



# EMPLOYMENT TRIBUNALS

**Claimants:** Mrs K Clarke  
Mr A Morais  
Mr M Isaac  
Mr T Johnston  
Mr K Couzens  
Mr J Gordon  
Ms C MacLean

**Respondents:** FMG Repair Services Ltd (formerly Runmycar Limited) (1)  
Redde Northgate plc (2)  
NWC Realisations Ltd (in administration) (formerly known as  
Nationwide Crash Repair Services Ltd) (3)

**Heard at:** Manchester

**On:** 31 October – 14 November  
2022

**Before:** Employment Judge Phil Allen

## REPRESENTATION:

**Claimants:** Mr S Smith, solicitor (for five of the claimants)  
Ms Bussandri for Mr Morias (lay representative)  
Mrs K Clarke in person

**Respondents:** Mr S Brochwicz-Lewinski, counsel (for the first and second  
respondents)  
The third respondent did not attend and was not represented

# JUDGMENT

The judgment of the Tribunal is that:

1. Mrs Clarke was assigned to the economic entity which transferred from the third respondent to the first respondent on 4 September 2020 and, accordingly, her employment transferred to the first respondent (FMG Repair Services Ltd) under regulations 3(1)(a) and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

2. Mr Johnston was assigned to the economic entity which transferred from the third respondent to the first respondent on 4 September 2020 and, accordingly, his

employment transferred to the first respondent (FMG Repair Services Ltd) under regulations 3(1)(a) and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 on that date.

3. Ms MacLean was assigned to the economic entity which transferred from the third respondent to the first respondent on 4 September 2020 and, accordingly, her employment transferred to the first respondent (FMG Repair Services Ltd) under regulations 3(1)(a) and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 on that date.

4. Mr Morais was not assigned to the economic entity which transferred from the third respondent to the first respondent on 4 September 2020 and, accordingly, his employment did not transfer to the first respondent (FMG Repair Services Ltd) under regulations 3(1)(a) and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. His claims against the first respondent are dismissed.

5. Mr Isaac was not assigned to the economic entity which transferred from the third respondent to the first respondent on 4 September 2020 and, accordingly, his employment did not transfer to the first respondent (FMG Repair Services Ltd) under regulations 3(1)(a) and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. His claims against the first respondent are dismissed.

6. Mr Couzens was not assigned to the economic entity which transferred from the third respondent to the first respondent on 4 September 2020 and, accordingly, his employment did not transfer to the first respondent (FMG Repair Services Ltd) under regulations 3(1)(a) and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. His claims against the first respondent are dismissed.

7. Mr Gordon was not assigned to the economic entity which transferred from the third respondent to the first respondent on 4 September 2020 and, accordingly, his employment did not transfer to the first respondent (FMG Repair Services Ltd) under regulations 3(1)(a) and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. His claims against the first respondent are dismissed.

8. By consent, there was no transfer of an undertaking from the third respondent to the second respondent (Redde Northgate plc) and none of the claimants were assigned to any undertaking which transferred. The claims of all claimants against the second respondent are dismissed.

## **REASONS**

### **Introduction**

1. The claimants were all employed by the third respondent. On the 3 September 2020 administrators were appointed by the third respondent. On 4 September 2020 part of the business of the third respondent was transferred to the first or second respondent. Each of the claimants alleged that they transferred under

TUPE to the first or second respondent. The first and second respondents denied that they did so. This was a preliminary hearing listed to determine whether TUPE applied to transfer the contracts of employment of the claimants to either of the first or second respondents on 4 September 2020.

**Claims and Issues**

2. The names of all the claimants and the case numbers for their claims are detailed in annex B of this Judgment. All of the claimants have claims against the first respondent (FMG Repair Services Ltd, formerly Runmycar Limited) and the second respondent (Redde Northgate plc). The first respondent is a subsidiary of the second respondent. Ms MacLean and Mr Couzens also have claims against the third respondent (NWC Realisations Ltd (in administration), formerly known as Nationwide Crash Repair Services Ltd). Ms MacLean's claim had been entered against the third respondent under both its current name and its former name (Companies House records that the name change occurred on 16 September 2020), but as it is still the same corporate entity whichever name is used, that has been treated as a single respondent for this Judgment.

3. A number of preliminary hearings have previously been conducted in these joined cases (or some of them), including on 28 April 2021, 18 June 2021, 5 October 2021, 7 January 2022, 28 January 2022 and 9 September 2022.

4. At the preliminary hearing on 5 October 2021, Employment Judge Dunlop identified the issues which were to be determined at this preliminary hearing (414). At the start of this hearing, it was confirmed with the parties that those issues remained the ones which were to be determined. In this Judgment I have determined only those issues identified. The list of issues is appended to this Judgment at annex A.

5. It was noted during submissions that issues one and two in the list of issues used terminology which might reflect a service provision change transfer, rather than a traditional TUPE transfer (under regulation 3(1)(a)). It was agreed that the transfer was a traditional TUPE transfer, not a service provision change transfer. I considered and determined the case as a traditional TUPE transfer.

6. In the course of submissions, all of the claimants accepted that if they were assigned to the undertaking which transferred, they would have transferred to the first respondent and not the second respondent. That accorded with the position taken by the first and second respondent. In this Judgment, the position taken by the first and second respondent is described as being the joint position of the two entities as both the first and second respondent and their employees were involved in the transaction and the decisions taken about who should transfer and why. However, by the time of submissions, it was common ground that the transferee for those who transferred was the first respondent only, and not the second respondent.

**Procedure**

7. Ms MacLean had been represented by Mr Smith, solicitor, throughout the conduct of her proceedings. Shortly before the hearing, Mr Smith also commenced

acting for four of the other claimants: Mr Isaac; Mr Johnston; Mr Couzens; and Mr Gordon. He represented the five claimants at the hearing. Mrs Clarke represented herself. Ms Bussandri represented her partner, Mr Morais. Mr Brochwicz-Lewinski, counsel, represented the first and second respondents. The third respondent did not attend and was not represented (being a company in administration).

8. The first day was taken entirely as a reading day without any party attending. The hearing was initially conducted on the second day as a hybrid hearing, that is with Mr Brochwicz-Lewinski and Ms Tasker-Wood in attendance in-person in Manchester Tribunal, and with all the other parties attending remotely by CVP remote video technology. It was agreed that, after that day, all parties and all witnesses would attend remotely by CVP. From day three of the hearing, it was conducted entirely remotely. All witnesses gave evidence remotely.

9. Mr Morais required the assistance of an interpreter for the part of the hearing during which he gave evidence (but not at other times). Arrangements were made for him (and his representative) to attend at Bury St Edmunds Employment Tribunal on the second day of the hearing. The interpreter also attended at Bury St Edmunds Employment Tribunal on the second day. Mr Morais gave evidence remotely from that Tribunal building with interpretation on the afternoon of the second day. Following the second day, his representative attended remotely in the same way as other attendees.

10. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 1474 numbered pages. A bundle of spreadsheets was also provided, which was only viewed electronically due to the complexities of the spreadsheets and the tabs in those spreadsheets. I read the pages to which I was referred by the parties or which were referred to in witness statements. The claimants provided reading lists in advance of the start of the hearing and those documents were read. It was emphasised to the parties that any elements of the spreadsheets which they wished to rely upon would need to be highlighted, it being impossible to take in the entire contents of the spreadsheets provided. Additional spreadsheets were provided during the hearing and referred to when required. Where a number is referred to in brackets in this Judgment, that is a reference to a page in the bundle.

11. On the morning of the third day of the hearing, the first and second respondent provided, at my request, a document listing the sites which transferred, those which did not transfer, and those which closed. That document was taken as being accurate unless any of the claimants identified anything within it with which they disagreed. No one identified any errors within it. As the third respondent had more than one site in some locations, the name of a town or location did not necessarily make clear which specific site it was that was being referred to.

12. I was provided with a bundle containing witness statements for all the witnesses being called by all parties. During the first day of the hearing, I read the witness statements, and the documents in the bundle which were referred to in those statements.

13. Each of the claimants had prepared a witness statement. Very shortly before the hearing, Ms MacLean and Mr Couzens submitted supplemental witness

statements. Ms MacLean's addressed some limited elements of her evidence and was relatively brief. Mr Couzens' initial witness statement had contained very little at all, and the supplemental statement provided far lengthier and more detailed evidence. In correspondence prior to the hearing, the first/second respondent objected to Mr Couzens' supplemental statement being admitted. At the start of the second day of hearing, Mr Brochwicz-Lewinski, (very sensibly) explained that there was no objection to either of the supplemental statements being admitted. Those supplemental statements were accordingly read alongside the relevant witness' first statement.

14. I heard evidence from each of the claimants, who were cross examined by Mr Brochwicz-Lewinski, before being asked questions by the other claimants' representatives (where they wished to) and by me. Each witness was also re-examined (or the opportunity for re-examination was given).

15. Prior to the hearing, Mr Isaac had applied for, and obtained, witness orders which required the attendance to give evidence of Ms Louise Cope (formerly the third respondent's People Director, who had transferred to the first respondent) and Mr Darren Wills (formerly the third respondent's Operations Director, who had transferred to the first respondent). Those orders (as varied) required their attendance remotely on the fourth day of the hearing. In both cases, the witnesses had signed settlement agreements with the first respondent and were concerned about what they could say in a statement. No witness statements were obtained or provided for either of them. The first/second respondent made clear that there they raised no issues about the witnesses' attendance nor was there any limitation on the evidence they could give. Ms Cope's evidence took the entire fourth day of the hearing (including oral evidence in chief and cross examination). Mr Wills agreed to return on the seventh day of hearing to give evidence without a further witness order being made. His evidence was heard on the seventh day (being heard after the first of the first/second respondents' witnesses but before the others).

16. The following gave evidence for the first/second respondents: Ms Katie Tasker-Wood, the second respondent's Corporate Services Director; Mr Harvey Stead, the Managing Director of the Redde Group of companies; Mr John Keeton, the Operations Director of FMG Limited; and Mr Jason Tripp, Managing Director of the second respondent (since January 2021). On occasion limited additional questions were asked as part of their evidence in chief in the light of issues which had arisen during the hearing. Each witness was cross examined by Mr Smith and asked questions by the other claimants' representatives (where they wished to do so), before being asked questions by me and being re-examined.

17. Prior to Mr Wills giving evidence, Mr Smith asked for an adjournment to further prepare for questioning and cross-examination (on the afternoon of the sixth day) and his application was granted, even though the first/second respondent objected to the resultant delay.

18. After the evidence was heard, each of the parties was given the opportunity to make submissions. As the evidence was concluded at lunchtime on the eighth day, the parties were given the rest of the eighth day to further prepare for submissions. Following discussion with the parties it was agreed that written submissions were to

be provided by 9.45 am on the morning of the ninth day and the hearing on the ninth day commenced shortly after 11 am. Each of the representatives produced a written submission and supplemented those written submissions with oral submissions (save for Mrs Clarke who relied only upon her written submission). It had been agreed in advance that the oral submissions would not be longer than an hour, the professional representatives having both indicated that they did not believe any longer was required.

19. Judgment was reserved and accordingly I provide the Judgment and reasons outlined below.

20. I was grateful to all the representatives for the manner in which the hearing was conducted.

### **Facts**

21. The third respondent (and the related companies) employed more than 2300 people in various roles which provided vehicle repair services. Immediately prior to the transfer, it operated one hundred and two body shop sites. An additional fifteen body shop sites had been closed or vacated prior to the transaction, albeit no precise timescale was provided for those closures. It also operated from six office locations. That included a head office at Witney. That also included an office at Northwich at which referrals were triaged and assigned to the relevant body shop for work to be undertaken. The third respondent's customers were predominantly large insurance companies. That meant that the relationships were managed centrally and nationally, each body shop did not have its own set of customers or clients as such.

22. The third respondent (and the related companies) entered into administration on 3 September 2020. It was clear from the evidence that there had been a period prior to that date when the third respondent was aware of its financial issues and, during which, alternative options to continue parts of the third respondent's operations (including averting large-scale redundancies) had been explored.

23. Following the administration, on (or around) 4 September 2020 the first/second respondent acquired certain sites and some assets of the third respondent. Those employees who did not transfer were made redundant as part of the administration. In broad terms, the first respondent took on seventy-seven body shops, three office locations, and certain central support functions. The entire goodwill of the third respondent was taken on by the first respondent, albeit it was known that the most significant insurance customer was unlikely to continue to use the first respondent post-transfer (and it did not). A total of two thousand three hundred and sixty-four employees were transferred to the first respondent. There was no dispute that the employees assigned to any single one of the transferring sites, transferred. Five hundred and thirty-one employees were not accepted at the time as having transferred (including a number wholly assigned to non-transferring sites), and all those employees were made redundant by the third respondent (in administration).

24. The second respondent provides various services to the insurance sector and, as part of those services, uses external body shops. Part of the rationale for the

acquisition was that the first/second respondents' group of companies would be able to send work to their own body shops (operated by the first respondent), in place of sending all the work to external body shops. This has occurred to an extent, albeit it was evidenced by Mr Tripp that a significant amount of work continues to be sent out to external body shops which are not operated as part of the first/second respondents' group of companies. The first respondent also continues to provide its services to insurance company customers, as the third respondent had previously.

25. There had been a proposed management buy-out of the third respondent ("the MBO"). Ms Cope, Mr Wills and Mr Gordon were all involved in the MBO. In the course of that proposal being explored, PWC provided advice on the application of TUPE. The MBO did not propose to take all of the third respondent's sites. Those involved in the MBO had, initially, considered identifying the staff which they wished to retain and transferring those staff. They were advised by PWC that they could not take that approach in accordance with TUPE. The advice provided by PWC (at least as understood by Ms Cope and Mr Wills) was that if a function transferred, then all the staff in that function needed to transfer, and any reduction in the staff numbers required needed to be undertaken as redundancies post-transfer. They understood that a transferee could not cherry pick who transferred. It was also their understanding, based upon the advice that they had received, that if an employee worked more than 60% of their time on the sites/work transferring, then the employee should transfer under TUPE. It was clear that this advice informed the view taken by the claimants who were aware of or involved in the MBO, Ms Cope and Mr Wills, of the first/second respondents' approach to TUPE. The first/second respondents did not have the same interpretation of TUPE or apply the same basic rules as PWC had advised the MBO. Ms Cope and Mr Wills asserted that they had provided this advice to the first/second respondents verbally during conversations in the process leading up to the acquisition; the first/second respondent disputed that they had done so.

26. There was no dispute that the acquisition of part of the business of the third respondent occurred relatively quickly and all steps were undertaken in a tight, intense, timeframe. That was, at least in part, driven by the financial position of the third respondent and the potential impending insolvency/administration. It was in that context that decisions about which staff transferred were made very quickly and based upon limited information. In his submissions, Mr Smith accepted that it was obviously a Herculean task to undertake in a few days. The primary source of the information which the first/second respondents had about the employees, their place of work, and their job title, was a spreadsheet provided by PWC and the third respondent. I was provided with some versions of that spreadsheet, which was added to and amended during the transaction (culminating in version 16 to which reference was made throughout the hearing). It was common ground that the spreadsheet was not entirely accurate. It incorrectly recorded some job titles. It incorrectly recorded some places of work, the data having been created based upon historic and, occasionally, incorrect information. During the hearing reference was made to the third respondent's historic acquisitions of other businesses having contributed to the inaccuracy of the data. The first/second respondents' witnesses accepted that the spreadsheet had (on occasion) erroneously recorded some employees who in practice were roaming or not based at any one site, as being

based at a specific site. The first/second respondents made decisions about who was based at a specific site, relying upon what was recorded in the spreadsheet.

27. The evidence of Mr Gordon, Ms Cope and Mr Wills was that the MBO had ceased to be a realistic outcome by late August 2020 when the first/second respondents' acquisition was being progressed in detail. Mr Stead's evidence was that the first/second respondents were never made aware that was the case (and there was no evidence that they were so informed). The first/second respondents operated during the acquisition (at least until a very late point in time) on the understanding that the administrator had other options for the business.

28. It was also the first/second respondents' evidence that the precise nature of what was being acquired changed and was only finally confirmed at the time of the acquisition. There was no period between exchange and completion on the deal. The precise sites to be acquired changed during the period when the transfer of staff was being considered.

*The correspondence and discussions pre-transfer*

29. The Tribunal was provided with a large number of emails, documents and spreadsheets recording the discussions and decisions made in the period between 21 August and the 4 September 2020. This Judgment does not record all that was provided or referred to.

30. On 21 August 2022 Ms Tasker-Wood, the corporate services director of the second respondent and the person who led the acquisition on behalf of the first/second respondents particularly on employee issues, stated in an email (423) "*We have confirmed that we will only be transferring the staff associated to the sites we wish to acquire, plus the HO and contact centre staff*".

31. It was Ms Tasker-Wood's evidence that her position, and that of the first/second respondents, was always that it would apply the following to the question of whether or not staff transferred: if staff were recorded as assigned to one of the sites which transferred, the employee would transfer; if staff were part of one of the identified functions being taken on, they would transfer irrespective of site (the functions which were ultimately included in the agreement are detailed below); and, if an employee was not assigned to a site transferring or part of a function transferring, they would not transfer. In verbal evidence Ms Tasker-Wood explained that if anybody had been working across multiple sites all of which transferred, they would have been accepted as having transferred, but that had not in fact been the case for any individual. The first/second respondents did not apply any cut off or percentage approach to work undertaken; they operated on the basis that unless someone was assigned to a transferring site in its entirety (or theoretically only to transferring sites), they would not transfer (unless they transferred as part of a function).

32. There was a telephone conversation between Ms Tasker-Wood, Ms Cope, Mr Wills and others on 22 August 2020. Notes were circulated the next day.

33. On 24 August 2020 there was a telephone call about the proposed acquisition, which was followed by an email from Mr Stead first thing the following



day (425). Within the email Mr Stead observed that Mr Wills had been helpful and engaging and that the recipients would, definitely, want him as part of the immediate integration team and most likely the final structure. Mr Stead said of Mr Gordon that he “*was the polar opposite*”. Mr Wills transferred under TUPE; Mr Gordon did not. The first/second respondents contended that Mr Wills was assigned to a site which transferred, Northwich (which was what was recorded on the spreadsheet). Mr Gordon was recorded as being assigned to Ayr, a site which did not transfer. It was the first/second respondents’ evidence (including that of Ms Tasker-Wood and Mr Stead) that the views expressed in the email played no part in the determination of who transferred; it was the first/second respondents’ evidence that the decisions about who should transfer were all made in accordance with the principles outlined by Ms Tasker-Wood.

34. Attached to the email of 25 August 2020 was a note (426) stated (in the email) to be of the previous day’s call. Mr Keeton’s evidence was that the note was actually made up of questions to which answers had been sought, answers provided by the third respondent (and, in particular, Mr Wills), and things said in the call. That explanation appeared consistent with the style of the note. That recorded in relation to staff retention in retained sites: “*Original approach was to select strongest staff in area from a combination of open and closed sites however understanding is that the Redde proposal is that all staff in sites will be carried over under pure TUPE*”. There was a dispute (or at least a lack of certainty) about whether the original approach referred to was a reference by Mr Wills to the original approach of the MBO or whether it was a reference by Mr Stead to the original approach of the first/second respondents. In any event, Mr Stead’s evidence was that, after Ms Tasker-Wood explained the approach that was to be taken to TUPE, hers was the approach that was followed. The note provided other details about the proposed acquisition.

