**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4104119/20 (P)**

**Held on 24 August 2021**

**Employment Judge N M Hosie**

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| **Mr K Fulke** | **1st Claimant Represented by Mr M A S Briggs, Solicitor** |
| **Mr K Reid** | **2nd Claimant Represented by Mr M A S Briggs, Solicitor** |
| **Wipro Limited** | **1st Respondent Represented by Ms S Reynolds, Solicitor** |
| **Highland Council** | **2nd Respondent Represented by Ms K Zoyrk, HR Business Partner** |
| **Northgate Public Services (UK) Ltd** | **3rd Respondent Represented by Mr I Abel, Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**E.T. Z4 (WR)**

The Judgment of the Tribunal is that:-

1. there was a relevant transfer, in terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006, from the first respondent to the third respondent;
2. the claims will proceed against the third respondent; and
3. the claims against the first and second respondents are dismissed.

## REASONS

### Introduction

1. There was an issue in this case as to whether there was a transfer, in terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), between the first respondent, Wipro Ltd ("Wipro") and either the second respondent, the Highland Council, ("the Council") or the third respondent, Northgate Public Services Ltd ("Northgate"). If there was a TUPE transfer, the claimants' employment transferred. If not, the claimants remained in the employment of the first respondent.

2. At a case management preliminary hearing, which I conducted on 15 March 2021, it was agreed, and I so directed, that a Joint Statement of Agreed Facts be prepared and that I would decide the TUPE issue "on the papers": on the basis of parties' written submissions. The Note which I issued following that hearing is referred to for its terms.

### Agreed Statement of Facts

3. The parties submitted an "Agreed Statement of Facts" which is in the following terms and in respect of which I find in fact that:-

"

1. *The First and Second Claimants both worked for the First Respondent. Their periods of continuous service commenced on 6 June 2011 and 16 April 2012 respectively.*

2. *The First Respondent previously had two groups of employees working on servicing the contract for the Second Respondent. One of these groups was the Applications group. The Second Respondent insourced this group around November 2019. The other group was the UNIX Systems Operations group. The only individuals who worked for the Systems Operations group were the First and Second Claimants.*

3. *The Second Respondent's UNIX Systems covered the main parts of the Second Respondent's computer systems for:*

    a. *Social Services ("CareFirst"),*
    b. *Housing, and*
    c. *Revenue and Benefits ("Revs&Bens").*

4. *The Second Respondent made the decision to remove the contract element relating to these three systems from the First Respondent. The Second Respondent advised the First Respondent of this decision around September 2019.*

5. *The contract to support the CareFirst system was to be administered by a company named OLM Systems Limited ("OLM"). The migration of the CareFirst systems to OLM was delayed. The Second Respondent arranged with OLM to take over support for CareFirst from the First Respondent from 1 April 2020 until the full migration was eventually completed on 24 September 2020.*

6. *The Housing and Revs&Bens contracts were awarded to the Third Respondent. The migration and decommissioning of these systems were completed by 31 March 2020. Thereafter, the First Respondent had no ongoing responsibility for these systems*

7. *The First and Second Claimants spent their working time carrying out activities supporting the three systems. The percentage breakdown of their time on each system is in dispute between the parties.*

8. *The First and Second Claimants roles differed slightly, in that the First Claimant supported the underlying operating systems and the Second*

*Claimant the databases, but together the broad aim of their roles was to provide support for these computer systems.*

9. *The First and Second Claimants were line managed by Liam Shand. Mr Shand had line management responsibilities and was not allocated exclusively to line managing the Systems Operations group.*

*The First and Second Claimants would to some extent cover one another's work while the other was taking periods of leave.*

10. *The activities predominantly carried out by the First Claimant in relation to the two contracts awarded to the Third respondent were as follows:*

    a. *Management of the monitoring facility;*
    b. *Management of the operating system level file systems;*
    c. *Management of daily operational tasks, e.g. backups and daily batch jobs;*
    d. *Management of underlying virtualisation technology supporting virtualised systems;*
    e. *Creation of operating system level procedures for file maintenance;*
    f. *Setting up of Unix/windows level printers and print queues;*
    g. *Setting up and management of system level accounts and groups;*
    h. *Setting up Operating System level cold backup procedures;*
    i. *Application of Unix level patches and Windows patches;*
    j. *Investigation of Operating System related issues;*
    k. *Call logging and resolution in conjunction with hardware support services;*
    l. *BOS system recovery following failure; and*
    m. *Operating system patches, security patches, service packs and hot fix management.*

11. *The activities predominantly carried out by the Second Claimant in relation to the two contracts awarded to the Third Respondent were as follows:*

    a. *Management of trace and log files;*
    b. *Expanding/reorganising tables where necessary;*
    c. *Copying and cloning databases as reasonably required from the Production Environment to the Test and Training environments;*
    d. *Ensuring the database has been configured for year-end processing where appropriate;*
    e. *Creating/updating data files and index spaces;*
    f. *Production database performance activity monitoring and high level turning;*
    g. *Consulting with End-Users administering the data;*
    h. *Consultation with Customer and third party application developers;*
    i. *Consultation with third party application providers; and*

*j. Install upgrades and patches to the database.*

*12. The First Respondent took the position that the Claimants' employment would transfer to the Third Respondent by operation of reg.4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The Second Respondent also adopted this position from approximately December 2019. The Third Respondent did not believe that this was the case, maintaining that the services they were providing had moved from a dedicated server environment to a shared server Cloud based environment.*

*13. In consequence of this dispute, the Claimants took their contracts to have been terminated either by the First or the Third respondent immediately upon the termination of the First Respondent's contract with the Second Respondent.*"

**Joint bundle of documentary productions**

4. A joint bundle of documentary productions was lodged by the parties ("P").

**Claimants' submissions**

5. The claimants' solicitor made submissions by e-mail on 25 June 2021 at 08:36. In support of his submissions he referred to the following cases:-

***Marks & Spencer Plc v. Commissioners of Customs & Excise C62/00*** [2002] ECR 1-06325;
***Churchill Dulwich Ltd v. Metropolitan Resources Ltd*** [2009] IRLR 700;
***Rynda (UK) Ltd v. Rhijnsburger*** [2015] IRLR 394;
***Salvation Army Trustee Co. v. Bahi & Others*** [2017] IRLR 410.

