Case Number 1401044/2018
1401185/2018
1600492/2018
1600534/2018
1600692/2018
1600693/2018
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1601040/2018
1601041/2018

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **CLAIMANTS** | | **RESPONDENT** |
|---|---|---|
| **(1) MR S MATTRAVERS** | **V** | **(1) IAN WILLIAMS LTD** |
| **(2) MR N HANCOCK** | | **(2) R &M WILLIAMS LTD** |
| **(3) MR S PARTRIDGE** | | |
| **(4) MR S BROOKER** | | |
| **(5) MR D HOPKINS** | | |
| **(6) MR G THOMAS** | | |
| **(7) MR M NUNNERLY** | | |
| **(8) MR M WILLIAMS** | | |
| **(9) MR M DAVIES** | | |
| **(10) MR L FORD** | | |

**HELD AT:** **PORT TALBOT** **ON:** **HEARING**: 30, 31 OCTOBER, 1 NOVEMBER 2018

**BEFORE EMPLOYMENT JUDGE: N W BEARD (SITTING ALONE)**

**Representation:**

**For the claimants:**
**Mr Davies & Mr Ford:** Mr S Perhar (Counsel)
**Messrs. Hopkins, Thomas & Brooker** (In Person)
Other claimants were not required to attend

**For the First Respondent:** Mr R Shepherd (Counsel)

**For the Second Respondent:** Mr C Howells (Counsel)

# PRELIMINARY JUDGMENT

The judgment of the Tribunal is that on the 1 January 2018 there was a relevant Service Provision Change as set out in in regulation 3(1)(b)(ii) Transfer of Undertakings (Protection of Employment) Regulations 2006

# REASONS

## PRELIMINARIES

1. This preliminary hearing was ordered by Employment Judge Howden on 3 August 2018. The order indicates the preliminary hearing should consider: "whether there was a TUPE transfer on 1st January 2018 (*i.e. was there a relevant transfer as set out in regulation 3(1)(b)ii* (sic)*Transfer of Undertakings (Protection of Employment) Regulations 2006?*" I considered what I was required to decide to answer that question: The following arose out of submissions and the authorities to which I was referred: taking account of the relevant circumstances immediately before the alleged transfer (1) What is the meaning of "immediately before" in the statutory material? (2) What, if any, were the activities by R1 carried out on behalf of a client prior to January 2018 which were to be carried out by R2 after that date? (3) Was there a fragmenting of the original activities so that, although the type of activities remained the same, for the purposes of the statute these were different activities? (4) Was there an organised grouping of employees and if so was the principal purpose of that grouping to carry out the activities identified in question one? (5) Does "purpose" within the regulations refer to the motivation of R1 to create a transfer situation or its intention in relation to the provision of service pursuant to contract? (6) Did R1, in a factual sense, use that grouping with the principal purpose of carrying out those activities? (7) Was assignment to that group temporary? I am not within the remit of this hearing required to consider whether any claimant was assigned to any grouping.

2. I have been referred to documentary and witness evidence. I have been provided with a bundle of documents running to 530 pages and, in addition to that, I have read witness statements from the following: Claire Elston and Mike Turner of the First Respondent; Darryn Parry and David Challenger from the Second respondent; the claimants David Hopkins, Paul Biston, Larry Ford and Michael Davies.

3. In discussion on the first day of hearing the assembled members of the Bar agreed and submitted to me that there was little factual dispute relevant to the issues which I would have to decide. On that basis it was suggested that I should read the bundle, witness statements, skeleton arguments and authorities provided to me and to hear submissions on 31 October 2018. I asked the claimants who were present if they agreed with this approach; they did. The unanimous view was that I should adopt this approach and I have done so. As such I have found facts from the written statements and documents within the bundle and heard submissions from both respondents.

4. I wish to take this opportunity to extend my gratitude to Mr Howells and Mr Shepherd for their detailed, comprehensive and most helpful submissions without which my task in reaching conclusions in this judgment would have been made much more difficult.

