



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Stockley

**First Respondent:** EV Cargo Limited

**Second Respondent:** North West Trucks Services Limited

**Heard at:** Manchester Employment Tribunal (by CVP)

**On:** 10 November 2023

**Before:** Employment Judge M Butler

## Representation

Claimant: Self-representing

First Respondent: Mr P Roberts (Solicitor)

Second Respondent: Mr S Shepherd (Solicitor)

# JUDGMENT (PUBLIC PRELIMINARY HEARING)

1. The claimant's employment contract did not transfer from the first respondent to the second respondent pursuant to Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.
2. The claim brought against the second respondent is dismissed.
3. The claim will proceed to a final hearing against the first respondent only.

# REASONS

## INTRODUCTION

4. This decision was reserved at the hearing. This is that reserved decision.

5. The claim form was presented on 16 December 2023. The claim was brought against the first respondent only. The claimant brought claims for unfair dismissal, a redundancy payment, notice pay, holiday pay and arrears of pay. The claimant also complains about a failure to consult with him.
6. The first respondent entered a defence to the claim. In its defence, it put forward a defence based on the respondent having outsourced its truck maintenance to another with effect from 01 November 2022. And as the claimant worked on truck maintenance, his employment automatically transferred on that same date.
7. Following enquiry with the claimant by the tribunal, the second respondent was added to these proceedings as a second respondent on or around 18 July 2023.
8. This case was initially listed for final hearing to be determined today. However, on considering the two ET3s in this case (that of the first respondent and that of the second respondent), Employment Judge Buzzard, on 03 October 2023, directed that today's hearing be converted to a preliminary hearing to determine whether there had been a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006. In other words, today's hearing was to determine whether the claimant's employment had transferred from the first respondent to the second respondent, or not. And that was the focus of this hearing.
9. Unfortunately, there was no time to case manage this case at this hearing. However, I have sought the final hearing to be relisted. The parties will receive a notice of hearing in due course. And I have issued case management directions in a separate document. As the second respondent has been removed from these proceedings and will take no further part in these proceedings, that listing and those directions will only involve the claimant and the first respondent.
10. I was assisted in this case by an evidence file that ran to 130 pages. And an Excel Spreadsheet that contained the second respondent's compliance schedule, which recorded the work that it completed on certain vehicles for the first respondent.
11. I heard evidence from the claimant. I also was provided with two additional witness statements, from Mr Thomas Stockley and Mr Ashley Losh. However, neither of these were called to give evidence.
12. I also heard evidence from Mr Gareth Wakefield, who is Head of Fleet for the first respondent. And from Ms Katie Aitken, who is Head of Compliance and HR for the second respondent.

#### LIST OF ISSUES

13. Did the claimant's employment transfer from the first respondent to the second respondent pursuant to Regulation 3 of the Transfer of

Undertakings (Protection of Employment) Regulations 2006?

LAW

14. Regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provides that there will be a service provision change, where any of the following situations exist:

- a) 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”),
- b) Activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities have 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
- c) Activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities have previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf.

*And which the conditions set out under paragraph 3(3) are satisfied.*

15. Whilst Regulation 3(3) defines the conditions referred to above as being:

(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

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client’s use.

16. Mr Shepherd reminded the tribunal of some useful case law in this area. Namely:

- a. That when considering whether there is a service provision change then it is essentially a question of fact for the tribunal, and one which should be determined using the straightforward language in the provision (Per His Honour Judge Burke QC in *Metropolitan Resources Ltd v Churchill Dulwich Ltd and ors* [2009] ICR 1380, EAT at para 30)
- b. When determining the ‘activities’ which ceased to be performed, the tribunal should consider the fact and degree of the activity, which involves a holistic assessment (*ALHCO Group Ltd v Griffin and*

*anor EAT 0007/14 at paragraph 15).*

- c. Quantity is a relevant factor when considering the activity pre and post transfer. A substantial change in the extent of the activities required by the client may result in the conclusion that the activities after the supposed transfer are not 'essentially the same' as before (*Department for Education v Huke and anor (UKEAT 0080/12 at para 21)*).
- d. The organisation of the grouping must be more than merely circumstantial but must have been organised intentionally by reference to the needs of the client (*Eddie Stobart Ltd v Moreman and ors [2012] ICR 919, EAT at para 18*).
- e. Lady Smith observed in *Argyll Coastal Services Ltd v Stirling and ors (EATS 0012/11 at paragraph 18)* that the phrase organised grouping of employees connotes a number of employees that is 'less than the whole of the transferor's entire workforce, deliberately organised for the purpose of carrying out the activities required by the particular client contract'.

