Case Numbers: 1801172/2021
1801173/2021
1801174/2021
1801175/2021
1801176/2021

EMPLOYMENT TRIBUNALS

Claimants: **Mr D White** (First Claimant)
Mr D Harper (Second Claimant)
Mr J Farley (Third Claimant)
Mr D Hickson (Fourth Claimant)
Mr O Brammer (Fifth Claimant)

Respondents: **Westfield Shovels Limited** (First Respondent)
Associated British Ports (Second Respondent)
Scanmech Plant (Sales and Service) Limited (Third Respondent)

Heard: Remotely (by video link) **On:** 15, 14 and 15 December 2021 and 9, 10, and 11 May 2022

Before: Employment Judge S Shore

Appearances

For the claimants: Mr D White, Lay Representative
For the respondents: Mr S Butler, Counsel (First and Third Respondents)
Mr P Smith, Counsel (Second Respondent)

RESERVED JUDGMENT ON LIABILITY

The decision of the Tribunal is that:

First Claimant – David White

1. The first claimant's employment was not transferred to the second or third respondents under the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE").

2. The first claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

3. The first claimant's claim of breach of contract (also known as wrongful dismissal) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

4. The first claimant's claim of holiday pay succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

5. The first claimant's claim for a statutory redundancy payment succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

Second Claimant – David Hickson

6. The second claimant's employment was not transferred to the second or third respondents under the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE").

7. The second claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

8. The second claimant's claim of breach of contract (also known as wrongful dismissal) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

9. The second claimant's claim of holiday pay succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

10. The second claimant's claim for a statutory redundancy payment succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

Third Claimant – Owen Brammer

11. The third claimant's employment was not transferred to the second or third respondents under the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE").

12. The third claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

13. The third claimant's claim of breach of contract (also known as wrongful dismissal) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

14. The third claimant's claim of holiday pay succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

15. The third claimant's claim for a statutory redundancy payment succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

Fourth Clamant – Darren Harper

16. The fourth claimant's employment was not transferred to the second or third respondents under the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE").

17. The fourth claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

18. The fourth claimant's claim of breach of contract (also known as wrongful dismissal) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

19. The fourth claimant's claim of holiday pay succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

20. The fourth claimant's claim for a statutory redundancy payment succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

Fifth Claimant – John Farley

21. The fifth claimant's employment was not transferred to the second or third respondents under the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE").

22. The fifth claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

23. The fifth claimant's claim of breach of contract (also known as wrongful dismissal) succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

24. The fifth claimant's claim of holiday pay succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

25. The fifth claimant's claim for a statutory redundancy payment succeeds against the first respondent. Remedy will be determined at a hearing to be fixed.

26. Directions will be sent under separate cover concerning the remedy hearing in this case.

REASONS

Introduction

1. The first respondent, Westfield Shovels Limited ("Westfield"), provided services to the second respondent, Associated British Ports ("ABP") that related to the operation of ABP's bulk cargo port at Immingham, Humberside until 31 December 2020, when ABP terminated all arrangements with Westfield. All the claimants were employed by Westfield until 31 December 2020.

2. On 31 December 2020, some of Westfield's employees were transferred to ABP under the provisions of TUPE. All the claims made by the five claimants arise from the fact that they were **not** transferred to ABP.

3. The third respondent, Scanmech Plant (Sales and Service) Limited was added as a respondent because of the possibility that some or all of the claimants should have been transferred to it under the provisions of TUPE.

4. The claimants all presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996 and regulation 7 of TUPE).

    2.2. Wrongful dismissal (failure to pay notice pay contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994).

    2.3. Failure to pay accrued holiday pay on termination contrary to regulation 14(2) of the Working Time Regulations 1998 ("WTR").

    2.4. Failure to pay a statutory redundancy payment on termination of employment (contrary to section 135 of the Employment Rights Act 1996 ("ERA").

3. The claims were case managed by Employment Judge Buckley on 9 June 2021 and she produced a case management order ("CMO") dated 10 June 2021 that identified the claims made by the claimants (as set out above) and the issues that the final hearing would have to determine (questions that I have had to find the answers to), as set out below.

4. The final hearing was listed for 5 days to commence on 15 December 2021 before me. I heard the evidence of all the claimants on 13, 14 and 15 December 2021. I then heard the evidence of Wayne Chapman, who had been Accounts Manager at Westfield, but who was now Office Manager of Scanmech, which he described as "the parent company of Westfield." Mr White, who was representing himself and the other four claimants, had no questions for Mr Chapman, but Mr Smith, for the second respondent, did have some questions. Mr Smith started his questions with a few general questions about Scanmech that quickly started to produce answers

that made me consider whether the claimants had a potential claim against it arising out of a TUPE transfer from Westfield.

5. I paused Mr Smith's cross-examination and expressed my concern that Mr Chapman's oral evidence could be interpreted as revealing a potential claim against Scanmech. I discussed the position with the three representatives; Mr White, Mr Butler, and Mr Smith, to canvass their views.

6. There was no disagreement when I suggested that I had seen no mention of the oral evidence that Mr Chapman had given in any witness statement or any document in the bundle. [Note – I mistakenly omitted the word "no" from my CMO dated 15 December 2021 that dealt with this issue.]

7. All three representatives seemed to be surprised by Mr Chapman's evidence. I indicated that I could see four options open to me:

    7.1. Grant an application by the claimants to add Scanmech as a third respondent;

    7.2. Refuse such an application;

    7.3. Add Scanmech as a respondent myself under the authority granted to me by Rule 34;

    7.4. Make no order adding Scanmech and carry on with the hearing.

8. I set out the options to the parties and granted Mr Butler's request for time for the parties to give instructions to their representatives on what course of action they would seek. I informed the parties that my primary consideration was to deal with the case justly and fairly and that my instinct was to add Scanmech and adjourn the hearing. My reasoning was that the possibility existed that the claimants' claims could fail against the first and second respondents, and could potentially leave them without a remedy for unlawful acts, depending on my findings of fact.

9. After the break, Mr Butler indicated that he still regarded the involvement of Scanmech as incidental and irrelevant to the matters to be determined, but if the claimants sought to add Scanmech, or if I decided to exercise my discretion to add Scanmech, then the first respondent would not actively object.

10. Mr Smith repeated what he had said earlier: justice and equity and the case law on TUPE cases required Scanmech to be joined.

11. Mr White confirmed that he had spoken to the other claimants and that they had decided to seek the addition of Scanmech.