## THE FACTS

5. Both respondents are in the business of property maintenance and, amongst other business, contract with local authorities to provide such services. The claimants were all employees of the first respondent until 31 December 2017. Mr Hopkins and Mr Biston have taken up employment with the second respondent on 1 January 2018 by accepting new terms and conditions, the other claimants have not.

6. The first respondent entered into a framework contract with Cardiff City Council which commenced in 2013 to run for a four-year term. The contract was to provide property maintenance services for the domestic housing stock belonging to the Council. The maintenance provided fell into three categories: response maintenance (dealing with faults as they arose), voids (where empty properties are prepared for letting) and planned works (where major repairs or upgrading is undertaken).

7. In early 2017 Cardiff City Council began the process of preparing for the end of the contract with the first respondent. During the process Cardiff City

Council began seeking tenders, not for maintenance of the entire housing stock as before, but for maintenance of the properties in three geographical areas. As part of this Cardiff City Council had decided that a separate contractor would be engaged in each of the three areas i.e. it would not be possible for the same company to win the bid in more than one area. That said the work to be carried out would fall into the same three categories as before but confined to one of the three particular geographic areas.

8. To fulfil the requirements of the original contract the first respondent employed some 75 employees (16 of whom were management staff). In the main the employees were tradesmen who would carry out repairs, maintenance or other works on Cardiff City Council's properties. It should be made clear that the first respondent has a nationwide business employing some 850 people in total.

9. The first respondent was made aware, formally, on 25 August 2017 that it had not been awarded any of the contracts. There is a statutory "standstill" period of ten days before contracts are concluded to allow for objections; therefore, it was 4 September 2017 when the new contractors were confirmed.

10. The first respondent was contacted by the Council on 3 October 2017 and asked to provide contact details to the successful bidders so that information could be provided in relation to any potential TUPE implications. It is clear that a dispute arose between the first and second respondent as to whether there was a TUPE situation. The second respondent took the view that the first respondent was manipulating the circumstances in order to manufacture circumstances where the TUPE regulations would apply. Additionally, this dispute was initially mirrored in discussions with the other two companies appointed to lots 2 and 3, however that was eventually resolved with both companies accepting that the regulations applied to some employees.

11. It is common ground that prior to losing the contract the first respondent had organised its workforce across the entirety of Cardiff and the organisation of the workforce was into three business units. Those units were to deal with the three types of works, response, voids and planned, described above. The first respondent organised its employees so that they were attached to one of the business units e.g. a decorator would only work on voids but would work across all of Cardiff.

12. Soon after the first respondent became aware that it was to lose the contract it decided to re-organise its employees. This followed an investigation into

where individuals had been working which revealed that no individuals consistently carried out work in any one of the new geographical areas. The re-organisation was to split employees into groups that would work in the three geographical areas employees covering all three types of work but within the restricted geographical area. The type of work in those geographical areas was of the same type as had previously been provided tradesmen repairing, maintaining or conducting other works. The re-organisation also involved seeking to re-deploy employees to roles with the first respondent. In order to do this the first respondent carried out a scoring exercise. The first respondent is candid; this re-organisation was undertaken in order to facilitate those employees that were not redeployed being transferred pursuant to the TUPE regulations, which would have the additional effect of avoiding redundancies.

13. There was a transition period between November and beginning of December to achieve this re-organisation. It is common ground that the workforce for lot 1 (the contract won by the second respondent) was carrying out work in this geographical area from approximately 5 weeks prior to the end of the first respondent's contract with the council. However, it is also the case that the employees in question were not fully occupied. I was taken to pages 280 and 297A of the bundle where it is demonstrated that on 7 November 2017 the Claimants were allocated to work in the geographical area covering Lot 1 and on 10 November 2017 it was clear that there was little planned work within that area.