### CLOSING SUBMISSIONS

17. I was assisted by written closing submissions prepared on behalf of the second respondent. And heard oral closing submissions on behalf of both the first and second respondent, and from the claimant. These have been considered in making this decision.

18. In short, the following submissions were made.

- a. The claimant submitted:
  - i. He did not consider this to be a genuine TUPE transfer, but was just caught in the middle.
  - ii. Considered that he should have been made redundant.
- b. Mr Roberts submitted:
  - i. The activity was essentially the same before and after 'transfer'. The first respondent maintained trucks at its Runcorn depot, and this activity transferred to the second respondent in respect of the 19 trucks.
  - ii. The new trucks were to replace older trucks, and therefore should not be discounted.
  - iii. A relevant transfer cannot be avoided through sub-contracting.
  - iv. For the 6 months pre-transfer, the claimant spent 75 % of his time on truck maintenance.
  - v. The second respondent throughout the consultation process never questioned whether there was a relevant transfer, but rather argued that he should.
  - vi. The parties envisaged at the time that maintenance of trucks would transfer to the second respondent.

- c. Mr Shepherd submitted:
- i. that the first respondent never undertook any work on the new truck. There cannot be anything that has ceased if the work has never been undertaken.
  - ii. That given the quantity of trucks that did not transfer to the second respondent against those that did, the activities cannot be said to be essentially the same.
  - iii. The claimant did not do such little work on the trucks that were assigned the second respondent that he could not be said to be wholly or mainly attributable to those 19 vehicles.

### FINDINGS OF FACT

I make the following findings of fact based on the balance of probability from the evidence I have read, seen, and heard. Where there is reference to certain aspects of the evidence that has assisted me in making my findings of fact this is not indicative that no other evidence has been considered. My findings were based on all of the evidence, and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why I made the findings that I did.

I do not make findings in relation to all matters in dispute but only on matters that I consider relevant to deciding on the issues currently before me.

19. Mr Stockton was employed as the workshop supervisor for the first respondent. He was employed by the first respondent from 08 August 2011.
20. The claimant's job description is at pages 22 and 23. The job title of supervisor has several different parts to it. This included supervising of the workforce, diagnosing and fault finding of any issues with vehicles and trailers, supporting the team, allocating of work, ensuring vehicles and trailers were maintained, book out parts correctly, fill out legal documentation, ensuring vehicles are prepped for MOTs, sign off timesheets and submitting timesheets to General Manager. The claimant's role involved matters that went beyond carrying out 6-weekly inspections and/or statutory inspections.
21. The first respondent is a logistics provider. It had 40 trucks in total. 31 of which were placed at the Runcorn depot at which the claimant worked. The first respondent also owned 9 further trucks, that were kept at a depot over the road. These 9 trucks were being transferred elsewhere, other than the second respondent. The claimant would work on all 40 trucks.
22. The second respondent is a franchisee of DAF. They are not a sub-contractor.
23. Around mid-2022, the claimant was the only qualified mechanic with the respondent. This meant that he had to carry out any required truck inspections, as this needed to be done by a qualified mechanic.
24. Either himself or other members of the workshop could undertake defect

work on the trucks.

