of the 2011 lease outweighs the clear oral evidence that this is what the parties actually agreed between them. The arrangement is both credible, consistent with the evidence and perfectly capable of having legal effect. In my opinion therefore it must be the case that from 1 August 2020 the Students' Union would no longer bear any responsibility for any cleaning in the Percy Gee building. Responsibility instead would fall to the University.

***University seeks feedback on the service level agreement for work from 1 August 2020***

47. On 29 April 2020, Mr F Cabellero wrote to Mr Kumaran in which he invited feedback as to the proposed service level agreements for the work that needed to be done from 1 August 2020. The Students' union provided that feedback.

***Students' Union give notice to Hands***

48. On 1 May 2020, Mr Kumaran gave notice to Hands that the cleaning contract would end from 1 August 2020. He wrote in particular:

"Unfortunately, the Students' Union will no longer be responsible for operational maintenance to the Percy Gee building from 1 August 2020 onwards and therefore are not in a position to continue the contract beyond this date"

49. On 14 May 2020, Mr Scroby wrote back to Mr Kumaran to say:

“As discussed we would very much like to continue to provide out bespoke specification and cleaning services of the Percy Gee building to Leicester University and would like the opportunity to arrange a meeting with all parties involved and discuss the advantage of Hands Cleaners being contracted to carry out this service....”

Thus Hands appear to have acknowledged the change in client going forward.

### ***Services from 1 August 2020***

50. As alluded to above in the correspondence, from 1 August 2020, the University arranged that the services provided to the Percy Gee building would be part of campus-wide services, and that they would be merged with the cleaning operations that took place in the other buildings on the University of Leicester Campus. In addition, and in line with the previous correspondence, the University also merged the cleaning services with the portering duties that were required on the University's Campus.

### ***Service level agreement***

51. The University drew up a service level agreement for the purposes of inviting tenders.
52. In the service specification, the following areas were identified as needing cleaning: Washrooms, the toilets, corridors, reception, the lifts and offices. All those areas were currently being cleaned by Hands.
53. Additional areas were added including teaching laboratories, research laboratories, seminar rooms and, in addition, there were added a series of portering services including opening and closing up, standard set up before timetabled teaching, litter picking, management of waste bins, fire alarm checks, site checks, setting up for events, washing the bins, providing an emergency response and special cleaning as and when required. None of the portering services were provided by Hands under the contract nor was Hands cleaning any teaching laboratories, research laboratories or seminar rooms as part of its contract.
54. In addition, Hands was not providing any cleaning services elsewhere in the University. Its staff worked only in the Percy Gee building. The expectation from 1 August 2020 was that staff should be prepared to work anywhere.
55. It was also the case that added to that service specification were the obligations to set up and maintain sanitisation stations and signage arising from the COVID-19 pandemic. That would be something Hands had never done and was not contracted to do.

### ***Dismissal of the Claimants***

56. On 31 July 2020, the First Respondent dismissed the Claimants from their employment.

57. There is no evidence that either the Students' Union or The University has had to take on extra staff as a result of the termination of Hands providing services.

**1 August 2020 onwards**

58. On 1 August 2020, the University took over the cleaning responsibilities for the whole of the Percy Gee building. It was intended that that would be a long-term arrangement, albeit might be reviewed after a year. It was not however seen as only a temporary short-term arrangement.
59. The project on the Percy Gee building finished in February 2021 and the service level agreement is now in place. The needs for services under it are limited because the COVID-19 pandemic is still restricting use of the Percy Gee building in line with government regulations.

**Surrender of the 2011 lease and new lease**

60. On 14 May 2021, the Students' Union surrendered the 2011 lease and entered into a new lease (the 2021 lease) for a demise that was approximately 50% smaller than that under the 2011 lease.
61. Clause 11 of 2021 lease still imposes maintenance obligations and, so far as is relevant, says that the tenant must keep the property tidy and clear of rubbish.

**The Percy Gee building now**

62. There are now in the Percy Gee building lecture theatres, seminar rooms, computer laboratory, academic departments as well as offices that relate to academia and the whole of the Percy Gee building is no longer demised to the Students' Union.

**No bad faith**

63. For the avoidance of doubt, there has been no suggestion by any party of bad motive on anyone's part to try and avoid the effect of TUPE and, for what it is worth, I can see no evidence of bad faith.

**The law**

64. The **Transfer of Undertakings (Protection of Employment) Regulations 2006 Regulation 3** provides:

“(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

“(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 a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

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

"(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

"(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.

