Case No. 2308262/2020

THE EMPLOYMENT TRIBUNAL

Sitting At: **London South**

Before: **Employment Judge Truscott QC**

Between:

Mr W Kasprzak **Claimant**

and

(1) Menzies Aviation (UK) Limited
(2) Aeroco Group International Limited

Respondents

On: **17, 18 and 19 November 2021**

Appearances:

For the Claimant: **Mr L Werenowski of Counsel**
For the First Respondent: **Mr M Palmer of Counsel**
For the Second Respondent: **Mr D Flood of Counsel**

JUDGMENT

The judgment of the Tribunal is that:

1. The employment of the claimant transferred from the first respondent to the second respondent by operation of Regulation 3 (1) b) (ii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

2. The claims against the first respondent are dismissed.

3. The claimant's claim of unfair dismissal brought under Part 10 of the Employment Rights Act 1996 is well founded against the second respondent.

4. The second respondent is ordered to pay the claimant compensation of £11,097.08.

5.

REASONS

PRELIMINARY

1. The claimant gave evidence on his own behalf and was represented by Mr L Werenowski, barrister. There was a Polish interpreter available to the claimant. The first respondent was represented by Mr M Palmer barrister who led the evidence of Ms L Hoy, HR Business Partner for the UK and Mr J Henderson, Senior Vice President Operations. The second respondent was represented by Mr D Flood barrister who led the evidence of Mr A Lewin, managing director.

2. There was a bundle of documents to which a number of items were added during the course of the hearing. The references in this judgment are to page numbers in the electronic bundle.

THE ISSUES

3. The parties identified the issues prior to the hearing. During the course of the hearing each respondent made a number of concessions related to unfair dismissal which meant that the list of issues could be reduced. This is the list as revised by the Tribunal in the light of those concessions:

(1) Was there was a relevant transfer on 01/10/2020 from R1 to the R2 by way of a service provision change ("SPC") within the meaning of reg. 3(1)(b)(ii) of TUPE?

(2) In relation to the Activities now carried out by employees of R2 are they fundamentally the same as the Activities carried out by C after he ceased to carry them out within the meaning of reg.3(2A) of TUPE?

(3) If so, was C assigned to the organised grouping of employees which had as its principal purpose the carrying out of carpet replacement and related services (the "Activities") on Easyjet passenger aircraft which was the subject of the SPC?

(4) If there was a SPC and C was assigned to the organised grouping of employees undertaking the Activities, did his employment transfer by operation of law to R2 in accordance with reg. 4(1) of TUPE?

(5) If C was assigned to the organised grouping of employees and thereby affected by the SPC?

(6) Was the SPC the sole or principal reason for his dismissal within the meaning of reg. 7(1) of TUPE and C's dismissal was thereby unfair?

(7) What is the Claimant's loss and what compensation is he entitled to?

FINDINGS OF FACT

1. The claimant was originally employed by Airline Services Limited ("ASL") on 10 July 2008 as a Laundry Assistant [105]. He worked at Gatwick airport. On 20 October 2011, his role changed to that of carpet fitter on easyJet aircraft. On 11 October 2015, he was promoted to Carpet Team Leader. Because aircraft for short haul flights receive heavy footfall from passengers, carpet wear is significant. His job was to measure, cut, fit and secure new carpet, after unfastening and taking out the old worn carpets. He travelled to Stansted Airport to collect carpet. Occasionally, he fitted new

curtains and replaced old ones. He fitted new seat covers or oversaw and managed their fitting. All his work for the first respondent involved working with aircraft used by EasyJet. He did not work on the planes of any other carrier. He was full time and worked night shifts. He was based in building 587D.

2. Both the first respondent and ASL were engaged in ground handling and associated services at a number of airports in the UK, including Gatwick. The process of acquisition of ASL by the first respondent started in 2018 and was referred to the Competition and Markets Authority which brought about a delay until 2019. Following full approval of the transaction in April 2019, all contracts between ASL and its customers were formally transferred to the first respondent. This included the contract to provide various services to easyJet under the Purchase Agreement for Goods and Services that had been entered into between easyJet and ASL on 1 October 2012 [210-249]. All of the employees who were employed by ASL at the time of the acquisition, including the claimant, transferred to the first respondent under TUPE.