**THE LAW**

14. The Transfer of Undertakings (Protection of Employment) Regulations 2006, so far as is relevant provide:

    14.1. At Regulation 2:

    *In these Regulations "assigned" means assigned other than on a temporary basis;*

    14.2. At Regulation 3:

    *These Regulations apply to—*

    *(1)(b) 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; or*

*(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.*

*(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;*

14.3. At Regulation 4:

*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.*

15. Mr Howells has asked me to construe the statute and so I set out my understanding of the approach to be taken to construing a statutory provision. When passing statutes or secondary legislation, the legislature intends to use ordinary English words in their ordinary senses unless the contrary is shown. In terms of regulations created by statutory instrument it is also the case that the words used are interpreted so as to support the intention of the governing statute. (In the case of these Regulations the governing statues and sections are section 2(2) of the European Communities Act 1972 and section 38 of the Employment Relations Act 1999. The 1972 gives authority to a designated Minister to introduce regulations to provide for rights and obligations arising out of community law. The 1999 Act extends the powers of the Minister so as to permit him to make regulations which exceed the rights and obligations arising out of community law.) In addition to this literal interpretation the rules of construction indicate that where there is ambiguity or doubt arising from the wording of the statute then there are a number of aids to construction which the courts have applied. Under the so called golden rule where the literal rule gives an absurd result, which Parliament could not have intended, the judge can substitute a reasonable meaning in the light of the statute as a whole. The mischief rule for interpreting statutes requires a judge to consider three factors: firstly, what the law was before the statute was passed; secondly, what the statute was trying to remedy; and, finally, what remedy Parliament was trying to provide. There is also the purposive approach which requires the Judge to consider the purpose of the statute and whether the intention is met by the interpretation placed upon those words. In **R v S of S for Health ex parte Quintavalle (on behalf of Pro-Life Alliance) [2003] 2 WLR 692** Lord Steyn gave an indication as to the circumstances in which such an approach can be taken setting out *"nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, e.g. social welfare legislation and tax statutes may have to be approached somewhat differently."* In addition to these approaches there are a number of "canons of construction" to further aid analysis: amongst these and, for the purposes of this judgment, relevant is that it is presumed that no statutory provision is redundant.

## SUBMISSIONS

16. Mr Perhar indicated that he did not wish to make submissions.

17. Mr Shepherd on behalf of the first respondent in his written submissions argued that the statutory language of the regulations was straightforward and that I should apply them literally without gloss.

18. Mr Shepherd took me to the case of **Argyll Coastal Services v Sterling and Others UKEATS/0012/11** indicating that it drew together various aspects of previous case law. In this case Lady Smith provides observations on the interpretation of the word "*activities*" in the Regulations albeit that she makes it clear that these observations are *obiter*. In paragraph 50 she set out that activities should be examined starting at "*what service did the client contract for*" she goes on to indicate that whilst ancillary matters might arise which facilitate the activity they are not the activity itself. Mr Shepherd pointed out she also refers to other aspects of the statutory formulation and says in respect of all of these matters it should be considered a "touchstone". He points out that Lady Smith refers to an "*organised grouping*" of employees as being number of employees which is less than the transferor's whole workforce but is organised deliberately for the purpose of carrying out the activities required by the client. He also points out dealing with "*principal purpose*" that Lady Smith considered that the words should bear their ordinary meaning not requiring a sole purpose of carrying out the client's activities. He supplemented his argument referring to the judgement of Underhill J (as he then was) in **Eddie Stobart Ltd v Moreman and others UKEAT/0223/11** where he indicated that the statutory language required that employees were organised "*in some sense by reference to the requirements of the client in question*".

