Appeal No. UKEAT/0063/15/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 & 27 November 2015
Judgment handed down on 29 January 2016

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

(SITTING ALONE)

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(1) MR A MUSTAFA
(2) MR K STEEN — APPELLANTS

(1) TREK HIGHWAYS SERVICES LTD (formerly in administration now dissolved)
(2) AMEY SERVICES LTD
(3) RINGWAY JACOBS LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	MS MELANIE TETHER (of Counsel) and MS NABILA MALLICK (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW
For the First Respondent	No appearance or representation by on or behalf of the First Respondent
For the Second Respondent	MR DALE MARTIN (of Counsel) Instructed by: Bird & Bird LLP 15 Fetter Lane London EC4A 1JP
For the Third Respondent	MS CHARLENE HAWKINS (of Counsel) Instructed by: TLT LLP 140 West George Street Rutland Square Glasgow G2 2HG

SUMMARY

Transfer of Undertaking Regulations.

Whether there was a temporary cessation of work/activities at putative transfer date that prevented a transfer of an undertaking and/or a service provision change. The Employment Tribunal held not. That together with other errors of law meant the appeal was allowed and the case remitted to the same Employment Tribunal.

THE HONOURABLE MRS JUSTICE SIMLER DBE

Introduction

1. This is an appeal by the Appellants, Mr Mustafa and Mr Steen. A third Appellant, Mr Davidson, has withdrawn his appeal following agreement with the Fourth Respondent, F M Conway Limited, and those parties are no longer party to this appeal. The appeal is from a Decision of the Employment Tribunal sitting at Watford (Employment Judge Southam sitting alone), with Reasons sent to the parties on 26 September 2014.

2. The case concerned the question whether there were one or more relevant transfers or service provision changes under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), so that 15 claimants (including the Appellants) continued in employment in the circumstances described below, with one or other of the putative transferees, despite the events of March 2013.

Overview

3. In overview, the Second Respondent (referred to as "Amey") was appointed as main contractor by Transport for London ("TFL") to carry out highway maintenance services in the North London region from 2007 to 31 March 2013. In November 2011 Amey entered into a sub-contract with the First Respondent (referred to as "Trek") under which Trek provided traffic management services on Amey's behalf for TFL in North London which was divided into the North East and North West regions. Mr Mustafa and Mr Steen transferred from Amey to Trek as a consequence, working wholly or mainly in the North East traffic management service, as they had before as employees of Amey.

4. In late 2012, with Amey's main contract due to terminate on 31 March 2013, TFL carried out a re-tendering exercise having divided London into four regions: North East, North West, Central and South. In November 2012 contracts were awarded for the North East to the Third Respondent (referred to as "Ringway Jacobs") and for the North West to the Fourth Respondent (referred to as "F M Conway") with effect from 1 April 2013, when Amey would cease to have any responsibility for these services. It was broadly accepted by Ringway Jacobs and F M Conway that employees principally engaged on traffic management services in those regions would transfer under TUPE.

5. However, in early March 2013 a dispute arose between Amey and Trek. On 5 March a dispute resolution procedure was instituted and on 8 March Amey notified Trek that no payments would be made for February 2013. As a result, Trek suspended operations and staff were told to go home and wait to be contacted. On 20 March 2013, settlement having been reached between Amey and Trek in relation to the dispute, Trek's sub-contract terminated by consent with effect from that date. By letters dated 20 March (which can have reached employees no earlier than 21 March 2013) Trek informed its North East region employees that their employment would transfer to Amey with effect from 21 March 2013. On 26 March 2013 Trek went into administration and the Administrators sold certain of Trek's assets relating to another contract to Hire-a-Lite Limited.

6. By letters dated 26 and 27 March, Ringway Jacobs informed Trek and the Trek employee representative for employees assigned to the North East part of the traffic management sub- contract that the service provision change rules only applied to a situation where Amey terminated Trek's contract at the request of TFL and that, since the reason for the termination of Amey's contract with Trek was a commercial dispute, Ringway Jacobs did not accept that any employees used by Trek to deliver services to Amey had a right to transfer to it.

7. On 27 March 2013, a group of 10 employees went to Amey's premises but were told to leave. They were subsequently turned away by Ringway Jacobs from its premises.

8. Against that background and having made detailed findings of fact at paragraphs 33.1 to 33.66, the Employment Judge held that there was no relevant TUPE transfer from Trek to Amey, followed by subsequent transfers to Ringway Jacobs and/or F M Conway; and no relevant transfers directly from Trek to the incoming sub-contractors whether by reference to the transfer of an economic entity or by reference to a service provision change. The Employment Judge further concluded in the alternative, that the Appellants were not in any event employed "immediately before" the transfer having been dismissed on 20 March 2013.

9. Those conclusions are challenged on this appeal by the Appellants represented by Ms Melanie Tether, who did not appear below and Ms Nabila Mallick, who did. The appeal is resisted by Amey, represented by Mr Dale Martin who appeared below, and relies on the reasons given by the Employment Judge and the additional reason that in fact the Appellants

were dismissed earlier than 20 March, on 8 March 2013, as the Employment Judge ought to have found. Ringway Jacobs also resists the appeal and is represented by Ms Charlene Hawkins, who did not appear below. Trek were neither present nor represented before the Employment Tribunal or on this appeal.

The relevant law

10. The law applicable to this case is broadly agreed.

11. Regulation 2 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) defines a "relevant transfer" in the following terms:

> **"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..."**

12. Regulation 3 provides that the TUPE regulations apply to (a) a transfer of an undertaking and (b) a service provision change, defined as follows:

> **"3(1)(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.**
>
> **(2) 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.**
> **(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.**
> **(3) 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**

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.
(6) A relevant transfer -
(a) may be effected by a series of two or more transactions; and
(b) may take place whether or not any property is transferred to the transferee by the transferor."

13. As to the meaning of the word "contractor" Regulation 2 provides that references to "contractor" in Regulation 3 shall include a sub-contractor.

14. Regulation 4 relevantly provides:

> **(1) "Except where objection is made under paragraph (7) a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee...**
> **(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in Regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions."**

15. There is no dispute between the parties as to what constitutes 'the transfer of an undertaking' within the meaning of Regulation 3(1)(a) TUPE. The question is whether there has been the transfer of an economic entity which has retained its identity; and the answer depends on a multi-factorial assessment (*Spijkers v Gebroeders Benedik Abbatoir CV* [1986] 2 CMLR 296).

