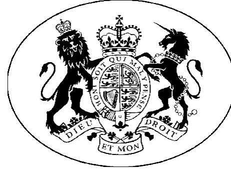

EMPLOYMENT TRIBUNALS

Claimants: Mr B Duffy
Mr A Priestner
Mr C Ashton
Mr J Astle
Mr C Birkett
Mr L Cahill

Respondent: Jones Lighting Limited

HELD AT: Manchester **ON:** 9-13 January 2023

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimants: For Mr Birkett and Mr Cahill: Mr B Henry, counsel
Other claimants: in person

Respondent: Mr C McDevitt, Counsel

JUDGMENT having been sent to the parties on 17 January 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a public preliminary hearing to determine whether there was a relevant transfer pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) from the respondent to Altitude Services Limited (Altitude)

and if so, whether all or some of the claimants were assigned to the undertaking transferred.

2. The represented parties had agreed a List of Issues, but this included issues beyond the scope of this preliminary hearing. The represented parties considered that it was the service provision parts of TUPE that were potentially applicable. The unrepresented claimants did not express a view as to which parts of TUPE I needed to consider. Although, at the start of the hearing, I left open the possibility that I could consider the transfer of an undertaking part of TUPE as well as the service provision changes, after considering the evidence, it appeared to me that, if there was a TUPE transfer, this would fall under the service provision change part of TUPE.

3. I adopt Mr Henry's suggestion in his closing submissions as to what the real issues are for this Tribunal, but extending the reference in his third issue to all the claimants and not just those Mr Henry represents.

4. The issues I need to determine are:

(a) Were the same activities undertaken by the respondent on behalf of their client AGMA which ceased on 31 December 2020 undertaken by Altitude on behalf of the same client?

(b) Was the carrying out of those activities on behalf of AGMA the principal purpose of an organised grouping of the respondent's employees?

(c) Were all or any of the claimants assigned to that organised grouping?

Background

5. The claimants are all bringing complaints of unfair dismissal and most are also bringing complaints about entitlement to a statutory redundancy payment, breach of contract in relation to wages and arrears of pay. All claims were either brought initially against Jones Lighting Limited (Jones) and Altitude Services Limited or Altitude was later added as a second respondent.

6. A public preliminary hearing was listed in December 2021 for a one day hearing. It was postponed on that day because it became apparent that one day was going to be insufficient and the case was then relisted for this five day hearing. By the hearing in December 2021, Altitude had settled some of the claims against them.

7. Jones was arguing that there was a TUPE transfer which operated to transfer the employment of the claimants to the employment of Altitude. Altitude was disputing that TUPE applied.

8. The pleaded case for the legally represented claimants, Mr Cahill and Mr Birkett, was that there was a TUPE transfer and that Altitude was liable for the unfair dismissals, but, alternatively, if the Tribunal found there was no TUPE transfer, that Jones was liable for their dismissals.

9. The unrepresented claimants in their claim forms did not set out a clear position as to whether or not they considered there was a TUPE transfer.

10. By the date of this hearing, all claimants had settled their claims against Altitude. One claimant had also settled against Jones. The remaining claimants continued to pursue their claims against Jones, which is now the only respondent to these claims. Where I refer to the respondent in the remaining part of these reasons, this is a reference to Jones.

11. Mr Henry argued at this hearing on behalf of Mr Birkett and Mr Cahill that there was no TUPE transfer because there was no organised grouping or, alternatively, that his clients were not assigned to that group.

Evidence

12. I had witness statements in writing at the start of the hearing from Mr Cahill and Mr Birkett for the claimants and Mr Francis on behalf of the respondent.

13. The other claimants told me that they wished to give evidence, but they had had not prepared written witness statements in advance of the hearing.

14. On the first day of the hearing, with the agreement of the respondent, while I was reading the witness statements and documents, the other claimants wrote statements which they sent that afternoon to the represented parties and to the Tribunal.

15. I heard oral evidence from all the claimants and from Mr Francis.

16. Mr Francis, the Operations Director with the respondent, has been employed by the respondent since March 2018. He did not, therefore, have personal knowledge of events, in relation to which he gave evidence, which predated his start date.

17. Mr Bob Payne had prepared a witness statement for Altitude when the hearing was to take place in December 2021. Mr Priestner and Mr Ashton asked that I read this statement. The other unrepresented claimants had not read the statement. Mr Henry on behalf of Mr Cahill and Mr Birkett was neutral on whether it should be read. The respondent objected to me reading it. I decided that I would read it since it might contain some relevant evidence. However, where facts were in dispute, I would give such weight as I considered appropriate to it, since Mr Payne was not giving evidence and could not be cross examined. Although I read Mr Payne's statement, I did not rely on anything in that statement in making my findings of fact or reaching my conclusions.

18. There was a hearing bundle of over 1,000 pages. The contracts of Mr Duffy and Mr Ashton with Altitude and related emails and an offer letter to Mr Duffy were added to the bundle during the hearing.

Findings of Fact

19. The respondent is a company which undertakes the maintenance and installation of streetlighting and associated street furniture. It also operates as an independent connection provider. It installs and connects new street furniture to the existing district network operator's cable network.

20. All the claimants worked for the respondent until 31 December 2020. The respondent says, and told the claimants at the time, that their employment with Jones came to an end because there was a TUPE transfer of a service to another contractor, Altitude, and the claimants were assigned to that service. The respondent had lost a contract with the Association of Greater Manchester Authorities (AGMA) following a retendering exercise and Altitude were successful in being appointed as first provider in the tendering exercise.