6. His *"primary position"* was that there was a relevant TUPE transfer between the first respondent, Wipro, and the third respondent, Northgate, from 1 April 2020. In the alternative, he submitted that there was a relevant TUPE transfer between the first respondent and the second respondent, the Council, on the same day. He submitted that rather than adopting a *"purposive approach"* to the TUPE provisions, "*the Tribunal should instead adopt the common domestic approach to legislative interpretation.*"

7. The claimants' solicitor then went on to make the following submissions in respect of the present case:-

"

*12. In the context of SPC, the relevant actors and their roles are as follows:*

*12.1 The "contractor" is the first respondent;*
*12.2 The "client" is the second respondent; and*
*12.3 The "other person" is the third respondent.*

*The "organised grouping of resources" comprised the first and second claimant.*

*13. It is submitted that the Tribunal should answer the following sequence of questions in order to determine whether or not a relevant transfer has occurred:*

*13.1 Were activities carried out by the first respondent on the second respondent's behalf which were subsequently carried out either by the second or third respondent?*

*13.2 Were those activities fundamentally the same once the first respondent ceased carrying them out?*

*13.3 Were the first and second Claimants an organised grouping of employees?*

*13.4 Was their principal purpose the carrying out of the activities identified at 12.1?*

*This is broadly the approach advanced by the Court of Appeal in Rynda (UK) Ltd v Rhijnsburger [2015] IRLR 394 per Jackson LJ at para.44.*

*14. The activities were as set out at paras.10 and 11, SOF* (Agreed Statement of Facts). *These activities are no longer carried out by the first respondent on the second respondent's behalf. They are instead carried out by the third respondent on the second respondent's behalf.*

*15. The third respondent's position is that these activities are not the same insofar as the services "had moved from a dedicated server environment to a shared server Cloud based environment" (para.12, SOF).*

*16. The focus of this part of the test is on the activities. The requirement that those activities be "fundamentally the same" steers the Tribunal away from a "pedantic and excessively detailed definition of activities" (Salvation Army Trustee Co v Bahi and others, [2017] IRLR 410. The*

*Tribunal should instead focus on the activities and ask whether the fundamentals of those activities were the same after the putative transfer as they had been beforehand.*

17. *It is submitted that the change in approach by the third respondent in the carrying out of these activities has not altered the fundamental nature of what was being done by the first respondent on behalf of the second respondent. The activities being carried out were fundamentally the provision of IT support on two systems. Those activities did not change. The question as to whether those activities were carried out on a "dedicated server environment" or a "shared server Cloud based environment" does not fundamentally alter the carrying out of those activities. To find that it did would be to fall into error identified by the court of appeal in Salvation Army.*

18. *The Claimants were either an organised grouping of themselves or each comprised their own organised grouping of one. While their roles were separate and distinct from each other, there was sufficient commonality that they would provide cover for one another during periods of leave. The Claimants shared a line manager. Both were broadly engaged in the provision of IT support to the second respondent on three systems. For these reasons, the primary position is that the organised grouping was of two. If the tribunal finds that they were not, it is submitted that each Claimant was an organised grouping themselves. Both jobs were unique, and therefore they existed in an organisational space within the first respondent's staffing structure that fell outside any other definable group.*

19. *The final question is therefore whether the principal purpose of the organised grouping was the carrying out of the activities. The Claimants' position is that their principal purpose was indeed carrying out the activities which transferred. Their position is that approximately 70% of their time was dedicated to the two contracts in respect of which these activities. The principal purpose need not be the sole purpose. Carrying out IT services on behalf of the second respondent comprised the full extent of the Claimants' workload. "*

**First respondent's submissions**

8. The first respondent's solicitor made her submissions by e-mail on 25 June 2021 at 14:27.

9. In support of her submissions she referred to the following cases:-

***Metropolitan Resources Ltd v. Churchill Dulwich Ltd (in liquidation) & Another*** UKEAT/0286/08
***Arch Initiatives v. Greater Manchester West Mental Health NHS Foundation Trust & Others*** UKEAT/0267/15
***Anglo Beef Processors UK v. Longland*** [2016] WL 08944729
***OCS Group (UK) Ltd v. Jones & Another*** [2009] UKEAT 0038/09/0408.

10. She submitted that, "*it is agreed by the parties that the claimants formed an organised grouping of employees in a UNIX Systems Operations Group servicing part of the first respondent's contract with the second respondent.*" (P.71-536) (the "Wipro contract"). Under this contract the first respondent provided "*support services for the second respondent's* "*CareFirst, Housing and Revs & Bens Computer Systems*." She also referred to the computer support services which the second respondent required as detailed in the Wipro Contract (P.185-296). She explained that, "*those concerning the claimants are best summarised as comprising day-to-day support on each of the respective vendor/licensor's environments/software, carrying out any upgrades or patches to be applied to these operating systems, databases and applications (the "Services").*

11. She submitted that the second respondent wished to have, *"a cloud hosted environment/platform for the application/computer systems moving forward"* and it was always the first respondent's intention to, "*migrate the computer systems it was supporting away from these physical data centres to a cloud environment/platform over the course of its contract with the second respondent.*" She referred to provisions in the contract in this regard (Annex1, P.524 and P.526).