12. I decided to complete the evidence of Mr Chapman, which would include allowing Mr Smith to finish his cross-examination; give Mr White another opportunity to cross-examine the witness; and offering Mr Butler the opportunity to re-examine Mr Chapman. Mr Bemrose and the claimants would have the opportunity to file an additional witness statement that dealt with the Scanmech question. After I had

heard Mr Chapman's evidence and decided to adjourn the final hearing, I converted the hearing into a preliminary hearing ("PPH").

13. I did not want to waste the evidence that had been taken from the claimants and Mr Chapman, and by consent, I decided that all the evidence I had heard would be preserved. I made that decision in furtherance of the overriding objective and the requirement to deal with matters flexibly and to save time and cost. I made case management orders that would give the claimants the opportunity to give further evidence on the Scanmech question.

14. My CMOs included:

    14.1. A requirement for the third respondent, Scanmech, to file ET3s;

    14.2. Leave for the claimants to submit additional witness statements to deal with the matters raised in cross examination by Mr Chapman about Scanmech; and

    14.3. Leave for the second respondent to produce an additional witness statement from Darren Bemrose, who was a director of both Westfield and Scanmech at 31 December 2020.

Issues

15. The CMO of EJ Buckley dated 9 June 2021 set out the following issues:

    1. ***TUPE***

    1.1. Was there a service provision transfer or other relevant transfer of the business or part of the business from the first respondent to the second respondent?

    1.2. Did the claimant fall within paragraph 4(3) of TUPE such that his employment transferred from the first respondent to the second respondent?

    2. ***Unfair dismissal***

    2.1. Was the reason or principal reason for the claimant's dismissal the transfer or a reason connected with transfer that is not an ETO reason entailing changes in the workforce? If so, the dismissal is automatically unfair.

    2.2. If not, what was the principal reason for the claimant's dismissal? The first respondent says that the reason is redundancy.

    2.3. If the reason was redundancy, did the first respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

2.3.1. The respondent adequately warned and consulted the claimant;

2.3.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.3.3. The respondent took reasonable steps to find the claimant suitable alternative employment; and

2.3.4. Dismissal was within the range of reasonable responses.

3. ***Remedy for unfair dismissal***

3.1. If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1. What financial losses has the dismissal caused the claimant?

3.1.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.1.3. If not, for what period of loss should the claimant be compensated?

3.1.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.1.5. If so, should the claimant's compensation be reduced? By how much?

3.1.6. Does the statutory cap of fifty-two weeks' pay apply?

3.2. What basic award is payable to the claimant, if any?

4. ***Wrongful dismissal/Notice pay***

4.1. What was the claimant's notice period?

4.2. Was the claimant paid for that notice period?

5. ***Holiday Pay***

5.1. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

6. ***Claim for a redundancy payment***

6.1. Was the claimant dismissed by reason of redundancy?

16. Whilst the list above was expressed in terms of a singular claimant, it was obvious that all the issues listed applied to all the claimants' claims.

17. I made an order in my CMO dated 15 December 2021 for the parties to agree a revised list of issues before the recommencement of the final hearing. That was not done, so I addressed the point as a preliminary matter on 9 May. It was agreed that the addition of Scanmech could be accommodated into the existing list of issues by the addition of the words "or third respondent" at the end of issues 1.1 and 1.2.

18. In making that decision, I was mindful of the thread of jurisprudence on the question of amending CMOs, the most recent example of which was the EAT decision in **Liverpool Heart and Chest Hospital NHS Foundation Trust v Poullis** [2022] EAT 9. I considered that the addition of a third respondent had been a material change in circumstances that warranted a departure for the list of issues ordered by EJ Buckley.

<u>Law</u>

19. For the purposes of the unfair dismissal claim, the relevant section of the Employment Rights Act 1996 is section 98.

"Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

20. Section 98 of the ERA is augmented by regulation 7 of TUPE, which states:

"*Dismissal of employee because of relevant transfer*

7.—(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

(a) paragraph (1) shall not apply;

(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

(5) …

(6) Paragraph (1) shall not apply in relation to a dismissal of an employee if the application of section 94 of the 1996 Act to the dismissal of the employee is excluded by or under any provision of the 1996 Act, the 1996 Tribunals Act or the 1992 Act.

21. Regulation 2 of TUPE relevantly defines a 'relevant transfer' as a 'transfer…to which these Regulations apply in accordance with regulation 3'.
22. Regulation 3 states:

"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.

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

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

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

(a) immediately before the service provision change—

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

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

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

23. Regulation 4 makes provision for the effect of a relevant transfer on contracts of employment. Relevantly it reads:

"(1) ...a relevant transfer shall not operate so as to terminate the contract of employment employed by the transferor and assigned to the organised grouping of ... 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.

(2) Without prejudice to paragraph (1)... on the completion of a relevant transfer-

(a) All the transferor's ... liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) Any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contact or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee."

24. For there to be a transfer within regulation 3(1)(b), the client must remain the same before and after the service provision change.

25. There may be more than one client, provided that the grouping of clients are able to form a common intention: **Duncan v. Ottimo Property Services Ltd** [2005] IRLR 806.

26. In **Rynda (UK) Ltd v. Rhijnsburger** [2015] EWCA Civ 75, [2015] IRLR 394, Lord Justice Jackson, giving the principal judgment in the Court of Appeal, laid down a four-stage test for determining whether there was an organised grouping of employees:

"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."

27. In **Amaryllis Ltd v McLeod** UKEAT/0273/15*,* the EAT emphasised that the principal purpose of any organised grouping of workers must be assessed at the point immediately before the change of provider, and not historically.

28. The tribunal should not confuse the issue of whether there is an organised grouping with the question of who is assigned to that grouping. A paradigm example of an organised grouping is an identified client "team". The fact that certain individuals happen to do most of their work for a particular client does not mean that there was an organised grouping of employees: **Eddie Stobart Ltd v Moreman** [2012] IRLR 356*.* There needs to be an element of conscious organisation: **Ceva Freight (UK) Ltd v. Seawell Ltd** [2013] IRLR 726.

29. In **Argyll Coastal Services Ltd v Stirling** UKEATS/0012/11, Lady Smith observed 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 and who work together as a team".

30. **Metropolitan Resources Ltd Churchill Dulwich Ltd** [2009] IRLR 700 EAT and **Hunter v McCarrick** [2013] IRLR 26 CA should be considered. Together they explain the nature and purpose of the service provision changes and their relationship with the European Union legal concept of a transfer of undertaking under regulation 3(1)(a).

