Appeal No. UKEAT/0617/10/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 13 May 2011
Judgment handed down on 13 December 2011

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MS K BILGAN

DR B V FITZGERALD MBE LLD FRSA

MR C T HUNTER — APPELLANT

MR M McCARRICK — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SHAEN CATHERWOOD (of Counsel) Instructed by: Wilsons Solicitors LLP Steynings House Summerlock Approach Salisbury Wiltshire SP2 7RJ
For the Respondent	MR EDWARD BROWN (of Counsel) Instructed by: Colemans CTTS LLP 25-29 High Street Kingston-upon- Thames Surrey KT1 1LL

SUMMARY

TRANSFER OF UNDERTAKINGS – Transfer

For there to be a service provision change within the meaning of Regulation 3(1)(b)(ii) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006**, the activities carried out by different contractors before and after the transfer must be carried out for the same client. The Employment Tribunal erred in holding that there was a service provision change when there was not only a change of contractor but also a change of client. The decision could not be upheld on the basis of a transfer of an undertaking under Regulation 3(1)(a). Amongst other matters, the facts advanced of such an argument would not support such a conclusion. Although not necessary for the disposal of the appeal, the EAT found that the Employment Tribunal had failed to consider the conditions set out in Regulation 3(3)(a) which must be satisfied for a service provision change under Regulation 3(1)(b) to be established. Appeal allowed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Mr Hunter ('the Appellant') appeals from the judgment of an Employment Tribunal ('ET') on a Pre-Hearing Review ('PHR') entered in the Register on 26 October 2010 by which they decided that Mr McCarrick ('the Respondent') was an employee of the Appellant with continuous service from 7 November 2005 until his dismissal on 8 March 2010. The question of the length of the Appellant's service with the Respondent fell to be determined in proceedings for unfair dismissal. The Appellant was employed by the Respondent from 14 August 2009 to 8 March 2010. He would only have sufficient qualifying service to bring an unfair dismissal claim if two changes on 3 February 2009 ('the February transfer') and 14 August 2009 ('the August transfer') in providers of property management services by whom he was employed to work on certain properties were service provision changes within the meaning of Regulation 3(1)(b) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE') so that the period of his continuous employment would have commenced more than two years before the termination of his employment. References in this judgment to Regulations are to TUPE unless otherwise indicated.

2. The appeal raises the question of whether there can be a service provision change within the meaning of Regulation 3(1)(b) when there is not only a change in the contractor providing services but also a change of client. This question arises in connection with the August transfer. There is no appeal from the finding of the ET that there was a service provision change within the meaning of Regulation 3(1)(b) on 3 February 2009 on the contracting out by Waterbridge Group Ltd of property maintenance services to WCP Management Ltd.

3. The Appellant also contends that the ET failed to consider, as it should by reason of Regulation 3(3)(a)(ii) whether, immediately before the alleged transfer, the client (or clients)

intended that the service activities provided would be carried out other than in connection with a single specific event or task of short-term duration.

4. Before the ET the Appellant also contended that the Claimant was not his employee. The ET found that he was. There is no appeal from this finding.

5. The Respondent contended that if we were to find that the ET erred in law in holding that the August transfer was a service provision change within the meaning of Regulation 3(1)(b), their decision should be upheld on the basis that it constituted a transfer of an undertaking within the meaning of Regulation 3(1)(a).