3. The work undertaken by the claimant under the Purchase Agreement with the first respondent was the same as the work he undertook with ASL which was carpet manufacturing and installation in planes [227]. The first respondent did not "manufacture" carpet in the normal meaning of the word. Only specialist carpeting can be used on aircraft (for example, to ensure it is fire retardant etc) so there are only a few companies who produce the carpet for aircraft. easyJet purchased the carpet directly from a supplier in Ireland. The carpet purchased and paid for by easyJet was shipped to the first respondent's facilities at Stansted in pre-cut lengths where the main cutting team was based. These pre-cut lengths of carpet were laid out and the team in Stansted would lay specific patterns on top of these lengths of carpet in order to cut the carpet to the specific sizes as dictated by the seating configurations for the specific aircraft. The carpet pieces cut by the team in Stansted were shipped to be held at the various airports to be held in readiness for use. One of the airports was Gatwick [226].

4. The claimant provided more detail of the work he carried out in 2020 for the first respondent. When replacement carpeting services were required at Gatwick, the claimant would be directed to replace carpet on the easyJet plane. He and his team would do so when the plane was grounded overnight [409]. As team leader, he arranged the collection and transport of the carpets. He went to Stansted 3 times a week unless he was on holiday [409]. He organised and participated in the fitting of the carpets at Gatwick.

4. Ordinarily, the claimant was in charge of 4 employees. The team seemed to reduce to 3 employees [409] and, in the months before the transfer, he was responsible for two employees, Mr Gunta and Mr. Cucu [311]. If there was no carpet work for the employees to do, they would carry out other duties for the first respondent, the claimant would not. After August, only the claimant remained employed on carpet fitting and continued working up to and on 30 September 2020.

5. The onset of the pandemic brought the first respondent's financial issues into an even sharper focus. The UK business was badly affected at a time when it had already experienced a drop in financial performance and the Board decided that action had to be taken in all areas of the business which, prior to the pandemic, had been loss making. This applied to the services under the Purchase Agreement referred to in

paragraph 3. The pricing structure under the Purchase Agreement was by way of a price per unit, set out in Schedule D of the Agreement [232-236]. The pricing arrangements were no longer fit for purpose where the requirements of the airline had reduced over time from a volume requirement to an increasingly *ad hoc* or shrinking requirement. For example, the laundry service had been a volume business when easyJet had fabric/cloth seat covers which required regular cleaning. The volume of work available was at this time low, meaning that the original pricing arrangements no longer worked. The first respondent tried to negotiate with easyJet to move away from unit pricing but easyJet was unwilling to do so. In these circumstances, the first respondent terminated the contract giving 3 months' notice in accordance with the Agreement on 2 July 2020 [259- 260].

6. On 16/17 June 2020, the first respondent informed the claimant that he was at risk of redundancy [90-91].

7. On 10 August 2020, he attended a meeting with the Station Manager, Mr Alda Pinto, where redundancy was discussed. Thereafter he was informed by letter dated 19 August 2020 that he would be made redundant [88]. He was told that he would receive a redundancy payment of £5,979.96. He received another letter from Mr Pinto on 26 August 2020 confirming his redundancy requiring him to work out his notice until 1 November 2020.

8. The first respondent's Human Resources and administrative staff learned that they would not be retaining any service or manufacturing functions in relation to easyJet on the 8 September 2020 at 11.03 [304]. In relation to London Gatwick, the e-mail which Ms Hoy received stated: -

> "LGW – they are going to Aeroco for dry cleaning based in Manchester (what does that mean for TUPE and redundancy?) and carpet installation in LGW and Aviation for washing. They would like TUPE numbers split by function ASAP".

9. The day before this announcement, there had been some sense that other contractors may be taking over some of the services provided under the Purchase Agreement because a series of meetings was held by the claimant's line manager, Ian Rance and his staff. The meeting notes of these meetings denote, in the top right-hand corner of the first sheet of each meeting, that the staff were involved in laundry, external wash and carpet cover work. On the second sheet of each interview, each member of staff is informed, using a number of different formulations, that because they had been working for more than 50% of their time on the Purchase Agreement, they were in scope for a TUPE transfer [188-299]. This was the basis of the first respondent's transfer figures.

