



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Ms J Rajput

v

(1) Commerzbank AG
(2) Société Générale

Heard at: London Central

On: 27 September 2021 – 1 October 2021

Before: Employment Judge Hodgson

Representation

For the Claimant: Mr R Downey, counsel

For the Respondent: Mr G Mansfield, QC

(PRELIMINARY ISSUE – TUPE)

DECISION

It being conceded that there was a transfer of an undertaking, which included the claimant, from the first to the second respondent, the date of that transfer is determined to be 1 October 2019.

REASONS

Introduction

1. At the commencement of this preliminary hearing, I confirmed that I would initially consider the preliminary issue identified in the email to the parties of 21 July 2021. That preliminary issue is as follows:

"It being conceded that there was a transfer of an undertaking, which included the claimant, from the first to the second respondent, the date of that transfer shall be determined as a preliminary issue."

2. I can refer to this as the TUPE¹ issue.
3. I also noted that the respondents wished me to vary a previous decision and to consider "whether the tribunal lacks jurisdiction in respect of any complaints on grounds of limitation." I confirmed that I would determine the TUPE issue, and when that was done, I would consider whether any other matter could be dealt with. I confirmed that the respondents may renew their application for a preliminary hearing on the question of limitation and any related matters, including strikeout for no reasonable prospect of success, provided they could establish that holding a preliminary hearing was in the interests of justice. I stated it would be necessary for the respondent to confirm whether the issues, as explored at the hearing on 21 May 2021, and as annotated by me, were now agreed as the issues to be determined in the case. I noted that the respondent had previously disputed my approach. I confirmed that it may not be possible to determine any time points, or any strikeout points, if the nature of the claims remain fundamentally uncertain, as had been the position at the hearing on 21 May 2021.

The evidence

4. I received a lengthy bundle of documents.
5. The claimant was represented by Mr Downey, who adopted the skeleton argument of Ms Sarah Clarke. The respondents were jointly represented for the purpose of the preliminary issue by Mr Mansfield, who filed a joint skeleton argument on behalf of both respondents.
6. The claimant relied on a witness statement of 23 July 2021. She did not put in evidence her previous witness statement. Mr Neil Aiken, head of lending at Commerzbank AG, relied on his statement and gave oral evidence.
7. Mr Mansfield chose not to cross examine the claimant. He confirmed that the claimant's evidence was either accepted, or irrelevant for the purpose of the preliminary issue. It follows that there was no formal admission of any of the content of the claimant's statement; I consider this to be an appropriate and proportionate approach. To the extent it is necessary for determination of this decision, I will decide the relevant facts. However, any facts alleged in the claimant's statement will not be binding on any future tribunal, save to the extent that they form part of my finding of fact.

The law

8. Regulation 3 TUPE provides, insofar as it is applicable -

3(1) These Regulations apply to—

¹ Transfer of Undertaking (Protection of Employment) Regulations 2006

(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;

...

(6) A relevant transfer—

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

9. Regulation 4 TUPE provides, insofar as it is applicable -

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

...

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

10. **North Wales Training and Enterprise Council Ltd v Astley et al** [2006] UKHL 29, HL, as identifies the correct test for determining the date of a transfer of an undertaking or business. A reference was made to the ECJ as to whether a transfer happened at a particular point in time, and if so, how that point was to be identified. The ruling of the ECJ on this issue² was that:

1. Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as meaning that the date of a transfer within the meaning of that provision is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.

2. For the purposes of applying that provision, contracts of employment or employment relationships existing on the date of the transfer within the meaning stated in para 1 of the operative part between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties in that respect.

² *Celtec Ltd v Astley and others* [2005] IRLR 647 at para. 46

11. It is necessary to identify the date on which responsibility for carrying on the business of the unit moves from the transferor to the transferee. HHJ Burke QC in **Metropolitan Ltd v Churchill Dulwich Ltd** [2009] ICR 1380 at [30] stated -

A common sense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided. The tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the tribunal on the evidence in the individual case before it.