The facts

6. The facts which were not in dispute are recorded in the judgment of the ET.

> **"5. From April 1993 to March 2009 the First Respondent was the Managing Director of Waterbridge Group Ltd which also had a number of subsidiary companies. There was no dispute that the Claimant commenced employment with the Waterbridge Group Ltd on 7 November 2005 ….and that he remained so employed until 3 February 2009.**
>
> **6. On 3 February 2009 a contract was signed to transfer control of the Waterbridge Companies which held a number of commercial properties, to a group of companies known as Midos. ……**
>
> **8. Although the contractual documentation in respect of the sale was signed on 3 February 2009, the complicating factor was that on the same date, a winding up petition was lodged by Her Majesty's Revenue and Customs (HMRC) in respect of the Waterbridge Group Ltd. This meant that the sale was void pending a lengthy validation process via the courts.**
>
> **9. The First Respondent's evidence was that it was agreed with Midos that a small number of employees of the Waterbridge Group Ltd or its subsidiary companies would transfer to WCP Management Ltd, a wholly owned subsidiary of Midos. …These individuals were the Claimant, Neil Jeeves, Peter Hughes, Ross Stewart, Peter Beck, Jonathan Yates, Katy Reis and Lucia Natejicina.**
>
> **10. There was no dispute between the parties that the Claimant was an employee with the Waterbridge Group Ltd during the period 7 November 2005 to 3 February 2009. It was also not in dispute that from 3 February 2009 until mid-August 2009 the Claimant, together with his colleagues Mr Jeeves and Mr Hughes were paid by WCP Management Ltd…**
>
> **11. …. Even on the First Respondent's evidence, the Claimant, Mr Jeeves and Mr Hughes were treated as employees of WCP Management Ltd.**
>
> **12. The First Respondent's evidence was that he understood there to be two options available in respect of the void sale transaction of 3 February 2009. The first was to give the money back to the Midos group and the second option – which was adopted – was to plead to the courts**

that the sale should be validated. Although the First Respondent believed that this would not be a particularly long process it went on for many months.

…

15. It is not in dispute that the Claimant continued to work for WCP Management Ltd and was paid by that company for his work from February 2009 to mid August 2009. On the Respondent's own written submission at paragraph 15 (of the submissions presented at the hearing), the Claimant was an employee of WCP Management Ltd and was paid by that company.

16. The next step in the chronology is that on 14 August 2009 Aviva Commercial Finance Ltd (Aviva) who was the lender on the property portfolio attached to the sale of the Waterbridge companies on 3 February 2009, appointed Law of Property Act Receivers to assume control of the properties. The Claimant and his colleagues had been employed by WCP Management Ltd to manage that portfolio of properties and once Aviva appointed Law of Property Act Receivers, there was no work for them to do on behalf of WCP Management Ltd."

As to the relevant disputed facts the ET made the following findings:

"23. The Tribunal finds that in August 2009 when the Law of Property Act Receivers were appointed, the First Respondent was keen to see the properties come out of receivership and revert to Midos, so that the sale transaction would go through.

24. We find that it was in the First Respondent's interests to have the Claimant, Mr Jeeves and Mr Hughes on board to help resolve the very difficult situation in which he had found himself with the sale of 3 February 2009 being declared void following the winding up petition from HMRC. The First Respondent was very keen to rescue the situation and put himself back on good terms with David Schreiber the owner of the Midos Group and with Aviva as a lender.

…

26. …. Mr Hunter said that his motivation was to keep the two parties supporting him (meaning Mr Schrieber and Aviva) and if he could get out of the mess he hoped they would support him in the future. ……

28. So far as suggestions that Mr Hunter was paying the Claimant and Messrs Jeeves and Hughes "to tide them over in difficult times" was concerned, we do not accept that he would do so over such a lengthy period of time without any benefit to himself. He was paying the sum of £4,300 to the Claimant and if equivalent sums were being paid to the other two gentlemen, this was costing him around £12,000 per month. In addition the evidence of both Messrs Jeeves and Hughes was that arrangements for personal payments from Mr Hunter to themselves was continuing to the date of the hearing which was some 13 months after the appointment of the Law of Property Act Receivers. We do not accept that Mr Hunter was altruistically "tiding these individuals over". We find that he was maintaining their salaries so that they would continue to work for him. Mr Hunter also said "I am not paying for ever and a day unless there is some end-goal or end desire". We have outlined in paragraph 26 above what that end desire or goal in fact was."