21. The respondent had depots at various places including Warrington and Leyland. It was accepted by Mr McDevitt on behalf of the respondent that the respondent operated the Leyland depot before it first won the AGMA contract, although Mr Francis had given evidence that Leyland was created to serve the AGMA contract. Mr Duffy and Mr Ashton worked at the Leyland depot from dates before the respondent won the AGMA contract.

22. The respondent was successful in being appointed first provider under the AGMA contract for the provision of streetlighting connection services under a public tendering exercise in 2012. This was the first contracting out of streetlighting connection services. The objective of the tender was to establish a framework agreement to provide the required services to the contracting bodies. These were Greater Manchester Authorities and some other bodies and organisations. The contracting bodies would obtain advantages of economies of scale in ordering services under the Framework Agreement. There was no obligation on the AGMA bodies to order services from the providers, however I find that it would be very unusual for one of those bodies to order services within the scope of the Framework Agreement from someone other than a provider. The first provider would be given first refusal on work being offered under the Framework Agreement. I accept the evidence of Mr Francis that, in practice, no-one other than the first provider gets the work.

23. I accept that the respondent recruited more employees when they were awarded the contract to be able to service this contract.

24. Electricity North West owns the cable network in Greater Manchester and Lancashire. Scottish Power owns it in Merseyside and North Wales. Northern Power Grid owns it in Yorkshire. There was some crossover on borders between regions, for example Barnoldswick which was managed from Leyland although the cable network is from Northern Power Grid, dating back from when the town was in Yorkshire.

25. The kit for each provider was different, although the type of work done for each provider was the same. The respondent kept the kit for Electricity North West at Leyland, the kit for Scottish Power at Warrington and the kit for Northern Power Grid in Huddersfield. Work done under the AGMA contract on the Electricity North West network was done from the Leyland depot since the kit was kept there.

26. About 90% of the work under the AGMA contract was on the Electricity North West network, with up to 8% on the Scottish Power network and the remaining small percentage on other independent provider networks. The claimants did work which was allocated to them. At least some of them, including Mr Duffy, did not know about the AGMA contract until they were told it had been lost and did not know when the work they were doing was done under that contract. The claimants during their employment with Jones worked on various contracts, including but not limited to the AGMA contract.

27. The respondent was successful in retaining the AGMA in a retendering exercise in 2016. The 2016 contract was for a two year term but could be extended for up to a further two years. The contract was extended initially to 31 March 2019 and then to 31 March 2020. Due to the pandemic the contract was extended until 31 December 2020 without retendering. An invitation to tender was made with a return date of 24 August 2020 to carry out the services after 31 December 2020.

28. The 2016 invitation to tender included a description of the streetlighting connection services to be provided. This came under the headings of New Connection Service, Transfer Service, Disconnection Service, Column Erection Service, Column Uproot Service and Lantern Installation Service. Some additional services which might be covered were also set out in paragraph 7.3.1 of that document.

29. The contract value for streetlighting connection services was estimated in the invitation to tender as £3.2 million.

30. The specification of the work in the 2020 invitation to tender was very similar to that in 2016 but with some further detail and additional fees payable, for example for aborted work. The contract value for streetlighting connection services was estimated in this invitation to tender as £3.6 million.

31. In the 2020 invitation to tender, tenderers could apply to be a provider for one or more of five lots. Lot 1 was the Electricity North West geographical region which would be the majority of the work. Lot 2 was the Scottish Power geographical region which was likely to be around 8% of the work and the other lots were for smaller categories of work.

32. AGMA was renamed GMCA (Greater Manchester Combined Authority) in the 2010 invitation to tender, but the members of this were the same as AGMA in the 2016 invitation to tender. The invitation to tender stated that the council considered that, if the Framework Agreement was awarded other than to the present provider, TUPE may apply. Tenderers were advised that they needed to form their own view as to whether TUPE would apply, based on the factual circumstances and any information provided.

33. As the contract holder, the respondent was required to provide information in an anonymised form as to employees who would be in scope to TUPE transfer should the service be transferred to another party. This information would be provided to tenderers on receipt of an undertaking to keep the information confidential and to use

it for no purpose other than in connection with the submission of a tender for the services. This list, which was provided as at 27 July 2020, consisted of 36 employees whom the respondent considered likely to be TUPE'd across. This included employees assessed as spending at least 50% of their working time on services provided under the AGMA contract. From the absence on the list of employees with the employment start dates of Mr Priestner and Mr Cahill, I find that this list did not include Mr Priestner and Mr Cahill. This was accepted by the respondent in closing submissions.

34. Only two LV jointers were included on the list. Mr Astell, an apprenticed electrician, was included on the list. I find that he was number 11 on the list. From matching start dates and dates of birth, I find it more likely than not that that number 3 (an LV jointer on the list) was Mr Duffy, and number 2 (also an LV jointer) was Mr Ashton. Number 5 (electrical supervisor) was Mr Birkett. The percentage of the work of each of the four claimants on this list recorded as being spent on AGMA work as at that time or as follows:

- Mr Duffy – 67%
- Mr Ashton – 76%
- Mr Birkett – 66%
- Mr Astell – 63%

35. The time spent on AGMA work for employees on this list ranged from 50% to 100%. 11 employees on the list (which did not include any of the claimants) were shown as working 95% or more of their time on the AGMA work. Of these 11, three were administrative assistants.