12. However, she submitted that: -

"*Irrespective of which provider hosts the computer systems or applications, or how they are hosted, there is still a need for the computer systems that are being hosted to be supported. It is the computer support that comprised the Services that were being provided by the first respondent and which ultimately transferred to the third respondent.*

*During its contract with the second respondent, the first respondent did make some inroads into consolidating the physical servers on which the second respondent's computer systems were hosted. However, it hadn't achieved the migration to a cloud based environment as intended, due to the technology limitations and time frames set by both the second respondent and the third respondent (in the third respondent's capacity as a software vendor at that point).*

*The second respondent removed from the first respondent the contract element relating to the provision of Services for each of the three computer systems/software. It instead awarded the contracts for those Services to the vendors/licensors of those computer systems/software. The contracts for computer support services for both the Housing and Revs & Bens Computer Systems/Software were accordingly awarded to the third respondent. The migration of those two computer systems from the first respondent to the third respondent was completed by 31 March 2020.*"

13. She further submitted that each of these contracts is for a five year term and, "*in the "background" section on the first page of each of these contract (P.548 and P.581)*, *it is clearly stated that the contract in each case is a direct contract with the third respondent for both the license of the software and "associated support and maintenance services", and that the Agreement shall apply to "the software licenses, soft support and maintenance services and NPS Cloud Services.*" (our emphasis). In each case the contract clarified that the second respondent "*now wishes to use NPS' Cloud hosting services in order to access the software*" (our emphasis).

14. It was further submitted that, "*the Housing & Revs & Bens contracts were the two largest parts of the Wipro Contract, together accounting for some 80% of the work undertaken by the claimants who were dedicated to servicing that contract. The first respondent submits that the transfer of Services for both*

*Housing and Revs&Bens Contracts from it to the third respondent constituted a service provision change under TUPE*.

*The first respondent's primary position is that it did not dismiss the claimants; the claimants' employment transferred to the third respondent pursuant to TUPE as a result of the Service provision change outlined above, effective 1 April 2020. This is a view shared by the second respondent also, the ultimate recipient of the transferring services, as evidenced in the defence to the claim (P.38) and in paragraph 12 of the parties' Agreed Statement of Facts (P.68-70).*

**The law**

15. The first respondent's solicitor then set out the relevant law with reference, in particular, to provisions in relation to a SPC at Regs.3(1)(b) and 3(3) of TUPE.

16. She submitted that, "*the only point of contention that the Tribunal must therefore determine is whether or not the activities to be undertaken by the third respondent were fundamentally the same as those carried out by the first respondent*". She referred to the principles set out by the EAT in ***Metropolitan Resources***. She submitted that, "*the question is whether 'the essential service or activity' provided by the transferee is the same as that formally provided by the transferor.*"

**"Application of the law to the present case"**

17. The first respondent's solicitor submitted that:-

"*The agreed statement of facts confirms the Services provided by the first respondent to the second respondent and sets out the specific activities performed by the claimants and providing that computer support for the second respondents CareFirst Housing and Revs&Bens computer systems. These are the very same activities that appear in the NPS Housing Contract and the NPS Revs & Bens Contract at sections 3.8 Support for the NPS System part c) Unix & Windows Administration Service and 3.9 Database*

*Administration Service ( see P566-569 and P.599-600). The first respondent accordingly avers that as the activities carried out by the claimant were the same as those now being carried out by the third respondent, the provisions of Reg.3 (2A) TUPE are satisfied.*"

18. She also submitted that, "*the activities making up those Services are the very same 'managed service infrastructure' as the second respondent describes in its ET3 defence (P.38) as now been provided to it by the third respondent…. The second respondent is clearly of the view that the third respondent is now carrying out the same service and activities for the second respondent as those carried out by the claimants on behalf of the first respondent before it.*"

19. The first respondent's solicitor submitted that the contention of, "*the matter of the whole solution being a cloud based virtual one is somewhat misleading*". She set out a number of reasons why that was so and why the third respondent was still providing, "*the same underlying Services to the second respondent that the first respondent did before it.*"

20. The first respondent's solicitor also submitted that even if the activities are now automated that did not prevent a SPC arising. She referred to ***Anglo-Beef Processors UK*** in this regard.

21. She also submitted that the ***OCS Group*** case, relied upon by the third respondent, should be distinguished as in the present case the services, "*are fundamentally the same*".

22. The first respondent's solicitor made the following submissions by way of conclusion:-

"*The second respondent contracted for the provision of computer support for its computer systems, and these are the Services it still believes it is now getting from the third respondent.*
*For the reasons set out above, the first respondent avers that the activities undertaken in delivering the Services are fundamentally the same now as those undertaken by the claimants when the first respondent was responsible*

*for providing the Services to the second respondents. This is the crux of the matter, and to ignore or overlook this simply because the third respondent uses the Cloud or a shared server environment in carrying out the activities and delivering the Services, effectively defeats the purpose of the TUPE Regulations in protecting employee's livelihoods and offering them job security.*

*The first respondent accordingly invites the Tribunal to find that there was a service provision change which pursuant to the TUPE Regulations, served to transfer the claimants' contracts of employment from the first respondent to the third respondent.*"

