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Service Provision Changes: The New Common Sense Approach

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INTRODUCTION

1. This paper considers recent developments relating to the meaning of service provision changes within Regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the 2006 Regulations").

2. In May 2011 the government indicated that it was considering reforming the TUPE Regulations. In particular, it noted that "some businesses believe that they [the Regulations] are `gold plated'[1] and overly bureaucratic".[2] In November 2011, the Department for Business Innovation and Skills ("BIS") published a Call for Evidence: Effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006. This focused in particular on service provision changes and insolvency proceedings. The call for evidence closed on 31st January 2012, and a consultation which will put forward the government's proposed amendments to the 2006 Regulations is likely to be published in the next few months.

3. This paper will argue however, that a flurry of recent Employment Appeal Tribunal decisions has significantly tightened up the circumstances in which a change of

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[1] Gold-plating refers to provisions which go further than required under European Union law.

[2] See BIS Statement on Next Steps in Review of Employment Law at http://nds.coi.gov.uk/content/detail.aspx?NewsAreaId=2&ReleaseID=419433&SubjectId=2

contractor is likely to amount to a service provision change. Indeed in all of the recent decisions considered below, the Employment Appeal Tribunal held that the outsourcing of work had fallen outside the definition of a service provision change.

4. In particular this paper will consider the recent approach of the Employment Appeal Tribunal to the following issues:

   (1) The identification of "the client" or "a client";

   (2) The definition of "activities";

   (3) The level of "fragmentation" required to take a transfer outside of the 2006 Regulations;

   (4) The meaning of the phrase "Organised Grouping of Employees";

   (5) The Supply of Goods.

WHAT IS A RELEVANT TRANSFER?

5. There are two types of relevant transfer as defined at Regulation 2(1) of the 2006 Regulations: a transfer of an undertaking or business (or part of an undertaking or business) and a service provision change (Regulation 3 of the 2006 Regulations).

6. The two types of transfers are not mutually exclusive, and a transfer of an undertaking may also be a service provision change and vice versa (*Kimberley Group Housing Ltd v Hambley* [2008] 1 ICR 1030 at 1038 (paragraph 26)).

7. The meaning of a transfer of an undertaking or business (or part of an undertaking or business) within Regulation 3(1)(a) of the 2006 Regulations (a "business transfer") is outside the scope of this paper.

8. A service provision change is defined at Regulation 3(1)(b) of 2006 Regulations. Regulation 3(1)(b), unlike Regulation 3(1)(a), does not derive from the Acquired Rights Directive (2001/23/EC), (or any other EU Directive) but from section 38 of the Employment Relations Act 1999. The fact that the statutory concept of service provision change does not derive from the Acquired Rights Directive, or represents 'gold plating' of the Directive, was highlighted in the recent European case of *CLECE SA v Maria Socorro Martin Valor and Ayuntamiento de Cobisa* (Case C-463/09), where the CJEU held that the Directive did not apply to a situation which would amount to a service provision change and therefore a relevant transfer under domestic law.

WHEN WILL THERE BE A SERVICE PROVISION CHANGE?

9. When considering whether there has been a service provision change there is no need to consider whether there was a transfer of plant and machinery, customer lists and other matters in addition to activities and an organised grouping of workers (*Hunter v McCarrick* [2012] IRLR 274 at paragraph 24). Further, none of the case-law relating to the meaning of a business transfer applies. A service provision change is a wholly new statutory concept, and the concepts which have developed under the 1981 Regulations or the Acquired Rights Directive are not relevant to its definition (*Metropolitan Resources Ltd v Churchill Dulwich Ltd and Others* [2009] 1 ICR 1380 at 1389 (paragraph 27).)

10. The test to be applied in determining whether or not there has been a service provision change is simply that contained at Regulation 3(1)(b) of the 2006 Regulations, and is summarised at paragraph 29 of *Metropolitan Resources Ltd* at 1390 as follows:

"… [T]he Employment Tribunal should ask itself simply whether, on the facts, one of the three situations set out in regulation 3(1)(b) existed and whether the conditions set out in regulation 3(3) are satisfied".