35. On 30 August Ms Cope emailed Ms Tasker-Wood, Mr Wills and PWC raising concerns about the list of those who would transfer. She identified “*a number of significant operations people who come out on day one that may cause significant disruption and operational problems*”. She named Mr Gordon. She went on to highlight that a number of members of the HR team were recorded as being due to leave and said “*Particularly given the steer we have already been given on TUPE can you provide me with some clarity?*”. It was not disputed that some members of the HR team had been omitted from the list of those transferring and, after this was highlighted, the lists were corrected. HR was one of the functions in which all employees were transferred as a result of being a part of a function which transferred.

36. An email from PWC late on 30 August (455) highlighted some comments on the spreadsheet and a copy of the relevant spreadsheet was provided. Amongst other things, this raised the issue of those recorded as home-based staff. PWC highlighted that a significant proportion of those so recorded appeared to perform site-related roles based upon their job descriptions. Very early on 31 August (457), Ms Tasker-Wood emailed Ms Cope and others, asking that her team reviewed a list of names (Ms Tasker-Wood’s evidence was that there were forty-six individuals) to advise whether the individuals were assigned to work by operational site. The email asked about the sites covered by those recorded as mobile or roaming. In the email Ms Tasker-Wood explained that she would be able to make an assessment of

whether they believed that the individuals were assigned, based upon the response provided. The list included a number of the claimants (as well as a number of others). That morning Ms Tasker-Wood also emailed PWC with the marked up spreadsheet detailing her queries.

37. Shortly before the previous emails referred to, Ms Tasker-Wood emailed Ms Cope and responded to her email of the previous day. She stated (462):

*“As discussed on our call, our starting point has been the sites we are acquiring as TUPE means all the people at those sites transfer. This is why the location data has been fundamental. Due to Nationwide not having a single site where core support services operated it was clear that there would be other employees in functions who were assigned to the business we were acquiring – the sites – and that they should also transfer. This is why the function data was critical.*

*Our entire approach has been to try to ensure TUPE is consistently applied...As I mentioned last night it may be that due to the way the Company has categorised functions there is an inconsistency”*

38. Mr Wills replied to Ms Tasker-Wood’s email on 31 August (467). He explained that he was sure that her team would have had difficulties in translating some of the job family mapping. He highlighted some who had “*fallen through the logic tree*” including some in HR. He addressed senior management and explained that the job titles used might depend on their experience and when they were appointed. He highlighted that some could appear to be attached to a site which was closing “*as that just happens to be the one where they have a desk in across their region*”. He identified that some were identified as homeworkers or attached to head office cost centre, when that was not entirely accurate. He expressed concern that:

*“On day one the list as it currently stands would remove about 80% of the Regional Structure for Managing the Sites, all of the Courtesy Car fleet mgmt. team, The only Director that runs mobile repair and our most experienced account managers. I have no doubt that wasn’t the intention....*

*We’re happy to help to ensure we all get the people transferred across that delivers a smooth Tupe, but just as important that we don’t accidentally leave behind anybody who will be a key player in delivering performance out of the business.”*

39. In a further email (485) early in the morning of 31 August Mr Wills listed a number of job titles and explained that he had gone through the list of those not transferring for whom queries had been raised and had added some commentary alongside each of them. The entries provided included a number of the claimants. He explained:

*“There are a number of people who we might not want to retain longer term, but that seems like a discussion for after day one. This isn’t all the queries, but it does address the immediate Operations concerns for day one”.*

40. On 31 August Mr Stead emailed Mr Ward, Ms Tasker-Wood and the finance director (558). He provided a spreadsheet which marked as grey some which he wished to retain and as blue some which were open for discussion. It was evidenced that not all those marked grey were in fact transferred. In his email he highlighted the difficulty he had in passing judgement on the technical roles such as the floating painter, as he had not seen the breakdown of the sites which were being transferred. He observed *"I assume these are for holiday or attrition coverage or capacity peaks, so I would anticipate we could manage without"*.

41. In her evidence, Ms Tasker-Wood detailed a call at 8 pm on 31 August between Mr Ward, the Finance Director and herself. It was her evidence that they went through the principles of TUPE and considered the issues which had been thrown up by the supposedly home-based employees. In her evidence she detailed the decisions which were made to transfer the Head of Mobile Repairs, the Head of Operations Support (Mr Bickerstaffe), the Head of Strategic Account Management (Ms Thomas), and the Head of Rapid Repair (Mr Chandler). Importantly in her evidence she explained *"We decided that the ... roles should also be included within the scope (and because of discrepancies in the dataset provided in the spreadsheet, had been omitted in error)"*.

42. At 8.54 pm on 31 August Ms Tasker-Wood emailed the person at PWC acting for the third respondent (626). She confirmed that the first/second respondents had finalised its position on the final list of employees. She confirmed that the upshot was that the first/second respondents believed that four named employees who were described as home-based *"are actually assigned to the business that we are acquiring based on the information provided and therefore will transfer"*. The four names included: Mr Bickerstaffe; Ms Thomas; and Mr Chandler. It was also stated that the remaining names would not transfer.

43. Later on the same evening, Ms Tasker-Wood emailed Mr Stead with two lists of Regional Operations Managers (683). The first five were employees in roles described as Regional Operations Manager and who were also described as being the ones the first/second respondents were keeping. A second list of five Regional Operations Managers were described as the ones that drop off. It was not in dispute that the five Regional Operations Managers who were kept, were the ones who were described on the relevant spreadsheets as site-based at a site which transferred, and they were accepted as having transferred. Both Mr Johnston and Mr Wills gave evidence about the list of five Regional Managers who were identified as transferring. Of the five Regional Managers recorded as transferring, both Mr Johnston and Mr Wills evidenced that: three of them were managers in the mobile repair business; and one of them was in fact a manager of a specific site rather than a region (at least at the time of the transfer). Accordingly, their evidence was that only one of the Regional Managers identified as transferring because they were identified as being site-based (at a site which transferred) was in fact a Regional Manager for the body shops

44. On 2 September Mr Stead emailed Mr Ward and others (682) following on from Ms Tasker-Wood's email of 31 August (683). He addressed the issue of Regional Managers and stated that, from day one, the first/second respondents

needed the overall structure in place. He went on to address the more senior managers and said:

*“They also have a large secondary structure above the Regional Managers of Technical and Regional Directors that we have decided we will not be maintaining.*

*Just for clarity Darren Wills is adamant that these are important roles to maintain, The three key roles he believes are critical are listed below: [he then listed Mr Gordon, Mr Isaacs and Mr Johnston and their salaries]*

*He had strong arguments for where each should stay. The case for Jim was around Scotland and his longstanding connectivity to most of the sites through longevity of service. Our decision is we can work round this.*

*The only possibly consideration would be Martin Isaacs – he has a large area under his management and, of all of them, he was the one Darren was most vocal about. Perhaps we could offer him a six month contract to help manage the transition? And then split the RM’s equally between him and Darren, giving John Keeton the capacity to get ‘under the skin’ of the Operation?”*

45. Mr Ward responded to Mr Stead within the hour (682) and said the following (with the email including a more detailed explanation):

*“The structure looks odd with a single report into Martin Isaac – maybe it is Paul Higgs that is the doer?”*

*We don’t want an overload of 6 figure salaries coming across or offering them out post deal...So I would counsel against bringing across significant cost and failed management”*

46. On 3 September (744) Mr Stead emailed Mr Wills and others with a list of six Regional Operations Managers, who were described as the immediate arms around retain after the deal list. That list mirrored the five who had been described by Ms Tasker-Wood on 31 August as being the ones who would drop off, save that Mr Higgs had been added to it. It was not in dispute that the names listed were the Regional Managers who were not accepted as having transferred under TUPE, but who were offered jobs immediately after the transfer. They were all Regional Managers for the body shops. Mr Stead, during his evidence, explained that there had been a realisation that there was a shortage of Regional Managers in the business, particularly when it was identified shortly before the transfer that only one of the five Regional Managers thought to be transferring was actually a Regional Manager. Mr Wills was initially asked to talk to the individuals to offer them a job and they were subsequently offered jobs, and all accepted them.

#### *The acquisition agreement*

47. I was provided with part of the agreement entered into between a number of Nationwide companies in administration (including the third respondent), the administrators of those companies, the first respondent as the purchaser, and another group company of the first/second respondents as guarantor (1117). The

agreement provided for the sale of the Business (as defined, see below) and certain assets, which were listed.

48. As considerable emphasis was placed upon it in the hearing, I will include in this Judgment the full definition of Business from the agreement (1122):

*“(a) the business of providing automotive crash repair, windscreen repair and accident administration services to the UK automotive industry carried on from the Properties, the Sutton Property and the Tissington Close Property;*

*(b) the operations carried out using the mobile repair vehicles leased or owned by the Sellers;*

*And the following functions that support such business:*

*(c) HR;*

*(d) IT; and*

*(e) finance,*

*as carried out by the Sellers as at the Completion date under the Name”*

49. The second and third parts of the definition of Business in the agreement (as (b)-(e)) provided that the following would transfer: the mobile repair operation; HR; IT; and finance. I will refer to those as the Transferring Functions in this Judgment. None of the claimants were employed in the Transferring Functions, but (for reasons I will address) some evidence about those functions was relevant.

50. The first part of the definition of Business in the agreement was at (a) specific to the Properties, which was a defined term (the other properties explicitly referred to were not relevant to the issues in these claims). The properties were defined as identified in a table appended to the agreement (included in the bundle separately at 722). As emphasised throughout the hearing on behalf of the first/second respondents, the definition of Business (when not addressing the Transferring Functions) was limited to the business carried on at the defined list of properties and it was only the business carried on from those properties which transferred (under the agreement).

51. During the hearing I was provided with a definitive list of the body shops operated by the third respondent which transferred and those which did not. The table also included a list of body shops which had been closed pre-transfer (albeit it did not record when each of those sites had been closed). It is not necessary for me to re-produce that document in this Judgment. In summary, that listed seventy-seven body shop sites which were transferred (and were the defined Properties for the agreement). Twenty-five body shops did not transfer. Broadly speaking, both lists contained sites spread all over England and Scotland (the list of transferred sites included some in Wales as well). At the date of the transfer, the third respondent operated one hundred and two body shops. As a percentage, 75% of the body shops in operation at the date of the transfer, were transferred. Fifteen sites were recorded as having been closed or vacated before the transaction. That meant that, as a

percentage, 66% of the sites which had been operated by the third respondent as at some unidentified point pre-transfer, transferred. In addition, three office locations were recorded as having been taken on (including Northwich), and three as not having been taken on (including Witney, the third respondent's head office). Those office locations were not included in the list of Properties appended to the agreement (722). None of the parties included the office locations in the statistics they relied upon when they referred to the percentages of sites transferred and not transferred.

52. The definition of Employees in the agreement (1124) defined employees by reference to those assigned to the Business under TUPE. It included reference to a list of employees appended to the agreement, but that list was not held out to be the definitive list of the Employees (as the defined term included, but was not limited to, those employees). Under clause 13 (1150) it was confirmed that the sale was a relevant transfer for the purposes of TUPE and that the Employees transferred to the Purchaser (a defined term, meaning the first respondent). As this was a sale by an administrator, and as is standard in those circumstances, the seller did not provide indemnities regarding the Employees. The other provisions regarding the Employees and the indemnities provided were not material to these claims.

53. During the hearing some reference was also made to clause 2.1 of the agreement (1134). That clause provided that certain things were being sold as part of the transaction. Those things included: the customer list; the goodwill; and the work in progress. Those elements were defined terms in the agreement. The customer list was the customer-specific information of the sellers, which was not limited to the definition of Business or to the transferred sites. The goodwill and the work in progress were defined by reference to the Business, and therefore the transferred sites.

#### *4 September 2020*

54. As already described, a large number of employees were accepted as having transferred and they did so on 4 September 2020. Those who did not transfer were asked to attend a Teams call at which they were informed that they would be made redundant. All of the claimants were not transferred at the time and were made redundant (by the administrators).

#### *Relevant post-transfer/acquisition correspondence*

55. Mr Johnston emailed Ms Cope on 4 September with an email headed "complaint" (849). Ms Cope forwarded the email on. In the email Mr Johnston said:

*"I feel it is not fair as when I went back into Rapid a took back it over from Andy (who has been kept on) it was under performing well behind plan and with in 3 moths not only had I got the sites to hitting targets but actually overachieving"*

56. Early on 5 September Ms Tasker-Wood responded to the internal emails about Mr Johnston's complaint (851). She said:

*“For my part, we have only taken some RRC sites and therefore he is not assigned to the business that we have acquired.*

*We need to remain robust on our stance on TUPE unless there is a very good rationale to the contrary. To give you a flavour, whilst there is no such thing as a percentage of assignment in the TUPE regs themselves, there is case law that even when an employee spent 80% of their time on the business that transferred the court held he was not assigned and TUPE did not apply.”*

57. Later on 5 September, Mr Stead emailed others and raised the possibility of re-considering the position for Mr Johnston. Within that email he said:

*“It was clear from Day One yesterday that we have cut really deep into the senior operations resource and done this almost blind (I understand why we needed to do this).”*

58. Mr Isaac telephoned Ms Cope when he was asked to attend the call on 4 September as it was a surprise to him and he did not think he should be included based upon PWC’s advice. He also emailed Ms Cope and others raising his contention that he should have transferred. He explained his position at some length in his emails, including a lengthy email of 9 September (965). Amongst other things he asserted *“My role was 100% to manage 10 of the sites that you have purchased”*.

#### *The evidence of Ms Cope and Mr Wills*

59. In her evidence, Ms Cope emphasised that the position she took and what she said about the application of TUPE, relied upon the advice which had been given to her by PWC. PWC had provided advice to the MBO team, as well as to the third respondent. PWC had not advised the first and second respondent. The advice which Ms Cope evidenced that she had received from PWC and which, understandably, she took to be correct was (in summary) that:

- a. where a function would be continued post-transfer, all employees within that function should transfer and then redundancies should be made from the team post-transfer if a reduced team was required. It was her clear view of the advice given, that it was impermissible and not in accordance with the law, not to transfer all members of a given team or function if any part of that function was to continue; and
- b. 60% was the test which applied to somebody’s work to establish whether they transferred or not (so if 60% of their work was for sites that transferred, they would transfer).

60. Ms Cope was challenged about the PWC advice and the implications of it, and she was very clear that she had fully accepted PWC’s advice as being entirely correct. Her evidence was that she provided that advice to the first and second respondents in emails and conversations; the first and second respondents disputed that she did. Ms Cope confirmed that she was not asserting that she had provided a written document containing the advice, but rather that she said she passed on the advice when explaining what she asserted about how TUPE should be applied.

61. In the emails sent from Ms Cope and Mr Wills there was reference to people who were required for the operation of the business to operate effectively and to whether those people should be transferred. Those references included a number of the claimants. Ms Cope's evidence was that there were two separate issues: whether TUPE applied (which was what the hearing was about); and what was required commercially (which it was not). It was put to Ms Cope in questioning and was suggested in Mr Stead's evidence, that the reason why Ms Cope and Mr Wills contended for the retention or transfer of key people was to protect their friends and colleagues. Ms Cope was very clear in emphasising in her evidence that her focus was on the people required for the organisation to operate effectively. Ms Cope explained her view of the importance of retaining the senior operations managers in the third respondent's business with reference to the limited experience and knowledge of the site managers at each site, who she described as being more supervisors than general managers in practice. Ms Cope considered Mr Gordon, Mr Johnston and Mr Isaac to be leading figures in the entire industry and it was her evidence that she believed that the decision not to transfer/employ them after the transfer was very naive. The advice to the first/second respondents of Ms Cope and Mr Wills about this group was ignored.

*Evidence from the first/second respondents' witnesses*

62. In her evidence, Ms Tasker-Wood emphasised that the data provided to the first and second respondents, upon which decisions needed to be based, was of poor quality. The due diligence provided was described as challenging, which was in part attributed to there being different HR and Payroll systems which had not been reconciled. The employee data evolved over time. She also gave evidence that there were issues with site closures which had occurred earlier in the year, but with the individuals based at those sites having been placed on furlough and remaining on furlough at the time of the acquisition. At the conclusion of her witness statement Ms Tasker-Wood said:

*"the Nationwide data and information provided was very limited, often inaccurate and unreliable and we had to make decisions, promptly, based on the limited information we had. We tried as best we could to apply clear principles to data we did have".*

63. In his witness statement, Mr Stead explained that the due diligence exercise was carried out rather quickly as it became apparent that the Nationwide business was under increased creditor pressure. In oral evidence, Mr Stead described the third respondent's senior management structure as having been "*a pot of spaghetti*", from the viewpoint of the first/second respondents. I found that to be a somewhat accurate description of the senior management roles at the third respondent and the ways in which they sat together. Each of the divisional director roles differed significantly from each other and, as Mr Gordon and Mr Isaac emphasised in their evidence, the structure charts provided to the first/second respondents which recorded management responsibilities, were not accurate. That was primarily because they did not record the variety of arrangements under which different managers reported to, and through, other senior managers within the management structure.



64. Mr Stead confirmed in evidence that he had no doubt that the first respondent took some people who it shouldn't have (applying TUPE strictly and accurately) because they were recorded as being assigned to a site.

65. Mr Keeton in his evidence explained that after acquisition there were very few, if any, business development proposals or tenders out for consideration. Post-acquisition, it was never the intention of the group to develop new business for the Nationwide sites. The group re-organised the workflows to feed the group's business into the acquired body shops. Mr Keeton also explained that the employee mapping exercise was challenging owing to inconsistent or incomplete data.

*Ms MacLean and related evidence*

66. Ms MacLean was, at the relevant time, a Divisional Parts Specialist. She was the only person within the third respondent who fulfilled that role. When she took on the role it had been created for the first time. Individual sites had Site Parts Assistants and/or Site Parts Managers. An area in the south had a Divisional Parts Manager, Ms Solomon, but the claimant's evidence was that her role was on a much smaller scale to the claimant's, albeit similar. Ms MacLean's evidence was that Ms Solomon supported six sites. The claimant was a Specialist and not a Manager, because she had no managerial responsibility (either for staff or a site).

67. Ms MacLean had previously undertaken other roles for the third respondent and had been responsible for other areas. In her contract, re-issued on 4 January 2017 (315), she was recorded as being home based and it was stated that her duties would require her to work from each of the Nationwide Repair Centres.

68. Ms MacLean's evidence in the hearing was that she supported all one hundred and two of the third respondent's sites. She accepted that she was, in practice, a roaming employee. She supported the third respondent's sites as required with the acquisition of parts, effectively as a support to Mr Gordon. The division for which she provided her specialist support in practice reflected Mr Gordon's division, but as his responsibilities ultimately covered all the body shops within the third respondent's business, she assisted all sites (including those covered by Ms Solomon, when she was absent). In the paper apart which had accompanied her claim form (285), Ms MacLean described that her role had originally been to cover Scotland, but it had been expanded to cover approximately seventy sites over a large geographic area

69. Ms MacLean never actually carried her job role out from home, her evidence being that it was impossible to do so. Her own evidence was that from 2017, when she had returned to Scotland, she was allowed to work from whichever branch suited her. That had changed from Glasgow to Dunfermline in 2019. She had an allocated office in Dunfermline. She spent the majority of her time working from other locations. Her evidence was that it was certainly less than fifty percent of her time that she spent at that office, but she found it difficult to be specific about how much less it was. Whether she stayed overnight when she travelled, depended upon the location of the site. Ms MacLean stayed away overnight on a relatively regular basis. Her payslips were sent from Falkirk. Her payroll number was attached to a Glasgow

branch. Her wages were effectively met by the site at which she worked for the time when she did so.