10. Mr Nicholas Jackets was the HR employee of the first respondent at Gatwick. On 8 September 2020 at 12:23pm, he wrote to Ms Hoy giving her a list of those who would "be in scope" to transfer to new suppliers [306]. His e-mail states that there would have been a list of 12, but 2 had already left. He sent a second e-mail at 16:18pm, listing the 10-remaining staff. All of those staff had been declared redundant. When their leaving dates were inserted, it became clear that 6 of the employees had already left the first respondent. That left only the claimant and 3 others who, by virtue of date of the expiry of their notice periods, would still be employed by the first respondent at the point of any transfer.

11. On 9 September 2020, Ms Jessica Sims of the first respondent sent a table that set out the various parts of the Purchase Agreement, the individuals who the first respondent believed to have been working on them at various airports including Gatwick and where it was at that time believed the work was going [311]. The chart shows 3 people involved in carpet fitting. Ms Hoy accepted in cross examination that the chart was out of date in that, in respect of London Gatwick, it showed 12 people, whereas, in accordance with the e-mail of Mr Jackets referred to above, only 4 would remain employed at the time of any transfer.

12. On 10 September 2021, Mr Lewin of the second respondent first contacted the first respondent requesting details of employees proposed for TUPE [312]. Later that day, Ms Sims sent Mr Lewin an e-mail containing a table setting out the proposed transfer numbers by airport, service, and what supplier the service was now going to [314]. That Table shows that in respect of Gatwick Airport, there were 4 individuals being said to be "in scope", only one of whom, the claimant, who was involved in carpet fitting, curtain and seat cover installation. Ms Hoy contacted the second respondent regarding the transfer on 11 September at 15.22 after easyJet identified it as the new provider [314-317 and 374]. The table shows LGW 4 in scope, 3 assigned to dry cleaning and 1 assigned to carpet, curtain and seat cover install [314]. easyJet intervened [388-389] to suggest that this was a supply of goods contract and/or that the services were provided to other carriers.

13. On 15 September 2020, Ms Hoy wrote to the claimant, informing him of her belief that, as of 1 October 2020, his employment would transfer to the second respondent [322].

14. On 18 September 2020, Ms Hoy wrote to the second respondent's HR, Ms Janice Grantham, confirming the numbers for those in scope at all airports. In relation to London Gatwick, her message stated [374]:

> "LGW contract. 4 in scope (1 stock controller, 2 Team Leaders and 1 Laundry Assistant)".

The EL1 attachment to the email identifies the claimant as the carpet team leader and provides information about the other 3 employees who were a laundry team leader, a laundry assistant and a stock controller at Gatwick [376-384].

15. On 18 September 2020, Ms Hoy wrote to Unite the Union [385] informing them of the transfer of: -

> "Transfer of dry cleaning, carpet, curtain and seat cover contracts from Menzies Aviation (UK) Ltd to Aeroco Group International Limited at London Gatwick Airport: Transfer of Undertakings (Protection of Employment) (TUPE)".

16. A consultation meeting took place on 22 September 2020. At that meeting, the claimant complained that so far, the second respondent had not contacted him. The first respondent said that the second respondent had his email address, his phone number and his home address and knew how to contact him [410]. It was noted by the first respondent that the second respondent would not have enough work to TUPE across.

17. On 25 September, Mr Lewin responded that the services would "look very different", that carpet manufacturing was a supply of goods contract, and that the service had been fragmented. Mr Lewis did not acknowledge that TUPE would apply [418]. He invited Ms Hoy to revert to him if she had any compelling alternative argument or reasoning in relation to what he had written. One of the objections raised in page two of his letter [418] put in the following terms: -

> "Again, it is a fairly trite statement of principle pursuant to TUPE that you need to have had in place a team of employees essentially dedicated to the relevant supply to Easyjet amounting to an "organised grouping" for TUPE to apply. I have seen no evidence to support the presence of any such organised grouping".

18. The second respondent continued to dispute the existence of a relevant transfer thereafter. Mr Henderson of the first respondent tried to contact Mr Lewin to try to come to some form of resolution. When he was able to have a discussion with Mr Lewin, the latter adhered to his position [519-520].