11. The material part of Regulation 3 is as follows:

> **3 A relevant transfer**
>
> (1) These Regulations apply to—
>
> (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;
>
> (b) a service provision change, that is a situation in which—
>
> (i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
>
> (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
>
> (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,
>
> and in which the conditions set out in paragraph (3) are satisfied.
>
> (2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
>
> (3) The conditions referred to in paragraph (1)(b) are that—
>
> (a) immediately before the service provision change—
>
> (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
>
> (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
>
> (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

12. Regulation 3(1)(b) provides for three types of service provision change:

    (1) **outsourcing** (subparagraph 3(1)(b)(i));

    (2) **insourcing**, or bringing services back in house (subparagraph 3(1)(b)(iii));

    (3) and the **change from one contractor to another** (subparagraph 3(1)(b)(ii).

13. The question of whether there has been a service provision change is a question of fact for the Employment Tribunal *(Metropolitan Resources* at 1389 (paragraph 27)). The Employment Tribunal should adopt a straightforward and common sense application of the relevant statutory words to the individual circumstances before them. There is no need for an Employment Tribunal to adopt a purposive construction, nor is there any need to apply a multi-factorial approach (*Metropolitan Resources* at 1390 (paragraph 28)).

14. When a tribunal is examining the question whether there is a service provision change or not it is of course entitled to, and must, look at all the facts and their implications in the round (*Kimberley Group Housing Ltd v Hambley* [2008] 1 ICR 1030 at 1041 (paragraph 35)).

15. When an Employment Tribunal is considering whether there has been a service provision change within Regulation 3(1)(b) it should be almost exclusively focused on the situation *immediately before* the putative transfer, and should therefore ignore, for example, what happens to the transferor's assets or employees post-transfer.[3] Events subsequent to the date of the putative transfer are unlikely to be

[3] See IDS Handbook; Transfer of Undertakings, 1.115

relevant to the determination of this issue (see *Metropolitan Resources* at 1394 (paragraph 43)).

Back to Basics: Identify the Client

16. There is no definition in the 2006 Regulations of the word "client". However, it is important to ask first, who is the "client" (*Hamshaw*) (paragraph 25).

17. *Hamshaw* was a case concerning the closure of a care home for adults with learning difficulties operated by an NHS Trust and the rehousing of the residents in homes of their own provided by a local housing association. In *Hamshaw*, the Employment Tribunal wrongly identified the "client" as the residents of the home, namely the persons who were benefiting from the activities in question. The Employment Appeal Tribunal (Bean J) held that this was incorrect:

> "This cannot be correct, because in sub-paragraphs (1) and (3) the "client" is the person who is carrying out the activities before or after the transfer as the case may be and on whose behalf (not "for whose benefit") the activities are carried out. Moreover, in all three sub-paragraphs of reg 3(1)(b) the "client" is the person who makes the decision about transfer, since by regulation 3(3)(b) it is necessary for a service change provision that the client must intend that the activities, following the change, will be carried out by the transferee".

18. Accordingly, the client referred to in Regulation 3(1)(b)(ii) is the client on whose behalf the transferor contractor carried out activities, not the end beneficiary of the activities. In *Enterprise Management Services Ltd v Connect-Up Ltd and others* [2012] IRLR 190, Enterprise and later Connect-Up both entered into Framework Agreements with Leeds County Council to provide IT support to schools. The

Employment Appeal Tribunal held at paragraph 8 that the "client" for the purposes of Regulation 3(1)(b)(ii) was Leeds County Council, rather than the schools who received the services or "activities".

19. Similarly in *Metropolitan Resources*, the Home Office had a contract with a charitable organisation called Migrant Helpline to provide accommodation to asylum seekers. Migrant Helpline in turn had contracts with a number of providers of such accommodation, including the contract with Churchill Dulwich Ltd and Metropolitan Resources. In that case, the Employment Appeal Tribunal held that Migrant Helpline was the client for the purposes of Regulation 3(1)(b)(ii) of the 2006 Regulations (see paragraph 20), rather than either the Home Office or the asylum seekers who received the accommodation.

