Neutral Citation Number: [2012] EWCA Civ 1399

Case No: A2/2012/0329/EATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HON MRS JUSTICE SLADE sitting with Lay Members
UKEAT/0617/10/DA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2012

Before :

LORD JUSTICE MAURICE KAY, VICE PRESIDENT OF THE COURT OF APPEAL
LORD JUSTICE ELIAS
and
DAME JANET SMITH

- -

Between :

MR M McCARRICK	**Appellant**
- and -	
MR C T HUNTER	**Respondent**

- -
- -

Mr Edward Brown (instructed by **Coleman-Ctts LLP**) for the **Appellant**
Mr Shaen Catherwood (instructed by **Wilsons Solicitors LLP**) for the **Respondent**

Hearing date : 16 October 2012

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Approved Judgment

Lord Justice Elias :

1. The question in this appeal is whether the appellant, Mr McCarrick, has sufficient continuity of employment to bring a claim for unfair dismissal against the respondent, Mr Hunter. It is common ground that the answer to that question depends upon whether, when Mr McCarrick became employed by Mr Hunter, it was pursuant to a transfer of an undertaking or of a service provision within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

The facts.

2. The respondent, Mr Hunter, was managing director of the Waterbridge group of companies. The appellant commenced employment with Waterbridge on 7 November 2005. The group held a number of commercial properties and the appellant was employed with others to manage those properties.

3. On 3 February 2009 a contract was signed to transfer control of Waterbridge to a group of companies known as Midos. The shares were to be sold to a wholly owned subsidiary of Midos, WCP Management Limited ("WCP"). However, although the contractual documentation in respect of the sale was signed on 3 February 2009, there was a complicating factor. On that very day a winding up petition was lodged by Her Majesty's Revenue & Customs in respect of the Waterbridge group. The result was that the sale was at that time void and was only ratified much later, following court proceedings, in December 2009. However, notwithstanding that the sale was not achieved at that stage, Waterbridge agreed with Midos that some of the Waterbridge employees would transfer to WCP. There were 9 employees who were transferred on that basis, including the appellant, Neil Jeeves and Peter Hughes.

4. The appellant continued to be employed in the management of the properties until mid August 2009 and was paid by WCP Management Limited. However, on 14 August 2009 Aviva Commercial Finance Limited ("Aviva"), who was the mortgagee on the property portfolio attached to the sale of the Waterbridge companies, appointed receivers to assume control of the properties. These were what are colloquially known as Law of Property Act receivers.

5. The receivers, BDO Stoy Hayward, in turn appointed a new property management company, King Sturge, and the property management services ceased to be carried out by WCP. What happened thereafter was disputed before the Employment Tribunal but the Tribunal found, after hearing evidence, that the appellant with two of his colleagues, Mr Jeeves and Mr Hughes, then became employed personally by Mr Hunter. They were each paid by Mr Hunter. They were made available by Mr Hunter to assist King Sturge in the management of the properties but they were not employed by King Sturge, nor by the receivers, nor by Aviva. They apparently continued to carry out all aspects of the property management service save for the collection of rents. It is not clear from the decision of the Employment Tribunal whether they did that work entirely on their own or whether King Sturge employees also undertook that function. Their services were provided at no cost to the receivership. The reason Mr Hunter made their services available to the receivers in this way was, according to the Employment Tribunal, that he wished to maintain good relations with Aviva and the owner of the Midos group and was hoping that the receivership could be brought to a swift end and the sale to Midos completed. Mr Hunter believed that providing their

services to the receivers would assist in achieving that objective. Subsequently the appellant was dismissed on 8 March 2010 and he claimed that his dismissal was unfair.

6. It is to be noted that the appellant is not claiming against the receivers nor is he contending that his employment ought to have been transferred to King Sturge. His claim is solely against Mr Hunter. The principal contention is that there was a transfer of a service provision effectively from WCP to Mr Hunter when he and his two colleagues left WCP to become employed by Mr Hunter personally and were allocated the property management work.

7. An alternative submission is that even if that was not a transfer of a service provision, the employment by Mr Hunter of the three individuals constituted the transfer of a business from WCP within the meaning of the TUPE Regulations.

