EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100017/2018, 4100019/2018, 4100020/2018, 4100021/2018, 4100022/2018, 4100052/2018, 4100053/2018, 4100058/2018, 4100060/2018, 4100072/2018, 4100094/2018, 4100096/2018, 4100104/2018, 4100105/2018, 4100106/2018, 4100110/2018, 410013/2018, 4100118/2018, 4100122/2018, 4100256/2018, 4100256/2018, 4105342/2017, 4106960/2017

Preliminary Hearing held at Glasgow on 11, 12 and 13 February 2019 (evidence) and 15 February 2019 (submissions)

Employment Judge: Muriel Robison

(1)	**Mr B Bennett**	**Claimant** **Represented by** **Mr B McLaughlin** **Solicitor**
(2)	**Mr N Kellett**	**Claimant** **Represented by** **Mr B McLaughlin** **Solicitor**
(3)	**Mr M Murphy**	**Claimant** **Represented by** **Mr B McLaughlin** **Solicitor**
(4)	**Mr J Bell**	**Claimant** **Represented by** **Mr B McLaughlin** **Solicitor**
(5)	**Mr J Lees**	**Claimant** **Represented by** **Mr B McLaughlin** **Solicitor**
(6)	**Mr G Abbot**	**Claimant** **Represented by**

		Mr B McLaughlin **Solicitor**
(7)	**Mr A Beattie**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(8)	**Mr J Craig**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(9)	**Mr W Ferris**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(10)	**Mr P Ryan**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(11)	**Mr K Thompson**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(12)	**Mr L Wilson**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(13)	**Mr C Stewart**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitors**
(14)	**Mr C Thomson**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**

(15)	**Mr H Lees**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(16)	**Mr C McDougall**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(17)	**Mr D Tinto**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(18)	**Mr S Young**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(19)	**Mr J Sinclair**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(20)	**Mr J Hannah**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(21)	**Miss S O'Connor**	**Claimant** **<u>Represented by</u>** **Mr B McLaughlin** **Solicitor**
(22)	**Mr O Lennon**	**Claimant** **<u>Represented by</u>** **Mrs N Lennon**
(23)	**Mr R Daly**	**Claimant** **<u>Represented by</u>**

Mr Lawson
Solicitor

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Amey Service Limited	**First Respondent** **Represented by** **Ms J Wright** **Solicitor**
McTear Contract Limited	**Second Respondent** **Represented by** **Mrs K Wedderburn** **Solicitor**
MITIE Property Services	**Third Respondent** **Represented by** **Mr R Bradley** **Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. On 14 August 2017 there was a service provision change between the first and third respondents amounting to a relevant transfer in terms Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

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2. With effect from 14 August 2017, the employment contracts of each of the claimant's listed at appendix B transferred to the third respondent;

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3. On 15 August 2017 there was a service provision change between the first and second respondents amounting to a relevant transfer in terms Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

4. With effect from 15 August 2017, the employment contracts of each of the claimant's listed at appendix A transferred to the second respondent.

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5. The claims directed at the first respondent are dismissed.

REASONS

Introduction

1. The first 21 claimants, represented by Mr B McLaughlin, lodged separate claims in the employment tribunal in January 2018 against the first, second and third respondents, as well as a fourth respondent, North Lanarkshire Council (NLC), claiming unfair dismissal, redundancy pay, notice pay, holiday pay and other arrears of pay.

2. In October 2017, the 22nd claimant, Owen Lennon, lodged a claim in the employment tribunal against the first and second respondents only, claiming redundancy pay and arrears of pay. Mr Lennon was represented at this hearing by Mrs N Lennon.

3. In December 2017, the 23rd claimant, Ryan Daly, represented at this hearing by Mr R Lawson, lodged a claim in the employment tribunal against the first, second and third respondent, claiming unfair dismissal, redundancy pay, notice pay, holiday pay and arrears of pay.

4. The first and third respondents entered responses in respect of all claimants, resisting the claims. The second respondent entered responses in respect of all claimants, except Mr Lennon (who made no claim against them), resisting the claims.

5. The claims by the first 21 claimants against the fourth respondent were dismissed on 28 June 2018, following their withdrawal.

6. At the case management preliminary hearing which took place on 14 August 2018, the issues to be determined at this preliminary hearing were agreed as follows:

"The key issue is whether the award of North Lanarkshire Council's contract for the installation and maintenance of kitchens in its social housing stock to Mitie and McTear constituted a TUPE transfer pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006. Specifically:

i. Was there a relevant transfer pursuant to TUPE from Amey to either Mitie and/or McTear?

ii. *If there was, when did that transfer take place?*

iii. *If there was, were the claimants' part of the organised grouping of employees caught by the transfer?*

iv. *If so, did each claimant transfer either to Mitie or McTear?"*

7. It was also agreed that it was appropriate for evidence in this case to be given by way of witness statements.

8. Although all of the claimants submitted witness statements, a decision was reached that only six claimants would give evidence. In addition to Mr Lennon and Mr Daly, the Tribunal heard from Steven Young, Charles Thomson, John Bell and Gregor Abbott. The Tribunal also heard evidence for the respondents from Martin White, operations manager with the first respondent, Stephen O'Rourke, project manager with the second respondent, Keiron McTear, commercial director with the second respondent, Steven Porch, then regional manager with the third respondent, Hugh Wilson, operations manager with the third respondent. The Tribunal also heard evidence from witnesses employed by North Lanarkshire Council, namely Gerry McWilliams, clerk of works, Ron Drozdziak, financial applications manager, and Martin Green, architectural technician.

9. Six joint volumes of productions were lodged amounting to 2109 pages, with one additional document added (2110) during the hearing, which are referred to in this judgment by page number. A joint volume of authorities was lodged for the hearing of submissions.

Findings in fact

10. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

The "old" contract

11. By letter dated 16 April 2012 (page 1713), a company called CFM Building Services Limited (CFM), which was taken over by the first respondent in 2013, was awarded a five year contract with North Lanarkshire Council (NLC).

12. The contract was known as “Measured Term Contract For Replacement of Kitchen Fitments 2012-2015” (lot 2) (page 1654), hereafter referred to in this judgment as “the old contract”. The contract was for the replacement of existing kitchens in NLC’s social housing stock, together with electrical upgrading or full rewiring as appropriate. The contract particulars, with a description of the work, was set out at paragraph A13 (page 1661).

13. Although the contract was due to be completed in 2015, the contract was extended by letters dated 18 December 2014 (1726), 29 January 2015 (1792), 23 December 2015 (1766), 24 April 2017 (1770) and 25 May 2017 (1794), extending the contract to 20 July 2017.

14. The contract was a “maintenance term contract”, which meant that a schedule of rates would be agreed at the tender stage, whereby the tenderer had offered to do the work for a percentage of the cost plus or minus the actual cost on the schedule of work.

15. NLC issued contract “orders” of kitchens to be installed, setting out the addresses for the properties whose kitchens were to be replaced. When an order was completed a practical completion certificate would be issued.

16. Latterly these were Order 9 (1730), Order 10 (1731), Order 11 (1752) and Order 12 (1768), which set out the commencement date, the estimated completion date and the estimated value. The last order which the first respondent received was Order 12 on 6 May 2016, with an appended list of 1524 addresses (2057 – 2079) (although some were brought forward from Orders 9,10 and 11 and were consolidated into this final order).

17. The contract extension letters dated 24 April 2017 and 26 May 2017 also had lists enclosed with them, which were the consolidated lists of addresses of properties, which superseded the addresses set out in Order 12.

18. The first respondent installed 18-25 kitchens per week, across the whole of the North Lanarkshire Council area. Each kitchen took approximately one week to install.

19. The practical completion certificate for Order 12 was issued on 30 August 2017 (1949), practical completion having completed on 7 June 2017. All kitchens were finally completed and finished by the termination date of 20 July 2017.

20. There was a "snagging" period of one year which ended on 6 June 2018. The "snagging" was not undertaken by the members of the teams who had worked on the old contract.

21. Prior to March 2017, there had been three teams working on the contract, which was at that time reduced to two teams.

22. Team 1 was supervised by Charles Thomson and included Norman Kellett (plumber), John Bell (electrician), another electrician SM who is not a claimant, Shellie O'Connor (apprentice electrician), John Lees (labourer), Colin Steward (joiner), Kenneth Thompson (roughing joiner), John Sinclair (plasterer), another plasterer SR who is not a claimant, Michael Murphy (labourer), Liam Wilson (driver/labourer), Ben Bennett (driver/labourer), Paul Ryan (tiler) and an electrical tester JL, who is not a claimant.

23. Team 2 was supervised by a Gordon Cuthbert. It consisted of Gregor Abbott (electrician), John Hannah (apprentice electrician), and another apprentice electrician RF who is not a claimant, William Ferris (joiner), Alan Beattie (joiner), Ian Craig (joiner), Christopher McDougall (plasterer), Steven Young (plasterer), Hugh Lees (labourer), two driver labourers, RS and MM who are not claimants, a tiler CM who is not a claimant and Derek Tinto, (electrical tester).

24. On infrequent occasions, members of team 1 would assist team 2 and vice versa, to cover annual leave, sick leave etc. On very rare occasions, members of the teams assisted on other contracts.

25. Although the teams would tend to work in or around the same area for convenience, the teams were not allocated to a geographical area and worked across the whole of North Lanarkshire Council boundary area.

26. All of the claimants, except for Mr Daly, worked solely on the kitchen installation for the old contract.

27. Ryan Daly, who was the operations manager, worked 99.9% of his time on this contract. He also worked on a contract for Clackmannanshire Council, attending no more than two meetings per year to stand in for the operations manager while he was on leave.

28. Owen Lennon was the surveyor for the whole of the contract.

Re-tendering of kitchen installation contract

29. In February 2017, NLC retendered the kitchen installation contract. The tender document was called “Enterprise and Housing Resources – Housing Property – Kitchen Replacement 2017 – lots 1 and 2” (1303–1653). On 15 March 2017, the date on which bids were due to be submitted, the first respondent submitted a bid for in the names of the first respondent and CFM (1702A). On that date, the second respondent submitted bids for lots 1 and 2 (1705-6) as did the third respondent (1703-4).