12. The focus must be on the transfer of the business, rather than the transfer of employees. Thus, in **Housing Maintenance Solutions Ltd v McAteer** [2015] ICR 87 Slade J stated at paragraph 40:

...when the CJEU in Celtec stated that the term “date of transfer” must be understood as the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee they were not referring to the date or dates when the transferee entered into contracts of employment with the employees. It was when...the business was transferred with the effect that the contracts of employment of former employees of the transferor engaged in the business were transferred to the transferee by operation of law.

13. The fact that a transfer is effected by a series of transactions which take place over a period of time, as per regulation 3(6)(a), does not mean there is no single date on which the transfer took place. That date must be determined.

14. In **Metropolitan Resources Ltd v Churchill Dulwich Ltd** [2009] ICR 1380, a service provision change under Regulation 3(1)(b), the EAT, in considering whether or not employees under the first service provider had transferred to the second held at paragraphs 38 and 39 -

38. ...it is likely in practice that the change pursuant to which the transferee performs the relevant activity instead of the transferor may be achieved by a series of steps or transactions over a period of time. It is unlikely that a service provision change will in practice always be entirely achieved on one day; and I have no doubt that the law is not such as to require that it should be so achieved...

I accept [counsel's] alternative argument that Celtec requires the Tribunal to find one date on which any type of TUPE transfer occurred on the facts before them but does not require that all the steps which constitute such a transfer must take place on the same day...

39. The tribunal, in a case in which the date of the alleged transfer is in issue, must, in my judgment, determine the date at which the essential nature of the activity carried on by the alleged transferor ceases to be carried on by him and is instead carried on by the transferee. The ascertainment of that date must be a question of fact. It is, at least in theory, possible that the facts may be so lacking in clarity that such a date cannot be ascertained; but such a case is likely to be rare...

15. The date of the completion of the sale of a business does not, however, necessarily determine the date of the transfer (see, e.g., **Commercial Motors (Wales) Ltd v Mr M Howley** UKEAT/0491/11/ZT).
16. It is necessary to consider a number of cases referred to by the claimant. I find the case of **Wheeler v Patel and J Golding Group of Companies** [1987] IRLR 211 turns on its own facts. It does not establish any general proposition that the date of completion is normally the date of transfer.
17. **Commercial Motors Ltd v Howley** UKEAT/0491/11/ZT held the completion date does not necessarily determine the date of the transfer. This simply illustrates each case is fact specific. It establishes no principle of law.
18. I accept the date on which the parties agreed between themselves as to when certain employees would move over is not determinative; as each case turns on its own facts, it cannot be assumed that any agreement is irrelevant. This was considered by the EAT in **Housing Maintenance Solutions Ltd v McAteer** [2015] ICR 87.
19. The claimant submissions state, "However it is averred that in a situation in which regulation 3(6) applies, namely where a transfer is 'effected by a series of two or more transactions,' responsibility for the business is assumed at the end of the series of transactions. See commentary from Harvey on Industrial Relations and Employment Law Division F para 103." I reject that submission. Whatever the meaning of the commentary in Harvey, TUPE does not provide that the transfer occurs at the end of a series of transactions. Each case must be considered on its own facts.

The relevant facts

20. The evidence I have received in this case is limited and lacking in detail. The claimant had little direct knowledge of the relevant transactions. The evidence from the Mr Aiken provides an overview with little detail that would pinpoint what responsibilities were transferred and when.
21. I expressed the view that the evidence put forward may be so poor that it may not be possible to identify the date of transfer accurately. Neither party wished to produce further evidence. Neither party sought to suggest that the evidence provided was a complete or comprehensive picture. Both parties stated they believed there was sufficient evidence for a decision to be made and invited me to proceed. Both parties accepted that it was appropriate I should identify the date of the transfer having regard to the available evidence. It was common ground that despite the number of potential transactions, and the length of the overall process of transfer, my role was to identify a single day when the transfer was effected and to some degree, that date would be a legal construct.