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

" (a) immediately before the service provision change—

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

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

" and

" (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

" ...

"(6) A relevant transfer—

" (a) may be effected by a series of two or more transactions; and

" (b) may take place whether or not any property is transferred to the transferee by the transferor."

65. That Regulation has been explained by case law. I have considered all the cases to which I have been referred but have found the following in particular helpful.
66. **Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice (C13/95) [1997] ICR 662 ECJ** is authority for the proposition that the mere loss of a contract is not enough usually to be a business transfer for the purposes of what is **Regulation 3(1)(a)**.
67. **Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 EAT** sets out at **[10]-[11]** multiple factors in relation to entity and transfer that a tribunal must consider when deciding whether or not there has been a transfer within **Regulation 3(1)(a)**.
68. **Spijkers v Gebroeders Benedik Abattoir CV (24/85) [1986] 2 CMLR 296 ECJ** emphasised that a similarity of activities before and after an interruption are relevant factors to take into account to decide if there were a relevant transfer.
69. Under **Regulation 3(1)(b)**, an organised grouping must be intentional as opposed to circumstantial, thus an organised grouping is not to be treated as synonymous with a mere grouping: **Amaryllis Ltd v McLeod UKEAT/0273/15; Eddie Stobart v Moreman [2012] ICR 919 EAT**.
70. **Metropolitan Resources Ltd Churchill Dulwich Ltd [2009] IRLR 700 EAT** and **Hunter v McCarrick [2013] IRLR 26 CA** are the lead cases. Together they explain the nature and purpose of the service provision changes and their relationship with the European Union legal concept of a transfer of undertaking under **Regulation 3(1)(a)**.
71. The starting point in defining the scope as service provision change is a natural meaning of the language used by the draftsman in the **TUPE Regulations**. In **Hunter**, Elias LJ said at **[22]**:
- “[22] I do not dispute that there may be issues where a purposive interpretation is appropriate with respect to service transfer provisions and where the courts should approach matters as they would similar issues relating to transfers of undertakings. For example, it may be necessary not to be too pedantic with respect to the question whether the activities carried on before and after the transfer are sufficiently similar to amount to the same service; or to take a broad approach to the question whether an employee is employed in the service transferred: **see Kimberley Group Housing Ltd v Hambley and others; Angel Services (UK) Ltd v Hambley and others [2008] IRLR 682 EAT**. But I agree with His Honour Judge Burke QC [in **Metropolitan Resources Ltd Churchill Dulwich Ltd [2009] IRLR 700 EAT**] that there is no room for a purposive construction with respect to the scope of **Regulation 3(1)(b)** itself. So far as that is concerned, there is in my view no conflict between a straightforward construction and a purposive one: the natural construction gives effect to the draftsman's purpose. There are no underlying EU provisions against which the statute has to be measured. The concept of a change of service

provision is not complex and there is no reason to think that the language does not accurately define the range of situations which the draftsman intended to fall within the scope of this purely domestic protection.

72. In **Hunter** at [37], the Court of Appeal held the language of **3(1)(b)** was only consistent with the situation where there is the same client throughout and that the focus in any given case was on the client's intention. This is an essential scoping feature of the legislation. Similarly, when focussing on short-term, the focus is on the client's intention – **SNR Denton UK LLP v Kirwan & Or [2012] IRLR 966 EAT**.
73. Other authorities support this proposition that one must not be too pedantic. For example, the provisions can apply even where the person carrying out the activities has no direct relationship with a putative client e.g. if that person is a sub-contractor (see **Jinks v London Borough of Havering UKEAT/0157/14**) and they can also apply to multiple clients acting together (see **Ottimo Property Services Ltd v Duncan [2015] ICR 859 EAT**). The absence of an umbrella contract however can make it difficult though not impossible to say that the client has not changed: **Duncan**.
74. In **Lorne Stewart Plc v Hyde & others UKEAT/0408/12**, His Honour Judge Burke QC said:  
“... To put it in the vernacular, the focus must be upon what was actually going on “on the ground”.”
75. Similarly, **CT Plus (Yorkshire) CIC v Black UKEAT/0035/16 EAT** supports the proposition that service provision changes must be applied in a common-sense and pragmatic way and to fall within **Regulation 3(1)(b)** the services must be carried out “on the client's behalf”
76. In the course of submissions I was also referred to **Horizon Security Services Ltd v Ndeze UKEAT/0071/14**.
77. I think **Ndeze** is important to this case however to understand where the boundary lies and that the definition of client is not without limit. Ndeze worked as a security guard at a site owned by a local authority. The site was managed by a separate entity called WS. WS latterly contracted with PCS who latterly employed Ndeze. A plan developed that the site would be demolished. Going forwards WS was going to cease to operate the site. It would revert back to the local authority, and the local authority would be responsible for security. The local authority contracted with Horizon to provide that security. Ndeze lost his job.
78. The Tribunal concluded that WS and the local authority were the same client because the local authority owned the building and so benefitted from the services provided by PCS (Ndeze's employer) (see [16]).
79. In the Employment Appeal Tribunal, Her Honour Judge Eady QC said the Tribunal had inferred the client was ultimately the owner of the building i.e. local authority because they benefitted from the security. She then said