Conclusions of the ET

7. The ET reached the following conclusions relevant to this appeal:

"32.1.4. The Claimant's submissions sent to the Tribunal on 7 October 2010 say that this was a transfer of business (the business being property management) in accordance with Regulation 3(1)(a) of TUPE and that the economic entity retained its identity before and after the transfer because (a) a group of Waterbridge employee transferred across to Midos; (b) post transfer, the group of employees and more specifically, the Claimant himself, worked on the same portfolio that he had worked on pre transfer; (c) the Claimant's roles and responsibilities were identical both pre and post transfer. This was evidenced by the fact that the Claimant noticed

no change in his employment terms and only became aware of the transfer by e-mail correspondence dated 30 March 2009 after the transfer was complete.

…

32.1.7. We find that the Claimant and his colleagues were employed to provide the service of managing the Properties that the First Respondent (via his companies) wished to sell to Midos. This was a service provision change. under Regulation 3(1)(b) of TUPE (and not a transfer of an undertaking or business under Regulation 3(1)(a)) in that the management of the Properties continued from 3 February 2009 to be carried out *by the Claimant* and his colleagues as employees of WCP Management Ltd for the benefit of the Waterbridge Group Ltd as the owner of the Properties.

32.1.8. We find that there was a service provision change on 3 February 2009 under Regulation 3(1)(b) of TUPE in respect of the property management services of the portfolio of Properties attached to the Waterbridge Group. These activities ceased to be carried on the Waterbridge Group as at 3 February 2009 and were carried out from that date by WCP Management Limited on behalf of Waterbridge Group.

…

32.2. Was there a transfer of the Claimant's employment from WCP Management Ltd to the first and/or second Respondent?

32.2.1. As we have found above, as from 3 February 2009 the Claimant transferred to and was employed by WCP Management Ltd.

32.2.2. The next material development was on 14 August 2009 when the mortgagee of the portfolio of Properties, Aviva Commercial Finance Ltd (Aviva) appointed Law of Property Act Receivers (BDO Stoy Hayward) who assumed control of the Properties. The Respondent's submission is that at that point, a firm called King Sturge, Property Consultants were appointed to manage the Properties.

…

32.2.9. We did not accept the contention made by the First Respondent that the Claimant had agreed with any party to work "for free". Indeed the Claimant continued to receive his salary directly from the First Respondent who was keen to preserve his relationship with Aviva as a source of borrowing and to save the transaction of 3 February 2009 and his relationship with David Schrieber as an investor. Therefore just as there was a service provision change on 3 February 2009 from the Waterbridge Group to WCP Management Ltd there was also a service provision change from WCP Management Ltd to the First Respondent on 14 August 2009.

…

32.2.11. …responsibility for the management of the Properties carried out in the First Respondent's hands for the benefit of Aviva and the Receivership and the First Respondent used the services of the Claimant and his colleagues. …

32.2.12. Even though Aviva and BDO Stoy Hayward took over the assets of the Properties, the property management service was continued by the First Respondent assisted by his team. This was a service provision change under Regulation 3(1)(b) of TUPE.

…

34.2. On what date the Claimant become an employee of the First Respondent? [sic] As stated above we find that this was on 14 August 2009.

…

34.4. On what date the Claimant's employment by the First Respondent end? We find that it ended on 8 March 2010 by virtue of the e-mail from the First Respondent to the Claimant at page 241 of the bundle."

The relevant provisions of TUPE

8. **"2(1) In these Regulations-**

"relevant transfer" means a transfer or a service provision change to which these Regulations apply in accordance with regulation 3 and "transferor" and "transferee" shall be construed accordingly and in the case of a service provision change falling within regulation 3(1)(b), "the transferor" means the person who carried out the activities prior to the service provision change and "the transferee" means the person who carries out the activities as a result of the service provision change;

…

3.—(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

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

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

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

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

and in which the conditions set out in paragraph (3) are satisfied.