22. The claimant invited me to draw inferences from the failure to produce evidence concerning the way employees were treated at particular times. I did not have any adequate evidence demonstrating what information was given to specific employees at specific times, or how the contractual arrangements developed between employees and the second respondent. It was not appropriate to infer the content of any discussions that took place. I simply had no evidence of the content of possible discussions. It was suggested that the respondent's failure to give further evidence should lead me to find that there was no belief that the transfer occurred on or around 1 October 2019. I confirmed that it was not possible to infer any primary findings of fact.
23. From late 2017, Commerzbank held discussions with Société Générale (SG) regarding the sale of Commerzbank's equity markets and commodity business (EMC). Agreement on terms was reached in July 2018. The agreement was announced in press releases from Commerzbank and SG on 3 July 2018.
24. The sale was governed by a business purchase agreement signed on 8 November 2018 (the BPA). The BPA runs to 1400 pages. I have not seen the entire document. I accept Mr Aiken's evidence that it deals mostly with technical details about the management of complex products that made up the EMC business. The sale of EMC was known as Project Crystal. Mr Aiken had oversight of the process, which involved the transfer and migration of the sold EMC business.
25. The EMC business was complicated. No party has sought to suggest that it consisted of separate or distinguishable organised groupings of resources. All parties accept that the EMC business constituted one single organised grouping of resources.
26. The migration involved a huge amount of preparation on both sides. It included 1800 clients who were to be transferred and serviced by SG. This was an ongoing process.
27. The respondents actively considered which employees would transfer and ultimately agreed around 365 employees across Commerzbank were formally transferred to SG. This affected employees in London, Germany, France, Switzerland, Luxembourg, and Hong Kong.
28. Mr Aiken describes the structure of EMC as follows -

12. Commerzbank's EMC business at the time of the sale comprised the bank's manufacturing and market making of flow and structured trading and investment products as well as its established exchange-traded funds (ETF) brand and its associated leading ETF market making platform. The different parts of Commerzbank's EMC business, as described in paragraph 13 below, were centred in different locations. Flow was mainly based in Germany, EVF was mainly based in London and Hong Kong, and AM was split mainly across Luxembourg, London, and Frankfurt.

13. The overall transaction was structured in the form of an asset deal involving the transfer of individual assets, liabilities, contracts, employees, and infrastructure. The transfer of the EMC business was organised in three parts which were called "Batches". Each Batch was then further divided into "Sub-Batches". The three Batches were:

(a) Asset Management ("AM") which was divided into three Sub-Batches;

(b) Exotics, Vanilla & Funds ("EVF") which was divided into six Sub-Batches; and

(c) Flow Trading/Market Making ("Flow") which was divided into four Sub-Batches.

29. EDF and Flow were of a similar size, and AM was approximately half the size of either.

30. As part of the process, employees who appeared to be affected were identified. Mr Aiken says this at paragraph 14

14. The employees who worked for the EMC business in these three Batches were described in internal documents as "HR" globally and this formed a fourth 'batch'. HR covered all those employees who worked in front office roles in EMC ("Front Office Employees") and people who supported the functioning of Front Office Employees in IT, legal support, and Operations ("Back Office Employees"). While there were more 'back office' functions that supported the EMC business at Commerzbank, such as Human Resources and Compliance these did not form part of the agreement between Commerzbank and SocGen. SocGen did not need these functions as they already had their own fully functioning Human Resources, Compliance, and Risk teams so commercially they were outside the scope of the deal. I understand that this does not, however, impact on the question as to whether such employees may have transferred to SocGen because of the Transfer of Undertaking Regulations.

31. The claimant worked in compliance. She accepts that she provided services for all three areas of the business, albeit that the majority of Commerzbank employees in London worked in AM and EDF. Flow was a small part of the London business with only five people working in it.

32. This was a significant deal and before it could proceed, it had to secure regulatory approval. This occurred on 11 February 2019.

33. The price paid by SG for the EMC business has not been disclosed, but Mr Aiken confirms it was "hundreds of millions of pounds sterling." The claimant has alleged that SG was particularly interested in one part of ECM which she has referred to as the "jewel in the crown." Mr Aiken accepts that SG was particularly interested in acquiring part of the business, which was the public distribution business, which would increase SG's market share, particularly in Germany. The evidence I have on this is limited. I accept Mr Aiken's evidence, which is to the effect that Commerzbank understood that some parts of the business were more attractive to SG than others.