“That, however, is not an inference that can properly be drawn on a straightforward application of **3(1)(b)** to the facts in this case.”

80. My understanding is that the Appeal Tribunal was making in clear that mere ownership of a property is not enough nor is ultimate benefit. There has to be something more and direct to it.
81. In my mind there are striking similarities to this case. The University is the landlord, but it does not follow therefore that they are *eo ipso* either the client or a client. Applying **Ndeze** and **CT Plus** I think it follows that simply because someone indirectly benefits does not mean it is done on their behalf and that they therefore are a client. What is required is some link between the services and the client.

### Conclusions

#### ***Was there a transfer of an undertaking within the meaning of TUPE Regulation 3(1)(a)?***

82. I deal with this because Hands raises it.
83. I am satisfied that there was a stable economic entity before 1 August 2020. In this case the Claimants were allocated specifically as wage earners to clean the part of the Percy Gee building as demised to the Students' Union. They were sufficiently structured and autonomous in that. There were no meaningful assets; this is primarily a manpower operation.
84. However, from 1 August 2020 that unit had not retained its identity nor was it transferred. The work undertaken by the people who do the cleaning now covers the whole of the Campus and covers far wider tasks. In my view, those wider tasks are not just the additional cleaning of lecture theatres, computer, teaching and research laboratories, academic workspace and seminar rooms, but more particularly covers a greater range of duties in the form of the portering duties now allocated to them. These include fire safety, health and safety, opening up and closing down, setting up for events and tidying up after them and the like. Similarly, the signs and sanitiser station duties are also significantly different tasks. It seems to me that given they are now carried out by a far wider group of people across the whole of the campus, it cannot be said the identity of the cleaners in the Percy Gee building has been maintained.
85. I note also that no employees have been taken on and there has been no suggestion of any assets having been transferred.
86. Hands has made submissions that what was cleaned before and now are in essence the same. I disagree. The offices and social spaces are essentially the same as before and after. Now, however, there are now lecture theatres, computer, teaching and research laboratories and seminar rooms which in my view are very different to what went before because of the use to which they are put, the different nature of their rooms and that they are likely to be used in different ways. I also believe that it is relevant that there is now a significantly greater square footage to the Percy Gee



building; three stories have been added to it as part of the project. This alone significantly makes a difference to what was expected from the Claimants before.

87. I have considered all the factors in **Cheesman**. Paragraph [11](viii) is particularly significant in my view. It reads

“(viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer....”

88. In this case it seems to me that this is what has happened here. The University parted with possession of the Percy Gee building by letting it to the Students' Union. They then took back responsibility for all cleaning from 1 August 2020. I note there is no contractual link between Hands and the University and in short is all that Hands can point to.

89. Hands tries to rely on the argument that because the University has the benefit of clause 5.1 of the 2011 lease, supervises the Students' Union and provides a grant, Hands are in reality working as much for the University as the Students' Union, so that there is in effect continuity once the University takes over responsibility. I reject that. Clause 5.1 of the 2011 lease imposes an obligation on the Students' Union about the terms of their possession and the grant helps them to discharge it. However, it is entirely up to the Students' Union how they comply with their legal obligations. The **University of Leicester Students Union** case confirms their separate identities. It is the Students' Union who retained Hands, paid their bills and entered into a contract with them. There is nothing that I have been shown that said that the Students' Union were forbidden for example to do it in house if they chose or they had to use Hands. There is no umbrella contract. It is trite law the lease gives exclusive possession to the Students' Union subject to clause 5.1. If those obligations are not discharged, it is up to the University to decide what soft measures it might use to persuade compliance or what legal measures it wishes to take but, provided the Students' Union complies as tenant, the University itself has no say over how clause 5.1 is discharged.