31. The starting point in defining the scope as service provision change is a natural meaning of the language used by the draftsman in the TUPE. In **Hunter**, Elias LJ said at paragraph 22:

    *"[22] I do not dispute that there may be issues where a purposive interpretation is appropriate with respect to service transfer provisions and where the courts should approach matters as they would similar issues relating to transfers of undertakings. For example, it may be necessary not to be too pedantic with respect to the question whether the activities carried on before and after the transfer are sufficiently similar to amount to the same service; or to take a broad approach to the question whether an employee is employed in the service transferred: see **Kimberley Group Housing Ltd v Hambley and others; Angel Services (UK) Ltd v Hambley and others** [2008] IRLR 682 EAT. But I agree with His Honour Judge Burke QC [in **Metropolitan Resources Ltd Churchill Dulwich Ltd** [2009] IRLR 700 EAT] that there is no room for a purposive construction with respect to the scope of regulation 3(1)(b) itself. So far as that is concerned, there is in my view no conflict between a straightforward construction and a purposive one: the natural construction gives effect to the draftsman's purpose. There are no underlying EU provisions against which the statute has to be measured. The*

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

32. In **Hunter** at paragraph 37, the Court of Appeal held the language of regulation 3(1)(b) was only consistent with the situation where there is the same client throughout and that the focus in any given case was on the client's intention. This is an essential scoping feature of the legislation. Similarly, when focussing on short-term, the focus is on the client's intention – **SNR Denton UK LLP v Kirwan & Or** [2012] IRLR 966 EAT.

33. **CT Plus (Yorkshire) CIC v Black** UKEAT/0035/16 EAT supports the proposition that service provision changes must be applied in a common-sense and pragmatic way and to fall within regulation 3(1)(b) the services must be carried out "on the client's behalf"

34. The word, "assigned" in regulation 4 is derived from the decision of the European Court of Justice (as it was then called) in **Botzen v Rotterdamsche Droogdok Maatschappij BV** 186/83 [1985] ECR 519:

    "the ... decisive criterion regarding the transfer of employees' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organizational framework within which their employment relationship took effect... An employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred...by reason of a transfer ... it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned."

35. Employment tribunals should bear in mind the protective purpose of the directive and the need to avoid complicated corporate structures getting in the way of the result which gives effect to that purpose: **Duncan Webb Offset (Maidstone) Ltd v. Cooper** [1995] IRLR 633.

36. In **Edinburgh Home-Link Partnership v The City of Edinburgh Council** UKEATS/0061/11, Lady Smith commented:

    "Regarding the Reg 4 issue of assignment, the question has to be asked in respect of each individual employee. It is not to be assumed that every employee carrying out work for the relevant client is assigned to the organised grouping....if, for instance, an employee's role is strategic, and is principally directed to the survival and maintenance of the transferor as an entity, it may then not be established that the employee was so assigned."

37. An employee, such as a senior manager, may spend a large proportion of their time working on the activities which are done by the organised grouping that transfers. But that does not mean that the employee is necessarily assigned. If the manager's purpose is to be responsible for running a branch, or for overall project management (including projects that do not transfer), it is open to a tribunal to find that the manager is not assigned to the grouping that transfers: **Williams v Advanced Cleaning Services & others** UKEAT 838/04.

38. **Süzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice** (C13/95) [1997] ICR 662 ECJ is authority for the proposition that the mere loss of a contract is not enough usually to be a business transfer for the purposes of what is Regulation 3(1)(a).

39. **Cheesman v R Brewer Contracts Ltd** [2001] IRLR 144 EAT sets out at paragraphs 10 and 11 multiple factors in relation to entity and transfer that a tribunal must consider when deciding whether or not there has been a transfer within regulation 3(1)(a).

40. **Spijkers v Gebroeders Benedik Abattoir CV** (24/85) [1986] 2 CMLR 296, the ECJ emphasised that a similarity of activities before and after an interruption are relevant factors to take into account to decide if there were a relevant transfer.

Housekeeping

41. The parties produced a joint bundle of 953 pages for the hearing in December 2021 and a further supplementary bundle of 426 pages that were numbered sequentially to the original bundle for the second hearing, making a combined bundle of 1379 pages. If I refer to any document in the bundle, I will usually set out its page number(s) in the bundle in square brackets (e.g. [356])

42. During the second part of the final hearing Westfield and Scanmech produced four invoices with the consent of the other parties:

    42.1. A sales invoice for a Volvo machine dated 1 July 2020 [1380];

    42.2. An invoice dated 16 December 2019 from Ritchie Bros. Auctioneers to Westfield for commission on the sale of an unidentified item of plant [1381-1382];

    42.3. An invoice dated 30 January 2021 from Euro Auctions (UK) Ltd. Leeds to Westfield from commission on the sale of a Hyundai machine [1383]; and

    42.4. An owner's detail report printed on 16 July 2021 noting the sale of equipment owner by Scanmech [1384].

43. On the final day of the hearing, in response to a line of questioning of Mr Curnow of ABP by Mr Butler on the penultimate day, the second respondent produced two documents that were admitted to the bundle by consent:

    43.1. Three undated Customer Support Agreements between Services Machinery & Trucks Ltd ("SMT") and ABP [1385-1387]; and

    43.2. Three Customer Support Agreements between Services Machinery & Trucks Ltd ("SMT") and ABP dated 22 December 2020 [1388-1393].

44. I read witness statements and heard live oral evidence from (in the order that I heard their evidence):

44.1. David White, who is the first claimant and who represented all the claimants. His witness statement dated 28 March 2021 consisted of 22 paragraphs. He did not produce a new witness statement for the second part of the hearing.

44.2. Daniel Hickson, who is the fourth claimant. His witness statement dated 11 April 2021 consisted of 19 paragraphs. He did not produce a new witness statement for the second part of the hearing.

44.3. Owen Brammer, who is the fifth claimant. His witness statement dated 1 April 2021 consisted of 13 paragraphs. He did not produce a new witness statement for the second part of the hearing.

44.4. Darren Harper, who is the second claimant. His witness statement dated 1 April 2021 consisted of 14 paragraphs. He did not produce a new witness statement for the second part of the hearing.

44.5. John Farley, who is the third claimant. His witness statement dated 1 April 2021 consisted of 14 paragraphs. He did not produce a new witness statement for the second part of the hearing.

44.6. Wayne Chapman, who was Accounts Manager at Westfield before taking the position of Office Manager of Scanmech. His undated witness statement consisted of 30 paragraphs.