16. All counsel referred me to Hunter v McCarrick [2012] EWCA Civ 1399 where the Court of Appeal (Elias LJ) referred with approval to the valuable guidance on the potential range of factors to be considered as set out in Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 (Lindsay P) as follows:

> **"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 paragraph 6 (which, confusingly, places the reference to "an economic activity" a little differently).**
> **....**
> **(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. The Court of Appeal referred to subsequent decisions of the CJEU that confirm that there may be a transfer of an undertaking even where there are no assets as such transferred, but only employees. Thus in certain sectors, where the activity is essentially based on manpower, the transfer of the organised grouping of workers to carry out essentially the same activity will be enough to constitute a transfer of an undertaking, but not necessarily in every case. The Court of Appeal held that it will depend on the sector under consideration; and that all potentially relevant factors must be considered, their importance varying depending on the business under consideration.

18. The question whether there has been a transfer was also addressed in Cheesman as follows:

" (i) As to whether there is in any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed - Vidal paragraph 22 and the case there cited; Spijkers -v- Gebrobroeders Benedik Abattoir C.V. [1986] ECR 1119 ECJ; Schmidt -v- Spar-und Leihkasse [1994] IRLR 302 ECJ paragraph 17; Sanchez Hidalgo paragraph 21; Allen paragraph 23.

(ii) In a labour intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity - Sanchez Hidalgo paragraph 32.

(iii) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation - Vidal paragraph 29; Sanchez Hidalgo paragraph 29; Allen paragraph 26. However, whilst no authority so holds, it may, presumably, not be an error of law to consider "the decisive criterion" in (i) above in isolation; that, surely, is an aspect of its being "decisive", although, as one sees from the "inter alia" in (i) above, "the decisive criterion" is not itself said to depend on a single factor.

(iv) Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by

the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended - Sanchez Hidalgo paragraph 29; Allen paragraph 26.

(v) In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on - Vidal paragraph 31; Sanchez Hidalgo paragraph 31; Allen paragraph 28.

(vi) Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets - Vidal paragraph 31; Sanchez Hidalgo paragraph 31; Allen paragraph 28.

(vii) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer - Allen paragraph 30.

(viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer - Vidal paragraph 35.

(ix) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor - Sanchez Hidalgo paragraph 30.

(x) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship Sanchez Hidalgo paragraphs 22 and 23.

(xi) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer - ECM page 1169 e-f.

(xii) The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub-contractor and the start by the successor - Allen paragraphs 32-33."

19. Although there is a degree of overlap between the two questions to be asked, it is well established that tribunals should deal with them as separate questions save in cases where one or other of the answers is so obvious that it barely needs separate consideration.

20. So far as what constitutes 'a service provision change' is concerned, the Court of Appeal in Hunter v McCarrick held at [22] 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. However it held that there is no room for a purposive construction with respect to the scope of Regulation 3(1)(b) itself; 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."

The Appeal

21. In somewhat discursive grounds of appeal, the Appellants seek to challenge the Employment Tribunal's critical findings that:

(a) there was no relevant transfer of an economic entity that retained its identity from Trek to Amey;

(b) there was no service provision change from Trek to Amey;

(c) there was no relevant transfer of an economic entity that retained its identity from Trek to Ringway Jacobs;

(d) there was no service provision change from Trek to Ringway Jacobs.

Further, no finding was made as to any subsequent transfer from Amey to Ringway Jacobs, and that failure is challenged as an error.

22. A number of errors of law are said to vitiate each critical finding and though there is some overlap, I shall address these in turn below.

23. In response to the appeal, both Respondents emphasise that this was a complex case with evidence heard over five days and a bundle of documents running to 1666 pages. They contend that the Employment Judge conducted the multi-factorial assessment required and made factual findings amply supported by the extensive evidence. In broad terms they say that there was no misdirection or misapplication of law at any stage; that this appeal is essentially an impermissible challenge to findings of fact properly made; and that it must accordingly fail. I have borne those arguments carefully in mind in addressing the arguments raised by the Appellants.

Transfer of undertaking from Trek to Amey

24. The Employment Judge held at [47] that there was no transfer of an undertaking within the meaning of Regulation 3(1)(a) TUPE between Trek and Amey on 21 March 2013. Although he described 21 March as the only date of this purported transfer contended for by the claimants, it is common ground that despite some confusion, the claimants' written case at the Tribunal contended for a transfer from Trek to Amey when the contract between Trek and Amey terminated by mutual agreement which was executed in writing on 20 March 2013.

The Employment Judge does not identify any critical distinction between these two dates, other than the termination of the Trek/Amey contract on 20 March. Since the contract between Trek and Amey terminated on 20 March, and the case and the appeal are advanced on the basis of an alleged transfer at that point, I am satisfied it is in the interests of justice that references to a transfer on 21 March in the Reasons should be read as references to a transfer on 20 March 2013 to the extent that the difference in dates is material.

25. The essential facts relevant to the Employment Judge's holding are set out as such by the Employment Judge at [42] as follows:

> **"By 21 March, no work had been carried out by Trek in traffic management functions under its contract with Amey since 6.00 am on 8 March. Some work was done by Mr Smith and Mr Hill, but it is not clear to me, on the evidence that I heard, what work they did. In the period between 8 and 21 March, what is clear however, is that there was no work being carried out on the ground. The operations staff had been laid off. Carl and Colin Phillips started with F M Conway Limited on 11 March and F M Conway was talking to others about joining them either before or on 1 April. Between 8 and 20 March, the vehicles that had been assigned to Trek for the purpose of the contract were not available for use because of the dispute between the parties. They were only released back to Amey after the contract was terminated. Trek was released from its obligations under the contract by the settlement agreement of 20 March, although I should acknowledge here that I accept that a consequence of the termination of that agreement could be a transfer of an undertaking. After 8 March, Amey carried out the services previously carried on by Trek on an ad hoc basis, using contractors who they knew were able to carry out specific tasks. Trek did not release to Amey the equipment that it used in fulfilment of its obligations, namely the signs and cones, nor did they assign the lease of the South Mimms premises to Amey. Lastly, there is no reference in the settlement agreement to a transfer of any activity or staff, as between Trek and Amey."**

The Judge held at [43] that "the difficulty for the Claimants who wish to argue that there was a transfer to Amey is the interval between 8 and 21 March 2013". After referring to Landsorganisation Danmark v Ny Molle Kro [1989] IRLR 37, [1989] ICR 330 (ECJ) and Wood v Caledon Social Club Ltd [2010] AII ER(D)79 he said at [44]:

> **"In my judgment, these cases do not apply to this situation. In the case of Ny Molle Kro, the business entity was the running of a seasonal inn. In the case of Wood it was the operation of a bar in a social club. In both cases, the activities of the economic entity were temporarily suspended. The economic entity was the operation of the inn or bar, as the case may be. Here, the economic entity was the provision of the traffic management service up to 8 March carried on by Trek. The facts that I have highlighted above show, in my judgment that whilst the obligation to provide a service continued in the hands of Amey until the transfer on 1 April, and therefore did not cease even temporarily, the identity of the (traffic management) economic entity as at, for instance, 7 March, no longer existed on 21 March.**

At [46] the Employment Judge continued:

> **"I am conscious of the need to distinguish, in assessing the viability of an economic entity, between the activities of the entity itself and the employees who are needed to carry it on. However, it seems to me that, even putting aside the position of the employees, the consequences of Trek's cessation of work on 8 March were such as to, in effect, destroy the identity of the economic activity. Amey still had its obligations but the unplanned nature of Trek's decision meant that there were no vehicles or equipment available for the carrying**

on of the service and the identity of the activity previously carried on by Trek, ceased to exist after 7 March"

26. The Appellants contend that the Employment Judge erred in law in holding that the principle established in Ny Molle Kro and Wood did not apply to the circumstances of this case. To the extent that he concluded that the present case could be distinguished from those cases, he erred in law in holding that "the economic entity was the provision of the traffic management service up to 8 March carried on by Trek" because this involved an analysis of the economic entity which included the actual performance of services by Trek, an approach which was bound to displace the principle that a temporary cessation of activity does not preclude the existence of a relevant transfer.

27. Ms Tether contends that the only difference between the situation which existed on 8 March 2013 and that which existed up to 20 March 2013 was that no traffic management services were provided by Trek between those dates. However, the resources that had been used by Trek to provide the traffic services, such as the vehicles, traffic cones and leased premises, remained in Trek's possession until 20 March 2013. Accordingly, the Employment Judge was wrong to conclude that the economic entity operated by Trek had ceased to exist simply because no work had been carried out during the short period from 8 March 2013 onwards.

28. Mr Martin, whose arguments were broadly adopted by Ms Hawkins on this issue, accepts that a temporary closure of an undertaking at the time of a transfer will not prevent a TUPE transfer and that there is no particular importance to be attached to a gap between the end of the work carried out by one subcontractor and the commencement of another. In his submission however the premise upon which the Appellants seek to challenge this finding is factually absent because there was no cessation of the provision of the service at all and there was nothing temporary about the disintegration of the economic entity in this case. In his submission, the Tribunal's factual findings to both of these effects are based on sound reasons and supported the conclusion that the economic entity was destroyed when Trek stopped its operations on 8 March 2013 (a date never relied on as the purported transfer date in this case).

29. There is no dispute between the parties that in deciding whether a relevant transfer has occurred all factors characterising the transaction must be considered, including the decisive

criterion, namely whether the economic entity retains its identity as indicated, inter alia, by the fact that its operation is continued or resumed. It is also agreed that the "temporary closure of an undertaking and the resulting absence of staff at the time of the transfer do not themselves preclude" the possibility of a transfer: see Ny Molle Kro at [19]. That case establishes that there can be a transfer at a time when no employees are working and no activity is being carried out. The cessation or suspension of activities is a factor to be considered in deciding whether a transfer has taken place, but is not determinative.

30. It is apparent from the Employment Judge's reasons that he considered that the traffic management service was an economic entity as at 7 March 2013: see for example [44] and the reference to Trek's business comprised by the "London contract" as an economic entity at [36] and [63]. The Employment Judge acknowledged and accepted that a consequence of the termination of the Trek/Amey agreement could be a transfer of an undertaking: see [42]. However, he concluded that the interval between 8 and 20 March was an obstacle to the argument that there was a transfer to Amey, and for the reasons he gave at [44] that there was no temporary cessation of the service because it continued in the hands of Amey until the transfer on 1 April so that the principle established in Ny Molle Kro (and similar cases) did not apply.

31. I agree with Ms Tether that the Employment Judge fell into error here by failing to apply the principle established in Ny Molle Kro. Instead he treated the cessation of activities by Trek on 8 March as determinative rather than as a factor among others, and as having destroyed the identity of Trek's activity, erroneously equating the entity with the activity performed by it.

32. The economic entity in this case was the traffic management service in North London, as the Employment Judge found. Trek had a dedicated and organised grouping of employees delivering that service (again as the Employment Judge found: see for example [63]. They used dedicated resources, equipment and vehicles, to do so. When on 8 March Trek suspended its activities as a result of the financial dispute, on the Tribunal's findings that suspension resulted in employees being sent home but not dismissed. For example at [33.36]: "Mr Steen was told to go home until further notice. Mr Mustafa said, and I accept, that on his return at 4.00am he found the site locked and there was a security guard. ... The gates were locked and they were told 'there is no work". At [33.37] the Tribunal found that Mr Hill was

"to go to the London depot and inform the staff that they were to go home and wait to be contacted before returning. He was not told that Trek was to cease trading." At [33.40] the Tribunal found that when Amey attempted to remove their assigned vehicles from the Trek premises, Trek refused to release them. On the Tribunal's findings all activity carried out by the Trek traffic management service was suspended on 8 March while dispute resolution procedures between Amey and Trek took place; but there are no findings to suggest that the entity did not continue in existence in the form of the dedicated staff, vehicles, equipment and importantly, the sub-contract between Amey and Trek. There are no findings to suggest that the activities could not have been resumed immediately if the dispute between Trek and Amey had been concluded with that outcome. The fact that Amey's obligation to provide the traffic management service continued, and was discharged by Amey by alternative means until 1 April, does not mean that there was no suspension of Trek's traffic management service provision. Nor does the fact that interim ad hoc arrangements were put in place by Amey to discharge its obligations in this period alter that conclusion. There was, on the Tribunal's own findings of fact, a temporary cessation of activity by Trek, contrary to the arguments advanced by Mr Martin and adopted by Ms Hawkins.