20. *Hunter v McCarrick* [2012] IRLR 274 is a valid reminder of why it is so important to clarify the identity of the "client" at the outset. In *Hunter*, the Claimant, Mr Hunter, worked for WCP Management Ltd, who provided property maintenance services in respect of commercial properties owned by Waterbridge Group Limited. In August 2009 Aviva, the mortgagee, appointed receivers to assume control of the properties. The Claimant had been employed by WCP Management Ltd to manage that portfolio of properties. The receivers, Aviva, appointed a firm of property consultants to manage the properties, which meant that there was no work for the Claimant to do on behalf of WCP Management Ltd. The Claimant claimed that there had been a service provision change from WCP Management Ltd to the firm of property consultants.

21. The Employment Tribunal held that there was a change of "client", from Waterbridge Group Limited (the original owner of the properties) to Aviva (the

receiver) and BDO Stoy Hayward who took over the assets of the properties. It also held that there was a change of the "contractor", from WCP Management Ltd to the property consultants. It is unclear from the judgment whether these two changes happened simultaneously or not.[4]

22. The Employment Appeal Tribunal (Slade J) accepted that Regulation 3(1)(b) requires a relationship between a contractor and a client. It rejected the Respondent's submission that a service provision change occurred when there was a change of client before or after the change of contractor. In doing so, the Employment Appeal Tribunal held that there was no service provision when the activities on which employees were engaged by one contractor were then carried out by a different contractor for a different client. At paragraph 25 the Employment Appeal Tribunal held that:

> "If the framers of the Directive or TUPE had intended the contractual terms of employees employed on an activity to follow that activity when it was undertaken for a different client they could have so provided. There would have been no need for the detailed consideration by the European Court of Justice of different elements constituting an undertaking **if all that were needed was to establish that a group of employees or an employee assigned to an activity would transfer to a new contractor irrespective of whether the client for whom the service was performed changed.** …
>
> In our judgment "the client" in reg 3(1)(b)(ii) refers back to a specific client. The specific client referred to earlier in the provision is the client on

[4] The same argument as to whether a simultaneous change of client and contractor could amount to a service provision change was made in ***Hanshaw*** see paragraph 27, but was not decided by the EAT.

whose behalf the transferor contractor carried out activities. The use of the definite article "the" must refer back to "any client". Reg 3(1)(b)(i) applies to contracting out activities which were carried out by the client himself, "a client", and are to be carried out on "the client's" behalf by another person. Similar wording, "a client" and "the client", is used in reg 3(1)(b)(iii) dealing with contracting in. There is no warrant for the giving the words "a client" and "the client" different meanings in the different sub-paragraphs of reg 3(1)(b). As in regs 3(1)(b)(i) and (iii) "the client" in reg 3(1)(b)(ii) is the same client as "a client"."

THE FOUR STAGES

23. After the client has been identified, there are four issues which an Employment Tribunal needs to consider in order to decide whether there has been a service provision change or not. It is important that these issues are approached in the following order (*OCS Group UK Ltd v Jones & Others* UKEAT/0038/09/CEA (paragraph 11)):

    (1) What are the relevant activity or activities?

    (2) Have those activities transferred?

    (3) Have the 3(3) conditions been satisfied?

    (4) Was the employee in question assigned to the organised grouping of employees?

1. Relevant Activities

24. The Employment Tribunal should first identify the relevant activity or activities under regulation 3(1)(b) (*Kimberley* at 1038 (paragraph 26); *Metropolitan Resources* at 1390 (paragraph 29-30)).

25. The word "activities" is not defined in the 2006 Regulations. In *Metropolitan Resources* at 1392 (paragraph 36-7) this task was described by Judge Burke QC as requiring the Employment Tribunal to look "for the **essential** service or activity" provided by the putative transferor and transferee (emphasis added). As is explained below, it is significant that it is the activities provided by the contractor and subsequent contractor, rather than being the activities provided by the employees concerned.[5]

26. In *OCS* the Employment Appeal Tribunal was satisfied that the identification of relevant activities as being the provision "of a full canteen service" was sufficient, and did not disclose any error of law (see paragraphs 19 and 22). This was a very narrow interpretation of the relevant contractual services, with the effect that no service provision change was held to have occurred.