…

3(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

…

(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;

…

3(6) A relevant transfer-

(a) May be effected by a series of two or more transactions;"

The contentions of the parties

Submissions on behalf of the Appellant

Ground 1

9. Mr Catherwood for the Appellant contended that the ET impermissibly adopted a strained construction of Regulation 3(1)(b) to hold that 'the client' on behalf of whom activities are

carried out does not have to be the same client before and after a change of contractor. He submitted that the language of Regulation 3(1)(b) is clear. It only applies where the client is the same before and after the change of contractor. Mr Catherwood pointed out that Mr Brown for the Respondent accepted that in this case in August 2009 the client changed as well as the contractor.

10. Mr Catherwood relied upon the judgment of the Employment Appeal Tribunal ('EAT') in **Metropolitan Resources Ltd v Churchill Dulwich Ltd (in liquidation) and others)** [2009] IRLR 700 to contend that there is no need for an ET to adopt a purposive construction to Regulation 3(1)(b) as opposed to a straightforward and common sense application of the relevant statutory words to the circumstances before them. As explained by HH Judge Burke QC in **Metropolitan Resources** at paragraph 27:

> **"The circumstances in which service provision change is established are, in my judgment, comprehensively and clearly set out in Regulation 3(1)(b) itself and Regulation 3(3)."**

Further, Mr Catherwood relied on Francis Bennion '*Bennion on Statutory Interpretation*' (5th Edition) Section 304 to contend that a literal interpretation of Regulation 3(1)(b) should be applied as it was in accordance with its legislative purpose. HH Judge Burke QC set out the legislative purpose of Regulation 3(1)(b) in paragraphs 26 and 27 of **Metropolitan Resources**. He held that it was

> **"to remove or at least alleviate the uncertainties and difficulties created, in a variety of familiar commercial settings, by the need under TUPE 1981 to establish a transfer of a stable economic identity which retained its identity in the hands of the alleged transferee, particularly in the case of labour-intensive operation."**

11. Mr Catherwood submitted that Mr Brown for the Respondent advanced no explanation why his interpretation of Regulation 3(1)(b) of 'client' to include 'clients', so that it would apply where there was not only a change of contractor but also of client, was correct. He

pointed out that John McMullen in '*Business Transfer and Employee Rights*' chapter 5 paragraph 250 wrote that the concept of service provision change 'is of course independent of European law as the Acquired Rights Directive does not make similar provision'. Further, if a subsequent client may be wholly unrelated to the original client it was said that the Respondent's interpretation would require the rewriting of Regulation 3(1)(b)(ii) as follows:

> **"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, or either client as the case may be, on his own behalf) and are carried out by another person ('a subsequent contractor on the same or another client's behalf."**

12. It was submitted on behalf of the Appellant that to be a transfer of an undertaking within the meaning of Regulation 3(1)(b) the same activities are carried out by different contractors for the same client. Mr Catherwood contended that it is not sufficient that the same activities are carried out for any client by the old and new contractor. If 'client' were to be interpreted to include different clients there would be no need for Regulation 3(1)(b) to require the existence of a relationship between contractor and client – the carrying out of the activities on his own behalf or by a contractor on behalf of a client. It was said that Regulation 3(1)(b) requires more than the carrying out of the same activities by one contractor and then another.

13. Mr Catherwood submitted that in context the reference to client in Regulation 3(1)(b) was to the same client before and after transfer. The intention of 'the client' within the meaning of Regulation 3(3)(a)(ii) as to the activities to be carried out by the transferee following the service provision change must refer to the intention of the same client before and after that change. This supports the contention that there is a service provision change within the meaning of Regulation 3(1)(b) only where there is a change of contractor carrying out the same activities for the same client. That was not so after the August transfer as the property

management activities on which the Appellant was employed were carried out on behalf of Aviva and not on behalf of the Waterbridge Group as they were before the transfer.

