Case No: 2413631/2018

EMPLOYMENT TRIBUNALS

Appellant: Nexus Workforce Limited

Respondent: The Commissioners for HM Revenue and Customs

Heard at: Liverpool Employment Tribunal (remotely) **On:** 31 October, 1 and 2 November 2022

Before: Employment Judge Dunlop (sitting alone)

Representation

Appellant: Mr D Tatton-Brown K.C.
Respondent: Mr S Lewis (Counsel)

JUDGMENT having been sent to the parties on 4 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Introduction and background facts

1. In order to understand the decision in this case, it is necessary to understand its unusual factual background. What follows uncontroversial. I consider it helpful to set it out at the outset, in order to place the rest of the decision in context, including my findings of fact relevant to the disputed issues.

2. Sports Direct is a well-known retailor, operating on the high street and online. The case concerns a large site operated by Sports Direct at Shirebrook near Mansfield. It has sometimes been referred to during the hearing as 'the warehouse'. That description is convenient but may be misleading; this is a huge site, operating 24 hours a day and employing hundreds of people to service Sports Direct's operational needs.

3. Some of the individuals employed at the site are employed by Sports Direct. Very many are not; they are supplied by third-party companies. Those companies charge Sports Direct for the wages and employment costs associated with each day worked, as well as a margin on top.

4. Prior to late May 2014 Blue Arrow Limited had a contract to supply labour to Sports Direct at Shirebrook. Blue Arrow is not involved in these

proceedings, although it has provided disclosure of certain documents further to case management orders made earlier in the proceedings. The appellant ("Nexus") says that it continues to trade and still operates in the labour supply sector. The respondent ("HMRC"), as I understand it, does not dispute this.

5. That contract was scheduled to run for three years, but a few months before it came to an end, Sports Direct wished to move the supply of labour to another company, Qualitycourse Ltd. Throughout the relevant period Qualitycourse Ltd traded as "Transline" and I will refer to it as Transline going forward. This duly happened at the end of May 2014.

6. Both parties in this case accept that there was a transfer (within regulation 3 Transfer of Undertakings (Protection of Employment) Regulations 2006) from Blue Arrow to Transline of the employment of a relatively small group of staff who were involved in managing the contract. The vast majority of the staff employed by Blue Arrow at Shirebrook were, broadly, warehouse operatives, it is those staff, rather than the managerial staff, to whom this case relates. It is the position of Nexus, that there was no TUPE transfer of their employment, notwithstanding that (at least in very many cases) their employment moved to Transline and that they continued to work at Shirebrook. In many of the documents the managerial staff are referred to as "permanent" and the warehouse operatives as "flexible". However, both sets of employees were on permanent contracts of employment it is not disputed that both were classed as employees within (for example) s.230 Employment Rights Act 1996. Although they were permanent employees, the warehouse operatives contracts provided for low levels of guaranteed hours, as explained further below.

7. In 2015 HMRC started an investigation under the National Minimum Wage Act into practices at Shirebrook. This involved linked compliance checks into three employers operating at the site at the time – Sports Direct itself, Transline and The Best Connection (a company unrelated to these proceedings which was also supplying labour to the site). Certain practices were identified which had resulted in workers receiving less than the NMW. In particular, for the purposes of this claim, security procedures were in place prior to operatives leaving the site. Queueing for these procedures could detain employees at work, unpaid, for significant, but variable, amounts of time on each shift.

8. In August 2016, HMRC issued Notices of Underpayment to all three companies. The period of underpayment went back to August 2012 in respect of Sports Direct and The Best Connection, but only to the end of May 2014 in Transline's case, as it had been disputing liability for the previous period when "its" employees has been employed by Blue Arrow.

9. The dispute rumbled on in correspondence. However, in May 2017 Transline went into administration. The business was bought out of administration by the company which became Nexus. The argument put forward by Nexus in relation to this second transfer reflects its argument in relation to the first – only the 'permanent' (i.e. managerial) employees transferred. The warehouse operatives who were the subject of the NMW investigation did not.

10. In June 2018 notices of underpayment were served on Nexus in respect of the period August 2012 – May 2014 i.e. the period when the workers in question were employed by Blue Arrow. Nexus challenges those notices, as it is entitled to do under s.19C NMWA, which provides a right to appeal to the Employment Tribunal. Nexus says that, as the underpaid workers did not transfer to Transline and, subsequently, did not transfer to Nexus, it has no liability for the underpayments and the notcies have been wrongly served and should be set aside.

11. This preliminary hearing was listed to determine only whether there were TUPE transfers of the relevant workers as asserted by HMRC. Nexus also challenges the notices on other grounds, but those did not fall to be determined at this hearing.

The Hearing

12. The hearing took place over three days by CVP. I had regard to an agreed bundle of documents of around 540 pages. On behalf of Nexus, I heard evidence from Jennifer Walker who is the Chief Financial Officer of Nexus. She had previously held a senior finance role in Transline, although had no relationship with Blue Arrow. There was also only one witness for HMRC, this was Gary Davies, a Senior Officer who had been involved in issuing the notices under appeal.

13. At the conclusion of the evidence I agreed to a request from counsel to have some time to finalise submissions in writing. I am grateful for the comprehensive submissions produced by each side in a short timeframe. Both counsel then made oral submissions, focusing on countering the points put by the opposing party.

The Issues and approach to the appeal

14. There has been extensive case management of this case, with five preliminary hearings for case management and a further detailed case management order made by the Regional Employment Judge following written application by the parties.

15. This process resulted in the development of an agreed list of issues which identified, by means of bold text, those issues for determination at today's hearing. That List is attached for reference but, essentially, it boiled down to whether the change in supply of labour in May 2014 amounted to a relevant transfer and whether the change in supply of labour in May 2017 amounted to a relevant transfer. The parties focused their evidence and submissions on the first putative transfer, on the basis that if that was found not to be a transfer then the appeal must succeed, and that if it was found to be a transfer then it was almost inevitable that the same conclusion would follow in respect of the further putative transfer in 2017.