27. In *Ward Hadaway Solicitors v Love* [2010] (UKEAT/0471/09/SM), the Employment Appeal Tribunal had to consider whether an Employment Tribunal had defined "activities" too narrowly by focusing on the actual work carried out by the putative transferor (Ward Hadaway Solicitors ("WHS") and excluding their availability to do new work.

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[5] See also *Eddie Stobart v Mr J Moreman & Others* UKEAT/0223/11/ZT paragraph 20.

28. WHS was one of a panel of four solicitors' firms who provided services for the Nursing and Midwifery Council ("the NMC"). In 2007, the NMC decided to tender out its work and Capsticks Solicitors LLP successfully won the contract to carry out all of the NMC's work after the 1st October 2007. The question arose as to whether any employees of WHS had transferred to Capsticks. The Employment Tribunal considered what activities had been carried out by WHS for NMC, and held that the activities carried out by WHS "must sensibly be confined to those cases in which WHS have been instructed and where they have accepted those instructions". The fact that WHS had had the right to receive future referrals from the NMC was not relevant. As all of the 'work in progress' remained with WHS until it had been completed (indeed, the evidence demonstrated that some of that work was still being undertaken by WHS in March 2009), the Tribunal found that "nothing transferred from WHS to Capsticks in October 2007. Accordingly, it held that there had been no service provision change.

29. On this point, the Employment Appeal Tribunal held that the Tribunal had been entitled to conclude that the relevant activities did not include the prospect of future referrals or their availability to do further work for NMC. The Employment Appeal Tribunal commented that the proposition advanced by the Claimants "pointed towards an old economic entity on the lines of old TUPE" (now Regulation 3 (1) (a)) and was, "at the most the opportunity to be on standby should NMC refer a case". Although it was "arguable that that constituted part of the activities", the Tribunal could "not be faulted in its clear decision that the activities for the purposes of a service provision change were the work in progress".

30. The Tribunal made a secondary finding on the alternative basis that the relevant activities did include the expectation of future referrals. It concluded that even if this definition were adopted, no service provision change had taken place. The Tribunal was required to consider the nature of the work done before and after the putative 'transfer'. It found that there were significant differences between the services being provided by Capsticks to the NMC and those which had been provided by WHS previously. For example:

> "there was less work done at an earlier stage by Capsticks than was carried out previously and the work was done by a paralegal, rather than at WHS, by qualified solicitors"; and
>
> "the new arrangement provided for substantially less work than that done by WHS".

31. The Employment Appeal Tribunal upheld the Tribunal's conclusion on this point also, stating that the "judgment as to the character and the quantity of the work and the nature of the service were all matters of fact for [the Tribunal] to decide. The Tribunal made a permissible decision. Indeed, it seems to us to be correct".

2. Have the activities transferred?

32. Then an Employment Tribunal should consider whether those activities have indeed been transferred over. The Employment Tribunal is “looking for a change from alleged transferee to alleged transferor in the performance of the essential activity” *(Metropolitan Resources* at 1393-4 (paragraph 40)).

33. Unlike in the case of business transfers, there is no specific requirement in the legislation for the activities to “retain their identity” after the transfer. However,

case-law has clarified that an Employment Tribunal must consider whether the activities carried out by the alleged transferee are **fundamentally or essentially the same** as those carried out by the alleged transferor. The answer to this question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it (*Metropolitan Resources* at 1390 (paragraph 30)(emphasis added)).

34. It is open to an Employment Tribunal to find that there is sufficient dissimilarity between the activities provided by the putative transferor and transferee, that there has been no service provision change. The weight to be accorded to any differences is for the Employment Tribunal to determine (*Coventry City Council v Nicholls and others* [2009] IRLR 345 at 351 (paragraph 60)).

35. In *Nottinghamshire NHS Healthcare Trust v Hamshaw & Others* (UKEAT/0037/11/JOJ), the Employment Appeal Tribunal had to consider whether the activities provided before and after the putative transfer were fundamentally or essentially the same. As set out above, the case concerned the closure of a care home for adults with learning disabilities on the 31st March 2010. On its closure, the residents were re-housed into homes of their own, but they continued to receive care from Perthyn or Choice Support, two specialist care firms. The Claimants, the employees, had formerly looked after the residents in the care home and continued to look after them in their new homes on behalf of either Perthyn or Choice Support.