25. Before May 2022, the claimant's non-vehicle work was in the region of 75% of his time.
26. By around May 2022, the claimant was the only truck fitter remaining in the employ of the first respondent, and 75% of his time was spent working on the trucks. However, this was across the entire fleet.
27. On 10 August 2022, there were discussions between the first and second respondent around the second respondent taking on responsibility for maintaining the first respondent's trucks.
28. The first respondent purchased a fleet of 76 new trucks from DAF. As part of this purchase, the first respondent entered into a DAF MultiSupport Agreement with DAF Trucks UK. This was entered into on 23 November 2022. As part of this contract, the first respondent paid a monthly fee of £510 per vehicle. Work done under this contract was completed at one of the approved DAF sites, of which the second respondent was one. The first respondent did not undertake any work on these trucks before or after the 01 November 2022.
29. The second respondent, when it completed work on a vehicle that was maintained under a DAF Multisport Agreement, would claim the costs against the contract. The second respondent would submit to DAF a breakdown of the work completed which would then generate a bill. The second respondent would then be paid.
30. Out of the 76 new trucks, maintenance of 24 of these trucks were placed with the second respondent. This was accepted by Mr Wakefield under cross examination.
31. On 03 October 2022, Mr Wakefield made an announcement to the first respondent's workforce under a document entitled 'Runcorn VMU Outsource Announcement' (see pp.35-36). This announced that following a strategic review, the first respondent was restructuring its operations, with certain operations being outsourced. It explained that Bibby Commercials would be taking over the use of the Runcorn Vehicle Maintenance Unit ('VMU') and all trailer work, which would impact the trailer technicians. And that the second respondent would be taking over all truck work, which would impact upon the truck technicians.
32. On 04 October 2022, an individual consultation meeting took place between the claimant, Mr Phillips of the first respondent, Ashley Loch and Ms Aitken of the second respondent. Although Ms Aitken is not referred to as being present in the meeting on the cover sheet, there is reference to a Katie in the recorded discussion, Ms Aitken gave oral evidence which supports that she was present and Ms Aitken appears to suggest she was present in her witness statement (see para 15 onwards).
33. At this meeting, there was discussion about whether there was a TUPE transfer that affected the claimant. The first respondent's position was that there was a relevant transfer and that the claimant's contract was to be

transferred to the second respondent. The claimant is recorded as considering that his role and himself did not fall within a TUPE transfer. The second respondent gave no clear indication either way and indicated that it would need some information before the next individual meeting.

34. On 10 October 2022, there was a second individual 'consultation' meeting with the claimant. The claimant was present, with Mr Wakefield and Ms Mather (of HR) of the first respondent, and Ms Aitken as a representative of the second respondent. This meeting focused on the role that the claimant would be in, and its details, should he move across to work for the second respondent.
35. On 14 October 2022, Ms Aitken emailed Ms Mather, and copied in Mr Wakefield and Mr Gornall (p.108). This concerned an issue that had arisen whereby the claimant had disclosed confidential information. In this email, Ms Aitken question whether TUPE applied to the claimant's situation.
36. On 14 October 2022, there is email correspondence between Ms Aitken and Ms Mather (see pp.109-110). Ms Aitken raises that the second respondent would have accepted that TUPE applied had they been given accurate Employment Liability Information, and it was on the basis of inaccurate information that they engaged in the consultation process.
37. On 17 October 2022, Ms Aitken emailed Ms Mather ((p.112). She explained that the second respondent had been led to believe that they were invited to a consultation meeting with a view to the whole workshop and technicians being transferred to the second respondent, whereas this was not the case. And instead, it was only the tractor servicing aspect that was being outsourced to the second respondent and only the workshop supervisor. Ms Aitken seeks specific documents in relation to the transfer question.
38. On 21 October 2022, a third 'consultation' meeting (notes of which are at pp.50-56) took place with the claimant. Mr Wakefield, Ms Mather and Ms Aitken were all present. As was a representative from DAF NorthWest. The claimant in this meeting doubts whether TUPE applied and explained that the majority of his job was not fixing jobs. The claimant explained that he had increased the amount of work he does on trucks from around May 2021, but that this was a result of others having left. Before this, he guesstimated that his time spent on other work was 75%, with his time spent on fixing trucks being around 75% from May onwards.
39. On 21 October 2022, Ms Aitken emailed the claimant (pp118-120). The email was a record of the conversation that took place between the claimant and the second respondent. That conversation concerned a role that the claimant would be undertaking should he move to the second respondent. This records that Ms Aitken and the second respondent considered that TUPE would apply. However, it is also recorded that the claimant was unsure whether there was a TUPE situation and that that was a matter that needed to be resolved.
40. The claimant provided a breakdown of the work that he completed for the first respondent for the period 06 September 2022 to 21 October 2022

(see pp.29-34), following having been requested to provide it during the consultation process. This is an accurate record of the work completed during this period. Although Mr Wakefield says this is an inaccurate breakdown of his time, and that it did not include time spent on breakdowns off site, or fixing of defects, I find that it is accurate. The claimant produced this closer to the time, in response to being required to produce this. And the first respondent has produced no documents that contradict this document, an option open to it.