34. Commerzbank wished to ensure that it did not retain those parts of the business that it did not wish to retain. The process was driven in part by securing an appropriate deal for the most valuable parts of ECM, and in part by ensuring that the less desirable or profitable parts of ECM were also transferred to SG.
35. As regards the public distribution business, which was mainly concerned with the German market, the part of the transaction which dealt with that, occurred late in the process and ran into 2020, the process of acquisition may not have been fully completed until after the claimant had been dismissed.
36. The claimant's role was compliance. Mr Aiken believed that no one from compliance was part of the transfer. He says this at paragraph 17

17. In total, 365 Front Office Employees were identified across Commerzbank's EMC business globally and 262 of these ultimately transferred. 66 Back Office Employees were identified in Germany and 57 ultimately transferred. There were a range of reasons why employees were identified as within scope of the sale did not transfer, including rejection of the transfer and resignation. In London 4 Back Office Employees were identified and transferred to SocGen (2 from IT and 2 from Legal). As I have set out above, no-one from Compliance was considered for part of the transfer as SocGen had a full compliance team and was not looking for any further compliance assistance.

37. However, it is now accepted that the claimant did transfer. The respondents, prior to the hearing on 21 May 2021, made a joint formal admission following the claimant's notice to admit facts. The respondent's admitted there has been a relevant transfer and stated the date was 1 October 2019. (The claimant had not advanced a positive date for the transfer.)
38. Following the hearing on 21 May 2021, the claimant amended her claim. She accepted that she was assigned to the EMC business. She alleged that the transfer occurred at the end of the transactions on 10 May 2020.
39. I have seen evidence which purports to set out transfer dates for batches of employees. It is clear that the respondents agreed to employees starting to formally transfer from 18 February 2019; that process continued until 1 June 2020. In this context when I refer to transfer, I am adopting the language used by Mr Aiken which describes the actual practical process whereby, in some manner, SG formally took responsibility for certain employees. However, that concept of 'transfer' is not the same as the definition of transfer for the purposes of TUPE, and I remind myself that focussing on the movement of employees may not be the right approach.
40. The BPA agreement had no formal completion date. Instead, the agreement provides for a gradual transfer of the business over a period of time. It provides for the acquisition of the EMC business. In the recitals it states:

The transfer of the Sold Business shall be implemented by way of a combined asset share deal by which the Seller carves out and transfers to the relevant purchases or, upon instruction by SG, to the Issuance Vehicles, as the case may be, the relevant (i) portfolio assets and liabilities and/or (ii) static assets and liabilities as soon as, or in due course after, the Relevant Purchases and Seller have achieved the relevant Operational Readiness and relevant Conditions Precedent have been fulfilled in accordance with this Agreement. The actual transfer shall occur in several batches (each a "batch" and together "batches") which may have to be broken down into smaller sub (each such part of a batch a "Sub- Batch" and together the " Sub Batches"). The transfer list, synthetically or legally, in full of the last sub- batch of all the batches is referred to herein as "closing." The transfer process, composition and transfer principles of the batches are described in this agreement in schedule 9...

41. It follows that the BPA envisaged a process. Signing the BPA led to a purchase commitment. As the deal was complex, it was not possible to have a single completion date, whereby all liabilities were acquired, and responsibilities transferred. To be ready to service the clients and comply with all regulatory obligations SG had to prepare in numerous ways, including designing and implementing all necessary infrastructure. As that process proceeded, the business, including clients, were transferred and specific employees, as identified, became actively managed by SG. That process occurred over three businesses and in relation to numerous parts of each business. Those three principal areas of business were spread over several countries. It follows that the deal was complex and multinational.
42. EMC is a business which operates across countries. TUPE is concerned with "a business or part of an undertaking or business situated immediately before the transfer in the United Kingdom." No party has sought to suggest that there was no economic entity which retained its identity situated entirely in the United Kingdom. There is no allegation that the claimant was not assigned to the organised grouping of resources or employees that was subject to the relevant transfer. There is no suggestion that the claimant was outside the scope of reg. 3 or reg. 4.
43. Reg. 3 is concerned only with a business or undertaking which was an economic entity, situated immediately before the transfer in the United Kingdom. With that in mind, it is clear that I must focus on the London operation. AM and EVF formed the vast majority of the London business.
44. Mr Aiken confirmed the facts as alleged in paragraph 58A of the first respondent's amended grounds of resistance. The BPA was agreed in November 2018, conditional on regulatory approval. Anti-trust approval was given on 11 February 2019. Commerzbank organised transfers of, either front and back office staff working in EMC into 13 tranches. A total of 97 Commerzbank London employees were identified as transferring to SG. By the end of September 2019, 95% of the EVF and AM business had transfer to SG. The 13 tranches occurred between 1 April 2019 and 1 May 2020. Up to and including 1 October 2019, 84 Commerzbank