30. The first respondent understood that TUPE would apply if they were not successful in winning the contract, given reference to the TUPE regulations in the tender document.

31. The tender document did not however state that TUPE regulations would apply, but rather (1316): “It should be noted that TUPE regulations may apply to this contract. The Council is not the employer and therefore is unable to comment on whether or not TUPE and/or the statutory guidance issued under section 52 of the Local Government in Scotland Act 2003 (statutory guidance) applies in this contract. Tenderers must ensure that they comply fully with their responsibilities under TUPE and the statutory guidance……Prior to submitting their tender, tenderers should obtain their own specific legal advice to ascertain whether TUPE and the statutory guidance could be held to apply

to such undertakings, and if so how that would impact on their tender. Should tenderers consider that TUPE does apply, they should contact the alleged incumbent contractor/s directly to obtain any information they consider necessary". The contact details of the incumbent contractors, CFM and Mears Scotland LLP, were then set out. It continued "the Council cannot verify the accuracy of any information supplied to tenderers in respect of personnel currently employed by the incumbent contractor/s, and therefore the Council has no liability in respect of such information. It is for the tenderer to ensure that they have sufficient TUPE information to submit a compliant tender. The Council accepts no liability for any costs, claims or expenses without limitation otherwise incurred directly or indirectly as a result of TUPE applying or allegedly applying to any transfer of undertaking or service provision change."

32. The 2017 tender document split the contract into two 'Lots' delineated in terms of two geographical areas in which the work was to be carried out. Each lot was for 420 properties addresses, which were included in the tender documentation. Lot 1 contained addressed which NLC had designated were in the north of the NLC boundary area and Lot 2 contained addresses in the south.

33. Lot 1 was to be given to the most economically advantageous tender and lot 2 to the next best tender. The two lots were not to be awarded to the same contractor.

34. This was a "bill of approximate quantities contract", which meant that tenderers would know how many kitchens were to be installed, with tenderers bidding on the basis of a number of kitchens as opposed to a schedule of rates.

35. The duration of each contract was one year (1900). The original tender was due to have an anticipated date of possession of 24 April 2017 and anticipated date for completion of 31 December (1360), thus expected duration was 36 weeks. The estimated value of each contract was in the region of £2 million (1711).

36. The tender was due to be awarded by NLC on 15 June 2017.

37. On 26 May 2017, the first respondent wrote to the claimants (eg 1787) to advise that they were at risk of redundancy.

38. On 14 June 2017, NLC sent an e-mail to the first respondent to ask if they would extend the acceptance period for acceptance of the tender to 15 July 2017 (1803-1804), which they agreed to (1805).

39. On 6 July 2017, the first respondent's solicitors wrote to NCL expressing concern about the delay with the tender exercise given the impending termination date, advising that in their view if they were not awarded the contract, then a service provision change would occur with employees "in scope" transferring to the new contractor or to NLC. The letter stated, "we hereby notify you that as of 21 July 2017 we consider that all the staff currently assigned to this work with CFM Building Services Ltd will transfer to the Authority by operation of TUPE" (1806).

40. On 11 July 2017 NLC wrote to the first respondent to ask if they would extend acceptance of the tender until 31 August 2017, and in another e-mail that same day stated they would confirm the award on or around 14 August 2017 (1812).

41. On 13 July 2017, the third respondent agreed to extend the tender acceptance period to 31 August 2017 following the request of NLC (1813). It is understood that the second respondent reached a similar agreement.

Award of the "new" contracts

42. On 20 July NLC wrote an acceptance letter in respect of lot 1 to the second respondent (1823) (relating to addresses primarily in the north of the North Lanarkshire Council boundary area).

43. On 20 July 2017, NLC wrote an acceptance letter in respect of lot 2 to the third respondent (1821) (relating to addresses primarily in the south of the NLC boundary area).

44. On 21 July 2017, the claimants (see eg 1826) were given notice of termination of employment, and advised that their employment would end by reason of redundancy.

45. On 21 July 2017, the first respondent was advised that the contract had been awarded to the second and third respondents (1848).

46. On 7 August 2017, the first respondent wrote to the second respondent requesting confirmation that they agreed that the TUPE regulations applied. They advised that they believed they had "identified an organised grouping of 13 people who are in scope to transfer to you under the TUPE legislation" (1859). They wrote a similar letter to the third respondent, advising that they had identified 16 people (1860).

47. The first respondent supplied ELI to the second respondent (1987-2008) and to the third respondent (2009-2027).

48. By letter dated 9 August 2017, the first respondent advised the claimants that their notice of redundancy was withdrawn (1861-1872).

49. In order to identify the staff that the first respondent understood were to transfer to the second and third respondents, the first respondent looked at the geographical areas of each lot and the geographical area in which teams had carried out work in the previous 12 months. The team which carried out most work in the north of the NLC boundary area (as categorised by NLC in the tender document) was allocated to lot 1 which had been awarded to the second respondent. The team which carried out most work in the south of the NLC boundary area (as categorised by NLC) over the previous 12 months was allocated to lot 2, which had been awarded to the third respondent. The first respondent's HR team produced a document to identify the staff allocated to each lot (2106-2109) based on that approach. This was based on a spreadsheet with the full list of addresses from Order 12 at which kitchens

were installed, with the initials CT, the supervisor of team 1 and GC the supervisor of team 2 (2032-2052).

50. Although both Ryan Daly and Owen Lennon worked across the whole of the kitchen installation contract for NLC, the first respondent, on the basis of their understanding that TUPE would apply, and that they were both "in scope to transfer" "took a pragmatic approach". Since the supervisor of Team 2 (Gordon Cuthbert) had secured an alternative role in the employment of the first respondent, that pragmatic approach meant that they slotted Mr Daly into the group allocated to the second respondent. The first respondent took the view that Mr Lennon should therefore be allocated to the third respondent, so that there was "a broadly equivalent" number of employees going to each of the transferees. That information was forwarded to Martin White and Martin Orr (HR officer with the first respondent) by e-mail dated 15 August 2017(2030).

51. By letter dated 10 August 2017, the first respondent advised the claimants that they were due to transfer either to the second or the third respondent (1873-1885) as determined by the approach described above, and advising them to report either to the third respondent on 14 August or the second respondent on 15 August. The claimants were paid by the first respondent up to those dates.

52. On 10 August 2017, the third respondent wrote to the first respondent advising that the TUPE regulations might apply, and advising they were trying to ascertain which employees were in scope to transfer, and asking the first respondent to confirm "why you believe each one to be assigned to the contract", seeking answers to questions and supporting evidence. In a further letter dated 15 August 2017, the third respondent disputed the start date of the contract, questioning whether TUPE applied, and seeking the supporting evidence requested (1911).

53. Around the beginning of August, the third respondent met with a number of employees of the first respondent at the NLC offices.

54. On 10 August 2017, Mr McTear met with Martin Orr and Martin White to discuss the possibility of the second respondent employing some of the first respondent's staff, which he followed up with a request for further information (1946).

55. On 14 August 2017 (1946) and again on 24 August 2017 (1945), Mr McTear asked for time sheets, site diaries and electrical test certificates with a view to substantiating the information which the first respondent had given them regarding the locations of where the operatives worked, including a request for information relating to Ryan Daley. Mr McTear received no substantive response.

56. By letter dated 15 August 2017 (1916) the first respondent confirmed their view to the third respondent that TUPE applied from 14 August, asserted that they had complied with their responsibility under the regulations, and "should any of the affected employees make contact with us, we will maintain this position and advise them to return to your offices". They refused to supply additional evidence requested, asserting that all necessary information had been provided.

57. On 14 August 2017 there was a pre-start meeting between NLC and the third respondent (see minutes 1898-1908). At that meeting it was confirmed that the date of possession and the contract start date was 14 August 2017. It was also confirmed that the addresses would be in the north area (as opposed to the south, as stated in the original tender). The third respondent was advised that the finalised address list would be forwarded when available. NLC asked to confirm that all TUPE obligations would be met. The third respondent advised that negotiations were ongoing.

58. On14 August, a number of the claimants attended the offices of the third respondent and met with Steven Porch, followed by a subsequent meeting when with Hugh Wilson met 13 operatives on 5 September 2017.

59. On 15 August there was a pre-start meeting between NLC and the second respondent (see minutes 1921- 1932). At that meeting it was confirmed that the date of possession and the contract start date was 15 August 2017. At or

after that meeting the third respondent was advised that the work would be in the south of the NLC's geographical area (which was a change from the original contract awarded). At that meeting the third respondent confirmed that they were fully aware of their TUPE obligations and that negotiations were ongoing.

The implementation of the new contracts

60. The addresses where the kitchens were to be installed were subsequently confirmed to the second and third respondents. It was deemed by NLC to be more appropriate for the winner of lot 1 to have the lot 2 addresses and vice versa. Although the precise reason for that was not formally confirmed, it was believed that this was because this would mean that the work would be closer to their respective head offices. This meant that although the addresses in the tender documents for lot 1 were in the north, addresses where they were asked to carry out work was in the south (letter to second respondent from NLC dated 21 August 2017) (2053-2056). While the third respondent was expecting to work at addresses in the south, in accordance with the tender documents for lot 2, the addresses where they were asked to carry out work were in the north. Neither the second nor the third respondent raised any objection. The lots continued to be referred to as lot 1 (awarded to the second respondent) and lot 2 (awarded to the third respondent.

61. Thereafter the implementation of the contract commenced, with the third and second respondents in charge of the contract from 14/15 August 2017 respectively. Initially they instructed surveyors, liaised with tenants and undertook pilots, and were fully involved in programming works.

62. Kitchen installation commenced in September 2017.

The second respondent

63. The second respondent took on the following claimants on new terms and conditions, with their continuity of service maintained: Alan Beattie (from 4 September 2017), John Craig (from 15 August 2017), William Ferris (from 4 September 2017), Hugh Lees (from 4 September 2017), Chris McDougall

(from 11 September 2017), Stephen Young (from 11 September 2017) and John Hannah (from 11 September 2017).