44.7. Darren Bemrose, who was Managing Director of Westfield at all material times and is a Director of Scanmech and another company that was peripherally mentioned in this case, KG5 Consultancy Limited. His first witness statement that was produced for the original hearing was undated and consisted of 66 paragraps. His second statement that was produced for the second part of the hearing was also undated and consisted of 38 paragraphs.

44.8. Ashley Curnow, who has been Head of Operations of ABP's Humber International Terminal ("HIT") since 2019. His first witness statement was produced for the original hearing, was undated and consisted of 41 paragraphs. His supplementary statement was also undated, but was produced in response to receipt of the statement of Mr Chapman and the first statement of Mr Bemrose.

49. All the witnesses gave evidence on affirmation. Their witness statements were taken as read. Their representatives were allowed to ask a few relevant supplementary questions before they were cross-examined by the representatives of the other parties. I asked some questions of some of the witnesses during and at the end of their evidence. All the representatives were given the opportunity to ask re-examination questions of their witnesses in order to seek more details of answers given to cross-examination questions.

50. At the end of the evidence, I received oral submissions from Mr Smith, who had supplied copies of seven precedent cases to the other representatives and the Tribunal. I decided that Mr Smith should go first because his witness, Mr Curnow, had gone last and the claimants and ABP had never articulated the exact nature of their respective cases against Scanmech, even though the thrust of Mr Smith's argument was possible to anticipate from the circumstances of the case and the questions he asked in cross examination of Mr Bemrose.

51. Mr Butler relied on a detailed opening note that he had produced on the first day of the hearing in December 2021, which he spoke to and to which he added comments about the submissions made by Mr Smith. Mr White produced written closing submissions that he spoke to. I had indicated on 11 May that I would be reserving my decision and limiting it to the question of liability only. I did not think it was possible to consider nearly 1400 pages of documents, nearly 300 pages of notes, ten witness statements from eight witnesses and a complex factual matrix involving three respondents and five claimants, all of whom had different circumstances relating to the job they did and other factors relevant to their employment and produce a cogent Judgment and Reasons in the time available to me. I apologise to all the parties for the length of time it has taken me to produce this Judgment and Reasons.

52. The hearing was conducted by video on the CVP application and ran fairly smoothly, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of the occasional technical glitches. I should also express my gratitude for the hard work put in by Mr White, Mr Butler and Mr Smith to assist me in my task. Messrs Butler and Smith treated Mr White with the respect he deserved and were at pains to try and ensure that he was able to participate fully in the hearing. None of the parties' representatives complained that they had not had a fair hearing.

Findings of Fact

53. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. No application was made by any side to adjourn this hearing in order to complete disclosure or obtain more documents, so I have dealt with the case on the basis of the documents and evidence produced to the Tribunal. I make the following findings.

Agreed and/or Undisputed Facts

54. Some facts were never disputed, challenged or disputed. As such, it is straightforward to record such facts as follows:

    54.1. David White commenced employment with Westfield on 12 August 2013 [contract 283-289]. His contract [283-289] appears to have been

written sometime after May 2018, as it records changes made on 25 May and 9 July 2018 [289]. His job is described as "Multi Skilled Operative/Mobile Plant, Hydraulic Hose Engineer" [283]. His effective date of termination of employment was 31 December 2020.

54.2. Darren Harper commenced employment with Westfield on 1 March 2003 [contract 276-282]. His contract appears to have been written sometime after May 2018, as it records changes made on 25 May and 9 July 2018 [282]. His job is described as "Engineering Manager" [276]. His effective date of termination of employment was 31 December 2020.

54.3. John Farley commenced employment with Westfield on 30 November 2016 [contract 290-296]. His contract appears to have been written sometime after May 2018, as it records changes made on 25 May and 9 July 2018 [296]. His job is described as "Multi Skilled Operative (MSO)" [290]. His effective date of termination of employment ("EDT") was 31 December 2020. Mr Farley was furloughed under the Government's Coronavirus Job Protection Scheme ("CJPS") from March 2020 until his employment ended.

54.4. Daniel Hickson commenced employment with Westfield on 30 November 2015 [contract 304-310]. His contract appears to have been written sometime after May 2018, as it records changes made on 25 May and 9 July 2018 [310]. His job is described as "Multi Skilled Operative (MSO)" [304]. It was also agreed that his effective date of termination of employment was 31 December 2020.

54.5. Owen Brammer commenced employment with Westfield on 7 September 2010 [contract 297-303]. His contract appears to have been written sometime after May 2018, as it records changes made on 25 May and 9 July 2018 [303]. His job is described as "Multi Skilled Operative (MSO)" [297]. It was also agreed that his effective date of termination of employment was 31 December 2020.

54.6. All the claimants began early conciliation with ACAS on 5 January 2021 and obtained an early conciliation certificate on 16 February 2021. Their joint ET1 was presented to the Tribunal on 28 February 2021.

54.7. It was never disputed that the main location of activity that concerns the claimants' claims was the Port of Immingham and, in particular, the HIT (Humber International Terminal) at the Port of Immingham, both of which were operated by ABP. There were some mentions of other works undertaken by Westfield at other places, but I found these to be peripheral to the issues in the case: the evidence was of so little activity taking place away from Immingham that it was irrelevant.

54.8. The actual terms of the agreements between Westfield and ABP (what the documents said), as discussed below, were never in dispute, even

if the scope of the agreement was. Neither was it in dispute that the services provided to ABP by Westfield evolved over time and that the documents provided by the parties did not accurately reflect the services that were covered by them. That made my task more difficult.

54.9. It was agreed that ABP gave Westfield notice to end the agreement between them for trimming services “as well as any other service provided by Westfield at the Port” by letter dated 1 October 2020 to be effective on 31 December 2020 [356-358]. There was an acceptance by all parties that the letter brought all work undertaken by Westfield for ABP to an end. I was not required to make any decision as to whether the agreement was lawfully ended. This case proceeded on the basis that whatever work Westfield did for ABP ended on 31 December 2020. The relevant question was whether such work included that done by the claimants to an extent that brought them within the protection of TUPE.

54.10. By a letter of the same date [359-361], ABP notified Westfield that it would be taking the trimming services in house and that TUPE may apply as a service provision change.

54.11. Westfield was asked a number of questions about staff who would potentially transfer to ABP under any TUPE transfer. Westfield responded through its solicitor.