8. If either argument is successful, Mr McCarrick's continuity of employment will have been preserved and he will be able qualify for the ordinary statutory right not to be unfairly dismissed. Conversely, if there was no relevant transfer, he will not be able to establish continuity and the Tribunal will have no jurisdiction to hear his ordinary unfair dismissal case. (There is apparently a separate claim of unfair dismissal for asserting a statutory right, when no qualifying period of continuous employment needs to be established.)

The legislation.

9. The TUPE Regulations are designed to protect employees caught up in the transfer of the business to whom they provide their services. When there is a transfer of an undertaking or part of an undertaking from one employer to another as defined in the regulations, the employees working in the undertaking are automatically transferred to the new owner, the transferee, together with their contracts of employment. Any dismissal connected with the transfer is automatically unfair (at least for those eligible to claim unfair dismissal) save where the employer can show an economic, technical or organisational reason entailing a change in the workforce.

10. The regulations are intended primarily to give effect to the European Directive known as the Acquired Rights Directive, the current version of which is Council Directive 2001/23/EC. In so far as the regulations are the domestic implementation of the Directive, they must be construed purposively to give effect to the aims of the Directive, even where this may involve some departure from the strict and literal application of their language: *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] ICR 341 (HL).

11. However, the domestic regulations were altered in 2006 to extend protection even where there might be no transfer of an undertaking or part of an undertaking. Identical protection to that afforded to employees on transfers of an undertaking was extended by regulation 3(1)(b) to employees caught up in a situation where there is a change of service provision. This has no equivalent in the Directive. It applies where a client contracts out a service, or takes it back in-house, or transfers the service from one provider to another. Employees assigned to the service transferred will become employed by the new employer providing that service. In a case where the service is brought back in-house that will be the client itself. The concepts of an undertaking

and a service provision are not mutually exclusive: many transfers of a service provision will also constitute a transfer of an undertaking, but this will not necessarily be the case.

12. Regulation 3 sets out the two types of situation where a relevant transfer may arise. Regulation 3(1)(a) deals with the transfer of a business or undertaking. It provides that the 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;

A key concept is the economic entity. That is defined by regulation 3(2) as follows:

> "In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is central or ancillary".

13. The circumstances in which a change of service provision will attract the protection of the regulations is set out in subsection 3(1)(b). It says that the regulations will apply to:

> "(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."

14. Regulation 3(3) then sets out the relevant conditions and in so doing identifies exceptional cases where the service provision change will not attract the protection of the regulations.

> "The conditions referred to in paragraph (1)(b) are that—
>
> (a) immediately before the service provision change—

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

The principal distinction, therefore, is that the economic entity is constituted by an organised grouping of resources, whilst a service provision only requires an organised grouping of employees.

The transfer of an undertaking.

15. There is a wealth of authority, both domestic and from Luxembourg, as to what constitutes the transfer of an undertaking within the meaning of regulation 3(1)(a). The essential question is whether there has been the transfer of an economic entity which has retained its existence: *Spijkers v Gebroeders Benedik Abbatoir CV* [1986] 2 CMLR 296. The definition in regulation 3(1)(a) reflects that approach.

16. In determining whether there has been the transfer of such an economic entity, the court must adopt what is sometimes termed a multi-factorial approach. Valuable guidance as to the potential range of factors which should be considered was provided by the EAT in *Cheesman v R Brewer Contracts Ltd* [2001] IRLR 144. Lindsay P, giving the judgment of the Tribunal, discerned the following principles from four cases which he considered: *Francisco Hernandez Vidal S.A. v Gomez Perez and associated cases* [1999] IRLR 132 ECJ, decided on the 10th December 1998; *Sanchez Hidalgo and others v Aser* [1999] IRLR 136 ECJ, decided on the same day by the same judges; *ECM (Vehicle Delivery Services) Ltd v Cox* [1999] ICR 1162 CA; and *Allen and Others v Amalgamated Construction Co. Ltd* [2000] IRLR 119 ECJ:

> "As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective - Sanchez Hidalgo paragraph 25; Allen paragraph 24 and Vidal para 6 (which, confusingly, places the reference to "an economic activity" a little differently).
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> ….
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> (ii) In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible - Vidal paragraph 27; Sanchez Hidalgo paragraph 26.