**Second respondent's submissions**

23. The second respondent's representative made submissions by e-mail on 24 June 2021 at 15:16 with attachments.

24. In support of her submissions she referred to ***Salvation Army Trustee Co.***

25. She first set out in her submissions the "*background",* with reference to the *"signed contract which stipulated clearly that UNIX platform support and Oracle Database Administration would be part of the service delivered by NPS*" (the third respondent). She then referred to the variations of the contract *"of substance"* and the *"new contracts with Northgate that replaced those WIPRO elements".* She further submitted that, "*NPS are not buying in computer power from a service provider but actively hosting and supporting this themselves which* ***directly relates*** *to the roles WIPRO employees carried out. NPS may be suggesting that they do not own/provide their own physical data centres to host TAC systems and data. Please see attached e-mail trail 'THC NPS RB/HOU Hosting Location' which will assist countering that position.*"

26. The second respondent's representative advised that the second respondent, Highland Council, had provided information to the third respondent that there were staff within WIPRO that might be in the scope of a relevant TUPE transfer. She further advised that a meeting had been held at Council

Headquarters on 4 February 2020 with representatives of the first and third respondents when the Council representatives advised them of their view that the claimants were within the scope of TUPE and of their right to transfer to the third respondent. The reason for this was that there was a SPC and, "*the activities which are being taken over by NPS from Wipro are exactly the same. There is no material difference. Unfortunately, NPS continue to hold their view that TUPE did not apply.*" In support of her submission in this regard and her contention that, "*the activities in question remained fundamentally the same before and after transfer*", the second respondent's representative referred to ***Salvation Army Trustee Co.***

27. Finally, the second respondent's representative said this:-

"*Currently NPS are delivering a management service infrastructure as per their contract with THC. There is a series of e-mail evidence to support this as well as contract documentation (attachment no. 5). NPS presented argument against TUPE relying on defense that their service provision delivers a Cloud-based platform/service and therefore the activity is not the same and the support required is fragmented is across several customers. The delivery being provided is not a full Cloud solution as it is connected to The Highland Council network via VPN which requires continued directed support to deliver the contracted service (**see e-mail evidence attachment No. 5, 8**). NPS manage the server infrastructure themselves, and therefore will be employing technical roles to carry out the specified dedicated requirement. These roles were typically undertaken by claimants.*

*We believe the evidence outlined above meets conditions set out in Regulation 3(1)(b) and have been satisfied where the client intended that the activities will follow the service provision change and be carried out by the transferee.*"

**Third respondent's submissions**

28. The third respondent's solicitor made his submissions by e-mail on 25 June 2021 at 12:53.

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

***OCS Group Ltd***
***Metropolitan Resources Ltd***

30. The main thrust of his submissions was that, "*the services being offered under new contracts for service are fundamentally different to the previous services and following case law, the services fall outside the scope of Regulation 3 (1)(b) and as a consequence there is no service provision change and therefore no transfer of staff.*"

**"Factual background"**

31. The third respondent's solicitor submitted that in approximately 2019 when the second respondent was considering transferring the work from the first respondent to the third respondent, *"there was no discussion around TUPE. It was not envisioned this would apply due to the difference between the services".* In support of his submission in this regard, he referred to, *"an e-mail trail between Brian Davidson, at the time ICT Project Manager for the second respondent and Philip Bradley, Account Manager at the third respondent".* He referred in particular to Mr Davidson's e-mail of 19 May 2019 to Mr Bradley (P.710) and specifically the third paragraph: "*Jon* (Jon Shepherd the second respondent's Head of ICT at the time) *is not convinced TUPE does apply as the new service will be delivered in a very different way."*

32. Accordingly, he submitted that, "*the people who had the correct level of knowledge as to how the services are actually being performed, were of the view the services to be provided by the third respondent under the new contract were very different to the previous contract.*"

**"How the contract is being performed differently"**

33. In support of his submissions in this regard, the third respondent's solicitor referred to the contract of services between the first respondent and the second respondent (P.71-536); the agreed Statement of Facts (P.68-70) "*and specifically paragraph 3*"; the fact that it was accepted and agreed that that contract ("Contract 1") was for three computer systems: "Social Services ("CareFirst"), *Housing and Revenue & Benefits ('Revs&Bens')".* He then referred to the "new contract" ("Contract 2") between the second and third respondents in respect of "Housing" (P.548-580) and "Contract 3" relating to Revs&Bens (P.581-613). While he accepted that "*these are lengthy legal documents and they are not overly helpful to the Tribunal for the purpose of trying to highlight the differences and how the services are performed…. what should be clear initially to the Tribunal is the original contract was for three computer systems, whereas the new agreement is for two, a difference in the services offered at the outset.*" While there was, *"some disagreement as to the approximate percentages for each of these contracts"*, it was submitted that, "*the services now performed under Contracts 2 and 3 are substantially different to Contract 1 when the time the claimants need to spend on the services are considered.*"

34. The third respondent's solicitor then went on to summarise the differences in how the contract is now being performed and said this: "*The original contract offered dedicated services and infrastructure in relation to three pieces of software, whereas the new contract offers access to a shared platform and access to two of these three pieces of software, as well as other applications. The original contract required dedicated staff (the claimants) to handle infrastructure activities associated with the pieces of software, whereas Contracts 2 and 3 do not require dedicated resources and the platform is maintained not individual pieces of software.*"

35. The third respondent's solicitor then referred to a, *"further way*" to highlight the fact that the original contract was, *'fundamentally different to the new contract'* by referring to the claimants' job descriptions and the Agreed Statement of Facts (P.68-70). He referred to the first claimants' duties at P.69, paragraph 10. He submitted that, "*many of these elements are no longer carried out by a dedicated employee and are in fact automated.*"

36. So far as the second claimant was concerned, he referred to his duties at P.69-70, paragraph 11. He submitted that: "*the respondent uses automated scripts to handle the majority of the tasks carried out here, with very little manual input indeed. In fact, that system can calculate that for all of these duties, the system states that these tasks were completed in 17.5 days per annum. Sections g), and i) remain with the second respondent in any event. The third respondent is the supplier of the application so h) is not required. We would again suggest the above is conclusive in showing that the post transfer activities are very different to those carried out prior to the change in provider.*"