16. The List of Issues sets out the matters to be determined in accordance with the legal tests set out in statute, as one would expect to see it in a claim arising directly from a putative transfer e.g. a claim of unfair dismissal or

failure to inform and consult. All of the authorities referred to by counsel similarly involve such claims.

17. I raised with both counsel during their submissions the fact that the question arises in this case in a different way. I was concerned to understand the correct way to approach the question in the context of a statutory appeal. To put it bluntly – was it for Nexus to establish that there had been no TUPE transfer(s) or for HMRC to establish that there had been TUPE transfer(s)? This was particularly relevant as each side criticised the other for not taking steps (whether historically or during this litigation) to secure more evidence of matters relevant to determining whether the first putative transfer was, indeed, a transfer within Regulation 3.

18. The Grounds of Appeal in this case state that the appeal is made under various sub-sections of section 22 National Minimum Wage Act 1998 (NMWA). In fact, section 22 was repealed and replaced in 2009. The regime relating to Notices of Underpayment is now governed by ss.19-19H, as reflected in the List of Issues. The basis for appeals to the Tribunal is set out at 19C, which I will set out in full (my emphasis added).

> **19C (1) A person on whom a notice of underpayment is served may in accordance with this section appeal against any one or more of the following—**
>
> **(a)the decision to serve the notice;**
>
> **(b)any requirement imposed by the notice to pay a sum to a worker;**
>
> **(c)any requirement imposed by the notice to pay a financial penalty.**
>
> **(2) An appeal under this section lies to an employment tribunal.**
>
> **(3) An appeal under this section must be made before the end of the 28-day period.**
>
> **(4) An appeal under subsection (1)(a) above must be made on the ground that <u>no sum was due</u> under section 17 above to any worker to whom the notice relates on the day specified under section 19(4)(a) above in relation to him in respect of any pay reference period specified under section 19(4)(b) above in relation to him.**
>
> **(5) An appeal under subsection (1)(b) above in relation to a worker must be made on either or both of the following grounds—**
>
> **(a)that, on the day specified under section 19(4)(a) above in relation to the worker, no sum was due to the worker under section 17 above in respect of any pay reference period specified under section 19(4)(b) above in relation to him;**
>
> **(b)that the amount specified in the notice as the sum due to the worker is incorrect.**
>
> **(6) An appeal under subsection (1)(c) above must be made on either or both of the following grounds—**
>
> **(a)that the notice was served in circumstances specified in a direction under section 19A(2) above, or**
>
> **(b)that the amount of the financial penalty specified in the notice of underpayment has been incorrectly calculated (whether because the notice is incorrect in some of the particulars which affect that calculation or for some other reason).**
>
> **(7) Where the employment tribunal allows an appeal under subsection (1)(a) above, it must rescind the notice.**
>
> **(8) Where, in a case where subsection (7) above does not apply, the employment tribunal allows an appeal under subsection (1)(b) or (c) above—**
>
> **(a)the employment tribunal must rectify the notice, and**

(b)the notice of underpayment shall have effect as rectified from the date of the employment tribunal's determination.

19. The basis for the appeal as it is put today is s19C(a). It is said that "no sum was due" to any of the workers because the respondent did not employ them at the time of the underpayment and liability had not transferred. (There are also issues raised as to calculation, which will engage the other subsections, but those are for another day). There is nothing in s.19C itself which indicates who bears the burden of establishing whether or not "no sum is due".

20. Mr Lewis, for HMRC, submitted that as these were proceedings brought by the appellant, they must have some burden of putting forward a positive case. He also referred, when pressed, to s.28 of the Act, which provides for a reversal of the burden of proof in certain circumstances. I accepted Mr Tatton-Brown's submissions that s.28 is of no assistance. S.28(1) concerns only the narrow question of whether a particular individual is entitled to be paid at NMW rates (i.e. due to their employment status). Everyone accepts that the warehouse operatives in this case were employees and were entitled to be paid at those rates. Ss.28(2)-(3) concern the burden of proof in calculating amounts due where a person is seeking to recover alleged underpayments. Again, this does not assist in determining how I establish whether "no sum is due".

21. There is some attraction in Mr Lewis's submission that the appellant, having instigated the proceedings, can be expected to 'do the running' in showing HMRC have got it wrong. However, I also acknowledge the appellant's position that they are a third party as regards the first putative transfer and that HMRC has significant statutory investigative powers which could arguably have been utilised to obtain more information and more clarity on the point.

22. I pause here to note that HMRC's covering letter to Nexus when the Notices of Underpayment were issued stated "*it is HMRC's opinion a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) took place between one of the Recruitment Agencies and Qualitycourse T/A Transline (currently in Liquidation). As discussed with Mr Whitehead* [Nexus's solicitor]*, I cannot reveal the evidence we have in our possession or the decision making process that came to that opinion due to confidentiality."* Mr Davies explained in evidence that, as far as he was aware, that comment reflected an internal policy stance adopted by HMRC. No attempts were made by HMRC, either in this case, or in this sort of situation more generally, to attempt to secure third party agreement to the release of information nor to consider whether 'confidentiality' represented a proper ground for withholding information and whether there might be proper exceptions. I appreciate that a company such as Nexus, facing a significant financial liability on a purely inherited basis, would find that position frustrating, to say the least.

23. Taking into account all of the above, I concluded that there is a neutral burden of proof in establishing whether a relevant transfer took place. I approached the question by doing my best to determine what facts I could

reliably establish, bearing in mind the limitations on the available evidence as to the factual situation before the first putative transfer.

Findings of Fact

24. In addition to the uncontroversial findings of fact above, I made the following relevant findings in areas where the evidence was contested, particularly in relation to the operation of the contract by Blue Arrow.