> (iii) In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower - Sanchez Hidalgo paragraph 26.
>
> (iv) An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity - Vidal paragraph 27; Sanchez Hidalgo paragraph 26.
>
> (v) An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it - Vidal paragraph 30; Sanchez Hidalgo paragraph 30; Allen paragraph 27."

17. Subsequent decisions from Luxembourg have confirmed that there may be a transfer of an undertaking even where there are no assets as such transferred but only employees: see for example, *Jouini v Princess Personal Service GmbH (PPS*) [2007] IRLR 1005,and *Scattalon v Ministero dell'Instuzione, dell'Universita et della Ricerca* [2011] EUECJ C-108/10. In the latter case, the Grand Chamber of the ECJ said this (para 49):

> "..**.**the court has repeatedly held that, in certain sectors, the activity is essentially based on manpower. In such circumstances, a structured group of workers may, despite the absence of significant material or immaterial assets, correspond to an economic entity for the purposes of Directive 77/187 : see in particular, concerning cleaning services."

18. In these cases, therefore, the transfer of the organised group of workers to carry out essentially the same activity will be enough to constitute a transfer of an undertaking. But that is not necessarily the case; it depends on the sector under consideration. All potentially relevant factors must be considered and their importance will vary depending on the business under consideration. In some sectors the fact that no material assets have been transferred will be a factor of significant weight pointing against the transfer of an undertaking: see e.g. *Liskojärvi and Another v Oy Liikenne Ab* [2002] ICR 155 para 34 and *Abler and Others v Sodexho MM Catering Gesellschaft mbH* [2004] IRLR 168 paras 33-35.

The change of service provision.

19. The concept of service provision is narrower and less complex. In *Metropolitan Resources Ltd v Churchill Dulwich Ltd* [2009] ICR 1380, the EAT (HH Judge Burke QC presiding) explained that the protection had been extended to a change of service provision principally because of the difficulty, particularly in labour intensive sectors, of predicting whether a particular transfer would constitute a transfer of an undertaking (para 26):

> "…. the introduction in TUPE 2006 of the concept of a transfer of undertakings by service provision change was intended 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, by including within the definition of a transfer of undertaking the situations falling within Regulation 3(1)(b) in which the conditions set out in Regulation 3(3) were satisfied. The three situations falling within Regulation 3(1)(b) can shortly be described as 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)). All these situations are well-known to employment lawyers to have caused problems under TUPE 1981."

20. His Honour Judge Burke QC then gave guidance as to the way in which tribunals should approach the question whether there has been a change of service provider (paras 27-28):

> " "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. 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)……. In contrast to the words used to define transfer in TUPE 1981 the new provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact.
>
> 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 commonsense application of the relevant statutory words to the individual circumstances before them; but equally and for the same reasons there is no need for a judicially prescribed multi-factorial approach, as advanced by Mr Bourne, such as that which has necessarily arisen in order to enable the Tribunal to adjudge whether there was a stable economic entity which retained its identity after what was said to be a transfer falling within what is now Regulation 3(1)(a).
>
> In a case in which Regulation 3(1)(b) is relied upon, the Employment Tribunal should ask itself simply whether, on the facts, one of the three situations set out in Regulation 3(1)(b) existed and whether the conditions set out in Regulation 3(3) are satisfied."

21. Mr Brown, counsel for the appellant, submitted that this observation is misguided. He says that there is no reason why a purposive approach should not be adopted here as it is when dealing with traditional TUPE cases. He points out that the particular regulations extending protection beyond the area circumscribed by EU law are made

pursuant to section 38(2) of the Employment Relations Act 1999. This subsection requires that the regulations should make the same or similar provision in relation to the treatment of employees in such cases as are afforded where business transfers occur. Accordingly, a broad interpretation is necessary to achieve that objective and to ensure that the will of Parliament is respected.