70. It was Ms MacLean's evidence that the transfer saw two of the nine Scottish site close. Seven (including Dunfermline) transferred (78%). In Ms MacLean's supplemental witness statement, she listed twenty sites at which she had been able to confirm/recall she had worked since 2017. Of the twenty sites listed, thirteen transferred and seven did not (65%). In the twelve months prior to transfer she had worked from Nottingham, Luton and Dunfermline, all of which transferred.

71. Ms MacLean's evidence was that she played a huge role in the third respondent's tenders for contracts relating to parts. She was unable to put a quantity upon the amount or proportion of her time which she spent on such tenders, albeit she highlighted that the time required varied over the year and was more significant at the time the tender processes were being undertaken.

72. Ms MacLean gave evidence that she spent a number of weeks supporting the profit and loss centre in Bristol and enquires from that centre took up some proportion of her time after she did so. Her evidence was that it wasn't often that she visited Bristol.

73. Ms MacLean's evidence was that she did not understand why she had fallen outside of the staff who transferred, which was why she was here (at the Tribunal). Ms MacLean was asked about the definition of Business in the contract during cross-examination. In answer to a question asked in re-examination, she asserted that she was part of Accident Administration Services.

74. Ms Solomon transferred. The reason why she transferred was because she was recorded on the spreadsheet as being assigned to the Bournemouth site.

75. Ms Tasker-Woods' evidence was that Ms MacLean did not transfer because she was designated as being home-based, without being allocated to a specific site. Mr Stead's evidence was that her duties and responsibilities as described did not continue post-acquisition "*as this function was centralized and incorporated into the existing model*". Mr Keeton's evidence was that the first/second respondents' view was that sites were capable of ordering their own parts and, post-acquisition, the duties she had undertaken did not continue.

#### *Mr Morais and related evidence*

76. There was no dispute that Mr Morais was a Multi-Site Painter who undertook a roaming role. He had no assigned office. His contract (96) described his place of work as being head office and various locations, but it was clear from his evidence that he had no idea where the head office described was intended to be. A document provided from the outset of his employment described his site as being the Roaming team (92). The offer letter (95) described his employment as being based at flexible locations.

77. Mr Morais worked individually being sent out to any site in the London and South East region when they needed a painter. It was his evidence that he attended

sites to cover absence and, from his oral evidence, it was clear that he was also asked to visit a site when it had high workload or a backlog. He was part of the London roaming team, but in practice he was sent to sites on an individual basis in response to need, rather than as part of a collective group. He would be told the site at which he would be working at relatively short notice. The time he spent at any specific site varied.

78. In his own document prepared in answer to questions asked by Employment Judge Dunlop (89), Mr Morais described his role as covering approximately fifteen body shops within the M25 and slightly outside (which he also described as having been his initial remit). He emphasised that he was part of the London area team or London roaming team.

79. Mr Morais emphasised in his evidence that he had at first worked throughout London, but the area had expanded over the time he was employed. Over time, the geographic area in which he was regularly required to work expanded. In his statement (89) he described an additional six sites in the south east of England at which he had worked. Towards the end of his period of employment, just prior to Covid, Mr Morais was asked to work in Mold, Wales. That showed that he was being asked to work at locations over a much wider area.

80. A spreadsheet was provided which showed where exactly Mr Morais had worked in the period between September 2018 and the end of his employment. Immediately prior to September 2020, Mr Morais was recorded as having been on a period of furlough. Prior to furlough, the sheet showed him as having worked at different sites in blocks of time which varied from one week to four weeks in a row. On occasion he was assigned to more than one site in a week. There was no specific pattern nor was there a consistent single location. In 2020 he was recorded as having worked at: Chelmsford; Luton; Fareham; Mold; and Sutton.

81. In his witness statement, Mr Morias listed the sites at which he had worked during his employment with the third respondent. In cross-examination it was put to him that ten of the eighteen sites at which he had worked had transferred, and he accepted that was the case. In his witness statement he had stated that eighty percent of the sites at which he had worked had transferred. When questioned on that figure, Mr Morias explained that the eighty percent came from his calculation of ten of eighteen sites.

82. As he fulfilled a roaming role, Mr Morais could have been asked to work from any location, something which was confirmed in evidence by Mr Johnston. When asked about Mr Morais, Mr Johnston (who had previously managed him) confirmed that Mr Morais was employed as part of the London area roaming team. He agreed that the teams in each area were expected to support and undertake work in other areas if required. Mr Johnston confirmed that Mr Morais had been helpful and willing to do that when asked, highlighting the time he had worked in Mold as being one such example. Mr Johnston agreed that where Mr Morais could have been asked to work, would have been any of the third respondent's sites.

83. On the main spreadsheet prepared by the third respondent (and provided to and adapted by the first/second respondents), in relation to Mr Morais: his hierarchy,

region and function mapping were all recorded as London; current site location was recorded as support; the answer to the question of whether he was head office was recorded as sites; and further and best view of current location, and contractual location, were stated to be home based. He was recorded on the Home-based tab of the definitive spreadsheet, where comments had been added, as being within the London region, assigned to sites in London, and being a roaming painter who would go to London sites as required.

84. The first respondent did not accept Mr Morais as transferring because he was recorded on the spreadsheet as being a home-based role (which was not correct as he never worked at home), he was in a multi-site role without an allocated site which transferred, and he was not part of the Transferring Functions. Mr Keeton's evidence was that he was not aware of any multi-site operative roles which transferred as part of the acquisition. Mr Tripp accepted that some multi-site or roaming roles had transferred and a small number of them remained in such roles after transfer (and furlough ending), but it was his evidence that they had transferred because they were assigned to a site (or had been recorded in that way).

*Mr Isaac and the related evidence*

85. Mr Isaac was the Divisional Director for the third respondent's north west and midlands division. Immediately prior to the time of the transfer, he was responsible for fifteen sites. Ten of those sites transferred. Five did not. Mr Isaac's evidence was that 66.7% of his role was transferred over, based upon the portion of sites which transferred.

86. In his evidence, Mr Isaac emphasised that the time taken with any specific site at any time would vary, and he would have spent longer focussing on the sites where issues had arisen. However, broadly, his evidence was that he believed that he was equally allocated to each site for which he was responsible.

87. In his statement Mr Isaac also confirmed that 64.3% of the Division was included within the purchased/transferring sites, measured by revenue.

88. The national map Mr Isaac provided which recorded the sites for which he was responsible (189) corroborated his evidence about the sites for which he was responsible and the numbers which transferred. It also showed that Mr Isaac had previously been responsible for one site which closed prior to the transfer (Birkenhead); there was no evidence provided about when that was.

89. Mr Isaac was responsible for the performance of the sites within his division and, broadly, he was responsible for the management of those sites. He evidenced occasions when his approach within his division would be adopted and rolled-out in other divisions, but he emphasised that he was not in any way responsible for the roll-out, as he was focussed upon (and very busy in) managing his own division.

90. Mr Isaac worked from the offices located in the sites for which he was responsible. It was his evidence that he never worked from home. In his statement he referred to having an office in Warrington, being the site which was closest to his home (and being a site which did not transfer). In his oral evidence Mr Isaac listed

other sites where there were offices from which he worked relatively frequently (including Dudley and Ellesmere Port, both being sites which did transfer). He explained that the offices from which he worked were the ones on larger sites where there was an office available which he could use when he visited the site. His evidence was that he was not based at any one site.

91. No contract was provided for Mr Isaac. On the spreadsheet prepared by the third respondent and provided to and adapted by the first/second respondents: his contractual location was recorded as home based, as was the best view of current location (which was not really accurate); he was shown as head office and support services – directors, under hierarchy; he was management under current site location; and head office was recorded as his location and the answer to the question of whether he was head office. He was recorded on the Home-based tab of the definitive spreadsheet where comments had been added, as being in the head office region and assigned to the sites in the north west and west midlands. At tab I he was recorded as senior operations, very effective within his region, solid financial and people performance. At tab J it said home based but would be at sites within north west/west midlands.

92. Mr Isaac particularly contrasted his treatment with that of Paul Higgs. Mr Higgs was a Regional Manager who worked within the division for which Mr Isaac was responsible and reported to him. Mr Higgs had been appointed a few months before the date of transfer. Mr Isaac's evidence was that Mr Higgs' responsibilities were comparable to Mr Isaac's own, save that he was responsible for only four sites within Mr Isaac's division rather than the fifteen for which Mr Isaac was responsible (including those which fell within Mr Higgs' responsibility). There was no dispute that Mr Higgs was not identified as someone who transferred, and he was made redundant by the third respondent at the same time as Mr Isaac. Mr Higgs was offered a job by the first respondent immediately after. Mr Isaac's evidence was that in practice the role Mr Higgs was offered was the same as the one Mr Isaac had fulfilled prior to the transfer (albeit with responsibility for the ten sites which had transferred rather than fifteen). The first/second respondents' evidence was that it was a different role in terms of breadth and seniority.

93. Mr Isaac also contrasted his treatment with James Houghton the divisional accountant who had been responsible for the same division as Mr Isaac. It was common ground that he transferred. Mr Isaac accepted that Mr Houghton was part of the finance team. He accepted that based upon functions, if the first/second respondents took everybody in the finance function, then it was reasonable for Mr Houghton to have been identified as transferring.

94. When questioned about the application of TUPE, Mr Isaac drew a distinction between circumstances where: some sites were transferred and some retained, which continued to operate, when he accepted that the role-holder might not transfer because he would remain responsible for the retained sites; and a situation where the sites which did not transfer ceased to operate and the employees were made redundant. He emphasised that, in the latter case, the person in the role was left with no job if they did not transfer and, therefore, he believed that the circumstances were materially different.

95. Mr Isaac's evidence was that a lot of the information about people in the spreadsheet upon which the first/second respondents relied, was not correct and people were not listed as working from the correct places.

96. In his evidence, Mr Isaac said there were four divisional directors at the time of the transfer: Mr Johnston; Mr Gordon; Mr Donnelly; and Mr Isaac. It was common ground that Mr Johnston, Mr Gordon and Mr Isaac had not transferred at the time (as they were three of the claimants). The first/second respondents' stated reason why Mr Donnelly transferred, was because he was treated as being allocated to Bridgend and that was what was recorded on the relevant spreadsheet. Bridgend was a site which transferred.

97. Mr Isaac was involved in planning the new structure of the division as part of his role, albeit he was not involved in either the proposed MBO or the transaction involving the first/second respondents. He was surprised to be requested to attend the conference call on 4 September 2020. He rang Ms Cope and spoke to her about it. Following the call, Mr Isaac sent a number of emails to those responsible at the first/second/third respondents in which he explained why he should have transferred. As recorded above, in one email (965) Mr Isaac stated that he was 100% responsible for the sites which transferred (in his division). In his verbal evidence he made it clear that he had been saying that after the transfer he would have been 100% responsible for the ten sites, he had not been asserting that the ten sites had made up 100% of his role pre-changes (when the ten sites had been two thirds of the sites for which he had been responsible).

98. Both Ms Cope and Mr Wills were witnesses called by Mr Isaac and for whom a witness order was obtained at his request. Their evidence provided helpful background to the position taken by the management of the third respondent about the application of TUPE, based as it was on PWC's advice (which I have already described). That advice informed Mr Isaac's position. It was clear that they had both advocated for the transfer of Mr Isaac and others, shortly before the transfer.

99. In summary, the first respondent did not accept Mr Isaac as transferring because he was not allocated to a specific site (which transferred), his role covered a number of sites (some of which transferred and some which did not); and he was not determined to be in scope as a result of a function which transferred.

100. Post-transfer the first respondent did not have divisional directors or that layer of management. The overseeing of the sites in the comparable geographic region and the management of those sites, was undertaken by one person (Mr Higgs) who in practice undertook a similar management role (even if the precise responsibilities and seniority were not the same).

#### *Mr Couzens and related evidence*

101. Mr Couzens was a Vehicle Damage Assessor or Estimator. It was his evidence that the third respondent had at least one VDA working on each site. Mr Couzens had a roaming role covering thirteen sites in the east. He and another roaming Estimator, Andrew Thorpe, would work from any of those thirteen sites, as requested, to cover sickness, holiday or workload issues.

102. Mr Couzens accepted that he was not allocated to any specific site. He did not work from home. He had to be at a site to do his work. He was critical of the description used of him as being home-based, because that was inaccurate.

103. He had been working at Chelmsford when the pandemic hit. He later worked from Cambridge for a period (which was a significant distance of travel from home). He was placed on furlough for some time, before returning to Cambridge (between 17 June 2020 until 28 August 2020). He was then asked to work from Swavesey from Monday 31 August 2020.

104. In his own statement prepared in answer to questions (365) Mr Couzens described that he worked between thirteen sites. He said that initially his base had been Norwich (at a site which closed, as opposed to the one which transferred), but it had transferred to Swavesey (a site which transferred). His employment contract from 2016 (366) described him as a Roaming Estimator. It recorded his place of work as Thetford. It was Mr Couzens' evidence that he had been based at that site because that was the site closest to his home, but that site had closed at some time before the date of the transfer and he would rarely have been there as he worked between the different sites to provide cover.

105. Of the thirteen sites at which Mr Couzens worked, seven transferred.

106. Where Mr Couzens worked was decided by the Regional Manager. It would be predictable regarding holiday cover; but would be unpredictable where cover was for other reasons. He could be asked to go to another site during a working day. He was allowed to stay in hotel accommodation during the working week. He could spend as little as an afternoon on a site, and as long as two months.

107. He was recorded on the Home-based tab of the definitive spreadsheet where comments had been added, as being within the East region, assigned to sites in the East region, and being a Roaming VDA who would go to sites within the East as required.

108. Mr Couzens contrasted his treatment with that of Mr Thorpe. Mr Thorpe was transferred, and Mr Couzens did not. Mr Couzens accepted that the spreadsheet upon which the first/second respondents based their decisions, recorded Mr Thorpe as having Ipswich as his site (which was an acquired site), when the same spreadsheet recorded Mr Couzens as being home-based. On 4 September 2020 Mr Couzens was told to stop work and go home. Mr Thorpe was brought in to take over the work which he had been carrying out.

109. The first respondent did not accept Mr Couzens as transferring because he was recorded on the spreadsheet as being a home-based role (which was not correct as he never worked at home), he was in a multi-site role without an allocated site which transferred, and he was not part of the Transferring Functions.

110. Mr Keeton's evidence was that he was not aware of any multi-site operative roles which transferred as part of the acquisition. Mr Tripp accepted that some multi-site or roaming roles had transferred and a small number of them remained in such

roles after transfer (and furlough ending), but it was his evidence that they had transferred because they were assigned to a site.

*Mrs Clarke and related evidence*

111. Mrs Clarke was employed by the third respondent from 2 January 2014. On 9 October 2017, she was promoted to Business Development Manager. That role was not restricted to one which sought new business, it was responsible for both existing customers and new business.

112. In her witness statement Mrs Clarke described the breakdown of the role which she fulfilled. She broke it down into four core areas which she described as: market (gathering market information); sales opportunities (tenders); customer (account management); and business structure (compliance and business improvement). Only one of the four areas was directly about obtaining new business (sales opportunities). When asked to try to define the time she spent on each of those core elements, Mrs Clarke emphasised the difficulty in doing so, as it changed from time to time and depended upon what was “*hot*” at the time. Some elements, such as the tender collation and submission (which were the activities which constituted the sales opportunities core area), were intensive at times but there would be many months when no tender work was required. The percentage ultimately explained in evidence was: 10% market; 10% sales opportunities; 40% customer; and 40% business structure.

113. It was Mrs Clarke’s evidence that the third respondent did not operate separate teams which dealt with client management and winning new work. The business development team undertook business development both in relation to existing clients and in obtaining new work. Mrs Clarke was clear in her evidence that she did so. It was also her evidence that so did Hayley Thomas and Leslie Bickerstaffe.

114. In her role as Business Development Manager, Mrs Clarke worked from home. Her evidence was that she estimated that 70% of her working time had been working from home. She also needed to attend the third respondent’s sites as part of her work. She particularly emphasised the need to do so to undertake the business improvement element of her role and the roll-out and training associated with it (part of the business structure core area). No contract was provided, save for an offer letter which recorded no place of work (49).

115. In its response to the claim entered at the Tribunal, the first/second respondents had contended that Mrs Clarke did not transfer because she was based at the Hertford site. Mrs Clarke was never based at the Hertford site (indeed there was no evidence heard at all about such a site, which was not recorded as being either an acquired or not-acquired site). Mrs Clarke had historically been based at the Havant site and had later been based at the Wokingham site, but her evidence was that those site locations related to times before she was promoted to Business Development Manager.

116. People who were identified as being part of the Business Development team were: Ms Thomas (Head of Strategic Account Management, who transferred); Mr



Bickerstaffe (Head of Operations Support, who transferred); Mr Roberts (Strategic Account Manager, who transferred); Ms Collis (Business Support Officer, who did not transfer); Ms Downen (Sales & Account Development Manager, who did not transfer); and Mr Hutt (Motor Manufacturing Compliance and Technical Manager, who it did not appear genuinely fulfilled a business development role at all). Ms Thomas and Mr Bickerstaffe were not allocated to any specific site. Mr Roberts was recorded on the spreadsheet as being allocated to the Leicester Call Centre site (a site which transferred). Mrs Clarke did not know of Mr Hutt and knew very little about Ms Collis (she highlighted that because the BD team worked throughout the UK she had not had a great deal of contact with other members). Mrs Clarke knew of Ms Downen. Mrs Clarke contended that she should have been treated consistently with Ms Thomas and Mr Bickerstaffe.

117. Mrs Clarke was recorded on the Home-based tab of the definitive spreadsheet where comments had been added, as being in a UK-wide Head Office role, as were Mr Bickerstaffe and Ms Thomas. At tab I it was recorded that she supported bids, customer relations issues and the BD team. At the same tab, Mr Bickerstaffe was described as having the key customer relations with three of the third respondent's customers, and Ms Thomas was described as having key relationships with all customers and as being the most senior within the BD team.

118. The business development undertaken by the third respondent was not site-specific nor was it intended to generate customers or work for a specific site. The business development was national and sought to bring in new business for all sites (which would then be triaged to the correct body shop) and to account manage the customers of all sites.

119. Ms Cope's evidence was that, within the third respondent, Business Development was a separate function and a small team. That team was very much focussed on clients and keeping the client relationship in a good place, as well as handling client complaints (or at least some complaints). They would work with the top ten key accounts.

120. Mr Tripp gave evidence that there was no need for new business development post-transfer, as the in-flow of work was to come from other Redde Northgate businesses and the group as a whole would carry out new business development collectively, rather than the first respondent carrying out its own.

121. Mrs Clarke also highlighted health and safety and compliance as being parts of the business which were cross-site, not part of the areas defined in the business purchase agreement, but where nonetheless the employees transferred. She contrasted her treatment with those within those teams.

#### *Mr Gordon and related evidence*

122. Mr Gordon in his evidence emphasised that he was operationally responsible for the entire operation of the third respondent and all of the body shops (but not mobile repairs). He reported to the Chief Executive in relation to all of the sites. He was part of the executive committee which oversaw and ran the third respondent. His evidence was that, in effect, he was the operations director. Within his role, Mr

Gordon had oversight of, and senior responsibility for, all sites and divisions covered by other divisional directors and his evidence was that an organigram should have shown the other divisional directors as reporting for their divisions through him to the Chief Executive.