19. Referring to **Amaryllis limited v McLeod UKEAT/0273/15** Mr Shepherd contended that the words "immediately before the transfer" and just that and that the historic development not of particular relevance, instead the conditions that existed at the point just before the transfer were those to be examined. He also made reference to the case of **Bangura v Southern Cross Healthcare Group Plc and Another UKEAT/0432/12** where an employee dismissed prior to a transfer but who had raised an appeal was not an employee for the purposes of transfer despite this only happening some short weeks before the transfer itself. Further by reference to **Tees Esk & Wear Valleys NHS Foundation Trust v Harland and Others UKEAT/0173/16** Her Honour Judge Eady holding that although a team put together by an employer for a specific purpose had retained its identity its

purpose had changed through time that the principal purpose was no longer the initial one.

20. Mr Shepherd argued that organised grouping of employees, based on the authorities presented, meant a team deliberately organised for the purpose of carrying out the activities required by a particular client under a contract. He then argued that the principal purpose need not be the sole purpose but must be the primary purpose of that grouping. He argues that the purpose at an earlier stage in the history of the contract is not necessarily of importance but that it is incumbent on the tribunal to assess the factual circumstances immediately before the change. He argues that there is no requirement that the grouping in question must, actually, be carrying out relevant activities immediately before the change.

21. In oral submissions Mr Shepherd attempted to deal with the written submissions provided by Mr Howells. Mr Shepherd argued that **Enterprise management services Ltd v Connect-Up Ltd and others UKEAT/0462/10** relied upon by Mr Howells, could not bear the interpretation Mr Howells sought to place upon it. Mr Shepherd submitted that the facts there dealt with a highly fragmented set of circumstances much different from the circumstances which I am required to consider.

22. I raised with Mr Shepherd the possibility of an employer having a nefarious motivation for organising a workforce in a particular way prior to a transfer and whether, if the literal interpretation was as he put it, this meant that the employer should achieve its nefarious aims. Mr Shepherd submitted that even in such circumstances motivation should be ignored, the statutory language must be relied upon because to do otherwise was to engage in making value judgements. Such value judgments, he submitted, were inappropriate when what was to be engaged in was an enquiry as to whether particular factual circumstances led to the transfer of a contract by operation of law. Mr Shepherd argued that the motivations 1st respondent were irrelevant to the questions of principal purpose and activities.

23. In terms of activities Mr Shepherd said that the work was fundamentally the same before and after the contract changed. Tradesmen repaired and maintained properties for the local authority. Dealing with the argument that the assignment was temporary, because it was only engaged in a few weeks prior to the change, Mr Shepherd argued that all contracts and work are temporary in some sense. The organised grouping here was not

temporary because although the contract between Cardiff City Council and the first respondent was coming to an end it did not mean that the activity was coming to an end. If the activity was not coming to an end then the contracts of employees assigned to an organised grouping would continue by operation of the regulations, that could not be said to be temporary.

24. Mr Howells began his written submissions by arguing that the activities were not the same before and after midnight on the 31 December 2017. The thrust of his argument was as follows: geographically the area changed and therefore although the type of activities the same activity as required by the statutory language had changed. He relied on **Enterprise** (above) in order to reinforce this argument. The type of contract in **Enterprise** was to be a preferred supplier to schools in the Leeds area; it was a matter for the schools whether or not they used the preferred provider contracted to the Council. In **Enterprise** there is also reference to a change in the type of service to be provided which would reduce the work by 15%. Mr Howells submitted that in this case the original contract for the entirety of Cardiff had been broken down into thirds where there was a requirement that 3 separate providers operated the 3 contracts. He drew parallels with paragraph 7 of the Judgement in **Enterprise** where there was a breakdown in the contract ending up with five providers. One of those provider, Connect, had 41% of the previous work at the point of transfer. His Honour judge Clarke dealt with the question of whether the activities carried on by Connect were "*significantly different*" (using the language of the Judge at first instance from those carried on by Enterprise). His Honour judge Clarke said this in paragraph 15 in holding that the employment judge was entitled to conclude as he did because of, first a 15% reduction where IT support for curriculum systems was removed from the contract and second "*provision of services formerly provided by Enterprise was so spread amongst other providers as well as Connect that no SPC had taken place on that basis*". HHJ Clarke therefore held that fragmentation was sufficient for there to be no service provision change within the meaning of the regulations. I should not that HHJ Clarke went on in his judgment to use the phrase "*essentially or fundamentally the same*" in support of his conclusions. Mr Howells argued based on those findings that, therefore, the activities in this case were different because of fragmentation at a greater level and could not be considered to be fundamentally the same as previously contracted for by Cardiff City Council. Mr Howells also submitted that Regulation 3 (2A) was introduced to codify this decision.