22. I do not dispute that there may be issues where a purposive interpretation is appropriate with respect to service transfer provisions and where the courts should approach matters as they would similar issues relating to transfers of undertakings. For example, it may be necessary not to be too pedantic with respect to the question whether the activities carried on before and after the transfer are sufficiently similar to amount to the same service; or to take a broad approach to the question whether an employee is employed in the service transferred: see *Kimberley Group Housing Ltd v Hambley* [2008] ICR 1030. But I agree with HH Judge Burke QC that there is no room for a purposive construction with respect to the scope of regulation 3(1)(b) itself. So far as that is concerned, there is in my view no conflict between a straightforward construction and a purposive one: the natural construction gives effect to the draftsman's purpose. There are no underlying EU provisions against which the statute has to be measured. The concept of a change of service provision is not complex and there is no reason to think that the language does not accurately define the range of situations which the draftsman intended to fall within the scope of this purely domestic protection.

23. I agree with the comment of Underhill P giving judgment for the EAT in *Eddie Stobart Ltd v Moreman and Others* [2012] ICR 919 para 19 when he said, with respect to identifying whether there is a relevant transfer:

> "No doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in the specified circumstances they "go with the work" (though the assumption that in every case that will benefit, or be welcome to, the employees transferred is not universally true). But it remains necessary to define the circumstances in which a relevant transfer will occur, and there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible."

The decision of the Employment Tribunal.

24. The Employment Tribunal considered both the initial transfer of the appellant's employment from Waterbridge to WCP in February 2009 and the subsequent transfer from WCP to Mr Hunter in August.

25. As to the initial February transfer from Waterbridge to WCP, the Employment Tribunal concluded that there was at that stage a service provision change under regulation 3(1)(b). It found that there was an organised group of employees whose principal purpose was the management of those properties. Mr Hunter did not challenge that conclusion before the Employment Appeal Tribunal; he accepted that there had been outsourcing by Waterbridge to WCP. However, the Tribunal also held that there was not a transfer of an undertaking or business under regulation 3(1)(a). Unfortunately it did not venture to give reasons for that conclusion.

26. The Tribunal then focused on the August arrangements. It found that these also constituted the transfer of a service provision. This conclusion was reached on the basis that:

> "… responsibility for the management of the properties carried on in [Mr Hunter's] hands for the benefit of Aviva and the receivership and [Mr Hunter] used the services of [Mr McCarrick] and his colleagues. It was [Mr Hunter] who continued to provide the service of the management of the properties."

27. The Employment Tribunal therefore recognised that the client for whom this service was now being provided was not Waterbridge directly, but rather Aviva and/or the receivership. The Employment Tribunal did not in terms make a finding that there was no transfer of a business within the meaning of regulation 3(1)(a) but it does appear to have treated the transfers in February and August as being essentially of the same kind. In the circumstances Mr Hunter contends that since the Tribunal held that there was no transfer of an undertaking in February, it must necessarily have concluded that regulation 3(1)(a) was not applicable to the August transfer either.

The appeal to the EAT.

28. Mr Hunter appealed on the grounds that it was not open to the Tribunal as a matter of law to conclude that there had been a change of service provision. Mr McCarrick in turn put in a respondent's notice in which he contended that the Employment Tribunal should have found that TUPE applied for the additional reason that there was a transfer of an undertaking within the meaning of regulation 3(1)(a). On the facts it was the only conclusion that was properly open to the Tribunal. Accordingly, even if the appeal was successful, the EAT should substitute a finding that there had been a transfer pursuant to regulation 3(1)(a).

29. As to the appeal, Mr Hunter contended that regulation 3(1)(b) envisages that the same client will be involved throughout: there may be outsourcing, a change of service provider or bringing back in house, but in each case the work is being carried out for the same client albeit by a different provider. That was not the situation here.

30. Mr Brown did not dispute that read literally regulation 3(1)(b) plainly does envisage that the service will be provided to the same client throughout. However, he contended that the clear purpose of the regulations is to protect employees when there is a transfer of a service provision, and that objective is not achieved unless a wider construction is adopted.

31. The Employment Appeal Tribunal accepted the employer's submissions and in doing so approved the approach of His Honour Judge Burke QC at paragraph 28 in the *Metropolitan Resources* case which I have set out above. All that was required was a straightforward and common sense application of the statutory language and that dictated only one answer. Mrs Justice Slade pointed out that the reference to "the client" in regulation 3(1)(b)(ii) must refer back to a specific client. If Mr McCarrick were right it would involve a complete re-writing of the provisions.