123. Mr Gordon also had direct responsibility for the geographic areas which were not the responsibility of other divisional directors. Within those areas, he had a number of regional managers who reported to him and who were each responsible for some sites within the division.

124. In his witness statement Mr Gordon explained that he had been responsible for all one hundred and two body shop sites, including the seventy-seven sites acquired by the first/second respondents and the twenty-five sites not-acquired. In his verbal evidence, he explained that he was directly responsible for (not including those which were the responsibility of other divisional directors) seventy-seven sites, of which fifty-seven transferred.

125. When explaining how his time would be spent, Mr Gordon emphasised that it would vary depending upon the needs of the business and the specific sites. His evidence was that, whilst he was responsible for all sites in Scotland, in practice that took up less of his time than some other geographic areas because he had been responsible for it for some time and had appointed most of the managers within Scotland and therefore it required less of his time to be focussed upon it.

126. In the spreadsheets provided to the first/second respondents, Mr Gordon was recorded as having head office as his region, and as having been based in Ayr. There was no evidence that he had been based at head office. Mr Gordon denied that he had been based in Ayr. He did however have the use of a manager's office in Ayr (a site which did not transfer) where a filing cabinet was also located, in which he stored personnel records. His evidence was that it reflected it being the closest office to his home. His evidence was clear that he did not spend significant amounts of time in, or working from, that office.

127. No contract for Mr Gordon was provided.

128. Mr Gordon was part of the proposed MBO and was privy to the PWC advice. It was partly based upon that advice that he contended that the approach of the first/second respondents was contrary to TUPE and amounted to a cherry-picking exercise.

129. Mr Gordon contrasted the fact that he (and Mr Isaac) did not transfer, with Mr Donnelly who did. Mr Donnelly was also a divisional director (albeit one with responsibility for considerably fewer sites than Mr Gordon). Mr Gordon's evidence was that Mr Donnelly was the lowest paid of the divisional directors. Mr Donnelly was recorded on the spreadsheets provided to the first/second respondents as having been based at Bridgend. Bridgend was a site which transferred. Mr Gordon accepted that was how Mr Donnelly was recorded on the relevant spreadsheet and he could see how the first/second respondents could have seen him as someone based at a transferring site, albeit he did not believe that their positions did in fact differ.

130. In summary, the first/second respondents did not accept Mr Gordon as transferring because his role covered a number of sites (some of which transferred and some which did not); he was not determined to be in scope as a result of a function which transferred; and the site to which he was recorded as allocated (Ayr) did not transfer.

131. In January 2021 (that is some time after the acquisition) Mr Gordon was approached by Ms Cope and another senior employee of the first/second respondents' group of companies about employment with the first/second respondents. Ms Cope advised Mr Gordon that the company had been too hasty in letting him go. In a subsequent conversation, Mr Gordon informed Mr Tripp that he did not wish to take up the offer.

*Mr Johnston and related evidence*

132. It was clear from the evidence of Mr Johnston and others that he had a multi-faceted role. He was responsible for the rapid repair centres, which were spread across the country (they were also the responsibility of the divisional director within whose geographic region the site was located). He had the title of divisional director, but in practice that was not the central part of his duties. Mr Gordon in his evidence did not describe Mr Johnston as one of the divisional directors at all, when he was describing them. Mr Johnston's role was made up of responsibility for the rapid recovery centres, divisional responsibility for the London region, and having broader technical responsibility. It was clear from both his evidence and that of other witnesses, that his responsibilities and, in particular the time allocated to each of those responsibilities, had varied over time

133. In his claim form (207) Mr Johnston described his main duties as being overseeing the rapid repair centres and he confirmed when giving evidence that was the case. In oral evidence he explained how he had been responsible for creating and setting up the rapid repair centres. During a period in 2018/19 he had taken on greater responsibilities as divisional director of London and had shifted his focus to those duties. However, as a result of performance issues with the rapid repair centres and their importance to the profitability of the business, in the latter part of his employment prior to the acquisition, he had reverted to being primarily focussed on the rapid repair centres. In answer to being asked to do so, he estimated that 90% of his working time was spent on his duties being responsible for the rapid repair centres, at the time of the acquisition.

134. In his witness statement, Mr Johnston recorded that eighteen of the twenty-four rapid repair centres were transferred, and he explained that (which transferred) as being 75% of his role. Nobody else gave any evidence which contradicted that evidence.

135. As part of his role, Mr Johnston was also divisional director for London. The sites for which he was responsible in that role were not precisely identified during the hearing, nor was there any clear evidence about which sites in the division transferred and which did not (save that there were some sites which did and some which did not). Mr Johnston's evidence was that he had a much reduced amount of day-to-day responsibility as divisional director in the period leading up to the

acquisition. Whilst he remained responsible, it was his evidence that the two regional managers had most of the day-to-day responsibility and he would just support them with telephone advice when he was called. Mr Morais' evidence was that Mr Johnston had previously been his manager, but that had ceased, and he had reported to another manager for a period prior to the transfer.

136. As a further part of his role, Mr Johnston was Head of Technical. In that role he was responsible for the technical issues as they applied to all one hundred and two of the third respondent's body shop sites, albeit not for the management of the staff who worked at those sites. Of those sites, seventy-seven transferred (75%) and twenty-five did not. In his verbal evidence, Mr Johnston explained that the time required for that part of his duties would vary, with occasions when there was no time required and others when he would need to attend meetings etc. In the period prior to the transfer, those duties were part of the 10% of his time which he defined as not having been spent on rapid repair centre responsibilities

137. Whilst not referred to in his witness statement, Mr Johnston also accepted that he had had some responsibility for value stream mapping and projects, as Ms Cope had stated in her evidence. Mr Johnston's evidence was that those were responsibilities of all divisional directors.

138. No contract for Mr Johnston was provided. On the spreadsheet produced by the third respondent and amended by the first/second respondents, he was recorded as having head office as his region, and his site location as being home based. Neither was correct, as his role was one which was not based at any individual site. On the Home based tab of the master spreadsheet at column I it was recorded that *"TJ has a role solely designated to rapid repair"*.

139. In its response, the first/second respondents had stated that Mr Johnston had been the company training manager. That was incorrect and it was not a role which he had ever held. The response also recorded Mr Johnston as having had Witney as his place of work. Mr Johnston stated that he had never been based at any site during his employment and had only very occasionally visited Witney. Mr Johnston did state in his witness statement that his establishment was Head office, as his role was group based.

140. In summary and based upon the evidence of Ms Tasker-Wood, the first respondent did not accept Mr Johnston as transferring because he was not allocated to a specific site (which transferred), he was not determined to be in scope as a result of a function which transferred, his role did not feature on any of the structure charts, and he was designated as divisional director on the spreadsheet without reference to the rapid repair business. Mr Johnston was treated in a way consistent with the others recorded to be divisional directors who were not site-based at a transferring site, however the first/second respondents' decision-making was informed by a very limited amount of information for his complex multi-faceted role.

141. When Mr Wills was asked about the estimated proportions of Mr Johnston's role (Mr Wills having been the Operations Director at the time of the transfer) he estimated that 10% was time spent on the technical role (which roughly equated to Mr Johnston's evidence) and 30% was spent overseeing what happened in rapid

response sites, with the remainder being spent on his regional responsibilities. Mr Wills did not give the detailed evidence which Mr Johnston had about the reduction in his responsibilities for the London region in the period prior to the transfer.

142. Mr Johnston contrasted his position with Mr Andrew Chandler. Mr Chandler was the Head of Rapid Repair. He had been appointed at the time when Mr Johnston had taken on less responsibility for the rapid repair centres. Mr Johnston's evidence was that Mr Chandler had been responsible for covering for managerial absence, after Mr Johnston himself returned to taking greater responsibility for the rapid repair centres. Mr Chandler was described on the main spreadsheet with similar entries to Mr Johnston regarding location and place of work. Mr Chandler as Head of Rapid Repair was considered to transfer under TUPE by the first/second respondents because he was head of the rapid repair part of the business. It was Ms Tasker-Wood's evidence that this accorded with the approach taken by the first/second respondents to TUPE, it was not her evidence that Mr Chandler had been transferred due to other commercial reasons.

143. Mr Johnston also raised as a relevant issue the recruitment of Mr Pennell as Technical Director by the first respondent in 2021. Mr Johnston's view was that when someone new was appointed to undertake a role four months after he had been let go, to do part of what had previously been his role, it was wrong that he had not been approached about that role. He was not approached. Mr Pennell was not employed in the business prior to, or at the time of, the acquisition/transfer. He was recruited some months later.

### **The Law**

144. This case involves consideration of the Transfer of Undertakings (Protection of Employment) Regulations 2006, which are referred to in this Judgment as TUPE. It is important to remember, as Mr Smith highlighted, that TUPE is there, as the title makes clear, as a protection of employment measure. TUPE provides employees with rights on the transfer of a contract, when the law would not otherwise afford them any protection. Those rights include: not to be dismissed because of a relevant transfer; and to transfer with all rights, powers, duties and liabilities under, or in connection with, the employment contract.

145. There was no dispute in this case that there was a transfer under regulation 3(3)(a) of TUPE. The issues in dispute were: what was the undertaking which transferred; and whether the claimants were assigned to the economic entity which transferred. This was a case involving a transfer under 3(3)(a) only, the traditional TUPE test (which implemented the Acquired Rights Directive). It was common ground that this case did not involve a transfer under the service provision change rules (regulation 3(1)(b)), which uses a test which goes beyond, and differs from, the test applied by the Acquired Rights Directive.

146. What transfers under regulation 3(1)(a) is an undertaking, business or part of an undertaking, to another person, where there is a transfer of "*an economic entity which retains its identity*".

147. Regulation 2 provides that assigned means “*assigned other than on a temporary basis*”.

148. Regulation 4 requires that, in order to transfer under TUPE, a person must be “*assigned to the organised grouping of resources or employees that is subject to the relevant transfer*”.

149. The Judgment in the European case of **Botzen [1985] ECR 519, Case 186/83** remains the key authority on assignment. Both the professional representatives referred to and relied upon that Judgment. It was noted that the facts of that case bore some similarities to this one. As **Botzen** was highlighted by both professional representatives in written and verbal submissions, it is appropriate to reproduce exactly what was said in the relevant part of that Judgment.

*“[14] On the other hand, the Commission considers that the only 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 organisational framework within which their employment relationship took effect.*

*[15] The Commission's view must be upheld. An employment relationship is essentially characterised 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 under Directive 77/187 by reason of a transfer within the meaning of Article 1(1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned.*

*[16] The answer to the second and third questions must therefore be that Article 3(1) of Directive 77/187 must be interpreted as not covering the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, although not employed in the transferred part of the undertaking, performed certain duties which involved the use of assets assigned to the part transferred or who, whilst being employed in an administrative department of the undertaking which has not itself been transferred, carried out certain duties for the benefit of the part transferred.”*

150. Guidance on the proper test for assignment was given in **Duncan Web Offset (Maidstone) Ltd v Cooper [1995] IRLR 633**, a case referred to by both professional representatives. Mr Justice Morrison said:

*“There will often be difficult questions of fact for industrial tribunals to consider when deciding who was 'assigned' and who was not. We were invited to give guidance to industrial tribunals about such a decision, but decline to do so because the facts will vary so markedly from case to case. In the course of argument a number were suggested, such as the amount of time spent on one part of the business or the other; the amount of value given to each part by the employee; the terms of the contract of employment showing what the*

*employee could be required to do; how the cost to the employer of the employee's services had been allocated between the different parts of the business. This is, plainly, not an exhaustive list; we are quite prepared to accept that these or some of these matters may well fall for consideration by an industrial tribunal which is seeking to determine to which part of his employers' business the employee had been assigned."*

151. Both professional representatives cited **London Borough of Hillingdon v Gormanley UKEAT/0169/14**. What was determined in that Judgment was specifically in the context of a service provision change transfer, which is not relevant to this case. Even for the parts of that Judgment which may still apply to assignment under a traditional TUPE transfer, I did not consider that what was said really added anything to the other cases relied upon. It was clear from **Botzen** and **Duncan Web** that I must consider all relevant circumstances when determining assignment. Whilst the passage cited from **Duncan Web** listed circumstances which are likely to be considered relevant, what was actually said in that Judgment was that guidance about the factors which would be relevant could not be provided. Accordingly, it is clear that factors such as structure or what duties an employee could be required to undertake under their contract, were, at least potentially, relevant material or circumstances (but, of course, would not be determinative), because all relevant circumstances must be considered.

152. Mr Smith relied upon what was said by J Serota QC in **Edwards v BT Managed Services Ltd UKEAT/0241/14**. He did not rely upon the facts of that case, as it was a service provision change decision. I agree that the passage cited was of assistance:

*"In the case of TUPE it is clear from its very title that its purpose is to protect **employment** (Transfer of Undertakings (**Protection of Employment**) Regulations (my italics)). TUPE should thus be construed so as to give effect to this purpose."*

[I have used bold in this Judgment to show the words which J Serota QC italicised in his]

153. Mr Smith also relied upon the Judgment of Mummery J in the Employment Appeal Tribunal in **Buchanan-Smith v Schleicher [1996] IRLR 547**. He highlighted what he described as the parallel facts and set out in his submissions a lengthy section of the Judgment. That was a case about a claimant in a small business who had undertaken a variety of different work. The issue was whether she had transferred with an undertaking which included part of the business, when she had undertaken other work which fell outside the undertaking/part transferred. It was also a Judgment made in the context of a transferor who was left with no business in which to employ employees after the transfer. The Tribunal at first instance found (it said, not without considerable hesitation) that the claimant was not employed in the identifiable part of the undertaking which transferred. The Employment Appeal Tribunal allowed the appeal against that Judgment. Mr Smith submitted that the Employment Appeal Tribunal considered the fact that the claimant would lose her job if she did not transfer, to be a relevant factor. He also submitted that **Buchanan-Smith** was authority for the fact that, in circumstances where a claimant worked in a

number of other roles in addition to those within the part transferring, that did not determine that she did not transfer.

154. In the key passages in **Buchanan-Smith v Schleicher [1996] IRLR 547** Mummery J said the following (whilst he was referring to the previous UK version of TUPE, there is no reason why it does not equally apply to the current version):

*“Whether the organisation and running of the service side meant that she was assigned or allocated to that part of the business depends, as stated in **Duncan Web Offset** ... on all the facts of the case, i.e., time spent, value given, contractual terms, allocation of costs and so on.*

*The chairman of the tribunal did not expressly consider the particular factors mentioned in order to decide the question whether the applicant was employed in the part of the undertaking transferred. His reasoning was that she was not employed in the service undertaking transferred because she turned her hand to everything in the small business, including her special role in the sale of smaller shredding machines, as well as the organisation of service, maintenance and repair. In other words, she was not employed in the service undertaking, because she was also working in the sales undertaking. In our judgment, that is not a legally correct approach.*

*As illustrated by **Duncan Web Offset** ..., an employee may in fact be regarded as assigned to an employer's business, even though that employee spends time looking after another business, even the business of someone other than the employer. In the case of one employer carrying on two undertakings, an employee may be assigned to one of the undertakings, even though engaged in the activities of the other undertaking. In our view, there is nothing in the earlier decisions of this appeal tribunal or in the European Court of Justice's decision in **Botzen** ..., to the effect that a person can only be regarded as employed in an undertaking, or part of an undertaking, if he works exclusively in that undertaking or part. The ruling of the Court of Justice in **Botzen** was to the effect that Directive (77/187/E.E.C.) did not protect an employee, who, although not employed in the transferred part of the undertaking, performed certain duties involving the use of assets of that part or who, whilst he was employed in an administrative department not transferred, carried out certain duties for the benefit of the part transferred. The test whether a person is employed in an undertaking or part is simply: was he assigned to that undertaking or part? That is a question of fact to be determined by considering all the relevant circumstances. The discharge of duties involving the use of assets or the discharge of beneficial administrative duties for the part transferred are insufficient to constitute employment in an undertaking.*

*In this case, the facts found by the chairman lead, in our view, to the conclusion that, for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981, the applicant was to be regarded as assigned to and employed in the transferred part at the date of the transfer. The part transferred was the service part. She ran and organised it. At the time when the transfer took place, a decision must already have been made*



*that the only other part of the business in which she had been active, the sales part, would cease to be carried on. The chairman held in his decision that the sales part ceased to trade. The employees concerned in that part ceased to work for Tarnator Ltd. and began to work, almost immediately and without a break, for the transferee. There was no longer any sales part or a sales undertaking to which the applicant or any other employee of Tarnator Ltd. could be regarded as assigned or allocated. There was no more sales work for them to be employed to do.*

*The position is that, if the applicant was, as we conclude, employed in the servicing part transferred, and the sales part ceased to trade, her contract of employment with Tarnator Ltd. would have been terminated by the transfer to the transferee, if it were not for the effect of the Regulations of 1981. There would, in the words of Mr. Reddiford, have been a repudiatory breach on the part of Tarnator Ltd. connected to or caused by the transfer, because there would have been no work left for her to do in either undertaking. That is a situation in which regulation 5(1) operates on the contract of employment, so that the contract has effect after the transfer as if originally made between the person employed and the transferee. The application of the principles laid down in the Court of Justice and in this appeal tribunal to the facts found by the chairman on the transfer of the servicing part and the closing down of the sales part, accompanying the transfer, brings the case within the Transfer of Undertakings (Protection of Employment) Regulations 1981.”*

155. In his verbal submissions, Mr Brochwicz-Lewinski submitted that the Judgment was something of a curiosity and it certainly could not be relied upon as determining that an employee must transfer where the employee otherwise was not assigned to the part of the business which transferred, because their job came to an end. He submitted that it cannot be right that insolvency means that someone not employed in an undertaking which transfers, instead satisfies the test of assignment. On that basis he described the curiosity of that case.

156. **Buchanan-Smith** does, of course, remain a decision which is binding on me and which I must follow. I accept that the passages cited above make it very clear that an employee may be assigned to one undertaking, even though they are, or have been, engaged in the activities of another undertaking. The Judgment made very clear that undertaking some activities outside of the transferring undertaking did not preclude a claimant from transferring. Where somebody performs certain duties for the part not transferring, Mummery J (as he then was) spelt out clearly that they will transfer if they are assigned to the undertaking transferring in all the circumstances. Some time spent looking after other (non-transferring) business does not preclude assignment to the part transferring. An employee turning their hand to something outside the part transferring, similarly, does not preclude assignment to the part transferring. Those duties are part of the relevant circumstances to be taken into account, but exclusivity to the business transferring is not a requirement of assignment to it.

157. For Mr Smith’s other submission following from **Buchanan-Smith**, I found the position to be more difficult. It is correct that I must take a purposive approach when applying TUPE and it is protection of employment legislation. However, I am clear

that the purposive approach cannot mean that someone who was otherwise not assigned to the part transferring, is somehow deemed to be assigned because the alternative was loss of employment. It is clear from Mummery J's decision that, in that case and in the particular circumstances he was considering, a relevant circumstance for him was the cessation of the work for the transferor. That much is clear from the later part of the passage cited. I am required to consider all the relevant circumstances, and therefore I accepted the submission made by Mr Smith that the fact that the claimants otherwise lost their jobs where the first/second respondents determined that they did not transfer, is part of the relevant circumstances I must take into account. I have done this when considering the claims of each of the claimants, albeit I will not repeat below each time that I have done so. However, I also accepted the submissions of Mr Brochwicz-Lewinski as summarised at paragraph 155 above and agree that loss of employment cannot be a factor which is determinative in a case when assignment would not otherwise have been found. I did not find, in the circumstances of the cases I was considering (and taking account of **Buchanan-Smith**) that the fact that the claimants would lose their jobs if they did not transfer, was a significant factor which meant that any of them were assigned to the economic entity which transferred, in circumstances where otherwise I would not have found that they were.