14. Mr Catherwood submitted that the Respondent is not entitled to rely on Regulation 3(1)(a) in support of the ET's findings. The ET expressly rejected the application of Regulation 3(1)(a) to the February transfer. He contended that they took the same view of the August transfer. Regulation 3(1)(a) was said to be at the forefront of submissions made to the ET on behalf of the Respondent. It was said that even if the EAT were to conclude that the ET did not reject the application of Regulation 3(1)(a) to the August transfer there would be no basis for remitting the case for the ET to determine this issue. It would be inconsistent for the ET to reject the application of Regulation 3(1)(a) to the February transfer and to find that such a transfer occurred in August. Regulation 3(6)(a) did not assist the Respondent in these circumstances.

15. It was submitted that in any event the findings of fact would not support a finding that Regulation 3(1)(a) applied to the August transfer. In August 2009 fewer workers than in March, three as opposed to nine, went to work for the new provider of services. The ET did not make findings as to whether equipment relating to the work they undertook was transferred. He submitted that what was carried out by the Appellant which was previously carried out by WCP Management Ltd was an activity not an undertaking. Mr Catherwood acknowledged that as with the Regulation 3(3)(a)(ii) issue, if the Appellant did not succeed in his first ground of appeal and if the Respondent were permitted to contend that the decision of the ET should be upheld on the basis that there was a transfer of an undertaking under 3(1)(a) that question should be remitted to the ET for determination.

Ground 2

16. Mr Catherwood submitted that the ET did not properly consider Regulation 3(3)(a)(ii). There are no passages in the judgment of the ET which address its requirements. Even if the ET did consider this provision, they failed to give any adequate reasons for finding that it was satisfied.

17. Moreover facts found by the ET would not support a conclusion that Regulation 3(3)(a)(ii) was satisfied. The ET found that the Appellant was

> **"keen to see the properties come out of receivership and revert to Midos, so that the sale transaction would go though."**

The ET held that the Appellant needed to keep the Respondent and the other two workers on board to assist him in 'getting out of the mess'. It was acknowledged by Mr Catherwood that the ET made no finding of fact regarding the intention of 'the client' as to whether the activities of maintaining the properties would be carried out by the Appellant 'other than in connection with a single specific event or task of short term duration'. Accordingly if the first ground of appeal did not succeed the case would have to be remitted to the ET to consider Regulation 3(3)(a)(ii).

Submissions on behalf of the Respondent

Ground 1

18. Mr Brown for the Respondent contended that the ET did not err in holding that there was a service provision change within the meaning of Regulation 3(1)(b) when there was not only a change of contractor but also a change of client. Construing the Regulation as applying when there was a change of client before and after the change of contractor would reflect the broad purpose of the Regulations of protecting the acquired rights of employees. The Appellant's construction would fail to reflect the statutory purpose of the Regulations. Mr Brown accepted

that construing Regulation 3(1)(b) as applying to a situation where a service was provided by a different contractor to a different client after a transfer did not conform to the literalist approach. However it was said that a purposive approach would lead to its application where there was a change of client. Mr Brown stated that the purpose of Regulation 3(1)(b) was to protect the acquired rights of employees where there was a service provision change irrespective of whether the client changes. He contended that the literal interpretation must yield to the purpose of TUPE. Mr Brown submitted that Regulation 3(6) which provides that a transfer can take place by two or more transactions lends colour to the argument that Regulation 3(1)(b) applies where one client steps into the shoes of another. It was said that the facts of this case evidence a piecemeal outsourcing transaction.

19. Mr Brown submitted that adopting a purposive construction to Regulation 3(1)(b) leads to the addition after 'client' of the words 'or person who has acquired the rights or obligations of a client'.

20. Mr Brown relied on the judgment of the EAT in **Kimberley Group Housing Ltd v Hambley and others** [2008] ICR 1030 paragraphs 28 and 33 to contend that what is relevant when considering Regulation 3(1)(b)(ii) is to see whether activities carried out by a contractor on a client's behalf have ceased. As is illustrated by Regulation 3(3), Regulation 3 is looking at the transfer situation as a whole. The EAT held at paragraph 33:

> **"It is not necessary or apparent that 'transferee' should be understood as being necessarily singular when one is looking at a service provision change or transfer of an undertaking, business or part of an undertaking in Regulation 3(1)(a)."**

Mr Brown contended that a similar approach should be adopted to the construction of 'client' in Regulation 3(1)(b).