25. There was a Service Level Agreement between Blue Arrow and Shirebrook which was reproduced in the trial bundle. The (unsigned) copy in the bundle is dated 1 May 2012 and states that it shall remain in force until 1 May 2015. Whilst I appreciate that the operation of a commercial contract 'on the ground' may vary from what is envisaged by its written terms, I consider that I am entitled to assume that this contract operated in accordance with its written terms, absent any evidence to displace that assumption.

26. Firstly, I find that Blue Arrow employed warehouse operatives in large numbers to perform warehouse tasks at Shirebrook including "picking and packing" to fulfill customer orders, loading and unloading of stock and general warehouse duties. As a basic fact, that is not disputed by Nexus, although the legal import of it is, as discussed further below.

27. The following additional matters are apparent from the SLA:
    - 27.1 Workers were recruited specifically to work for Sports Direct at Shirebrook;
    - 27.2 Recruitment included "site specific testing and assessment";
    - 27.3 Induction included company information on both Blue Arrow and Sports Direct;
    - 27.4 Induction included on-site health and safety induction, to be conducted by Blue Arrow employees approved by Sports Direct for that role;
    - 27.5 Blue Arrow provided a contract manager, based on-site in an office provided by Sports Direct;
    - 27.6 All documentation held by Blue Arrow in respect of each flexible employee was to be held on-site, and made available to Sports Direct for immediate auditing;

28. I find that all the work done by the operatives took place at the Shirebrook site, operated by Sports Direct. The presence of account managers onsite meant that even managerial functions conducted by Blue Arrow took place there. For example, emails contained in the bundle demonstrate that the information sessions which were proposed by Blue Arrow in relation to the putative transfer were to take place "in the auditorium on site".

29. As it transpired, Sports Direct did not continue the relationship with Blue Arrow for the full three years envisaged by the SLA. Instead, following the movement of some senior sales staff from Blue Arrow to Transline in 2013, Sport Direct decided that it wanted to move the contract for the supply of labour to Transline. Sports Direct, Blue Arrow and Transline were each active (if not necessarily willing) participants in the process of moving the contract. This is evidenced by documents in the bundle, commencing with a formal letter dated 14 February 2014 from Sports Direct to Blue Arrow notifying that "*Sports Direct have taken a commercial decision to elect for*

an extended period of hire in relation to the transfer of the provision of temporary labour from Blue Arrow to Transline Group with effect from w/c 14th April 2014…". The third and final paragraph of this very short letter expressly references the TUPE regulations and states "…*we require this TUPE transition of all workers to take place 'seamlessly' over the next eight weeks…"*

30. Subsequently, emails and meeting notes (which I will not itemise in detail) demonstrate that all parties were proceeding on the basis that TUPE applied to all workers. These included correspondence and FAQs prepared for the workers themselves. In emails dated 25 April and 1 May 2014 Blue Arrow provided Transline with spreadsheets containing employee information in respect of around 1200 workers it expected to 'TUPE out' to Transline.

31. I reject Nexus's contention that the proper reading of these documents is that the parties' made a contemporaneous distinction between the 'permanent' site team and the 'temporary' or 'flexible' warehouse employees, and were proceeding on the basis that TUPE applied to the former but not the latter. This is clear from the numbers in the spreadsheet but also, by inference, from the surrounding correspondence. That is a distinction which Nexus have sought to make after the event.

32. A Deed of Agreement was entered into between Blue Arrow and Transline on 9 May 2014. Again, that document expressly provides in its preamble that "*A transfer of service under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") shall occur between Blue Arrow and [Transline]*." The date of the transfer is to be 26 May 2014. The deed provides for a fee to be paid by Transline to Blue Arrow, and for an additional amount to be paid in respect of any holiday time which had been taken by a worker at the point of transfer in excess of their accrued entitlement. It provides for Blue Arrow to administer holiday entitlement up to the point of transfer and to make payment direct to the workers in respect of any accrued but untaken holiday at the point of transfer. There follows a release of claims and other ancillary clauses.

33. Again, I reject Ms Walker's evidence that the TUPE transfer acknowledged in this Deed was understood at the time to apply only to the onsite management team. Although the document did not spell out that TUPE applied to all employees, including the warehouse operatives, it did not need to as that was the basis on which all the parties were operating, not least because they had been clearly directed to do so at the outset by Sports Direct. The position that Ms Walker sought to adopt was not credible against the wording of the Deed itself and the backdrop of other documents. Of course, as discussed further below, the fact that the parties at the time treated the change in supply of labour as a TUPE transfer of the warehouse operatives does not necessarily mean that, in law, there was such a transfer.

34. I also record as a finding of fact that both Blue Arrow and Transline employed the warehouse operatives on very similar contractual terms set out in 'flexible employee' contracts and associated handbooks. Pertinently:

34.1 The contracts make clear that the warehouse operatives are employees of Blue Arrow/Transline respectively. Despite references to them as 'temporary' employees, it was not disputed before me that they were employees within the meaning of s.230(1) Employment Rights Act 1996 with full employment rights

34.2 The contracts guarantee the operatives a minimum of 336 hours work in a twelve month period. This is equivalent to one day per week and, as I understand it, relates to a minimum required by HMRC to accept a contractual arrangement as being an employment relationship, thereby permitting tax relief on travel and subsistence expenses.

34.3 The contracts provide that the employee will be assigned to carry out work for a client and must comply with the rules and instructions of the client whilst on assignment. The employing company may terminate the employee's assignment, or move him/her to a new one at any time.

34.4 Employees may be entitled to a travel and food allowance.

34.5 Employees were asked to indicate on accepting employment whether they were only available to undertake work in one postcode area or were 'fully mobile' and able to undertake assignments without geographical restriction. There was no middle ground between these two positions.