41. As of 31 October 2022, the first respondent owned 40 trucks. However, 9 of those trucks were being transferred elsewhere on 01 November 2022.
42. Before November 2022, the second respondent did carry out work on trucks owned by the first respondent.
43. At least from November 2022, the trucks owned by the first respondent were being serviced by two suppliers, the second respondent and a third-party company, Motus Deeside.
44. Between 31 October 2022 and 28 August 2023, the second respondent undertook work on 19 of the first respondent's trucks (this is the evidence contained in the excel spreadsheet of works completed by the second respondent), as they had been placed on the second respondent's compliance schedule. The spreadsheet is colour coded, which signifies the type of work that was undertaken. This includes the colour red, which signified that work was undertaken by a different DAF dealer. I have accepted this as an accurate record of the work completed by the second respondent, as the first respondent has not produced any evidence to the contrary, and Mr Wakefield when cross-examined accepted the accuracy of some of the figures recorded, including the time spent to complete an inspection. On balance, in these circumstances, I made the finding that I did.
45. Comparing the truck work undertaken by the claimant (as contained in his breakdown of work for the period 06 September 2022 to 21 October 2022) by reference to registration number, and comparing that to the vehicles contained on the second respondent's compliance schedule, I adopt the figures referred to at paragraph 38 of Mr Shepherd's written closing submissions, as they are an accurate reflection of that work:

06.09.22 – 2 hours re vehicle registration VX68 WRO  
07.09.22 – no work on vehicles placed on R2's compliance schedule  
08.09.22 – no work on vehicles placed on R2's compliance schedule  
09.09.22 – 2 hours re vehicle registration VX68 WRL  
12.09.22 – 3 hours re vehicle registration VX68 WRT  
13.09.22 – 2 hours re vehicle registration VA21 HJD  
14.09.22 – 4 hours re vehicles registration VA21 HHZ and VX19 YGO  
15.09.22 – no work on vehicles placed on R2's compliance schedule  
19.09.22 – 2 hours re vehicle registration VX19 VYP  
20.09.22 – no work on vehicles placed on R2's compliance schedule  
21.09.22 – 2 hours re vehicle registration VX18 WBM



- 22.09.22 – no work on vehicles placed on R2's compliance schedule  
23.09.22 – no work on vehicles placed on R2's compliance schedule  
26.09.22 – 3 hours re vehicle registration VX19 YKE  
27.09.22 – 2.5 hours re vehicle registration VX19 YHB  
28.09.22 – no work on vehicles placed on R2's compliance schedule  
29.09.22 – 4 hours re vehicle registration VX19 YHD  
30.09.22 – 5 hours re vehicle registrations VX19 YHE and VX19 YHC  
03.10.22 – no work on vehicles placed on R2's compliance schedule  
04.10.22 – no work on vehicles placed on R2's compliance schedule  
05.10.22 – no work on vehicles placed on R2's compliance schedule  
06.10.22 – no work on vehicles placed on R2's compliance schedule  
10.10.22 – 2 hours re vehicle registration VX19 VYO  
11.10.22 – 3 hours re vehicle registration VX19 YKD  
12.10.22 – no work on vehicles placed on R2's compliance schedule  
13.10.22 – 2 hours re vehicle registration VX68 WRJ  
17.10.22 – no work on vehicles placed on R2's compliance schedule  
18.10.22 – no work on vehicles placed on R2's compliance schedule  
19.10.22 – no work on vehicles placed on R2's compliance schedule  
20.10.22 – no work on vehicles placed on R2's compliance schedule  
21.10.22 – 3 hours re vehicle registration VX68 WRO
46. Based on a 9-hour working day, the claimant would have been expected to have worked some 279 hours across the 31 working days that he has provided a breakdown for. And, he only worked for 41.5 hours on vehicles that were placed on the second respondent's compliance schedule. This equates to 14.9% of his working time.
47. The second respondent explained to the first respondent that the fleet of trucks owned by the first respondent had not been well maintained, and that the work required included servicing and replacing of major components that was overdue (Mr Wakefield accepted this under cross examination, and it is consistent with the email sent to Mr Wakefield on 13 December 2022 by Mr Gornall of the second respondent, see p.126).
48. In November 2022 (see p.128), the first respondent spent close to £48,000 for works completed by the second respondent. However, I find that this figure included the costs for parts, as well as costs for labour. The parts costs were in the region of £40,000, with labour in the region of £8,000. The reason why I make this finding is that although such a split was denied by Mr Wakefield, the first respondent accepted that this figure did include labour costs and parts costs and yet decided not to include evidence on what the split was, or to lead evidence on it. In those circumstances, I considered that that would be a reasonable figure given the evidence in front of me, and on preferring the second respondent's submission on it.
49. On 13 December 2022, there is email correspondence between Mr Wakefield of the first respondent and various others, including Mr Gornall of the second respondent and Mr Fitzjohn of Motus Commercial, in respect of truck services and repairs. In short, Mr Wakefield is unhappy

with the service he is being provided, which has led to a number of his trucks being unavailable.