32. The Employment Appeal Tribunal then considered the point raised in the respondent's answer that in any event there had been a transfer of an undertaking

within the meaning of regulation 3(1)(a). The EAT first found that the Employment Tribunal had concluded that there was no regulation 3(1)(a) transfer in the following terms (para 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."

33. It then turned to Mr Brown's submission that the only proper conclusion on the material facts as found in the Employment Tribunal's decision was that that regulation 3(1)(a) applied. Mr Brown had identified the following features from the Employment Tribunal's decision which he submitted compelled this conclusion:

> (1) The individuals who originally transferred were all named. The Appellant, together with his colleagues Mr Jeeves and Mr Hughes (his team) were all originally paid by Waterbridge, then by WCP, then by the Respondent;
>
> (2) The Appellant and his colleagues continued to manage the portfolio of properties after the transfer to WCP (and indeed any employees who were not involved in managing the portfolio were not transferred);
>
> (3) The Respondent continued to give instructions to the Appellant and the other employees on what they were to do at work;
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> (4) Mr Hughes continued to sign emails in the capacity of Finance Controller of WCP;
>
> (5) From 14 August 2009, the Respondent continued paying the salaries of the Appellant, Mr Jeeves and Mr Hughes so that they would continue to work for him. The situation was identical, albeit with a bit more '*red tape*';
>
> (6) On 25 August 2009, the Appellant, Mr Jeeves and Mr Hughes attended a *'handover meeting'* with the Respondent and other interested parties. The Respondent stated that the Appellant, Mr Jeeves and Mr Hughes would continue to *'support'* the properties;

> (7) The Respondent required the Appellant, Mr Jeeves and Mr Hughes *'on board'* in order to rescue the situation that had developed following the winding up petition. Specifically they were required "to retain the two key factors that [the Respondent] needed to succeed as a commercial property developer namely a debt provider and source of capital";
>
> (8) The Appellant, Mr Jeeves and Mr Hughes continued to carry out the same property management roles and responsibilities before and after the Respondent assumed paying them, both in relation to properties in the hands of the receivers and other properties. The ET considered that this was supported by the letter from Aviva dated 3 September 2010;
>
> (9) The Respondent maintained the position as 'team leader'. The ET accepted the Appellant's evidence that 'it was not four musketeers but a leader and a team'.

34. The EAT rejected that argument. Their conclusion was expressed as follows (para 32):

> "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 that constituted the 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 it and make adequate findings in relation to regulation 3(1)(a)."

35. So the EAT has concluded that the material relied upon certainly did not compel the conclusion that there had been a regulation 3(1)(a) transfer. There would need to be other findings made and considered by the Tribunal before any such conclusion could properly be reached, including the matters which it has expressly identified.

Discussion.

36. In substance the arguments addressed before us repeated those which had been considered by the Employment Appeal Tribunal.

37. For reasons I have already explained (see paras 22-23 above), I can see no basis for giving the language of regulation 3(1)(b) an artificial or expanded meaning. It would be quite illegitimate to rewrite the statutory provisions in the very broad way

suggested by the appellant. This is domestic legislation and is not giving effect to EU law. Section 38(2) of the Employment Relations Act 1999 confers a power to make the regulations to provide the same or similar provision "in relation to the treatment of employees in circumstances other than those to which the Community obligation applies". That is precisely what the regulations do. The section does not, however, identify which employees should be afforded that treatment, and nothing in section 38 has any bearing at all on that question. The section does not advance the appellant's case. The language of regulation 3(1)(b) is only consistent with the situation where there is the same client throughout; and regulation 3(3), which focuses on the intention of the client, is premised on that same assumption.

38. The difficulties have arisen here because of the unusual arrangements made between the parties. In principle, if Waterbridge could be seen as the client, there was at least arguably a transfer of a property management undertaking from WCP to King Sturge and yet the appellant never sought to claim that he was employed by them. This is not, therefore, an example of a case where the natural construction of the regulations gives a meaning which would plainly frustrate the objective of the statute and leave the employee unprotected.