36. There was work which was done from the Leyland depot other than just the work under the AGMA contract. There were more employees based at the Leyland site than employees engaged at any one time on work under the AGMA contract. Mr Birkett estimated that in December 2020 there were around 20-25 employees based at the Leyland depot. I consider it likely that Mr Birkett was talking about non administrative staff so there may have been some additional employees at the Leyland site working in an administrative capacity, but I make no finding about this since this was not clarified with Mr Birkett or anyone else in evidence.

37. The respondent had an email address which was specific to the AGMA contract work which clients used in relation to work they wanted done under the AGMA contract. Most of the claimants did not have work email addresses and there was no email group set up for employees working on AGMA contract work.

38. On or around 20 November 2020, the respondent was informed that they had not been successful in their tender to be appointed first provider for Lots 1 and 2. Altitude was successful in their bid to be first provider for Lot 1, which was the majority of the work (the Electricity North West work). Lot 2 (the Scottish Power work) was

awarded to a Nottingham based contractor, McCann's, but the understanding of Mr Francis and those of the claimants who had heard about this, was that McCann's did not take on this work and it was done instead by Altitude. Mr Francis speculated that this was because it was not economically viable for the Nottingham based McCann's to take on this relatively small amount of work away from their geographical base. Documents provided by Altitude show that they were doing some Scottish Power work after they acquired the contract.

39. Before the respondent lost the contract, the work under the AGMA contract amounted to approximately 40% of the respondent's turnover. Between the date when the respondent became aware that they had not been successful in tendering for Lots 1 and 2 and 26 November 2020, the directors of the respondent (including Mr Francis) discussed amongst themselves which employees they wanted to retain in the business. If there were notes of these discussions (which would seem likely) they have not been disclosed in these proceedings.

40. On 25 November 2020, David Jones, the Managing Director of the respondent, wrote to all Leyland colleagues regarding the AGMA contract, although we cannot tell from the letter (there being no covering email included in the bundle with this document) whether the letter was sent to everyone working at Leyland or to a subset of these employees. He informed them that they had been unsuccessful in their bid for the two main contracts. The Electricity North West (Lot 1) contract had been awarded to Altitude. The Scottish Power (Lot 2) contract had been awarded to McCann's. He wrote that they would be speaking to both companies over the next few days in relation to the possible transfer of staff via the TUPE regulations and would keep them fully updated on developments.

41. On 26 November 2020 the respondent informed Altitude by letter that they believed TUPE applied and that there were currently 18 employees they considered assigned to the undertaking. If there was a list of these 18 employees, I have not been referred to it in evidence, so I do not know who was included on this list of 18 employees.

42. On 1 December 2020 Altitude replied saying they did not believe TUPE applied. The reasons they gave included that they understood the previous AGMA framework ended in March 2020. They were wrong in this understanding.

43. On 4 December 2020 the respondent wrote again to Altitude informing them that the framework had been extended until 31 December 2020 and giving reasons why they considered there was a service provision change to which TUPE applied. They wrote that there was an organised grouping of 13 employees constituting an economic entity wholly or principally assigned to this activity, and the activities that Altitude would be carrying out were fundamentally the same so TUPE applied. They enclosed employee liability information. This enclosure is not together with the letter in the bundle, so I am unclear which document was included, if it is a document which is in the hearing bundle. If it is the list at page 859 (which is suggested by the index to the bundle), this has 12 names not 13.

44. The list of 12 employees at page 859 included the six claimants and six other employees. I accept Mr Francis' evidence that the number dropped from 13 to 12 because an administrative employee left. I accept Mr Birkett's evidence that there were more than these 12 employees based at the Leyland depot – he thought there were about 20-25 employees based there by this time.

45. At some time between the employee list being produced in July 2020 and 4 December 2020, Mr Priestner and Mr Cahill and possibly some other employees were added to the list of those employees. The respondent then informed Altitude who they believed would transfer to the employment of Altitude by operation of TUPE. Some employees may have come off this list in this period because they had left the respondent's employment.

46. In the period from the date the respondent was informed that they had not been successful in their bid until the letter of 4 December 2020, the respondent removed from the July list some employees who they wanted to retain in the respondent's business and who agreed to stay with the respondent. Some employees (including at least Mr Priestner and Mr Cahill) were added to the list. Since the July list is anonymised and I do not have start dates and dates of birth linked to names for employees other than the claimants, I am unable to make findings as to the full extent to which the composition of the list of possible TUPE transfers changed in the period July 2020 to December 2020.

47. I have found the evidence of Mr Francis, in paragraph 31 of his witness statement, about how the respondent arrived at the list of employees they asserted would transfer by operation of TUPE to be inconsistent in some respects with his oral evidence. What is clear from both this paragraph and his oral evidence is that the respondent arrived at what it asserts to be the organised grouping of employees, which he describes as the "AGMA team", after the respondent learnt it had lost the contract rather than before. In paragraph 31 he wrote that they identified employees whose work on the tender amounted to under 95% of their total work role (the period over which this was assessed being unspecified) and that these employees could be absorbed into the business due to their skill set and that those working 95% and above could not be absorbed. Mr Francis gave oral evidence about a selection process based on the respondent's view of individual skills and experience and whether they could be absorbed elsewhere in the business.

48. Paragraph 31 equates a skill set making employees suitable to be absorbed elsewhere in the respondent's business with whether or not they worked less than 95% of their time on the AGMA contract work. This makes no sense since the four claimants who appear on the July 2020 list have percentages of their time spent on the AGMA contract assessed at that time as considerably less than 95%. Their skillset would not have changed in the few months because the balance of the work they were given for the period October to December 2020 was changed to 100% AGMA work. I prefer Mr Francis' oral evidence as to how the AGMA team was identified where this is different to the description in paragraph 31 of his witness statement.