90. For what it is worth, I do not think that the break caused by the closure due to COVID-19 is relevant here. That was down to an independent event beyond the control of all parties and had no bearing on the decisions made.

91. Taking a step back and looking at all those factors which I have derive from analysing [10] and [11] of **Cheesman**, it seems to me that no one can properly say that there has been a transfer that falls within **Regulation 3(1)(a)** of TUPE.

***Was there a service provision change within the meaning of TUPE Regulation 3(1)(b)?***

92. Firstly, I observe that what Hands supplied was not concerned wholly or mainly with the supply of goods, but with labour (and so the case satisfies **3(3)(b)**)

93. I also conclude (for the reasons set out above) that immediately before 1 August 2020 there was 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 (and so the case satisfies **3(3)(a)(i)**)
94. In my opinion the arrangements from 1 August 2020 fail to satisfy **3(3)(a)(ii)**. It is quite apparent from the facts of this case the Students' Union had no intention that the activities that Hands carried out would be carried out by a transferee. The University would have the intention they (and more) were carried out by their portering staff, but the Students' Union had no need for the activities to be carried out by whoever took over from Hands since it was no longer their problem. It follows there was no service provision change.
95. If my analysis is wrong, I will consider the other criteria in any event below.
96. I deal briefly with **3(1)(b)(i)**, ("activities cease to be carried out by a person on his own behalf and are carried out instead by another person on the client's behalf"). In my view, that cannot apply in this case. It would involve Hands being their own client. It would simply be a nonsense.
97. In relation to **3(1)(b)(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 on the client's behalf"), on the facts that I have found the Students' Union had no need after 1 August 2020 to carry out any cleaning or maintenance of the Percy Gee building because the Students' Union and the University had agreed that the Students' Union would be released from the obligation under clause 5.1 of the 2011 lease. The Students' Union's need for Hands' services therefore completely ceased.
98. I will now consider **Regulation 3(1)(b)(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").
99. I believe that the key question here is whether or not there has been a change in client. In my view, the only proper analysis that can be brought upon the facts in this case is that the Students' Union and the University are completely separate clients so that there has been a change.
- 99.1. There is no umbrella contract or agreement in this case.
- 99.2. The **University of Leicester Students Union** case confirms their distinct identities. The Students' Union is a separate company and charity. The University does not tell the Union how to run its affairs and the Union does not simply act as an agent for the University.
- 99.3. The fact that the University is the landlord in my view cannot simply be enough. The **Ndeze** case lends support to this

conclusion. The correct analysis here is as set out earlier. The University as landlord has benefit of clause 5.1 of the 2011 lease. It provided a maintenance grant to the Students' Union to assist it to comply with the clause (among other things). It ultimately had legal claims if the Students' Union did not comply. However, beyond that it was entirely up to the Students' Union to decide how to comply and how to allocate the maintenance grant. The University had no say or control over those matters. The Students' Union in my opinion cannot sensibly be described as a sub-contractor to the University or as akin to one.

- 99.4. The effect of the agreement that the Students' Union would no longer have to comply with clause 5.1 of the 2011 lease from 1 August 2020 is that the Students' Union ceased to need the services of the Hands because the University effectively took over.
100. Even if I am wrong on all of that, I conclude that the activities that had been carried on before and afterwards cannot be described as fundamentally the same. The cleaning that was required had significantly increased because the building is 3 floors bigger; the cleaning now requires the cleaners to cover the whole of the University campus as and when they are rostered; they are now responsible for the new portering duties including locking up, unlocking, fire safety, maintenance of sanitizer station signage, setting places up for events and they are also responsible for cleaning significantly different areas in the form of the computer, teaching and research laboratories, lecture theatres and seminar rooms. That cessation was clearly intended to be permanent.
101. I do not believe that I am being too pedantic in deciding that the University and the Students' Union should be treated as separate parties. The lease, law, and the structure of their relationship all point to clear distinction between them as bodies.
102. What was going on at the site changed radically on 1 August 2020. There was no service provision change because the client changed and the work required changed. This is something Hands itself appeared to acknowledge.
103. Therefore, I come to the conclusion there has been no relevant transfer of the Claimants' employment within the meaning of TUPE in this case from

the First Respondent to either the Second Respondent or to the Third Respondent.

104. Therefore, proceedings against the Second and Third Respondents are dismissed.

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Employment Judge Adkinson

Date: 3 August 2021

JUDGMENT SENT TO THE PARTIES ON

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