54.12. As at 31 December 2020, Westfield had 17 employees, including Mr Bemrose and Mr Chapman. 10 of Westfield’s staff TUPE’d to ABP, whilst the 5 claimants in this case and Messrs Bemrose and Chapman did not. It was agreed that whilst Messrs Bemrose and Chapman remained employed by Westfield, at least for a short time, the employments of the 5 claimants ceased on 31 December 2020.

54.13. There were frequent mentions of the principle of demurage in the case, which is a charge payable to the owner of a chartered ship on failure to load or discharge the ship within the timescale agreed. The relevance in this case was the need for Westfield to have its plant, machinery and operators available 24 hours per day on all but 3 days of the year to facilitate ABP’s contractual obligation to discharge ships’ cargoes on time and thereby avoid a demurage charge to ABP.

Findings on Disputed Facts

What was the relationship between Westfield and ABP?

55. I am aware that the critical period of this case is the time immediately before the purported transfer of employees. However, there was a considerable difference between the evidence of the claimants, Westfield, ABP and Scanmech about what Westfield did for ABP, so I find it relevant to look at the position before ABP served notice on Westfield to terminate their business relationship.

56. It was not disputed that ABP entered into a contract with Westfield dated 13 July 2006 that was titled "Plant Services Contract" [179-181]. I find the relevant terms of the contract included:

    56.1. The details of ABP's Humber International Terminal ("HIT") only [179];

    56.2. The general scope of the contract was stated to be for the "provision of Plant services for bulk cargoes…" [179];

    56.3. The Plant services were to include the provision of "all appropriate plant, labour and fuel to carry out mechanical trimming of bulk cargoes, assisting Stevedore (sic) in slinging of mechanical equipment, and keeping all working areas free from spillage." [179];

    56.4. Plant services were to be available on a continuous period, 24 hours per day, 7 days per week, every day of the year except 25 and 26 December and 1 January. [179]; and

    56.5. The contract set out various rates for the various work that was covered by the contract.

57. It was agreed evidence in the hearing that the mechanical trimming of bulk cargoes involved Westfield staff using ABP cranes to lower machines known as excavators into the holds of bulk cargo vessels. The excavators were used to move product out the areas of the hold that the bulk loading systems could not access.

58. Mr Curnow gave unchallenged evidence that the HIT employed over 100 people and is the largest biomass handling facility in the world. I was advised that biomass largely replaced coal at Immingham and that the movement of coal almost came to a complete halt. It was also Mr Curnow's unchallenged evidence that the HIT site comprises of 40 hectares of storage area for bulk cargo.

59. It was not disputed that disputed that ABP entered into a further contract with Westfield dated 22 July 2007 that was titled "Stockyard Bulldozer Plant Services Contract" [182-185]. I find the relevant terms of the contract included:

    59.1. The details of ABP's Humber International Terminal ("HIT") only [182];

    59.2. The general scope of the contract was stated to be for the "provision of Bulldozer Plant Services in the Terminal stockyards for the handling of bulk cargoes…" [182];

    59.3. The Bulldozer Plant Services were to include the provision of "all appropriate plant, labour, fuel and maintenance." [182];

    59.4. Bulldozer Plant Services were to be available on a continuous period, 24 hours per day, 7 days per week. [182]; and

59.5. The contract set out various rates for the various work that was covered by the contract.

60. It was agreed evidence in the hearing that the bulldozer plant services involved Westfield staff using a Westfield bulldozer to move coal around the port. A backhoe loader was used to clear spilled product (mostly coal) from the dockside as part of the bulldozer contract. Westfield also cleared roadways of spilled coal products.

61. On 9 February 2012 ABP set out in a letter to Westfield [186-190] the terms on which the provision of Bulldozer Plant Services would be provided. There was a further revision by a letter dated 27 April 2015 [191-192]. It was the unchallenged evidence of Mr Bemrose that Swallow Stevedores were appointed as Principal HIT provider in 2014 or 2015 and that Westfield provided services direct to that company, rather than to ABP. That arrangement ended in 2018 and Westfield went back to providing services direct to ABP.

62. There was a lot of vague and contradictory evidence about precisely what services Westfield provided to ABP and where they were provided. I find that the claimants' evidence in chief was almost exclusively concerned with what they did as individuals. That is not a criticism of them. I find that Mr Curnow's evidence was only reliable in relation to the part of the Port of Immingham that he manages: the HIT. He did not seem to know a lot about other parts of the port or other ports in the local area operated by ABP.

63. Mr Bemrose was the witness who ought to have been able to give the most comprehensive picture of what Westfield did for ABS. His evidence in chief was, by far, the longest of the eight witnesses. Mr Curnow filed a witness statement in response to those from Messrs Bemrose and Chapman, but it consisted of an attempt at a retrospective analysis of the documents, rather than a first-hand account of the services provided by Westfield to ABP. I have found it very difficult to work out exactly what Westfield did, when it did it, who did what and what contract or agreement regulated the work done. However, I make the following findings.

64. I find that the documents evidencing agreements between Westfield and ABP do not completely set out the work that Westfield did for ABP or, with particular reference to this case, the work that the claimant's did for ABP. I make that finding because the evidence of all the claimants and of Mr Bemrose, Mr Chapman and Mr Curnow made reference to works that were undertaken for ABP that were not mentioned in any of the contractual documents. The most obvious example of this was the hydraulics work undertaken by Mr White and Mr Hickson and (to a much smaller degree) Mr Harper.

65. I find that it was shown on the balance of probabilities that work done by Westfield employees to maintain and repair the plant and machinery provided to ABP under the contracts referred to above must have been part of the agreement between ABP and Westfield. I make that finding because of the requirement for the plant and machinery to be available and operational on nearly every day and during all hours

of the year. The evidence clearly showed that there were large financial incentives for ABP to process cargos from ships docking at Immingham as quickly and efficiently as possible and there were demurage penalties if the plant and machinery were not available when they were needed. The contractual document for the bulldozer included specific reference to "maintenance".

66. However, I also find that the services provided by Westfield to ABP changed over time and were impacted by the work done by the five claimants in this case on things other than maintenance for the work undertaken by Westfield for ABP at 31 December 2020.

What sort of transfers does this case concern?

67. It was agreed that if there was a transfer between Westfield and ABP, then that was a service provision change under Regulation 3(1)(b). It was agreed that if there was a transfer between Westfield and Scanmech, then that was a straightforward business transfer under Regulation 3(1)(a).

Was there an organised grouping of employees at the date of the transfer contended for?