25. Mr Howells argued that the claimants were not an organised grouping of employees because the contract between the first respondent and Cardiff City Council covered the original larger geographical area. Because of that the organised grouping for the purpose of the activities carried out (the whole of the contract) was all 75 employees servicing that contract. In those circumstances there could be no self-contained grouping in a smaller area such as the new lot 1. Mr Howells' argument is that this smaller group was not there to service the activities but to avoid redundancies.

26. His final argument relates to the definition of assignment in regulation 2. He argues that as work was drying up in the smaller area it cannot actually be argued there was anything other than a temporary assignment to this area in the re-organisation by the first respondent, the principal argument addressed the fact that there was only a short period before the date of change of contract.

27. During his oral submissions Mr Howells was robust in maintaining that statutory language needed to be applied without gloss and that I should be applying domestic principles of statutory interpretation. His position (and indeed that was echoed by Mr Shepherd) was that European cases could not be used to aid interpretation. He argued that the literal interpretation of the statute meant that activities and organised grouping bore the interpretations he had placed upon them.

28. He made the point that in circumstances such as this case bids were placed with local authorities based on a particular set of circumstances and that an artificial interference with those circumstances has the potential to undermine the basis upon which a bid is made; this is the context of these provisions. Mr Howells endorsed the point I made during Mr Shepherd's submissions that the Regulations were not only to inform who would be protected in any relevant transfer but also to delineate who would not be the beneficiary of such protection.

29. In dealing with the definition of activities Mr Howells enlarged his argument by stating that it is not only the geographical nature of the change that was important in this case but also this size and volume of the activities which would be required of each contractor under the terms of the new contracts in comparison to the pre-existing contract. On this basis he submitted that it clear that the activities in the lot 1 area were not "fundamentally the same" as those carried out by the first respondent across the entirety of Cardiff.

30. In dealing with the question of an organised grouping of employees Mr Howells submitted that the internal grouping of employees as part of the first respondent's arrangement of work was of little relevance. In the circumstances of this case the activities were across the entirety of Cardiff, the fact that the first respondent sent employees to work in a particular area was not connected the activities but to internal convenience (to avoid redundancies and cherry pick the best employees to retain). Therefore, the organised grouping must be the entirety of the workforce which was applied to the activities required of the first respondent by Cardiff City Council and that was the servicing of the large geographical area.

31. When dealing with the issue of principal purpose Mr Howells said that the principal purpose of organising within the smaller geographical area was not to service the activities required by the contract but was, instead, a “device” to seek to ensure that those individuals were transferred to the second respondent. He argued that there is a difference between activities and purpose: the purpose of placing these employees into lot 1 was not to carry out the activities (there was little in the way of activities to carry out) but was, objectively examined, to further the device.

32. His argument in respect of the nature of the assignment was one I found difficult to understand. But, as far as I could tell it is that because the change in contract was to take place a short time later then this must be a temporary state of affairs. This is because to allow such a change would be to permit cherry picking of employees. He went on to argue that because the first respondent knew there was a risk that these employees would not transfer, their assignment could not be anything other than temporary in nature.