London employees had transferred to SG's control, representing 87% of the total identified as transferring. (The claimant was never identified as an individual who transferred.) Of the 97 Commerzbank London employees who were formally identified as transferring to SG, 89 worked in front-office roles, four worked in back-office roles (two from legal and two from IT) as noted, no compliance employees were identified as transferring, albeit it is now common ground that the claimant did transfer. By the end of September 2019, 95% of the EVF and AM business, in terms of value and responsibility, had transferred to SG.

45. The claimant confirms that during her employment, until she was made redundant, she continued to provide compliance services across the entirety of the EMC business. This included working on matters for which SG had clearly taken on responsibility. It follows that as the responsibilities became shared by Commerzbank, and then taken on by SG, the claimant continued to provide services in relation to all that business.
46. The claimant was made redundant on 31 March 2020, purportedly by the first respondent. At no time prior to her dismissal was the claimant informed that she was part of the undertaking or business transferred from Commerzbank to SG.
47. In May 2020, both respondents released press announcements confirming that Commerzbank had agreed to sell its equity markets and commodities business to SG in July 2018 and that the acquisition had now been finalise.
48. There are various press reports. Those reports confirm that the process of transfer started in the second quarter 2019 and had now (in May 2020) completed.

The claimant's submissions

49. The claimant's written submissions are extensive; the relevant part is brief. Paragraph 20 states the following:

20. It would appear from Mr Aiken's statement that 'closing' occurred by 10th May 2020, as this is when the last element of the Flow batch was transferred (pg 4). This corresponds with C's understanding of when the sale would be finalised whilst she was still employed by R1- see email 13/09/19 in which C advises that her understanding was that the transfer would be complete Q2 2020 [876].

50. At paragraph 21 and 22 they state:

21. C's position is that interest in the sale of the EMC business was generated primarily due to the interest in the Exchange Traded Funds (ETF), which formed part of the Flow batch, the so-called "jewel in the crown" [see article pg 978 "Both Goldman and SocGen have submitted final bids, and are more interested in just the EFT business, but Commerzbank wants the buyer to acquire all of its trading operations"]. R1

made it clear to all prospective buyers that they would only sell the EMC business as a unit [see articles in financial publications pg 974; 976]. The CEO of R2 indicated in a statement just how important the EFT part of the business was, stating that “this will clearly position us as the number 2 in the European EFT market and number 3 in the German EFT market” [983]. It is averred that this corroborates C’s assertion that the EFT part of Flow was the ‘jewel in the crown’.

22. As the ETF was such an important part of the sale, R1 ensured that this would be the last part of the business to transfer [C WS paras 17 to 20].

51. It follows that the claimant's position is that the tribunal should have particular regard to what the claimant describes as “the jewel in the crown,” being the exchange traded funds (ETF).³ It is said that this was the most desirable part of the business, and it is suggested that this was the primary motivation for the second respondent entering into the deal. Therefore, it is only on completion of that part of the transaction that the transfer was effected.
52. The claimant also points to the fact that Mr Aiken does not specify a particular date.
53. The claimant relies on the press releases as corroboration that responsibility for EMC transferred to SG on 10 May 2020.