36. The Tribunal concluded that no relevant transfer had taken place. It found that there were a number of significant differences in the care services being provided before and after 31 March 2010 (the date of the putative transfer). For example, there was an expectation that the adults, whilst continuing to receive care and support from the

specialist care companies, would develop a greater independence in the cleaning, care and management of their own homes; and similarly that they would routinely undertake domestic tasks such as shopping, food preparation and cooking. The Tribunal concluded that the changes:

> "...represented a material shift in the ethos of the service and the manner of its provision… While the tribunal accepts that there remained an obligation on those undertaking day to day provision of the care to call upon the services of medically qualified personnel where necessary, the Tribunal is satisfied that post 1st April 2010 the emphasis was one of supporting living and welfare…"

37. The Employment Appeal Tribunal held that the services provided after the rehousing were materially different for the reasons found by the Employment Tribunal, and therefore there had been no service provision change.

38. In *Enterprise Management Services Ltd v Connect-Up Ltd* [2012] IRLR 190, the Employment Appeal Tribunal had to consider whether the activities provided by the putative transferor (Enterprise) and the putative transferee (Connect-up) were fundamentally or essentially the same. Both companies were concerned with the provision of ICT support to schools in Leeds. The Employment Tribunal below had held that after the date of the putative TUPE transfer, Connect-Up did not undertake curriculum work. Whereas the organised grouping of Enterprise employees dedicated to the Leeds County Council schools service had carried out this work before the putative TUPE Transfer. The curriculum work was held to represent 15% of the work previously carried out by Enterprise. The Employment Appeal Tribunal held that the omission of this 15% (the curriculum work) of the activities was sufficient to mean that the activities carried out by Connect after the putative

transfer were not essentially or fundamentally the same as those carried out by Enterprise (paragraph 14).

39. Any difficulties in determining who should take responsibility for an employee's contract after any given date may be taken into account by an Employment Tribunal as indicating that there is no service provision change (*Kimberley* at 1041 (paragraph 35); *Clearsprings Management Ltd v Ankers & Others* UKEAT/0054/08/LA (paragraph 12)).

40. An Employment Tribunal must determine the date at which the essential nature of the activity carried on by the alleged transferor **ceases** to be carried on by him and is instead carried on by the alleged transferee. The ascertainment of that date must be a question of fact (*Metropolitan Resources* at 1393 (paragraph 39)).

Fragmentation

41. When private companies or public bodies outsource work that was previously undertaken in-house, or conduct re-tendering exercises, it is relatively common for that work to be 'parcelled up' and tendered as several discrete contracts. This division of services on an outsourcing or retendering, which has become known as "fragmentation" or "service fragmentation", may cause the transfer of services to new contractors to fall outside the scope of Regulation 3(1)(b) altogether (*Kimberley* at 1040-1 (paragraph 35)).

42. The fact that services have become fragmented undermines the very existence of a service provision change, as in the event of fragmentation "nothing which one can properly determine as being a service provision change has taken place" (*Kimberley* at 1040-1 (paragraph 35)). An Employment Tribunal is entitled to find that the existence of fragmentation has caused the transfer of services to new contractors to

fall outside the scope of Regulation 3(1)(b) altogether (*Kimberley* at 1040-1 (paragraph 35)).

43. The question for the Employment Tribunal when considering this issue is whether the service has become so fragmented that nothing which one can properly determine as being a service provision change has taken place (*Kimberley* at 1040-1 (paragraph 35)).

44. It is unclear how many other contractors must be involved for fragmentation to occur. In *Enterprise* (see above), after the 1st April 2009, the date of the putative transfer (when Enterprise ceased to provide the ICT support for administrative and curriculum systems to schools in Leeds), five different suppliers (including Connect Up) provided ICT support to schools in Leeds. However only Connect-Up provided this ICT support pursuant to a Framework Agreement with Leeds County Council.