35. Ms Walker's witness statement contained a significant amount of evidence about the travel and food allowance scheme operated by Transline. It was apparent from the documentation that Blue Arrow operated a very similar scheme, and it was Ms Walker's understanding that this had been designed by the same provider. The purpose of the scheme was to take advantage of tax concessions available to mobile workers. This appeared to be the starting point for an argument that as 'mobile workers' the warehouse operatives could not be considered to be assigned to the Sports Direct contract. In the end, this was not a line of argument pursued by Mr Tatton-Brown, and so I have not made full findings about the scheme.

36. Ms Walker fairly acknowledged in her evidence that Transline/Nexus did not, in practice, move the Sports Direct workers around or require them to take on other assignments. She explained that as Transline/Nexus had no other clients in the locality of Shirebrook it would not be feasible to do so. She said that she was unaware of Blue Arrow's client profile and opined that it was possible that their workers were utilised on different assignments according to client need.

37. Whilst I acknowledge that it is possible, and I have no direct evidence either way, I find it is very unlikely that Blue Arrow warehouse operatives were routinely moved to different assignments. I base this conclusion on the site-specific recruitment and induction which is evidenced by the SLA, and on the fact that Blue Arrow were able to identify (in the 'TUPE out' spreadsheets) exactly which workers were in the scope of the transfer without, seemingly, any hint of debate or uncertainty.

38. There was no SLA between Sports Direct and Transline (or, at least, not one that was referred to in these proceedings). There was also more limited documentation relating to the second change in supply of labour from Transline to Nexus, albeit that there was direct evidence from Ms Walker, including in response to cross-examination questions, about the operation

of the contract by each of those companies. The key point in my view is that the workforce was stable. Despite the references to mobility in contract handbook, the reality was that the warehouse operatives were recruited specifically to work for Sports Direct at Shirebrook and that is exactly what they did.

39. HMRC placed reliance on documents prepared by Deloitte as Administrators for Transline. In particular, the Joint Administrators' Proposals (published on Companies House) and a SIP16 statement prepared in relation to the purchase by the company that would become Nexus. Both referred to all employees (numbering around 5,500, and including the Shirebrook warehouse operatives as well as many others employed elsewhere) have transferred to the purchaser (i.e. Nexus) under TUPE. Again, there were spreadsheets of employee information, which included the Shirebrook flexible employees, and template letters to employees informing them of the change and expressly describing it as a TUPE transfer.

Relevant Legal Principles

40. The TUPE Regulations apply when there is a "*relevant transfer*" as defined under Reg. 3. Regulation 3(1) covers two types of transfers: (a) a transfer of business and (b) a service provision change ("SPC"). There was some suggestion from HMRC at points in this case that the change in supply of labour might have been a business transfer. However, the point was not expressly argued and neither party cited any of the European and domestic case law relating to that test. That is perhaps unsurprising, as the SPC provisions were designed to introduce more certainty in cases which were borderline or complex when viewed through the business transfer lens. In the absence of submissions on the point, I have not considered whether these putative transfers amounted to business transfers, and have only considered whether they amounted to SPCs.

41. Regulation 3(1)(b) defines a SPC situation and provides at Reg 3(1)(b)(ii)[1] that TUPE applies to:

> ***"(b) a service provision change, that is a situation in which—***
> ***...***
> ***(ii) activities cease to be carried out by a contractor [Blue Arrow] on a client's [Sports Direct'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")[Transline] on the client's behalf []***
> ***...***
> ***and in which the conditions set out in paragraph (3) are satisfied."***

42. The conditions set out in regulation 3(3) are as follows:

> ***"(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***

[1] The parties in bold have been added to clarify the relevant identities for the purposes of the current claim in relation to the 2014 alleged SPC

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."

43. In his submissions, Mr Tatton-Brown extracted a lengthy, and very helpful, section of the Judgment of HHJ Eady QC (as she was then) in **Tees Esk & Wear Valleys NHS Foundation Trust v Harland and others [2017] ICR 760** which examines various earlier authorities and summarises the approach to be taken in determining whether there has been a SPC. It is useful to repeat it here:

> 19. The principal issue raised by this appeal concerns the concept of transfer by means of service provision change for the purposes of regulation 3(1)(b) **TUPE**. This is a broader concept than that of a "transfer of an economic entity" (regulation 3(1)(a)) in that it includes the transfer of an activity alone. That said, for there to be a transfer under regulation 3(1)(b) specific conditions must be met, as provided by regulation 3(3), relevantly as required by regulation 3(3)(a)(i):
>
> "(a) immediately before the service provision change -
>
> (i) there is an organised grouping of employees … which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
>
> …"
>
> 20. In an early consideration of the approach to be adopted to regulation 3(1)(b), in **Metropolitan Resources Ltd v Churchill Dulwich Ltd [2009] ICR 1380**, the EAT (HHJ Burke QC) observed as follows:
>
> **"27.** "Service provision change" is a wholly new statutory concept. It is not defined in terms of economic entity or of other concepts which have developed under the 1981 Regulations or by Community decisions on the Acquired Rights Directive prior to April 2006 when the new Regulations took effect. The circumstances in which service provision change is established are, in my judgment, comprehensively and clearly set out in regulation 3(1)(b) itself and regulation 3(3); if there was, immediately before the change relied upon, an organised grouping of employees which had as its principal purpose the carrying out of the activities in question, the client intends that those activities will be carried out by the alleged transferee, other than in connection with a single specific event or a task of short term duration, and the activities do not consist totally or mainly of the supply of goods for the client's use, and if those activities cease to be carried out by the alleged transferor and are carried out instead by the alleged transferee, a relevant transfer exists. In contrast to the words used to define transfer in the 1981 Regulations the new provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact."
>
> That straightforward adherence to the wording of the regulations relevant to a service provision change transfer was subsequently approved by the Court of

Appeal in **Hunter v McCarrick** [2013] IRLR 26 CA (see per Elias LJ at paragraph 22).