64. Hugh Lees has since retired.

65. Initially, the second respondent installed around 10 kitchens per week, but that gradually increased to between 15-20 kitchens per week, with a maximum of 30 being installed each week.

66. The contract ran from 15 August 2017 to 18 July 2018, during which time the second respondent completed 337 kitchens.

The third respondent

67. The third respondent engaged the following nine claimants on new terms and conditions on or after 14 September 2017: Ben Bennett, Norman Kellett, Liam Wilson, John Sinclair, Kenneth Thompson, Charles Thomson, Colin Stewart, and Paul Ryan.

68. Four were made redundant in April 2018, because work on the new contract came to an end.

69. The third respondent ultimately installed a maximum of 19 kitchens per week.

Future contracts

70. The intention of the client, North Lanarkshire Council, was that this contract would be followed by a longer maintenance term contract with a rolling programme of kitchen installations. That contract was never awarded for technical reasons. The second and third respondents were advised of that in or around April 2018.

Relevant law

71. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (the 2006 Regulations) lays down rules regarding the transfer of employees terms and conditions in circumstances where there is a "relevant transfer".

72. Regulation 3(1) states that a relevant transfer is, either

"(a) A transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer of the UK to another person where there is a transfer of an economic entity which retains its identity, or

(b) A service provision change, that is a situation in which –

i. Activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor")

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

iii. Activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out instead by the client on his own behalf

And the conditions set out in paragraph (3) are satisfied".

73. The conditions in paragraph 3 are that:-

"(a) Immediately before the service provision change –

i. There is an organised grouping of employees situated in GB which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

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

(b) The activities concerned do not consistent wholly or mainly of the supply of goods for the client's use".

74. Regulation 4 relates to the effect of the transfer on an employee's contract of employment, and states as follows:

5 *(1) …..a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the*
10 *person so employed and the transferee.*

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by
15 *virtue of this regulation to the transferee; and*

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in
20 *relation to the transferee.*

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he
25 *had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions*.

First Respondent's Submissions

75. Ms Wright lodged written submissions which she supplemented with oral submissions. These are summarised here but dealt with in detail in the subsequent discussion. She dealt in turn with each of the issues, identified for determination in paragraph 6, dealing with issue (ii) separately. Her position was that there was a service provision change (SPC) in terms of regulation 3(1(b)(ii).

76. Relying on *Kimberley Group Housing v Hambley 2008 IRLR 682* and *Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust 2016 ICR 607*, Ms Wright submitted that the Tribunal is required to give TUPE a purposive construction to give effect to the underlying purpose of the legislation, which is to safeguard employees' rights on the transfer of the business. The approach taken should not be overly legalistic, with each situation turning on its own facts. She submitted that it was well established that there may be a transfer from one transferor to more than one transferee. The focus is on the employees, and not on any inconvenience or unfairness to the employer.

77. Ms Wright submitted that taking a broad holistic view that the activities should be framed as the replacement of kitchens in NLC social housing stock.

78. Relying on *Metropolitan Resources Ltd v Churchill Dulwich 2009 IRLR 190*, she submitted that taking "a common sense and pragmatic approach" to the question the activities were fundamentally the same before and after, the answer being one of "fact and degree". Here the work was "all but identical", and whether it was done in the north or the south is irrelevant.

79. She submitted that this case should be distinguished from the situation in *Enterprise* and *Clear Springs* cases. The splitting of the contract could not give rise to fragmentation so as to conclude no TUPE transfer, and there was no fragmentation of the activities here. This is not a case where the tribunal has to wrestle with fragmentation of activities along technical or functional lines. She submitted further that there is no evidence to support the contention that the scope of the activities and/or the quantity of the work means that an SPC has not taken place. The first respondent provided the ELI and was

under no obligation to provide any other information; any alleged failures, even a failure to provide ELI, would not impact on the question whether there was an SPC, so that is irrelevant.

80. Relying on *Eddie Stobart Lt v Moreman 2012 IRLR 356*, she submitted that this was a paradigm case of an organised grouping of employees, where the first respondent had a dedicated team structure servicing the NLC contract, supported by an operations manager and a surveyor. The claimant's evidence supports this conclusion. There was an awareness (given the notice that they were at risk of redundancy) that the contract was winding down, and the evidence is that some members of the team (Gordon Cuthbert and Esther Ryan for example) were relocated or took new employment. It is irrelevant that there were others who may or may not have been part of the team, the question is whether there was a grouping and whether the claimants were part of that grouping.

81. Relying on *Kimberley*, on the question of the allocation of the claimants to the second and third respondents, the next step is to consider the consequences, that is what happens if anything to the staff and whether they should transfer under regulation 4 and if so to which transferee. She submitted that the factors from *Botzen*, and *Duncan Webb* were relevant here, and the focus is on the link between the employee and the work or activities performed.

82. Here under the tender exercise the work was split in half. Given that two teams were dedicated to the work prior to the end of the contract, the first respondent applied a logical approach to which of its employees should transfer to each of the new contractors, based on the tender documents and looking at the geographical areas in which the claimants had worked prior to termination. A pragmatic approach was taken in respect of Mr Lennon and Mr Daly. Notwithstanding that attempt to do something more accurate, it would have been open to the first respondent to have simply told team 1 to go to the second respondent as the winner of lot 1 and team 2 to go to the second respondent as the winner of lot 2. The claimants' evidence was that they are involved in exactly the same roles before and after, and that did not matter whether the properties were in Croy or Motherwell. Mr White gave evidence

about the information which he had about the allocation, and there was no dispute as to the content. While there was no evidence of accuracy, equally there was no evidence of inaccuracy.

83. Ms Wright submitted that the approach taken permissible, and stressed that no authority has been identified which says it is not.

84. Relying *on Lightways Contractors Ltd v Associated Holdings Ltd 2000 IRLR 247,* Ms Wright submitted that the behaviour of the parties is a relevant factor, and here the third respondent costed their bid on the basis that TUPE would apply and was expecting some employees to transfer. Mr McTear's evidence was that when the claimant's presented themselves they matched pay and recognised their continuity of service, which could only have been in contemplation of TUPE applying. Further, the absence of certificates, such as health and safety certificates, is irrelevant to the question whether there was a relevant transfer.

85. Ms Wright submitted that this was not a "task of short term duration" (the issue being what the client intends), relying on evidence that the kitchen installation work at the time the contract was awarded was to run beyond the end of the contract with those parties. It was not until April 2018 that NLC decided it would not be carrying out this larger re-tender exercise. She submitted that the contractual documentation is not relevant or determinative as to whether TUPE applied, and the question is whether it was intended that the work be short term in nature.

86. Finally, Ms Wright submitted the date of transfer should be regarded as 14 and 15 August for the third and second respondents respectively, given evidence that they took responsibility for the contract from those dates and were engaging in surveying works and liaising with tenants thereafter.

Submissions for second respondent

87. Mrs Wedderburn lodged detailed written submissions which she referred to in oral submissions. These are summarised here but dealt with in detail in the

subsequent discussion. After setting out the issues and a number of facts not in dispute, she made reference to the relevant case law. She set out proposed findings in fact.

88. She submitted the parties' perceptions as to whether TUPE applied is not relevant, distinguishing Lightways, which is particular on its facts, because in this case there is no suggestion that the second respondent stated that if awarded the contract, TUPE would apply.

89. She submitted that the evidence of Mr White should not be regarded as reliable, since it was based on information from others, failing which Tribunal should conclude from the documents at 2106-2111 that this was not an accurate reflection of the employees working on the NLC contract.

90. She invited the Tribunal to infer from the considerable ongoing employment liabilities of its employees (redundancy pay, notice pay) and lack of substantiation as to its approach, that the first respondent was attempting to divest itself of some of its employees and avoid the associated liabilities without any legal basis. It could not substantiate that there was to be a relevant TUPE transfer.

91. Relying on *Cukic v Vordula* EAT 4.11.02, Mrs Wedderburn argued that the burden of proof in establishing a relevant TUPE transfer is upon the claimants, and that they had failed to discharge it.

92. Mrs Wedderburn summarised her submissions in support of her position that there was no service provision change for the following reasons:

    a. There was no intentional organisation by the first respondent of its workers with reference to the particular client or contract or in the geographical area in which they were operating. The claimant's evidence was that there was no distinction between the north and the south no dedicated team structure servicing the north and the south (relying on *Eddie Stobart* and *Ceva Freight*);

    b. The activities were not fundamentally the same pre and post transfer;

c. There is evidence of work in progress (relying on Ward Hadaway);

d. Change from a five-year maintenance term contract to a 36 week bill of quantities type contract meant a significant change in scope;

e. There was a substantial reduction in the amount so that the activity was not essentially the same (relying on Department of Education v Huke EAT/080/12);

f. The customer base was different;

g. The place where the work was carried out was different;

h. There was a split of activities as between two lots and geographical areas, the claimants having worked predominantly in the northern geographical area for the first respondent;

i. In any event, the activities were of short-term duration and therefore excluded (relying on *Liddells Coaches*);

j. Failing which the allocation of activities post transfer was fragmented so not fundamentally the same, meaning that it is not possible to identify to which respondent the claimant's transferred;

k. Failing which, the destination of the activities was the third respondent, on geographical grounds, in line with Kimberley, applying Duncan Webb Offset, as claimants were essentially dedicated to the activities taken on by the third respondent in the north area.

93. In response to the claimants' submissions, she submitted that since Mr McLaughlin and Mr Lawson adopt her position that there was no SPC, then if the claimants do not advance a case that there has been a SPC then they are no longer advancing a case against the second respondent, so the claims should be dismissed.

Third respondent's submissions

94. Mr Bradley lodged an outline submission, which he supplemented in oral submissions, summarised here and dealt with in detail in the subsequent

discussion. He opened by pointing out that whatever the Tribunal decides, the claimants would not be deprived of a remedy. Mr Bradley then considered each of the issues for determination by the Tribunal set out in paragraph 8 in turn.

