EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105563/16

Held in Glasgow on 24 & 25 May 2017

Employment Judge: F Jane Garvie

Mr James McGarry	**Claimant** **Represented by:** **Ms K Graydon - Solicitor**
McDermott Contract Services Limited	**Respondent** **Represented by:** **Mr D Hay - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

1. the claimant was not an employee of Alpine Ground Services Limited;

2. *esto* the Tribunal was wrong in its determination that the claimant was not an employee of Alpine Ground Services Limited and the claimant was an employee of Alpine Ground Services Limited then he was not part of the organised grouping of employees which transferred to the respondent on 1 July 2016 and

3. the claim is therefore dismissed.

REASONS

Background

E.T. Z4 (WR)

1. In his claim, (the ET1) presented on 11 November 2016 the claimant alleges that he was unfairly dismissed. He also seeks notice pay and asserts that he is making a complaint of wrongful dismissal at Section 8.1 of the ET1, (page 7 of the claimant`s bundle). He seeks compensation for unfair dismissal as well as damages for wrongful dismissal, a claim for loss of statutory rights and seeks reinstatement or, in the alternative, re-engagement.

2. In the Paper Apart to the ET1, (C14-17) the claimant alleges that there was a relevant TUPE transfer of the services provided to Queen`s Cross Housing Association, (referred to as QCHA) by Alpine Ground Services Limited, (referred to as AGSL and also referred to as the transferor) to the respondent. It is further asserted that the claimant was the Contracts Manager for delivery of that contract. QCHA was the client of the transferor for at least 15 years prior to 1 July 2016. The claimant asserts that he was part of an organised grouping which transferred from AGSL to the respondent on 1 July 2016.

3. The respondent presented a response, (the ET3) on 13 December 2016 which is set out at pages C19-28. The respondent resists the application for unfair dismissal and wrongful dismissal. The respondent also denies that the claimant`s employment was transferred to the respondent in terms of Regulation 3 of the TUPE Regulations 2006. They assert that the claimant was not an employee of AGSL and, in any event, they assert that he was not an identifiable member of the team undertaking the QCHA contract.

5. By letter dated 20 December 2016, (C29) the parties were informed that Employment Judge Lucy Wiseman had directed that the claimant`s representative should provide written comments on both the ET3 and the application for a Preliminary Hearing to determine whether the claimant was employed by the respondent. An extension was sought and granted on 6

January 2017, (C31). Comments were received on 6 January 2017, (C33 – 37).

6. By email of 29 March 2017, (page 39) Ms Graydon submitted that there were two issues for determination at the Preliminary Hearing as follows:-

   (1) Whether the claimant was assigned to that organised grouping of employees, (C39-40).

7. By email dated 6 April 2017, (C41) Mr McQuade for the respondent confirmed the two issues for consideration were:-

   (1) Whether the claimant was an employee of Alpine Ground Services Limited at the relevant time.

   (2) Whether the claimant was assigned to the organised grouping of employees which had as its principal purpose the carrying out of the activities which the respondent now carries out in respect of the Queen`s Cross Housing Association contract.

   There was then a request for documentation, (C43-44) and a reply at C45-48).

8. Further documents were also provided which are set out in the claimant`s bundle. The respondent also provided a bundle of documents. It is referred to by the initial "R" followed by the page number.

The Preliminary Hearing on 24 and 25 May 2017

9. The claimant gave evidence. Evidence was also given on his behalf by Mr Cyril (Cy) Ross who is an employee of the respondent as his employment transferred on 1 July 2016 to the respondent. Mr William Melvin who was formerly employed by AGSL also gave evidence on the claimant's behalf.

Mr Andrew Harvey one of the respondent`s Directors and a Mr David Clark formerly an employee of AGSL and whose employment transferred to the respondent both gave evidence for the respondent.

Findings of Fact

10. The Tribunal found the following essential facts to have been established or agreed.

11. In 1990 the claimant commenced work as a self employed gardener. His work involved ground maintenance such as cutting grass and hedges. Some years later a limited company called Alpine Garden Services was established. In March 2010 another company, Alpine Ground Services Limited was incorporated. As indicated above, this is referred to as AGSL. Initially, the claimant was the sole shareholder although son later became a 205 shareholder and the balance of 80% of the shares are held by the claimant. AGSL's Registration Number is SC374532, (R106).

12. In the claimant`s response to the respondent's request for further particulars, (C47-48) at question 10, (C48) it was confirmed that AGSL was incorporated on 10 March 2010 and that all (existing) contracts and staff transferred were to it. In answer to question 11 it states:-

> "It is technically speaking an "active" company as it is not insolvent; however, there has been no activity or trading since the QCHA service transferred to McDermott on 30 June 2016. There is no intention for the company to trade again; it will eventually be wound up."

13. AGSL held a contract with QCHA for ground maintenance of grounds either owned by QCHA or, alternatively, managed by it on a factoring basis. In relation to the claimant there is a document entitled, "ALPINE GROUND SERVICES LIMITED – SCHEDULE OF PARTICULATS OF THE MAIN

TERMS OF EMPLOYMENT", (C49). This gives the claimant`s details and indicates that these were the Particulars of the terms and conditions on which the claimant was being employed with effect from 1 April 2014. There is reference to the claimant's employment with AGSL having begun on 1 April 1990. It is unclear how this can be the case given AGSL was not incorporated until March 2010. It may be that it was intended to refer to the claimant having commenced work on his own account on 1 April 1990 and that he later transferred into the original company, (Alpine Garden Services). The document also refers at the top as follows: -

> "In this statement under the Employment Protection (Consolidation) Act 1978 as amended, James McGarry, trading as Alpine Ground Services Limited (AGS), having a place of business at 79 Braeside Street give you".

14. Below this certain terms are set out. The claimant is referred to as being the Chief Executive Officer with a rate of pay of £54,000 per annum and a requirement to work 30 hours per week. Next, there is entitlement to holidays, including public holidays and holiday pay, including accrued holiday pay on termination. It is stated that the holiday year commences on 1 April each year, the claimant is entitled to 8 weeks' annual leave and all public and bank holidays.

15. In relation to a period of illness the claimant is stated to be entitled to one year at full pay and a second year at half pay. He was further entitled to a pension from the company of £4,800 per annum. The document states:-

> "*You are required to report for duty each day at Bearsden, Glasgow and you will finish each day at the same location*".

The reference to Bearsden was to the claimant`s home address which was set out at the top of the Schedule.

16. His duties were stated to be:-

- "*Preparing cyclical ground maintenance schedules.*
- *Allocation of duties*
- *Overseeing completion of contract with QXHA*
- *Attending meetings with customers*
- *You are not required to do any manual labour*."

17. The notice period is stated to be 12 weeks. This document was signed by the claimant on 1 April 2014 and by his wife whose signature is followed by the word, "*Secretary*".

18. There are no disciplinary or grievance procedures set out nor is there any indication of whether the claimant had a line of reporting, for example, to the Secretary or a Board of Directors.

19. A payslip for the claimant for 20 May 2016, (C50) shows a basic pay of £211.54 with £1 of PAYE tax deducted and no national insurance. It states that the claimant`s total gross pay to that date was £1,457.71 with tax paid of £2.20 and earnings for national insurance of £1,453 and a net pay of £210.54.

20. P60s for the tax years to 5 April 2012, 2013, 2015 and 2016 were provided, (C51-54).

21. In addition, mileage forms for various dates from 2013 to 2016 were provided, (C55-76). A document at C77 sets out the claimant's duties as contract manager for QCHA and also the claimant's duties as Director of AGSL are set out.

22. The duties as Contract Manager are set out under numbered bullet points as follows:-

- *"08:00 daily – telephone discussion with foremen to discuss allocation of duties for the day and discuss any relevant issues.*

- *Daily – Travel from Bearsden to Maryhill.*

- *Daily – Carry out quality inspections on areas of work from previous day.*

- *Daily – Carry out inspection of upcoming areas of work for risks or hazards and evaluate any potential changes to upcoming programme.*

- *Daily – Travel from Maryhill to Bearsden.*

- *17:30 daily – telephone discussion with foremen to discuss work that has been carried out and discuss any relevant issues.*

- *Daily – Evaluate next days work programme and duties based on discussions and inspections from today.*

- *Daily – Completion of paperwork in relation to contract e.g items for invoicing preparation, mileage forms etc.*

- *Procurement duties for evaluating and purchasing of items for the QCHA contract e.g machinery, tools, vehicles, weedkiller, plants etc and organising any repairs to these items.*

- *Meetings with client in person or telephone to discuss any contracts issues when requested, including visits to work areas.*

- *Visits to potential new areas of work to evaluate and prepare prices for extra work required by client.*

Duties as Director of Alpine Ground Services:

- *Completion of cash sheets, bank sheets and VAT sheets, time sheets.*

- *Twice yearly – Meeting with accountant*."

23. These duties are much more detailed than those that appear in the Schedule of Particulars at C48.

24. As at 2016, the only contract held by AGSL was with QCHA. In addition to the claimant as Contract Manager, Mr Ross was employed as a Foreman/Supervisor and Mr William Melvin as a Chargehand. He is the claimant`s brother-in-law. A Mr John Jackson was another Chargehand. Mr David Clarke had the same title and rate of pay as Mr Melvin and Mr Jackson although he did not supervise a squad of gardeners. There were two squads of gardeners. Mr Melvin supervised one squad and Mr Jackson supervised the other. Mr Ross was the overall Supervisor with Mr Melvin and Mr Jackson reporting to him. QCHA covers a very large physical area of land in Maryhill as far across as to the edge of Great Western Road. The claimant had two squads of gardeners with the Chargehands for each squad as well as Mr Ross carrying out the actual gardening work. The gardeners were divided into two squads because there was such a large physical area of grounds to cover. AGSL rented business premises in Maryhill from QCHA. In addition, there were vehicles which appear to have

belonged to the claimant rather than to AGSL. Some of these were kept overnight at Dawsholm in the Maryhill area of Glasgow.

25. The claimant had ceased making National Insurance Contributions given his date of birth is 27 September 1950.

26. AGSL submitted invoices on a monthly basis to QCHA. Its employees were paid weekly. Calculation of the wages was carried out by AGSL`s accountants. They calculated the relevant tax and national insurance and payments for each employee on a weekly basis and payments were then made by BACS transfer. The claimant was also paid weekly using the same system.

27. The claimant submitted mileage sheets showing travel incurred by him in relation to the supervision of the contract. He used his own car. The claimant would either visit the business premises in Maryhill each morning, that is Mondays to Fridays or, alternatively, he might telephone Mr Ross as the Supervisor to discuss with him what tasks were to be carried out by the two squads each day.

28. Generally, towards the end of the working day, the claimant would carry out a daily inspection. He did so by driving round and looking at the areas where work had been carried out. He estimated that he would usually return home around 3pm. He would then have a telephone conversation at about 5.30pm with Mr Ross when they discuss any issues that had occurred during the day.

29. The claimant completed any paperwork that was required. He accepted there was not a great deal of paperwork to be done either on a daily or monthly basis.

30. The equipment, (apart from the vehicles mentioned above) that were required in order to carry out the contract appears to have been owned by AGSL.

31. The claimant accepted that he had very few duties as a Director of AGSL. As is set out at C77 what he did have to do involved the completion of cash sheets, bank sheets and VAT sheets and time sheets. VAT sheets had to be prepared every three months and there was also a twice yearly meeting with AGSL's accountants.

32. The claimant had very little contact with Mr Clarke who although he was paid at the same rate as the two Foremen did not have a squad of gardeners working under his supervision. The claimant's main contact was with Mr Ross

33. AGSL had carried out gardening services for many years for QCHA, dating from 1990 onwards through to the middle of 2016.

34. In 2016, the QCHA contract came up for renewal. QCHA prepared documentation for that renewal, (R58-90). This sets out a summer specification which included one visit in March followed by two visits per month from April to October and 9 items listed of work to be carried out, while the winter programme from November to February required 2 visits per month, (pages 89-90).

35. The summer specification is as follows:-

> "***Summer Specification (March: 1 visit; April – October: 2 visits per month)***
>
> 1. *De-litter all front and rear gardens, backcourts, shrub beds, open spaces, tree bases, planters and hard standing areas.*

Remove all rubbish, debris and fallen leaves. TWICE MONTHLY.

2. *Cut on all front and back gardens, backcourts and common areas. All cuttings and spoil must be removed. All grass plots must be edged. Lawnmowers with grass collection systems must be used – hoover type machines i.e. flymo are not acceptable. TWICE MONTHLY.*

3. *De-weed, hoe and tidy shrub beds, flower beds and planters in gardens, tree bases, backcourts and common areas. Remove all spoils. TWICE MONTHLY.*

4. *Tree banding to be checked – banding to be slackened, tightened or replaced as required. TWICE MONTHLY.*

5. *Tree stakes to be checked – stakes to be replaced, secured or removed as required. TWICE MONTHLY.*

6. *Wind damaged, vandalised or dangerous tree limbs on trees to be removed as required.*

7. *Shrub growing over windows, on to footpaths or drying areas to be cut back.*

8. *Spotweed all beds and planters twice per season – thereafter remove dead weeds.*

9. *Spray all hard standing areas with a total weed killer twice per season – thereafter remove dead weeds*.