21. As for how an ET is to carry out the assessment required of it in determining whether there has been a service provision transfer, four stages were identified by the Court of Appeal in **Rynda (UK) Ltd v Rhijnsburger** [2015] IRLR 394, see per Jackson LJ at paragraph 44:

> "44. … The first stage … 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."

22. Focusing more specifically on the fourth step, practical guidance has been provided by Underhill P (as he then was) in **Eddie Stobart Ltd v Moreman and Ors** [2012] IRLR 356 EAT, as follows:

> "18. … reg. 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.
> 19. I do not regard that conclusion as objectionable on policy grounds. No doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in the specified circumstances they 'go with the work' (though the assumption that in every case that will benefit, or be welcome to, the employees transferred is not universally true). But it remains necessary to define the circumstances in which a relevant transfer will occur, and there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible.
> 20. 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 employees should, so far as possible, know where they stand …"

23. Having determined whether there is an organised grouping (and, if so, what that consists of), the ET needs then to determine whether the employees in question have been assigned to that grouping; an analytically distinct step although one that may well have been answered when defining the "organised grouping", see per Underhill P in **Eddie Stobart** at paragraph 16. Drawing upon the case law relevant to these questions, in **Costain Ltd v Armitage** UKEAT/ 0048/14/DA (2 July 2014, unreported), I identified the following principles: (1) for an organised grouping to exist, the employer must have deliberately put the employees together into a team in order to carry out work for the client; (2) when deciding whether an employee has been assigned to a group, it should not be assumed that every employee who carries out work for that client is part of the transferring group; (3) the fact that an employee was working on the transferring activities immediately before the transfer is not, on its own, sufficient to show assignment to the grouping (see paragraphs 35 to 36 **Costain**). Additionally, I note the further guidance provided by Slade J in **Amaryllis Ltd v McLeod** UKEAT/0273/15/RN (9 June 2016, unreported), who observed that, when looking at whether the condition at regulation 3(3)(a)(i) is satisfied, the assessment is not to be carried out on a historic basis: the ET is concerned with the position *immediately before* the service provision change.

44. In addition to the principles outline above, Mr Tatton-Brown based significant reliance on the decision of Lady Smith in **Argyll Coastal Services Ltd v Stirling UKEATS/0012/11 (**15 February 2012, unreported) and, in particular, these comments at paragraphs 18 and 20 respectively:

> "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 and who work together as a team…"
>
> "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?"

45. Mr Lewis did not demur from the overall approach outlined above. He relied further on the principle that minor differences in the way that activities were performed before and after transfer would be immaterial to the legal analysis (**Churchill Dulwich Ltd (in liquidation) v Metropolitan Resources Ltd [2009] IRLR 700**).

46. In addition, he drew my attention to **The Salvation Army Trustee Company v Coventry Cyrenians Limited [2017] IRLR 410** in support of the proposition that the comparison between activities carried out prior to and subsequent to a change of providers, must be neither too generalised nor too pedantic.

Submissions

47. As noted above, detailed submissions were provided in writing. By way of brief summary only, Mr Tatton-Brown submitted that the service being provided by Blue Arrow was to "supply flexible workers" and therefore the associated activities were the activities pertaining to that supply – broadly recruitment and then on-going managerial support. There was an organized group of employees carrying out those activities i.e. the small 'permanent' contract team who, as Nexus has always acknowledged, were the subject of a SPC.

48. Even if its argument is rejected in relation to the service being provided, Nexus asserts that the warehouse operatives did not amount to an "organised grouping of employees". (This was, probably, the primary ground for the appeal, although it arises sequentially after the point above). Mr Tatton-Brown's submissions on this point were firmly based in what he described as the "striking" lack of evidence as to the working arrangements of the warehouse operatives under Blue Arrow. Relying on **Argyll Coastal Services** he placed emphasis on the requirement that those employees "work together as a team" and contrasted the permanent management supervisory staff (who were described as a team) which the warehouse operatives, who were not so described in the documentation available.

49. The third and final strand to Mr Tatton-Brown's argument was that, even if I was satisfied in relation to the first two elements, I should find that this was a task of "short term duration", on the basis that the key requirement for Sports Direct was flexibility. As it wished to have no commitment beyond the shift-to-shift basis on which it requested labour, and the contractual framework enabled this, the activities were carried out in connection with tasks of short-term duration (i.e. the length of any one shift).

50. For HMRC, Mr Lewis agreed that the service being provided was the supply of labour, but submitted that the activities that involved were the activities of the warehouse operatives i.e. picking and packing, loading and unloading of pallets an stock and other general warehouse duties. (He acknowledges that there were ancillary managerial duties carried out by employees outside the scope of the Notices of Underpayment.)

51. Following on from that, Mr Lewis submitted that it was evident from the contemporary documentation that responsibility for providing those services had changed from Blue Arrow to Transline, and that the services were provided in essentially the same way.
He suggested that the warehouse workers were the "paradigm" of a large organised grouping in line with the authorities.

52. Mr Lewis went on to submit that Sports Direct's requirement for labour supply was on-going. This must be seen in the context of the earlier fixed-term contract with Blue Arrow and the history of workers being consistently suppled to the warehouse for a number of years. Finally, he argued that it was apparent that the individual workers named in the Notices of Underpayment were assigned to relevant grouping. He drew on the fact that the employee contracts themselves used the word "assignment" and that

the practical reality was that there was nothing temporary about these arrangements.

Discussion and conclusions

53. It should be acknowledged that there is a wealth of contemporaneous documentation which shows that the parties to each putative transfer were proceeding on the basis that the warehouse operatives would transfer under TUPE. To the extent that Ms Walker's evidence suggested that this was not the case – and that those references were only references to the 'permanent' managerial staff, I have rejected her evidence.