45. The Employment Appeal Tribunal held that the Employment Tribunal was entitled to find that there had been fragmentation, even though only Connect Up was a party to the Framework Agreement (paragraph 15). Further, the Employment Appeal Tribunal held that the Employment Tribunal was entitled to find that the spread of the work between five different providers meant that "the provision of services formerly provided by Enterprise were so spread amongst other providers as well as Connect that no service provision change had taken place on that basis" (paragraph 15).

3. The Regulation 3(3) Conditions

46. Thirdly the Employment Tribunal should consider whether the conditions in Regulation 3(3) have been satisfied (*OCS Group UK Ltd v Jones & Others* UKEAT/0038/09/CEA (paragraph 11)). An Employment Tribunal would err if it

considered whether the conditions contained in Regulation 3(3) have been fulfilled before it had considered whether the activities have changed as between one contractor and another, and before it had determined whether there was indeed a service provision change (*OCS* paragraph 11).

47. The Regulation 3(3) conditions are as follows:

> (3) The conditions referred to in paragraph (1)(b) are that—
>
> (a) immediately before the service provision change—
>
> (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
>
> (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
>
> (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

Organised Grouping of Employees

48. Regulation 3(3)(a)(i) requires that "immediately before the service provision change 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'.

49. Just as in the case of a business transfer (where there is no economic entity capable of transferring if there is no organised grouping of *resources*), there will be no

service provision change where there is no organised grouping of *employees.*[6] An organised grouping of employees can be a single employee.

50. The BERR guidance which accompanied the 2006 Regulations made it clear that the intention behind the term "principal purpose" in the 2006 Regulations is that the old service provider should have in place a team of employees to carry out the service activities, which is "essentially dedicated" to the activities being transferred (though they do not need to work exclusively on those activities). An example is given of a contractor engaged to provide courier services where collections and deliveries are carried out each day by various different couriers on an *ad hoc* basis rather than by an identifiable team of employees. In such circumstances, the guidance states that there would be no service provision change.

51. When considering whether the conditions in Regulation 3(3)(a) have been satisfied, it is not necessary for the Employment Tribunal to undertake a quantitative comparison of the service after the transfer as against the service before *(Kimberley* at 1039 (paragraph 30)*)*. The Employment Tribunal simply need to decide whether the purpose of the organised grouping of employees is an "ancillary" purpose or a "principal" purpose (*Kimberley* at 1039 (paragraph 29-30)).

52. In *Hunt v Storm Communications Limited* (Unreported, 27 March 2007, Case No. 2702546/2006), Ms Hunt was employed by Storm as an Account Manager who provided PR services. In the course of the year leading up to the putative transfer, the Tribunal accepted Mrs Hunt's evidence that she had spent approximately 70% of her contracted hours working on one client's account, BBW. Two other individuals – a junior account executive, and a freelancer who had formerly been Storm's BBW

[6] See IDS Handbook; Transfer of Undertakings, 1.93.

account director – also worked on the account during this period, but to a much lesser degree.

53. On the facts, the Tribunal decided that there had been a service provision change when the client terminated its contract with Storm and awarded a new contract to a different PR Agency. The Tribunal was satisfied that Mrs Hunt constituted an "organised grouping of employees" whose principal purpose was to provide services to that client. This was so, notwithstanding that the freelancer who had worked on that account was not employed by Storm, so she could not be part of a "grouping of employees"; and although the junior account executive who worked on the BBW account was an employee, his contribution was deemed to be "ad hoc", "peripheral" and not sufficiently "specialist" to be considered "dedicated" to the BBW account.

54. In light of the recent decision of the Employment Appeal Tribunal in ***Eddie Stobart v Mr J Moreman & Others*** UKEAT/0223/11/ZT, it is unclear whether ***Hunt*** would be decided in the same way today.

55. Eddie Stobart's ("ES") operation at the Manton Wood plant was concerned with the warehousing of meat in bulk, and its delivery to sites where it would be processed. At the relevant time, ES undertook activities for two major clients. One client, F, required all or most of the products to be "picked" principally by the employees working on the night shift. The other client, V, required products to be picked by the employees working on the day shift. Accordingly the nightshift employees worked principally on tasks required by the F contract, and the dayshift employees worked principally on tasks required by the V contract.