Winter Programme (November – February: 2 visits per month)

1. De-litter. TWICE MONTHLY.

2. Check Tree banding – adjust or replace as required.

3. Remove damaged limbs on immature trees

4. Prune low branches on immature trees

5. Prune shrub beds.

6. Turn beds and cut new edges where required.

7. Remove tree stakes no longer necessary

8. Remove fallen leaves.

9. Prune shrubs and turn soil in planters."

36. The claimant was not involved in any of this work himself. The tender submitted on behalf of AGSL was unsuccessful. The contract was awarded to the respondent with a transfer date of 1 July 2016. It is accepted that the transfer was a relevant transfer under Regulation 3(3)(a)(i) of the TUPE Regulations 2016, (the 2016 Regulations).

37. AGSL was duly informed that their tender application had not been successful. The respondent was informed that their tender had been accepted by QCHA.

38. Mr Harvey met the claimant and all the AGSL employees at the office at Braeside Street, Maryhill on 17 May 2016. He made notes of that meeting, (R10). A pro forma letter to these employees (with the exception of the

claimant) was sent by the respondent. The letter is dated 20 May 2016, (R11-12). It referred to that meeting, advising that the contract would transfer on 1 July 2016. It also referred to Regulation 13(2)(d) of the TUPE Regulations, indicating that the respondent did not envisage changing any policies or procedures although employees would be expected to adhere to the respondent's existing policies under reference to the respondent's Employee Handbook, a copy of which would be provided. The letter also explained that the individuals would be asked to sign a contract with the respondent which would honour their existing length of service with AGSL. It was also explained that there would be a change whereby wages would be paid fortnightly for the first three months after transfer and thereafter from October 2016 would be paid on a four weekly basis. At this meeting on 17 May there was no mention made to Mr Harvey of daily phone calls from the claimant to Mr Ross apart from a reference to an update being provided at the end of the day.

39. Mr Harvey then had a further meeting in Braeside Street on 17 June 2016 with all the employees except the claimant. An Agenda with a list of items was prepared, (R13).

40. Mr Harvey also had a separate meeting with Mr Jackson and Mr Clarke. He found them relatively reluctant to talk to him given they were still employed by AGSL.

41. At the initial meeting in May Mr Harvey had understood from the claimant that the Chargehands, namely Mr Clarke and Mr Jackson oversaw the squads and that Mr Clarke rarely saw the claimant. His understanding from the claimant was that it was Mr Clarke and Mr Jackson who "*ran the contract*". He also understood from the claimant that he had used a "*fairly light touch*" and in effect, the "*boys ran the contract*".

42. Accordingly, Mr Harvey was left with the impression that the Foremen, Mr Clarke and Mr Jackson were heavily involved in the day to day operations for delivering the contract to QCHA.

43. Mr Harvey understood that Mr Ross was working on light duties and was primarily involved in spraying weed killer at the various sites. He also understood that Mr Jackson was responsible for updating QCHA at the end of every week as to the works that had been carried out.

44. Mr Harvey further understood that he claimant was essentially involved in running the company, AGSL rather than managing this particular contract with QCHA.

45. The respondent received copies of the Schedules of Particulars for employees, (R15-32). These Schedules had a similar layout to the claimant's document but they contained very different terms of employment, see, for example, R15-16 for Mr Ross and R19-20 for Mr Jackson.

46. By letter dated 24 May 2016, (C78) Mr Harvey wrote to the claimant and referred to their recent meeting and discussion. This appears to be a reference to the meeting on 17 May 2016.

47. The letter refers to the claimant believing that the Tupe Regulations applied to his position as "*Managing Director in respect of this change in service provision*".

48. The letter explained that the respondent disagreed since it now had an understanding of the claimant`s role on a day to day basis. It was their view that this role did not form part of the "*organised grouping*" as set out in Regulation 3(3)(a)(i) of the Regulations. The letter continued:-

> "*This is because we do not consider that you are part of the team which currently delivers the service and who are essentially*

dedicated to this particular contract which is the subject of the service provision change. The available evidence suggests that you are not directly involved in the delivery of services to the client and you therefore are not assigned to that organised grouping.

While it appears that your duties involve the management and/or maintenance of Alpine Ground Services Limited this differs from being involved in the direct provision of the services to Queen`s Cross Housing Association. Employees require to be assigned to the organised grouping of workers who discharge services under a particular contract and it is our view that this does not apply to your position. In addition, I think there is a lack of evidence which confirms that you are in fact an employee of Alpine Ground Services Limited, rather you are the owner and majority shareholder and you are not required to undertake any specific duties as an employee.

Based on the information that we have at this time, we do not believe that TUPE applies at all to your position.

However, at this stage we would be more than happy to consider any information that you have that may assist us further in confirming whether TUPE applies in this instance. Please confirm in writing why you believe that TUPE applies to your role."

49. A reply was sent by Clyde & Co dated 8 June 2016, (C79-80) which specified the claimant was the Chief Executive Officer and had a contract of employment. It then provided detailed information as to the work carried out by the claimant under the heading, "*Assigned to the Organised Grouping*". This indicates as follows:-

- *"Every morning he contacts the foremen by telephone to discuss allocation of duties in respect of the work required*

under the QCHA Contract that day, and to discuss any issues arising;

- *He visits the QCHA site daily to carry out quality inspections on areas of work from the previous day and to inspect upcoming areas of work for risks or hazards. This also enables him to evaluate any potential changes to the upcoming programme;*

- *At the end of each day, he speaks with the foremen to discuss the work carried out and any issues arising;*

- *On a daily basis he evaluates the next day`s work programme and duties based on the discussions and inspections from that day;*

- *On a daily basis he completes the paperwork in relation to the contract;*

- *He is responsible for procurement and maintenance of equipment required for the QCHA Contract;*

- *He meets with QCHA as required to discuss work which has been carried out and which requires to be carried out.*

Mr McGarry is therefore an integral part of the team which currently delivers the service and he is undoubtedly dedicated to the QCHA Contract. The Contract could not be delivered without him. Accordingly, he is assigned to the organised grouping of employees in terms of Regulation 3(3)(a)(i) of the TUPE Regulations.

Given that our client only has one customer, Mr McGarry spends less than 5% of his time on the management of the company."

50. A reply was sent o 14 June 2016, (C81-82) followed by a reply dated 3 June 2016 from Clyde & Co, (C84-87). There was then a reply to that letter of 27 June 2016, (C88). This referred to the change in the payment of wages from weekly to four weekly and a separate letter of the same date, (C89-90) in which the respondent disputed that the claimant was an integral part of the service team. This was acknowledged by letter dated 30 June 2016, (C91) addressed to the claimant advising that the position, so far as the respondent was concerned, was unchanged and that the TUPE Regulations did not apply to him and therefore there was no need for him to report for work on 1 July 2016.

51. The claimant replied by email of the same date, (C91-92) in which he disputed the position as set out. His email was dated 30 June 2016 timed at 13:09 hours and Mr Harvey`s reply on the same date is as at 16:49:58 hours.

52. As indicated above, AGSL had previously held a contract for similar garden services with Shettleston Housing Association. That work had ceased many years earlier, probably in around 2000 although the exact date was not available.

53. The respondent was provided with a spreadsheet of employee information from AGSL in May 2016, (R1-8).

54. They also received a letter dated 3 May 2016 from O`Hara`s Chartered Accountants, (R9). This letter confirmed that the claimant was the Managing Director and an employee of AGSL. The letter continued:-

> "*Mr McGarry`s income is taken from the company by way of a combination of salary and regular dividend payments. His agreed annual gross remuneration is £54,000, £10,000 of which is taken as a salary and the balance is taken by way of a regular dividend payment. Mr McGarry`s income is taken in this way for tax efficiency.*

While Mr McGarry`s income is taken by combination of salary and dividend, the company is contractually required to pay him an annual gross income of £54,000 as agreed between Mr McGarry and the company.

Let us know if you require any additional information."

55. The individual employees' Particulars of Main Terms of Employment specify different hourly rates depending on whether the individual was a Foreman as in the case of Mr Ross, (R15-/16) or a Gardener, for example, (R23-24). In both categories the hours of employment were specified with entitlement to holidays being to 28 days including public holidays and reference to statutory sick pay in the event of absence through illness. Specific duties were specified for example for Mr Ross these were "*grass cutting, hedge cutting, weeding and de-littering*", (R15) and by reference to offences that would amount to gross misconduct and reference to warnings.

56. In contrast, there is no reference to gross misconduct or warnings in the claimant`s Schedule of Particulars, (R14). The reference to the pension from AGSL of £4,800 related to pension contributions that were paid by AGSL into the claimant`s personal pension scheme.

57. In relation to the work now carried out by the respondent, Mr Harvey is contacted by a Supervisor/Foreman at the end of each day whereas the claimant`s position was that he was contacted at the end of each day by Mr Ross. He also spoke to Mr Ross each morning either by being in attendance in Maryhill or, alternatively, by having a discussion by telephone.

58. Mr Harvey has responsibility for the supervision of the day to day running of the contract now held by the respondent. He also liaises with QCHA as did the claimant. If Mr Harvey is not able to liaise with QCHA then his colleague, Mr Ian Richardson does so. The respondent holds monthly meetings with QCHA. Mr Harvey decides which workers work in which

squad although there is a slight difference in the way the work is now structured between the two squads. In addition to Mr Harvey and his colleague Mr Richardson another colleague, a Miss Todd carries out some site inspections although these are not done with the same regularity as the claimant did when AGSL held the contract with QCHA.

59. The claimant was responsible for procurement and maintenance of equipment and carried out the completion of all paperwork although, as he indicated, this was not something that involved much of his time. The running or management of the contract by the respondent is carried out by Mr Harvey, Mr Richardson and Miss Todd and, on occasions, a Miss Steel who is another employee of the respondent assists them.

60. At the conclusion of the Preliminary Hearing there was insufficient time for the closing submissions to be provided. The representatives agreed to provide written submissions and these are set out below.

Claimant's Submissions

The two issues to be determined by the Employment Tribunal are:

1. Whether the Claimant was an employee of Alpine Ground Services Limited (hereinafter "Alpine") at the relevant time; and

2. Whether the Claimant was assigned to the organised grouping of employees which had as its principal purpose the carrying out of the activities which the Respondent now carries out in respect of the Queen's Cross Housing Association contract (QCHA).

1. **WAS THE CLAIMANT AN EMPLOYEE OF ALPINE GROUND SERVICES LIMITED?**

1.1. "*Employee*" for the purposes of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE Regulations") is defined at **Regulation 2(1)** as: *"Any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services."*

1.2. The Claimant was employed by Alpine from 1996 (formerly known as Alpine Garden Services) until the Respondent took over the delivery of the QCHA Contract on 1 July 2016. Prior to the incorporation of Alpine, the Claimant operated as a sole trader.

1.3. The Claimant was employed by Alpine as the Chief Executive Officer and was assigned as the Contract Manager responsible for the delivery of the QCHA Contract.

Contract of Employment [**Page 49 of the Claimant's Bundle**]

1.4. "*Contract of Employment*" is defined at **Regulation 2(1)** as: *"Any agreement between an employee and his employer determining the terms and conditions of his employment"*.

1.5. The Claimant's contract confirms the following:

- His job title (Chief Executive Officer)
- His rate of pay (£54,000 per annum) – in reality, this is what the Claimant received
- His hours of work (30) – in reality, this is what the Claimant worked

- His holiday entitlement – this reflects the reality of the number of days taken by the Claimant. The Claimant would ordinarily take these days immediately before or after the weekend

- The provisions for sick pay entitlement – this reflects what the Claimant would have been owed had he been unfit for work

- The contributions to the Claimant's pension (£4,800 per annum) – **page 7 of the Respondent's bundle** provides the details of the pension scheme that the Claimant was a member of

- The Claimant's duties: "*Preparing cyclicai ground maintenance schedules, allocation of duties, overseeing completion of contract with QCHA, attending meetings with customers, you are not required to do any manual labour"* – in reality, these were the duties that the Claimant carried out on a daily basis

- And finally, the Claimant's notice entitlement (12 weeks). This reflects the Claimant's actual entitlement.

In terms of the usual test for employee status, there was the necessary mutuality of the obligation and the requirement for personal service. The Claimant could not have substituted another individual.

1.6. <u>The Respondent has suggested that the Claimant's contract was produced "*at a* time when the prospect of re-tendering for</u>

the contract would be appearing on the far horizon". The Claimant's contract is dated 1 April 2014, the contract was not won by the Respondent until May 2016, over two years later. Alpine had held the contract for 25 years, at that stage there was no reason to worry that this could change and in any event it was a long way off. The suggestion that the Claimant's contract is anything other than a genuine attempt to formalise the relationship that was already in place is disputed and not supported by any evidence.