50. On 16 January 2023, the first respondent entered a Maintenance Contract with the second respondent (p.77).

## CONCLUSIONS

51. Work that was, or was to be, undertaken on the new trucks was not completed by anybody at the first respondent. Rather, repair and maintenance of these trucks was provided for under the DAF MultiSupport Agreement, which the first respondent entered into with DAF Trucks Limited. The activity of repair and maintenance of these new trucks was never intended to be carried out by the first respondent, and never was. And as this was an activity that was never carried out by the first respondent, then it is not an activity that the first respondent ceased to carry out and then was carried out by another on its behalf.

52. And as work on these trucks was never carried out by the first respondent, it could not have had an organised group of employees that had the principal purpose of carrying out that work on behalf of the first respondent.

53. In respect of the new trucks no work was completed by the first respondent before 01 November 2022, which was then transferred to a new entity, namely the second respondent after that date.

54. There is no evidence supplied of the older trucks that the new trucks were said to be replacing, or of what work was done by the second respondent on the soon to be replaced trucks. This submission was therefore rejected given the lack of any meaningful evidence on it.

55. Turning to the remaining trucks that were part of the first respondent's fleet, which extended to some 40 vehicles. There were 9 vehicles which the first respondent never intended the second respondent to carry out repairs and maintenance work on. And they never did.

56. The claimant was a Workshop Supervisor. He had a broad range of activities and responsibilities. This did include having a role in diagnosing and finding faults with vehicles and maintenance work on the trucks.

57. I have accepted the claimant's evidence about the extent of his time spent on repair and maintenance of trucks. And this equated to around 25 % of his time up until May 2022, after which this increased to around 75% as a consequence of 2 fitters/mechanics having left the employ of the first respondent and not having been replaced.

58. The claimant did undertake repair and servicing work on the 9 trucks that were kept by the first respondent at the depot across the road. This took up some of the claimant's working time. Responsibility for which never passed to the second respondent.

59. The second respondent took on responsibility for repair and maintenance of 19 of the first respondent's remaining 31 trucks from 01 November 2022.
60. And during the period 06 September 2022 to 21 October 2022, the claimant only spent 14.9% of his working time inspecting vehicles that later formed part of work undertaken by the second respondent on behalf of the first respondent.
61. I agree with the views of the Mr Shepherd on behalf of the second respondent, that the document at p.128 is misleading. The first and second respondents agree that truck work was completed by the second respondent on behalf of the first respondent before November 2022. And yet this document does not provide this information. Further, there is no attempt to distinguish between labour costs and costs for parts, which would have been more beneficial, given my task is to consider the activity undertaken before and after the alleged transfer date of 01 November 2022 (rather than overall costs). This document also refers to vehicles that were under the DAF MultiSupport Agreement, which covers work that the first respondent did not do itself, but rather that work was completed under a separate contract. This document, when considered, attempts to inflate the extent of the work carried out by the second respondent on trucks owned by the first respondent from November 2022 onwards.
62. The extent that the claimant worked on the 19 vehicles that became the responsibility of the second respondent was quite limited, relative to his working time. And this is further supported by the second respondent's compliance schedule, which was accepted as accurate. This schedule highlights, for example, that during a 2-week period, w/c 07 November 2022 and w/c 14 November 2022, the second respondent only completed 13.5 hours of work on trucks that had previously been serviced and maintained by the first respondent. In those circumstances, using the claimant's normal weekly working week of 45 hours, this would be the equivalent of 15% of his working time (6.75 hours per week/45 weekly hours).
63. I can only conclude in these circumstances that there is a significant difference in the work being carried out by the first respondent before the 01 November 2022, and that carried out by the second respondent after that date.
64. And further, that the claimant was not wholly or mainly assigned to provide repair and maintenance of the trucks assigned to the second respondent.
65. In these circumstances, there has not been a service provision change in this case pursuant to Regulation 3 of the TUPE regulations. The proceedings against the second respondent are dismissed.
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Employment Judge **Mark Butler**

Date: 29 January 2024

JUDGMENT SENT TO THE PARTIES ON

Date: 6 February 2024

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FOR THE TRIBUNAL OFFICE

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