49. I find, on the basis of Mr Francis' evidence, that the respondent chose who, from those working from the Leyland depot, they wanted to keep in their business and identified the remaining employees as being the AGMA team which they asserted would transfer to Altitude by operation of TUPE. Mr Francis described this, in his oral evidence, as a selection process and described matching employees with vacancies.

50. Information from the respondent's time recording system shows that 100% of the claimants' working time in the period 28 September 2020 to 31 December 2020 was spent on work done under the AGMA contract. I have not been shown timesheet information for other employees. Mr Francis accepted that the timesheet information for Mr McDougall, the electrician with whom Mr Astell worked, might show that Mr McDougall worked 100% of his time in this period on AGMA work.

51. In a letter dated 7 December 2020, Altitude reiterated their view that TUPE did not apply. They included in their letter that they would welcome applications from any of the employees whose roles were becoming redundant and gave details of where they should apply. Some of the claimants heard that Altitude was recruiting. Given the number of former workers of the respondent which Mr Duffy estimates were working for Altitude, which exceeds the number of claimants now working for the respondent, it seems likely that some respondent employees or workers applied for, and took up, work with Altitude. There may be some who worked as self-employed contractors for Jones who also went to work for Altitude, but, if they were not employees, they would not potentially be transferred by operation of TUPE.

52. The claimants and six other employees (together making up the 12 listed on page 859 on the employee liability information sheet) were informed at a meeting on 9 December 2020, or by a telephone call, that the respondent had lost the AGMA contract to Altitude who would take this on from 1 January 2021. The respondent told them that they believed that TUPE applied and that colleagues should expect to be employed by Altitude from 1 January 2021 and their employment with the respondent would end on 31 December 2020. Letters to these employees were sent the same day confirming what had been said. The employees were described as those assigned to the AGMA Electricity North West contract.

53. By a letter dated 9 December 2020, the respondent again wrote to Altitude to state their view that TUPE applied. They wrote that the staff allocated to Lot 1 of the AGMA contract would transfer to Altitude's employment on 1 January 2021.

54. The respondent wrote to the claimants and the six others on 14 December 2020 about the election of employee representatives. Mr Birkett and Mr Cahill were appointed as employee representatives. The respondent wrote to Mr Birkett and Mr Cahill on 14 December 2020 with information in relation to the proposed transfer as elected representatives of the affected employees. The letter included the information that the AGMA Electricity North West contract to provide electrical services to Wigan Council AGMA had been lost and would transfer to Altitude on 1 January 2021, and the transfer would affect all staff currently employed on Lot 1 of the AGMA contract. The letter included the statement that the respondent believed TUPE applied to the

changing contractor and this meant that any employees who are working in the AGMA ENWL contract would transfer to Altitude Services Limited on their existing terms and conditions of employment. They wrote that certain information could not be provided as Altitude was refusing to accept the transfer.

55. On 16 December 2020, Altitude reiterated that they did not accept that any employees would automatically transfer to their employment on 1 January 2021.

56. The respondent wrote on 17 December 2020 to Mr Birkett and Mr Cahill. They reported that Altitude was continuing to refuse to accept that there would be a TUPE transfer. They reiterated their position that there was a TUPE transfer and that on 1 January 2021 they would become employees of Altitude. They wrote that they should, on the first working day after the New Year, report to Altitude, giving the address at which they should attend. The respondent wrote that any employee due to transfer could object to that transfer, the effect of which would be to end their employment at the point of transfer and that, unless the objection related to a proposed substantial and detrimental change to their working conditions, an employee whose employment ended in that way would have no claim against either the respondent or Altitude.

57. Altitude wrote again to the respondent on 17 December 2020, writing that there was no obligation for any GMCA member or other participating authority to procure through the framework and that it was ludicrous to expect Altitude to transfer staff when they had no commitment of ongoing work from any clients. The respondent replied, reiterating that there was a relevant TUPE transfer.

58. In a meeting with staff representatives on 18 December 2020, the respondent told them that the claimants and the six other employees should attend Altitude's premises on the first working day in the New Year. The respondent recommended that, if they were turned away by Altitude, they should seek legal advice and speak to ACAS.

59. The claimants attended Altitude's premises on 4 January 2021 but were turned away, being told that Altitude did not believe TUPE applied.

60. Mr Duffy and Mr Ashton were employed by Altitude within a short period, without Altitude accepting that there had been a TUPE transfer, so no employment prior to their start dates with Altitude was treated as continuous employment.

61. Altitude took on other people who had worked for the respondent (around 15 according to Mr Duffy's estimate). Mr Duffy and Mr Ashton were taken on as employees. We did not hear evidence as to the employment status with either Jones or Altitude of others who had previously worked for Jones and then went to work for Altitude. Mr Duffy, during closing submissions, told me that the majority had been self-employed contractors with Jones, but I cannot make findings of fact based on new evidence given during submissions, when there is no longer an opportunity for that evidence to be tested by cross examination.

62. Altitude disclosed documents which showed work done by them under the contract, which the claimants agreed was work which would previously have been done by Jones under the AGMA contract. I heard evidence about Jones doing some AGMA work after 31 December 2020. On the basis of the evidence I have heard, I am not satisfied that any of this was new AGMA work. I find that the work done under the AGMA contract after 1 January 2021 by Jones was completing work which had already begun and they were contractually obliged to complete.