1.7. The facts in the case of ***O'Kelly v Trusthouse Forte plc* [1983] ICR 728** referred to by the Respondent can be distinguished from the present case as the contract in that case gave the Claimant the right to choose whether or not to work, and for the employer not to give them work. Having said that, the approach taken by the Court of Appeal with regards to no one factor is determinative is agreed.

1.8. In the case of ***Autoclenz v Belcher* [2011] ICR 1157** also referred to by the Respondent, the Supreme Court held that a group of valeters were employees despite their contracts stating that there was no duty to accept work, the right to send a substitute and express reference to being self employed because this was held not to reflect reality. The Claimant's contract of employment did reflect what happened in practice.

Employee Payslip [**Page 50 of the Claimant's Bundle**]

1.9. The Claimant's payslip demonstrates that the Claimant was paid a weekly wage by Alpine. The Claimant's payslips include the Claimant's Employee Number and Employee National Insurance Number. They also show the employee Income Tax deductions that were made. Due to the Claimant's age, he no

longer makes Employee National Insurance contributions; however, contributions were made prior to the Claimant reaching the State Pension age.

P60s [**Pages 51 - 54 of the Claimant's Bundle**]

1.10. The Claimant's P60 forms show the tax contributions that the Claimant made on an annual basis in his capacity as an employee of Alpine.

1.11. Alpine were paying Employer National Insurance contributions on the Claimant's behalf in light of his employee status.

Method of Remuneration

1.12. As above, the Claimant received £54,000 per annum in respect of his employment. For tax efficiency reasons, £10,000 of this was paid to the Claimant by way of a weekly wage basis with the remaining £44,000 remunerated by way of regular dividend payments. The reality is that the dividend payments were simply another form of remuneration for the Claimant's employment.

1.13. Wages is defined as "*any sums payable to the worker in connection with his employment*". It is expressly stated that this includes "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"*. None of the express exclusions (e.g. loan, advance payments or expenses) relate to dividend payments. (**Section 27 Employment Rights Act 1996**)

1.14. A weeks pay is defined as *"the amount which is payable by the employer under the contract of employment in force*" (**Section 221 Employment Rights Act 1996**)

1.15. The case of ***Commissioners for HM Revenue and Customs v PA Holdings Ltd*** **[2011] EWCA Civ 1414** concerned the taxation of bonus payments made to employees in the form of dividends. The question for the Employment Tribunal and subsequently, the Court of Appeal was whether these dividend payments were emoluments of employment or dividends. The Court of Appeal concluded that the dividends in question were indeed emoluments from employment.

1.16. The Court of Appeal found that:

> "*It is not in every case that an employee who is awarded shares and receives dividends can escape the conclusion that the dividends are remuneration and not investment income".* (Paragraph 34)
>
> *"The correct approach is to consider all the facts relevant to the receipt of the income. This requires the court not to be restricted to the legal form of the source of the payment but to focus on the character of the receipt in the hands of the recipient."* (Paragraphs 36 & 37*)*

This case supersedes the case of ***Eyres v Finnieston Engineering Company Ltd*** [1916] 7 TC 74 referred to by the Respondent. That case can in any event be distinguished on the facts where the provision that dividends on shares were to be regarded as part of remuneration of the Directors was contained in the Articles of Association not contracts of

employment and the Directors had purchased the shares for valuable consideration.

1.17. In ***Department for Employment and Learning v Morgan*** **[2016] NICA 2,** [2016] IRLR 350 the Northern Ireland Court of Appeal looked at the payment of dividends as remuneration. In that case, the Claimant had originally been employed as an accountant under a contract of employment. After buying 50% of the company's shareholding he became an 'employee director'. For tax efficiency, he received the majority of his earnings by way of dividends rather than salary. When the company later became insolvent, the Claimant claimed against the Department for Employment and Learning for a redundancy payment. The Department refused the Claimant's application on the basis that he had not been an employee, principally evidenced by the fact that he was remunerated by way of dividends. The Employment Tribunal held that as the payment was in reality an emolument for services rendered for the company, the Claimant was entitled to the state payments. On appeal, the Northern Ireland Court of Appeal agreed and rejected the Department's appeal.

1.18. In delivering the Judgment, Weatherup LJ commented as follows:-

> "*It is not only in tax cases that substance should prevail over form. Nor is it only in tax cases that attention should focus on the character of the receipt in the hands of the recipients. The question is whether the payments made in the form of dividends were made for services rendered by employees on foot of a contract of employment. That is a question of fact*." (Paragraph 20)

> *"Ultimately, the question remains as to the basis on which the claimant received the payment. When the recipient of the payment is a director and a shareholder and the tribunal is required to determine whether the recipient is also an employee, the issue for the tribunal* remains *whether the payment was for services rendered under a contract of employment and the focus remains on the basis on which the payment was made."* (Paragraph 23)
>
> *"It is apparent that throughout the period the total payment was intended to reflect the salary stated in the contract."* (Paragraph 24)

1.19. Whilst the Judgment of the Northern Ireland Court of Appeal is not binding on this Tribunal, the likeness of the facts to the present case gives the Judgment reliable and persuasive weight.

1.20. In ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** **[1968] 2 Q.B. 497** MacKenna J commented that a contract of service exists if three conditions are fulfilled, the first of these was *"the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master".* (Emphasis added)

1.21. It is the Claimant's position that it is the substance of the remuneration rather than the form that is crucial when determining whether or not there is a contract of employment, and that the substance of the payments he received was clearly remuneration for the services that he delivered under his contract of employment,

Minimum Wage / Illegality

1.22. With regards to the remaining element of the Claimant's pay that is paid by way of a weekly salary, £10,000, the additional £44,000 that is paid to the Claimant means that the National Minimum Wage legislation is not engaged. In the aforementioned ***Morgan*** case, Weatherup LJ commented:-

> *"The appellant contends that as the PAYE element was below the national minimum wage that represents a breach of the statutory scheme which taints the contract with illegality so as to render it void and unenforceable. We cannot accept this argument. The claimant's salary was £69,500 per annum. The arrangements for payment cannot conceivably engage the national minimum wage legislatio*n. (Paragraph 26)

1.23. The issue of minimum wage and legality was not raised by the Respondent either in the ET3 or during the course of the Hearing including in cross-examination. There was therefore no fair notice of this line of defence, nor was the Claimant given the opportunity to address this. We note the Respondent does not ultimately submit that the contract of employment was tainted by illegality.

1.24. The case of ***Enfield Technical Services v Payne*** **[2008] ICR 1423** referred to by the Respondent is not directly applicable to the Claimant's case as it addressed the situation where Claimants and their employers had operated on the basis the claimants were self employed and paid tax accordingly, whilst it was later determined the claimants were in fact employees. The Claimant's position has consistently been that he is an employee and pays tax on that basis. The Court of Appeal in

Enfield placed emphasis on the need for misrepresentations for a finding of unlawful performance of a contract of employment (Paragraph 29). The Tribunal has heard no evidence of any misrepresentation by the Claimant in this case.

1.25. There is accordingly no basis at all for any suggestion that the arrangements operated by Alpine in relation to the Claimant's remuneration were in any way illegal.

Employee Expenses [**Pages 55 - 76 of the Claimant's Bundle**]

1.26. The Claimant reclaimed expenses for business travel as an employee of Alpine.

Employee Liability Information [**Pages 1 - 8 of the Respondent's Bundle**]

1.27. Prior to the transfer, Alpine produced a spreadsheet that was sent to the Respondent setting out the Employee Liability Information in accordance with the TUPE Regulations, the Claimant's name was included in the list of employees.

1.28. The Respondent was also provided with a copy of the Claimant's contract of employment between the beginning of May 2016 and prior to the first meeting taking place.

1.29. Prior to the transfer taking place, the Respondent also received a copy of the Claimant's wage slip, mileage sheet and, at a later date, a list of duties that the Claimant performed.

Director / Shareholder

1.30. Separate to the Claimant's employee status, the Claimant was also a Companies House Director and majority shareholder of Alpine. The positions held by the Claimant are not inconsistent.

1.31. In ***Fleming v Secretary of State for Trade and Industry*** **[1997] IRLR 682,** the Court of Session held that the existence of a controlling interest (in that case the Managing Director owned 65% of the shares) was a relevant, but not a decisive, factor:-

> "*We are not, however, convinced that it would be proper to lay down any rule of law to the effect that the fact that a person is a majority shareholder necessarily and in all circumstances implies that that person cannot be regarded as an employee, for the purposes of the employment protection legislation."* (Paragraph 12)

1.32. In ***Johnson v Ryan & ors*** **2000 ICR 236**, the Employment Appeal Tribunal identified 3 categories of office holder, the third of these categories was *"workers who are both officer holders and employees, such as company directors* (Paragraph 19)

1.33. In ***Percy v Church of Scotland Board of National Mission*** **2006 ICR 134** the Supreme Court confirmed that holding an office such as Company Director and being an employee are not inconsistent:-

> "*There are clear cases where, for example, a company director also has a written contract of service, but this*

may also be implied, for example where the director is required to work full time for the company in return for a salary" (Paragraph 142)

1.34. In the Employment Appeal Tribunal case of ***Nesbitt & anor v Secretary of State for Trade and Industry*** **2007 IRLR 847**, the Honourable Mr Justice Underhill commented as follows:-

"They seem to me to be clear authority that the fact that a putative employee has a controlling shareholding and is very clearly the "prime mover" of the business (and has indeed been "at pains to retain overall absolute control") is not sufficient by itself to establish that he is not an employee if he otherwise satisfies the criteria for employment status. The tendency of the judgment – though I accept that there is no express statement to this effect – is to accept that the contract of employment should be taken at face value unless the putative employee did not "behave as an employee" or his companies were "mere simulacra" of himself." (Paragraph 20)

"I believe that the law is that the fact that a claimant under the employment protection legislation is a majority shareholder and a director of the company which employs him does not affect his status as employee unless the tribunal finds that the company is a "mere simulacrum". (Paragraph 27)

1.35. Allowing the appeal, Mr Justice Underhill found that the Claimants, who were in practice in total overall control of the company and therefore able to prevent their own dismissals, were employees.

1.36. In the Employment Appeal Tribunal case of ***Clark v Clark Construction Initiatives Ltd*** **[2008] IRLR 364** the Honourable Mr Justice Elias gave the following guidance (Paragraph 98) for deciding whether the contract of employment of a majority shareholder should be given effect.

(1) The onus is on the party denying a contract; where an individual has paid an employee's tax and NI, *prima facie* he is entitled to an employee's rights.

(2) The mere fact of majority shareholding (or de facto control) does not in itself prevent a contract arising.

(3) Similarly, entrepreneur status does not in itself prevent a contract arising.

(4) If the parties conduct themselves according to the contract (e.g. as to hours and holidays), that is a strong pointer towards employment.

(5) Conversely, if their conduct is inconsistent with (or not governed by) the contract, that is a strong pointer against employment.

(6) The assertion that there is a genuine contract will be undermined if there is nothing in writing.

(7) The taking of loans from the company (or them guaranteeing of its debts) are not intrinsically inconsistent with employment.

(8) Although majority shareholding and/or control will always be relevant and may be decisive, that fact alone should not justify a finding of no employment.

1.37. In the joint appeal ***Secretary of State for Business Enterprise and Regulatory Reform v Neufeld*** **[2009] IRLR 475** the Court of Appeal held that directors with 90% and 100% shareholdings respectively in their companies were employees on the facts. In his Judgment, Rimer LJ approved Elias P's guidance in ***Clark*** subject to two qualifications to which it must now be read: (paragraphs 88 & 89)

(1) guideline (1) should not be read as constituting a formal reversal of the burden of proof on to the party denying employment status; it may still be necessary for the putative employee to do more than produce documentation to satisfy the tribunal;

(2) guideline (6) may be expressed too negatively — lack of writing may be an important consideration but if the parties' conduct tends to show a true contract of employment 'we would not wish tribunals to seize too readily on the absence of a written agreement to justify a rejection of the claim'.

1.38. It is submitted that the above line of case law which, when applied to the facts of this case, supports the conclusion that the Claimant was an employee, is to be preferred to the older decisions relied on by the Respondent.

Conclusion of Part 1

1.39. On the basis of the evidence and the supporting case law, it is our submission that the Tribunal should find that the Claimant was an employee of Alpine.

2. WAS THE CLAIMANT ASSIGNED TO THE ORGANISED GROUPING?

1.40. The Respondent accepts that there was a relevant transfer for the purposes of **Regulation 3** of the TUPE Regulations.

1.41. It is clear from the ET3 (paras 4, 7, 14, 16, 17 and 18 of the paper apart to the ET3) and from the correspondence exchanged prior to the transfer of the QCHA Contract [**Pages 78, 81-83 and 89-90 of the Claimant's Bundle**] that the Respondents accepts that there was an organised grouping of employees in accordance with **Regulation 3(2)** which had as its principal purpose the carrying out of the activities on behalf of the client (QCHA).