21. If contrary to the Respondent's contention, the ET erred in holding that there was a service provision change within Regulation 3(1)(b), Mr Brown submitted that there was a transfer of an undertaking within the meaning of Regulation 3(1)(a) first to WCP Management Ltd and then to the Appellant. He referred to findings of fact by the ET which would lead to the conclusion that an organised group of employees whose job was to manage the portfolio of properties held by Waterbridge Group Ltd and then by the LPA receivers appointed by Aviva transferred from Waterbridge Group Ltd to WCP Management Ltd and then to the Appellant. Mr Brown contended that the August transfer constituted a transfer of an undertaking within Regulation 3(1)(a) if it were not a service provision change within Regulation 3(1)(b).

Ground 2

22. As for the second ground of appeal, relying on paragraph 251 of McMullen '*Business Transfer and Employment Rights*', Mr Brown contended that 'short-term duration' qualifies both 'single specific event' and 'task' in Regulation 3(3)(a)(ii). A project which it is hoped may conclude quickly but does not is not a task of short-term duration. Mr Brown submitted that the question of whether a specific task is short-term is for the ET to decide. What is relevant is not the client's desire but their intention. Mr Brown submitted that on the facts of this case it was intended that the Appellant would continue to provide management services for the properties indefinitely. The ET found that the arrangement by which the Appellant paid the Respondent continued to the date of the hearing before the ET which was some 13 months after the appointment of the LPA receivers. It was said that such findings did not support a conclusion that managing the properties by the Appellant was to be a task of short-term duration. Accordingly Regulation 3(3)(a)(ii) was satisfied and the requirements for a service provision change within the meaning of Regulation 3(1)(b) were met.

Discussion and conclusion

Ground 1

23. The respective positions adopted by the parties leads to the conclusion that if in Regulation 3(1)(b)(ii) 'a client' and 'the client' must be the same client the appeal succeeds. If not then Ground 2, which relates to Regulation 3(3)(ii), will determine its outcome. The parties in the appeal before us do not suggest that the introduction in TUPE 2006 of the concept of a transfer of an undertaking by service provision change implemented a requirement of the Acquired Rights Directive (Council Directive 2001/23/EC) which had not already been transposed by TUPE 1981. Although we understand that there is no authority on whether 'a client' and 'the client' in Regulation 3(1)(b) must be the same, useful guidance on the purpose of the introduction of Regulation 3(1)(b) is to be found in the judgment of HH Judge Burke QC in **Metropolitan Resources Ltd**.

24. HH Judge Burke QC held that the purpose of Regulation 3(1)(b) was to clarify the application of TUPE in outsourcing (Regulation 3(1)(b)(i)), in-sourcing (Regulation 3(1)(b)(iii)) and change in the provision of activities or services carried out on behalf of a client between one contractor and another (Regulation 3(1)(b)(ii)). The inclusion of service provision change in the definition of 'relevant transfer' introduced by the 2006 TUPE Regulations Regulation 3(1)(b) also obviated the need to consider the multi-factorial approach required on considering whether there is a transfer of an undertaking within the meaning of what is now Regulation 3(1)(a). For a service provision change there is no need to consider whether there is a transfer of plant and machinery, customer lists and other matters in addition to activities and an organised grouping of workers. We respectfully agree with HH Judge Burke QC when he held in paragraph 27 of **Metropolitan Resources Ltd**:

> **"'Service provision change' is a wholly new statutory concept. It is not defined in terms of economic entity or of other concepts which have developed under TUPE 1981 or by**

> **community decisions upon the Acquired Rights Directive prior to April 2006 when the new Regulations took effect."**

HH Judge Burke QC held in paragraph 28:

> **"In this context there is, as I see it, no need for an employment tribunal to adopt a purposive construction as suggested by Mr Cooper, as opposed to a straightforward and common sense application of the relevant statutory words to the individual circumstances before them …"**

We respectfully agree. There is no warrant for adopting an interpretation of Regulation 3(1)(b) other than that required by the ordinary meaning of the language used.