19. On 28 September 2020, Ms Hoy responded to Mr Lewin's letter, setting out the basis on which the first respondent maintained that there was a transfer at London Gatwick [422], the letter stated as follows:

> " LTN/LGW Carpet Fitting, Washing and Seat Install… As you will be aware, the fragmentation of services does not mean that a transfer does not take place. … At LGW there is a dedicated team of 4 employees to easyJet for the provision of these services. As Menzies Aviation does not provide these services to any other airlines at this location it is clear, as a result, that all the members of the dedicated team are properly assigned to the contract and subject to transfer"…"

20. On the same day, Mr Henderson wrote to Ms Sophie Michelson of easyJet, copying in Alan Blanchflower of easyJet that contained the same paragraph as set out inn paragraph 21 [425].

21. On 30 September 2020, at 13.27, Ms Hoy sent Ms Grantham information about Gatwick, that there were now 4 employees serving notice [441], at 14:36pm, the first respondent was told by easyJet that, contrary to what had been anticipated by it up until that point, the dry cleaning portion work formerly carried out under the Purchase Agreement had not been awarded to Aeroco [431]. At 14:38, Ms Sims sent an e-mail to Ms Hoy and others stating [438]:-

> "I also just called Alan back who confirms the 4th and final person (carpet install) is still eligible to transfer to Aeroco (although he did say that they dispute TUPE applies), but carpets are going to Aeroco".

22. At 14:46, Ms Grantham sent a further letter from Mr Lewin to Ms Hoy [446] replying to her earlier letter to him and re-affirming position that there was not a transfer situation.

23. Ms Hoy escalated the matter to her superior, Rebecca Kable and a decision was made to instruct the first respondent's solicitors, DLA Piper. On 30 September 2020 DLA Piper wrote [448], stating that "Carpet fitting, washing and seat install at London Gatwick" would transfer to the second respondent under TUPE. This was not accurate as only carpet fitting was in scope of transfer by that date.

24. Mrs Hoy sent the second respondent revised ELI information on 1 October 2020 [456], stating as follows:

> "Further to our legal response to Tony Lewin, I am confirming that after being told by easyjet last night that Dry Cleaning was no longer to be supplied by Aeroco Group as planned, only 1 of the LGW employees was in scope to transfer and so I have updated the ELI to reflect this for you. Same password as before. The other 3 employees have been informed that they did not transfer to yourselves."

25. On 1 October 2020, the claimant turned up for work for the second respondent. He waited for 45 minutes at its visitor car park [81]. No one came and he was left unaware of what should happen next. Later that day he sent an email to Ms Grantham of the second respondent [76]. He also sent an email with the letter from the first respondent confirming the TUPE transfer. He received a reply from Ms Grantham who said that the TUPE had not been approved by the second respondent and that she considered him an employee of the first respondent. He then sent an email to the first respondent's HR department on 2 October 2020 [76]. In reply, Ms Hoy disputed Ms Grantham's position and told him that his employment transferred from the first respondent to the second respondent at 00.01 1 October 2020.

26. The claimant also wrote a letter to the first respondent on 5 October 2020, appealing the decision to transfer him to the second respondent [483]. Both respondents adhered to their positions. The second respondent adopted no procedure in relation to the claimant.

27. The second respondent has a team of 2 working a 7 day night shift which replaced aisle and under seat carpeting using finished carpet products supplied by easyJet and installed new seat covers. The second respondent receives deliveries of the carpet sections from its depot in Manchester. The 'Cabin Maintenance Services Agreement' [521 – 554] between the second respondent and easyJet contains similar provisions in Schedule 3 in relation to carpet replacement in the Purchase Agreement between easyJet and the first respondent [547].

SUBMISSIONS

28. The Tribunal received written submissions from all parties and also heard oral submissions of the highest order from each.

LAW

29. The relevant provisions of TUPE concerning a relevant transfer SPC are (underlining emphases added):

> Regulation 2(1):
>
> …
>
> references to "organised grouping of employees" shall include a single employee;
>
> …
>
> "Relevant transfer" means a transfer or a service provision change to which these regulations apply in accordance with regulation 3 and "transferor" and

"transferee" shall be construed accordingly and in the case of a service provision change falling within 3(1)(b) "the transferor" means the person who carried out the activities prior to the service provision change and "the transferee" means the person who carried out the activities as a result of the service provision change.