95. With regard to the first issue, starting with "condition" set out at regulation 3(3)(a)(i), the key phrases are that "immediately before" there is an "organised grouping" of employees undertaking the "activities concerned". Adopting Mrs Wedderburn's submission at para 25 of her submissions, he submitted that there was no evidence to support the view that the first respondent organised its employees in a group dedicated to the south; indeed the evidence points in the opposite direction. He submitted that there was no clear evidence that the identified employees were deliberately organised for the purposes of carrying out the activities of lot 2 and worked together as a team pre-transfer; Mr White's evidence supports the submission that there was no deliberately organised group for the purposes of carrying out the activities of lot 2, and he said that those who had been allocated, were allocated on an ad hoc and random basis.

96. Turning to the second issue Mr Bradley submitted that if there was found to be a service provision change, there was no real issue about the timing of it, and that for the third respondent was 14 August 2017 and the second respondent was 15 August 2017.

97. Mr Bradley dealt in his submission with issues 3 and 4 together. He argued that while there might be an organised grouping of employees, it was necessary to consider whether or not each claimant was part of that grouping and liable to transfer to one or other transferee, in terms of regulation 4(1).

98. Looking at the first respondent's rationale for those transferring to the third respondent, this was based on a review of "past established work groupings in a geographical area aligned to the lots awarded". This analysis was a retrospective and artificial construct since none of the first respondent's teams or employees worked in a way that they were obviously assigned to lot 1 or lot 2 north or south. There was nothing obvious or automatic where anyone

was assigned, or who to. The first respondent had a vested interest in doing so which was to avoid statutory redundancy payments, the claimants having been dismissed (by way of redundancy) on 21 July 2017, and then the notice was withdrawn on 9 August 2017 when their position changed.

5 99. Further, the first respondent had failed to provide information to confirm to the respondents that the employees they were being asked to take on were in scope to transfer. While the furnishing or otherwise of the ELI is not relevant to the question whether or not there is an SPC, it is relevant to the question of who is assigned. Here the transferees cannot know which are assigned to 10 them because that grouping by definition is being split. Both transferees are entitled to ask for information which vouches the belief there are 13 and 16 workers in scope, but that information was never provided.

100. Adopting paragraph 42 of Mrs Wedderburn's submission that Mr White's evidence should not be relied on, Mr Bradley went further and argued that this 15 was not evidence at all. In particular, the Tribunal cannot assume that the first respondent's allocation to lots 1 and 2 is correct because it is not evidenced, nor spoken to by any witness who prepared it. The documents at 2106-2109 are not agreed, and since they do not speak for themselves, the Tribunal cannot accept them as evidence of their content.

20 101. With regard to the information supporting the way the first respondent assigned the others, they produced a list of the Order 12 installations with supervisor initials, but produced no evidence as to is content or accuracy on the addresses listed or the teams said to have worked at them. Again the document is not agreed, it does not speak for itself; there is no evidence about 25 the primary material relied on to source its conclusions. Further, there is no mention of the kitchens installed from 7 July to 20 July, referred to by Mr White in his evidence.

102. There was no witness who could speak to or vouch the content or the accuracy of the list. There is no primary evidence (eg site diaries, time sheets) 30 in full or by sample to vouch any entry on the list and and no explanation why we have not heard from either Esther Ryan or Martin Orr.

103. In any event the stated reference period is 12 months, but the reference at regulation 4(3) is to persons so employed immediately before the transfer, and thus the first respondent's only methodology is flawed.

104. With regard to the first respondent's approach to Mr Lennon and Mr Daly, this shows that they did not properly consider the question of assignation; Mr White could not recall specifically why they allocated Mr Lennon to the third respondent; and with regard to Mr Daly he was assigned to the second respondent to replace the team leader who had moved within the first respondent. Their evidence shows that their cases are properly against the first respondent because neither of them were assigned to either lot.

105. With regard to the impact of the lot swap, Mr Bradley submitted that the Tribunal is not in a position to say that anyone was assigned and there is no evidence to support the basis on which first respondent seeks to transfer claimants to the second or third respondent; no evidence of them being assigned in terms of Regulations 4; and no other basis on which to make that finding.

106. Mr Bradley submitted that Lightways could be distinguished on its facts and has in any event nothing to do with whether any employee was assigned.

Mr McLaughlin's submissions (for 21 claimants)

107. Mr McLaughlin indicated that he broadly adopted the submissions of Mrs Wedderburn and Mr Bradley that the evidence shows that there was no SPC in this case. In particular, he agreed that the evidence of Mr White could not be relied on (referring to *Clearsprings*). Relying on *Ceva Freight* on the meaning of "organised grouping", he adopted the submissions of Mrs Wedderburn at para 28 of her submissions, and submitted that it was not legitimate to isolate one component of the team identified, amplified in the case of Mr Daly. He supported the submissions of Mr Bradley that it was inappropriate for the first respondent to allocate employees on the basis of a "broadly equivalent number of employees".

108. He did however challenge Mrs Wedderburn's submission that the burden of proof is on the claimants, because the claimants were simply advised to go either the second or third respondent, but they had no input to the allocation process and were not consulted about the charts or spreadsheets.

5 109. He submitted on behalf of Mr Lennon that it was unreasonable of the first respondent to defend any case pursued by him.

Mr Lawson's submissions (for Mr Daly)

110. Mr Lawson also argued that on the basis of the evidence heard, that there was no transfer, and therefore that liability in respect of his client rests with
10 the first respondent.

111. Relying on *Seawell* at the EAT, he argued that Mr Daly and Mr Lennon were in a different position from the remainder of the claimants. There was no basis in which regulation 4(1) could have the effect of transferring their employment and no basis to assign them to either parts of the contract which had
15 transferred.

112. It was not appropriate, in terms of regulation 4, for Mr Daly to be "slotted into" the role that was vacated by Gordon Cuthbert, who had accepted another role within Amey, since his role was clearly different.

113. Further the second explanation for the allocation also lacked substance since
20 the desire for broadly equivalent numbers was entirely unrelated to the question of to which part he was assigned. A pragmatic decision cannot constitute a factual basis for concluding that Mr Daly was assigned to the organised grouping of resources in question.

114. He submitted that the Tribunal requires to consider other factors when
25 considering the assignment question, such as those set out at paragraph 15 of the *Duncan Web* case, endorsed in *Costain Ltd v Armitage* UKEAT/0048/14.

115. Endorsing Mr Bradley's submissions, he submitted that there was no cogent evidence to conclude that Mr Daly spent a particular amount of time in the

geographical parts transferred; there was no evidence of any value being apportioned between the two lots by the first respondent prior to the transfer; and there was no allocation of costs between the parts of the business purportedly transferred. The issue of the terms of the contract is not engaged in this case because the claimant's contract draws no distinction between the north and the south.

116. There is therefore no basis to say that Mr Daly (nor Mr Lennon who was in the same circumstances), transferred under regulation 4(1).

117. He went on to make a couple of observations in respect of regulation 3, including the burden of proof and the provisions relating to a single specific event or task of short-term duration, addressed in detail in the subsequent discussion.

Mrs Lennon's submissions (for Mr Lennon)

118. Mrs Lennon adopted the submissions of Mr Lawson, since Mr Lennon was in a similar position as Mr Daly.

Tribunal's discussion and decision

Observations on the evidence and witnesses

119. The Tribunal heard evidence in this case by way of witness statements.

120. This led to a rather unusual situation (in Scotland at least) where although it had been agreed that the witnesses for North Lanarkshire Council would be called by the first respondent, those witnesses had also been precognosed by the second respondent, and witness statements lodged by them. Mrs Wedderburn explained that in light of the Scottish Courts Guidance on witness statements, it was not considered appropriate to parties to view the other statements prior to the agreed date of exchange.

121. Although it had initially been agreed that Mrs Wedderburn for the second respondent would cross examine witnesses called by Ms Wright, following detailed discussion, it was agreed and accepted that Mrs Wedderburn would

rely on the evidence of the NLC witnesses as their evidence in chief, and that meant that she would forgo her right to cross-examine them.

122. As it transpired, Ms Wright chose not to call one of the North Lanarkshire Council witnesses. Instead, Mrs Wedderburn having decided to call Mr Green, Ms Wright decided to cross examine him.

123. With regard to the witnesses for the first respondent, Mr White gave evidence, as well as the two North Lanarkshire Council witnesses, Ron Drozdiak and Gerry McWilliams. Much was made of the fact that Mr White's direct knowledge was limited in respect of the steps which the first respondent took to allocate the various claimants to the second and third respondents. It was not clear why Mr Orr at least, or perhaps Ms Ryan, were not called to give evidence regarding that process. Whatever the reason, there were a number of questions which he was not able to answer because they were not within his direct knowledge, although I deal with the significance of that in later discussions.

124. As well as relying on the NLC witness evidence, Mrs Wedderburn called Mr McTear and Mr Steven O'Rouke for the second respondent. While I accept that both were telling the truth, I did not find their evidence necessarily reliable, especially Mr McTear. It seemed clear that Mr McTear was not au fait with the TUPE provisions, despite the language which he used in his witness statement. Not that he can be blamed for that, since this whole dispute is about their interpretation, but it does highlight a concern with regard to the use of witness statements since it does not necessarily reflect how he himself would have described circumstances.

125. Evidence was given for the third respondent from Mr Porch and Mr Wilson, upon which there was little cross examination, and therefore assumed to be little dispute.

126. I accepted that all of the claimants were credible and reliable witnesses.

127. Although it had been agreed that in a case such as this that witness statements were appropriate, I believe it is appropriate to observe that this

case illustrates the difficulties of witness statements. The very fact that Ms Wright on reflection chose not to call Mr Green but instead chose to cross-examine him having read his witness statement reveals that, given that during cross examination he confirmed that a number of his statements were inaccurate, or at least based on having made a number of assumptions. Further, I noted too that in the witness statements of Mr Gerry McWilliams, he stated in one that he had undertaken the same role in respect of both the old and the new contracts, but appeared to suggest in the other that he played a more extensive role. However, on questioning it became clear that in one he was talking generally about his role as clerk of works, and in the other he set out more detail about his role. However this serves too to illustrate the tendency of witness statements filtered through the minds of interviewers to reflect what the interviewer believes they are saying in a way which might at least emphasise facts which support their claims.

