

Neutral Citation Number: [2025] EAT 107

Case No: EA-2024-000348-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01 August 2025

Before :

JOHN BOWERS KC, SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

MACH RECRUITMENT LTD

- and -

Appellant

MRS MARIA OLIVEIRA

Respondent

MR T WOOD of Counsel (instructed by Bridge Employment Law Ltd) for the Appellant
MR H OLIVEIRA represented the Respondent

Hearing date: 17 July 2025

JUDGMENT

SUMMARY

TRANSFER OF UNDERTAKINGS

In a case where the tribunal decided that there was a sufficient “grouping” for a service provision change under TUPE, there was evidence on which the tribunal could so find. The tribunal’s decision was not perverse.

JOHN BOWERS KC, SITTING AS A DEPUTY HIGH COURT JUDGE:

1. The central issue in this appeal concerns whether the EJ erred in concluding that there had been “an organised grouping of employees” whose “principal purpose” was transferring activities for the purpose of a transfer of an undertaking. Mr Wood appeared on behalf of the Appellant whilst the Respondent was represented by her son. The Respondent had the services of an interpreter who joined remotely. I adopt the nomenclature of the parties in the tribunal.

2. The Respondent is a temporary work agency, which engaged the Claimant from 18 July 2018. Prior to that date, Claimant was employed by another agency G-Staff Ltd (“G-Staff”). The Claimant had been supplied by G-Staff to Butcher’s Pet Care Limited (“Butcher’s”) to work as an Alutray [ie aluminium tray] Operative. The Respondent later in 2018 began providing services to Butcher’s under a Service Level Agreement.

3. The EJ concluded that the cessation of activities being covered by G-Staff and the consequent assumption of those activities by the Respondent amounted to a service provision change for the purposes of TUPE. He decided that G-Staff had had an organised grouping of employees whose principal purpose was the activities on behalf of Butcher’s but this remains controversial.

The legal framework

4. As is well known by reg 3 Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) a service provision change is (in relevant provisions) “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”.

5. Reg 3(3) states “The conditions referred to in paragraph (1)(b) are that— (a) immediately before the service provision change— (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client”. It is the meaning of organised grouping which is crucial in this case.

6. I will first consider the developing jurisprudence in this area in chronological order.

7. In *Argyll Coastal Services Ltd v Stirling and others* UKEATS/0012/11 at [18] the EAT referred to an organised grouping of employees as a number of employees which is less than the whole of the transferor’s entire workforce, deliberately organised for the purpose of carrying out the activities required by the particular client contract and who work together as a team.

8. One of only two cases cited by this tribunal on the point was *Eddie Stobart Ltd v Moreman and others* [2012] ICR 919. At [18] the EAT decided that “organised grouping” necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. In that case it was a group which was split on the lines of different shift patterns and this did not amount to an organised grouping servicing particular clients. The other case mentioned in the Reasons is *Enterprise Management Services Ltd v Connect up Ltd* [2012] IRLR 90 which provided similar guidance to *Moreman* which is set out in the Reasons.

9. *Ceva Freight (UK) Ltd v Seawell Ltd* [2013] CISH 59 at [33] is authority for the proposition that it is not legitimate to isolate one employee on the basis that the employee in question devoted all, or virtually all, of his or her working time to assisting in the collaborative effort.

10. The EAT in *Amaryllis Ltd v McLeod and others* UKEAT/0273/15 at [30] provided this guidance:

- (1) There must be an organised grouping of employees. On a natural meaning of the phrase it must be the employer who organises a group of employees;
- (2) The organised grouping within the putative transferor must have as its principal purpose carrying out the relevant activities not in general but for the particular client which activities will be undertaken by the putative transferee. It is not sufficient to satisfy the Regulation that a department carries out certain work. It must be organised for the principal purpose of carrying out that work for the client in question;
- (3) The relevant time at which there is to be an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client is immediately before the transfer

11. The clearest analysis of the various stages to be considered by the tribunal may be found in *Rynda (UK) Ltd v Rhijnsburger* [2015] ICR 1300 at [44]):

The first stage of this exercise is to identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a “grouping” for the principal purpose of carrying out the listed activities.

12. It appears to be common ground between the parties that

- a. The relevant time at which there must be an organised grouping is immediately before the transfer (*Amaryllis*);
- b. The relevant “organiser” of the group is the employer (i.e. the transferor) (*Amaryllis*).

Submissions for the Appellant

13. Mr Wood argued that the statutory language does not naturally apply to a situation where, as here, a combination of circumstances—essentially, shift patterns and working practices on the ground—mean that a group of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. He also said that an organised grouping is distinct from a grouping, which is in turn distinct from a group for which principal he cited *Moreman*. The organisation must be the result of deliberate planning or intent (*Argyll / Moreman / Amaryllis*). There must be a conscious decision on the part of the transferor to establish the grouping which he said did not happen in this case.

14. He said that the Judge erred in concluding that G-Staff deliberately organised its workforce by reference to Butcher's activities and that the Employment Judge's conclusion was limited to the Claimant's evidence (and did not fully take into account that evidence which was called by the Respondent). In fact the only evidence on which the Judge's conclusion was reached he says (which is insufficient) is that

- (1) the Claimant's work was always with Butcher's;
- (2) It was always as an Alutray Operative;
- (3) the Claimant worked with and alongside the same people throughout, except when someone would leave and be replaced by a new person.