56. The V contract was then taken over by FJG, another logistics business, and the question arose as to whether there had been a service provision change of the

dayshift employees to FJG. The employees argued that they were an organised grouping of employees whose principal purpose was to carry out the work required by the V contract.

57. The Employment Tribunal held that the fact that certain employees had found themselves spending the majority or the whole of their working time working for one client as a result of the time of day that V's customers chose to place their orders was not sufficient basis to say that those employees constituted an organised grouping. The Employment Tribunal particularly relied on the fact that the employees in question had not identified themselves as part of V's team, they were "simply a group of staff working for all the contracts, albeit that the vast bulk of some of the contracts fell to be done at the time that they were engaged to work" (paragraph 13).

58. In the Employment Appeal Tribunal the Claimants argued that it was not necessary for them to be organised as, in effect, members of a V team. Further, they argued that in the logistics industry it would be rare to have teams organised in the way the Employment Tribunal had suggested.

59. However, the Employment Appeal Tribunal (Underhill P) upheld the Employment Tribunal's decision, saying:

> "… regulation 3(3)(a)(i) does not say merely that the employees should in their day-to-day work in fact (principally) carry out the activities in question: it says that carrying out those activities should be the (principal) purpose of an "organised grouping" to which they belong. In my view that necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. The statutory

> language does not naturally apply to a situation where, as here, a combination of circumstances – essentially, shift patterns and working practices on the ground – mean that a group (which, NB, is not synonymous with a "grouping", let alone an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. The paradigm of an "organised grouping" is indeed the case where employers are organised as "the [Client A] team", though no doubt the definition could in principle be satisfied in cases where the identification is less explicit".

60. In other words, organised groupings of employees must be the product of design rather than accident. Underhill P continued that for policy reasons, the language of the 2006 Regulations should not be stretched beyond its natural meaning and emphasised the importance of certainty, so that both employers and employees can know whether a TUPE transfer has occurred or not. He held that:

> "If the putative "grouping" does not reflect any existing organisational unit there are liable to be real practical difficulties in identifying which employees belong to it. It is important that on a transfer employees should, so far as possible, know where they stand" (paragraph 20).

Single Specific Event

61. Given the proximity of this seminar to the Olympics, it is worth highlighting that Regulation 3(3)(a)(ii) provides that there is no service provision change in circumstances where the client intends that the activities will be carried out in connection with a single specific event or task of short-term duration. This is highly

likely to apply, for example, to contracts relating to the provision of security services to the Olympics.

Sale of Goods

62. The application of regulation 3(3)(b) to individual cases is essentially one of fact. In *Pannu and others v Geo W King Ltd* [2012] IRLR 193 the Employment Appeal Tribunal had to consider whether the exception in Regulation 3(3)(b) relating to activities which consist wholly or mainly of the supply of goods for the client's use applied to the circumstances of the case.

63. Geo W King ("GWK") manufactured axles for IBC Vehicles Ltd, who manufactured commercial vehicles. The Claimants worked on the axle assembly line at GWK's factory premises. GWK fell into financial difficulties, and IBC itself funded the supply of parts to GWK from its suppliers directly. Ultimately GWK went into liquidation, and IBC entered into a new contract with Premier for the supply of parts formerly manufactured by GWK. The Employment Appeal Tribunal held that GWK was the contractor, IBC was the client, and Premier was the subsequent contractor (paragraph 8).

64. The first question for the Employment Appeal Tribunal was whether they should consider the activities undertaken by the Claimants (the employees) or the contractor (GWK). Some of the Claimants argued that the assembly process on the axle assembly line was a service ie the service of assembling the axles, and not the supply of goods. Other Claimants argued that the activities carried out by the contractor were the activities of the organised group of employees working on the axle assembly line.