68. I find that the maintenance function of Westfield was an organised grouping with the principal function of servicing the needs of ABP under the various agreements in place at some times during the employment of the claimants, but that the principal purpose of the grouping evolved as time passed. I make that finding because the evidence of all the witnesses painted a picture of Westfield attempting to diversify and broaden its customer base over time. At the start of the relationship with ABP, the maintenance element of Westfield's business had as its principle purpose, the carrying on of activities concerned on behalf of ABP. I make that finding because I find the maintenance of the plant and machinery to be integral to the provision of the plant and machinery under the contracts.

69. However, at the date of the transfer of the plant operatives to ABP (31 December 2020) there were a number of facts that led me to conclude that immediately before the service provision change to ABP, the operatives were an organised grouping and transferred, but the claimants were not an organised grouping because I find that they did not have the principal purpose of carrying out activities for ABP at the relevant date.

70. There are two slightly different tests of whether a service provision change took place. The earlier is in **Enterprise Management Services Ltd v Connect-Up Ltd** [2012] IRLR 190, (per HHJ Peter Clark at ¶8):

    70.1. the *"first task"* is to *"identify the relevant activities"* performed by the putative transferor;

70.2. the *"next (critical) question"* is whether those activities *"are fundamentally or essentially the same"* as those carried out by the putative transferee;

70.3. then decide whether, before the transfer, there was *"an organised grouping of employees"* which had *"as its principal purpose"* the carrying out of the activities on behalf of the client;

70.4. then decide whether the exceptions in Reg. 3(3)(a)(ii) and 3(3)(b) apply (not relevant on the facts of this case);

70.5. then, *"finally"*, decide whether each individual claimant is assigned to the organised grouping of employees.

71. The Court of Appeal in **Rynda (UK) Ltd v Rhijnsburger** [2015] ICR 1300 summarised the issues as being (per Jackson LJ at ¶44):

71.1. the *"first stage"* is to *"identify the service"* which the putative transferor was providing to the client;

71.2. the *"next step"* is to *"list the activities"* which employees of the putative transferor *"performed in order to provide that service"*;

71.3. the *"third step"* is to identify the employees of the putative transferor who *"ordinarily carried out those activities"*;

71.4. the *"fourth step"* is to consider whether the putative transferor *"organised that employee or those employees into a 'grouping' for the principal purpose of carrying out the listed activities"*.

72. I find that the differences between the two iterations of the test to be applied are largely semantic, but will address both. I find that the relevant activities pursued by Westfield were:

72.1. The provision of plant, machinery and operatives to ABP as described above;

72.2. The necessary ancillary maintenance and repair of the plant and machinery to ABP in respect of the plant and machinery provided; and

72.3. The provision of plant, machinery, operatives and engineering maintenance and repair services to other customers.

Identify the Service and/or Relevant Activities

73. As at 31 December 2020, I find that the relevant activities or service provided by Westfield for ABP at HIT were:

73.1. The mechanical trimming of bulk cargoes and the maintenance of the plant required to undertake the task;

73.2. Bulldozer services to move coal around the HIT. The service also included the provision of a tractor and backhoe loader;

73.3. The provision of approximately 10 front end loaders to load cargo into lorries for onward distribution; and

73.4. The servicing and maintenance of the plant and machinery provided for the above (including the provision of hydraulics services).

74. I make the following findings about the services/relevant activities:

74.1. I find that there was a very substantial reduction in the amount of coal coming into Immingham/HIT in the late 2010's. The evidence of all the witnesses who spoke on the subject was agreed on the point. I find that the requirement for backhoe loaders and bulldozers to deal with coal had substantially diminished;

74.2. I find that the substantial reduction in the amount of coal landed at Immingham caused a commensurate reduction in the need for coal to be moved around to avoid hotspots developing. That development largely removed the participation of Mr Brammer in the provision of services to ABP;

74.3. I find that there was never any requirement for specialist cleaning of the excavators that were used on cargoes that produced large amounts of dust, such as wood pellets. I find that the "specialist" cleaning undertaken by Mr Farley was not specialist. It was undertaken at the choice of Westfield. I found that the evidence showed that when Mr Farley was absent due to being furloughed, no one did the specialist cleaning that he says he did, which leads to my finding that it was not integral to the services provided;

74.4. I find that Mr White had largely moved into the provision of hydraulic services at 31 December 2020 and his role contributed much less to the provision of services to ABP than it had previously done. I make that finding on an analysis of his cross-examination evidence and my finding that Mr Bemrose's evidence was not credible to the required standard. Mr White accepted that Westfield had grown its customer base for hydraulics beyond ABP;

74.5. I find that Mr Hickson had also moved into the provision of hydraulic services at 31 December 2020 and his role had also contributed much less to the provision of services to ABP than it had previously done. I make that finding on an analysis of his cross-examination evidence and my finding that Mr Bemrose's evidence was not credible to the required

standard. Mr Hickson accepted that Westfield had grown its customer base for hydraulics beyond ABP;

74.6. I find that ABP had recruited a number of Westfield's staff as 31 December 2020 that had the effect of further reducing the proportion of Westfield's work that was undertaken for ABP. I make that finding as it was agreed evidence; and

74.7. I find that the work done by the five claimants was not principally for the ABP agreement.

Who carried out the activities?

75. I find that the activities were carried out by the 10 employees who TUPE'd to ABP and that the claimants carried out some of the maintenance and service activities.

Were the activities/services provided by Westfield fundamentally or essentially the same as those carried out by ABP and/or Scanmech?

76. I find that the activities undertaken by Westfield for ABP were fundamentally and essentially the same as those carried out by ABP. In making that finding, I have taken a relatively 'holistic' approach following the guidance in **Salvation Army Trustee Co v Bahi** UKEAT/0120/16/RN (01.09.16, unreported), per HHJ David Richardson at ¶10). In essence, ABP took in house the provision of plant, machinery and operatives to assist it manage the transport of freight at Immingham Dock, particularly the HIT.

77. I find that the fact that ABP contracted some of its maintenance out to third parties (partly because it purchased some new machines that carried manufacturers' warranties) does not mean that the work done after the transfer was materially different to the work done before.

78. All the five claimants did different tasks for Westfield that meant that they cannot be assessed as one and the same in relation to the work each undertook for ABP under the contracts. They should be assessed independently of one another, as each has a separate claim, but the question of TUPE transfer has to be assessed as an organised grouping.

79. I should preface my findings with a finding about all of the claimants: I found them all to be truthful, but the detail in their evidence was not what I would have hoped to see. They are lay people without representation, so cannot be expected to be able to grasp the technicalities of TUPE cases. I find that they did their best.