The respondent's submissions

54. The relevant part of the respondent's submissions is also brief. The operative part of the submission is set out at paragraph 35 as follows:

35. Here, of course, the sale of EMC was agreed in November 2018. That, however, seems unlikely as a date for the transfer because it was conditional on the approval of the regulators. Anti-trust approval was given on 11 February 2019, and that is a candidate for the date of transfer. Commerzbank considers, however, that 1 October 2019 is the most sensible date given that 95% of the EVF and AM Business and 84 of 97 UK employees had transferred to SocGen by then. The core of the activities had therefore transferred by that date. That is also the date at which the Claimant would probably have transferred in fact (had she been included as part of the TUPE transfer) [see Aiken §§24-26].

55. Both parties, essentially, agree on the law. I can summarise the position. The belief of the parties does not dictate the date of the transfer. It is necessary for the tribunal to consider all of the evidence and to focus on the transfer of the business, rather than the transfer of the employees. It is necessary to identify one date for the transfer. The assumption of responsibility for employees pursuant TUPE occurs on the date of the transfer. It follows that an analysis of how the parties viewed the employees at any time may lead the tribunal into error. Each case must be considered on its merits, and it may not be possible to produce one formulation of words which applies to all cases. It is important to bear in mind the general principle. What is required is established in **Astley**. The

³ This is not the same “jewel” as identified by Mr Aiken, but nothing turns on this.

tribunal must identify “the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.” This involves, in some manner, the assumption of responsibility. In **Metropolitan Resources Ltd V Churchill Dulwich Ltd** 2009 ICR 1380 it was put as follows: “...the essential nature of the activity carried on by the alleged transferor ceases to be carried on by him and is instead carried on by the transferee.” I don't take this to be a specific legal test that modifies or changes **Astley**, it is, more an identification of the general approach. **Metropolitan** goes on to say "the ascertainment of that date must be a question of fact."

56. TUPE recognises that a transfer may be affected by a series of two or more transactions (see regulation 3 (6)). What constitutes a transaction is not defined. A transaction may be a specific contract, the terms of the contract, or an arrangement which is not in itself contractual. The nature of transaction is, in my view, wide. Moreover, TUPE does not say that the transfer occurs at the end of a series of transactions. To the extent that the claimant suggests that Harvey supports the proposition that transfer will occur at the end of a series of transactions, I reject that submission.
57. The reality is a transfer may occur at the start of the series of transactions, partway through the series, or at the end of the series. Each case must turn on its facts.
58. I am looking for the point, in this case, when the essential nature of the activity carried on by the transferor ceased and was taken over by the transferee.
59. One possible date of transfer would be at the point when the contract is signed. That possibility is identified by Mr Mansfield (paragraph 35 of his submission). It is not a date contended for by either party.
60. The claimant says the date of transfer was 10 May 2020, being the date when the transfer of the EDF business was complete. Her prime reason for this, beyond being the simple end point of a chronology, is the EDF business was or contained the most attractive commercial parts of the agreement from the perspective of the second respondent.
61. I do not accept the claimant's submission. Any commercial transaction may contain parts of a business which are attractive and parts which are unattractive. A transferor may be keen to profit from the most attractive parts of the business sold and equally keen to shed responsibility for those parts that it no longer wishes to keep. It is possible that the majority of the business is the less desirable part. It is possible that responsibility will be taken on by the transferee gradually. It is still necessary to find the date of the transfer. That is not contingent upon what either party considers to be the most desirable part of the transaction commercially. What is required is identification of the date on which responsibility as employer for carrying

on the business of the unit transferred moves from the transferor to the transferee.