63. Jones was approached towards the end of their contract period to do work under the AGMA contract but they informed the potential clients that they had lost the contract and that Altitude should be contacted to do the work.

64. There is no evidence that Altitude engaged people who had been employees of the respondent on a self-employed basis rather than as PAYE employees. I am not satisfied, as was asserted in Mr Francis' witness statement at paragraph 15, that Altitude do not employ staff but have self-employed individuals. Mr Francis did not give any evidence to support this assertion. Mr Duffy and Mr Ashton are engaged by Altitude as employees.

65. The Warrington and Leyland depots are more than 25 miles apart. The respondent's generic contract provides in relation to the place of work that a normal place of work is as recorded or a depot to be agreed. Clause 8.2 provides that the employer may change the normal place of work to any place within a 25 mile radius and shall give three months' notice of any change. Clause 8.3 provides that the employee may from time to time, and at the absolute discretion of the Board, be required on reasonable prior notice to work on a temporary or permanent basis as required, depending on the location of work sites. The respondent still has the Leyland depot, but this is now used for storage and has an office base there which is reduced in capacity.

66. I make the following further findings of fact relating to the individual claimants.

Mr Birkett

67. Mr Birkett joined the respondent in April 2014 as a streetlighting manager following a TUPE transfer in. His continuous employment began on 1 January 2000. He began working for the respondent from its Widnes depot. When this closed in late 2019 he moved to work from Leyland.

68. When Mr Birkett joined the respondent, he was manager of the streetlighting team. In August 2016 he took on the role of Health and Safety Manager. From November 2019, following a restructure, Mr Birkett was transferred to the Leyland site to oversee and run the streetlighting department from the Leyland depot, initially alongside another manager who was subsequently promoted. I accept that Mr Birkett retained his health and safety responsibilities alongside his supervisory role.

69. From November 2019, Mr Birkett remained managing the streetlighting department, working from the Leyland site. I accept Mr Birkett's evidence (which is not contradicted by any documentary evidence) that he was not described as Contract Manager of the AGMA contract, although managing that contract came within his responsibilities from November 2019 as supervisor of the streetlighting team at the Leyland site. He managed all the employees at the Leyland site, which he estimated to be 20-25 in December 2020 and not just the 12 employees who the respondent asserts to be the AGMA team. Mr Birkett was working exclusively on the AGMA contract after July 2020 until the contract expiry on 31 December 2020.

Mr Cahill

70. Mr Cahill joined the respondent on 13 May 2013 as a cable jointer. This was connecting streetlighting appliances to the electricity network. Before 2020, he was based in Warrington, doing work on the Scottish Power network.

71. In early 2020, Mr Cahill moved to Leyland to do Electricity North West work. After the move, he worked exclusively on the AGMA contract work.

72. I accept the unchallenged evidence in Mr Cahill's supplementary witness statement that he was led to believe that the assignment to Leyland was temporary. I have not been shown any documentary evidence that there was a permanent move.

Mr Priestner

73. Mr Priestner joined the respondent on 13 May 2020 as a cable jointer. He worked initially from Warrington, predominantly on Scottish Power faults work. He was furloughed for a period in 2020.

74. When Mr Priestner returned to work in August 2020 he went to work at the Leyland depot. I have seen no documentary evidence of a permanent change to his normal place of work.

75. In October to December 2020, Mr Priestner worked 100% of his time on AGMA contract work.

Mr Duffy

76. Mr Duffy joined the respondent on 7 November 2011 as an electrical jointer. In October to December 2020, when not on leave, he worked 100% of his time on AGMA contract work from the Leyland depot.

77. On 4 January 2021 Mr Duffy had a discussion with managers at Altitude, as a result of which he was sent an offer of employment that afternoon for employment beginning on 18 January 2021 as an LV jointer. The contract was dated 5 January 2021 and he signed it on his first day of work which was 18 January 2021.

78. Mr Duffy did the same type of work in the same geographical area for the first few months with Altitude as he had done for the respondent. He worked in teams with people who had been employed by, or worked for, the respondent.

79. After a few months, Altitude sent Mr Duffy on jobs in Cumbria as well as other work. He told me this was because he was the jointer who lives closest to Cumbria. When doing work in Cumbria, he works with other people from Altitude who had not previously worked for Jones.

Mr Astell

80. Mr Astell began working for the respondent as an apprentice electrician on 18 April 2017. Although Mr Astell was not aware of this, I accept that the respondent's reason for recruiting an apprentice was as part of its compliance with commitments to social values, which included a commitment to promote employment, which formed part of the framework award criteria.

81. Mr Astell went out with a qualified electrician (Mr McDougall) on any jobs which Mr McDougall was doing. Mr Francis suggested that Mr Astell had gone out with other employees at other times but Mr Astell's evidence had not been challenged that he was always with Mr McDougall. As an apprentice electrician, Mr Astell would need to be working with a qualified electrician. I find that, whenever both were working, Mr Astell worked with Mr McDougall. At other times, he spent time sweeping and tidying up the yard at the Leyland depot.

82. When working with Mr McDougall, Mr Astell would use Mr McDougall's iPad to record his time. When working in the yard, because he did not have his own iPad, he would tell a supervisor what he was doing and rely on the supervisor to complete the timesheet records.

83. I accept Mr Astell's evidence that, despite time records showing that he worked 100% on AGMA contract work in October to December 2020, there were some days in that period when he was sweeping and tidying up the yard rather than being out on contract work.