33. Nor do the factual findings made by the Tribunal at [42] relied on by Mr Martin as strongly supporting the Tribunal's conclusion that the Trek entity was in fact destroyed on 8 March (thereby distinguishing this case from those in which a temporary cessation of activity occurs), in fact support that conclusion. First, the majority of those findings concern the fact that no work was being carried out, that employees were laid off (not dismissed) and that vehicles or equipment assigned to Trek for the purpose of the sub-contract were not released to Amey. These findings are all consistent with the Trek entity continuing but only its activities being suspended. The finding that two employees left to join F M Conway on 11 March could not by itself, absent more detailed findings about the numbers who remained, and the reasons why those who left did, support a conclusion that the entity itself was destroyed. (I note that there are additional findings at [33.64] about the 13 employees assigned to the North West part of the contract, and the numbers who transferred to F M Conway, but there are no findings that any, still less the majority left before 20 March). Secondly, the Employment Judge concluded at [46] that the consequences of the cessation of work were such as to destroy the activity. This point is repeated, and I cannot accept accordingly that the reference to 'activity' is a slip and should be read as 'entity'. Moreover, the introductory sentence to [46] suggests that the Employment Judge was focussing on the

activities of the entity rather than the employees and resources needed to carry them out, and was not distinguishing between the activities and the entity itself. The Employment Judge did not hold at [46] that the consequences of the cessation of work were such as to destroy the entity. The latter is simply not addressed by him.

34. On the Employment Judge's findings taken as a whole, the cessation of work brought the activities to a halt, but the bulk of the employees, the vehicles, the equipment and the contract continued in existence and force. Should Trek and Amey have agreed that Trek should resume provision of the traffic management service till 31 March 2013, there is nothing in the Tribunal's findings to suggest it could not have done so. On the Employment Judge's findings there was a stable economic entity as at 7 March. What he failed to do is to assess, on a multifactorial basis, whether that entity transferred to Amey and/or Ringway Jacobs despite the temporary cessation of activity by Trek, and the ad hoc provision of the traffic management service by Amey on a temporary basis between 8 March and 1 April. This ground of appeal is accordingly upheld.

No service provision change from Trek to Amey

35. At paragraphs 48 to 54 of the Reasons, the Employment Judge found that there was no service provision change within the meaning of Regulation 3(1)(b) TUPE when Trek's contract with Amey was terminated by mutual agreement. He accepted at [50] that the termination of the sub-contract between Amey and Trek and the resumption by Amey of responsibility for delivering the traffic management service to TFL was in principle capable of amounting to a service provision change. However, he held that analysis broke down for two reasons. First, because there was no organised grouping of employees immediately before the service provision change "which had the purpose of carrying out the traffic management responsibilities previously carried out by Trek as sub-contractors to Amey prior to 8 March": [53]. Secondly, because the only intention that could be inferred on the part of TFL "would be that Amey's involvement in succession to Trek would be a matter of short-term duration because of the new contracts coming into force on 1 April": [51]. Both reasons are challenged as in error of law by the Appellants.

36. Before addressing those reasons I deal shortly with a point raised by Mr Martin. He submits that the very short answer to this argument based on a relevant service provision

change is that there is no appeal from the factual finding that Amey did not carry out the service concerned. He submits that this is a precondition for the application of Regulation 3(1)(b) which transfers liability to the person by whom the activities are "carried out" after the transfer. In his submission, the work was carried out by ad hoc contractors and not directly by Amey.

37. I do not accept the factual premise of this submission. The Tribunal did not make a factual finding that Amey did not carry out the service concerned. Indeed at [50] as already indicated, the Employment Judge expressly accepted the potential applicability of the second of the three situations envisaged in Regulation 3(1)(b). There were factual findings that supported this acceptance, and Amey has not put in a Respondent's Notice taking this point. For example, at [33.39] the Employment Judge recorded the response of Mr Phillips of Amey to Trek's suspension of its traffic management service operation: "he said that Amey would continue to deliver its contractual obligations to TFL and would therefore resource and procure alternative suppliers to enable them to achieve that." At [42] the Employment Judge held that after 8 March, "Amey carried out the services previously carried on by Trek on an ad hoc basis, using contractors who they knew were able to carry out specific tasks." There are also references at [44] and [46] to the ongoing obligation of Amey to provide the service to TFL. Accordingly, it is not open to Amey to submit that the appeal should be dealt with on the basis that Amey did not carry out the relevant services.

38. Returning to the Appellants' grounds of appeal, the first reason for rejecting the proposition that there was a service provision change is addressed at [49] by the Employment Judge as follows:

> **"By 21 March, the Trek traffic management staff had, it seems to me, ceased to be an organised grouping of employees. Some of them, it may be argued, were still employed by Trek, but others, including Carl and Colin Phillips, had either left the employment of Trek or were planning to do so. It seems to me, on the normal interpretation of the words 'organised grouping of employees', those words cannot refer to the former Trek traffic management employees as at 21 March. Mr Hill and Mr Smith, in particular, gave no evidence as to how the staff were being organised. On the facts, they were doing no work and cannot be said to be organised".**

39. That paragraph when read as a whole is to be taken as the Employment Judge saying that his focus in deciding whether there was an organised grouping of employees immediately before the service provision change should be on those employees who remained employed

by Trek. I do not read [49] as saying that so many individuals had either left Trek's employment or were planning to do so, that those who remained could not any longer constitute an organised grouping of employees. Had that been his intention, I would have expected clear findings about the numbers who left before 20 March and when they did so, together with the numbers who stayed and some analysis of how and why such defections resulted in the dissolution of the organised grouping of employees.

40. Ms Tether submits that the Employment Judge's conclusion in relation to the remaining employees, that they were "doing no work and cannot be said to be organised", reflects the same error of approach by the Employment Judge in wrongly treating the cessation of work as determinative of the question whether there was an organised grouping of employees. She relies on Inex Home Improvements Limited v Hodgkins and others [2016] ICR 71 at paragraphs 57 to 61 to support her submission that the Employment Judge erred in law in this respect.