62. The fact that there is a press release at the end of the process tells me nothing about the process itself, or the date on which any responsibility became that of the transferee. It tells me nothing about the date of the transfer.
63. To the extent the claimant suggests there can be no transfer until everything is transferred, I reject that submission. It is clearly not the case that the tribunal simply identifies the last transaction in a series of transactions, and that is the date of the transfer. It is necessary to consider the substance of those transactions, and then to ask when responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee.
64. The claimant sought to persuade me that it is relevant to consider how specific employees were treated at specific times: What were they told about the transfer? Was there any form of formal secondment? Where they told they had transferred? What happened to their contracts? These are the questions that the claimant suggests are relevant. Moreover, it is suggested that the absence of evidence given by the respondent in relation to those matters is something from which I should infer first that there was no proper communication given to those employees, and second that this indicates the transfer did not occur on 1 October 2019. I reject that submission. It is suggested I focus on the way the parties treated the employees at any particular time. That would, in my view, be an improper focus. The date of the transfer is not determined by the approach of either the transferee or the transferor to the affected employees. There may be occasions when such an enquiry may assist with the central question, which revolves around the transfer the economic entity and the assumption of responsibility. Put simply, it is identification of the transfer of the business or economic entity which determines when the employee is transferred, and not vice versa.
65. The treatment of employees in this case is particularly problematic. It is clear that employees were 'transferred'⁴ as between Commerzbank and AG over a long period. Much of that process occurred because SG had to build an infrastructure to take over responsibility for the business it had bought. That process could not happen overnight. That was not the commercial or practical reality. The 'transfer' of employees between the respondents was a practical arrangement designed to facilitate the overall implementation of the BPA. The gradual movement of those employees reflected the commercial reality. However, it would be no more logical to say that the transfer occurred when the first employee moved between the respondents as to say the transfer occurred when the last employee

⁴ I use this term in a general sense to indicate the active treatment of the employed by the respondents.

moved. The reality is a number of employees moved in order to facilitate the transfer itself.

66. It does not necessarily follow that all of those employees who agreed to move prior to the TUPE transfer transferred by reason of TUPE. Employees can agree to move at any time. Equally, it cannot be assumed that they did not transfer on the date of the TUPE transfer. It cannot be assumed there would be no continuity and the initial vanguard could be deemed seconded pending the date of transfer. Further section 218 Employment Rights Act 1996 may be relevant to continuity. None of this need I resolve; in any event, I have no evidence. It would be inappropriate to infer primary facts. The reality is neither party has put all the relevant evidence before me. I must make my decision, on the evidence that is before me applying the balance of probability.
67. What is clear is that when there was a gradual movement of employees, as agreed between transfer or in transferee, the agreements which underpinned that movement do not dictate the date of the transfer and may not assist evidentially in establishing the date.
68. The respondents' argument is straightforward. The respondents focus on what constituted the vast majority of the business within the UK. That business consisted of EDF and AM. It is acknowledged that it is extremely difficult to identify the exact date of transfer. Mr Aiken says 95% of the AM and EDF batches were transferred to SG by the end of September 2019. Out of a total of 97 employees identified as being formally taken on by SG leading, 84 had transferred leading up to 1 October 2019. Flow was predominantly based in Germany and only five people in London were directly involved.
69. I am concerned with transfer of the business situated in the UK. The best evidence I have is 95% of that business had transferred to SG on 1 October 2019. Both respondents accept that that is when the responsibility for the business was assumed by SG and passed from Commerzbank.
70. As I have noted, the evidence is sparse. Undoubtedly, there is a vast amount of detail which could have been advanced which may have assisted. However, I am required to form a decision on the best available evidence. I do not consider this to be one those cases where the facts are so poor that no decision can be made. Both respondents agree the date. That agreement appears to be based on rational grounds, supported by evidence that transfer of approximately 95% of the business assets was complete.
71. To find the transfer occurred on the date the claimant alleges, I would have to take the view that despite the almost complete transfer of assets in London by 1 October 2019, nevertheless, the essential nature of the activity carried on by the transferee remained with the transferee and not the transferor. Further, I would need to find that the essential nature of the

activity remained with the transferee until the very end of the transactions in May 2020. That submission is unsustainable. The reality is the essential nature of the activity had transferred. The second respondent had taken over responsibility. It is hard to be certain about the date. However, I do not need to be certain; I have to decide the matter on the balance of probability, based on the best available evidence. The best evidence I have points to the date of transfer as being 1 October 2019, and that is the date I find to be the date of transfer.

Employment Judge Hodgson

Dated: 22 October 2021

Sent to the parties on:

.22/10/2021.

For the Tribunal Office