David White

80. Mr White's statement was very light on the detail of what work he did at the important date: 31 December 2020. In paragraph 2 of his statement, he stated:

> *"I worked for them as a 'Multi Skilled Operator' (See page 283) but was primarily involved in the maintenance and repair of plant and machinery. My work also involved fixing other customers machines including ABPs as well. A few years ago, the cost of outsourcing the hydraulic work was soaring so hydraulic hose making equipment was purchased and I trained up making hydraulic hoses. One thing led to another, and I soon grew a large customer base on the Docks with many customers including A.B.P, Origin Fertiliser, Ward Recycling and many others."*

81. I find that Mr White's contract described him as a 'Multi Skilled Operative / Mobile Plant, Hydraulic Hose Engineer' [283]. I found his description of his work in his witness statement did not match the other evidence or his oral evidence. As noted above, he described his work as was "primarily involved in the maintenance and repair of plant and machinery" and added that he was "trained up making hydraulic hoses". I find that by the time of the transfer, this description overplayed his role in the maintenance and repair of plant and machinery and underplayed his role in what I find had become a growing part of Westfield's business: the hydraulic hose business. I find that at the date of the transfer, Mr White was primarily engaged in the hydraulic hose part of Westfield's business and did some repair and maintenance on the machines used in the contract with ABP. No witness suggested that Mr White's role as an occasional operator made him part of the cohort that were TUPE'd to ABP.

82. I find that Westfield had grown the hydraulic hose business to such an extent that it had had to train Mr Hickson to augment its capacity to meet demand. It is indisputable that some of the work that Mr White did with hydraulic hoses was for ABP, but I do not find it was shown on the balance of probabilities that most of his time was sent on ABP business.

83. I did not find Mr Bemrose to be an entirely credible witness. It is incredibly rare to find any witness to be entirely credible or entirely incredible. Some of what Mr Bemrose said was credible in that it contained sufficient detail, was internally consistent, was externally consistent with the documents and other witness evidence and was plausible. However, on the subject of the TUPE transfers and the Scanmech issue, I found the detail to be insufficient (or non-existent in some instances), inconsistent and implausible.

84. Mr Bemrose did his credibility considerable damage by the way that the whole Scanmech issue was handled in this litigation. Mr Butler persisted with the line that Scanmech was a 'sideshow' that Mr Smith had seized upon to muddy the waters of fact in this case, which was really about Westfield and ABP. Despite my findings on the issues in this case, which finds no liability attaches to Scanmech, I find that Mr Bemrose was less than totally frank about the events concerning the three respondents and the transactional relationships between them. I find that it would and should have been possible for Westfield to produce a written analysis of what work each of the claimants did for ABP, Scanmech by reference to documents that are available (some of which were provided), such as work sheets, invoices, time

records etc. Instead, I was presented with vague and incomplete evidence that was bolstered by the piecemeal nature of the disclosure of documents.

85. I find Mr Bemrose's evidence about what work Mr White did was less than credible. It was clearly in the interests of Westfield and Scanmech for me to find that the claimant's transferred to ABP. I found Mr Bemrose's evidence to be self-serving, by which I mean that the purpose of the evidence was to argue or bolster the legal position taken by Westfield and Scanmech and reduce or mitigate the liability for which Westfield and Scanmech could be liable. I make that finding because Mr Bemrose was economical with the facts concerning the TUPE transfer between Westfield and ABP and the involvement of Scanmech.

86. I also find that the Principal Roles document prepared by Westfield [402-426] was inconsistent with the evidence of Mr White and Mr Bemrose [details].

Daniel Hickson

87. Mr Hickson's statement was also light on detail as to what work he undertook for which customers of Westfield:

> *"I worked for [Westfield] as a 'Multi Skilled Operator' (See page 304) but was primarily involved in the maintenance and repair of plant and machinery. My work also involved fixing other customers machines including ABPs as well. I worked from Westfields workshop on Immingham Docks. I soon trained up as a Hydraulic Engineer making hoses and carrying out hydraulic repairs. This was on both Respondents [Westfield and ABP] machines. We also grew quite a good customer base on and off the Docks where we would attend to customer breakdowns."*

88. I find that Mr Hickson's contract described him as a 'Multi Skilled Operator (MSO)' [304] and described himself in his witness statement (see above) as being "primarily involved in the maintenance and repair of plant and machinery", but had been "trained up as a Hydraulic Engineer, making hoses and carrying out hydraulic repairs".

89. I also find that the Principal Roles document prepared by Westfield [402-426] was inconsistent with the evidence of Mr Hickson and Mr Bemrose. In the part of the document referring to Mr Hickson [415], it stated that he was a "Multi Skilled Operator" and "Engineer". It stated in the column titled "Job Role" that he operated "all machinery" and "prepare[d], clean[ed], check[ed] and sanitize[d] equipmrnt to industry standards". In the column titled "Signpost to ABP Approved Contractor Document T&C's", it stated that Mr Hickson prepared and maintained equipment to GAFTA TASCC & PSS SIP 022 Guidance and standards.

90. In his witness statement, Mr Bemrose said that Mr Hickson was "generally concerned with the service, maintenance and repair of a number of heavy plant and machinery which was owned by [Westfield] and provided to [ABP] (with or without operators) or owned by [ABP] directly in deliverance of the services required. I

repeat my findings on the credibility of Mr Bemrose's evidence that I made above in respect of Mr White's claim.

Darren Harper

91. Mr Harper's description of his work was also brief:

> *"I worked for Westfields as a 'Engineering Manager' (p 276) and was primarily involved in the organization of maintenance and repair of plant and machinery. I was part of the Dozer team for maintenance and breakdown call out. A Major part of my role was machine inspection and organizing repairs, and 24/7/365 callout on the HIT ship machines and dozers. During holiday periods and breakdowns, I also covered our hydraulic engineer."*

92. I also find that the Principal Roles document prepared by Westfield [402-426] was inconsistent with the evidence of Mr Harper and Mr Bemrose. It listed Mr Harper's Job Roles [411] as:

    92.1. Engineering Manager;

    92.2. Multi Skilled Operator;

    92.3. Trainer/Assessor;

    92.4. Hydraulic Hose Engineer;

    92.5. Deputy for Operations Manager;

    92.6. Trained Fire System Technician; and

    92.7. Welder, Plater, Fabricator.

93. His "principal roles to provide the service provision" were listed as 17 different tasks, details of none of which made it into his witness statement.