84. Mr Astell understood that Mr McDougall was never told that he would be TUPE'd to Altitude. No-one told Mr Astell why he would be TUPE'd but Mr McDougall was not being TUPE'd.

85. On the basis of Mr Francis' evidence, I find that Mr McDougall was not included in the group which the respondent asserted was to be TUPE'd to Altitude because the respondent wished to keep him working for the respondent.

<u>Mr Ashton</u>

86. Mr Ashton began working for the respondent on 26 October 2009 as an apprentice electrician, then as a fully qualified electrician and live cable jointer. He worked from the Leyland depot, starting before the respondent had the AGMA contract. He worked on contracts for other clients as well as AGMA work (for example Cheshire East, Cumbria and Shropshire). He worked exclusively on the AGMA contract work in the period October to December 2020.

87. Mr Ashton went to work for Altitude as a cable jointer starting on 11 January 2021. He had provided his CV to Altitude before he attended their premises on 4 January 2021. He was offered work after 4 January 2021. He worked on the contract for Cheshire East (Ringway Jacob) rather than on AGMA work for Altitude.

Altitude's pleaded case

88. Altitude's pleaded case was as follows. They are no longer a party to these proceedings, but they did enter responses and provided evidence before they settled the claims with the claimants.

89. In their responses, they relied upon what they asserted to be fundamental differences (unspecified) between the volume and/or type of activities they undertook compared to the respondent. They also denied that, immediately before the alleged transfer, there was an organised grouping of employees that had as its principal purpose the carrying out of the activities concerned on behalf of the relevant clients.

Submissions

90. I had written and oral submissions from Mr McDevitt and Mr Henry. Mr Henry was making submissions on behalf of Mr Birkett and Mr Cahill. The written submissions of Mr McDevitt and Mr Henry can be read, if required.

91. Mr Duffy, Mr Ashton and Mr Priestner also made brief oral submissions.

92. In summary, the respondent submitted that the activities carried out by the respondent were fundamentally the same as those carried out by Altitude and that the claimants were part of an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client. The respondent submitted that there was an identifiable team of employees created for the purpose of, and dedicated to, carrying out the service activities pursuant to the AGMA framework

agreement. The respondent submitted that the claimants were assigned to performing the activities under the AGMA contract. The respondent submitted that the employment of the claimants transferred to Altitude by operation of the service provision change provisions of TUPE.

93. Mr Henry, on behalf of Mr Birkett and Mr Cahill, submitted, in summary, that there was no consciously organised grouping prior to the risk of the respondent losing the AGMA contract. The purpose of the grouping in the lists of 26 November 2020 and 14 December 2020 was of workers who the respondent did not feel they could retain to work elsewhere because of their skill sets or to save ongoing costs after a drop of 40% of their income. The exercise was undertaken after the respondent found out it had lost the contract. The organisation was not for the principal purpose of carrying out the AGMA contract. Mr Henry submitted that TUPE did not operate to transfer the employment of Mr Birkett and Mr Cahill because there was no organised grouping of employees as required for a service provision change under TUPE. Mr Henry further submitted, in the alternative, that, if there was an organised grouping, Mr Birkett and Mr Cahill were not assigned to that grouping. Mr Birkett retained his role as the respondent's Health and Safety Manager and he ran the Leyland branch in addition to that substantive post. He did not run the AGMA contract. Mr Cahill was allocated to Warrington. He believed any move to Leyland was temporary. The evidence is that he was not permanently transferred to Leyland.

94. Mr Duffy wanted to clarify that other people who moved to Altitude from the respondent had been contractors, rather than employees, of the respondent. As noted above (see paragraph 61), we were unable to take account of this new evidence, since it was given in closing submissions.

95. Mr Ashton said he had worked on similar work after moving to Altitude but this was Ringway, rather than GMCA work.

96. Mr Priestner said he felt his situation was very similar to that of Mr Cahill. He had been assigned, prior to furlough, to the Warrington depot.

The Law

97. The law I have to apply is as follows.

98. The legal provisions are contained in the Transfer of Undertakings (Protection of Employment) Regulations 2006, referred to as TUPE. The particularly relevant parts of these regulations for this case are as follows.

99. Regulation 2(1) defines "assigned" as meaning "assigned other than on a temporary basis".

100. The definition of "relevant transfer" in regulation 3 includes at 3(1)(b) the definition of a service provision change, that is a situation in which:

"(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (a subsequent contractor) on the client's behalf and in which the conditions set out in paragraph 3 are satisfied."

101. The conditions set out in paragraph 3 are that immediately before the service provision change:

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

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

102. Other provisions are not relevant to this case apart from regulation 4(1) which provides:

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

103. Mr McDevitt and Mr Henry referred me to a number of authorities which I have taken account of:

Eddie Stobart v Moreman [2012] IRLR 356 EAT

Argyll Coastal Services v Sterling UKEATS/0012/11

Costain Ltd v Armitage UKEAT 10048/14

Seawall Ltd v Ceva Freight (UK) Ltd [2013] IRLR 726 Court of Session

London Borough of Hillingdon v Gormanley UKEAT/0169/14

Mowlem Technical Services (Scotland) Ltd v King 2005 SC 514 Court of Session

Enterprise Management Services Ltd v Connect-up Ltd UKEAT/0462/10/CEA

Rynda (UK) Limited v Ms Ailien Rhijnsburger [2015] EWCA Civ 75 CA

104. I find particular assistance in the step-by-step approach which the IDS handbook on TUPE refers to as being gleaned from His Honour Judge Peter Clark's summary of the authorities in **Enterprise Management Services Limited v Connect-Up Limited & Others** to the effect that:

(1) An Employment Tribunal's first task is to identify the activities performed by the in-house employees in an outsourcing situation or the original contractor in a retendering or insourcing situation.