65. The Respondent contested that whilst the employees in question provider their services to the contractor, the contractor supplied goods, namely the assembled axles, struts and corners to its client, IBC. The Employment Appeal Tribunal accepted the Respondent's argument, and held that whilst

> "identifying an organised grouping of employees carrying out the activities concerned on behalf of the client is a prerequisite of an SPC under reg.3(1)(b) by virtue of 3(3)(a)…. The fact that that organised group provide a service (directly to their contractor employer) cannot answer of itself the separate reg.3(3)(b) question" (paragraph 21).

66. The Employment Appeal Tribunal approved the following example contained in the BIS Guidance:

> "The example is that of a contractor engaged to supply sandwiches and drinks to a client's canteen for sale by the client's own staff. That would not given rise to an SPC when the contract is awarded elsewhere, even where the first contractor has a dedicated team assigned to making the sandwiches for that particular contract. It may be otherwise where the contractor provides not only the sandwiches and drink (the goods) but also the canteen staff to dispense it at the client's premises".

67. The Employment Appeal Tribunal held that the activity undertaken by the contractor was the supply of finished goods (the assembled axles etc) to IBC (paragraph 22). The Employment Appeal Tribunal held that the fact that IBC funded the supply of parts was not relevant, because the relevant activities remained the same, albeit that the raw materials used in producing the finished goods were paid for (paragraph 23).

4. Regulation 4/Assignment

68. Finally, under Regulation 4(1) of the 2006 Regulations the Employment Tribunal must consider whether the employee was "assigned" or not. Assignment refers to the link between an individual employee and the work or activities which are performed (*Kimberley* at 1045 (paragraph 47)). This is a separate question from whether there existed an organised grouping satisfying the requirements of regulation 3(3)(a)(i), but the two issues do overlap to a very considerable extent, since for the purpose of considering who is assigned to a putative "organised grouping" it is necessary to identify what that grouping consists of (*Eddie Stobart* , at paragraph 16).

69. Assigned is defined in Regulation 2(1) as "assigned other than on a temporary basis". The material part of Regulation 4 is as follows:

> **4 Effect of relevant transfer on contracts of employment**
>
> (1) 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.

70. The question for the Employment Tribunal is whether an employee's contract transferred with either i) any particular part of the undertaking (in ordinary transfers of undertakings) or ii) service provision. The same test applies to both ordinary transfers of undertakings and service provision changes, save that in the case of service provision changes the question is whether the employee was assigned to the

organised grouping of *employees*, rather than resources (*Kimberley* at 1045 (paragraph 47-8)).

71. There is no exhaustive list of facts which will conclusively determine to which aspect of the activities involved in service provision the employee is assigned (*Kimberley* at 1045). The Employment Tribunal should focus on the link between the employee and the work or activities which are performed (*Kimberley* at 1045).

72. The Employment Tribunal must approach the question of assignment under Regulation 4 in service provision change cases in an identical manner to that in respect of ordinary transfers of undertaking under regulation 3(1)(a) (*Kimberley* at 1045 (paragraph 47)). When determining assignment, the Employment Tribunal should apply the principles which derive from *Botzen v Totterdamsche Droogdok Maatschappij BV* (Case 186/83) [1985] ECR 519 (see *Duncan Webb Offset (Maidstone) Ltd v Cooper* [1995] IRLR 633 and *Kimberley* at 1045).

CONCLUSION

73. The recent case-law reveals that the Employment Appeal Tribunal is anxious to adopt a "straightforward and common sense" approach to the meaning of service provision change in order to avoid any uncertainty about the meaning of the new statutory concept, and in order to reduce uncertainty for both employees and employers at the time of any potential TUPE transfer.[7]

74. This move towards certainty accompanies a recognition by the Employment Appeal Tribunal that a finding that TUPE does apply, is not necessarily in the interests of either employees or employers and therefore the natural meaning of the 2006

[7] See for example *Hunter* at paragraph 25.

Regulations should not be stretched just in order to achieve a transfer in as many situations as possible (*Eddie Stobart* at paragraph 19).

75. It is unclear whether judicial concern about certainty has been prompted by the recent voicing of concerns about the scope of the TUPE Regulations (as explained above). However it is clear that going forward, in light of these decisions, it will be more difficult to establish that a service provision change has occurred.

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