Relevant Transfer

128. The key question which this Tribunal must determine is whether or not there was a relevant transfer. If there was no transfer, then the claimants' claims will lie against the first respondent, their former employer. However, if the Tribunal concludes that there was a relevant transfer, then another key question which it was agreed would be determined at this hearing is whether each claimant transferred to the second or third respondent.

129. By the time this case reached Tribunal, no party argued, even in the alternative, that this was a standard, old style transfer type case. Rather Ms Wright argued that there had been a service provision change type transfer, and all other parties ultimately argued that there was no transfer at all.

130. Under Regulation 3(b)(ii) of the TUPE regulations, a relevant service provision change is a situation where activities cease to be carried out by one contractor (in this case the first respondent) on behalf of a client (in this case NLC) and which are carried out instead by another person ie a subsequent contractor.

131. Although the language of the statute suggests that there will be only one transferee, the EAT confirmed *in Kimberley v Hambley 2008* IRLR 682 that,

as with a standard transfer, in a service provision change type case there can be two or more transferees. In this case, both the second and third respondents can legitimately and simultaneously be transferees.

132. *In Enterprise Management Services Ltd v Connect Up Ltd 2012* IRLR 190, Judge Peter Clark, after reviewing the relevant authorities, set out the following guidance and issues which Tribunals assessing this question should determine:

1. the relevant activities carried out by the original contractor;

2. whether the activities carried on by the subsequent contractor after the relevant date are fundamentally or essentially the same as those carried out by the original contractor, disregarding minor differences, which is essentially a question of fact and degree for the tribunal;

3. whether there is a division of services after the relevant date amongst a number of different contractors such that the case falls outside the SPC regime (fragmentation);

4. whether the following conditions are satisfied:

    i. there is an organised grouping of employees in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

    ii. the client intends that the transferee, post-transfer, will not carry out the activities in connection with a single specific event or task of short-term duration;

    iii. the activities are not wholly or mainly the supply of goods (rather than services) for the client's use.

5. whether each claimant was assigned to the organised grouping of employees.

133. I have followed that guidance in this case, and consider each of these questions in turn, except 4(iii) which is not relevant.

134. There is however in this case a sixth issue for determination because in this case there was a transfer to more than one transferee. In this situation, the guidance of Langstaff P in *Kimberley* is particularly relevant. When a tribunal is examining whether there is a service provision change, it must look at all the facts and their implications in the round. It may be that any difficulties in determining who should take responsibility for an employee's contract after any given date would be taken into account by a Tribunal as indicating there is no service provision change. However where a tribunal has legitimately concluded that there is an SPC, then the tribunal must ask what the consequences of that are, and in particular which transferee should take responsibility for the employees' contracts after the SPC. In determining that question, the tribunal should consider to which aspect of the activities in the service provision the employee was assigned. In order to determine that the tribunal should look at the factors (such as those set out in the Duncan Web Offset case for determining whether there is an SPC) which are equally applicable to the question of determining which transferee should take responsibility for the employees after the SPC.

Burden of Proof

135. Before considering the relevant questions, I deal with the issue of the burden of proof which was raised, particularly and consistently by Mrs Wedderburn, who argued that the burden of proof is on the claimants in this case. I noted that she was however not able to refer me to clear and unequivocal principles from case law or legislation on that matter, beyond one decision of the EAT, *Cukic v Vordula Ltd* EAT/875/02.

136. Mr Lawson addressed this point in his submissions, and distinguished the circumstances in Cukic. In that case, there was only one respondent (who was not represented) so that it was necessary for the claimant to adduce evidence to support his claim. He submitted that the burden of proof is not relevant. He argued that that paragraph 13 applied here, that was that "the

Tribunal is required to form a view, on the evidence put before it, and has to make a decision on an issue of fact which was within the scope of its statutory responsibility".

137. It might be assumed that the party seeking to show that there was a relevant transfer would bear the burden of establishing that. Here that would be the first respondent. The relevant evidence will primarily (thought not exclusively) be in their hands. As Mr McLaughlin pointed out, the claimants were simply advised by them to which new contractor to report, and not consulted or informed about how that decision had been reached. However, I noted in a case to which I was not referred (*Robert Sage v O'Connell* 2014 IRLR 428) at [42] that Slade J indicated when it came to the exception for an event or task of short-term duration, that it is for the party relying upon it "to establish that the exception applied". Here that would be the second respondent.

138. In any event, I accepted Mr Lawson's submission that this is not a case which turns on the burden of proof. I must form a view and make findings in fact on the evidence before me. While the burden of proof may ultimately lie on the claimants to prove their claims, the question of whether or not there has been a relevant transfer is a preliminary point where the focus is on the identification of the correct respondent, which must be addressed before considerations come to the substance of the claimants' claims.

139. It follows that I did not accept Mrs Wedderburn's submission that because the claimants were not insisting on their claims against the second respondent, that the claims against them should be withdrawn or dismissed. This was not least because had the claimants not pursued the claims against the second and third respondents, the first respondent could, and indeed self-evidently would, have sought for them to be brought in as parties against whom a claim lay.

140. The "relevant transfer question" is thus essentially a preliminary question to be determined as between the three respondents.

Question 1: what activities were carried out by the original contractor?

141. The first question is to identify the “activities” which were carried out by the first respondent on behalf of North Lanarkshire Council under the old contract.

142. In contrast with many other TUPE cases, I did not consider that to be unclear in this case. Ms Wright submitted that the activities should be framed as the replacement of kitchens in North Lanarkshire Council social housing stock, relying on the tender documentation and the evidence of Martin White.

143. I accept that submission, based on the evidence heard and the documents lodged. I did not however understand that central point to be in dispute, that is that the old contract was for the replacement of kitchens, and the new contract was also for the replacement of kitchens. The detail was included in the documents lodged which showed the purpose of the old contract and the new, as set out in the tender documents. No evidence was led to suggest anything different.

Question 2: were the activities post transfer fundamentally the same?

144. Notwithstanding the lack of focus in evidence on the description of the work as set out in the old contract and the tender documents in respect of the new contracts, it was argued that these activities were not “essentially or fundamentally the same” in the post-transfer situation.

145. There were a number of factors relied on, by Mrs Wedderburn in particular, which it was argued would lead to a conclusion that the activities could not be classed as “fundamentally or essentially the same”, which I consider in turn.

When the activities are work in progress

146. Mrs Wedderburn relied on the case of *Ward Hadaway v Love* UKEAT/71/09, in which the EAT found that there was no transfer where the activities were the work in progress being carried out by a solicitor’s firm at the expiry of its contract, which was to be completed within six months.

147. Ms Wright submitted in response that the case of *Hadaway* was distinct on its facts because here there was no long-running work, given that a kitchen

would be installed in a week. She submitted that on such an analysis there would never be an SPC, considering the example of a waste collection contract. She argued that this was not relevant to the issue here, where the focus was on activities.

148. I considered that there was no evidence to support any contention that there was work in progress in this case. There was no evidence that addresses from Order 12 had been included in the new contract. The evidence was that Order 12 had been completed in July 2017, and although there was reference to snagging taking place over the course of the next year, that was not carried out by the teams which had worked on fulfilment of the substantive tasks of the old contract.

Change in scope and quantity

149. Mrs Wedderburn, relying on *Department for Education v Huke* EAT/80/12, submitted that it is also necessary to look at quantity, and that a substantial change ie the reduction in the amount of a particular activity might mean that the activities were not essentially the same.

150. Ms Wright submitted that there is no evidence to support the contention that the scope of the activities and/or the quantity of the work means that an SPC has not taken place. There was evidence that the first respondent was installing between 18-25 kitchens per week, with evidence of up to 30 by the second and up to 19 by the third. The second and third respondents were therefore installing as many kitchens per week as the first, and there no reduction in scope, if anything increase when contract splits. She submitted that the evidence supports a conclusion that the first respondent installed around 108 kitchens per month, and the second and third 105, all respondents taking around one week to install each kitchen.

151. Although I noted there was a lack of consistency in regard to the numbers of kitchens installed by the second respondent (their NLC witness said they were installing between 15-20 per week, Mr O'Rourke said 20-30 and Mr McTear said in para 63 of his statement that by the end of the project up to 20 installations took place every week), I accepted that similar numbers were

being installed each week. I therefore concluded that there was little or no change in the scope or quantities of work which was being undertaken as between the first and the second and third respondents.

Types of contract

152. To the extent that it was argued that the fact that these were two different types of contract, one being measured term and the other taking a bill of quantities approach to pricing, I did not consider that this was a relevant consideration because it relates not to the activities but method of payment. In any event there was no evidence that this made any difference to the activities carried out, or the way that they were carried out.

North/south divide

153. Mrs Wedderburn argued that the activities of the second respondent's employees were not fundamentally the same because they were for different properties, in a different geographical area from which the first respondent had been operating in the nine or ten months prior. To the extent that Mrs Wedderburn argues that the mere fact that the kitchens were being installed in a different part of North Lanarkshire indicates that the activities were not the same, I did not accept that. That was an issue which was considered in the case of *Metropolitan Ltd v Dulwich Ltd* 2009 ICR 1380, and HHJ Burke QC confirmed that the Tribunal's conclusion that the place where the activity was provided was not integral to the definition of that activity was a legitimate conclusion when it came to considering whether the activities were fundamentally the same. I considered that this question, if relevant at all at this stage, was more relevant to the fragmentation question to which I now turn.

Question 3: was there fragmentation?

154. Mrs Wedderburn also argues that there should be no finding of an SPC because the activities in this case are fragmented. The "fragmentation" question is an issue which should be considered in the context of whether the activities are fundamentally the same, as is clear from the recent decision of

the EAT included in the volume of authorities, *London Care Ltd v Henry* UKEAT/0219/17.

155. Referring to the BIS guidance, Mrs Wedderburn argued that "a split or change in activities is a relevant consideration as to whether or not the activities post transfer are fundamentally the same as those before the purported transfer", and she argued that the split between the north and the south was fundamental. She submitted that "there needs to be careful consideration about how the activities are organised and whether there was a division of the functions on a split of lots in a re-tender exercise".