54. Of course, the view taken by the parties at the time is not determinative. There may be various reasons related to business efficacy or simply mistake, why parties may proceed on a basis which does not reflect the true legal position. In reaching my conclusion, I have set aside the views taken by others at earlier points. They are not relevant in themselves, although evidence of the basis or rationale on which a view was taken might be relevant.

Service and activities

55. I start with step one of the four-step assessment identified by Jackson LJ in **Rynda**, identifying the service which Blue Arrow was providing to Sports Direct. Mr Tatton-Brown put this as being the "provision of labour", dawing on the following wording the SLA "[providing] flexible industrial and driving employees" and "supply flexible employees". Mr Lewis phrased it as "the provision and supply of labour to Sports Direct's warehouse and/or distribution centre in Shirebrook". There is no material distinction between these formulations.

56. At step 2, however, the parties parted ways. Step 2 required an identification of the activities that were carried out on behalf of Sports Direct. Mr Tatton-Brown argued for the primacy of the contractual wording (drawing on **Argyll Coastal Services**) that emphasised the activities identified in the SLA i.e. the recruitment and induction of the employees (clause 5.1); screening applicants (10.1); checking proof of identity and immigration status (clause 10.2); assessment and interview (10.3-10.4); offering flexible labour for placement (10.5); carrying out an initial induction (clause 11.1); and providing account management support (13.1) and management information (clause 13.2).

57. Crucially, according to Mr Tatton-Brown, the activities specific in the SLA did not include the actual warehouse work being done by the workers supplied to Sports Direct. He stated "*BA is (and was) an employment agency and an employment business for the purposes of the Employment Agencies Act 1973. It matches workers who seek employment with clients who need workers. That is the service it provides. It does not operate warehouses on behalf of clients nor does it purport to do so.*"

58. Mr Lewis defined the key relevant activities (which he describes as the "Core Activities") as being "picking and packing" of goods within the

warehouse to fulfill customer orders, loading and unloading of pallets and stock and other general warehouse duties.

59. Notwithstanding the lack of direct evidence, I am content to make a finding of fact that the core activities as described by Mr Lewis were exactly what the warehouse operatives employed by Blue Arrow to work at Shirebrook were doing on a day-to-day basis immediately before the transfer. There was no real suggestion that they were doing anything else, and any such suggestion would fly in the face of common sense and commercial reality.

60. The sticking point was whether those activities are properly regarded as "the activities" which were being carried out by Blue Arrow for Sports Direct. I am content that they are. This was not a situation where Blue Arrow, acting as a recruitment agency, merely identified individuals to engage for work and handed them over to Sports Direct. It is not in dispute that the warehouse operatives were employees and that their employer was (at that time) Blue Arrow. Mr Tatton-Brown submitted that BA and Nexus were not 'picking and packing' companies. However, the employees doing the picking and packing are employees of the business just as much as managerial staff in head office or any of the site consultants are employees of the business. If 97% of the workforce are pickers and packers then, in my view, the characterisation of the business as a picking and packing business is not unjustified. (The 97% figure comes from Deloitte documentation and refers to Nexus in 2017 and not Blue Arrow in 2014, but the business model is the same and the point holds good.)

61. I turn now to the specific argument that the core activities are not named or identified in the SLA. It is correct, as Mr Tatton-Brown submits, that there is no reference in the SLA to "picking and packing" or any other descriptor of the warehouse work. The closest the SLA comes is in the preamble, which states "*Sports Direct has appointed Blue Arrow as the provider of flexible Industrial and driving employees*". In my view, however, the absence of a specific reference to "picking and packing" or other forms of warehouse work is not because there was any doubt or ambiguity about the role that the employees were to perform, but rather the opposite. Sports Direct were not going to use these flexible employees to staff the tills in the high street, manufacture leisurewear or star in their ad campaigns. The fact that the employees were going to be carrying out the basic warehouse roles required for Sports Direct's online business to function was blindingly obvious. I take further comfort in this conclusion from the categories of KPIs identified at clause 18 of the SLA, and referred to by Mr Lewis in his submissions. The KPIs relate to order fulfilment, attendance, performance, retention and compliance – all matters which will depend on the performance of the warehouse operatives supplied by Blue Arrow in carrying out the core activities.

62. The argument being run by Mr Tatton-Brown is, in some respects, the mirror to the argument being advanced in the **Argyll** case. That case concerned a cargo ship contracted by the Ministry of Defence to operate in the Falkland Islands. As well as the crew of the ship, the contractor employed two staff in a small office in Scotland carrying out ancillary matters "*such as the employers' duties in relation to the crew, the need to arrange insurance for the vessel and to arrange for repair of the vessel if required, and the*

paperwork involved in, for instance, invoicing the MOD". Whilst not resolving the point, the EAT recognised it may be the case that these matters "*whilst they might be seen as facilitating the activity in which the Claimant is interested – are not the activity itself*". The references in **Argyll** to the primacy of the contract must be read against that factual background. It is, in my view, a more logical argument to centre the commercial service for which the client is contracting, to the exclusion of ancillary administrative activities, than to centre the ancillary administrative activities (important though they may be) to the exclusion of the activities which form the fundamental purpose of the contract.

63. Finally, I draw support for this conclusion from other matters referred to in Mr Lewis's skeleton argument at paragraph 9, which I will not repeat here.

The organised grouping of employees

64. As per **Rynda** the third step is to identify the employees of Blue Arrow who normally carried out those activities. The class of employees in this case flows naturally from the identification of the activities. As I have determined that the relevant activities included the warehouse operations as well as the ancillary functions of management and supply, the employees carrying out those activities are both classes of Blue Arrow employees. Broadly, they were the 1,200 employees identified by Blue Arrow in a spreadsheet sent to Nexus in the run up to the date when Nexus took over the contract. (In making that finding, I make no finding in respect of any particular named employee as that would be a matter to be determined at a later date, and I recognise the possibility of individual errors or discrepancies within the spreadsheet).