158. Mr Brochwicz-Lewinski relied upon **Skillbase Services Ltd v King EATS/0058/03**. That was a service provision change case (Mr Smith's primary submission being that service provision change cases could not assist in this case). Mr Brochwicz-Lewinski's submission highlighted (quite correctly) that it was a case where a branch manager was held not to have been assigned to a contract even though 80% of the work undertaken at the branch related to that contract. The appeal Judgment confirmed that the issue in each case is essentially a question of fact to be determined by reference to all the evidence. It was identified in that Judgment that, for the appeal to succeed, the Employment Appeal Tribunal would need to find that the Tribunal at first instance had reached a perverse decision. The Employment Appeal Tribunal did not find that the decision was perverse. The authority was accordingly of limited assistance, save for showing that the finding made on those facts in that case, was not perverse.

159. Mr Brochwicz-Lewinski also relied upon **Williams v Advance Cleaning Services Limited UKEAT/0838/04**. The claimant in that case was found not to have transferred, even though he had spent the majority of his working time on the relevant contract. That was a decision on the facts of that case, which was upheld by the Employment Appeal Tribunal. The Employment Appeal Tribunal notably declined to attempt to provide a formula for deciding whether an employee was assigned to the part transferred or not. Save for the very limited value of showing that the decision reached in that case on those facts was not perverse, the Judgment provided limited assistance. What was correctly cited by Mr Brochwicz-Lewinski and which was of assistance as a statement of what needs to be decided, was that Bean J said:

*"it is not sufficient for an employee to show that he was substantially involved in the part transferred: he has to show that he was effectively assigned to the part transferred."*

160. Both professional representatives made reference to the Judgment of HHJ Eady in **Costain Ltd v Armitage UKEAT/0048/14** in their submissions. Mr Smith emphasised verbally that his basic position was that, as it was a service provision change Judgment, it could not assist in this case; however, if the Tribunal thought assistance could be drawn from service provision change decisions, he said it assisted the claimants he represented. What HHJ Eady said about **Botzen** is set out below, which was something which I was satisfied could assist in this case, even though it was said in a Judgment in a service provision change case. In his submissions, Mr Brochwicz-Lewinski also cited a passage which followed on from (and referred to) another decision in a service provision change case, and I did not find that subsequent passage to be helpful as it was clearly said in the context of discussion of a service provision change transfer. In her helpful explanation of **Botzen** HHJ Eady said:

*“That talks of assignment in terms of a business undertaking or part, rather than any service provision change, but the language of assignment remains the same. In approaching that question, it is often tempting to try to establish assignment by reference to the percentage of time an employee is engaged in working in the relevant undertaking or part or on the particular activities in question. That might not be an irrelevant question, but it is not the test.”*

161. The IDS handbook on TUPE helpfully summarises the case law by stating that the most significant and generally applicable point to emerge from the cases is that the problem of ascertaining assignment will rarely be a simple matter of making a mathematical calculation as to the proportionate amounts of time an employee spends working for different parts of a business. The same summary was also quoted by Mr Brochwicz-Lewinski from the IDS Brief.

162. Whether an individual was assigned to the entity transferring is a matter of fact for me to determine considering all the relevant circumstances in the case. It is not something which is determined by the views of the parties. The reasons why a party may have taken a particular stance in relation to TUPE at the time of the transfer are not determinative of the question of whether the employee was assigned to the transfer. If the first/second respondents gave a reason at the time for someone not being assigned which transpires to have been incorrect, that did not mean that the employee must have been assigned; I am required to consider the circumstances and determine for myself whether the employee was (or was not) assigned.

163. This Judgment does not reproduce all that was said in submissions by the parties, but all matters which they raised were considered.

164. None of the parties during the hearing, or in submissions, made any reference to the case of **ISS Facility Services v Sonia Govaerts C-344/18**, to any cases which have applied that decision, or to any arguments based on that case or the outcome of it. The parties all conducted the case on the basis that an individual's role either transferred under TUPE in its entirety, or it did not. There was no argument put forward that any of the roles split at transfer so that part (only) of any claimant's role was transferred to the first or second respondents, and part not transferred. As I am required to do, I considered only the claims advanced.

**Conclusions – applying the Law to the Facts**

165. As was recorded in the list of issues, it was accepted by the first and second respondents that the first respondent acquired part of the business of the Nationwide companies (including the third respondent) upon those companies going into administration, and that this resulted in a relevant transfer within Regulation 3(1)(a) of TUPE.

*The correct respondent*

166. The fourth issue recorded in the list of issues, was not one which I ultimately needed to determine as the position was accepted in submissions by all of the claimants. For any claimant found to have been assigned to the economic entity which transferred, the company to which their employment contract transferred was the first respondent and not the second respondent. I understood why the position may not have been clear to the claimants at the time that they entered a claim at the Tribunal. By the end of the hearing there was no doubt that was the case, and the claimants were correct to accept that position. Accordingly, and as recorded in the list of issues, the claims of all the claimants against the second respondent can be dismissed as, if they did not transfer under TUPE to the second respondent, their claims against the second respondent cannot succeed.

*Temporary exclusion*

167. The third issue recorded in the list of issues was also not one that ultimately needed to be decided for the claimants whose claims were being determined at the preliminary hearing. It was not an issue for any of the claimants that assignment on a temporary basis or absence, had any bearing upon whether or not they were assigned to the part transferring.

*The issues to be determined*

168. That left two issues to be determined. The first of those issues had been recorded as being: what was the “organised grouping of resources or employees” which transferred to the second respondent or any subsidiary company on or around 4 September 2020. The correct questions to be asked, using the terminology of regulation 3(1)(a) and 4, were: what was the undertaking, business or part of an undertaking, which transferred to the first respondent on 4 September 2020? What was the economic entity which retained its identity? What was the organised grouping of resources and employees which transferred? In this Judgment I have referred to the economic entity as being the thing which transferred, as a shorthand for having applied all of these questions. As the list of issues also recorded: to the extent that there may have been more than one such undertaking or economic entity, I only needed to consider the position in relation to any undertaking or economic entity which one or more of the claimants may arguably have been assigned to.

169. The second issue to be determined (and the one which was the primary focus of almost all the evidence and argument heard during the hearing) was (using the terminology I have confirmed and applying it to a traditional TUPE transfer under

regulation 3(1)(a)): in respect of each claimant, were they, immediately before the transfer, assigned to the economic entity, which transferred?

*The economic entity which transferred*

170. The first issue was something which was raised as a dispute between Mr Smith and Mr Brochwicz-Lewinski during submissions. The starting point for determining the economic entity which transferred, was the agreement which the first/second respondents reached when purchasing the assets and, in particular the definition of Business within it (1122). Both professional representatives based their arguments, at least in part, on the asset purchase agreement and its definition of Business. The difference of view really was about whether the economic entity could be defined solely by reference to that agreement, or the extent to which any definition needed to go beyond that agreement.

171. In his written submissions, Mr Brochwicz-Lewinski focussed on the asset purchase agreement. He submitted that the economic entity or organised grouping of resources and employees that was transferred, was the operation of automotive crash repair, windscreen repair, and accident administration services carried out from seventy-seven sites, plus the mobile repair services, along with the identified supporting functions. That left outstanding the issue of any functions transferred which did not strictly fall within the definitions used in the acquisition agreement.

172. In his submissions, Mr Smith also relied in part upon the agreement, but he added a category to it. He asserted that the economic entity or organised grouping of resources which transferred was a UK-wide grouping which consisted of: the seventy-seven sites which transferred; the staff who were based at those sites, or one of the defined support functions (HR, IT, finance); and the staff who supported those sites permanently but were not at one site. That last part of his definition was disputed by the first/second respondents. I accepted Mr Brochwicz-Lewinski's verbal submission objecting to the third part of Mr Smith's definition of the economic entity, as it incorporated the question of who was assigned to the economic entity into the definition of the economic entity itself, and accordingly it could not be the correct way to define the economic entity.

173. As was stated in closing submissions by Mr Brochwicz-Lewinski, there were two ways of approaching this question. In general terms it could either be a series of small undertakings, or one large undertaking. It could be that: the economic entity which transferred was each of the seventy-seven body shops taken on and, separately, each of the Transferring Functions; or the economic entity which transferred was the business collectively. I have no doubt that the collective approach is the correct one. The acquisition agreement collectively covered all of the assets and sites acquired. The first/second respondents applied a single approach across the acquisition. In reality, this was a transfer of a single economic entity. Breaking the economic entity down into smaller economic entities, in the circumstances of this case, would introduce an artificiality to the transfer which occurred.

174. I find that the economic entity which in fact transferred did not necessarily adhere to the terms of the acquisition agreement. Adopting the approach to

economic entity proposed by Mr Brochwicz-Lewinski would have the potential impact of rendering parts of the economic entity transferred outside the protection of TUPE, solely because of the definition of economic entity adopted in the acquisition agreement, rather than because of consideration of all the circumstances as they applied and were to be considered. I do not find that approach to be correct. The economic entity which transferred was not restricted to the undertaking defined in the agreement, it incorporated all the parts of the economic entity in fact transferred. I therefore found the economic entity which transferred to be: the operation of automotive crash repair, windscreen repair, and accident administration services carried out from seventy-seven sites, plus the mobile repair services along with the identified supporting functions, and any other functions which were in fact transferred (whether or not they strictly fell within the definition of Business within the agreement).

*Assignment and the issues as they applied generally to all claimants*

175. In this Judgment I am going to consider the issue of assignment to the economic entity which retained its identity, as it applied generally, before addressing it for each individual claimant specifically.

176. As with the previous question, the starting point was the definition of Business in the asset purchase agreement (1122). The first/second respondents' witnesses and, in particular Ms Tasker-Wood, placed significant reliance upon that agreement as defining who it was that was assigned to the economic entity which transferred, and what it was the first/second respondents sought to identify when deciding who they accepted should/would transfer. As I will return to later in this Judgment, there are some individuals for which there has been dispute about whether the agreement was applied in practice or correctly, but nonetheless the starting point was still what the agreement provided.

177. As confirmed above, the second and third parts of the definition of Business in the agreement were that the following would transfer: the mobile repair operation; HR; IT; and finance. None of the claimants were part of those functions. Some of the other individuals raised by the claimants and contended to represent anomalies/exceptions/inconsistencies which supported their cases, were. The Transferred Functions were intended to be transferred in their entirety. Ms Tasker-Wood's evidence was that they were (or at least that is what the first/second respondents endeavoured to achieve). The transfer of those functions was, broadly, part of the relevant circumstances in the claims. However, I found the transfer of individuals who were either part of the Transferred Functions or perceived by the first/second respondents to be part of Transferred Functions, did not make any material difference to my determination of whether any of the claimants were assigned to the economic entity which transferred.

178. Mrs Clarke and, to an extent, Mr Smith, questioned the inclusion within the HR function of Standards and Compliance and Health and Safety. The employees in those functions/sub-functions were treated by the first/second respondents as being assigned to the economic entity which transferred. I accept that it was not necessarily the case that those sub-functions had to be treated as part of the HR function. I noted the organograms which were provided which recorded them as

being separate departments/teams under the People Director (Ms Cope), rather than strictly being part of the HR function. Nonetheless I did not find that the fact that the first/second respondents chose to treat Standards and Compliance and Health and Safety as part of the HR function and accordingly transferred the employees within those sub-functions, genuinely assisted me in determining whether any of the claimants in the cases I was considering were assigned to the economic entity which transferred.

179. During the hearing Mr Stead accepted on behalf of the first/second respondents that some people in fact transferred, even if technically and applying the first/second respondents' approach they should not have done so, because they were recorded by the third respondent on the relevant spreadsheet as being assigned to or based at a site which did transfer. One such example appeared to be Mr Thorpe, the person who Mr Couzens raised as being a contrast to his own treatment. On the spreadsheet, Mr Thorpe was identified as working at Ipswich. As a result, the first/second respondents operated based upon the information recorded on the spreadsheet and transferred that individual. During the hearing other examples were raised. I fully understand why such perceived inconsistency caused the claimants to be aggrieved. On an objective basis, the inconsistent treatment of two people in the same or similar circumstances (save for an entry on a spreadsheet) appeared unfair. Nonetheless, I accepted Ms Tasker-Wood's evidence, and the evidence more generally of the first/second respondents' witnesses, of the reason for the differences in treatment. As **Botzen** and **Duncan Web** make clear, I am to consider all the circumstances and those inconsistencies are a relevant circumstance. However, I have not found that any such inconsistency (arising from the sites as recorded on a spreadsheet), has genuinely assisted me in determining whether any of the claimants in the cases I am considering were assigned to the economic entity which transferred. An erroneous decision that someone transferred because the third respondent and their administrators provided out-dated or erroneous information on a spreadsheet which suggested that should do so, did not assist in reaching a determination for the claimants in this case.

180. There was evidence that six Regional Managers were offered employment by the first respondent immediately after the transfer of the staff who did transfer, even though they had not been identified as having transferred under TUPE. The reason why the first/second respondents did not identify them as having transferred was because they were not identified as being at sites which transferred, and their responsibilities were for both transferring sites and non-transferring sites. I have not heard a claim by a Regional Manager and therefore do not need to determine whether they should have transferred under TUPE. The fact that the first respondent chose to offer employment to Regional Managers post transfer was part of the relevant circumstances generally, but was not something which genuinely assisted me in determining whether any of the claimants in the cases I was considering were assigned to the economic entity which transferred.

181. As recorded at paragraphs 41 and 42 above, there were four individuals who were identified on 31 August 2020 at a late stage in the process, as being individuals who were to transfer, albeit those four had not previously been identified as falling within the parameters which the first/second respondents (and Ms Tasker-Wood in particular) applied. I have considered those four in some detail.

182. Of the four, one was the Head of Mobile Repairs. As the Head of Mobile Repairs, he was part of the Transferring Functions (irrespective of where he was located or the site to which he was assigned). The decision to accept him as transferring was consistent with the terms of the agreement and the definition of Business within it. It was consistent with the first/second respondents' approach. I find that his inclusion within the list of those transferring was correct and amounted to a valid correction to an error which had been made in identifying who should transfer. To that extent, his inclusion reflected the other corrections which had been made, such as the inclusion of a number of members of the HR team who had initially been incorrectly omitted from those transferring even though they fell within the Transferring Functions (and about whom Ms Cope had been so concerned).

183. Mr Chandler transferred. He was Head of Rapid Repair. Rapid Repair was a part of the third respondent's business which was somewhat unusual. It operated from body shops which were managed by the regional and divisional managers responsible for body shops. The rapid repair sites also had separate management, which was responsible for that operation of those sites, comprising (as far as it was evidenced at the hearing): Mr Chandler; and Mr Johnston. The first/second respondents' position, as evidenced by Ms Tasker-Wood, was that Mr Chandler transferred under TUPE as head of the rapid repair centres. Nothing in the acquisition agreement appeared to record the transfer of the rapid repair business (save for the inclusion of body shops which were rapid repair centres in the list of sites, in the same way as other body shops). Nothing in the agreement (at least as identified during the hearing) meant that the rapid repair function and those who managed/supported it who were located outside the transferring sites, transferred. I found that the transfer of Mr Chandler as head of the rapid repair function fell outside the specific terms of the agreement. It did not rigidly adhere to the principles emphasised by Mr Brochwicz-Lewinski and evidenced by Ms Tasker-Wood. That is a material factor in Mr Johnston's claim, which I address (as it applied to him) below.

184. I will address in more detail the impact on Mrs Clarke's claim of the position taken by the first/second respondents regarding the Head of Operations Support (Mr Bickerstaffe) and the Head of Strategic Account Management (Ms Thomas). It does appear that that the decision to transfer those two individuals reflected some degree of flexibility being applied to the rigid principles emphasised by the first/second respondents and Ms Tasker-Wood in particular. There appeared to be an element of commercial pragmatism behind their inclusion in the list of those transferring. I accept that Ms Tasker-Wood identified an argument to justify their inclusion in those who transferred. I do not find that the argument necessarily rigidly adhered to the principles outlined in evidence by her and which formed the basis for the first/second respondents' decisions about who transferred. They were not assigned to a site which transferred nor were they part of the Transferring Functions. The way in which the duties they fulfilled might be those which were acquired, was more complicated than the core principles the first/second respondents relied upon. I do not need to decide whether they should have transferred under TUPE as they are not claimants, but I have needed to consider whether the flexibility shown was a material factor in determining whether the claimants transferred (aside from Mrs Clarke for whom it was clearly material and is addressed below).



185. When considering the claims of all the claimants, I accept that the fact that the first/second respondents did not in all cases rigidly adhere to the principles they laid down, is a relevant circumstance to be taken into account. However (and save as specifically addressed below), I did not find that the fact that the first/second respondents made exceptions to the rigid application of the principles they applied in two or possibly three cases (or at least showed some flexibility in applying those principles), materially assisted me in determining whether any of the claimants in the cases I am considering were assigned to the economic entity which transferred. I can understand why it was perceived to be unfair and I can understand why a claimant may argue that the principles should also have been set aside for them, but the fact that the principles were not applied rigidly does not generally (and aside from the specific issues addressed below) assist in considering whether the claimants were themselves in fact assigned.

186. Some of the claimants raised that the spreadsheet produced by the third respondent and relied upon (and amended) by the first/second respondents, included calculations for amounts such as the sum which would be recoverable for unfair dismissal as a basic and compensatory award. It was contended that proved that it was considered that they should have transferred. I do not find that to have been the case. I accept that the figures provided were part of a full and thorough due diligence process and the spreadsheet was to assist a potential purchaser in making appropriate commercial decisions. The inclusion of the information was uniform for all employees whether identified as transferring or not. I do not find that its inclusion assisted me in determining whether the claimants were assigned to the economic entity which transferred.

187. The very strong position taken by Ms Cope and, to a lesser extent Mr Wills, was based upon the advice they received from PWC. I have not seen any evidence of the advice actually provided by PWC, but I accept Ms Cope and Mr Wills' evidence about what they understood the PWC advice to have been. That was advice provided in the context of a potential management buy-out which did not proceed, but which clearly informed their approach to the transfer to the first/second respondents and who they believed should have been assigned. It in part informed the view of some of the claimants who had been informed of that advice. I accepted that Ms Cope and Mr Wills endeavoured to explain that advice to the first/second respondents during their discussions leading up to the transfer (albeit I noted that what was written at the time was voiced in terms of commercial need rather than TUPE definitions and it did not expressly set-out PWC's advice). I also accept that the first/second respondents were not obliged to approach the transfer in the way promoted by two employees who were part of the undertaking transferring, nor was it obliged to take into account the advice those people had received.

188. I have set out in the section on law above, the tests which are to be applied when identifying whether somebody is assigned to the economic entity transferring. A difficulty which I fully appreciate arises from the case-by-case fact-sensitive approach required by **Botzen** and **Duncan Web**, is that it takes account of all the circumstances and is not easy to apply to a large number of people in a short timescale, based upon limited information. I had the benefit of nine days of evidence and argument about the circumstances which applied to seven claimants. The MBO and the first/second respondents were trying to identify a standard fair approach to

apply to circa two thousand nine hundred employees, in a time-pressured situation with limited information and in circumstances of impending potential insolvency or administration. I appreciate that it was inevitable that those involved would need to take approaches which were not fact-specific and they would use rough and ready guidance to determine those approaches. The 60% approach which was evidenced as being part of the advice provided by PWC was not correct; as I have explained the cases say that a purely mathematical calculation based upon time spent is not the approach which should be taken to identify assignment (and the cases do not identify a 60% benchmark). Generic percentage approaches to assignment can create perceptions of unfairness, as they undoubtedly did in this case, when the cases emphasise that a percentage approach is not correct at all.