39. Accordingly, I unhesitatingly reject this aspect of the appeal.

The regulation 3(1)(a) submissions.

40. Mr Brown is highly critical of the EAT's analysis of his case on regulation 3(1)(a). First, he submits that the EAT made the elementary error in paragraph 30 (see para 32 above) of assuming that a transfer of an undertaking and change of service provider are mutually exclusive so that if the change of service provision applied, there could be no transfer of an undertaking. He relies upon the last sentence of paragraph 30 in support of that submission.

41. I would accept that, taking the sentence on its own that is a reasonable reading of it. However, I am satisfied that it is not what the EAT was intending to say. Read in the context of the paragraph as a whole, it seems to me that the Tribunal is saying that since the transfers were essentially the same in February and August, the fact that the Employment Tribunal had found that there was no transfer of an undertaking with respect to the February transfer necessarily meant that it must have formed the same conclusion with respect to the August change. That, as I understand it, was the argument advanced by counsel for Mr Hunter which the EAT was addressing and accepting. But whether that be right or not, nothing turns on this point because the EAT did address the alternative submission advanced by Mr Brown and rejected it.

42. Mr Brown submitted that in any event the EAT had failed properly to engage with the question whether regulation 3(1)(a) had been satisfied.

43. I do not accept that submission. It seems to me that the observation of the EAT that "the facts relied upon relate solely to the organised group of employees and the activities carried out by them" is a succinct but entirely accurate summary of the principal factors relied upon by Mr Brown.

44. Thereafter, the EAT considered the submissions as they had been advanced before them. The case had been put solely on the basis that the only proper inference from the facts found by the Tribunal was that there had been a regulation 3(1)(a) transfer.

45. In my judgment, the EAT were plainly correct to reject that submission. It would be necessary for the Tribunal to have regard to a whole range of factors when assessing whether there had been a transfer, and the EAT identified some of them. I have referred to the array of EU authorities which emphasise both that all relevant factors should be considered and that, depending upon the nature of the activities under consideration, it may be highly material to consider what equipment or other assets are used in the context of the business and which, if any of them, have been transferred. The EAT noted that there were no findings about the significance of assets nor about other potentially relevant matters. Without such findings, I do not see how the EAT could have possibly upheld this ground of appeal.

46. Mr Brown's submission seems to me to assume that where there is a change of service provision resulting from the transfer of an organised group of employees that will necessarily amount to a transfer of an undertaking. But these are different concepts. The transfer of an organised group of employees may suffice to constitute a transfer of an undertaking, but not necessarily. It could not be assumed that the function of property management is so labour intensive that other factors could not potentially be material.

47. I do recognise that the Tribunal's conclusions with respect to regulation 3(1)(a) were in many respects unsatisfactory. It did not set out its reasons for its conclusion that regulation 3(1)(a) did not apply with respect to the February transfer, and whilst that may have been a legitimate conclusion, there is really no way of knowing whether it was or not. The reasons were therefore not *Meek* compliant (*Meek v City of Birmingham District Council* [1987] IRLR 250). It may be - I put it no higher - that had the matter been remitted to the Employment Tribunal they may have concluded in the light of all the evidence concerning the facts of the transfer that there was indeed a regulation 3(1)(a) transfer. But the EAT was never asked to remit the case. The respondent's notice simply contended that the Tribunal had failed to reach the only conclusion it could properly reach when considering that question. In those circumstances I can see no error of law in the way in which EAT disposed of the matter.

48. I would add this. The appellant has assumed that if he can show that there was a regulation 3(1)(a) transfer, it would not matter that there had been a change in the client receiving the service. He may be right about that, but it seems to me that the point is arguable. I am not aware of any authority on it, and we were not shown any. It may be that where the business is in the nature of a service provided to a particular client, the identity of the client is an essential element in the description of the undertaking. If that is so, the services carried on for the new client would constitute a different undertaking and there would be no transfer. But that is an argument for another day.

49. In any event, I would dismiss the appeal.

Dame Janet Smith:

50. I agree.

Lord Justice Maurice Kay:

51. I also agree.