41. At paragraph 58 of Inex, the EAT (HH J Serota QC) held:

> **"There is nothing in the language of Regulation 3 ...as to whether or not the organised grouping of employees having as its principal purpose the carrying out of the relevant activities must be actually engaged in the activity 'immediately before the service provision change'. There is nothing to suggest that a temporary cessation of activities at that time precludes the continued existence of the organised grouping. Indeed, the wording of Regulation 3(1)(b)(ii) requires that 'activities ceased to be carried out by a contractor' and whilst it is required that the activities 'are carried out instead by another person' there is nothing to suggest that there cannot be a lapse of time between cessation and resumption."**

42. I respectfully agree. As a matter of construction of the Regulations there is no requirement for the grouping of employees to be working immediately before the service provision change in order to be an organised grouping. As the Employment Appeal Tribunal in Inex went on to hold, in each case it will be a question of fact and degree whether an organised grouping of employees retains its identity as such even though work has come to a halt. There may be cases where on the particular facts a temporary lay-off caused by the absence of any work might be sufficient to dissolve the organised grouping, but a temporary cessation of work without more does not by itself mean that a grouping of employees can no longer be said to be organised. I have reached those conclusions as a matter of straight-forward construction of the statutory provisions themselves rather than by reference to a purposive interpretation. To the extent that a purposive interpretation is appropriate as the

Employment Appeal Tribunal in Inex found, it adds further support for this approach, and is not impermissible following Hunter v McCarrick at paragraph 22.

43. Since the Employment Judge did not, contrary to Mr Martin's submission, conduct a factual assessment of this question, but instead treated the absence of any work being carried on as determinative, I have concluded that his finding at [53] that there was no organised grouping of employees (by 20 March) which had the purpose of carrying out the traffic management responsibilities previously carried out by Trek (on behalf of TFL) under the sub-contract with Amey before 8 March, was in error of law.

44. Mr Martin also makes a point about the fragmentation of the work once it was being carried out on an ad hoc basis following the termination of Trek's subcontract. However in the absence of any findings by the Employment Judge on this point, and absent a Respondent's Notice or cross-appeal on the point, I cannot see where it takes him.

45. The second reason relied on by the Employment Judge arises from Regulation 3(3)(a)(ii) which provides that there will be no service provision change if, immediately before the service provision change, the client intends that the activities will be carried out by the transferee in connection with a task of short-term duration. The Employment Judge found at [51] as follows:

> **" ..I had no evidence of TFL's intentions on or about 21 March. In so far as they can be inferred from circumstances, since they were probably unaware of the detail of what was occurring as between Trek and Amey, the only intention that can be inferred on the part of TFL, would be that Amey's involvement in succession to Trek would be a matter of short-term duration because of the new contracts coming into force on 1 April."**

46. That reasoning is challenged by Ms Tether as in error: the short term nature of Amey's involvement had no relevance at all in circumstances where TFL's requirement was for traffic management services to be provided on a continuous and ongoing basis, even after 1 April; and the traffic management service which Amey was contracted to provide under its contract with TFL was never intended to be a task of short-term duration.

47. Mr Martin submits that the Employment Judge's assessment can be supported. He submits that the Employment Judge was right to focus on the intention of TFL at the time of the alleged service provision change and that the question is "essentially one of time and permanence": see SNR Denton UK LLP v Kirwan [2013] ICR 101 at [41] and Sawbridge

Hire v Butler UKEAT/0056/13. He submits that the duration of the task was short; limited to 3 weeks. The situation was impermanent. These were "mere stopgap measures by which Amey was able to fulfil its obligations to TFL" in the short period up to the termination of the original TFL contract.

48. The difficulty with these submissions is that the points relied on by him play no part in the Employment Judge's Reasons. The Employment Judge did not define the task as the so-called 'stopgap measures' adopted by Amey, no doubt because as he held, TFL was probably unaware of what was occurring as between Trek and Amey. Moreover it is difficult in light of the findings made by the Employment Judge to reach a conclusion other than that the task in question was the provision of the traffic management service which was never intended by TFL to be a task of short-term duration; and even on 20 March was intended to be an ongoing, and not a short term task, given the imminent commencement of new contracts for the delivery of the service on 1 April 2013.

49. The Employment Judge inferred an intention on the part of TFL that Amey's *involvement* would be of short term duration. But the question to be considered under the Regulations was not whether TFL intended Amey's involvement to be of short-term duration. The question was whether the task in respect of which Amey was to be involved was intended to be of short-term duration. That question was not addressed. Accordingly the decision of the Employment Judge that there was no service provision change from Trek to Amey cannot stand, subject to the point raised by Amey by way of Respondent's Notice.

Employees not employed "immediately before" any transfer to Amey

50. The Employment Judge did not address this question in light of his other findings. Nevertheless Mr Martin submits that the position is clear and that even if the Employment Judge erred in his conclusions in relation to a relevant transfer by Trek to Amey, no purpose would be served in remitting these questions because neither of the Appellants was employed immediately before the transfer, their employments having come to an end on 15 March 2013, so that the Employment Judge's decision can be upheld on this alternative basis.

51. In support of this submission, Mr Martin (supported by Ms Hawkins) points to the asserted date of termination of his employment in Mr Mustafa's ET1 of 15 March and to

paragraph 4 of the Grounds of Claim in both Appellants' cases which states that their "employment came to an end on or around 15 March 2013". Further, he relies on extracts from the Employment Judge's notes of evidence which demonstrate that evidence given by both Mr Steen and Mr Mustafa was consistent with that position. In his Skeleton Argument he relies in particular on notes to the effect that Mr Steen stated in cross examination that his employment with Trek "stopped on 15 March 2013" and Mr Mustafa said "he was told he was not employed by Trek anymore on 8 March". In these circumstances, he submits that the Appellants cannot resile from their own case that they were dismissed on 15 March and accordingly could not have been employed immediately before the transfer.

52. Despite their pleaded case, Mr Martin accepts however that the Appellants' case proceeded before the Tribunal on a different factual basis and that they moved away from their pleaded case in relation to dismissal, certainly by the end of submissions. Although Amey objected to this change of case, that objection was not expressly dealt with by the Employment Judge. The Employment Judge may not have appreciated that the objection was being maintained since Mr Martin does not appear to have insisted that an application to amend be made by the Appellants, or sought a reasoned decision on his objection. Indeed he accepts that the Employment Judge implicitly permitted the change, without any such application or further objection. I agree with Mr Martin that this was not a satisfactory way of proceeding, but do not consider that it is open to this Tribunal to interfere. That is particularly so if there was evidence available to support the Employment Judge's contrary findings.

53. The Employment Judge made no finding of dismissals on 15 March or any earlier, and at [33.36] [33.37] and [33.49-33.64] made findings as to what the employees were told and what was done that are inconsistent with dismissals on that date. The Employment Judge found:

(i) Mr Steen was told to go home on 8 March until further notice.

(ii) On returning from the night shift, Mr Mustafa found the site locked and a security guard in attendance.

(iii) Messrs MacDonald and Gul arrived for work to find the gates locked and were told that there was no work.