189. It is also appropriate for me to address two arguments put forward by the first/second respondents; one which was part of the actual rationale applied at the time; and one which was not (but was hypothetically advanced by Mr Brochwicz-Lewinski in submissions).

190. Ms Tasker-Wood's position was that someone who was not part of the Transferred Functions would not have transferred if they were not based at a transferring site, if they had responsibility at all for any of the sites which did not transfer. She accepted that a person who worked on a roaming basis (100%) for only sites which transferred, or someone who managed (100%) only sites which transferred, would have transferred. Her evidence was that was one of the things which she was endeavouring to clarify with reference to the relevant spreadsheets in the period leading up to the transfer. It was her evidence that nobody was in that position. I did not find the position she took on assignment in fact reflected the correct legal approach to assignment. When looking at all the circumstances of any case, it must clearly be possible for somebody to have been assigned to the undertaking which transferred even if they had responsibility for some sites or functions which did not transfer and were not part of the undertaking. That was exactly the situation addressed in **Buchanan-Smith**. The very emphasis in **Botzen** and **Duncan Web** to considering all the circumstances, must mean that someone doing some work in some part of a business which is not part of the undertaking transferring cannot, of itself, preclude somebody being assigned to the part which transferred. To Transfer, a manager or roaming operative did not need to be assigned 100% only to transferring sites.

191. In submissions, Mr Brochwicz-Lewinski went further than the position taken by Ms Tasker-Wood. He submitted that where a manager was responsible for only sites which transferred, he would still not transfer as he would not have been assigned to the economic entity which transferred (the body shops). He contended that the element of assignment was not present. I did not accept that submission at all. Whilst it is clear that a mathematical approach to assignment is not determinative and it will always depend upon the circumstances of the case, where (hypothetically) a manager/director was responsible for overseeing a number of sites, and 100% of the sites for which he was responsible were part of the economic entity which transferred, I find that it would be highly unlikely that the relevant manager/director would not be assigned to the economic entity which transferred.

192. Some of the evidence which I heard and the questions which were asked of witnesses, addressed: the performance of the third respondent's business and the reasons for its financial challenges; and the performance of the first respondent post-transfer, including whether there were sufficient managers employed and/or whether the business would have operated better or more successfully had additional people been transferred. I accept that in the broadest sense those matters are part of the background circumstances and I understand why individual witnesses felt it important to explain their view on those issues. In practice, in the circumstances of the claims I heard, that evidence did not assist me in determining whether the claimants were assigned to the economic entity which transferred.

*Mr Morais*

193. Mr Morais was ably represented during the hearing by his representative, Ms Bussandri. Ms Bussandri presented brief but focussed submissions, which addressed why exactly she asserted that Mr Morais should be found to have been assigned to the economic entity which transferred. In her submissions, Ms Bussandri submitted that it had been made clear during the hearing that as part of the first respondent's acquisition process an unfair and incorrect selection process had been undertaken. She asserted that was based upon incorrect or incomplete information regarding Mr Morais' role. She also asserted that this was because the same TUPE rules were not fairly applied to all individuals resulting in (what she described as) a selective, biased, unjustified selection exercise taking place which went against what (she asserted was) a TUPE regulation requirement that staff should be treated the same and was therefore unlawful. She emphasised Mr Bickerstaffe and Mr Chandler as being examples of the first/second respondents not adhering to the rules which it set out for the application of who would be assigned to the transfer. She emphasised Mr Wills' evidence about the advice of PWC and the application of a 60% threshold over which an individual should be assigned. She relied upon the fact that Mr Morais could be required to work at any of the third respondent's sites as evidencing that in fact 75% of his role transferred. Ms Bussandri concluded, in her written submission, by asserting that the TUPE rules were incorrectly applied or were not applied in a fair and consistent manner, to the detriment of Mr Morais.

194. I have addressed some of the arguments made in the general part of my decision at paragraph 185 above. It must be emphasised that the decision I have needed to reach about whether or not somebody was assigned to the economic entity which transferred, is not a decision about the fairness of the process followed. As I have addressed when considering the arguments which applied generally for all claimants, I have found there to have been occasions when TUPE was not applied entirely consistently by the first/second respondents. However, I have not found those examples to have assisted me in determining whether Mr Morais was assigned to the economic entity transferred.

195. I have considered all the circumstances which applied to Mr Morais and about which I heard evidence. Some of the circumstances are described above. When reaching my decision on assignment the things I have considered included the following:

- a. He carried out a roaming role as a Multi-Site Painter. It was not in dispute (and was part of his job title) that he was required to work at various sites and would work at a site when requested to do so;
- b. He attended sites to cover absence, where there was a high workload, and to assist in clearing backlogs;
- c. He was part of the London roaming team, but in practice he was sent to sites on an individual basis in response to need, rather than as part of a collective group;
- d. He would be told the site at which he would be working at relatively short notice. The time he spent at any specific site varied;
- e. A document provided from the outset of his employment described his site as being the Roaming team (92). The offer letter (95) described his employment as being based at flexible locations;
- f. He had no assigned office or work location. Whilst his place of work was recorded in his contract as being Head Office and various locations (96), in practice he had no physical base and his place of work was not head office (he never worked at Witney);
- g. In his own statement prepared in answer to questions asked by Employment Judge Dunlop (89), he described his role as covering approximately fifteen body shops within the M25 and slightly outside (which he also described as having been his initial remit). He emphasised that he was part of the London area team or London roaming team;
- h. In that same statement, he listed twelve sites as part of those fifteen which had formed the London area to which he had initially been assigned. Of those twelve, six transferred (60% of those named and identifiable) and four did not (one of the Chelmsford sites, Hendon, Sutton and Tonbridge), with the position being unclear on two of those listed;
- i. Over time, the geographic area in which the claimant was required to work expanded. In his statement (89) he described an additional six sites in the south east of England at which he had worked. Of those, three transferred (50% of the additional sites named), two did not (Fareham and Goring), and one closed pre-transaction (Portsmouth);
- j. Towards the end of his period of employment, just prior to Covid, Mr Morais was asked to work in Mold, Wales. That showed that he was being asked to work at locations over a much wider area. That site transferred;
- k. In his witness statement Mr Morais listed eighteen sites where he had in fact worked during his time with the third respondent. Of those eighteen sites, ten transferred. Whilst Mr Morais incorrectly referred to

80% in his statement as being the proportion of the identified sites which transferred, in fact that meant that 56% of the sites at which Mr Morais had worked, transferred;

- l. A spreadsheet was provided which showed where exactly he had worked in the period between September 2018 and the end of his employment. Immediately prior to September 2020, Mr Morais was recorded as having been on a period of furlough. I have entirely ignored the period of furlough when identifying whether he was assigned to the entity which transferred. Prior to furlough, the sheet showed him as having worked at different sites in blocks of time which varied from one week to four weeks in a row. On occasion he was assigned to more than one site in a week. There was no specific pattern nor was there a consistent single location. In 2020 he was recorded as having worked at: Chelmsford; Luton; Fareham; Mold; and Sutton. Of those sites: Luton and Mold transferred; Fareham and Sutton did not; and it was not clear which of the Chelmsford sites it was at which he had worked at that time (as one Chelmsford site transferred, and one did not);
- m. As he fulfilled a roaming role, Mr Morais could have been asked to work from any location, something which was confirmed in evidence by Mr Johnston. Accordingly, of the one hundred and two work shops open at the date of transfer, Mr Morais could have been asked to work at any of the seventy-seven sites which transferred (75%) or the twenty-five sites which did not;
- n. Mr Johnston (who had previously managed him) confirmed that Mr Morais was employed as part of the London area roaming team. He agreed that the teams in each area were expected to support and undertake work in other areas if required. Mr Johnston confirmed that Mr Morais had been helpful and willing to do that when asked. Mr Johnston agreed that where Mr Morais could have been asked to work, would have been any of the third respondent's sites;
- o. The entries in the spreadsheet prepared by the third respondent, and provided to and adapted by the first/second respondents, did not add anything to, or assist, in determining whether he was assigned to the entity which transferred;
- p. Whilst he was recorded on the Home-based tab of the definitive spreadsheet where comments had been added, as being within the London region, assigned to sites in London, and being a roaming painter who would go to London sites as required – I accept Ms Bussandri's submission that the geographic restriction contained in those comments was not in practice correct when the places where he had worked was considered;
- q. The first respondent did not accept Mr Morais as transferring because he was recorded on the spreadsheet as being a home-based role

(which was not correct as he never worked at home), he was in a multi-site role without an allocated site which transferred, and he was not part of the Transferring Functions; and

- r. Mr Keeton's evidence was that he was not aware of any multi-site operative roles which transferred as part of the acquisition. Mr Tripp accepted that some multi-site or roaming roles had transferred and a small number of them remained in such roles after transfer (and furlough ending), but it was his evidence that they had transferred because they were assigned to a site or were recorded as being so assigned.

196. As required, I have considered all of the circumstances when considering whether or not Mr Morias was assigned to the economic entity which transferred. I have considered all of the factors which I have outlined. I have reminded myself, that it is not sufficient for Mr Morais to have shown that he was substantially involved in the part transferred; he had to show that he was effectively assigned to the part transferred. I have found that he was not assigned to the economic entity which transferred, when the roaming role he undertook and the way in which that work was allocated, in particular, were taken into account.

197. It was undoubtedly the case that Mr Morais had worked in locations which transferred. I have been very mindful that, as I have explained, assignment is not a mathematical test based upon where in practice Mr Morais had happened to be working at the relevant time. Mr Morias' claim illustrated why mathematical proportions are a poor determinant for someone in a roaming role, where the place of work each week is effectively an accident of workload management. I accept that he could have been asked to work anywhere and therefore 75% of his potential sites transferred. However, for Mr Morais, his clear connection to London and the south east and the fact that only 56% of the sites at which he had actually worked transferred, were relevant circumstances (albeit I accept the point made by Mr Brochwicz-Lewinski that the element of chance about where he worked points away from assignment and makes the percentage based analysis of considerably less relevance). I have taken into account the spreadsheet which recorded where Mr Morais had worked in the period preceding the transfer (something which I only had for Mr Morais) and found that the way in which his workplace varied (including both sites which transferred and those that did not), was a significant factor in showing that Mr Morais was not assigned to the economic entity that transferred.

198. I understand that the first respondent did not undertake the detailed assessment of all the circumstances that I have been able to. Their reason at the time for not having accepted that Mr Morais transferred was relatively simplistic and, as I have addressed when considering all of the claimants, was in some ways incorrect. I have certainly not accepted the first/second respondents' view as being determinative that Mr Morais did not transfer under TUPE. Mr Morais' circumstances were complex. Having considered all of the circumstances, on balance, and having considered the factors which I have described, I found that he was not assigned to the entity which transferred.

*Mr Couzens*

199. Mr Couzens was also employed in a roaming role, but as an Estimator. In his submissions on Mr Couzens' behalf, Mr Smith described Mr Couzens' role as having been one which provided support for the estimators based at sites in the east region. He described that role as having been that he provided roaming support for the east region by attending sites, rather than work from the same one every week. He particularly emphasised that his duties were taken over by a colleague who was part of the same team and fulfilled the same role, but had been described on the relevant spreadsheet as having been site-based (when Mr Couzens was not). This was described by Mr Smith as being another inconsistency and a departure from what he described as coherent transfer arrangements.

200. As I have already addressed, the decision I have needed to reach about whether or not somebody was assigned to the part of the business which transferred, was not a decision about the fairness of the process followed. Inconsistency and incoherence of approach are part of the circumstances which I needed to consider when determining whether Mr Couzens was assigned to the economic entity which transferred, but I did not consider them to be particularly significant factors in reaching a decision in relation to him. As I have addressed when considering the arguments which applied generally for all claimants, I have found there to have been occasions when TUPE was not applied correctly or entirely consistently by the first respondent. However, I have not found those examples to have been material to a determination about whether Mr Couzens was assigned to the economic entity transferred. I can entirely understand why he perceived the treatment of another Estimator to whom he could clearly and easily compare himself, to be unfair. It did not mean that Mr Couzens was assigned to the economic entity which transferred. The other Estimator differed from Mr Couzens because he was recorded on the spreadsheet prepared by the third respondent as being site-based at a site which transferred. I understand entirely why that felt unfair (particularly where Mr Couzens was required to pass him the work being undertaken at the time he was asked to leave site).

201. I have considered all the circumstances which applied to Mr Couzens and about which I heard evidence. Some of the circumstances are described above. When reaching my decision on assignment the things I have considered included the following:

- a. He was a Vehicle Damage Assessor or Estimator. It was his evidence that the third respondent had at least one Estimator working on each site. However, Mr Couzens had a roaming role covering thirteen sites in the east. He, and another roaming Estimator, Mr Thorpe, would work from any of those thirteen sites, as requested, to cover sickness, holiday or workload issues;
- b. He accepted that he was not allocated to any specific site. He did not work from home. He had to be at a site to do his work. He was not home-based;

- c. Where he worked was decided by the Regional Manager. It would be predictable regarding holiday cover; but would be unpredictable where cover was for other reasons. He could be asked to go to another site during a working day. He was allowed to stay in hotel accommodation during the working week;
- d. He could spend as little as an afternoon on a site, and as long as two months;
- e. He had been working at Chelmsford when the pandemic hit. He later worked from Cambridge for a period (which was a significant distance of travel from home). He was placed on furlough for some time (which I have not taken into account for determining assignment), before returning to Cambridge (between 17 June 2020 until 28 August 2020). He was then asked to work from Swavesey from Monday 31 August 2020;
- f. In his own statement prepared in answer to questions (365) he described that he worked between thirteen sites. He said that initially his base had been Norwich (at a site which closed, as opposed to the one which transferred), but it had transferred to Swavesey (a site which transferred);
- g. His employment contract from 2016 (366) described him as a Roaming Estimator. It recorded his place of work as Thetford. It was Mr Couzens' evidence that he had been based at that site because that was the site closest to his home, but that site had closed at some time before the date of the transfer, and he would rarely have been there as he worked between the different sites to provide cover;
- h. Of the thirteen sites at which he worked, seven transferred (54%);
- i. On 4 September 2020 he was told to stop work and go home. Mr Thorpe was brought in to take over the work which he had been carrying out;
- j. He contrasted his treatment with that of Mr Thorpe. Mr Thorpe was transferred and Mr Couzens did not. Mr Couzens accepted that the spreadsheet upon which the first/second respondents based their decisions, recorded Mr Thorpe as having Ipswich as his site, when the same spreadsheet recorded Mr Couzens as being home-based;
- k. The first respondent did not accept Mr Couzens as transferring because he was recorded on the spreadsheet as being in a home-based role (which was not correct as he never worked at home), he was in a multi-site role without an allocated site which transferred, and he was not part of the Transferring Functions; and
- l. Mr Keeton's evidence was that he was not aware of any multi-site operative roles which transferred as part of the acquisition. Mr Tripp



accepted that some multi-site or roaming roles had transferred and a small number of them remained in such roles after transfer (and furlough ending), but it was his evidence that they had transferred because they were assigned to a site.

202. As required, I have considered all of the circumstances when considering whether or not Mr Couzens was assigned to the economic entity which transferred. I have considered all of the factors which I have outlined. I have reminded myself that it is not sufficient for Mr Couzens to have shown that he was substantially involved in the part transferred; he had to show that he was effectively assigned to the part transferred. It was undoubtedly the case that Mr Couzens had worked in locations which transferred. I have found that he was not assigned to the economic entity which transferred, when the roaming role he undertook and the way in which his work was allocated, in particular, were taken into account.

203. As I have already explained, I have been very mindful that assignment is not a mathematical test based upon where in practice an employee had happened to be working at the relevant time. However, for Mr Couzens, I found the breakdown of the sites for which he might be responsible (and which transferred) was of greater assistance than it might have been for some of the other claimants. He covered a relatively small number of sites and it appeared that he would (or at least genuinely might) at some time have been asked to work at each of them as cover. The proportion approach did not support a contention that Mr Couzens was assigned to the undertaking which transferred, as only 54% of the sites for which he provided cover, transferred. I have not treated that as determinative. I have considered all of the circumstances and, in particular, the nature of Mr Couzens' cover role, but the fact that only 54% of the sites at which he might have been required to work transferred, was part of the relevant circumstances which I took into account.

204. As I have already explained, I can entirely understand Mr Couzens' dissatisfaction with the disparate treatment he suffered when compared to Mr Thorpe. There was no evidence before me which explained why Mr Thorpe was allocated to a site on the relevant spreadsheet, when Mr Couzens was not. There might have been a valid reason specific to Mr Thorpe (I have not heard evidence from him), but their circumstances appeared to be comparable. However, that difference in treatment did not mean that Mr Couzens was assigned to the entity which transferred. As Mr Brochwicz-Lewinski submitted, it may have been that Mr Thorpe was lucky and ought not to have transferred under TUPE, but that does not change the decision I have reached in relation to Mr Couzens. I have made my decision based upon the circumstances which applied to Mr Couzens. I have not found that Mr Couzens was assigned to the economic entity which transferred, based upon all the relevant circumstances.

*Mr Isaac*

205. In his written submissions, Mr Smith highlighted that Mr Isaac was part of the regional management (for the north west sites, which in fact included part of the midlands). He submitted that Mr Isaac's case illustrated the inconsistencies created by the TUPE process followed by the first and second respondents. Mr Smith confirmed that five of the fifteen sites for which Mr Isaac was responsible did not

transfer. Mr Smith also emphasised that Mr Isaac's junior colleague took over responsibility for the same sites, although he did not transfer (that was Mr Higgs). Reliance was placed upon **Buchanan-Smith** as even if Mr Isaac was deemed to have separate responsibilities from the regional management, that would not be (what Mr Smith described as) a barrier to transfer.

206. Mr Brochwicz-Lewinski's written submissions were relatively lengthy for Mr Isaac. The key points raised were:

- a. He was not assigned to any one site, he worked as required across all of them and would spend time on each site dependent on need. In his submissions, Mr Brochwicz-Lewinski also described him as having a floating or roaming role, which is not a description I consider to be entirely accurate, as being the senior manager/director responsible for a number of sites was not the same type of roaming role as a roaming Painter or Estimator;
- b. He had a central organisational role in a layer of senior management not replicated in the first respondent's business. Mr Brochwicz-Lewinski contended that he was assigned to central management and/or to senior management functions which did not transfer;
- c. The fact that he worked at or for some sites which transferred did not mean he was assigned to those sites;
- d. Even if a mathematical analysis were undertaken, the fact that only two thirds of his sites transferred showed that his role would have continued to exist in the transferor's management structure; and
- e. Mr Higgs was not transferred, he was employed post-transfer. In any event he submitted that Mr Higgs appointment did not alter the relevant facts.