25. We reject the suggestion advanced by Mr Brown that the purpose of TUPE Regulation 3 is to preserve employees' terms and conditions and continuity of employment in circumstances in which the activities on which they are engaged by one contractor are carried out by a different contractor for a different client. If the framers of the Directive or TUPE had intended the contractual terms of employees employed on an activity to follow that activity when it was undertaken for a different client they could have so provided. There would have been no need for the detailed consideration by the European Court of Justice of different elements constituting an undertaking if all that were needed was to establish that a group of employees or an employee assigned to an activity would transfer to a new contractor irrespective of whether the client for whom the service was performed changed. Nor is there any indication that the purpose of Regulation 3(1)(b) is other than that explained by HH Judge Burke QC.

26. Whilst as explained by Langstaff J in the EAT in **Kimberley Housing**, TUPE can apply where there is a transfer of his operations from one transferor to more than one transferee so that 'another person' in Regulation 3(1)(b)(ii) is to be construed as including 'other persons'. The principal reason for this conclusion was that:

> **"It is well established by a large number of cases that such transfers may take place to more than one transferee even though there is one transferor."**

It may be that the services of an economic entity are provided to different clients before and after a transfer. Applying a multi-factorial approach there may be a transfer of an undertaking within Regulation 3(1)(a) in those circumstances and the acquired rights of employees protected. However there are no precedents or purposive requirements to read 'the client' in Regulation 3(1)(b) as 'any client' or 'clients' which would be necessary as indicated by Mr Catherwood in the wording revised to take account of such a change.

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

28. Conditions set out in Regulation 3(3)(a) must be satisfied for there to be a service provision change within the meaning of Regulation 3(1)(b). 3(3)(a)(i) refers to the person on whose behalf activities are carried out before the transfer as 'the client'. In context 'the client' in Regulation 3(3)(a)(i) is 'a client' in Regulation 3(1)(b)(i), (ii) and (iii). Regulation 3(3)(ii) requires a consideration of the intention of 'the client' with regard to the activities following the service provision change. The relevant intentions are those 'immediately before the service provision change'. There is no warrant for giving a different meaning to 'the client' in 3(3)(a)(i) and in (ii). If 'the client' were to include the plural, whose intention would be relevant for the

purposes of Regulation 3(3)(a)(ii)? Regulation 3(1)(b) which HH Judge Burke QC held was introduced to provide certainty would be rendered uncertain by such an interpretation.

29. Accordingly, in our judgment the ET erred in holding that there was a service provision change within the meaning of Regulation 3(1)(b) and therefore a transfer of an undertaking for the purposes of TUPE when, on the August transfer, there was not only a change of contractor but also a change of client.

30. The Respondent contends in the Respondent's Answer that his employment transferred under Regulation 3(1)(a) first to WCP Management Ltd and then to the Appellant. In paragraph 32.1.7 the ET clearly rejected the contention that the changes in February 2009 constituted a transfer of an undertaking within the meaning of Regulation 3(1)(a). They held that they constituted a service provision change within the meaning of Regulation 3(1)(b). There is no appeal by either party from this conclusion of the ET. Although there was no express rejection of the argument that there was a transfer of an undertaking under Regulation 3(1)(a) in August 2009 that is necessarily implied in the finding that there was a service provision change within the meaning of Regulation 3(1)(b) on that occasion.

31. The difficulty we find with the contention that the decision of the ET should be upheld on the basis that they should have held that there were transfers of an undertaking within the meaning of Regulation 3(1)(a) in February and August 2009 is that even if the facts relied upon to support such a contention were to be taken from Mr Brown's skeleton argument (they do not appear in the Respondent's Answer in the Employment Appeal Tribunal) in our judgment they are insufficient to support such a finding. They amount to no more than that on each occasion there was a transfer of an organised grouping of workers including the Respondent pursuing the activity of managing the properties.