33. Within the authorities I was directed to reference was made to the case of **Rynda (UK) Ltd v Rhinjsburger[2015] IRLR 394 CA** this case identified four stages which the tribunal should follow in the process of deciding whether there had been a service provision change which were first to identify the service which had been provided to the client by the existing contractor, secondly to list activities provided to provide that service, third is the identification of the employees who ordinarily carried out those activities and finally give consideration as to whether the original contractor had organised those employees into a grouping for the principal purpose of carrying out the listed activities.

## ANALYSIS & CONCLUSIONS

34. The parties agree that there is no guidance directly on point in previously decided cases. It seems clear to me that as Regulation 3(2A) was not in force until 31 January 2014 and therefore that decisions made about transfers happening before that date have to be considered in that light. However, it appears to me that I can draw the following guidance from the authorities I have been directed to by Counsel:

34.1. The phrase immediately before the service provision change in Regulation 3(3)(a) does not require an examination of the circumstances that existed to create an organised grouping but does require consideration of the factual circumstances immediately before, the literal language is to be applied: see **Amaryllis.**

34.2. Immediately before is necessarily a short time before: see **Bangura.**

34.3. The word "activities" used throughout Regulation 3 must be considered, initially, by examination of the service contracted for (**Argyll**) but is then understood by listing those activities which are performed in order to provide that contracted service: see **Rynda**.

34.4. Fragmentation of a previously unified service so that it becomes "*significantly different"* can mean that there has been no service provision change: see **Enterprise.** However, I need at this point to deal with Mr Howell's submission that this phrase is now codified with the words "*fundamentally the same*" in regulation 3(2A). I cannot accept that submission. The phrase if the two phrases are to be considered as reaching the same point from opposite ends (which is the substance of Mr Howells' submission) then there would be no purpose in enacting the second phrase; it would be redundant. It is a well known cannon of construction that if a statute can be read so that one element is active and another redundant and can alternatively be read so that they both have meaning, it is the latter approach that should be adopted. In my judgement "*fundamentally the same*" must have added or changed something in 2014 for that reason: I deal with that meaning below.

34.5. To create an organised grouping of employees requires a conscious decision by the employer to arrange the employees to work together mere happenstance is insufficient: see **Eddie Stobart.**

34.6. Principal purpose does not mean the only purpose: see **Argyll.**

34.7. The principal purpose must be to engage in the activities necessary to provide the service: see **Argyll, Tees & Rynda**

35. Dealing with the phrase "*fundamentally the same*" in Regulation 3(2A): the word "fundamentally" means being an essential part of a foundation or basis. The word "same" means identical or closely similar. The phrase, using those definitions, in its ordinary English usage would mean, as Mr Howell's submitted, something achieving the same result as "*significantly different*" particularly as HHJ Clarke used the phrase interchangeably. In more prosaic terms something which is significantly different cannot be fundamentally the same. It seems to me, therefore, the phrase used in **Enterprise** refers to a difference which is of significance to the activities then 3(2A) must refer to something other than the activities to avoid being redundant. However, as it is a definitional description of activities I could not reach such a conclusion without significant violence to the language of the Regulation. On that basis I conclude that the addition of the Regulation must be to in some way alter the law from that as described by HHJ Clarke. provided as opposed specifically to activities. It seems to me, taking account of the decision in **Rynda,** that a distinction is drawn between the service provided and the activities to support the service. It would make sense in those circumstances that the phrase "fundamentally the same" would relate to those activities and consideration of fragmentation was confined to the service requiring the service to be fragmented to the extent that the activities did not remain "fundamentally the same", that is the interpretation I shall apply.