156. Simler P in the case of *Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and others* 2016 ICR 607, at [21] states that, " … it is commonplace for contract awarding bodies to split a service into different components or functions when re-tendering, each of which is assigned to a different incoming contractor. Whether or not the service provision change provisions in fact apply in any of these circumstances will depend on the application of the particular conditions within the service provision change regime to the facts of the particular case. A split or change in activities is plainly a relevant consideration in assessing whether the activities cease in relation to the outgoing contractor and whether fundamentally the same activities are carried on by the incoming contractor for the same client, but at the end of the day in each case the question is one of fact and degree."

157. I accept that it might be that the Tribunal is unable to identify on the basis of the findings in fact that there has been a service provision change because the activities carried out before are afterwards so fragmented among other persons who might win aspects of a new contract that it is impossible to determine that there has been a service provision change. However, the fact that the activities are carried out by two transferees is not without more, any indication that the activities which were being carried out could be said to be fragmented, and certainly not to such an extent that it was not possible to conclude that there was a SPC.

158. I accept too that where there was a “division of functions” in a re-tender exercise that may well be relevant to this question. However, this is not a case where it could be said that there was “a division of functions” in the sense of any division or split of activities or services, as there was in the Arch case. In that case, there had been a restructuring of the service by the client, separating the case management function from the delivery of interventions function, which notwithstanding was held to be an SPC.

159. The question is a matter of fact and degree, and here the split along geographical lines was irrelevant to the activities being undertaken, as was clear from the evidence that the lots were swapped round after the contracts were awarded and from witness evidence that it did not really matter to them where the kitchens were to be installed. I did not consider that where the kitchens were installed was a relevant consideration in this case when it came to the question of whether or not the activities before and after were different.

160. The activities undertaken under the old contract by the first respondent were undertaken all over NLC boundary area, and the activities carried on by the second and third respondents under the new contracts were all over North Lanarkshire, albeit carried out by one largely in the north and the other largely in the south. There was no division of functions in this case.

161. I did not consider this to be a “fragmentation” type case at all. There was no splitting of the service/activities into “different components or functions”. The activities under the old contract carried out by the first respondent was replacing kitchens, and that was the activity carried out by both the second and third respondent. I therefore reject the contention that there was fragmentation resulting in no SPC in this case.

Conclusion on activities

162. The focus on is activities, not contracts or locations, and here I found there was no work in progress and the scope and quantity is essentially unchanged. I conclude therefore that none of the purported differences between the contracts was relevant to the key question which the tribunal must consider and that is whether the activities carried out by the subsequent contractor after

the relevant date were fundamentally or essentially the same as those carried out before. I did not accept that the geography question was relevant, and to the extent that it might be said to be relevant it could only be categorised as a minor difference which does not affect the conclusion. In so far as that distinction is relevant to the overall question, it is considered elsewhere in respect of other stages of the test.

163. As between the two respondents taken together they were carrying out work throughout NLC boundary area. Taking particular account of the evidence of the claimants, I conclude that the activities pre and post transfer were essentially the same.

Question 4(1): was there an organized grouping of employees?

164. I next considered the question whether there was "an organised grouping of employees situated in GB which has as its principal purpose the carrying out of the activities concerned on behalf of the client".

165. The focus and force of Mr Bradley's submission was on this point. Although he submitted that the issue of whether there was an "organised grouping of employees" for regulation 3(3)(a)(i) was "analytically distinct" from the question of whether employees had been assigned to that grouping for the purposes of regulation 4, he chose to deal at the same time with the issue whether the claimants were part of an organised grouping caught by the transfer (issue 3 on the list of issue for determination by the Tribunal) and whether each claimant transferred either to the second or third respondent (issue 4).

166. I did not however, for reasons that follow, agree that it was appropriate to conflate these questions when it came to the correct analysis. In particular, I did not agree that it was necessary or indeed appropriate to consider when determining this particular question (the organised grouping) whether or not each claimant was part of that grouping (and liable to transfer to a particular other transferee).

167. Judge Peter Clarke in *Enterprise* considered they should be dealt with sequentially. Further, at the EAT in *Seawell Ltd v Ceva Freight (UK) Ltd* 2012 IRLR 802, Lady Smith made it clear at [18] that “the identification of the existence of an organised grouping of employees logically comes first”. In *Costain Ltd v Armitage* UKEAT/0301/13, HHJ Eady QC confirmed that the two issues are analytically distinct, and that for the purposes of considering assignment to a putative organised grouping, it was first necessary to identify what the grouping consisted of [35], a second question being that of a particular employee’s assignment.

168. Reliance was placed by parties on the cases of *Edie Stobart v Moreman* 2012 ICR 919 and *Ceva Freight Ltd v Seawell* 2012 IRLR 726 at the Court of Session, which confirm that the “organised grouping” must be more than merely circumstantial, and that the employees must have been organised intentionally, with reference to the work being undertaken for the client, based on deliberate planning and intent, and that there was a “conscious organisation” by the transferor.

169. Mr Bradley argued that there was no clear evidence that the identified employees were deliberately organised for the purposes of carrying out the activities of lot 2 and worked together as a team pre-transfer. Indeed he argued that Mr White’s evidence supports the submission that there was no deliberately organised group for the purposes of carrying out the activities of lot 2, and that the allocations were ad hoc, random and based on happenstance.

170. I accepted he was right about that to the extent that the evidence from the claimants was clear that they was no “north” and “south” team. While there was much discussion about the methodology used to determine whether the team members had worked predominantly in the north or the south, it was clear from the evidence that this was a retrospective analysis based on where the teams had worked over the last year of the contract.

171. However, to consider this question from the perspective of the "new" contract is, to use Mr Bradley's phrase, looking through the wrong end of the telescope.

172. The focus here, self-evidently since the question relates to the situation "immediately before the service provision change", is on the way that the *first respondent* organised its business in order to deliver the requirements of its contract with NLC, that is under the old contract, which related to the activities which ceased. It happened then thereafter to be undertaken in two lots rather than one, but that, when it comes to this particular question, is nothing to the point.

173. This is clear too from the decision of the EJC in *Botzen v Rotterdamsche Droogdok Maatschappij BV* 1986 2 CMLR 50 in which the ECJ upheld the proposition that "the only decisive criterion regarding the transfer of employees rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organisational framework within which their employment relationship took effect".

174. Further, in the decision of the Court of Appeal on which Mrs Wedderburn relied, *Rynda (UK) Ltd v Rhijnsburger* 2015 EWCA Civ 75, when Lord Justice Jackson talks of a "fourth step", that is to "consider whether company B organised that employee or those employees into a 'grouping' for the principal purpose of carrying out the listed activities", company B is the transferor, ie in this case the first respondent Amey.

175. Mrs Wedderburn and Mr Bradley in turn relied on the BIS Guidance. Mrs Wedderburn submitted that this guidance "makes it clear that the intention behind this language is that the old service provider should have in place, immediately before the service provision change, a team of employees to carry out the service activities which is <u>essentially dedicated to carrying out the activities being transferred</u> (emphasis added)".

176. 176. This is not in quote marks and indeed is not an exact quote despite the emphasis. In fact the guidance states, at page 10/11 "where the old service

provider (ie the transferor) has in place a team of employees to carry out the service activities, and that team is essentially dedicated to carrying out *the activities that are to transfer on behalf of the client*". The emphasis added to this quote makes it clear that the activities which are being considered are those which are being undertaken by the transferor, that is by the first respondent.

177. It follows therefore that I did not agree with Mrs Wedderburn "that in this case, that means essentially dedicated to the activities in the north; and separately in the south of NLC's geographical area", because that is to look back from the situation post-transfer. As is confirmed by HHJ Burke QC in *Metropolitan Resources* at [43], the Tribunal should almost exclusively be focussed on the situation before the putative transfer and therefore should not be influenced by what happens to the transferee's assets or employees after the transfer.

178. In support of her argument that there was no organised grouping, Mrs Wedderburn sought to rely on evidence that the claimants did not work in fixed teams, although any suggestion that there was fluctuating numbers appeared to be explained by the reference to different trades coming in at different points of the installation. The evidence shows that swapping even between teams was infrequent, and working outwith teams was very rare, and this might be to cover annual leave or sickness. In any event I accepted the evidence of the claimants that they worked in teams and that the teams were put in place for the specific purpose of servicing the NLC contract. I take from the principles of the Eddie Stobart case that the requirement is for the employees to be organised in some sense aligned to the requirements of the client in question, and that is exactly the position here, the client being NLC.

179. Considering the evidence in this case, not least from the claimants themselves, I therefore came to the view that the first respondent had made a positive decision to have a team of workers which worked on the NLC contract and which was identified and referred to in relation to that contract. The evidence was that latterly there were two teams, all of whom spent 100% of their time working on that contract. I considered that there was no "stretch" at all in this case which was necessary to allow me to conclude that the first

respondent had, latterly and immediately before the transfer, consciously and deliberately, formed two teams which worked exclusively on the NLC kitchens contract, as confirmed by the evidence of the claimants as well as Mr White. I therefore concluded that the first respondent had an organised grouping of employees working on the NLC contract.

Question 4(2): was the contract for a single specific event or task or short-term duration

180. In order for the Tribunal to conclude that there has been an SPC, a second condition is that the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration.

181. Mrs Wedderburn relied on this exception. She supported her submission by reference to the case of *Liddell's Coaches v Cook* 2013 ICR 547, and in particular the dicta of Lady Smith that this should be judged in the context of employment relationships as a whole. In that case a one-year contract was excluded as being of short term duration.

182. The first matter to consider is whether this provision is intended to refer to two different things, namely a single specific event or a task of short term duration, or whether this refers to an event or task which is both single specific and of short term duration.

183. Mr Lawson directed the Tribunal to the BIS guidance which suggests that the event or task must be both single specific and of short term duration, ie that latter of those propositions. It seems clear too, considering the rationale for including the wording "short-term duration" in the Government's 2006 Consultation Response at paras 2.12 and 2.13, that was the legislative intent.