1.42. The Respondent accepted that, with the exception of the Claimant, all employees of Alpine transferred to them under the TUPE Regulations. All of the employees of Alpine were assigned to the organised grouping of resources or employees that was subject to the relevant transfer. All of the employees had as their principal purpose the carrying out of the activities, and delivery of the services, under the QCHA Contract. Accordingly, all of the employees of the Transferor transferred to the Respondent. The Respondent accepted and continued to employ all of the employees of the Transferor with the exception of the Claimant, who the Respondent refused to accept with the result that he was therefore dismissed.

1.43. The only issue for the Tribunal to determine is therefore whether the Claimant was assigned to that organised grouping.

1.44. "*Assigned*" means assigned other than on a temporary basis. The Claimant had worked on the delivery of the services to QCHA for about 25 years before the Respondent took over delivery of the service on 1 July 2016.

1.45. In the leading case on the issue of assignment, ***Botzen v Rotterdamsche Droogdok Maatschappij BV* 186/83 [1985] ECR 519, [1986] 2 CMLR 50**, the European Court concluded that "*an employment relationship is essentially characterised by the link between the employee and the part of the undertaking or business to which [they are] assigned to carry out [their] duties"* (Paragraph 15).

1.46. The Claimant was an integral part of the team which delivered the service and was undoubtedly dedicated to the QCHA Contract, Alpine's only contract. He was appointed as the Contract Manager for the delivery of the QCHA Contract. Clause 9 of the Claimant's Contract of Employment [**Page 49 of the Claimant's Bundle**] details his duties. The Claimant's principal function was the management and operation of the QCHA Contract and he had a contractual duty to allocate tasks to the chargehands.

1.47. The Claimant was permanently assigned to the delivery of the service; it is irrelevant whether or not he got his hands dirty. The Respondent's staff that now perform the duties and tasks that the Claimant performed do not get their hands dirty.

1.48. In the Employment Appeal Tribunal case ***London Borough of Hillingdon v Gormanley & ors*** **EAT 0169/14** the court highlighted the importance of considering what duties the employees could be called upon to perform under the terms of their contracts as well as those which they were actually performing. The duties highlighted in the Claimant's contract all relate to the delivery of the services under the QCHA Contract and the duties which the Claimant ultimately performed were almost exclusively in relation to the delivery of the services under the QCHA Contract:-.

> *"An important source of information on an employee's role in an organisation is likely to be their contract of employment. The job description or statement of duties is likely to inform a decision as to whether their duties are confined to certain activities or whether they include more general duties….. In my judgment this illustrates the importance of considering what duties the Claimants could be called upon to perform under their contracts as well as those which they were actually performing at a particular moment in time." (*Paragraph 37*)*

The Claimant's Role [**Page 77 of the Claimant's Bundle**]

1.49. The Respondent's Managing Director, Andrew Harvey, is involved in the day to day running of the QCHA Contract.

- The Claimant was previously responsible for the day to day running.

1.50. Andrew Harvey supervises the delivery of the QCHA on a daily basis.

- The Claimant previously supervised delivery. The chargehands and Foreman would not give instructions without the Claimant's approval. No one decided what had to be done apart from the Claimant. No decisions would be made without the Claimant's input. Mr Ross confirmed this in his evidence. The Claimant offered the chargehands guidance and support where needed.

1.51. The Supervisor / Forman provides an update to Andrew Harvey every morning.

- Every morning the Claimant spoke to the Foreman, Cyril Ross, by telephone to discuss the allocation of duties in respect of the work required under the QCHA Contract that day. Mr Ross then relayed these instructions to the chargehands that were responsible for the respective groups of employees, as grouped by the Claimant, on a particular area of the site, as specified by the Claimant, to ensure completion of the task(s), as allocated by the Claimant. The Respondent has continued the same practice. There needs to be someone for the workmen to contact.

1.52. The Supervisor / Forman reports back to Andrew Harvey at the end of each day.

- At the end of each day at Alpine, the Claimant spoke with the Foreman to discuss the work carried out and any issues arising.

1.53. Andrew Harvey is responsible for liaising with QCHA. Andrew Harvey or Iain Richardson attend the monthly meeting with QCHA

- The Claimant was previously responsible for this.

1.54. Andrew Harvey decides which workers go in which squad and the allocation of their work

- The Claimant was previously responsible for this.

1.55. Andrew Harvey is involved in the process of deciding the programme setting out what work was to be done and when. The list of properties is purely that, a list of addresses, it does not tell staff what to be done, when or in what order.

- The Claimant was previously responsible for this.

1.56. Karen Todd, Iain Richardson and Andrew Harvey are responsible for carrying out site inspections for the Respondent. A fourth individual was added to that list when Mr Richardson was unfit for work.

- The Claimant visited QCHA sites daily to carry out quality inspections on areas of work from the previous day and to inspect upcoming areas of work for risks or hazards. This also enabled the Claimant to evaluate any potential changes to the upcoming programme. The Claimant evaluated the next day's work programme and duties based on the discussions and inspections from that day. The Respondent calls into question the frequency of the Claimant's site visits as a result of Mr Clark's assertion that he rarely had occasion to see the Claimant. During the course of the Hearing it was suggested by the Respondent that the Claimant had not been seen on site much by Mr Clark in the last four years. Mr Melvin's reaction to this suggestion was that it was "ludicrous". Mr Clark accepted

that he moved around sites, that the contract covered a large area and that Mr Ross was his supervisor. There was no reason for Mr Clark to see the Claimant. Mr Melvin and Mr Ross confirmed regular face to face meetings with the Claimant.

1.57. Staff contact Andrew Harvey if there are any absences

- The Claimant would previously have been informed and then instructed what changes to make to the squads

1.58. Staff contact the Administrative staff if there are any problems with equipment or protective wear

- The Claimant was responsible for procurement and maintenance of the equipment required to service the QCHA Contract. The Claimant visited employees in person where the need arose, for example: to provide petty cash, to receive petty cash slips, to carry out equipment checks, and to discuss and fulfill work orders for tasks which were not covered by the specification of the QCHA Contract. On a daily basis, the Claimant completed the paperwork in relation to the QCHA Contract, for example: timesheets, mileage sheets and paperwork in relation to any work orders which were received.

1.59. It is irrefutable that the Claimant was fundamental to the delivery of the services to QCHA. All of the practices that the Claimant undertook are still being carried out by the Respondent. The work is necessary, it was not for the Respondent to decide how and who it should be done by when the Claimant was delivering the exact same role immediately prior to the transfer. The Respondent relies on

the evidence of their witness that it was "not rocket science" knowing what needed to be done on site, yet, the Respondent considers in necessary to carry out the same tasks and functions that the Claimant carried out on a daily basis in order to provide the service.

1.60. In cross examination Andrew Harvey accepted that the above tasks were integral to the delivery of the QCHA service saying they "*collectively form part of that*".

1.61. In cross examination Andrew Harvey accepted that the duties carried out by McDermott are "*consistent*" to the description of the duties that Mr McGarry gave in relation to his role at Alpine. Andrew Harvey went on to accept that the tasks the Claimant did are still being done by the Respondent.

1.62. In cross examination Andrew Harvey accepted that his own role is fundamental to the fulfillment of the QCHA contract. He went on to say that someone else could take that job on, there just needed to be someone responsible for the overall contract. The contract will not run itself. Immediately prior to the transfer, the Claimant fulfilled that role of responsibility.

1.63. The same functions in order to fulfill the QCHA Contract are still being discharged by the Respondent, just by a different individual, or in this case, by four individuals: Andrew Harvey (Director), Iain Richardson (Compliance Manager), Gail Steel and Karen Todd (both Administrative Staff). As is evident by the replacement hired when Mr Richardson was absent, if these individuals were not there, McDermott would need to hire someone else to do the role that the Claimant did.

1.64. It is not for the Respondent to refuse the transfer of an employee because they wish to change how and by whom that role is carried out. Andrew Harvey accepted that the tasks carried out by the Claimant were fundamental to the delivery of the service but that it was a matter of opinion how much time should be spent performing that role. Under TUPE, there is no scope to refuse to comply based on a personal opinion that previous practices were "excessive".

1.65. One of the reasons put forward by the Respondent for disputing the Claimant's role in the day to day delivery of the service was that the squads apparently were able to perform their duties appropriately on the occasions when the Claimant was away on holiday. Every business must be able to operate when members of staff go on holiday, whether senior members of staff or otherwise. Employees are entitled to take their holidays; it is a fundamental principle of health and safety. Mr Ross confirmed that he kept in regular contact with the Claimant even when he was on holiday.

1.66. Reference is made to the Claimant's higher rate of pay than the supervisor/chargehands. It is not uncommon for salaries to increase the further up a hierarchy you go. The Respondent's Mr Harvey confirmed that he himself earns more than the hourly rates paid to the supervisor/chargehands.

1.67. Reference is made to the "time spent by the Respondent on quality checking work which was estimated as amounting to 4-5 man-days per month, or 28 – 35 hours". As above, the Claimant's role is split between four individuals at the Respondent. This "quality checking" time does not cover the other tasks that are set out above that the Respondent still carries out, for example: daily contact in the morning and

afternoon, planning work, preparing agenda, handling day to day queries, meeting with the client, maintenance of equipment and so on.

1.68. When asked in cross examination whether it was fair to say that a more diligent employee might have deemed it necessary to carry out more than a monthly inspection, Andrew Harvey agreed. The Respondent's suggests that quality checking does not form part of the services. It is clearly an integral part of, and inextricably linked to, delivery of the service. If Alpine has delivered poor quality work they would have been failing to provide the service as is the case in any contract for the delivery of a service.

1.69. Cyril Ross disagreed that the Claimant's role was "excessive".

1.70. QCHA conduct monthly meetings where customer service, feedback and any complaints are looked at. It would be reasonable to conclude that ensuring quality is an important aspect in the delivery of the service.

1.71. Andrew Harvey stated that he did not "*deem it necessary to see every property*" when carrying out inspections. Yet, three individuals at the Respondent are responsible for these inspections and it was deemed necessary to employ an entirely new individual when one of these employees was unfit for work. In any event, whether or not the frequency of the tasks carried out by the Claimant was necessary did not mean that the Respondent could pick whether or not TUPE applied. When asked in cross examination whether it was fair to say that a more diligent employee might have deemed it necessary to inspect every property, Mr Harvey said "*could do, yes".*

1.72. When asked in cross examination whether the Claimant's alleged comments that the boys "ran the contract" and "light touch" could be referring instead to the manual labour side of things Mr Harvey conceded that they could be. Just because the Claimant did not do the physical work, does not mean that he was not part of the organised grouping responsible for delivering the service.

Time Spent on the QCHA Contract

1.73. The Claimant spent the vast majority of his time on the delivery of the QCHA Contract. The Claimant's own evidence, the evidence that the Tribunal heard from the witnesses and the mileage sheets show his regular attendance in support of this.

1.74. The QCHA Contract was the only contract that Alpine held, this had been the case for c. 25 years. The time required to run the business side of Alpine was minimal. In the Claimant's evidence, he said the time spent running Alpine could be quantified as "*minutes*".

1.75. Whilst the Claimant spent at least 95% of his working time on the QCHA Contract, it is not necessary for the organised group, or any member of it, to have as its sole purpose the carrying out of services for the QCHA Contract, this was confirmed by the Employment Appeal Tribunal in ***Argyll Coastal Services v Stirling*** **UKEATS/0012/11**:-

> *"Turning to "principal purpose" there seems to be no reason why the words should not bear their ordinary meaning. Thus, the organised grouping of employees*

need not have as its sole purpose the carrying out of the relevant client activities, that must be its principal purpose." (Paragraph 19)

1.76. In ***Hunt v Storm Communications*** **Case No. 2702546/2006** the Employment Tribunal found that an employee who spends just 70% of their time on a particular contract can be a part of the organised grouping even when they had not been specifically employed for that contract and a portion of their time was spent carrying out other unrelated work.

1.77. In any event, the proportion of time is only one of the factors to be considered. Other factors include the terms of the contract of employment and the amount of value given by the employee (Paragraph 15, ***Duncan Web Offset (Maidstone) Ltd v Cooper & ors*** **1995 IRLR 633, EAT**).

Organised Grouping: Director

1.78. In ***Edinburgh Home-Link Partnership & ors v City of Edinburgh Council & ors*** **EATS/0061/11** the Employment Appeal Tribunal held that co-directors, and the sole director, of two contractors were not assigned to the organised group of employees because it was not established that the strategic work which they carried out was directed towards the delivery of the particular activities under the contract, the substance of their jobs was not carrying out frontline work but other activities not contracted for. By contrast, the Claimant in the present case was involved in the day-to-day operation of the services as detailed above. The Claimant's role was largely operational rather than strategic; he ensured that the required services were delivered to the required standards. His role was not principally directed to the survival and maintenance of

Alpine as an entity. Alpine only had one contract, his principal direction was to the performance of that contract. Little time was required to maintain the company given that everything was focused around the single contract.