65. The fourth step, to quote directly from **Rynda** is "to consider whether company B (ie. Blue arrow) organised those employees into a 'grouping' for the principle purpose of carrying out the listed activities". The appellant's second major challenge to HMRC's conclusion that there was a service provision change arises from this.

66. I considered carefully the guidance given in the **Eddie Stobart** case and the emphasis that it is not enough that the employees may as a matter of fact be carrying out activities for the client, there must be an "organised grouping" and the carrying out of those activities must be purpose of that organised grouping. Here, Mr Tatton-Brown says, is where the respondent's case founders on lack of evidence. I have no evidence as to exactly what warehousing activities the Blue Arrow flexible workers were doing, how they were organised to do it, how work was allocated and distributed, how regular the work was, whether Blue Arrow employees worked together or alongside colleagues from Sports direct or another agency, or whether any Blue Arrow employees were ever assigned to work in other warehouses, for other clients.

67. As a subsidiary point on this issue, Mr Tatton-Brown submits that in order for there to be an organised grouping of workers, those individuals must have been working together as a team, and organized as such by Blue Arrow. His authority for this proposition is para 18 of the judgment in **Argyll**. He says that the Blue Arrow flexible employees were not viewed as a team,

relying on references to the "Blue Arrow Team" in the contemporaneous documentation which (it is clear from their context) are references to the permanent employees as distinct from the flexible employees.

68. This gives rise to two related issues – a difficulty in making any determination about the organisation of the warehouse operatives during the Blue Arrow phase of their employment, and what is meant by the requirement that they be a "team". As jndicated in the findings of fact section above, despite being troubled by the lack of evidence in relation to the pre-transfer operation of Blue Arrow I was able to make basic findings of fact about the work being performed and the way in which it was performed. In particular, the finding that, in essence, flexible employees engaged to work at Shirebrook would only work at Shirebrook. This was the case despite mobility clauses in the flexible workers contracts, and the opportunity for them to take advantage of a mobile workers' expenses salary sacrifice scheme.

69. I am therefore satisfied that there was a coherent group of workers who constituted the "workforce". I went on to consider whether that group was organised for the purpose of carrying out the activities. Again, the lack of evidence presents a difficulty and it would be wrong to simply assume that evidence about how the work was carried out by Transline/Nexus can be read across to apply to the way in which Blue Arrow was carrying out the work pre-transfer without further scrutiny.

70. I consider that the flexible employees were "organised" by reference to the fact that they had been recruited to and performed work for Sports Direct, at Sports Direct's premises, under the control of Sports Direct. The lack of evidence that Mr Tatton-Brown points to relates, in my view, to the day-to-day organisation of the work, rather than the organisation of the group. The organisation of the group is quite simple – they are the people turning up every day to perform the necessary tasks in the warehouse. Their work was fundamental to the operation of the Shirebrook site and they were more closely integrated with the operation of that site than contractors performing ancillary services such as cleaning or catering, or the 'client teams' typically found in the field of professional services such as lawyers, marketeers or project management teams.

71. It is helpful, in many cases, to consider whether the grouping can be characterised as a team. It is less apt in this case, given the large numbers involved as well as the lack of evidence about how the work (as opposed to the group) was organised. Notwithstanding the wording in **Argyll Coastal Services** I do not ultimately consider that to be problematic in this case. These flexible employees are self-evidently a more coherent group than the workers in **Eddie Stobert**, who did most of their work on a single contract through mere happenstance, or the workers in **Argyll** who comprised two individuals in an office in Glasgow and the crew of a boat in the south Atlantic. If they are not aptly characterised as the 'Sports Direct client team' then it is because they are more than that, not because they are less. Whilst reference to the term "team" may be useful in borderline cases, it would be wrong, in my view, to resile from a finding which I can reach without difficulty - that these workers formed an organised grouping – simply because the

word “team” (which does not itself appear in the Regulation) was not applied to them.

72. For those reasons, I consider that the conditions in Regulation 3(3)(a)(i) are satisfied in relation to the first putative transfer.

Short term duration

73. The third challenge raised by the appellant arises from regulation 3(3)(a)(ii) which excludes from the service provision change category situations where the client intends that the activities will be carried out by the new contractor “in connection with a single specific event or task of short-term direction. It is fair to say that this challenge was not pressed with the same vigour as the two matters I have already discussed.

74. Mr Tatton-Brown rightly submits that it is the intention of the client i.e. Sports Direct that is to be examined here, and that no evidence had been adduced from Sports Direct as to that intention. The argument appears to be that because the over-arching purpose of this arrangement was to provide flexibility to Sports Direct, it can only be confidently said that Sports Direct had a firm intention that Transline were to supply staff in connection with each particular shift it might order, and that those individual shifts were tasks of short term duration.

75. I do not accept that argument. Sports Direct had an on-going need, or at least desire, for the provision of large numbers of flexible employees at Shirebrook with whom it had no direct employment relationship. The running of that operation is not a task of short-term duration whether at 2012, when the SLA was entered into with Blue Arrow which was proposed to run for three years, nor in 2014 when Transline was brought in to take over the contract.

Conclusion

76. For the reasons I have discussed I am satisfied that there was a relevant transfer, namely a service provision change, under the TUPE regulations and in relation to the flexible employees in 2014.

77. It follows from that, and in line with the position adopted by the parties, that there was a further service provision change in 2017 transferring the employment of the flexible employees to the business which would become Nexus.

78. For clarity, I make no specific finding as to whether any specific individual employee whom HMRC claims has been underpaid was assigned to the organised grouping of flexible employees at the time of either the first or second transfer.

79. The appeal will now proceed to a final hearing, the dates of which have already been notified to the parties.

Employment Judge Dunlop

Date: 8 December 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

13 December 2022

FOR EMPLOYMENT TRIBUNALS

ANNEX

LIST OF ISSUES – AGREED BY THE PARTIES

This list of issues is prepared further to the reissued order of the employment tribunal dated 25 November 2020 ("the Order").