184. This was the view too, albeit obiter, of Langstaff P in *SNR Denton UK v Kirwan* 2013 ICR 101 EAT. On the meaning of short-term, his view was that duration was not to be judged from a historical perspective but in the broader context of employment relationships as whole. Other factors were that it would take a year to build up employment rights, that notice of between one and 12 weeks

would require to be given, and claimants would have three months to bring an unfair dismissal claim. These considerations plus the circumstances of the particular employment all create a context in which short-term must be judged and accordingly the question will be one of fact and degree for the tribunal.

5 185. Although Lady Smith in *Liddell* agreed with Langstaff P on the meaning of short-term in that context, she suggested that the provision was disjunctive, ie that single specific events are a separate entity from tasks of short term duration. In that case she concluded one year contract was short term given that the type of contract was usually awarded for three years or more, but that 10 was based on the facts in that case about the type of contract.

186. Subsequently Slade J adopted the view of the President in *Swanbridge Hire and Sales Ltd v Butler* EAT/0056/13, finding that an 18-month project to insulate and lag five industrial boilers at a power plant was a task (though not an event) of short-term duration.

15 187. I could not say in this case that the contract was for a single specific event of short-term duration, but it could it be argued that this is a single specific task of short term duration? The circumstances here would appear not to fall within that category. The contract here was for contractors to carry out a programme of work to fit kitchens. The fact that it was only for one year is not determinative 20 of the short term question. As I understand it this is an anti-avoidance provision, to prevent a client entering into a series of short-term, one off contracts, such as to provide ongoing daily services, for what was intended in reality to be an SPC. The facts in this particular case do not point to such a situation.

25 188. Indeed, as Ms Wright submitted, the focus in on the client's intentions.

189. Ms Wright argued that the evidence of the NLC witnesses was that the award of the contract was intended to run beyond the end of the new contracts with those parties. There is therefore no evidence that the intention was that it should be carried out for a short period of time. The evidence was that it was 30 not until April 2018 that NLC decided it would not be carrying out this larger re-tender exercise.

190. I accepted that there was evidence from the NLC witnesses of an intention to undertake another re-tendering exercise as I understood it was for a rolling programme of kitchen replacements. Ms Wright had sought on the morning of the second day to lodge a letter sent from NLC to the third respondents to confirm this. Although Mr Bradley objected to the late lodging of that letter, I noted that there was oral evidence in addition from his own witness referring to the cancellation of this further re-tendering exercise in April 2018.

191. I therefore accepted that there had been an intention to request bids for another rolling contract and that was evidence that this was not intended to be a short term task. I accepted that the question of the client's intention is to be considered at the time of the purported SPC (*Horizon Services Ltd v Ndeze* 2014 IRLR 254) and therefore that what happened subsequently (ie the decision not to issue a further tendering exercise) was not relevant to the intention question.

192. I conclude that the contract was not intended to be a contract of the type which fell within the exception.

Question 5: were the claimants assigned to the organised grouping of employees?

193. This question involves the provisions at regulation 4(1). As discussed above, I readily accepted Mr Bradley's submission that this question is analytically distinct from whether there is an organised grouping of employees dedicated to the client for the purposes of reg 3(3)(a)(ii) such as to constitute a transferable entity. I accept that an employment tribunal may find that, although there was an organised grouping of employees, a particular employee was not assigned to that grouping. Indeed, I agree with Mr Bradley's observation that it is not uncommon that there will be no dispute that there has been an SPC, but that there is a dispute about who is "in scope". That is why this is a separate question and should not be conflated with the "organised grouping" question.

194. Regulation 4(1) states that "a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the

transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee".

5 195. As discussed above, the organised grouping of employees is that which pertains immediately before the transfer, and the question is whether a particular claimant was assigned to that organised grouping immediately before the transfer.

196. Mrs Wedderburn argued that in determining to which person employees 10 transfer under TUPE reg 4(1), the Tribunal should apply the *Duncan Web Offset* factors as to determine whether the employee(s) were essentially dedicated to the activities taken on by the transferee. But as discussed above I do not accept that is the correct test at this stage of the analysis. The focus is not on the activities taken on by the transferees.

15 197. It follows too that Mr Bradley's submissions, as discussed above, regarding the first respondent's rationale for "transferring" particular employees to the third respondent, are not relevant to this question, at this stage of the test at least.

198. Their focus was on the fact that the Tribunal could not say that a claimant was 20 assigned to the part of the contract that went to the north and that part of the contract that went to the south. But that is not the correct test.

199. It is clear from regulation 4 that the question of whether an employee is "assigned" is a question about whether the employee was "assigned to the organised grouping of employees that is subject to the relevant transfer". This 25 is clearly, given the next phrase "which would otherwise be terminated by the transfer", a reference to the circumstances pertaining under the old contract. To consider this question from the perspective of the "new" contract is, as discussed above, to take the wrong approach. It takes as its starting point where the employees ended up, rather than whether they were assigned to 30 the identified organised grouping which transferred.

200. Indeed, it is clear from the relevant case law that any guidance or factors to be relied on and referred to in cases such as Duncan Web Offset relating to “difficult questions of fact for industrial tribunals when deciding who was ‘assigned’ and who was not” refers to difficulties in determining, on the basis of the facts, whether an employee was “assigned” to work on the “old” contract, and we are not, at this stage at least, looking at that question in relation to the new.

201. In *Duncan Web Offset*, Mr Justice Morison at [15] suggested in a case where x transfers part of his business to Y that “in order to determine which employees were employed by X in the part transferred it is necessary to ask: which of X’s employees were assigned to the part transferred”. The reference here is to whether the employees of X, ie the transferor, were assigned to the part transferred. The “part transferred” of the first respondent’s business was the whole contract with NLC.

202. The focus thus is not on the activities taken on by the transferee, as is confirmed by HHJ Burke in *Metropolitan Resources* at [43], discussed above. I therefore did not consider, when determining the “assignation” question, that it was appropriate to look at this from the perspective of what happened subsequently, or the specific lots or contracts awarded to the second or third respondent where the claimant’s ended up, but what they had been working on before the transfer.

203. When looked at this way, the answer is clear. Disputes about who is “in scope” are usually focussed on the situation where a claimant may have spent only part of their time on a particular contract. Here all of the claimants spent 100% of their time of the contract which was re-tendered. This is not one of those difficult cases (at this stage of analysis at least). The evidence is unequivocal. Each of the claimants worked exclusively on the NLC contract. There was some evidence that members of team 1 could cover team 2 and vice versa, but that was very infrequent (to cover annual leave and sick leave) and would still confirm their “assignment” to the NLC contract. Only very rarely indeed would team members not work on that contract.

204. There was some evidence that Mr Ryan Daly did not work exclusively on this contract. Mr White said that he worked 99.9% of his time on the contract. Mr Daly in cross examination confirmed that he had in the past worked on the Clackmannanshire re-wire contract, but latterly attended only two meetings per year when his equivalent on that contract was on annual leave. In any event, I considered this de minimis and find that Mr Daly was assigned to the organised grouping that dealt with the old NLC contract.

205. In light of the relevant case law, and on the basis of the evidence heard, it is clear that all of the claimants in this case were assigned to that part of the undertaking which was argued to have transferred.

The date of the transfer

206. Having concluded that there was a service provision change in this case, consideration requires to be given to the date of transfer, which was also in dispute.

207. The Tribunal heard evidence about the tender process, and the delays in the award of the contracts which the first respondent state caused them considerable difficulty. The evidence was that the contract came to an end on 20 July, and that the first respondent paid the claimants up to 14 or 15 August, which was a result of the delay in awarding the contracts.

208. The contracts were awarded on 21 July. The pre-start meetings took place on 14 and 15 August.

209. Although no kitchens were being installed at that point, the contact had clearly commenced at that point, and it is clear from the minutes of those meetings that possession had been taken, and subsequently surveys were being undertaken and liaison with tenants, until the kitchen installations started in September.

210. I therefore conclude that the date of transfer in respect of the third respondent was 14 August 2017 and in respect of the second respondent was 15 August 2017.

The final question: Did each claimant transfer either to Mitie or McTear?

211. I have therefore concluded that there was an SPC on 14/15 August 2017 in respect of the third and second respondent respectively. The final matter to consider is liability, that is who is liable to take on those employees who were in the organised grouping. Normally identifying that the claimants were assigned to the organised grouping of employees which transferred would be the whole answer to the question, because it having been concluded that they were assigned to the part transferred, then employees would transfer to the transferee.

212. The focus in the *Kimberley* case was on this question, ie what were the consequences of that conclusion, the EAT having determined that it was legitimate in that case for the tribunal to conclude that there was an SPC.

213. As with the facts in *Kimberley*, difficulties arose because the contract was split in two, which means not one, but two transferees. But the particular difficulties were compounded in this case because the contract was split along geographical lines. It is that fact which has caused a good deal of the confusion regarding the correct application of the facts to the legal tests in this case, and it is indeed that fact, and the other factual circumstances in this case, which makes this case a particularly difficult one to determine.

214. The focus of argument in this case related to the fact that the contract was split, and that it was split as between the north and the south. There was no argument that it was not possible to say that the activities post transfer were carried out by both, as is clear from the case law. The Tribunal is not precluded from concluding that there was a service provision change if the activities were carried on by one or more transferees. In this case that could be the second or third respondent, or indeed both.

215. As stated by Langstaff P in *Kimberley*, it might be that the Tribunal is unable to identify on the basis of the findings in fact that there has been a service provision change because the activities carried out before are so fragmented among other persons who might win aspects of a new contract that it is impossible to determine that there has been a service provision change.

216. In particular, at [35] it is stated that "when a tribunal is examining the question whether there is a service provision change or not it is of course entitled to and must look at all the facts and their implications in the round, and it may be that a tribunal wishes to take into account as indicating that there is no service provision change any difficulties in determining who should take responsibility for an employee's contract after any given date. But as a matter of clarity and logical progression having taken that into account in determining whether there is a service provision change, as this tribunal here in our view was entitled to do, we turn now to what the consequence is and how reg 4 operates". The fact that there are significant difficulties in deciding this question does not thereby mean that there is no service provision change.