207. Both Ms Cope and Mr Wills were witnesses called by Mr Isaac and for whom a witness order was obtained at his request. I heard a considerable amount of evidence from them. Their evidence provided helpful background to the position taken by the management of the third respondent about the application of TUPE, based as it was on PWC's advice (which I have already described). That advice informed Mr Isaac's position. It was clear that they had both advocated for the transfer of Mr Isaac and others shortly before the transfer. Such advocacy was partly based upon perceived operational need; however, I accept that it was rooted in their understanding of the basic rules regarding the application of TUPE which followed from the PWC advice. I do not accept that the approach taken by the first/second respondents was a subversion of TUPE as Ms Cope asserted and as was emphasised in Mr Smith's submissions. The first and second respondents, and Ms Tasker-Wood in particular, genuinely endeavoured to correctly identify who was assigned to the part transferring. There were three cases which I have already addressed where that approach was applied flexibly or which might have fallen outside the strict application of that approach. Whilst that was part of the circumstances which applied to Mr Isaac and others, and which therefore needed to

be taken into account, I did not find the difference of view between Ms Cope/Mr Wills and Ms Tasker-Wood to have been a particularly significant factor in whether or not Mr Isaac (and others) were assigned to the entity which transferred.

208. I have considered all the circumstances which applied to Mr Isaac and about which I heard evidence. Some of the circumstances are described above. When reaching my decision on assignment, the things I have considered included the following:

- a. He was the Divisional Director for the third respondent's north west and midlands division;
- b. He was responsible for the performance of the sites within his division and, broadly, he was responsible for the management of those sites;
- c. He evidenced occasions when his approach within his division would be adopted and rolled-out in other divisions, but he was focussed upon (and very busy in) managing his own division;
- d. Immediately prior to the time of the transfer, he was responsible for fifteen sites. Ten of those sites transferred. Five did not. 66.7% of the sites for which he was responsible, transferred. One of the sites in the north west (Birkenhead) had also closed at some time prior to the transaction;
- e. The time taken with any specific site at any time would vary, and he would have spent longer focussing on the sites where issues had arisen. However, broadly, his evidence was that he believed that he was equally allocated to each of the sites for which he was responsible;
- f. His evidence was that, measured by revenue, 64.3% of the division was included within the purchased/transferring sites;
- g. He worked from the offices located in the sites for which he was responsible. It was his evidence that he never worked from home. In his statement he referred to having an office in Warrington, being the site which was closest to his home (and being a site which did not transfer). In his oral evidence Mr Isaac listed other sites where there were offices from which he worked relatively frequently (including Dudley and Ellesmere Port, both being sites which did transfer), explaining that the offices from which he worked were the ones on larger sites where there was an office available which he could use when he visited the site. His evidence was that he was not based at any one site;
- h. Mr Higgs was a Regional Manager who worked within the division for which Mr Isaac was responsible and reported to him. Mr Isaac's evidence was that Mr Higgs' responsibilities were comparable to Mr Isaac's own, save that he was responsible for only four sites within Mr Isaac's division rather than the fifteen for which Mr Isaac was

responsible (including those which fell within Mr Higgs' responsibility). There was no dispute that Mr Higgs was not identified as someone who transferred and he was made redundant by the third respondent at the same time as Mr Isaac. Mr Higgs was offered a job by the first respondent immediately after;

- i. James Houghton, the divisional accountant who had been responsible for the same division as Mr Isaac, transferred. Mr Isaac accepted that Mr Houghton was part of the finance team (that is he was part of the Transferring Functions);
- j. Of the three other divisional directors, two did not transfer and one did (Mr Donnelly). As the roles of the divisional directors differed so significantly from each other, I did not find the approach to the others to be a significant factor in determining assignment and, in any event, the reason why Mr Donnelly transferred was because he was treated as being allocated to Bridgend (based on the spreadsheet), a site which transferred;
- k. Mr Isaac was involved in planning the new structure of the division as part of his role shortly prior to the transfer, albeit he was not involved in either the proposed management buy-out or the transaction involving the first/second respondents;
- l. No contract was provided for him. None of the entries in the main spreadsheet added anything to my consideration of the issues. The entries in the Home-based tab of the definitive spreadsheet broadly accurately recorded his role and the fact that he had no place of work. The descriptions of his performance were not relevant to whether he was assigned;
- m. In summary, the first respondent did not accept Mr Isaac as transferring because he was not allocated to a specific site (which transferred), his role covered a number of sites (some of which transferred and some which did not), and he was not determined to be in scope as a result of a function which transferred; and
- n. Post-transfer the first respondent did not have divisional directors and/or that layer of management. The overseeing of the sites in the region and the management of those sites was undertaken by one person (Mr Higgs) who in practice undertook a very similar management role, whether or not the precise responsibilities and seniority were the same.

209. As required, I have considered all of the circumstances when considering whether or not Mr Isaac was assigned to the economic entity which transferred. I have considered all of the factors which I have outlined. I have reminded myself, that it is not sufficient for Mr Isaac to have shown that he was substantially involved in the part transferred; he had to show that he was effectively assigned to the part transferred. I have been very mindful that assignment is not a mathematical test.

210. Mr Isaac's case certainly illustrated the difficulties in determining assignment under the test to be applied as explained in **Botzen** and **Duncan Web**. I fully understand why Mr Isaac believed that he should have been assigned, particularly in the light of PWC's advice. The focus of my consideration has been on whether someone holding Mr Isaac's senior and overseeing role was actually assigned to the economic entity which transferred, where one third of the sites for which he was responsible did not transfer, in all the circumstances which I have described. On balance, having considered all the factors and, in particular, his role and position in the organisation pre-transfer, I have not found that Mr Isaac was assigned to the entity which transferred. He was responsible at a senior overseeing level for a number of transferring sites, but his position as a divisional director meant that I found that he could not be truly described as having been assigned to the transferring entity which included only two thirds of the sites for which he was responsible.

*Mr Gordon*

211. Whilst Mr Gordon was described as a divisional director, in practice his responsibilities were more senior than that. He was part of the executive committee which oversaw and ran the third respondent. In his submissions, Mr Smith described him as in effect being the operations director, which was based upon Mr Gordon's own evidence. Mr Smith relied upon **Buchanan-Smith** and emphasised that Mr Gordon having different duties did not preclude him from transferring.

212. Mr Brochwicz-Lewinski emphasised in his submissions the central national role which Mr Gordon fulfilled. He emphasised the wide-reaching role which he fulfilled including being responsible for the full profit and loss of all the sites, as well as setting strategic goals, overseeing operational strategy, and being responsible for the flow of operational information to the Chief Executive and the Board. He submitted that Mr Gordon had a pivotal role at the heart of the Nationwide business. His submission was that, whilst Mr Gordon had some divisional director responsibility for a large number of sites (some of which transferred and some which did not), he could not feasibly be described as assigned to the parts of the business transferred.

213. I have considered all the circumstances which applied to Mr Gordon and about which I heard evidence. Some of the circumstances are described above. When reaching my decision on assignment, the things I have considered included the following:

- a. He had oversight and senior responsibility operationally for the whole of the third respondent's body shop operations as part of the senior management team;
- b. He reported to the Chief Executive;
- c. His oversight and senior responsibility was for all body shop sites and all the other divisional directors reported to him;
- d. He had more direct responsibility for the areas which were not the responsibility of other divisional directors. Within those areas, he had a

number of regional managers who reported to him and who were each responsible for some sites within the division;

- e. In his witness statement, Mr Gordon explained that he had been responsible for all one hundred and two body shop sites, including the seventy-seven sites acquired by the first/second respondents and the twenty-five sites not-acquired (that is that 75% of all the sites for which he had responsibility transferred). In his verbal evidence, he explained that he was directly responsible (not including those which were the responsibility of other divisional directors) for seventy-seven sites, of which fifty-seven transferred (being 74%);
- f. When explaining how his time would be spent, he emphasised that it would vary depending upon the needs of the business and the specific sites. His evidence was that whilst he was responsible for all sites in Scotland, in practice that took up less of his time than some other geographic areas;
- g. He had the use of a manager's office in Ayr (a site which did not transfer) where a filing cabinet was located, in which he stored personnel records. His evidence was that reflected it being the closest office to his home. His evidence was that he did not spend significant amounts of time in, or working from, that office;
- h. No contract for Mr Gordon was provided and the spreadsheets provided little of additional relevance, save for confirming that he was recorded as being based in Ayr;
- i. Of the three other divisional directors, two did not transfer and one did (Mr Donnelly). As the roles of the divisional directors differed so significantly from each other, and Mr Gordon's role in particular was not akin to those of the other divisional directors, I did not find the approach to the others to be a significant factor in determining assignment. In any event, the reason why Mr Donnelly transferred (with whom Mr Gordon contrasted himself and whose transfer he asserted was cherry picking), was because he was treated as being allocated to Bridgend, a site which transferred; and
- j. In summary, the first respondent did not accept Mr Gordon as transferring because his role covered a number of sites (some of which transferred and some which did not); he was not determined to be in scope as a result of a function which transferred; and the site to which he was recorded as allocated (Ayr) did not transfer.

214. As required, I have considered all of the circumstances when considering whether or not Mr Gordon was assigned to the economic entity which transferred. I have considered all of the factors which I have outlined. I have reminded myself that it is not sufficient for Mr Gordon to have shown that he was substantially involved in the part transferred; he had to show that he was effectively assigned to the part transferred. I have been very mindful that assignment is not a mathematical test.

215. I have not found that Mr Gordon was assigned to the entity which transferred. Whilst I have noted the fact that 74% or 75% of the sites for which Mr Gordon had senior managerial authority did transfer, I have not found that Mr Gordon was genuinely assigned to those sites and the entity which transferred. I accepted the submissions of Mr Brochwicz-Lewinski with regard to Mr Gordon and the emphasis placed upon his national senior role and broad operation-wide duties and responsibilities. I understand and accept that Mr Gordon's senior responsibilities over and above the senior management of the transferring sites did not preclude him from being assigned to the entity which transferred. However, I found that, looking at all the factors and in particular his pivotal role at the heart of the pre-transfer business, that he was not assigned to the economic entity which transferred.

*Mr Johnston*

216. Mr Johnston had a multi-faceted role which made consideration of assignment even more complex than it was for the other claimants. He had the title of divisional director, but in practice that was not the central part of his duties. Mr Johnston's role was made up of responsibility for the rapid recovery centres, divisional responsibility for the London region, and technical responsibility. It was also clear from both his evidence, and that of other witnesses, that his responsibilities and, in particular the time allocated to each of those responsibilities, had varied over time.

217. In his written submissions, Mr Smith emphasised Mr Johnston's management of and creation of the rapid repair centres. He also submitted that Mr Johnston's own evidence about his work split should be preferred to the evidence of Mr Wills.

218. In his submissions, Mr Brochwicz-Lewinski emphasised Mr Johnston's numerous roles and the fact that he worked across numerous sites and in a central position, which it was said meant that he simply was not assigned organisationally to any individual sites. The contrast between Mr Johnston and Mr Wills' evidence was emphasised. The position of Mr Chandler and Mr Pennell was also addressed. For Mr Chandler it was highlighted that rapid repair constituted the entirety of his role, when it did not for Mr Johnston.

219. In the light of those submissions, I have needed to consider the difference between the evidence of Mr Johnston and Mr Wills about the proportion of time which Mr Johnston spent on rapid repair work prior to the transfer.

220. In his claim form (207) Mr Johnston described his main duties as being overseeing the rapid repair centres and he confirmed, when giving evidence, that was the case. In oral evidence he explained how he had been responsible for creating and setting up the rapid repair centres. During a period in 2018/19 he had taken on greater responsibilities as divisional director of London and had shifted his focus to those duties. However, as a result of performance issues with the rapid repair centres and their importance to the profitability of the business, in the latter part of his employment (prior to the acquisition) he said he had reverted to being primarily focussed on the rapid repair centres. In answer to being asked to do so, he estimated that 90% of his working time was spent on his duties for the rapid repair centres, at the time of the acquisition.

221. As detailed above, Mr Wills' estimated proportions of Mr Johnston's role roughly equated to Mr Johnston's evidence on the technical element, but differed on the split between the rapid repair centres and the divisional director elements, with Mr Wills identifying only 30% of Mr Johnston's time being spent on the rapid recovery centres. Mr Wills did not give the detailed evidence which Mr Johnston had about the reduction in his responsibility for the London region in the period prior to the transfer. I am mindful that Mr Wills was a witness called by another claimant and not by the respondent.

222. In considering the evidence which I have heard, I have preferred Mr Johnston's own evidence about his workload and the breakdown of his responsibilities at the time of the transfer. His evidence was based upon a detailed explanation of his own role and the changes in it over time. I found him to be a genuine and truthful witness. His evidence was consistent with what he had recorded on his claim form (albeit that had not included the same detail). It was also generally supported by Mr Gordon not considering him to be a divisional director at all, and Mr Johnston having ceased to be Mr Morais' manager for a period prior to the transfer. It was more consistent with the entry on the Home-based tab of the master spreadsheet which described Mr Johnston as being in a role solely designated to rapid repair. I entirely accept that Mr Wills' evidence was genuinely given, but find that it was based upon a broad overview which was not time-specific and which did not result from the same detailed consideration of the change over time of Mr Johnston's role.

223. Of considerable importance to Mr Johnston's claim was the approach taken to Mr Chandler and the rapid repair centres. Mr Chandler's job title was Head of Rapid Repairs. The first/second respondents (not unsurprisingly) considered that Mr Chandler was the person with responsibility for the rapid repair sites. They accepted him as transferring in that role, because they considered the rapid repair centres to fall within the scope of the transfer under TUPE. That decision might appear to have been surprising because Mr Chandler was neither assigned to a site which transferred, nor was he part of the Transferred Functions. Nonetheless in the position taken and the evidence given about Mr Chandler (particularly by MS Tasker-Wood) and the application of TUPE, the first/second respondents considered the management and operation of the rapid repair functions to be akin to the Transferred Functions inasmuch as they determined that Mr Chandler transferred under TUPE as a result of his role (and even though some rapid repair centres were transferred sites and others were not). Ms Tasker-Wood was very clear in her evidence that the first/second respondents followed their TUPE rules without exception. It was not part of the first/second respondents' case that Mr Chandler had been transferred due to economic or pragmatic reasons; it was their case that he transferred under TUPE because of the role he fulfilled.

224. I understand the distinction drawn by Mr Brochwicz-Lewinski between Mr Chandler being wholly assigned to the rapid repair centres and the fact that Mr Johnston had other responsibilities. However, as I have found that 90% of Mr Johnston's time prior to the transfer was spent on the rapid repair centres, that distinction is less significant than it otherwise might have been. Aside from that difference, I have not been able to identify any other reason why one person responsible for the rapid repair centres should transfer and the other should not. If



responsibility for the rapid repair centres meant that Mr Chandler was assigned to the entity which transferred, it would appear that responsibility for the rapid repair centres at a more senior level would be a significant factor pointing towards Mr Johnston also being assigned. In her evidence, Ms Tasker-Wood did provide some evidence about Mr Chandler's duties post-transfer and it was clear that the rapid repair centres did not in fact progress in the way that the first respondent had envisaged pre-transfer, but I have not found the evidence about those matters to be of any significance to whether Mr Johnston was assigned at the date of the transfer (where the first/second respondents in fact treated Mr Chandler as assigned to the entity which transferred because he was head of rapid repairs).

225. I have considered all the circumstances which applied to Mr Johnston and about which I heard evidence. Some of the circumstances are described above. When reaching my decision on assignment, the things I have also considered included the following:

- a. He created and set up the rapid repair centres. After a period during which he took on other responsibilities when he shifted his focus away from rapid repair centres, he reverted to being primarily focussed on the rapid repair centres. At the time prior to the transfer, he spent approximately 90% of his time focussed on the rapid repair centres;
- b. As part of his role, Mr Johnston was also divisional director for London. The sites for which he was responsible in that role were not identified, nor was there any clear evidence about which sites in the division transferred and which did not (save that there were some sites in which each occurred). Mr Johnston's evidence was that he had a much reduced amount of day-to-day responsibility as divisional director in the period leading up to the acquisition. Whilst he remained responsible, it was his evidence that the two regional managers had most of the day-to-day responsibility and he would just support them with telephone advice when he was called;
- c. As a further part of his role, Mr Johnston was Head of Technical. In that role he was responsible for the technical issues as they applied to all one hundred and two of the third respondent's body shop sites, albeit not for the management of the staff who worked at those sites. Of those sites, seventy-seven transferred (75%) and twenty-five did not. In his verbal evidence, Mr Johnston explained that the time required for that part of his duties would vary, with occasions when there was no time required and others when he would need to attend meetings etc. In the period prior to the transfer, those duties were part of the 10% of his time not spent on rapid repair centre responsibilities;
- d. In his witness statement, Mr Johnston recorded that 18 of the 24 rapid repair centres were transferred (75%). Nobody else gave any evidence which contradicted that assertion;
- e. As recorded above, Mr Chandler as Head of Rapid Repair was considered to transfer under TUPE by the first/second respondents

because he was head of the rapid repair part of the business. The role which the first/second respondents perceived that Mr Chandler had was very similar to (if not the same as) that which Mr Johnston held in practice;

- f. As no contract for Mr Johnston was provided, that did not assist with my decision and, save for one entry I have already referred to, the spreadsheets also did not assist. Mr Chandler's role was one which was not based at any individual site;
- g. The first/second respondents' response to the Tribunal claim was incorrect and did not assist;
- h. In summary and based upon the evidence of Ms Tasker-Wood, the first respondent did not accept Mr Johnston as transferring because he was not allocated to a specific site (which transferred), he was not determined to be in scope as a result of a function which transferred under the acquisition agreement, his role did not feature on any of the structure charts, and he was designated as divisional director on the spreadsheet without reference to the rapid repair business. Mr Johnston was treated in a way consistent with the others recorded to be divisional directors who were not site-based at a transferring site, however the first/second respondents' decision-making was informed by a very limited amount of information for his complex multi-faceted role; and
- i. A new Technical Director was recruited by the first respondent some months after the transfer, Mr Pennell. Whilst I understood why Mr Johnston felt that he should have been approached about the role, I do not find that to be material to determining whether Mr Johnston was assigned to the entity which transferred.

226. As required, I have considered all of the circumstances when considering whether or not Mr Johnston was assigned to the economic entity which transferred. I have considered all of the factors which I have outlined. I have reminded myself, that it is not sufficient for Mr Johnston to have shown that he was substantially involved in the part transferred; he had to show that he was effectively assigned to the part transferred. I have been very mindful that assignment is not a mathematical test. I also understand that the first respondent did not undertake the detailed assessment of all the circumstances that I have been able to, they made their decision based upon very limited information which could not possibly have reflected the complexity of Mr Johnston's roles and the history of how his focus had evolved.

227. As a result of Mr Johnston's evidence, I find that his primary focus in the period prior to the transfer, and the matter upon which he spent most of his time, was the rapid repair centres. They were something he created, managed, and returned to as his primary focus for the vast majority of his time immediately before the transfer. Whilst he had responsibilities for other matters and was designated as a divisional director and technical director, those were essentially additional duties to his core focus.

228. In terms of numbers, 75% of the rapid repair centres transferred. That was a notable proportion of the work to which Mr Johnston was assigned, but on its own might not have been sufficient for him to have been assigned to the entity which transferred. What was most significant for me in considering assignment, was the fact that Mr Chandler, as head of rapid repair, transferred and was asserted by the first/second respondents to have been assigned to the entity which transferred. As I have explained, I cannot see any genuine difference between their positions (save for Mr Johnston's other responsibilities which I have considered and addressed), as they were the two senior people responsible for the operation of the repaid repair centres. As the first/second respondents considered the management of the rapid repair centres to be part of the entity which transferred and there was no evidence that Mr Chandler's transfer was simply due to his recorded work location on a spreadsheet, I find that to be a significant factor in all the circumstances in considering whether Mr Johnston also transferred where the vast majority of his time/responsibility/focus was also the rapid repair centres.