In accordance with para.1 of the Order, issues for determination at the Preliminary Hearing presently listed for 10 – 12 May 2020 inclusive are identified by bold italicised text.

References to legislation are to the National Minimum Wage Act 1998, unless otherwise indicated.

References to "Blue Arrow", "Transline", "Sports Direct" and "Nexus" are references to Blue Arrow Limited, Qualitycourse Limited (in liquidation), Sportsdirect.com Retail Limited and the Appellant respectively.

The relevant Notices of Underpayment to which this appeal relates are identified at paras. 5 – 7 inclusive of the Appellant's amended "Full Details of the Grounds of Appeal" document, hereafter referred to as "the NOUs".

SECTION 19C(1)(a)

The Appellant appeals the decision to issue the NOUs on the ground that no sum was due within the meaning of s.19C(4).

1. ***Did the change in supplier of labour to Sport Direct from Blue Arrow to Transline in or around May 2014 amount to a relevant transfer (i.e. a service provision change) within the meaning of Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)?***

    1.1 Did activities (relating to the provision or supply of labour at Sports Direct's Shirebrook distribution centre) cease to be carried out by Blue Arrow (as a contractor) on Sports Direct's behalf, which were then carried out instead by Transline (as a subsequent contractor) on Sports Direct's behalf, within the meaning of Regulation 3(1)(b)(ii) TUPE?

    1.2 Immediately before the putative service provision change, was there an "organised grouping" of employees at Blue Arrow which had "as its principal purpose" the carrying out of the activities concerned on behalf of Sports Direct within the meaning of Regulation 3(3)(a)(i) TUPE?

    1.3 Immediately before the putative service provision change, did Sports Direct "intend" that the activities concerned would, following the putative service provision change, be

carried out by Transline "other than in connection with a single specific event or task of short-term duration", within the meaning of Regulation 3(3)(a)(ii) TUPE?

1.4 Were the workers who were the subject of the NOUs "employed" by Blue Arrow within the meaning of the reference to "employee" within Regulation 2(1) TUPE?

1.5 Were the workers who were the subject of the NOUs assigned by Blue Arrow to any organised grouping of employees "other than on a temporary basis", within the meaning of Regulation 2(1) TUPE?

2. Did the change in supplier of labour to Sport Direct from Transline to Nexus in or around May 2017 amount to a relevant transfer (i.e. a service provision change) within the meaning of Regulation 3 TUPE?

2.1 Did activities (relating to the provision or supply of labour at Sports Direct's Shirebrook distribution centre) cease to be carried out by Transline on Sports Direct's behalf, which were then carried out instead by Nexus on Sports Direct's behalf, within the meaning of Regulation 3(1)(b)(ii) TUPE?

2.2 Immediately before the putative service provision change, was there an "organised grouping" of employees at Transline which had as its "principal purpose" the carrying out of the activities concerned on behalf of Sports Direct, within the meaning of Regulation 3(3)(a)(i) TUPE?

2.3 Immediately before the putative service provision change, did Sports Direct "intend" that the activities concerned would, following the putative service provision change, be carried out by Nexus "other than in connection with a single specific event or task of short-term duration", within the meaning of Regulation 3(3)(a)(ii) TUPE?

2.4 Were the workers who were the subject of the NOUs "employed" by Transline within the meaning of the reference to "employee" within Regulation 2(1) TUPE?

2.5 Were the workers who were the subject of the NOUs assigned by Transline to any organised grouping of employees "other than on a temporary basis" within the meaning of Regulation 2(1) TUPE?

3. As a result of its alleged conduct in the course of its national minimum wage investigation, including alleged events in 2016 and alleged express or implied representations, was the Respondent estopped from issuing the NOUs to the Appellant?

SECTION 19C(1)(b)

The Appellant appeals the requirement imposed by the NOUs to pay to the workers the sums identified therein.

4. ***Paragraphs 1 and 2, above, are repeated. Such issues relate to the Appellant's ground of appeal that no sum was due to the worker within the meaning of s.19C(5)(a).***

5. The Appellant further appeals pursuant to s.19C(5)(b) in that the amount specified in the notice as the sum due to the worker is incorrect. Insofar as the Respondent relies upon working time resulting from time spent passing through Sports Direct's mandatory security arrangements as the basis for the underpayments within the NOUs:

    5.1 Was the Respondent entitled to adopt what the Appellant will refer to as a notional figure of 11 minutes per worker per shift (hereafter referred to as the "11 Minutes Figure"), for the time spent passing through Sports Direct's mandatory security arrangements?

    5.2 Does the 11 Minutes Figure apply to all workers who were subject to the NOUs, including those who were not members of a trade union at the material time?

    5.3 Does the 11 Minutes Figure bind the Appellant, which was not party to the agreement on which the Respondent relies on in support of the figure?

    5.4 If the ET concludes that the 11 Minutes Figure is not the appropriate figure, ought the ET substitute a different figure and, if so, what figure, pursuant to s.19C(8)?

6. Did the Appellant employ or engage Mark Evans, identified within the NOUs by number 239156 at any material time? [N.B. It has already been accepted by the Respondent that Mr Evans ought not to have been included within the NOUs.]

7. As a result of its alleged conduct in the course of its national minimum wage investigation, including alleged events in 2016 and alleged express or implied representations, was the Respondent estopped from issuing the NOUs to the Appellant?

SECTION 19C(1)(c)

The Appellant appeals against the requirement to pay a financial penalty levied in two NOUs dated 22 August 2018.

8. Paragraphs 1 – 5 inclusive of this list of issues are repeated.

DISPOSAL: SECTION 19C(7) and (8)

9. In view of its findings, should the tribunal rescind the NOUs pursuant to s.19C(7)?

10. Alternatively, should the tribunal rectify any or all of the NOUs pursuant to s.19C(8)? If so, in what amount?