Regulation 3

(1) These Regulations apply to—

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

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

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

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

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

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

….

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

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

(a) Immediately before the service provision change-

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

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

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

30. The applicable principles developed by the appellate courts to assist the Employment Tribunal in determining whether or not there has been a SPC and the assumption of activities by a subsequent service provider are stated by HHJ Eady QC,

as she then was, at paragraphs 33 to 39 of **QLOG Ltd v. O'Brien & others** [UKEAT/0301/13] unreported. Those principles are encapsulated in the guidance set out by HHJ Peter Clark in **Enterprise Management Services Ltd v Connect-up Ltd** [2012] IRLR 190 EAT at paragraph 8):

> "(2) The expression 'activities' is not defined in the Regulations. Thus the first task for the Employment Tribunal is to identify the relevant activities carried out by the original contractor: … That was the issue on appeal in OCS, where the Appellants challenge to the activities identified by the Employment Tribunal failed.
> (3) The next (critical) question for present purposes will be 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. Minor differences may properly be disregarded. This is essentially a question of fact and degree for the Employment Tribunal (Metropolitan, para. 30).
> (4) 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 service provision change regime, ….
> (5) Even where the activities remain essentially the same before and after the putative transfer date as performed by the original and subsequent contractors, an SPC will only take place if the following conditions are satisfied:
>
> > (i) there is an organised grouping of employees in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
> > (ii) the client intends that the transferee post-service provision change will not carry out the activities in connection with a single event of short-term duration;
> > (iii) the activities are not wholly or mainly the supply of goods rather than services for the client's use. […]
>
> (6) Finally, by reg 4(1) the Employment Tribunal must decide whether each Claimant was assigned to the organised grouping of employees."

31. The principles applicable to Regulation 3(1)(b) were summarised by Jackson LJ in **Rynda (UK) Limited v. Rhijnsburger** [2015] ICR 1300 CA at paragraph 44 after considering **Eddie Stobart Ltd v. Moreman** [2012] IRLR 356 and **Seawell Ltd v. Ceva Freight (UK) Ltd** [2013] IRLR 726:

> "If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within regulation 3 of TUPE. The first stage of this exercise is to identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a "grouping" for the principal purpose of carrying out the listed activities."

32. In determining the identification of activities under reg. 3(1)(b), the Employment Appeal Tribunal has observed in **Argyll Coastal Services Ltd v Stirling others** [UKEATS/0012/11] unreported**:**

> "20. Regarding "activities" it seems plain from the terms of both regulation 3(1)(b) and 3(3)(a)(i) that Parliament, by using the word "activities" had in mind

considering what it was that the client required of the transferor or employer. What exactly was the service that was contracted for?"

33. In **Argyll Costal**, Lady Smith at paragraph 18 observed:

"It seems to me that the phrase "organised grouping of employees" connotes a number of employees which is less than the whole of the transferor's entire workforce, deliberately organised for the purpose of carrying out the activities required by the particular client contract and who work together as a team."

34. It has been observed by Underhill P, as he then was, in **Eddie Stobart Ltd v. Moreman** above at paragraph 18 that:

"Taking it first and foremost by reference to the statutory language, regulation 3 (3) (a) (i) does not say merely that the employees should in their day-to-day work in fact (principally) carry out the activities in question: it says that carrying out those activities should be the (principal) purpose of an "organised grouping" to which they belong. In my view that necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. The statutory language does not naturally apply to a situation where, as here, a combination of circumstances – essentially, shift patterns and working practices on the ground – mean that a group (which, NB, is not synonymous with a "grouping", let alone an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. The paradigm of an "organised grouping" is indeed the case where employers are organised as "the [Client A] team", though no doubt the definition could in principle be satisfied in cases where the identification is less explicit."

35. Underhill J went on in paragraph 20 of **Moreman**, to add that policy considerations point to the need for further refinement of the notion of an organised grouping:

"Indeed the policy considerations point, if anything, the other way. If the putative 'grouping' does not reflect any existing organisational unit there are liable to be real practical difficulties in identifying which employees belong to it. It is important that on a transfer employee should, so far as possible, know where they stand…if the touchstone was whether a particular employee was assigned to a recognised team principally serving a particular client, the answer would normally be evident (though no doubt there would sometimes be marginal cases)."