1.79. This is not a case where the Claimant worked on a series of contracts or projects, and just happened to focused on the QCHA Contract at the time of transfer – he played an integral role in the delivery of the QCHA services, and had done for 25 years, and was therefore assigned to the organised grouping of employees delivering those services. It was not happenstance that he played that role – it is expressly provided for in his Contract of Employment.

1.80. The Employment Appeal Tribunal case ***Williams v Advance Cleaning Services Ltd and another*** **UKEAT/0838/04/DA** confirms that being in a managerial or supervisory role is not an automatic bar to being part of the same organised grouping as other, more operational employees. Mr Williams was not found to be part of the organised grouping because he was moved from contract to contract in the past. This case can therefore be distinguished factually.

1.81. This is not a situation where a Managing Director has a global or group remit, or is juggling several contracts, and therefore a significant part of their role relates to matters other than the delivery of services under the contract in question. Alpine had a single contract – that was the sole focus of the entire business. This genuinely was a situation where the entire workforce was organised as a grouping with the principal purpose of carrying out the activities required under the QCHA Contract.

1.82. The Claimant was dedicated to carrying out the activities being transferred. Alpine consciously put together a group with the principal purpose of carrying out the QCHA service. The Claimant was clearly assigned to that group.

Relevant Time

1.83. **Regulation 3** applies to a person that was employed by the transferor *immediately* before the transfer (**Regulation 4(3)**). The Claimant's past ownership, employment, or otherwise is irrelevant.

1.84. In the Employment Appeal Tribunal case ***Amaryllis Ltd v McLeod*** **UKEAT/0273/15/RN** it was confirmed that the principal purpose of any organised grouping of workers must be assessed at the point immediately before the change of provider and not historically

1.85. The Respondent laboured over the historic creation of Alpine in 1990, or as previously called 'Alpine Garden Services'. The Claimant was not "reluctant in nature" to answer these questions. It had not been anticipated that the Respondent would focus on this given that the relevant period for the purposes of the TUPE Regulations is the period immediately prior to the transfer, not historically. This line of argument had not been raised in the ET3. The Claimant is not an expert on different forms of legal entity, nor indeed on tax matters.

Dismissal

1.86. The basis for the Claimant's employment coming to an end was the Respondent being awarded the QCHA Contract and refusing to accept that the Claimant was part of the organised

grouping. Accordingly, the Claimant was dismissed [**Page 91 of the Claimant's Bundle]** on or after 1 July 2016.

1.87. Alpine is technically speaking an "active" company as it is not insolvent; however, there has been no activity or trading since the QCHA service transferred to McDermott on 30 June 2016. It is lying dormant. There is no intention for the company to trade again and it will eventually be wound up. The Claimant has not received a weekly wage since the QCHA Contract was lost. These financial facts show that the Claimant was assigned to the organised grouping that transferred and the consequence of him not being permitted to transfer is that there was no work for him to do.

Conclusion of Part 2

1.88. On the basis of the evidence and the supporting case law, it is our submission that the Tribunal should find that the Claimant was part of the organised grouping which had as its principal purpose the carrying out of the activities on behalf of QCHA.

3. Credibility of witnesses

3.1. Finally, I would like to take this opportunity to comment upon the credibility and reliability of witness evidence heard by the Tribunal. On behalf of the Claimant, the Tribunal heard from the Claimant himself and from two witnesses who were able to give first hand evidence. Neither of the Respondent's witnesses offered first hand evidence. I would ask the Tribunal to find the witnesses for the Claimant to be credible, reliable, consistent and supported by the documents.

3.2. It is not accepted that the Claimant "filtered" his evidence or was "*at pains to attempt to portray the Respondent in a bad light, making reference to matters that were irrelevant to the issues before the Tribunal*". The Claimant was asked about protective gear and the entity that owned the safety equipment that was provided to the squads. The Claimant's comments about the injury sustained by David Clark as a result of not wearing safety glasses was made in that context.

3.3. The Claimant's evidence was not reluctant. The Claimant was in an unfamiliar environment, he felt understandably anxious and his state of health with discussed on more than one occasion. Any perceived reluctance was not intentional. There were occasions when the Claimant did not understand what was being asked or the relevance of what was being asked, however, raising this did not demonstrate any reluctance. Where the purpose of a hearing is to determine complex legal issues, it is understandable that the Claimant, or indeed any witness, as a lay person, cannot be certain when giving evidence what is relevant to those complex legal issues.

3.4. On the other hand, the Respondent's perceived efforts to discredit the Claimant's witnesses with irrelevant questioning was interrupted by Employment Judge Garvie. The Claimant's second witness, William Melvin, was asked about his personal relationship with the Claimant instead of his working one.

3.5. Where there is any conflict between the version of events of the Claimant and the Respondent's witnesses, the Tribunal is invited to accept the evidence of the witnesses for the Claimant.

The claimant also provide the following list of authorities:-

Part 1 : Was the Claimant an employee of Alpine Ground Services Limited?

1. Employment Rights Act 1996, Sections 27 & 221

2. Transfer of Undertakings (Protection of Employment) Regulations 2006, Regulation 2(1)

3. Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 Q.B.497

4. Fleming v Secretary of State for Trade & Industry [1997] IRLR 682

5. Johnson v Ryon & ors [2000] ICR 236

6. Percy v Church of Scotland Board of National Mission [2006] ICR 134

7. Nesbitt & anor v Secretary of State for Trade & Industry [2007] IRLR 847

8. Clark v Clark Construction Initiatives Ltd [2008] IRLR 364

9. Secretary of State for Business Enterprise and Regulatory Reform v Neufeld [2009 IRLR 475

10. Commissioners for HM Revenue and Customs v PA Holdings Ltd [2011] EWCA Civ 1414

11. Department for Employment and Learning v Morgan [2016] NICA 2, [2016] IRLR 350

Part 2: Was the Claimant assigned to the organised grouping?

12. Transfer of Undertakings (Protection of Employment) Regulation 2006, Regulations 3 & 4(3)

13. Botzen v Rotterdamesche Droogdok Maatschappij BV 186/83 [1985] ICR 519, [1986] 2 CMLR 50

14. Duncan Web Offset (Maidstone) Ltd v Cooper & ors [1995] IRLR 633, EAT.

15. Williams v Advance Cleaning Services Ltd and another UKEAT.0838/04/DA

16. Hunt v Storm Communications Case No. 2702546/2006

17. Argyll Coastal Services v Stirling UKEATS/0012/11

18. Edinburgh Home-Link Partnership & ors v City of Edinburgh Council & ors EATS/0061/11

19. London Borough of Hillingdon v Gormanley & ors EAT 0169/15

20. Amaryllis Ltd v McLeod UKEAT/0273/15/RN

Respondent`s Submissions

1. These are the written submissions for the Respondent following the Final Hearing which took place at the Glasgow

Tribunal office on 24 and 25 May 2017. In line with the directions of the Tribunal at the conclusion of that Hearing, these submissions do not seek to rehearse the evidence which was adduced by both parties, save as to identify matters of dispute that may be of relevance to the issues, and to identify those features of the evidence which the Respondent considers to be relevant in support of its submissions. In these submissions the documents produced will be referred to as either **C*x*** or **R*x*** to reflect whether they were produced in the Claimant's or Respondent's bundle respectively. Queens Cross Housing Association will be referred to as "QCHA". Brief comments in response to the Claimant's submissions are contained at the very end of these submissions.

2. As identified at the outset of the Preliminary Hearing (and in previous case management discussions) there are two issues before the Tribunal:

   (i) whether the Claimant was, at the point of the relevant transfer on 1 July 2016 to the Respondent, an employee.

   (ii) if the answer to the first issue is yes, whether the Claimant was wholly or mainly assigned to the undertaking that transferred to the Respondent.

Observations on the Evidence

3. In large part there were few disputed issues of fact and the evidence was, in the main, consistent as between the witnesses. It is submitted that any conflict in the evidence on any matter material should be resolved by preferring the evidence of the Respondent's witnesses, Mr Harvey and Mr

Clark. Both gave their evidence in a clear and straightforward manner. They made concessions where appropriate. The Claimant gave his evidence generally in a straightforward manner, and was clearly a man who took a pride in the work he had done for over 25 years; however there were some features of his evidence which detract from its reliability in places. There were occasions where his high personal standards of working were transferred into the very nature of the services provided to QCHA itself. He appeared at pains to attempt to portray the Respondent in a bad light, making reference to matters that were irrelevant to the issues before the Tribunal. On at least two occasions in evidence he made reference to an apparent injury sustained by David Clark in the days prior to the Hearing as having some bearing on matters, apparently offering a view of the Respondent as a shoddy operator. He also offered the view that, post transfer, the QCHA contract had "*gone to rack and ruin*". The Tribunal might consider, therefore, that there was some filtering of aspects of his evidence to that end. On the matter of the details and arrangements in respect of the incorporation of his two companies (Alpine Garden Services and Alpine Ground Services), and in respect of matters in respect of his own tax affairs and the mechanics of his payments and drawings from the companies, his evidence on this, which was not covered in any way during his examination in chief, initially was reluctant in nature (having been directed on more than one occasion to answer the question being asked) and thereafter vague in content, with little insight provided beyond the indication that matters were done by, or done as a consequence of the advice of, his accountant. The amount of insight that the Claimant was able to provide to the full circumstances around his business structures to the Tribunal was not what one might have expected.

4. The question of the frequency of the Claimant's presence on site, was the subject to of some dispute in that Mr Clark rarely had occasion to see the Claimant, even when attending morning muster meetings in the bothy in Maryhill. It is accepted that this matter might well be one of subjective perception on the part of Mr Clark as opposed to hard fact; however, it does bear upon the disputed evidence as to what was said by the Claimant to Mr Harvey at the meeting they had pre transfer on 17 May 2016 as to the degree of management and oversight he performed in the running of the service contract. Mr Harvey distinctly recollected the phrase "light touch" being used by the Claimant and that he identified two workers, Mr Clark and Mr Jackson, who 'ran the contract'. This recollection is supported by the fact that in his short contemporaneous note at ***R10*** Mr Harvey has recorded the names of Cyril Ross, David Clark and John Jackson in bullet points. Clearly their names were discussed. Whilst Mr Clark did not consider himself to be in a distinctly supervisory role prior to transfer to the Respondent, it is not disputed that he had been promoted to chargehand by the Claimant prior to the transfer. The Tribunal can conclude that the Claimant did represent that his management was "light touch" during this discussion. This is also supported by the observations considered later under the question of whether the Claimant was assigned to the undertaking. Other factual matters of significance are referred to within the substance of the submissions below.

(i) Whether the Claimant was an Employee

5. The relevant definition of employee is found in **Regulation 2(1) TUPE 2006** as being "*any individual who works for another person whether under a contract of service or*

apprenticeship or otherwise but does not include anyone who provides services under a contract for services".

6. The approach to determining whether one is employed under a contract of service has been the subject of much discussion by the Courts. Whilst there might be thought to be a great deal of good sense in the 'economic reality test' expressed by asking '*is the person who has engaged himself to perform these services performing them as a person in business on his own account?*, the law has moved on to emphasise that no one factor is determinative – **O'Kelly v Trusthouse Forte plc** [1983] ICR 728 *per* Sir John Donaldson MR at 762C-G, which traces back the classic approach of McKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance** [1968] 2 QBD 497 at 515C-D. More recently, the UK Supreme Court has emphasised that the task of the Tribunal is to consider the true nature of the arrangement between the worker and the master to determine whether there is a contract of employment in **Autoclenz v Belcher** [2011] ICR 1157, which can include looking behind the *ex facie* terms of any written terms of engagement to determine the true agreement between the parties (*per* Lord Clark of Stone-cum-Ebony at paragraphs 22, 23, 29 & 35).

7. In the Respondent's submission the pretended contract of employment produced at ***C49***(***R14***) does not reflect the true agreement, or relationship between the parties. Whilst the Supreme Court in **Autoclenz** shied away from the stark use of the word 'sham', in particular because it could lure a Tribunal into examining the subjective intentions of the parties to deceive or misrepresent an arrangement, it is clear that the agreement between the Claimant and his company Alpine Grounds Services Ltd did not reflect the true nature of their

engagement or legal relationship as a matter of fact, having regard to all the facts and circumstances. In particular the Respondent relies upon the following in support of its submission:

(i) The Claimant had operated in largely the same manner (albeit in smaller scale) as a sole trader paying tax on a self-employed basis from 1990 until at least 1996. His time as a sole trader also included employing other workers including Mr Cyril Ross. The operation of the contract under Alpine Ground Services essentially involved the Claimant operating in the same way.

(ii) The Claimant's first written contract of employment, produced at ***C49*** and ***R14***, only arose towards the start of the 2014/2015 financial year, and was at a time when the prospect of re-tendering for the contract would be appearing on the far horizon.

(iii) The Claimant confirmed that the reasoning behind issuing a contract of employment was understood by him to be a suggestion on the part of his accountant as a vehicle for tax efficiency.