**"Floodgates argument"**

37. The third respondent's solicitor referred to the following *"wiki definition"* of "*cloud": the term is usually used to describe data centres available to many users over the internet.*" He explained that, *"the third respondent's cloud uses data centres to provide services to many users over the internet".* He submitted that the service delivered by, "*one of these public clouds is delivered in a vastly different way and a fraction of the resources utilised to provide those services.*" He cautioned against a finding that TUPE applies and, "*the possible precedent it could set. As the world changes with technology, cloud services are becoming very common for businesses to use. They are cheaper as they do not require a user to have expensive hardware and can be used almost anywhere in the world as long as there is an internet connection. As more and more businesses provide these services, it is going to become more common for service users to switch between suppliers and*

*the Tribunal must be aware of the possible dangers of confirming that a change from a dedicated service provider with dedicated staff, to a cloud provider equates to a service provision change. An analogy could be drawn by using one of the world's largest two cloud providers – Amazon and Microsoft. Should a business currently employ staff to handle its infrastructure internally and support computer systems then wish to change to Microsoft Azure Platform, this should fall outside of TUPE as the services are being performed in a fundamentally different way. This is the exact situation in this case".*

**"Conclusion"**

38. Finally, the third respondent's solicitor said this:-

"*Considering all of the above and following the precedent and guidance set out in OCS we respectfully request that the Tribunal reach the decision that Regulation 3 of TUPE does not apply and request that the case is struck out against the third respondent. We would suggest this is the correct position to adopt in line with established case law as detailed above as we believe it is clear that the services under Contracts 2 and 3 are being provided in a different way than pre-transfer and that these are not 'fundamentally and essentially the same'. We also believe that this would be in line with the overriding objective by saving the valuable time and resources of the Tribunal.*"

**Claimants' comments on the other parties' submissions**

39. The claimants' solicitor responded to the submissions by the third respondent's solicitor by e-mail on 8 July 2021 at 12:46 as follows:-

"*The argument advanced by the third respondent at paras. 8 and 9 (under the sub-heading "Floodgates Argument") is without any basis in law. This is a policy consideration and should not influence the Tribunal's approach to its adjudication of this matter. It is trite to say that the decision should be based on the law and not on the potential policy implications of those laws.*"

**First respondent's "supplemental submissions"**

40. The first respondent's solicitor responded to the other parties' submissions by e-mail on 8 July 2021 at 14:12.

**"Comments on the claimants' submissions"**

41. The first respondent's solicitor noted that the claimants' solicitor supported her submissions that, "*whether these activities have been carried out on a dedicated server environment or on a shared service Cloud based environment, it does not fundamentally alter the carrying out of those activities.*"

**"Comments on second respondent's submissions"**

42. The first respondent's solicitor noted that the second respondent's representative had confirmed that the new contracts with the third respondent "*replaced those with the first respondent relating to Revs and Bens and Housing. Like the claimants, the second respondent believes that the activities undertaken on its behalf both before and after the transfer are the same also relying on the* ***Salvation Army*** *case which we have dealt with above.*"

43. She also, "*reiterated the point that the second respondent, as the recipient of the services, is best placed to determine what services were provided to it by the first respondent pre-transfer and those which are now provided to it by the third respondent post transfer.*"

44. She then referred to email correspondence from Brian Davidson, and Jon Shepherd, the second respondent's ICT Project Manager and Head of ICT, respectively (P626-628). She submitted, *"that demonstrates that the third respondent's solution is not wholly cloud based and that it is incorrect to compare what the third respondent is providing to the likes of Microsoft or Amazon.*"

**"Comments on the third respondent's submissions"**

45. While there was e-mail correspondence suggesting that the second respondent's Head of ICT, Jon Shepherd was not convinced TUPE applied, she submitted that TUPE operates, "*by matter of law and that a party's mistaken view in the application of TUPE does not defeat a TUPE transfer from occurring.*" In any event, it was submitted that it is now evident from the Agreed Statement of Facts (para. 12) that the second respondent has changed its position.

46. The first respondent's solicitor also submitted that the fact that the "new agreement" with the third respondent is for just two computer systems, rather than three, did not mean, as the third respondent's solicitor submitted, that the "relevant activities" had changed. There are three separate IT support service contracts for each of the three computer systems and two of these were awarded to the third respondent; the services provided haven't changed; rather than one provider supporting all three contracts, the systems have been split between two providers; the contracts awarded to the third respondent, "*constituted the greatest part of the work undertaken by the claimants.*" It was also disputed, as the third respondent's solicitor submitted, that the *"CareFirst system took up 40% of the claimants' time*. *At no time did the third respondent support that system and cannot therefore possibly know what proportion of the claimants' time in fact went into supporting this system".* She also submitted that, "*the first respondent, as the party actually servicing these computer systems and therefore better placed to know the reality here, maintains that the opposite was in fact true.*"

47. While it was accepted that the "new contract offers access to a *"shared platform"*, it was submitted that, "*the second respondent's computer systems are still being supported and maintained by the third respondent, and as such, the services haven't changed…… support and maintenance is required on each application instance for each customer.*"

48. She further submitted that, "*the second respondent did not per se "require" dedicated support, as the third respondent has suggested. Rather, it simply happened that the claimants were organised as they were to deliver the services promised under the contract with the second respondent.*"

49. She submitted that the activities which the third respondent's solicitor had listed as being done by the first claimant, "*is the very same list that appears in both the NPS Housing Contract and the NPS Revs & Bens Contract as being activities the third respondent was to take on.*" Although these activities may have been *"automated"*, that did not prevent a SPC change arising under TUPE.