217. After careful consideration, and taking account of the division of activities, as discussed above, applying the legal tests, I have concluded that there is an SPC. I therefore find myself in a similar position to the employment tribunal in the *Kimberley* case, where a determination had to be made as to who should take responsibility for the employees' contracts after the SPC. This is a question about which of two transferees is liable for the contracts of employment of each of the individual claimants.

218. What is clear also from the decision in *Kimberley* is that liability cannot be divided between two transferees, and the rights and liabilities in respect of each affected employee could only transfer to one of those transferees. Indeed this case illustrates precisely why the solution found by the tribunal in *Kimberley* is not viable because here the claimants were not dismissed by the first respondent and many were taken on by either the second or third respondent.

219. But *Kimberle*y is also authority for the proposition that when determining which of two transferees rights and liabilities transferred to, the factors set out in Duncan Web Offset case can be referred to to determine the question in the same way that they can for the assignation question in relation to the old contract. That case sets out a non-exhaustive list of the factors to be taken into account when determining the assignment question which Langstaff P states are equally applicable at this stage of the analysis. That includes the

amount of time spent and the amount of value given by the employee; the terms of the employment contracts showing what the employee could be required to do; and how the cost of employing the employee was apportioned. The "overall principle….to be focussed upon is essentially the link between employee and the work or activities which are performed".

220. Applying those factors in *Kimberley*, the EAT concluded that that correct approach was that "the transferee who took the greater part of the transferor's activities took all the employees of the transferor". The determination is therefore clearly not an exact science.

221. In *Kimberley* then the division of activities involved a quantitative split. Unlike that case however, here there was no lack of clarity over the proportions being undertaken by the transferees in this case. Here the facts are that the split was 50:50, given that the new contracts were to install 420 kitchens each. That points to 50% of those employed on the contract going to the second respondent and 50% going to the third.

222. However, that still does not give us the answer to the question which of the two respondents each individual claimant ought to have transferred. The factors referred to do not give the answer here. However, it is clear those factors are illustrative, and so other factors have to be resorted to in this case.

223. Ultimately, relying on the principles set down in *Kimberley*, I accepted Ms Wright's submission that the first respondent could legitimately have chosen to have directed that team 1 employees be transferred to the second respondent and team 2 to the third, or vice versa.

224. However, the first respondent attempted to be more accurate in this case and the approach taken by the first respondent was to consider whether each claimant had worked predominantly in the north or the south given the terms of the re-tendering process. A further factual difficulty however with that approach in this case was that rationale was apparently thrown on its head when the client swapped round the addresses, unknown of course to the first respondent.

225. Mrs Wedderburn argued in the alternative that all of the claimants would transfer not to her client the second respondent but to the third respondent, who ultimately got a list of addresses in the north. Mrs Wedderburn submitted that the evidence supported a conclusion that in fact the activities of the claimants pre-transfer had primarily been in the north. This she said was clear from her analysis of the list of addresses (at 2057 et seq).

226. In any event, I did not agree that the evidence supported a conclusion that the work had pre-transfer been carried out predominantly in the north, because that depended entirely on what period of the old contract was considered. Mr Bradley might equally have argued taking a longer period that the addresses were mainly in the south. In any event I have decided that the correct time frame to consider is the position before the swap, ie as at the time of transfer, so applying that alternative argument to the facts found, all the claimants would have transferred to the second respondent.

227. Relying on *Kimberley,* I accept that a pragmatic approach can be taken to this question, and that the first respondent's approach of roughly splitting the numbers and of broadly indicating that those who worked broadly in the north would transfer to whoever was awarded lot 1 and those who broadly worked in the south to lot 2 was legitimate and appropriate.

228. Mr Bradley made forceful submissions regarding the sufficiency of evidence, in support of Mrs Wedderburn's submissions. He argued in particular that the documents lodged to support the conclusions regarding which claimants had worked predominantly in the north and which in the south had not been agreed, and did not speak for themselves. He argued that since the authors of the documents had not given evidence, and there was no evidence to support the allocation on the lists of the teams to the addresses, they could not be relied upon

229. However, to the extent that I have accepted that where the claimants worked predominantly pre-transfer is a factor to be taken into account when determining to which respondent each claimant transfers, I did not accept his submissions.

230. Mr White gave evidence about the documents. He was aware of the rationale behind the allocations, and he had been sent copies of the spreadsheets by colleagues. As Ms Wright argued, there was no evidence to indicate that the lists were not accurate. Here we also have the evidence of the claimants regarding their places of work. Mr White and the claimants confirmed that there was also no conscious grouping around north and south teams, but there was no evidence to challenge the accuracy of the allocations which had been made by the first respondent. I noted that it had been put to Mr White in cross examination that the allocations were random, ad hoc and based on happenstance. Those questions were however related to whether, under the old contract, the first respondent had organised the claimants into north and south based teams. There was however no dispute about that. I accepted that the evidence which I heard was sufficient to allow me to conclude that the first respondent had gone to some lengths to work out whether each claimant had broadly worked more in the north or the south. This was an artificial construct in an attempt to be more accurate about which employee transferred to which transferee.

231. In any event, my primary conclusion is that the first respondent could have said that team 1 was allocated to the second respondent and team 2 to the third. This alternative approach was as good as any, which split the team members broadly 50:50.

232. The second respondent was awarded the contract for the north, and the third respondent was awarded the contract for the south. The relevant point in time is the point of transfer on 14/15 August. The fact that thereafter, at the pre-start meetings, the lists were swapped round is not relevant to the question who is transferred to which respondent. I accept that the rationale of allocating those who had broadly worked more in the north to the second respondent and those who had worked broadly more in the south is, in the particular circumstances of this case, appropriate. I accept too, as discussed above, that to achieve a broadly equal split was an appropriate rationale so that Mr Lennon was transferred to the third respondent and Mr Daly was transferred to the second respondent. Consequently, the claimants having been advised

to transfer either to the second or third respondent, I accept those as the appropriate transferee, as set out in the annexes to this judgment.

233. I came to this conclusion on the basis that it would be entirely illogical to first conclude that there was a relevant transfer here, as it seems to me that there was no doubt that the facts supported, and then to conclude that none of the employees were in fact transferred.

234. I was alert to the fact that I could have decided that the question was so difficult that I required to conclude that there was no SPC, as suggested by Langstaff P in *Kimberley*. The facts do not however point to that conclusion, as discussed above. The "part transferred" in this case is the NLC contract, and the question is not to be viewed from the perspective of the purported transferees. But for the fact that the contract was split into two lots, there would be no dispute that there was an SPC. The mere fact that the contract was split along geographical lines into two could not turn what was otherwise clearly an SPC into a situation where there was no relevant transfer. It is clear that in itself does not preclude a TUPE transfer taking place, even of the SPC variety. That the north/south divide was a red herring, and without significance for the delivery of this contract, is confirmed by the fact that immediately after the contract was awarded the client swapped round the addresses. Indeed the addresses were stated by NLC witnesses to be "indicative". Steven Porch said that it did not matter whether the addresses were in the north or the south.

235. I agreed with Ms Wright that were that the case, it would be apt for abuse, because there would be a very easy way to get round TUPE employment protection objectives which is simply to split a contract into lots based on a rationale which might ensure that no employees could be properly assigned to any new contract.

236. I bore in mind too that to find otherwise would be contrary to the employment protection objectives of the legislation. While I accept Mr Bradley's point that in this case none of the claimants will be left without a remedy whether there was a relevant transfer or not, there is a difference between a remedy which

is compensation for the loss of a job and a remedy which protects the claimant's contract of employment.

237. I did not accept that there was any deliberate intention on the part of the first respondent to avoid their employment liabilities. The first respondent found itself in a difficult situation, coming to the end of the contract with NLC, but the award of the re-tender having been delayed. The first respondent was left with no option but to inform employees working on the contract that they were redundant, until NLC confirmed the position at the eleventh hour. NLC have caused a good deal of further confusion not only by the geographical split, but also by the swapping around of addresses at the start of the new contracts. The result of their actions has been a great deal of uncertainty, which the claimants, through no fault of their own, have required to endure throughout this whole process.

238. There was much discussion too in this case about ELI. Where there is a failure to comply with the ELI requirements, a remedy lies between the transferor and the transferee(s), and is not relevant to the question whether there was an SPC. Nor however was any additional information sought by the second and third respondents a relevant factor in determining either to which transferee an employee might transfer. Mr McTear's evidence was that he tendered assuming that TUPE did not apply, which perhaps explains why the second respondent was the preferred bid, whereas the third respondent tendered on the basis of a maximum of 30 transfers. It is difficult in any event to see what difference it would have made in this case had the information been forthcoming, given reliance on the north/south argument. Where a potential transferee bids for a contract where TUPE may apply, as in this case, the risk lies with them, and where they are of the view that they do not have sufficient information then they have the option not to bid.

Conclusion

239. The Tribunal therefore concludes that:

a. there was a “relevant transfer” being a “service provision change” in terms Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006;

b. on 14 August 2017 there was a relevant transfer from the first to the third respondent;

c. With effect from 14 August 2017, the employment contracts of each of the claimants listed at appendix B transferred to the third respondent;

d. On 15 August 2017 there was a relevant transfer from the first to the second respondent;

e. With effect from 15 August 2017, the employment contracts of each of the claimant’s listed at appendix A transferred to the third respondent.

f. The claim is dismissed against the first respondent

Employment Judge	**Muriel Robison**
Date of Judgment	**14 March 2019**
Entered in register and copied to parties	**18 March 2019**

Appendix A - Transfer to second respondent

1. Ryan Daly
2. William Ferris
3. Steven Young
4. John Hannah
5. John Craig
6. Hugh Lees
7. Gregor Abbott
8. Derek Tinto
9. Christopher McDougall
10. Alan Beattie

Appendix B - Transfer to third respondent

1. Owen Lennon
2. Shellie O'Connor
3. Paul Ryan
4. Norman Kellett
5. Michael Murphy
6. Liam Wilson
7. Kenneth Thomson
8. John Sinclair
9. John Lees
10. John Bell
11. Colin Stewart
12. Charles Thomson
13. Ben Bennett