15. Further Mr Wood contended that the possibility that the increase in, and final number of, workers being provided by the Respondent replicated the fluctuating need of G-Staff. This is however almost inevitable in agency working. In disregarding the Respondent's evidence, Mr Wood says that the EJ failed to consider whether Alutray work was only one part of a wider group of activities transferring, in which case he consequently failed to consider the wider group and its principal purpose. He says that the EJ failed properly to address the first and second steps set out by the Court

of Appeal in *Rynda* at [44].

Submissions for the Respondent

16. Mr Oliviera in response argued that the Tribunal correctly assessed the evidence presented by the Claimant, which demonstrated that she worked consistently with the same group of employees. This provided a basis for concluding that an organised grouping existed, contrary to the Respondent's assertion that the Tribunal merely accepted the Claimant's narrative without scrutiny. The Tribunal's inference regarding the transferor's intent was reasonable, he says, given the Claimant's unchallenged evidence concerning her nature of her work. He contends that the Respondent's claims that this was merely coincidental lacks merit. The Tribunal is entitled to draw reasonable conclusions from the evidence presented.

17. He also says that the burden of proof of organised grouping is on the employer. I disagree, although the burden in this case may be easy for the Claimant to discharge and most of the knowledge about organisation will reside in the employer.

Lack of evidence

18. Mr Wood quite properly draws attention to the repeated statements by the Judge that there was no evidence provided by the Respondent (eg ET Reasons paras 6, 15, 18). It is indeed not correct to say that there was *no* evidence given by the Respondent in this respect but the evidence for the Respondent was it is fair to say exiguous, as Ms Katie Barrett accepted in her statement (see paras 8, 9, 12). That statement deals in any event mainly with lack of continuity of employment and not whether there was an organised grouping. The tribunal is correct in identifying a lack of evidence about "who was provided to Butcher's, how they were chosen..." save for a fairly random list of employees which does not appear to take the issue much further. This lack of evidence is I think the key to the decision reached by the tribunal.

19. Mr Wood's suggestion was that the evidence on grouping from the Claimant was "no more than that she worked alongside the same people throughout her engagement at Butcher's. That was insufficient for a conclusion of an organised grouping." I note that it is not clear to me that a Claimant could ever really say much more than this unless there was (which would be rare) a positive minuted decision to delineate a formal grouping of employees. One can see the different sort of evidence adduced for example in *Moreman*.

Discussion: Reasoning on organised grouping

20. I do think that there is an element of over reasoning and technicality about Mr Wood's submissions which are out of place in dealing with a service provision change which should be a straightforward process of reasoning. For example he drew a rigid distinction between a group and a grouping which I do not think is borne out (although I do note the way this was put *en passant* in *Moreman*). He says that the group here was inherently flexible and ad hoc. It seems to me that this is the basis of agency work which tends to be precarious and shape shifting. Clearly if there were random allocation to clients as in the case of couriers this would be unlikely to amount to an organised grouping. The principal purpose here however was clear that is the servicing of Butcher's by Alutray operatives and there must have been a conscious decision of some sort that it should be organised in this way, presumably to satisfy Butcher's the client of the agency. As Underhill J said in *Moreman* there must be "the employees organised *in some sense* by reference to the requirements of the client in question" (para 18; my italics) and here they were, as Alutray workers for Butcher's.

21. I do not accept that the Judge merely confined his analysis to: the activities that the Claimant and her team was doing and the Employment Judge found that her team carried out those activities, and on that basis concluded that they formed an organised grouping of employees. The Judge found that "she worked with and alongside the same people throughout, except when someone would leave

and be replaced by a new person” (para 13). This it should be said is typical of agency work to which service provision change applies as it does to other work. The Judge went on to find that this was “a settled group of employees, placed by the Respondent (and its predecessor) to work in a specific location”. He directed himself that this “must be more than coincidental or merely circumstantial” (para 14) and he found that it was more so. Another judge might have decided differently but this does not make the issue subject to appeal in the absence of perversity and this conclusion was not perverse.

22. This was not merely “a combination of circumstances” as it was put in *Moreman* at para 18 so the judge found. Nor do I accept Mr Wood’s contention that the EJ “failed to consider whether Alutray work was only one part of a wider group of activities transferring, in which case he consequently failed to consider the wider group and its principal purpose”. Rather he did consider this as part of his Reasons.

23. Mr Wood’s submissions suffer more generally I think from the assumption that there needs to be a literally conscious decision to segregate a particular group. I believe that it is enough that the Claimant consistently operated with the same group of employees without more. On more than one occasion Mr Wood spoke of the need for “deliberate conscious organisation”. There does not in my view need to be anything more formal than there was in this case on the evidence called.

24. Further the Judge can only operate on the basis of the evidence heard. It should be noted that the tribunal saw the Claimant as a credible witness. The Respondent might have called evidence from which it could be inferred that there was no organised grouping but they did not. I consider that broadly speaking the tribunal properly directed itself and reached a conclusion which it was entitled to reach (although a different tribunal might have reached a different conclusion). Applying *Amaryllis* there was an organised grouping within the putative transferor which had as its principal purpose

carrying out the relevant activities not in general but for the particular client which activities will be undertaken by the putative transferee.

25. It follows that notwithstanding the concise and persuasive advocacy of Mr Wood this appeal is dismissed.