50. She also submitted that the third respondent's submissions suggested that "*the software is bespoke for certain customers"* However, "*the second respondent has a similar bespoke solution and it is the software that is being maintained rather than the platform on which it is being run.*"

51. While the third respondent, "*may well have been the original supplier of the application, this did not negate the fact that the claimants were providing support and maintenance to the second respondent on the same applications that have now transferred to the third respondent.*"

52. So far as the third respondent's submission that a finding of a TUPE transfer "*would open the floodgates*" was concerned, it was submitted that, "*the services are not simply the storage or hosting of the computer systems alone, as the third respondent seeks to make out. Rather, the services that are being provided are supporting and maintaining those computer systems and, it is this that has triggered the TUPE transfer in this case. Put simply, the services go beyond simply hosting applications.*"

53. The first respondent's solicitor further submitted, with reference to paragraph 9 of her submissions, that the third respondent's solicitor, "*seeks to once again confuse the act of hosting applications in the cloud and this being the service under discussion, with the actual service provided in the present case*

*which is the maintenance and support of those applications that are being hosted in the cloud. There is a distinct difference that must be recognised here, and it may help the Tribunal to think of the 'cloud' as being the repository for computer systems and the service that is being provided as the maintenance/support of those systems.*"

**Second respondent's response**

54. By e-mail on 8 July 2021 at 14:41 the second respondent's representative advised that she did not consider it necessary to respond to the other parties' submissions.

**Third party's comments on the other parties' submissions**

55. The third party's solicitor responded to the other parties' submissions by e-mail on 8 July 2021 at 14:33.

**First respondent's submissions**

56. The third respondent's solicitor submitted that, "*much of the first respondent's submission is irrelevant to the real issue for the Tribunal to assess here, following **OCS**, namely whether the services pre-transfer are 'fundamentally and essentially the same' as the pre-transfer activities.*" He referred to a further case namely, ***Enterprise Management Services Ltd v. Connect-Up Ltd & Others*** UKEAT/0462/10/CEA. In that case the "incoming contractor" decided not to tender for 15% of the overall contract and it was held that the services post and pre-transfer were fundamentally different.

57. So far as the present case is concerned, the third respondent only took on two of the three applications previously maintained by the first respondent which means that there was a 20% reduction *"at the very least".* It was submitted therefore that, "*if a 15% reduction in **Enterprise** is enough for the*

*EAT to suggest TUPE should not apply, we would suggest that the Tribunal must come to the same conclusion here.*"

58. Further, it was submitted, with reference to ***McTear Contracts Ltd v. Bennet & Others*** [2021] UKEAT0023_19_2502 and ***ISS Facility Services NV Govaerts*** C-344/18, that if I was persuaded that TUPE applied, "*the liability should not solely be that of the third respondent given the fragmentation of the contract.*"

59. Further, the third respondent's solicitor submitted that the *"difference in work"* pre and post transfer had to be appreciated and that it was, "*simplistic to say, as the first respondent has, that the pre and post transfer work was the "provision of computer support".* The relevant test, with reference to ***Metropolitan Resources***, is "*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…. and that it follows that a service provision change is not precluded by some minor difference or differences between the nature of the task carried on….. or in the way in which they are performed"* and that a "*common sense and pragmatic approach is required.*" It was further submitted that in that case, "*the EAT also indicated that in assessing whether the activities are similar, a more detailed rather than an 'overview' approach should be adopted (i.e. consideration should be given to the exact nature of the activities performed by each of the transferee and the transferor and the exact manner in which those activities are performed.) The key point we wish to point out here is the manner in which the activities are carried out. We have explained in detail in our previous submission that much of the work detailed in the claimants' job descriptions is now automated and these tasks are automatically performed by the NEC Cloud platform on behalf of all customers using that platform (approximately 400). We believe that when this approach is compared with the roles and activities previously performed by the claimants it is not possible to conclude that the pre and post transfer activities are fundamentally the same.*"

60. The third respondent's solicitor then when on in his submissions, by way of response, to *"illustrate"* his position with reference to a *"picture"* which shows the *"time taken to complete relevant work*" which, he submitted, is "*as strong an argument as you can make to highlight that the pre and post transfer activities are very different and could not be described as "fundamentally or essentially the same".*

61. He also submitted that the contention by the first and second respondents, "*that the NEC Cloud is not a full cloud service as it requires a VPN to connect.*" is "wrong". "*Every 'cloud' requires a way to connect to it and in any environment where this link needs to be secure (such as the handling of government data) a VPN is usually the desired choice but, to suggest that this is not a full cloud solution purely due to the fact that it requires a VPN to connect the cloud is a fundamentally flawed argument and shows a lack of understanding of the technology in question.*"

**"The claimants' submissions"**

62. The third respondent's solicitor disputed the contention by the claimants' solicitor that the activities being carried out, namely, the provision of IT support, pre transfer on three systems, were the same as those being carried out post transfer by the third respondent on two systems. He submitted that, on the basis of ***Enterprise***, *"this must mean that the activities are not fundamentally the same.*" Further, with reference to ***Salvation Army Trustee Co.***, "*the activities should not be defined at such generality that they do not describe the specific activities at all. We would respectfully suggest that characterising the provisions of services as "the provision of IT support" by the claimants, does just that.*"

**"Conclusion"**

63. Finally, the third respondent's solicitor said this:-

"*We would respectfully suggest that the issue for the Tribunal here is relatively straight forward. However, the issue is clouded with complex technological jargon and misuse of the same by the parties. It is already agreed between the parties that activities previously carried out by the claimants comprising at least 20% of their time were not covered by the service that is now provided by the third respondent. Following the precedent laid down in* ***Enterprise Management****, this alone should be enough to persuade the Tribunal the pre and post activities are not fundamentally the same.*