94. In his witness statement, Mr Bemrose said that Mr Harper was "generally concerned with the service, maintenance and repair of a number of heavy plant and machinery which was owned by [Westfield] and provided to [ABP] (with or without operators) or owned by [ABP] directly in deliverance of the services required". He also said that Mr Harper was "one of three Deputy Managers assigned to the supervise work undertaken by Westfield for ABP in general".

95. Mr Bemrose asserted that Mr Harper conducted "daily or weekly" inspections and checks including "pre-lift inspection, lifting eye inspection photograph taking, recording and emailing both to [ABP]" (shared with David White) and that he, with David White, "operated a rota so that one of them or preferably both were available to ensure Westfield could provide the constant and immediate response required

in the event of any issues with machinery.” I repeat my findings on the credibility of Mr Bemrose’s evidence that I made above in respect of Mr White’s claim.

John Farley

96. In his witness statement, Mr Farley described his work as:

> *“I worked for Westfields as a ‘Multi Skilled Operator’ (see p.290) but was primarily involved in the maintenance and repair of plant and machinery. My work also involved looking after Westfield stores, stocking service kits and parts that regularly failed for all the machines and other customers as well. My other major role was as a specialist cleaner, when machines still overheated with regular cleaning I would strip panels off machines and do a full deep clean, a job I also performed for ABP.”*

97. In his contract, Mr Farley was described as a “Multi Skilled Operator” [290]. Mr Bemrose described Mr Farley’s work as being “generally concerned with the service, maintenance and repair of a number of heavy plant and machinery which was owned by [Westfield] and provided to [ABP] (with or without operators) or owned by [ABP] directly in deliverance of the services required”. Mr Bemrose said that Mr Farley was an “engineer undertaking service, maintenance and repair work” and “also undertaking specialist cleaning of machines”, and that he “would generally clean and prepare machines used in the provision of services for [ABP] as required in the general course of maintenance”.

98. Mr Bemrose further asserted that Mr Farley “undertook particular cleaning jobs at HIT and elsewhere at the Port for [ABP] (directly or via [Westfield]) to handle or move different material such as bio-fuels and animal feed which required the use of particular biological agents” and also undertook “specialised cleaning of loading shovels at [R2]’s bio-fuel terminal in Hull”. I find it difficult to reconcile Mr Farley’s account of his own work with Mr Bemrose’s account of it. I repeat my findings as to Mr Bemrose’s credibility made above.

99. The “Principal Roles” document [416] lists Mr Farley’s role as “Engineer”, “MSO” and “Specialist deep cleaner and sanitizer of wood pellet and animal feed use machines.” The deep cleansing role is the only function listed as being a part of the service provision to which Mr Farley was allocated.

100. Mr Farley’s position is complicated by the fact that he was furloughed from March 2020 and never returned to work for Westfield. It is further complicated by his oral evidence that he worked “a few days” in early 2020 as a relief worker. He also said in oral evidence that he did not clear the machines every day. He worked for ABP at the HIT for “a couple of months in 2019/2020. He said he worked for ABP at Hull in 2020. Whilst it was vague, I found Mr Farley to be a credible witness.

101. However, I find that Mr Farley did not undertake specialist cleaning as part of the work that TUPE’d to ABP and that his work as a stock controller/warehouseman, was greatly exaggerated in evidence.

Owen Brammer

102. In his contract, Mr Brammer was described as a 'Multi Skilled Operator' [297]. His witness statement describes his work as follows: "I worked for Westfields as a 'Multi Skilled Operator' (see p.297) but was the Primary operator of the BL71 backhoe loader at the HIT."

103. Mr Bemrose described Mr Brammer's work as follows: "his role was essentially to operate a machine required for general site cleaning, stockpile fire control and haul road maintenance (needed for compliance with coal stockpiling guidance and emergency service requirements".

104. I find that Mr Brammer operated a machine that was dedicated to the movement of coal and that at 31 December 2020, there was little of that work to do. He was obviously still employed by Westfield, so I find that he was mainly doing work other than that for ABP.

Summary

105. I find that immediately before the transfer, the claimants were not an organised grouping of employees at Westfield which had as its principal purpose the carrying out of the activities on behalf of ABP. The claimants were not a part of the organised grouping of operators and ancillary staff that were transferred under TUPE. They did not form an organised grouping as at the date of contended transfer. I find that the evidence does not show on the balance of probabilities that the claimants were organised in some sense to the requirements of ABP at 31 December 2020, although they may have been in earlier years (per **Rydna**).

106. I was mindful of the decision in **Amaryllis Ltd v McLeod** UKEAT/0273/15, in which the EAT emphasised that the principal purpose of any organised grouping of workers must be assessed at the point immediately before the change of provider, and not historically.

107. I found the argument against the claimant's alleged transfer to ABP as set out in the correspondence from Westfield's solicitors less convincing than the responses from ABP's solicitors. The evidence did not show that the principal purpose of the grouping of claimants taken together (rather than individually, per **Argyll**) was not to service and maintain ABP's plant and machinery. There was no conscious organisation.

108. I therefore find that the claimants were not transferred to ABP by the operation of TUPE.

109. I find that the claimants were not transferred to Scanmech by the operation of TUPE because they were not an organised grouping of employees, for the reasons I have set out above.

110. I therefore find that the claimants were all dismissed by the first respondent, Westfield.

Applying the facts to the Law and Issues

111. On my findings above, there was no service provision transfer or other relevant transfer of the business or part of the business from the first respondent to the second respondent or the third respondent?

112. I do not have to determine any other issues on the question of TUPE

113. The reasons or principal reasons for the claimants' dismissals were not the transfer or a reason connected with transfer.

114. The principal reason for the claimant's dismissal was redundancy.

115. The first respondent did not act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.

116. The first respondent did not adequately ward and/or consult the claimants.

117. The first respondent did not give any evidence of any attempt to use any form of selection process.

118. The first respondent took no reasonable steps to find the claimants suitable alternative employment.

119. Dismissal was not within the range of reasonable responses.

120. The Tribunal will consider remedy at a further hearing.

121. The first respondent failed to pay the claimants the appropriate amount of notice pay.

122. The first respondent failed to pay the claimants for annual leave the claimant had accrued but not taken when their employment ended?

123. The claimants were dismissed by reason of redundancy and are entitled to a statutory redundancy payment.

124. All monetary claims will be determined at a remedy hearing. I will prepare a separate Case Management Order in respect of the remedy hearing. The second and third respondents are excused from attending the remedy hearing.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
9 August 2022