(iv) Mr Davidson heard later that day that the South Mimms depot was locked and guarded and that employees had been sent home. He also received a telephone call

from a manager who said that there would be no work that evening and that he would be in touch with him.

(v) Mr Hill, the Depot Manager, was informed by Mr Halsey on 7 March 2013 that because of the financial dispute with Amey, Trek had made a decision to suspend operations and that he was to go to the London depot and inform the staff that they were to go home and wait to be contacted before returning. He was not told that Trek was to cease trading.

(vi) The employees received no further communication from Trek until they received Kane Halsey's letter dated 20 March 2013, sent by post, informing them of the transfer of their employment to Amey with effect from the next day, and that they would retain all their rights and obligations under their existing contracts [33.49].

(vii) The letters enclosed P45s but made no reference to them. All P45s indicated that employment with Trek ended on 15 March.

(viii) Two members of Trek staff delivered personnel files to Amey on 21 March, and under pressure, Ms Pearson of Amey signed a document confirming receipt, which suggested that a service provision change had occurred, and attached a list of employees working in the North London region said to have transferred [33.50, 51].

(ix) On 22 March Mr Halsey notified Ringway of the action taken with regard to Amey and the Trek staff. He said Trek's agreement with Amey had terminated by mutual consent and staff eligible for transfer were no longer employees of Trek. He attached a copy of the document signed by Ms Pearson indicating as contended by Mr Halsey, that Trek staff had transferred to Amey.

(x) On 22 March the vehicles were returned by Trek to Amey. They were full of rubbish and in poor condition such as to be unusable in Amey's view, before the expiry of the TFL contract [33.53].

(xi) Amey staff denied that Trek employees had transferred to Amey, but confirmed that the Trek contract had come to an end and in the meantime, "Amey had arranged for other contractors to carry out the traffic management work" [33.57].

No doubt these were contentious matters, with conflicting evidence on both sides but nobody has suggested that there was no evidence to support those findings.

54. Moreover, I am not satisfied that the notes of evidence demonstrate that those findings are plainly wrong. The test to be applied in determining whether there has been a dismissal is

objective rather than subjective. The notes do not show that unambiguous words of dismissal were used, nor do they support an inevitable finding that a reasonable person would have understood the words used to amount to dismissal, or that the Appellants plainly understood that they were being dismissed, rather than laid off. In Mr Steen's case he referred to his employment with Trek stopping on 15 March, but that is neutral terminology in the particular circumstances of this case. In Mr Mustafa's case, the notes of evidence do not say that "he was told he was not employed by Trek anymore on 8 March". Rather, they say: "I did no work for Trek, or anyone, after 8 March". Again this is neutral. Later in the notes he says "Trek told us they were not responsible for us anymore" but it is not clear when this was said and in the context of this case is also neutral. There is also a note that "Some group speak to the supervisor. I did not know them. They told us we were not employed by Trek". The time and person who said this are not identified, and the circumstances in which it was said and whether that person was authorised to say it are not addressed.

55. Accordingly, in the light of Jafri v Lincoln College [2014] ICR 920 it would be wrong for the Employment Appeal Tribunal to substitute its judgment for that of the Employment Tribunal in relation to Amey's alternative ground for upholding the Employment Tribunal's Judgment that there was no transfer to Amey. I therefore reject Mr Martin's alternative argument that a finding that the Appellants were not employed immediately before the transfer can and should be substituted by this Tribunal. It is unnecessary in the circumstances to address the alternative arguments advanced by Ms Tether in response to it.

No subsequent transfer from Amey to Ringway Jacobs

56. Because of his conclusions that there was no transfer of an undertaking nor any service provision change from Trek to Amey, the Employment Judge found it unnecessary to deal with the question whether there was a subsequent transfer from Amey to Ringway Jacobs: see [55]. In light of my conclusions, this question will now have to be addressed.

57. Ms Tether submits that the Employment Judge nevertheless made findings at [58] which are relevant to that question and are wrong in law: the findings that the traffic management employees had been dismissed by 20 March 2013 by "the purported, but failed, attempt to persuade Amey that the employments of those engaged on traffic management work as employees of Trek transferred to Amey on that date" and by "Trek's action in purporting to

persuade [employees] that they had transferred to Amey". She submits that those findings are premised on the Tribunal's erroneous conclusion that there was no relevant transfer from Trek to Amey. If, as the Appellants contend, there was a relevant transfer from Trek to Amey, Trek's actions in attempting to persuade Amey that a relevant transfer had taken place and in informing the employees that they had transferred to Amey were plainly incapable of effecting the termination of their employment.

58. I accept that submission. Moreover, as Mr Martin contends, Trek's 'action' so far as employees were concerned, was to send them letters dated 20 March (following termination of the subcontract as referred to above) stating that their employments had "transferred to Amey and that employees would retain all their rights and obligations under their existing contracts of employment": see [33.49]. That is inconsistent with any intention to dismiss, and neither the letters, nor Trek's actions viewed objectively (again as summarised by reference to the Employment Judge's findings above) evinced any such intention.

59. Although the letters sent to employees by Mr Halsey (which were posted and therefore cannot have been received before 21 March) enclosed P45s referring to 15 March as the employment termination date (see paragraph 47 above) "the sending of a P45 cannot in law amount to a termination of contract; it must depend upon the particular circumstances of the case": see Frederick Ray Ltd v Davidson EAT/678/79. Here, the Employment Judge placed no reliance whatever on the sending of a P45 to support his finding that Trek's actions in seeking to persuade Amey and the employees that there was a transfer amounted to a dismissal. In the context of Trek's actions, it is difficult to see how it could have done in the circumstances of this case.

60. The Employment Judge made no finding of any other act of dismissal by Trek. Accordingly, the finding at [58] that Trek dismissed its employees cannot stand. In the circumstances it is unnecessary for me to address the alternative submissions made by Ms Tether (based on Geys v Societe Generale [2013] 1 AC 523) in relation to this finding.

No transfer of undertaking from Trek to Ringway

61. The Employment Judge held that there was no transfer of an economic entity within the meaning of Regulation 3(1)(a) TUPE from Trek to Ringway Jacobs on 1 April 2013. He observed at [57] that:

> **"All agree ... that there is no difficulty in my reaching a conclusion that the activities in each of the North-West and North-East areas of London could be regarded as a putative but separate economic activity immediately after 1 April or a service provision which became divided at the point at transfer. .... The first question is therefore, whether or not there was, as at 1 April, an economic entity capable of being divided into two separate economic entities which, after 1 April, would retain their separate identities."**

62. However at [58] he held that there were difficulties in the way of a conclusion that any economic entity was transferred from Trek to Ringway Jacobs because (i) after 8 March, no work was being done; (ii) the contract between Amey and Trek was terminated on 20 March for reasons unconnected with the transfer; (iii) staff were laid off and some went to FM Conway (the reference to Ringway is an error); and (iv) all Trek employees were dismissed by 20 March by Trek's failed attempt to argue that there was a transfer.