229. For the reasons I have explained, I found that Mr Johnston was assigned to the entity which transferred. As I have explained, **Buchanan-Smith** made clear that having responsibility for, or turning one's hand to, some part of the business which did not transfer, did not preclude someone from transferring. I have considered Mr Johnston's divisional director and technical director responsibilities to be of that nature, even though the focus of his responsibilities had varied over time and he had for a while previously focussed significantly more of his time on the London divisional director role. On balance I have found that Mr Johnston was assigned to the economic entity which was in fact transferred.

*Mrs Clarke*

230. In her submissions, Mrs Clarke emphasised that two members of the business development team, were transferred: the Head of Operations and Support (Mr Bickerstaffe); and the Head of Strategic Account Management (Ms Thomas). She highlighted that Ms Tasker-Wood's evidence was that in a telephone call on 31 August the two roles were identified as being within scope and that because of discrepancies in the dataset provided in the spreadsheet they had been omitted in error. She submitted that if sales and marketing was deemed as a function to be assigned to the entity which transferred, the whole function should have been transferred.

231. In her submissions, Mrs Clarke also relied upon two things which I have already addressed when considering the claims against all the claimants. She referred to the transfer of Standards and Compliance and Health and Safety. I have already explained that I did not consider that the inclusion of those functions with the HR function (which was a Transferring Function) materially assisted the claimants. She also emphasised that the costs of an unfair dismissal claim were included in the spreadsheet, something which I found to be unsurprising in the context of a significant due diligence exercise and not indicative of assignment or any particular approach to assignment.

232. In his submissions, Mr Brochwicz-Lewinski emphasised that the business development role held by Mrs Clarke was a group role which was not site specific

and in which she worked 70% of her time from home. He submitted that she was not assigned to any particular site or sites, but rather was assigned to a central function. His contention was that business development was not a function taken on by the first respondent. He relied upon the evidence of the first/second respondents' witnesses and Mr Tripp in particular, that there was no need for new business development post-transfer as the in-flow of work was to come from other Redde Northgate businesses and the group as a whole would carry out new business development collectively, rather than the first respondent carrying out its own. He explained the transfer of Mr Bickerstaffe and Ms Thomas as being because they had been correctly identified as having been responsible for maintaining the base of existing customers and he asserted that existing customers were a part of the business transferred in the acquisition agreement. He contended that Mrs Clarke was not engaged in the same role and it would not be correct to say that she was assigned to maintain the existing customer base. He also highlighted that two other members of the business development function did not transfer: Ms Collis (Business Support Officer); and Ms Downen (Sales & Account Development Manager). He concluded with the contention that Mrs Clarke was in a central role which did not transfer.

233. As was clear from the submissions, the position of the third respondent's business development function (which included sales and marketing), was neither clear-cut nor necessarily consistent. It was Ms Tasker-Wood's evidence that it had been identified that Mr Bickerstaffe and Ms Thomas were assigned to the entity which transferred under TUPE and therefore they correctly transferred. It was neither her evidence nor the first/second respondents' case, that the decision to take those individuals was a pragmatic or commercial one (outside TUPE). It was not in dispute (and was evidenced by Mr Stead) that the third respondent's largest customer who represented a third of their workflow, severed ties at the time of the acquisition and did not transfer. The first/second respondents' position was nonetheless that two members of the business development team transferred and Mrs Clarke did not. For Mrs Clarke the primary reason for that was because she was believed to be responsible for obtaining new business. In fact, from the evidence which she gave at the hearing, it was clear that Mrs Clarke had a role which included responsibility both for obtaining new business and the account management of existing customers.

234. I have considered all the circumstances which applied to Mrs Clarke and about which I heard evidence. Some of the circumstances are described above and they have also been considered. When reaching my decision on assignment, the other things I have considered included the following:

- a. From 9 October 2017 Mrs Clarke was employed by the third respondent in a position described as Business Development Manager. That role was not restricted to one which sought new business, it was responsible for both existing customers and new business;
- b. In her witness statement Mrs Clarke described the breakdown of the role which she fulfilled as being into four core areas which she described as: market (gathering market information); sales opportunities (tenders); customer (account management); and business structure (compliance and business improvement). Only one

of the four areas was directly about obtaining new business (sales opportunities);

- c. When asked to try to define the time she spent on each of those core elements, Ms Clarke emphasised the difficulty in doing so, as it changed from time to time and depended upon what was “*hot*” at the time. Some elements, such as tender collation and submission (which were the activities which constituted the sales opportunities core area), were intensive at times but there would be many months when no tender work was required. The percentages she ultimately gave in evidence were: 10% market; 10% sales opportunities; 40% customer; and 40% business structure. In her submissions, Mrs Clarke referred to customer account management as having accounted for 40% of her role;
- d. The third respondent did not operate separate teams which dealt with client management and winning new work. The business development team undertook business development both in relation to existing clients and in obtaining new work. Mrs Clarke was clear in her evidence that she did so and I accept that evidence. I also accepted her evidence that Ms Thomas and Mr Bickerstaffe also had responsibilities for existing clients and obtaining new work. Ms Cope’s evidence supported that position, when she gave evidence about the business development team as a whole;
- e. In her role, Mrs Clarke estimated that 70% of her working time had been working from home. She also had needed to attend the third respondent’s sites as part of her work, particularly to undertake the business improvement element of her role (part of the business structure core area). No contract was provided, save for an offer letter which recorded no place of work (49);
- f. The first/second respondents’ grounds of response was completely erroneous in what it said about Mrs Clarke’s place of work. Mrs Clarke had historically been based at the Havant site and had later been based at the Wokingham site, but those site locations related to times before she was promoted to Business Development Manager and were of no relevance to a decision about her assignment at the time of the transfer;
- g. Of those identified as being part of the Business Development team: Ms Thomas (Head of Strategic Account Management) transferred; Mr Bickerstaffe (Head of Operations Support) transferred; Mr Roberts (Strategic Account Manager) transferred; Ms Collis (Business Support Officer) did not transfer; and Ms Downen (Sales & Account Development Manager) did not transfer. I have not considered Mr Hutt as being relevant, based primarily upon his job title and because none of the evidence which I heard provided any genuine evidence that he had fulfilled what could truly be described as a business development role. Ms Thomas and Mr Bickerstaffe were not allocated to any specific site.

Mr Roberts was recorded on the spreadsheet as being allocated to the Leicester Call Centre site (a site which transferred);

- h. I have noted from the entries on the Home-based tab that Mrs Clarke was recorded as being responsible for customer relations issues and supporting the BD team, as well as being responsible for bids. At the same tab, Mr Bickerstaffe was described as having the key customer relations with three of the third respondent's customers and Ms Thomas was described as having key relationships with all customers and as being the most senior within the BD team;
- i. The business development undertaken by the third respondent was not site-specific nor was it intended to generate customers or work for a specific site. The business development was national and sought to bring in new business for all sites (which would then be triaged to the correct work shop) and to account manage the customers of all sites; and
- j. Under the acquisition agreement, and as detailed at paragraph 53, clause 2.1 of the agreement (1134) provided that certain things were being sold as part of the transaction which included: the customer list; the goodwill; and the work in progress. The customer list (as defined) was the customer-specific information of the sellers, which was not limited to the definition of Business or to the transferred sites. The goodwill and the work in progress were defined by reference to the Business and therefore the transferred sites, albeit it was not clear that there was any distinction in the goodwill between sites.

235. As required, I have considered all of the circumstances when considering whether or not Mrs Clarke was assigned to the economic entity which transferred. I have considered all of the factors which I have outlined. I have reminded myself, that it is not sufficient for Mrs Clarke to have shown that she was substantially involved in the part transferred; she had to show that she was effectively assigned to the part transferred.

236. I agree with Mr Brochwicz-Lewinski's submission that Mrs Clarke was clearly not assigned to sites, or the transferring sites. Whilst she worked at sites on occasion (which would have included, but not been limited to, the transferring sites), she was not assigned to the sites at all. She worked largely from home.

237. What I found to be at the heart of the issue of whether Mrs Clarke was assigned to the economic entity which transferred, was the transfer of a significant part of the Business Development team, together with the customer list and goodwill of the business which had been operated by the third respondent. What transferred was the majority of the third respondent's customer relationships in terms of number of customers, albeit that the most significant customer did not in fact transfer. Alongside that, three members of the Business Development team also transferred, including what appeared to have been the two most senior members of it. Throughout the hearing there was repeated reference to cherry-picking key staff and the fact that doing so was not consistent with TUPE. I do not need to decide whether

in fact Mr Bickerstaffe and Ms Thomas were cherry-picked, albeit it seemed to me that there were self-evident commercial reasons why the first/second respondents would have chosen to take the two most senior individuals in the business development team with the customer relationships described on the Home-based tab, in a business with limited numbers of very significant customers. However, I do find it to have been a very significant factor when determining whether Mrs Clarke was assigned to the entity which transferred, that a significant part of the Business Development team and the most senior members of it were transferred, in circumstances which Ms Tasker-Wood evidenced and the first/second respondents contended was consistent with TUPE.

238. I have considered very carefully whether a distinction between winning new work and account management, could genuinely distinguish between Mrs Clarke and Mr Bickerstaffe/Ms Thomas (such that she was not assigned to that which transferred, and they were). I have decided that it did not. I accept Mrs Clarke's evidence that Mr Bickerstaffe, Ms Thomas and the whole Business Development function, undertook both account management and new business development. From Mrs Clarke's detail of her own role, only the one element of sales opportunities (tenders) was genuinely focussed on gaining new business. I accept her evidence that such work would have been time-intensive on occasion when required, but that it was not something which she undertook all the time. She also defined that part of her role as having been only 10% of the time she spent as a rough approximation. The market and business structure parts of her role appeared to be more applicable (or at least as applicable) to supporting the retention of existing customers' business as to obtaining new work. I accept that the first respondent ceased to undertake new business acquisition for itself post-transfer, and that cessation was a relevant circumstance to be considered.

239. I have found that, when considering Mrs Clarke's role as a whole, alongside the accepted transfer of the two most senior members of the Business Development function and one other member of it, she was assigned to the economic entity which transferred. In reaching that decision I have considered the actual economic entity which was transferred, which included customer lists, goodwill and at least a substantial part of the Business Development function. I found that Mrs Clarke was assigned to the entity which transferred.

#### *Ms MacLean*

240. Ms MacLean held a role which was unique within the third respondent, of divisional parts specialist. She had previously held other roles, but those roles were not material for determining whether she was assigned to the entity which transferred. She supported the third respondent's sites as required with the acquisition of parts, effectively as a support to Mr Gordon. The division for which she provided her specialist support in practice reflected Mr Gordon's division, but, as addressed in relation to Mr Gordon, his responsibilities ultimately covered all the body shops within the third respondent's business. Her evidence was that the area for which she had been responsible had expanded.

241. In his submissions, Mr Smith submitted that Ms MacLean was assigned to the Dunfermline site and accordingly she should have transferred because that was a

site which transferred. Her own evidence was that from 2017, when she had returned to Scotland, she was allowed to work from whichever branch suited her. That had changed from Glasgow to Dunfermline in 2019. She had an office in Dunfermline, but her evidence was that it was certainly less than fifty percent of her time that she spent at that office, but she found it difficult to be specific about how much lower it was. Her evidence was that she could be at any of the branches depending upon what needed to be looked at. Her payslips were sent from Fife. Her payroll number was attached to a Glasgow branch. In the twelve months prior to transfer she had worked from Nottingham, Luton and Dunfermline. She supported all sites, not just Dunfermline. In her contract re-issued on 4 January 2017 (315) she was recorded as being home based and it was stated that her duties would require her to work from each of the Nationwide Repair Centres. I did not find that Ms MacLean was assigned to the Dunfermline site such that the transfer of that site (in and of itself) determined that she was assigned to the entity which transferred. As she herself recorded in her claim form and evidenced, her responsibilities went well beyond the site where her office was located. As explained below, I did however find the claimant's office location to be part of the relevant circumstances to be considered when determining whether they all, collectively, meant that she was assigned to the entity which transferred.

242. In the alternative, Mr Smith submitted that Ms MacLean was in any event assigned to the entity which transferred. He asserted that she was part of the organisational framework of the entire one hundred and two sites, of which seventy-seven were transferred. He highlighted that individual sites were allocated her costs (as she had evidenced). He referred to **Buchanan-Smith**.

243. Mr Brochwicz-Lewinski submitted that her role was a truly roaming role in that she would attend any site where her input was needed, and he asserted that she was manifestly not based at any one site. He referred to her being assigned to the Nationwide business at large in an overarching role. He described her as being supernumerary to the site-based parts specialists. He asserted that she was, in reality, assigned to the transferor business and he contended that, had Nationwide continued to operate, she would have continued to have had a role for the remaining twenty-five sites, albeit with a change in scope.

244. It was contended by Ms MacLean that she was not transferred because she was associated with Mr Gordon. She emphasised the observation made about Mr Gordon in the email of Mr Stead of 24 August 2020 (425), addressed at paragraph 33. That assertion was denied. I accept that the reason why the first/second respondents did not accept Ms MacLean transferred was for the reasons evidenced by Ms Tasker-Wood and their adherence to the principles which she outlined in evidence. The reason Ms MacLean did not transfer was not her association with (or perceived connection to) Mr Gordon.

245. In her evidence, Ms MacLean highlighted Ms Solomon a Divisional Parts Manager in the south. Ms Solomon supported only six sites, but her role appeared to have some similarities to Ms MacLean's (on a much smaller scale). Ms Solomon transferred. The reason why she transferred was because she was recorded on the spreadsheet as being assigned to the Bournemouth site. In submissions the first/second respondents accepted that may have been mistaken. I accept that Ms



Solomon being assigned to a site which transferred on the spreadsheet was the reason why she transferred. I agree with Mr Brochwicz-Lewinski's submission, that whatever the proper analysis for Ms Solomon, that did not change the position for Ms MacLean (at least to any material extent).

246. I have considered all the circumstances which applied to Ms MacLean and about which I heard evidence. Some of the circumstances are described above and they have also been considered. When reaching my decision on assignment, the things I have considered included the following:

- a. The role of Divisional Parts Specialist was unique. Whilst it had similarities with Ms Solomon's role, it differed from it;
- b. She had no managerial responsibility (either for staff or for a site), her role was a broader support role;
- c. Whilst her contract described her as being home-based (which was not genuinely accurate), she fulfilled a UK-wide support role and worked from the site which was required for that work from time to time;
- d. She had an office in Dunfermline. The time she spent there was less than 50% of her time. However, the time she spent at that site did appear to have been significantly more than that spent at the particular sites by any of the other claimants. That site transferred. When working at that site she was not working specifically for the site;
- e. Of the twenty sites listed in her supplemental statement where she had confirmed she had worked from 2017, thirteen transferred and seven did not (65%). In the twelve months prior to transfer she had worked from Nottingham, Luton and Dunfermline, all sites which transferred (100%);
- f. She spent a number of weeks supporting the profit and loss centre in Bristol and some time in further support thereafter. Bristol was an office location which transferred;
- g. Her evidence was that she supported all one hundred and two body shops and, as described above, whilst she had once had responsibility for Scotland, her responsibilities had spread to be UK-wide. Seventy-seven of the UK sites transferred (75%);
- h. Individual sites were allocated her costs, when she worked from them. In the twelve months prior to the transfer, where costs were allocated, those costs would have been paid by sites which transferred;
- i. Glasgow, to which her payroll was linked, was a site which transferred. Falkirk, which appeared on her payslips, transferred;
- j. Her evidence was that she played a huge role in the third respondent's tenders for contracts relating to parts. That tender work was national and was for the benefit of all sites;

- k. She did not understand why she had fallen outside of the staff who transferred;
- l. The first/second respondents' evidence was that Ms MacLean did not transfer because she was designated as being home-based, without being allocated to a specific site; and
- m. Mr Keeton's evidence was that her duties and responsibilities did not continue post-acquisition as the function was centralised. To an extent, that, in practice, meant that her duties/responsibilities did continue within a centralised national function.

247. As required, I have considered all of the circumstances when considering whether or not Ms MacLean was assigned to the economic entity which transferred. I have considered all of the factors which I have outlined. I have reminded myself, that it is not sufficient for Ms MacLean to have shown that she was substantially involved in the part transferred; she had to show that she was effectively assigned to the part transferred. I have been very mindful that assignment is not a mathematical test.

248. I have found the determination of whether Ms MacLean was assigned to the economic entity which transferred to have been very finely balanced. On the one-hand, her cross-site role and effectively roaming responsibilities, did not support an argument of assignment to the entity transferring for the reasons explained for other roaming roles. However, the transfer of the site where she had an office and from which she undertook a notable amount of her work, the transfer of the sites from which she was paid and which appeared on her payslip, and the transfer of all the sites where she had worked in the twelve months prior to the transfer together with the Bristol office which took up a part of her time, all supported assignment. 75% of the sites for which she was responsible transferred. Her position in relation to the sites differed from the more senior claimants such as Mr Gordon, as her duties and responsibilities were more closely aligned to the sites as, in particular, evidenced by the allocation of costs to the sites when she worked with them. The overall functioning of parts-acquisition continued post-transfer (at least for the acquired sites) within a centralised national function as evidenced by Mr Keeton. I have found (on balance) that Ms MacLean was assigned to the economic entity which transferred.

### **Summary**

249. For the reasons explained above, I have found that Mrs Clarke, Mr Johnston and Ms MacLean were assigned to the economic entity which transferred and transferred under TUPE from the third respondent to the first respondent. I have not found that the other claimants were assigned to the economic entity which transferred to the first respondent. None of the claimants transferred to the second respondent

Employment Judge Phil Allen  
29 November 2022

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
5 January 2023

FOR THE TRIBUNAL OFFICE

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# **ANNEX A**

## **LIST OF ISSUES**

It is accepted by the respondents that the first respondent acquired part of the business of various companies set out in the ET3 (“the Nationwide Companies”) upon those companies going into Administration and that this resulted in a relevant transfer within Regulation 3(1)(a) TUPE. The public preliminary hearing will determine:

1. What was the “organised grouping of resources or employees” which transferred to the second respondent or any subsidiary company on or around 4 September 2020? (To the extent that there may have been more than one such grouping, the Tribunal will only consider the position in relation to any grouping which one or more of the claimants may arguably have been assigned to)
2. In respect of each claimant, were they, immediately before the transfer, assigned to the relevant organised grouping of resources or employees?
3. Was any claimant assigned on a temporary basis and/or absent from work immediately before the transfer, if so, what are the facts relating to that and what is the impact on issue 2 above?
4. In respect of any claimant found to have been assigned to a transferring part of the business, which company did their employment contract transfer to? If this was the first respondent (as the respondents assert) should the second respondent be dismissed from that claim?

## Annex B

### SCHEDULE OF CLAIMS

Claim Number	Claimant	Respondents (additional to the first and second respondent)
1406358/2020	Mrs K Clarke	None
2307802/2020	Mr A Morais	None
2501833/2020 & 3313268/2020	Mr M Isaac	None
2502152/2020	Mr T Johnston	None
3314422/2020	Mr J Gordon	None
4107929/2020	Ms C MacLean	NWC Realisations Ltd (in administration) (formerly known as Nationwide Crash Repair Services Ltd)
3312536/2020	Mr K Couzens	NWC Realisations Ltd (in administration) (formerly known as Nationwide Crash Repair Services Ltd)