36. In considering whether the organised grouping of employees existed at the relevant time, it is necessary to decide whether or not the purpose of the organised grouping in providing the service is its principal purpose. In **Argyll Coastal**, Lady Smith went on to comment at paragraph 19:

"Turning to "principal purpose" there seems to be no reason why the words should not bear their ordinary meaning. Thus, the organised grouping of employees need not have as its sole purpose the carrying out of the relevant client activities, that must be its principal purpose.

37. The employees who transfer, Reg 4(1), are those who are assigned to that organised grouping of employees. Assignment is not defined under the Regulations other than that it means, Reg 2(1), “other than on a temporary basis”.

38. In **Arch Initiatives v. Greater Manchester West Mental Health NHS Foundation Trust** [2016] IRLR 406 EAT, the Employment Appeal Tribunal addressed a scenario where activities, on a retender, were split along functional lines. It was held that the SPC regime was not to be construed as requiring that all of the activities carried out by the putative transferor before the relevant date cease and be carried out, instead by a single putative transferee. Simler J (as she then was) commented that in TUPE the terms ‘Activities’ was undefined and unqualified as such it is not to be read as analogous or co-extensive with the word 'service'. According to Simler J:

a) there was no reason why the SPC provisions should not in principle apply also in a case involving a division on functional lines; and

b) there was no reason in principle to limit the number of organised groupings of employees to one in any particular SPC case.

"If…the SPC regime applies only where the whole of the activities carried out by the outgoing person are replicated in the hands of the incoming person, the range of situations in which the SPC provisions are capable of applying would be substantially restricted and it would be easy for the provisions to be circumvented so as to frustrate the purpose of the SPC regime." (para.23)

Discussion and decision

39. The evidence of the claimant was credible and reliable and was not attacked by either respondent. The evidence of Ms Hoy and Mr Henderson was also credible and reliable.

40. The Tribunal finds that the “activities” are as described in the Purchase Agreement with easyJet as taken over by the first respondent and as detailed in the evidence of the claimant. The service which first respondent had been providing was as the single supplier of carpet fitting and seat cover installation services to easyJet at Gatwick airport. ASL had been performing the services without a break since 2012 and the first respondent continued them.

41. It was accepted by Mr. Lewin for the second respondent in cross examination that the service which the first respondent had provided to easyJet in relation to the fitting of carpets and the installation of seat covers on easyJet aircraft at Gatwick was now undertaken by the second respondent. The ‘Cabin Maintenance Services Agreement’ between easyJet and the second respondent confirms that evidence [521-554] and, in particular, Schedule 3 which sets out the description of services undertaken [547)]. In re-examination, Mr. Lewin suggested that this team undertook a wider range of ‘within sight’ cabin presentation works. This formed no part of his written evidence. It formed no part of Schedule 3. No additional documentary evidence supports Mr. Lewin’s new evidence. The Tribunal did not accept his evidence. In relation to the contention that the contract was a supply of goods, Mr Lewin accepted that ‘goods’ in the form of the carpets supplied by easyJet were now fitted by the second respondent’s two-man team working at nights alongside the installation of seat covers whilst the aircraft were awaiting routing formed the basis of the activities. The work was not a supply of goods but the carrying out of services for easyJet. Mr Lewin

suggested that the fitting and maintenance of carpets in aircraft was undertaken in a different way. The Tribunal did not accept that there could be or was a fundamental difference.

42. The second respondent took over the service on 1 October 2020 and continues to provide the service to easyJet to the date of the hearing. This establishes that the contract was not short term.

43. The activities do not need to be identical before and after the transfer, minor differences should be discounted. One difference lies in the first respondent having collected the carpeting from Stansted whereas the second respondent receives deliveries of the carpet sections. The Tribunal found that the activities remained fundamentally the same.

44. There was no challenge to the evidence of Ms Hoy and Mr Henderson that the first respondent had organised this part of its wider workforce into a grouping for the purposes of carrying out the activities. The claimant confirmed that his team worked exclusively on easyJet aircraft. When they were not busy, the other employees would be temporarily tasked on other duties but the claimant would not be. The Tribunal found that there was an organised grouping of employees based in building 587D who worked nightshifts and which had as its principal purpose the fitting of carpets and installation of seat covers on easyJet aircraft at Gatwick whilst those aircraft were awaiting routing or undergoing maintenance. The claimant's evidence established a distinct working grouping of employees who performed the activities set out above.