63. At [63] the Employment Judge assumed that the interval between 7 March and 1 April 2013 could be classed as a temporary cessation of work having no effect on the applicability of the TUPE Regulations, but nevertheless concluded that there was no transfer of an undertaking by Trek to Ringway Jacobs, for reasons set out as follows:

> **"Having considered the evidence, I am of the view that there was not a transfer of an undertaking as between Trek and the third and fourth respondents respectively, even on the assumption that the interval between 7 March and 1 April can be classed as a temporary cessation of work having no effect on the applicability of the regulations. I am satisfied that there was an economic entity which undertook traffic management work on the London north contract without distinction between the notional north-west and north-east regions. Since the concept of economic entity means an organised grouping of resources, for there to be a transfer of an undertaking it is the organised grouping of resources which must retain its identity. One can put the employees to one side in this respect. There was no evidence before me that any of the resources deployed by Trek on Amey's behalf before 7 March were intended to be deployed by the incoming contractors starting on 1 April. The vehicles would remain with Amey; the signs and cones would remain with Trek. The premises at South Mimms appeared to be of no importance. Ringway Jacobs, at least, did not employ specialised traffic management operatives. On that basis, it is difficult for me to conclude that the function of providing traffic management services would continue as before, once Ringway Jacobs Limited became responsible on 1 April. The fact that F M Conway Limited did employ some former Trek employees suggests that there might be comparisons favourable to a transfer as between Trek's organisation of the provision of services and that which would be undertaken by F M Conway Limited after 1 April but I heard no evidence about that"**

At [64] the Employment Judge rejected the proposition that the interval could be classed as a temporary cessation of work in any event. He said:

> **"I return to the question of whether the interval between 8 March and 1 April could in fact be regarded as a temporary cessation of work. I rejected that proposition in relation to the**

possibility of a transfer between Trek and Amey (at paragraphs 44 and 46 above). Those arguments apply equally to these possible transfers."

64. Both conclusions are challenged as in error of law by the Appellants. The challenge is supported by Mr Martin on behalf of Amey if (contrary to his primary case) the Employment Judge is held to have erred in law in relation to his conclusion that there was no relevant transfer by Trek to Amey. The challenge is resisted by Ms Hawkins for Ringway Jacobs who contends that the Employment Judge made a finding of fact that this case did not involve a temporary cessation of work or suspension of operations because Amey's obligation to provide the service continued, so that the principle in Ny Molle Kro did not apply. Even if she is wrong about that however, she contends that the Tribunal's findings at [63] reflect a proper multi-factorial assessment of all relevant factors that cannot be impugned as in error of law on this appeal.

65. I have dealt already with the arguments based on temporary cessation of work. The Employment Judge's conclusion at [64] depends expressly on his earlier reasoning at [44] and [46]. Since I have concluded that the earlier reasoning is flawed, the conclusion at [64] cannot stand.

66. As for the multi-factorial assessment he conducted at [63], I agree with Ms Hawkins that if the Employment Judge took account of all relevant considerations and ignored irrelevant ones, his assessment could not be challenged on this appeal. The Employment Judge was plainly right to focus on whether there was an organised grouping of resources that retained its identity. However, in deciding whether there was, he said "One can put the employees to one side in this respect". He gave no explanation for this, and instead, went on to address other resources, and the fact that there was no evidence that resources used by Trek in providing the service were intended to transfer to the new contractors for use in providing the service from 1 April: the vehicles were released by Trek to Amey but remained with Amey, and the other equipment remained with Trek. The Employment Judge did not return to the question of the employees.

67. I agree with Ms Tether that the Employment Judge erred in law in holding that the employees could be "put to one side" in deciding whether there was an organised grouping of resources that retained its identity. On any view, the Trek employees were a critical part of

the organised grouping of resources dedicated to delivering the traffic management service, even if during this interval, they were not working or performing activities required to deliver the service. The employees should accordingly have been considered, albeit in that context. To fail to do so was to ignore a materially relevant consideration.

68. To the extent that the Employment Judge ignored the employees because none transferred to Ringway Jacobs, the Employment Judge wrongly failed to address the question why Ringway Jacobs did not take over the employees assigned to the North-East part of the contract: see ADI (UK) v Willer and others [2001] IRLR 542, paragraphs 52-59, and RCO Support Services Ltd and another v UNISON and others [2002] ICR 751, paragraphs 24-26 and 33-36.

69. The Employment Judge's findings as to Ringway Jacobs intentions in relation to TUPE can be summarised as follows:

(i) Ringway Jacobs initially accepted that in principle employees engaged in the traffic management service in the North-East area were entitled to transfer under TUPE, but at the same time, those responsible knew that Ringway Jacobs would have a surplus of its own employees after 1 April (having lost a bigger contract than the North-East contract it would gain) who could be deployed within the service in the north-east: [33.24].

(ii) When interviewed by Ringway Jacobs, both Appellants (and other claimants) said they worked 100% of their time on the north-east region of the service: [33.31].

(iii) Ringway Jacobs did not take matters any further before the events of 8 March: [33.33]. After that date, Mr Archbold of Ringway Jacobs resolved to take as strict a line as possible about who would transfer: [33.42].

(iv) Mr Archbold responded to Mr Hill's letter of 13 March (Mr Hill was acting as representative of Trek employees thought likely to transfer) challenging the absence of any communication, but did not say whether or not the North-East area employees would be accepted as transferring: [33.43].

(v) On 15 March 2013 Mr Archbold emailed Mr Halsey stating that Ringway Jacobs would not accept that any of the North-East staff had a right to transfer because he was not satisfied that they worked for more than 50% on the north-east part of the contract:[33.47]. (In fact, I was told by Ms Tether, without contradiction by either Respondent, that there was no dispute before the Employment Tribunal that

the Claimants worked more than 50% on the North-East part of the service, and this is reflected in the Employment Judge's other findings).