*If this is not the case, the Tribunal should adopt the approach detailed in* ***Churchill*** *whereby it was suggested that consideration should be given to the exact nature of the activities performed by each of the transferee and the transferor and the exact manner in which those activities are performed. We respectfully suggest that if this approach is taken the only logical conclusion is that TUPE does not apply.*

*To assist the Tribunal, we would use an analogy. The current on premise, dedicated infrastructure system that was in place with the first respondent is similar to taking a trip in a car. It is a dedicated means of transport and the car is able to go wherever the driver wishes it to. The driver can control the speed, direction, the number of passengers and a number of other factors in relation to the use of the car. The third respondent's new system is like a train. There are multiple customers on the train, but it can only move in a certain direction. It is at the control of the train-driver and the passengers have no control over the direction and speed of the train. In this example we would respectfully suggest the two methods of transport cannot be said to be the same, even if the start and end destinations were the same. Both methods are getting someone from A to B but the manner in which they do cannot be said to be fundamentally the same. Following that logic, the services pre and post transfer cannot therefore be held as "fundamentally or essentially the same" and accordingly TUPE cannot apply in line with* ***OCS Group, Churchill*** and ***Enterprise Management Services***.

*We therefore would respectfully reiterate our request for the Tribunal to strike-out the case against the third respondent.*"

**Discussion and decision**

64. The issue in the present case was whether there had been a relevant transfer under the Transfer of Employment (Protection of Undertakings) Regulations 2006 ("TUPE"), because of a "service provision change" ("SPC").

65. 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 following provisions were relevant:-

"***3. A relevant transfer***

*(1) These Regulations apply to –*

*(a) ……...*

*(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.*

*(2) …….. ……*

*(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 its principle purpose the carrying out of 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.*"

66. As Reg. 3 is a creation of domestic law, rather than being EU derived, the "multi-factorial" approach to whether there has been a TUPE transfer, which continues to apply in a standard TUPE transfer, does not apply to a SPC. This was confirmed by Judge Burke Q.C. in ***Metropolitan Resources***, to which I was referred. In his view, the circumstances in which a SPC is established are, "*comprehensively and clearly set out in Reg. 3(1)(b) itself and Regulation 3(3):-*

*The introduction of Reg.(3)(1)(b) enables a transfer to be established in any of these three situations if the activities previously carried out by the client or contractor have ceased to be so carried out and, instead, are carried out by a contractor or a new contract or by the client……..*

*If there was immediately before the change relied upon, an organised grouping of employees which had as its principal purpose the carrying out of the activities in question, the client intends that those activities will be carried out by the alleged transferee, other than in connection with a single specific event or a task of short-term duration, and the activities do not consist totally or mainly of the supply of goods for the client's use, and if those activities cease to be carried out by the alleged transferor and are carried out by the alleged transferee, a relevant transfer exits. In contrast to the words to define transfer in the 1981 Regulations the new provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact…….there is no need for a judicially prescribed multi-factorial approach……*

*29. In a case in which Regulation 3(1)(b) is relied upon, the Employment Tribunal should ask itself simply whether on the facts, one of the three situations set out in Regulation 3(1)(b) existed and whether conditions set out in Regulation (3) are satisfied.*"

**Relevant activities**

67. Reg. 3(2)(A) is in the following terms:-

> "
> *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.*"

68. The greater focus of the case law has been on whether activities remain the same in the hands of the new contractor. This was the main issue in the present case. When considering this issue I remained mindful that in ***Metropolitan Resources*** Judge Burke Q.C. emphasised that when comparing the activities of the alleged transferor and transferee, detailed differences will be inevitable and it could not have been intended that the '*new concept*' of a SPC should not apply because of "*some minor difference*". In his view, "*a common sense and pragmatic approach is required*".

69. In ***Salvation Army***, to which I was also referred, HH Judge David Richardson, in the EAT, expressed the same view: "*the activities must be defined in a common sense and pragmatic way……..one the one hand, they should not be defined at such a level of generality that they do not really described the specific activities at all…….on the other hand, the definition should be holistic, having regard to the evidence in the round, avoiding two narrow a focus in deciding what the activities were……..a pedantic and excessively detailed definition of 'activities' with this defeating the purpose of the SPC provisions.*"

70. Further, in ***Johnson Controls Ltd v. Campbell & Another*** UKEAT/0041/12/JOJ the Honourable Mr Justice Langstaff (President) said that, "*identifying what an activity involves is an holistic assessment by the Tribunal. The Tribunal is trusted to make that assessment. Its evaluation will be alert to possibilities of manipulation, but it is not simply to be decided by enumerating tasks and identifying whether the majority of those tasks quantitively is the same as the majority one prior to the putative transfer.*"

**Present case**

71. What then of the present case? The question for me was whether the activities before and after the purported transfer were fundamentally the same. That question was one of fact and degree. The technology involved in the activities and the terminology used did not make the determination of this easy. However, I found the guidance of HHJ Peter Clark in ***Enterprise Management*** to be of particular assistance. This was summarised in the head note to the case report in the IRLR as follows:-

> "*To determine whether a SPC arises under Reg.3(1)(b)(ii), the first task is to identify the relevant "activities" carried out by the original contractor. The expression is not defined in the Regulations. The next critical question is whether the activities carried on by the subsequent contractor after the relevant date are fundamentally or essentially the same as those carried on by the original contractor. This is essentially a question of fact and degree. Minor instances may properly be disregarded. Cases may arise where the division of services after the relevant date, known as fragmentation, amongst a number of different contractors means that the case falls outside the SPC regime, as explained in Kimberley (**Kimberley Group Housing Ltd v. Hambley & Others** [2008] ICR 1030)."*

72. Two services namely "Housing" and "Revs&Bens" transferred to the third respondent. I am satisfied that the third respondent is still providing the same underlying services to the second respondent, the Highland Council, that the first respondent, Wipro, did before it. I am satisfied that that is so notwithstanding the fact that the third respondent provides the services using a "Cloud based server environment". I am satisfied that the submissions on behalf of the claimants and the first and second respondents, in support of their contention that the relevant activities carried on by the third respondent, *"the subsequent contractor*" are *"fundamentally or essentially the same"* as those carried out by the *"original contractor",* the first respondent, are well-founded. It was significant that Highland Council, the recipient of the services, is of that view.