45. The claimant confirmed the final configuration of the organised grouping of which by the date of the transfer, he was the only surviving employee. He had been assigned to the team since 2010/2011 and immediately before the transfer, he was the person ordinarily undertaking the activities and records having done so on the day immediately before the relevant transfer, 30 September 2020.

46. From the activities which he performed and the fact that he was engaged on the easyJet carpet fitting work, the Tribunal found that he was assigned to the organised grouping of workers.

47. The consequence of the foregoing findings is that there was a service provision change between the first respondent and the second respondent on 1 October 2020 under Regulation 3(1)(b)(ii).

48. The claimant's contract of employment transferred by operation of law to the second respondent in accordance with Regulation 4(1). The second respondent was aware when the claimant presented himself as being available for work immediately after the transfer that he undertook carpet fitting work for the first respondent on easyJet aircraft. The failure of the second respondent to offer work to the claimant means that he was dismissed and the sole or principal reason for his dismissal was that he was part of the organised grouping of employees who transferred upon the service provision change. Regulation 7(1) renders that dismissal unfair.

49. The second respondent did not seek to establish an economic, technical or organisational or other defence. The Tribunal finds that the easyJet understanding

about the nature of the carpeting services and the work undertaken at Gatwick for easyJet as set out in its correspondence is not correct on both bases put forward by it. The claimant and his team were not engaged in the production of the carpet itself and hence the supply of goods. One might have thought easyJet would know what manufacturing was in this context as it purchased the carpet in Ireland. It may not have known whether or not the work was not carried exclusively for it but it was told so by the first respondent as soon as it raised the issue.

50. The second respondent has been in existence since 1998. It is likely to have been involved with transfers of contracts between contractors sufficient to know that it is incumbent upon it to make its own enquiries of any situation. It too readily adopted the plainly misconceived approach advanced by easyJet. The second respondent had or could have sought the material available to it to make an assessment:

a) the wording of Schedule A of the Agreement with the first respondent;
b) its Cabin Maintenance Services Agreement with easyJet;
c) the information provided on 11 September that 1 team leader in carpet fitting was employed at Gatwick [314];
d) The information on the ELI of 18 September 2020 [376-384]
e) The revised ELI information on 1 October 2020 [456] which stated as follows:-

> "Further to our legal response to Tony Lewin, I am confirming that after being told by easyjet last night that Dry Cleaning was no longer to be supplied by Aeroco Group as planned, only 1 of the LGW employees was in scope to transfer and so I have updated the ELI to reflect this for you. Same password as before. The other 3 employees have been informed that they did not transfer to yourselves."

51. The 1 LGW employee was the claimant. The second respondent could have interviewed his when he turned up for work on 1 October 2020 if it wanted more information.

52. In correspondence subsequent to the transfer, the first respondent sought to resolve this dispute but the second respondent did not seek to. The second respondent adopted an unreasonable stance from the outset. Mr Lewin's contention on 25 September that he had seen no evidence of a transfer was not correct.

53. The Tribunal has not lost sight of the fact that the first respondent continued with its defence of the case based on outdated information used by DLA Piper which did not separate the employees involved in dry cleaning from the employee involved in carpet fitting, but it provided the correct information to the second respondent at the time. The first respondent is dismissed from proceedings.

54. The claimant's amended schedule of loss contained a number of calculation errors and sought 12 weeks' pay in lieu of notice. As he had already served eight weeks of his notice period, it seemed inequitable to award the sum again. The Tribunal used the figures in the schedule to make the following awards, a basic award of £5976.00, loss of earnings of £3196.86, pension loss of £400 and loss of statutory rights of £500. The total compensatory award is £4096.86. It was not suggested that the claimant had failed to mitigate his loss.

55. The Tribunal also awarded a 25% uplift in respect of the failure by the second respondent to undertake any procedure in relation to the claimant. This amounts to £1024.22. Total compensation is £11,097.0

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Employment Judge Truscott QC
Date: 14 December 2021

Sent to the parties on
Date: 7 January 2022