(iv) The pretended contract asserted employee status as from 1 April 1990. This was factually wrong given the evidence that the Claimant operated as a self-employed trader for at least six years from 1990. Whilst it is arguable for parties to give credit for prior service in their contractual dealings, that is different from the question of the extent to which such a contract truly reflects the situation on the ground as a matter of fact.

Clause 1 of the contract on its face is factually misleading in respect of employment status.

(v) The substantial part of the Claimant's remuneration under this pretended contract was not subject to payroll PAYE deductions. £10,000 was paid as salary through a payroll operated by the Claimant's accountants, which deducted both tax and employee's NI contributions. The remaining £44,000 per annum was drawn as a dividend on a less frequent basis by the Claimant through internet banking (as the company's director and controlling shareholder) – see ***R9***. The Claimant was unable to clarify his accounting of this remaining sum for tax and national insurance, albeit it would stand to reason that employee NI contributions would not ordinarily be taken from dividend income.

(vi) This points to a broader issue in respect of the Claimant's drawings of dividends, and in the Respondent's submission demonstrates a conflation as between his role as an owner outright, or thereafter 80% owner of the business lying at the heart of the Claimant's business arrangements in respect of performing the QCHA contract. From the evidence heard by the Tribunal there was no real distinction between the concept of the company Alpine Grounds Services as a distinct legal personality and the Claimant as a sole trader. The only other Director, Mrs McGarry, played no part in the business at all. His son, who acquired a 20% holding of ordinary shares in Alpine Ground Services in 2014 played no part in the business. By the stage of around 2010 onwards the Claimant was doing no manual work on sites. His place

of work, in contrast with those who worked on site, was his home in Bearsden (see ***C49/R14*** Clause 8), where he had a home office. His remuneration for the tasks he undertook was substantially drawn as profit from a business which was, with the exception of the North Lanarkshire Housing Association contract for a period of time, servicing a single contract. Whilst the Court of Appeal in **Sec of State for Business Enterprise and Regulatory Reform v Neufeld** [2009] ICR 1183 has gone so far as to suggest that the question of the existence of a controlling shareholding on employee status is 'ordinarily irrelevant', the Inner House of the Court of Session has not inclined to that view. In the old tax case of **Eyres v Finnieston Engineering Company Ltd** [1916] 7 TC 74 the First Division considered, in the context of allowable deductions from company profits, that a dividend payment could not amount to remuneration for services. Whilst that conclusion strains against the developments of the case law in respect of employment status as it has developed in modern times, the First Division in 1997 (chaired by Lord Rodger with the Opinion of the Court delivered by Lord Coulsfield) remained of the view that a majority shareholding in a company was a relevant consideration in determining whether that person was an employee in **Fleming v Secretary of State for Trade and Industry** 1998 SC 8 at 12E-13B, albeit the Court stressed that the significance of that fact was a matter for the Tribunal. **Fleming** remains good law and is, it is submitted, binding on this Tribunal.

(vii) The Claimant was subject to the control of no individual. He was his own master. Whilst the Respondent accepts

that modern case law has permitted outright owners of companies to successfully assert employee status, it does not follow that the absence of control as a feature of the case becomes irrelevant. Where the absence of control might be the only contra-indicator of employment status, with all other matters pointing towards employment, then it will usually not prevent a conclusion of employment status; however that is not the case in the claim before this Tribunal, where the absence of control features as one of several other significant contra-indicators to employment status.

8. For the reasons outlined above the Respondent submits the Tribunal should find that the Claimant was not an employee. His pretended contract of employment, prepared in 2014 only, and his earlier business modelling of incorporating into limited companies, appears only to have been used as a vehicle for the efficiencies of the Claimant's own finances. The Claimant's approach in evidence appeared to be little more than to point to this pretended contract of employment, the fact that £10,000 of his £54,000 annual remuneration was paid through a payroll system subject to PAYE deductions of income tax and NI, and the P60s that were prepared as a result of that. He accepted the proposition put to him in cross-examination that when one spoke of Alpine Grounds Services Limited, in reality that meant him. In answer to a question from the Tribunal as to who owned the machinery, the Claimant's response was "*I own it, or the company does*". Mr Ross, when questioned as to his understanding of the position of 'who his employer was' considered he was "*always employed by Mr McGarry*". Whilst these are two small pieces of the overall evidence, and not to be considered as determining matters on their own, they are eloquent of the true position in respect of

this matter. The Tribunal is moved to conclude that the Claimant was not an employee and dismiss the claim.

Illegality?

9. The Tribunal raised the issue of potential illegal performance during the hearing, in particular having regard to the tension between the terms as stated in the Claimant's pretended contract in respect of remuneration and the fact that a proportion of this was drawn as salary and the remainder as dividend income. Two issues raised by the Tribunal related to the accounting of sums for the purpose of national insurance on this approach, and any question of illegality arising from the fact that on the basis of payment of salary of £10,000 per annum for work of 30 hours per week would fall considerably short of the minimum wage.

10. The Claimant is, in effect, both parties to his pretended contract and the Respondent has no insight into his tax affairs beyond what he presented to the Tribunal in evidence at the hearing. It would appear that any question of illegality that may arise would be in respect of performance of an otherwise legitimate contract as opposed to a contract itself being illegal. In general terms performance of a contract of employment (it is of course disputed the Claimant was engaged under a contract of employment) in respect of matters of accounting to the revenue in a tax efficient way is illegal where there are misrepresentations made by the parties expressly or impliedly as to the facts – see **Enfield Technical Services v Payne** [2008] ICR 1423 *per* Pill LJ at paragraphs [26]-[29]. The Respondent does not have any insight from the evidence provided by the Claimant as to how these matters might be accounted by him to HMRC, and what information in respect

of his arrangements is provided to them. The Respondent contends that this vague evidence works against the Claimant in the analysis of the merits of his assertion that he is truly an employee, but the Respondent does not consider itself to be in a position responsibly to make any submission to the effect that there has been a misrepresentation giving rise to illegality in this case. The Tribunal may wish to consider, if it is perturbed by the Claimant's arrangements in respect of tax and national insurance as exemplified in evidence and any submissions made, referring the matter to HMRC; however the Respondent does not consider itself to be in a position to assert a view either way.

11. In respect of the question of national minimum wage compliance, the Respondent would note that payment as a dividend is not expressly excluded from a worker's remuneration in terms of **Regulation 10** of the **National Minimum Wage Regulations 2015**, and the Respondent would note the apparent loosening of approach by the Inner House to the treatment of dividend payment as being distinct and exclusive from remuneration from services discussed above. In addition, a similar argument was given short shrift by the Northern Ireland Court of Appeal in the **Department for Employment and Learning v Morgan** [2016] NICA 2 at paragraph [26]. The Respondent would prefer to rest on the position that these discrepancies and features of the Claimant's arrangement point towards sham employment as opposed to any question of unlawful performance of a contract of employment.

(ii) Assigned to the Undertaking?

12. In the event the Tribunal concludes that the Claimant was an employee immediately prior to the transfer of 1 July 2016, the question would yet arise whether he was assigned to the organised grouping of resources or employees subject to the relevant transfer (**Regulation 4(1) TUPE 2006**). It is not disputed that the successful award of the tender by QCHA to the Respondent amounts to a service provision change in terms of **Regulation 3(1)(b) TUPE**. A recurrent feature of the terms of the Regulation 3 as to service change is to the activities performed '*on behalf of the client*'. The '*service*', it is submitted, is determined not by the contractor but by those activities done by the contractor on the client's behalf. This distinction was emphasised by Lady Smith in the case of **Edinburgh Home-Link Partnership v City of Edinburgh Council** UKEATS/0061/11/BI at paragraph [41], and at [42] where it was stated:-

> "...*the fact that a causal chain can be shown does not determine the issue. Rather, the question is: was the particular employee, prior to the transfer, assigned to the organised grouping of employees which was organised to have as its principal purpose the carrying out of the activities for which the client contracted, on the client's behalf?*"

13. The issue of what matters comprised the service to QCHA is of considerable importance to this question. It did not appear to be disputed in the evidence that the work that was done immediately prior to the transfer was as set out in the Specification schedule for the tender found at ***R89-90***. The Claimant accepted that proposition in cross-examination. Mr

Harvey was asked directly by the Employment Judge what he considered the services to be, and he referred to the same document. There was no evidence to suggest that any form of detailed checking of work formed part of the activities to be performed on behalf of the client, QCHA, as opposed to for Alpine Grounds Services own purposes, namely to ensure that it was performing its contractual obligations with QCHA. The question of Alpine, or the Claimant individually, satisfying itself as to the work done is distinct from the doing of the work. Quality checks ensure that the contract is running smoothly, but bear upon the question of relations between the two contracting parties and maintaining the confidence of the client. To that extent they are part of the corporate or business relations of Alpine, and not of the activities done on the client's behalf. Monitoring of staff attendance has some bearing upon the delivery of the service to the client, but it also bears upon the individual employment relationships between Alpine and its employees. At the end of the day what needed to be done was to deliver relatively uncomplicated gardening services again and again in a cycle of maintenance for the housing stock of QCHA, together with some reaction to unforeseen maintenance needs that would usually be weather-related. Whilst the Respondent does not dispute that the Claimant did perform the quality checks that he did, and that he considered them to be important, that was not what was contracted for by the client. There is no evidence, beyond the Claimant's own views and particular pride in his work, to suggest that they were.

14. It is submitted that all the Claimant has demonstrated is a causal link between his work activities and the service. He has failed to go beyond that to demonstrate assignment to those employees performing the activities detailed in ***R89-90***.

The phrase oft repeated in the hearing was that the Claimant performed work 'integral to the service'. First of all, that is not the test contained in the Regulations, but second of all it overstates the Claimant's role in day-to-day delivery of services. The suggestion that the squads would simply not know what to do on a day-to-day basis unless specifically advised by the Claimant should not be accepted for the following reasons:-

(i) there was a list of properties provided by QCHA (per Mr Ross's evidence) to be serviced in terms of the contract;

(ii) the duties required were consistent for each visit, depending only upon the time of year to determine frequency of visits and nature of tasks to be done, and set out in the tender documentation;

(iii) Mr Ross appeared to be the everyday point of contact for matters on the ground, either between QCHA or Alpine's employees, and had a work mobile telephone (which he had had for a number of years) to that end. The Claimant would only become involved for more complicated matters.

(iv) the nature of the tasks to be done was general gardening tasks no different from what might be contracted by an individual homeowner. As Mr Clark said in evidence, the matter about knowing what needed to be done on site was "*not rocket science*".

(v) the squads apparently were able to perform their duties appropriately on the occasions when the Claimant was away on holiday.

(vi) checking of work done formed an aspect of the squad supervisor/chargehand's role on site – who were paid significantly lower rates that an annual salary of £54,000 (see table at ***R1-8***, in particular hourly rates at ***R3***).

(vii) the time spent by the Respondent on quality checking work (as a matter of good practice as opposed to contractual obligation to QCHA) was estimated as being amounting to 4-5 man-days per month, or 28 – 35 hours per month by Mr Harvey in evidence, as opposed to the 30 hours per week asserted by the Claimant

(viii) the Claimant spent no time performing any of the manual gardening tasks on site.

15. The Tribunal should therefore reject the contention that quality checking formed part of the services done on behalf of QCHA, and reject the contention that those services could not be performed without the daily involvement of the Claimant. The squads operated to a routine and received ordinary supervision from the chargehands and foreman, who all transferred to the Respondent. The Claimant has failed to demonstrate that he was wholly or mainly assigned to the organised grouping that transferred and accordingly his claim should be dismissed for that reason, if the Tribunal considers the Claimant was an employee.

16. Were the Tribunal to conclude that the Claimant was assigned to the organised grouping that transferred, the Tribunal should assign a remedies hearing.

Comments in Response to the Claimant's Submissions

17. It is readily accepted that there is no dispute as to the existence of an organised grouping relating to the work tendered for QCHA. The Respondent would stress that the focus of the definition of who comprised that group must be done by reference to the specific services contracted for. The Claimant appears to have made no attempt to provide a definition of the services that were to be provided in the analysis of his claim other than by passing reference to the QCHA contract as a whole, and speculation at paragraph 2.28 of his submissions that because there are monthly meetings between QCHA and the service provider, it must follow that the Claimant's own methods of quality assurance are written into the service contract. The evidence in the case does not support that contention. The Tribunal has the Respondent's submissions that all the Claimant has done is demonstrate a causal link between what he did and the service that transferred. That is insufficient. The Claimant's submissions get close to suggesting that every employee of a company engaged on work under a single contract must transfer under TUPE (they certainly make no attempt to draw a defining line between those cases where all employees should transfer, and those where they do not). That is not the law.

18. The Claimant relies upon a number of apparent concessions made by the Respondent's Andrew Harvey in cross-examination to support its claim at paragraphs 2.21-2.26 of his submissions. Those concessions carry little if any weight to

the determination of the questions before the Tribunal. It is of note that the Claimant makes no comment upon (and presumably no challenge to) Mr Harvey's evidence as to the amount of man hours spent overseeing the QCHA contract. The Tribunal has the Respondent's submissions in respect of what it describes as exaggeration on this point.