(2) The Tribunal should then consider the question of whether these activities are fundamentally the same as those carried out by the new contractor outsourcing or retendering or in-house employees insourcing. Cases may arise where the activities had become so fragmented that they fall outside the service provision change regime.

(3) If the activities have remained fundamentally the same, the Tribunal should ask itself whether, before the transfer, there was an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client.

(4) Following this, a Tribunal should consider whether the exceptions in regulation 3 apply, namely whether the client intends that the transferee post service provision change will carry out the activities in connection with a single specific event or task of short-term duration and whether the contract is wholly or mainly for the supply of goods for the client's use.

(5) Finally, if the Tribunal is satisfied that a transfer by way of a service provision change has taken place it should consider whether each individual claimant is assigned to the organised grouping of employees.

105. Other particularly relevant points that I have taken from the case law are that the grouping must be deliberately organised for the purpose of carrying out the relevant activities, the authority for which is the **Argyle Coastal Services v Sterling** case. Even if employees are working 100% of their time on the relevant activities, that will not be enough, by itself, to conclude that they form an organised grouping of employees: **Costain v Armitage.** Adopting the words of Mr McDevitt in his submissions, "a deeper dive is required". The grouping should have existed prior to the loss of the contract: **Eddie Stobart Limited v Moreman.** Mr Justice Underhill, President of the EAT wrote in that case:

> "Whereas it is perfectly possible to see how a part of an undertaking may first become a separate entity only at the moment of transfer, it is the essence of a service provision change that the organised grouping should have existed prior to the loss of the contract."

Conclusions

106. I would like to start by recognising what an awful situation the claimants were put in through no fault of their own when Jones, after losing the AGMA contract, acted on the basis of a belief that the claimants' employment would transfer to Altitude by operation of TUPE, but Altitude refused to accept this.

107. The claimants and other affected employees attended for work with Altitude on 4 January 2021 but were turned away. They were left with no job and no redundancy pay. Two of the claimants did secure work with Altitude, but on the basis of being new employees on new terms of employment rather than as employees with existing terms of employment and continuity of service. Sympathy for the claimants' predicament can, however, play no part in my decision. Also, although I am aware that the claimants have settled their claims against Altitude (but not how much they received by way of settlement), the fact of the settlement is not a matter which is relevant to my decision making. I am required to apply the law to the facts I have found in deciding whether there was a TUPE transfer and, if I do decide there was a TUPE transfer, in deciding whether the claimants were assigned to the organised group which transferred to the employment of Altitude.

108. Either Jones or Altitude was mistaken in the view they took as to whether the claimants' employment transferred to Altitude by operation of TUPE. The fact that Jones and Altitude did not agree as to whether there was a TUPE transfer did not mean that there could not be a TUPE transfer. Whether there is a TUPE transfer, and whether it operates to transfer the employment of a particular employee, is a matter of application of the relevant law to the particular factual situation. It is possible that both companies acted in good faith in their belief. One of them must have been wrong in their belief.

109. Mr McDevitt described this, in his closing submissions, as a classic TUPE service provision change. At first glance, what happened here may seem to have all the features of a classic TUPE service provision change. A contract for particular services was lost by one contractor and awarded to another. The activities carried out under that contract appear to be the same before and after the end of one contract and the start of the other. At least some of the same people who did the work for Jones (including Mr Duffy) worked on the same type of work for the same client after the contract moved from one contractor to another.

110. However, the situation is more complex than appears at first glance. A careful examination of the relevant facts and the application to those facts of the relevant law is required to decide whether there was a TUPE transfer and if so, whether the claimants were assigned to the organised grouping of the respondent's employees such that TUPE would operate to transfer their employment to Altitude.

111. There was no disagreement between the parties as to the applicable law. Both representatives approached the case on the basis that, if there was a TUPE transfer, it was the service provision change part of TUPE which was applicable. The unrepresented claimants did not express a view on this. Having heard the evidence, I

agree with the representatives that it is the service provision change parts of TUPE which are relevant to this case.

112. I turn to the three issues which are relevant in deciding whether there was a TUPE service provision change transfer and, if there was, whether the claimants were assigned to the grouping which transferred.

113. The first issue for me to consider is: were the same activities undertaken by the respondent on behalf of their client AGMA which ceased on 31 December 2020 then undertaken by Altitude on behalf of the same client?

114. The respondent submits that the activities were the same. Mr Henry, on behalf of Mr Birkett and Mr Cahill, has adopted a neutral stance on this question, neither of those claimants having personal knowledge of what Altitude worked on after Jones lost the contract. None of the other claimants made any submissions on this issue.

115. I agree with Mr McDevitt's submissions in relation to the activities being the same before and after 31 December 2020. The activities were set out in the invitation to tender documents. The description in the invitation to tender document won by Jones in 2016 is virtually the same as that in the 2020 invitation to tender won by Altitude. The only difference is some additional detail and an ability to charge for some additional matters such as aborted jobs. The similarity of the type of work and geographical area has been supported by the evidence of Mr Duffy who went to work for Altitude as well as the documents produced by Altitude, while they were still a party to these proceedings, of work done under the contract won by them. I conclude that the activities were the same before and after the change in service provider.