36. I take immediately before 1 January 2018 to be the period in the last few weeks before that date. It appears to me that there is no basis to consider any earlier period given the statutory language. The facts on the ground immediately before the transfer were that R1 had deliberately assigned particular employees to work in the geographical are to be covered by Lot1 the contractual area for R2. There was a lead in period in the latter part of 2017 where the new contractors were taking over work from R1. The taking over of that work did not alter the contractual obligations of service between R1 and Cardiff City Council. The service required under the contract was repair and maintenance of the Council's properties in three circumstances: response, voids and planned. The activities required to provide those services was that tradesmen would attend properties to carry out maintenance, repairs

and/or to refurbish/update those properties. The employees assigned to the geographical area of lot 1 carried out those activities in that area insofar as work was available. The respondent was contractually obliged to carry out those works as required by Cardiff City Council in that area.

37. The service supplied by R2 after from 1 January 2018 was to provide, in the geographical area of Lot1 repair and maintenance of the Council's properties in the same three circumstances: response, voids and planned. The activities required to provide those services was the same that tradesmen would attend properties to carry out maintenance, repairs and/or to refurbish/update those properties.

38. In my judgment there was a fragmenting of the original service required by the respondent. The type of activities remains the same. The activities are what is to be considered for the purposes of the statute. These were not different activities, in my judgment the fragmentation of the service did not lead to the fragmentation of the activities. Albeit late in the day the organisation of the activities prior to 1 January 2018 was such that their character remained fundamentally the same from that date.

39. There was there an organised grouping of employees. R1 had made the decision to assign particular employees to carry out work in the geographical area of Lot 1. Mr Howells' submission was that although an organised grouping this was not in order to carry out the activities as the activities related to the greater geographical area. For the reasons I have given about activities above I reject that submission.

40. The principal purpose of that grouping was to carry out the activities I have identified. In my judgment "purpose" within the regulations cannot refer to the motivation of R1. The purpose is certainly that of the employer, in this case R1 however, that purpose is connected in the statutory language to activities. If the purpose has no connection with the activities, then an SPC is not made out. Mr Howells' submissions are that the intention of R1 in this case was to avoid redundancies and that means that the principal purpose was not related to the activities. During submissions I raised the distinction between motivation and purpose in this sense, if R1's motivation for the change was not redundancies but instead to save on expenses for employees that would be its motivation but not its purpose within the Regulations. R1's purpose would be, in those circumstances, to facilitate the efficient provision of the activities. In my judgment Mr Shepherd is right, to consider motivation would

be to engage in value judgments, that would muddy the waters and involve tribunals and courts in inquiries that would add to uncertainty in these situations where the intention of the regulations is to provide some certainty. I must consider the objective circumstances the arrangements made by R was an internal organisation which would allow it to prepare for the end of the contract and would ensure that it continued to provide the service to the respondent. It was not organised with the sole purpose of servicing the contract but was organised with that principal purpose.

41. I now consider whether the assignment of these individuals was "temporary" so as to bring them outside the definition in regulation 2. Mr Howells argued that this provision prevents Cherry Picking. His submission was that this is to prevent the unscrupulous dumping of poor employees (he made no argument that there were any poor employees amongst the claimants) into a transfer pool and the retention of "good" employees. As to the retention of good employees I take the view that if Mr Howells were right this would prevent redeployment with an existing employer, I cannot consider this to be correct. It would be a strange state of affairs if the definition section of the Regulations prevented an employer and employee agreeing that instead of a transfer there would be a change of role. I have more sympathy with the "dumping" argument, if employees are deliberately moved for no other reason than the existing employer wishes to lose their services then it can be seen that this is undesirable. However, what is the difference between that and simply leaving behind in a transfer group those who are less valued by an employer. In my judgment temporary in the regulation is meant to describe circumstances of secondment or other similar temporary arrangements where the specific individual does not form part of the organised grouping and is to be decided at the time when it is considered whether a specific individual has been assigned to the organise grouping. No doubt that would be sufficient to deal with the "dumping" issue, at that stage when as a matter of fact, it could be decided if that individual had been placed in the grouping for the principal purpose of the activities or for some other purpose.

_____
Employment Judge Beard
Dated: 1 November 2018

Order sent to Parties on
6 November 2018

For the Tribunal Office