19. Whilst the Claimant is correct to observe at paragraph 2.41 of his submissions that the relevant time to determine assignation to the grouping is immediately prior to the transfer, it would be wrong to suggest that past facts and circumstances that cast light upon the nature of the Claimant's engagement (employee or other) as at immediately prior to the transfer are somehow irrelevant. Such a proposition is incompatible with **Autoclenz**.

Further Hearing on 17 August 2017

61. The parties were informed that the Judge required further submissions from them in relation to sections 7 and 8 of the respondent's bundle, in particular at pages 52-54 and 54-57. The pages at 52-53 are a letter from P & D Scotland Limited about the claimant and an Extract from an Agreement between them and AGSL regarding, "Consortium". Pages 54-57 are marked, "Initial Notes" for Queen's Cross Tender. The representatives' initial reaction appeared to be that they had nothing to add to their original submissions. They were informed that a further Hearing date would be added so that the Tribunal could be addressed on this documentation and in particular to clarify why there is reference to the claimant as being the Contracts Manager.

Claimant's Additional Submission

This documentation relates back to 2012 when there were apparently eight separate contractors for QCHA. There was a consortium in place for four years to run through to 2016 when the present tender was issued which was then awarded to the respondent. The leading member of that consortium was P & D Scotland Limited. AGSL were the grounds maintenance contractor and occasionally there was additional work done and P & D would be paid a management fee. Page 52 was the agreement in place with AGSL. Pages 54-55 was the 2012 tender and at section 6, (page 55) there is reference to a "Contractor must appoint contract Manager who can not be dismissed without client approval", this being a reference to the claimant. The next bullet point goes on to state:-

"Tupe equally applies to you if appointed"

Page 56 is an extract from the contract. Section 30 is headed, "Contracts Manager" and lists "The general duties" at subsection 30.2 and "The specific duties" at subsection 30.3.

It was suggested that the representatives might want to take their client's instructions and so a short adjournment was held. On reconvening Mr Hay explained that Mr Harvey was not available. Mr Hay then addressed the Tribunal.

Respondent's Additional Submission

The respondent does not dispute the involvement of P & D Scotland in the 2012 contract which was awarded to them and included AGSL.

The 2016 tender involved the documentation set out at page 73 onwards of the respondent's bundle. Mr Hay directed attention to page 78 and the section entitled, "TRANSFER OF UNDERTAKINGS (PROTECTION OF

EMPLOYMENT) 2006 (TUPE). This explains that QCHA currently had what is described as a "Term Maintenance Contract" with a contractor to provide repairs and maintenance and this is followed by more information about Tupe and its applicability but points out that tenderers were advised to seek independent legal advice.

The respondent's understanding was that the claimant performed the function of Contracts Manager, described at page 56. In Mr Hay's submission, the Tribunal had heard what the claimant said were his duties and also from Mr Harvey as to what he now does. In Mr Hay's submission these were of a "high level" and were each in relation to the contract given to AGSL in 2012 and then in the 2016 contract to the respondent.

Mr Hay accepted that these were in effect the general administration of the contract. Mr Hay referred next to Section 30.2, 30.3 and at 30.5, (page 56) where it is stated that:-

> "30.5 The Contracts Manager shall:
>
> 30.5.1 have full authority to act on behalf of the Service Provider for all purposes in connection with this Agreement; and
>
> 30.5.2 not be removed or replaced without the prior written consent of the Client".

In his submission, this then takes it back to there being a broad oversight involved. Section 30.2 sets out in vague general terms the duties of the Contract Manager. Section 30.2.2 indicates there is to be liaison with the client's representative, that is the QCHA representative. The Tribunal heard evidence from the claimant and Mr Harvey on this aspect. It was Mr Hay's submission that Mr Ross dealt with routine matters but those of a more complex nature were referred to the claimant. Next, Section 30.2.3 refers to Health and Safety and, in his submission, this relates to staff of AGSL and

its requirement in relation to statutory compliance. Again, Mr Hay emphasized that there is high level organisation involved. He referred to Section 30.2.4 which states:-

> "30.2.4 to maintain administrative audit and Quality Management and Assurance systems."

This relates to the management of the contract and the Quality standards.

Turning to the 2016 tender, there is no specification of a prescribed standard of work so it is not enough to draw on the element of Quality Standards. Section 30.3 is a broad point but goes to support Mr Hay's contention that there was a high level of administration involved rather than the delivery of the service which is what the tender specifies. In his submission, the is no specification as to the quality of the service and there was no requirement to have a Contracts Manager at all.

Mr Harvey's evidence was that what he is doing relates to the high level of administration of the contract with QCHA. As the Tribunal understood it, Mr Hay submits that Mr Harvey's involvement is in running the contract for QCHA.

In reply, Ms Graydon submitted that Mr Harvey gave evidence as to his overall management of the contract and his liaison with QCHA.

Mr Hay submitted that the role of a Contracts Manager was not being tuped over as it was not part of the service that was tendered for by the parties.

Ms Graydon in reply, again submitted that what the claimant was doing was work on the job for QCHA and that he was an integral part of the service provided to QCHA.

Relevant Law

62. Regulation 2(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is defined as follows:-

> "Any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services."

63. Regulation 3(2) is defined as follows:-

> "In this regulation "economic entity" means an organized grouping of resources which has the objective or pursuing an economic activity, whether or nor that activity is central or ancillary.

Observations on the Witnesses

64. The Tribunal has little comment to make on the evidence given by the witnesses. It does note, however, that the claimant did not always appear to understand the purpose of some of the questions asked of him. It was apparent that Mr Clarke saw relatively little of the claimant while employed by AGSL as he was mainly working on duties away from the two squads. Mr Clarke is now a Foreman with the respondent but he was not so employed by AGSL although he was paid at the same rate of pay as their two Foremen. Mr Melvin transferred to the respondent with effect from 1 July 2016. He asked not to continue working over the winter and was informed that the respondent would contact him if he was required the following spring, that is in 2017. He has not been contacted by them.

65. The claimant seemed to have very specific views as to how the QCHA contract is now operated by the respondent although it was not entirely clear how he would have known this. Against that, Mr Harvey was clear that QCHA are pleased with the way the work is being carried out now and

going forward they might reduce the number of meetings they will have with his company.

Deliberation & Determination

66. The first issue for determination is whether the claimant was an employee. As indicated, there was reference to the definition in Regulation 2(1) of TUPE 2006.

67. The Tribunal gave careful consideration to all that was said on behalf of both the claimant and the respondent. It noted that the claimant appeared to have operated in the same way as a sole trader on a self employed basis from 1990 until about 1996 at which time he seems to have started to employ other staff, including Mr Ross. It was around then that the first company was incorporated as Alpine Garden Services. Subsequently, Alpine Ground Services Limited, (AGSL) was established in early 2010.

68. The Tribunal noted that the claimant`s first written contract appears only to have been provided in 2014. It was suggested by the respondent that this may have been at a time when a prospective re-tendering for the QCHA contract was “on the far horizon”.

69. It was suggested that the claimant had been an employee since 1 April 1990 but that does not fit with the claimant accepting that he had been self employed for a period of about 6 years from 1990. The respondent suggested that this was misleading in relation to clause 1 of the claimant`s written terms and conditions produced at C49 and R14.

70. It was suggested by the respondent that there was a conflation between the claimant`s role as an owner or 80% owner of the business, AGSL after his son and wife became involved in AGSL, at least in relation to his wife being named as Secretary in the claimant’s Schedule of Particulars. Her signature

appears against the words, "Employer's signature) and after the signature the word, in brackets, "(Secretary) appears, (page C49).

71. The claimant`s son acquired a 20% holding in the shares in 2014, albeit he did not play any part in the running of the business. It is not clear on what basis the claimant's wife is stated to be the "Employer" since the Schedule refers only to the company as "AGS" and not "AGSL" which is the heading on that Schedule. Importantly, it was not suggested by the claimant in his evidence that there was a Board of Directors to whom he reported. The Tribunal did not understand Mrs McGarry to have taken any part in the day to day running of AGSL.

72. Another significant factor was that the duties set out in relation to what it was suggested were the duties undertaken by the claimant appear only to have been set out in writing during the course of the negotiations with the respondent, (page C77). This mirrors to a large extent what is said in the letter from the claimant's representative dated 8 June 2016 to Mr Harvey, (pages C77 and C78). In contrast, much less is specified in the claimant's Schedule of Particulars at C49.

73. It is not in dispute that the claimant was doing no manual work on the sites and that he had a home office in his house in Bearsden. The Tribunal noted that the respondent pointed out that the claimant`s remuneration was from a business which had, with the exception of a period when Shettleston Housing Association was a client, the servicing of a single contract, namely QCHA.

74. The Tribunal noted the reference to ***Secretary of State for Business Enterprise and Regulatory Reform v Neufeld*** [2009] ICR 1143 where it was submitted that the decision in ***Fleming v Secretary of State for Trade & Industry*** [1998] SC 8 at 12E/13B was significant in relation to a majority shareholding in a company being a relevant consideration in determining whether that person was an employee. In this case, there was no indication

that the claimant had a responsibility to report to the board of AGSL. Only the claimant and his wife had any involvement and there was no suggestion that the claimant's wife participated in the running of AGSL. This is perhaps explained by the fact that AGSL held the contract for the gardening services to QCHA for a very long time indeed. As indicated above, the only other client had been another housing association but that business relationship appears to have lapsed at least some years ago.

75. In reaching a determination on the issue of employment status the Tribunal considered that it was significant that there was no control over the claimant.

76. Instead, it was submitted that the claimant was not subject to the control of any individual but was "*his own master*" and so the absence of control was a significant contra-indicator to employment status.

77. In addition, reference was made to the claimant`s drawing of his income primarily by way of dividends and that the issuing of the Statement of terms of employment may have been provided as a vehicle for tax efficiency.

78. The Tribunal also noted that, so far as the respondent was concerned, the claimant`s approach in his evidence appeared to point to a "*pretended contract of employment*" with the fact that only £10,000 of his £54,000 annual remuneration was paid through payroll and so subject to PAYE deductions of income tax and national insurance. The claimant also accepted that any reference to AGSL was in reality to "*him*". He also accepted that he owned some of the machinery and equipment used to carry out the contract for QCHA.

79. The Tribunal noted that it was suggested that the claimant`s arrangements in relation to income tax and national insurance was vague evidence which worked against the claimant in his assertion that he was truly an employee but the respondent did not suggest that there was any illegality involved.

80. Reference was made to the issue of national minimum wage compliance and that payment of a dividend is not expressly excluded from a worker's remuneration in terms of Regulation 10 of National Minimum Wage Regulations 2015. It was pointed out that there has been a loosening of approach taken by the Inner House in relation to the treatment of dividend payments. Reference was also made to the Northern Ireland Court of Appeal's judgment in ***The Department for Employment & Learning v Morgan*** [2016] NICA 2 at paragraph 26.

81. The respondent`s position was that this was a sham contract of employment rather than an unlawful performance of a contract of employment.

82. Against this, it was submitted for the claimant that AGSL had held the contract with QCHA for 25 years. It was submitted that the present circumstances could be distinguished from ***O`Kelly v Trusthouse Forte Plc*** [1983] ICR 728.

83. it was also submitted that the decision of the Supreme Court in ***Autoclenz v Belcher*** [2011] ICR 1157 could be distinguished since the claimant`s contract reflected the reality of what happened.

84. Reference was also made to the weekly payslips and that income tax was deducted while the fact that the claimant no longer paid national insurance was due to his age as he had already reached state pension age.

85. There was also reference to the P60 forms, the method of remuneration and that dividend payments are simply another form of remuneration for the claimant`s employment.

86. The Tribunal noted Ms Graydon's submission that while the decision of the Northern Ireland Court of Appeal in ***The Department for Employment & Learning***, (see above) is not binding the likeness of its facts gives it reliable and persuasive weight in this case.

87. In relation to minimum wage and illegality, the Tribunal noted that issue was not taken by the respondent nor does the respondent suggest that the claimant's contract was tainted by illegality.

88. Expenses recovered by the claimant for business travel were said to be as an employee. It was submitted that it is not inconsistent for the claimant to be a Director and majority shareholder of a AGSL whilst also being an employee.

89. The Tribunal noted that in ***Fleming v Secretary of State for Trade & Industry*** [1997] IRLR 682 the Court of Session held that the existence of a controlling interest where a Managing Director owned 65% of the shares was relevant but not decisive. At paragraph 12 it said this:-

> "*We are not, however, convinced that it would be proper to lay down any rule of law to the effect that the fact that a person is a majority shareholder necessarily and in all circumstances implies that that person cannot be regarded as an employee, for the purposes of the employment protection legislation*."