116. I turn next to the second issue which is significant in deciding whether there was a TUPE transfer. That issue is as follows: was carrying out those activities on behalf of AGMA the principal purpose of an organised grouping of the respondent's employees?

117. I conclude that "the Leyland team" did not equate and was not interchangeable with something which has been described by the respondent's managers as "the AGMA team". There were more people working from the Leyland site than the respondent says formed the AGMA team. All the claimants prior to September-December 2020 had worked on contracts for other clients as well as for the AGMA clients. The claimants did not always know who the client was for the work they were doing – some had not heard of the AGMA contract until they were informed that the contract had been lost.

118. The list of employees who the respondent considered likely to transfer under TUPE if the contract was lost, provided in July 2020 as part of the invitation to tender process, is very different to the group identified after the respondent was told that they had not been successful in retaining the AGMA contract. This was not just a matter of natural staff movements. Some on the list may have left the respondent in the intervening period but the majority of the changes related to the respondent's directors deciding, after losing the contract, who they wanted to retain in their business, leaving

the others to form the group which the respondent asserted would transfer by operation of TUPE to Altitude.

119. I conclude that the group the respondent has identified as being the group to which TUPE applies was not an organised group formed prior to the contract being lost. Applying paragraph 21 of the **Eddie Stobart** decision, this alone would seem to be enough to reach a conclusion that this was not an organised grouping formed for the principal purpose of carrying out the activities on behalf of AGMA. Without such an organised grouping there is no service provision change to which TUPE applies.

120. I do not rely only, however, on application of this part of the **Stobart** decision in reaching a conclusion that there was no service provision change to which TUPE applies. The respondent has not satisfied me that the group of 12 (including the claimants) was an organised grouping of employees with the principal purpose of carrying out the activities on behalf of AGMA for a number of reasons. The number of people asserted to be likely to transfer by operation of TUPE changed considerably from July 2020 to November 2020, not as a result of anything to do with a change in the activities being performed on behalf of AGMA but in large part because the respondent wanted to retain certain people in its business and did not want to retain others. It is beyond the scope of what I am dealing with in this hearing to examine whether the respondent had any reasonable basis for asserting that certain employees had better skills and experience than others. I know that at least some of the claimants take issue with the respondent's evaluation of their skills and experience compared to those of others. The formation of the group which the respondent asserted would transfer under TUPE was not a positive formation of a group for the purpose of carrying out the AGMA activities but was a group of those not selected in what Mr Francis described as a "selection process" conducted after the loss of the contract, matching employees with vacancies they had in the business.

121. As I noted in my findings of fact, the evidence in paragraph 31 of Mr Francis' witness statement about being able to absorb employees who did under 95% of their work on AGMA work into the business because of their skillset made no sense. This evidence further undermines the respondent's attempt to persuade me that the group arrived at was an organised grouping formed for the purpose of carrying out the AGMA contract. It may or may not be coincidental or happenstance that the claimants all carried out 100% of their client work in the period October-December 2020 under the AGMA contract. I did not hear evidence that there was a reorganisation of who did what work or why this was done in this period. I have not seen timesheets to show whether or not the other six affected employees did 100% of their work in this period under the AGMA contract. I do not know whether there were employees not in the group who also did 100% of their work under the AGMA contract during this period, although it seems likely that at least Mr McDougall was one such employee. Even if the claimants and other employees in the group of 12 all did 100% of work in this period under the AGMA contract, this does not mean, by itself, that they constituted an organised group of employees with the principal purpose of the carrying out of the AGMA activities. Time spent on the AGMA activities in this period is a factor which could point towards the employees being part of an organised group with the requisite

purpose. However, I conclude that the other facts I have referred to, which point to the lack of formation of a group for that purpose, outweigh the time spent factor in deciding whether there was an organised group with the requisite purpose.

122. I conclude that the formation of the group was not for the principal purpose of carrying out the AGMA contract. Since this is a requirement for there to be a TUPE service provision change, I conclude that there was no TUPE transfer.

123. The final issue was: were all or any of the claimants assigned to that organised grouping? Given my conclusion on the previous issue, this question does not arise. However, in case I am found, on appeal, to be wrong in my conclusion, I give my views on what I would have concluded on this last issue, had I decided there was an organised grouping.

124. If I had concluded that there was an organised grouping with the principal purpose of carrying out the AGMA contract activities, I would have concluded that Mr Priestner and Mr Cahill were only temporarily assigned to the group and, therefore, because regulation 2(1) says "assigned" means assigned other than on a temporary basis, would not have transferred to Altitude by operation of TUPE.

125. I would have concluded that Mr Birkett did not transfer because he was not only the supervisor of the AGMA contract work: he was also the supervisor of all employees at Leyland and Health and Safety Manager. I agree with Mr Henry's submission that Mr Birkett's situation was like that of the Depot Manager in the **Mowlem Technical Services v King** case.

126. If I had found that the group of 12, excluding Mr Birkett, was an organised grouping with the principal purpose of carrying out the AGMA contract activities, I would have found that Mr Duffy, Mr Ashton and Mr Astell were assigned to that group and their employment would have transferred to Altitude by operation of TUPE. There would have been no basis for me concluding that they were not assigned to that organised group.

127. However, given my conclusions on the first two issues, that there was no TUPE transfer, I have concluded that none of the claimants were transferred from the employment of the respondent to the employment of Altitude by operation of TUPE.

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Employment Judge Slater

Date: 28 February 2023

REASONS SENT TO THE PARTIES ON

2 March 2023

FOR THE TRIBUNAL OFFICE

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