(vi) Having been informed of the mutually agreed termination of the Trek/Amey subcontract on 20 March, by letter dated 26 March 2013, Mr Archbold of Ringway Jacobs informed Trek that Ringway Jacobs position was that the TUPE service provision change rules only applied in a situation where Amey terminated Trek's contract at the request of TFL. Since that was not the position, and the contract terminated as a result of a commercial dispute, there was no service provision change, and no Trek employees formerly delivering the traffic management service had the right to transfer: [33.61].

(vii) When a group of Trek employees arrived at Ringway Jacobs they were sent away: [33.63].

70. I do not accept Ms Hawkins' submission that in light of these findings (particularly at [33.61]) it would have been artificial to consider why Ringway Jacobs did not take on the North-East employees. Having regard to the principles set out in ADI and RCO, and in light of the chronology summarised above, it was incumbent on the Employment Judge to examine Ringway Jacobs reasons for not taking on employees undoubtedly assigned to the North-East region, to determine whether those reasons reflected an intention to avoid a transfer or an erroneous view that TUPE did not apply. There was strong evidence in the Employment Judge's findings of a motive from the outset for Ringway Jacobs to avoid the application of TUPE, together with evidence of Mr Archbold seeking to rely on a false factual basis (the 50% point) to do so. Ringway Jacobs somewhat opportunistic stance in relation to the commercial dispute should have been examined in light of all the circumstances and the history of its approach.

71. This is a case where it was at least arguable that the Employment Judge might be required to deem the workforce to have transferred for the purposes of carrying out the multi-factorial assessment.

72. In addition, at paragraph 63 the Employment Judge relied as a relevant consideration on the fact that Ringway Jacobs did not employ specialist traffic management operatives, and said that it was difficult for him to conclude that the function of providing traffic management

services would continue as before on that basis. That, however, was irrelevant. The fact that a transferee chooses to integrate an economic entity into its own operations after a transfer, so that the entity does not retain an autonomous organisational structure, does not prevent the Acquired Rights Directive (or TUPE) applying – see Klarenberg v Ferrotron Technologies GmbH [2009] ICR 1263, paragraphs 47-50 and 53; and Ferreira da Silva e Brito v Estado Portugues [2015] IRLR 1021 at paragraphs 32 to 35. What matters is whether a functional link between the elements of production transferred is preserved; and that functional link allows the transferee to use them, even if they are integrated in a new and different organisational structure after the transfer, to pursue an identical or analogous economic activity. Here, the function of providing traffic management services in the North-East of London for TFL was to continue after 1 April 2013, following the re-tendering exercise, and there is nothing in the findings of fact to suggest that the service to be provided would be different in any material respect. The question to be addressed was not whether Ringway Jacobs would choose to organise the delivery of that service in precisely the same way as it had previously been organised, but whether Ringway Jacobs would pursue identical or analogous activities using elements of production that transferred or should be deemed to have transferred.

73. For all these reasons, the multi-factorial assessment carried out by the Employment Judge at [63] was flawed. The finding that there was no transfer of an economic entity to Ringway Jacobs at [63] cannot stand. Likewise, the Employment Judge's conclusion that there was no transfer of an undertaking to Ringway Jacobs at [65] also falls away.

No service provision change between Trek and Ringway Jacobs

74. The Employment Judge held that there was no service provision change between Trek and Ringway because there is no room within the service provision change regime for a temporary cessation of work: [68] Accordingly, he held that "for all the reasons already discussed" there was no organised grouping of employees engaged in the provision of the services under the contract between Trek and Amey immediately before the service provision change on 1 April.

75. For all the reasons I have addressed above, this conclusion cannot stand. That there is a temporary cessation of work or the suspension of operations is a factor to be considered

among others in determining whether there was an organised grouping at the relevant time. To the extent that the Employment Judge sought to distinguish cases concerning temporary cessation by reference to the facts of this case, his approach was in error of law as already addressed. To the extent that this was considered by the Employment Judge as a factor (as Ms Hawkins submits it was), the Employment Judge erred in his assessment for the reasons also set out above.

Employees employed immediately before transfer to Ringway Jacobs

76. At paragraph 66 of the Reasons the Employment Judge made an alternative finding if he was wrong to have concluded that there were no relevant transfers from Trek to Ringway and F M Conway, that the traffic management staff were not in any event protected by Regulation 4 TUPE because they were not employed immediately before the transfer, having been dismissed on 20 March 2013. The Appellants challenge that conclusion on the same basis as the Employment Judge's similar finding in relation to Amey.

77. For reasons I set out earlier the Employment Judge was wrong to hold that the traffic management staff were dismissed by Trek by 20 March 2013. Trek's actions in seeking to persuade Amey that there had been a transfer and in informing its staff that they had transferred to Amey under TUPE did not evince an intention by Trek to dismiss them.

78. In any event, the Employment Judge's analysis ignores altogether the possible application of Regulation 4(3) to these factors so far as Amey and Ringway Jacobs are concerned.

79. Accordingly, I am satisfied that the Employment Judge's holding that employees were not employed immediately before the asserted service provision change cannot stand. Since his finding that employees were dismissed is flawed, his finding as to the reasons for that dismissal must also fall away and will have to be freshly addressed on remission.

Conclusion

80. For all the reasons set out above this appeal is allowed and the following conclusions reached by the Employment Judge in error of law must be set aside:

(a) that there was no relevant transfer of an economic entity that retained its identity from Trek to Amey;

(b) that there was no service provision change from Trek to Amey;

(c) that there was no relevant transfer of an economic entity that retained its identity from Trek to Ringway Jacobs;

(d) that there was no service provision change from Trek to Ringway Jacobs.

81. In dealing with the issues in the case the Employment Judge also erred in concluding that the Appellants were dismissed by Trek on 20 March and further, were not employed immediately before any potential service provision change on 1 April. The finding as to the reason for such dismissals also cannot stand. Finally, no finding was made as to any subsequent transfer from Amey to Ringway Jacobs and that issue must now be addressed.

82. None of the parties suggests that further evidence is required. The fact finding exercise was properly conducted by the Judge and has not been challenged. The findings of fact remain, and to the extent that further findings of fact are invited, this must be on the basis of the evidence already heard. Given that, and for reasons of proportionality, I have concluded that remission should be to the same Employment Judge, to reconsider the issues set out above in accordance with this Judgment. I have every confidence that he will approach that task conscientiously and with an open mind. It will be up to the Employment Judge, having heard from the parties, to determine the extent of further argument and submissions, and the way that is to be conducted.