90. The Tribunal also noted the reference to ***Johnson v Ryan & Ors*** [2000] ICR 236, ***Percy v Church of Scotland Board of National Mission*** [2006] ICR 134, ***Nesbitt & anor –v- Secretary of State for Trade & Industry*** [2007] IRLR 847 as well as the guidance provided in ***Clark v Clark Construction Initiatives Ltd*** [2008] IRLR 364 and the guidance provided by the then Mr Justice Elias at paragraph 98 and the items set out at points 1 to in the claimant`s submission at page 8 of those submissions.

91. The Tribunal further noted the points set out by the respondent in relation to the ***Secretary of State for Business Enterprise & Regulatory Reform v Neufeld***, (see above).

92. Having given careful consideration to all that was said by the claimant and the respondent in relation to whether the claimant was an employee the Tribunal concluded that the absence of any control over the claimant in that he did not have to report to, for example, a Board of Directors but was an 80% shareholder in AGSL and indeed remains the majority shareholder in that company is significant. The Tribunal concluded that the absence of any control over the claimant militates against his being an employee rather than a Director and majority shareholder of AGSL. It was apparent from the claimant's own evidence that during the discussions with Mr Harvey he very much downplayed his day to day involvement in the running of the service provided by AGSL to QCHA. This was perhaps understandable in that the claimant wanted to secure the transfer of the two squads of men and their immediate supervisors to the respondent. On the issue of his direct involvement in the contract the Tribunal concluded that it was apparent that the claimant was very heavily vested in that contract which had been held with QCHA for a very long time. The claimant had considerable pride in the way the contract was operated and must have had high standards as to what was done in terms of the gardening service that was paid for by QCHA. However, the Tribunal formed the view that the claimant saw himself and AGSL as effectively being inter-changeable. He seemed to see himself and AGSL as being one and the same. Perhaps as the principal owner of a very small company whose ongoing existence was vested in a single contract that was understandable but it does not help in lending credence to the argument that the claimant was an employee of AGSL. The Schedule, (C49) is, at best, limited in the information that is set out yet it makes it clear that the claimant enjoyed very considerable benefits that would not normally be provided to most ordinary employees. The job title, Chief Executive Officer, high level of remuneration, lengthy annual leave, generous illness provisions and substantial payment to a pension for the claimant do not lend support to employment status where the claimant was also the majority shareholder and director of the company. It was puzzling that the claimant was to report for duty each day at his home address whereas the claimant's evidence tended to suggest that he reported on

most working days to the Maryhill business premises. In all these circumstances, the Tribunal concluded from the evidence and the documentation that the reality was that the claimant was not an employee of AGSL. As indicated above, the lack of control over the claimant was a strong factor in militating against the claimant being an employee of AGSL. The Tribunal therefore concluded that the claimant was not an employee of AGSL. That being its view it therefore follows that the claim cannot succeed since, absent employment status, the claimant has no basis in law to proceed with the claim that he was part of an organised grouping of employees that transferred on 1 July 2016 to the respondent.

93. However, at the Hearing on 17 August 2017 it was agreed that, in the event the Tribunal were to conclude that the claimant was not an employee of AGSL, the Tribunal should, on an esto or alternative basis go on to consider whether, if it was wrong in its conclusion that the claimant was not an employee but was employed by AGSL, whether he was part of the organised grouping that transferred to the respondent on 1 July 2016.

Esto the claimant was an employee of AGSL was he part of the organised grouping?

94. This issue is set out on an esto basis given the Tribunal has determined that the claimant was not an employee of AGSL and, for the avoidance of doubt, was not an employee of theirs as at 1 July 2016. The relevant regulation is Regulation 3 of the TUPE Regulations as is set out above.

95. It is not in dispute that there was an organised grouping of employees in terms of Regulation 3(2) and that all the employees of AGSL, with the exception of the claimant, were transferred on 1 July 2016 to the respondent.

96. The sole issue for determination is whether the claimant himself was assigned to the grouping and by that "assigned" means assigned other than on a temporary basis.

97. For the claimant, it was submitted that the claimant had worked on the delivery of the service to QCHA for about 25 years prior to the transfer.

98. In relation to assignment, reference was made to ***Botzen v Rotterdamsche Droogdok Maatschappij BV*** 186/83 [1985] ICR 519, [1986] 2 CMLR 50 where the European Court concluded that "*an employment relationship is essentially characterised by the link between the employee and the part of the undertaking of business to which they are assigned to carry out their duties"* (paragraph 15).

99. For the claimant, it was submitted that he was an integral part of the team which delivered the service and he was the Contracts Manager for the delivery of that service.

100. It is relevant to note now that this issue of a Contracts Manager and the reference to it in the respondent's bundle was the reason why the Tribunal required to hear from the representatives on 17 August in order to provide clarification as to why the pages which refer to this were included in that bundle. The Tribunal was grateful to the representatives' attendance on 17 August to address it on this point.

101. It was submitted that it was irrelevant whether or not "*the claimant got his hands dirty*".

102. Reference was made to ***London Borough of Hillingdon v Gormanley & ors*** EAT 0169/14 and it was submitted that the duties highlighted in the claimant`s contract related to the delivery of services.

103. Currently, the respondent`s Mr Harvey is involved in the day to day running of the QCHA contract which the claimant had previously carried out. Mr Harvey also supervises the delivery of the contract on a daily basis which was previously done by the claimant.

104. The Tribunal took into account what was said in relation to the time spent by the claimant in relation to the contract and the reference to the Director in ***Edinburgh Home-Link Partnership & ors v City of Edinburgh Council & ors*** EATS/0061/11 where the Employment Appeal Tribunal held that co-Directors and the sole Director of two contractors were not assigned to the organised grouping because it was not established that the strategic work which they carried out was directed towards the delivery of particular activities. Here, the claimant stated that he was involved in the day to day operation, his work was operational rather than strategic and his role was not directed to the survival and maintenance of AGSL as an entity since there was only one contract and the claimant`s direction was solely to the performance of that contract.

105. The Tribunal also noted the reference to ***Williams v Advance Cleaning Services Ltd and another*** UKEAT/0838/04/DA where being in a managerial or supervisory role is not an automatic bar to being part of the same organised grouping as other more operational employees. There, the individual was found not to be part of the organised grouping because he was removed from the contract but that can be distinguished from the present circumstances. It was submitted that this was not a situation where the Managing Director had a global or group remit and was juggling several contracts: rather there was a single contract which was the sole focus of the business and the claimant was dedicated to carrying out the activities being transferred.

106. It was noted that the principal purpose of an organised grouping must be assessed at the point immediately prior to the change of provider rather than historically.

107. In relation to assignment, the Tribunal noted that the respondent specifically referred ***to Edinburgh Home-Link***, (see above) and the distinction made there by Lady Smith as to activities performed (on behalf of the client) and that the service is determined not by the contractor but by those activities done by the contractor on the client`s behalf. Lady Smith put it thus:-

> *"… the fact that a causal chain can be shown does not determine the issue. Rather, the question is: was the particular employee, prior to the transfer, assigned to the organised grouping of employees which was organised to have as its principal purpose the carrying out of the activities for which the client contracted, on the client`s behalf*?"

108. The respondent pointed out that what comprised the service to QCHA was of considerable importance here. The Tribunal accepted that that is correct. It is accepted that the work that was done immediately prior was as set out in the specification to the tender document at pages R89/90.

109. That was also accepted by the claimant. Mr Harvey also referred to the same document when questioned by the Tribunal.

110. It was not suggested that any form of detailed checking of the gardening work formed part of the work performed for the client as opposed to AGSL doing so for its own purposes. Rather the issue was whether AGSL was performing its contractual obligations for QCHA.

111. It was submitted for the respondent that the question of AGSL or the claimant satisfying itself/himself as to the work being done (the provision of the garden maintenance for QCHA) was distinct from the actual doing of the work.

112.. Quality checks to ensure that the contract was running smoothly rest with the issue of ensuring smooth relations between the two contracting parties and maintaining the confidence of the client, QCHA. To that extent, the respondent submitted they were part of the co-operative business relations of AGSL with QCHA and not activities done on QCHA`s behalf.

113. The monitoring of staff attendance had some bearing in relation to delivery of the service and also in relation to the individual employment relations between AGSL and its employees.

114. What needed to be done was relatively uncomplicated gardening services with a cycle of maintenance of the housing stock/gardens of QCHA and some swift reaction to any unforeseen maintenance which would usually be weather related.

115. The respondent accepted that the claimant did perform quality checks and that he considered them to be important but that was not what he was contracted for by QCHA.

116. The respondent submitted that while there was a causal link between the claimant`s work activities and the service but he had failed to demonstrate assignment to those employees who were performing the activities.

117. It was submitted that the test in the Regulations is not "*integral to the service*" and that the claimant's submission was overstating the claimant`s role in the day to day delivery of the service to QCHA.

118. It was suggested that the squads would not know what to do unless they were told by the claimant. Mr Hay submitted for the respondent that points i to viii should be accepted. These are as follows:-

> *"(i) there was a list of properties provided by QCHA (per Mr Ross's evidence) to be serviced in terms of the contract;*

(ii) the duties required were consistent for each visit, depending only upon the time of year to determine frequency of visits and nature of tasks to be done, and set out in the tender documentation;

(iii) Mr Ross appeared to be the everyday point of contact for matters on the ground, either between QCHA or Alpine's employees, and had a work mobile telephone (which he had had for a number of years) to that end. The Claimant would only become involved for more complicated matters.

(iv) the nature of the tasks to be done was general gardening tasks no different from what might be contracted by an individual homeowner. As Mr Clark said in evidence, the matter about knowing what needed to be done on site was "not rocket science".

(v) the squads apparently were able to perform their duties appropriately on the occasions when the Claimant was away on holiday.

*(vi) checking of work done formed an aspect of the squad supervisor/chargehand's role on site – who were paid significantly lower rates that an annual salary of £54,000 (see table at **R1-8**, in particular hourly rates at **R3**).*

(vii) the time spent by the Respondent on quality checking work (as a matter of good practice as opposed to contractual obligation to QCHA) was estimated as being amounting to 4-5 man-days per month, or 28 – 35 hours per month by Mr Harvey in evidence, as opposed to the 30 hours per week asserted by the Claimant

(viii) the Claimant spent no time performing any of the manual gardening tasks on site."

119. The Tribunal should not accept the contention that quality checking was part of the service done on behalf of QCHA or that these services could not be performed without the claimant`s daily involvement.

120. The squads operated to a routine and received ordinary supervision from the Chargehands and Foremen all of whom transferred to the respondent.

121. It was submitted the claimant had failed to demonstrate that he was wholly or mainly assigned to the organised grouping which transferred and his claim should be dismissed if the Tribunal considered that he was an employee of AGSL.

122. The Tribunal noted that in the past, albeit some very considerable time ago, AGSL or its predecessor had operated a similar grounds maintenance contract for Shettleston Housing Association. For whatever reason, that contract did not continue but at that time there had been two contracts operated by the claimant and the company, whether this was AGSL or its predecessor.

123. The Tribunal concluded that the respondent was correct in their submission that while there was no doubt that the claimant took a great deal to do with the management of the garden maintenance service for QCHA it was not persuaded that the claimant was wholly or mainly assigned to the organised grouping of employees.

124. The Tribunal concluded that it was very clear that the transfer was in relation to the specification schedule set out at the tender document at pages R89/90.

125. While there were other matters dealt with by the claimant in his evidence in relation to management and so forth these were matters which as a Director of AGSL and as the 80% shareholder, he chose to deal with this himself personally.

126. The tender specification is very specific in that it sets out both a summer and winter programme. It spells out exactly what ground works were to be carried out. It was not in dispute that the claimant was never involved in any of these works himself other than on checking the work had been carried out by the squads who worked under supervision.

127. The Tribunal concluded that, while the claimant had clearly taken great pride in the running of the contract with QCHA for a very considerable period of time, he was not part of the organised grouping. His day to day involvement was as a hands on Chief Executive Officer as he is described in the Schedule of Terms of Employment. The situation here was not dissimilar to Edinburgh Home-Link, (see above) where the EAT was satisfied that the two individuals had not been doing frontline work but rather that the substance of their jobs/roles was the carry8ing out of activities that had not been contracted for. The Tribunal concluded that a very similar situation arose here.

128. Accordingly, the Tribunal was not persuaded that he was assigned to the organised grouping of employees which was organised as having its principal purpose as the carrying out of the activities for which the client namely QCHA had contracted.

129. The Tribunal concluded, in all the circumstances, that the claimant was not assigned to that organised grouping and, in the event the Tribunal was wrong to have determined that the claimant was not an employee of AGSL the Tribunal would have concluded that he was not assigned to organised grouping of employees which had as its principal purpose the carrying out of

the activities for the respondent now carried out in respect of QCHA contract.

130. It therefore follows applying the law to the above findings of fact that this claim cannot succeed and it is therefore dismissed.

Employment Judge: F Jane Garvie
Date of Judgment: 20 September 2017
Entered in register: 22 September 2017
and copied to parties