32. Without wishing to be over technical in our approach, and allowing the argument under Regulation 3(1)(a) to be advanced on the basis of the skeleton argument to bolster the Respondent's Answer, in our judgment the matters relied upon by the Respondent to seek to uphold the decision of the ET on the basis of Regulation 3(1)(a) are insufficient to support a conclusion that there constituted a transfer of an undertaking within the meaning of Regulation 3(1)(a). The facts relied upon relate solely to the organised group of employees and the activities carried out by them. No complaint is made on behalf of the Respondent of an absence of findings as to whether equipment was needed to carry out the work and whether it transferred, as to what work was carried out by the employees before and after the transfers, or the financial arrangements between putative transferor and transferee. It may be that a consideration of these matters would not have assisted the Respondent. In any event there is no cross appeal complaining of failure properly to consider and make adequate findings in relation to Regulation 3(1)(a). Whilst the Respondent is entitled to make his argument on appeal on Regulation 3(1)(a) it is that contained in the skeleton argument. On the basis of the matters there set out which are restricted to the organised group of workers transferring to a new contractor we cannot and do not uphold the judgment of the ET on the basis of Regulation 3(1)(a).

33. In order to succeed in establishing sufficient continuity of employment, the Respondent would have to uphold the decision of the ET on the basis that there was a relevant transfer in August 2009. Our conclusion is that the ET erred in so holding.

34. Our findings that the ET erred in holding that the events of August 2009 constituted a service provision change within the meaning of Regulation 3(1)(b) and our conclusion on the

application of Regulation 3(1)(a) are sufficient to dispose of the appeal which is allowed. However for completeness we also consider Ground 2.

Ground 2

35. In our judgment for the purposes of this appeal it is not necessary to determine whether the words 'short term duration' in Regulation 3(3)(a)(ii) qualify 'single specific event' as well as 'task'. On the facts of this case, providing management services for the properties in the hands of the receiver would be categorised as a 'task' rather than a 'single specific event'. Regulation 3(3)(a)(ii) clearly provides that activities in connection with tasks following the service provision change which are intended to be of short term duration are excluded from those falling within the definition of 'service provision change' within Regulation 3(1)(b). Regulation 3(1)(b) provides that Regulation 3(3)(a) must be satisfied in addition to Regulations 3(1)(b)(i), (ii) or (iii) if it is to apply. Regulations 3(3)(a) includes the requirement that:

> **"(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…"**

36. We agree with the submissions of Mr Catherwood that there are no passages in the judgment of the ET which address the requirements of Regulation 3(3)(a)(ii). At the heart of proper consideration of that provision is a determination of the intention of 'the client'. The ET made no such finding. The ET held that in August 2009 there was a service provision change within the meaning of Regulation 3(1)(b). They could only have done so on the basis that the Regulation applied where there was not only a change of contractor but also of client. The fact that the ET have not stated which client's intention they considered to be relevant lends further weight to the argument that they gave no consideration to Regulation 3(3)(a)(ii).

37. Accordingly Ground 2 of the appeal succeeds. If we had not held that the appeal should be allowed on Ground 1, in allowing the appeal on Ground 2 we would have remitted the case to the same or a differently constituted ET for determination whether the conditions of Regulation 3(3)(a)(ii) were satisfied. At the hearing before us Mr Catherwood rightly recognised that this would be necessary in the absence of any findings of fact about the client's intention. However, as the appeal is allowed on Ground 1 remission for further findings of fact is not necessary.

38. The appeal is allowed and we:

(1) set aside the finding of the ET that in August 2009 there was a service provision change within the meaning of Regulation 3(1)(b) of TUPE and a transfer of Mr McCarrick's employment to Mr Hunter, and

(2) substitute a finding that the employment of Mr McCarrick did not transfer to Mr Hunter pursuant to TUPE.