73. The fact that fewer employees may now be required by the third respondent to carry out these activities is nothing to the point. If that is so, it will be open

to the third respondent to engage in a redundancy process and rely on Reg.7(2) "*that there is an 'economic technical or organisational reason entailing changes in the workforce.*"

74. The "floodgates argument" advanced by the third respondent's is also nothing to the point. I found favour with the submissions by the claimant's solicitor in this regard that this has, *"no basis in law"* and that, *"potential policy implications should not influence the Tribunal's approach to its adjudication of this matter."*

**Identifying the activity**

75. It is necessary to focus on the activity and what this is. This was considered by the EAT in ***Johnson***. I am satisfied that the submissions on behalf of the claimants and the first and second respondents in this regard are well-founded. The activities which transferred were the contracts for the computer support services for both the "Housing" and "Revs&Bens" computer systems/software. The Agreed Statement of Facts sets out the services provided by the first respondent to the second respondent and the specific activities performed by the claimants in providing these computer support services. These are the very same activities that appear in the third respondent's Housing and Revs&Bens contracts. The third respondent is still providing the same underlying services to the second respondent that the first respondent did before it, namely the day to day support required on the Housing and Revs&Bens computer systems.

**"Fragmentation" of activities**

76. The Department of Business Innovation & Skills Guide on TUPE, dated January 2014, recognises, at page 10, that a SPC under Reg.3(1)(b) is capable of applying where there is "fragmentation":-

"*SPC: Fragmentation of a Service*

*A service provision change will often capture situations where an existing service contract is re-tendered by the client and awarded to a new contractor. It would also potentially cover situations where just some of those activities in the original service contract are re-tendered and awarded to a new contract, or where the original service contract is split up into two or more components, each of which is assigned to a different contractor. In each of these cases it is necessary to consider whether the activities after the change are fundamentally the same as those carried out before it and then whether there was an organised grouping which had as its principle purpose the carrying out of the activities that are transferred (see below on this). However, the activities might be divided up so much that there is no service provision change. This is often called "fragmentation" of the service, and it will depend upon the circumstances as to whether a service is so fragmented that it is not a service provision change.*"

77. There are no hard and fast rules, therefore, to determine when activities have become too fragmented for an SPC to have taken place. It is a question of fact and degree for the Tribunal. This was demonstrated by the EAT in ***Kimberley*** and ***Enterprise Management***.

78. It was common ground among the parties in the present case that approximately 80% of the "relevant activities" had transferred to the third respondent. The third respondent's solicitor relied on ***Enterprise Management*** , which decided that the services pre and post transfer were fundamentally different where the Council decided to remove the requirement for support for curriculum software which had constituted 15% of the workload. However, each case has to be determined on its own particular facts and circumstances. In ***Kimberley***, L Ltd contracted with the Home Office to provide accommodation and support services for the Teeside area from offices in Middlesbrough and Stockton. The Home Office then re-tendered the contract and ended up splitting the Teeside area between two new contractors, K Ltd and A Ltd. In Stockton, K Ltd won 97% of the work, while in Middlesbrough, K Ltd won 70% of the work and A Ltd won 29%. In determining to whom the rights and liabilities transferred, and overturning the Tribunal's decision to apportion liability, the EAT held that it was not permissible to divorce a contract from the rights and liabilities under it. The *"overall principle*" is to focus on the *"link between the employee and the work*

*or activities which are performed."* On this basis, and with regard to the Stockton - based claimants (where K Ltd had won 97% of the work), the EAT held that their employment had transferred to K Ltd. Regarding the Middlesbrough - based claimants (where the split was 71% to K Ltd to 29% to A Ltd), the EAT determined the case solely on the basis of the work split and accordingly held that all rights, duties and liabilities under those employee's contracts should also pass to K Ltd.

79. This case law reinforced the view that each case has to be considered on its own facts and circumstances and whether there has been a SPC is a question of fact and degree. According to Mr Justice Langstaff in ***Kimberley***, the overall principle is clear: "*What has to be focused on is essentially the link between the employee and the work or activities to be performed".* Looking in broad terms at the present case, the claimants had been principally assigned to the contractor who had ended up with the vast majority of the work.

80. I arrived at the view, therefore, that by and large the submissions on behalf of the claimants and the first and second respondents, in support of their contention that the activities carried on by the third respondent are fundamentally or essentially the same as those which had been carried on by the first respondent, were well-founded.

81. That was the main issue in the present case as the parties were agreed that there was an "*organised grouping of employees which has as its principal purpose the carrying out of the activities on behalf of the client.*"

82. I arrived at the view, therefore, that there was a TUPE transfer, in the form of a SPC, from the first respondent to the third respondent. It follows, therefore, that the claims should proceed against the third respondent only and that the claims against the first and second respondents should be dismissed.

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|---|---|
| **Employment Judge** | **NM Hosie** |
| **Dated** | **26 August 2021** |
| **Date sent to parties** | **26 August 2021** |