

Neutral Citation Number: [2022] EAT 124

Case No: EA-2020-000379-VP

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 9 March 2022

**Before:**

**MRS JUSTICE HEATHER WILLIAMS DBE**

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**Between:**

**MS L TUITT**

**Appellant**

- v -

**LONDON BOROUGH OF RICHMOND UPON THAMES**

**Respondent**

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**Lucille Tuitt the Appellant in person**  
**M Lee (instructed by South London Legal Partnership) for the Respondent**

Hearing date: 9 March 2022  
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**JUDGMENT**

## SUMMARY

### **TRANSFER OF UNDERTAKINGS**

The claimant appealed the Employment Tribunal's decision that her employment did not transfer to the respondent pursuant to the **Transfer of Undertakings (Protection of Employment) Regulations 2006**. The Employment Tribunal rejected the contention that her employment had transferred by virtue of a service provision change within the meaning of **regulation 3(1)(b)(iii)**, finding that the activities carried out before and after the alleged transfer date were not fundamentally the same.

Her appeal was dismissed. The Employment Tribunal had asked the correct question required by **regulation 3(2A)** and had permissibly concluded for the reasons that it identified that the activities undertaken by the respondent after the alleged transfer date were fundamentally different to those previously carried out by the claimant's employer. The question was one of fact and degree for the Employment Tribunal's assessment and no error of law in its approach had been identified. Furthermore, it is apparent from the statutory test and the related caselaw that the focus of the inquiry is upon the activity undertaken and whether and to what degree this has changed after the alleged transfer. The reasons behind the change, if there was a change, are not directly in point (save in so far as they indicate a deliberate engineering to avoid the consequences of the Regulations); if the activity was fundamentally different, it mattered not whether this arose from staff availability or for other reasons. The claimant's submission that any change stemming from employee availability should be left out of account by the fact-finder was not well founded.

Whilst the Employment Tribunal did not identify the case law that it had relied upon (which would have been preferable), this would only give rise to a material error of law if this had led the Tribunal to ask the wrong question or to give legally erroneous self-directions, which was plainly not the case here.

**MRS JUSTICE HEATHER WILLIAMS:****Introduction**

1. The claimant appeals from the judgment of the London (South) Employment Tribunal (Employment Judge Hyams-Parish sitting alone) ("ET"), given orally on 11 February 2020 and then contained in written reasons promulgated on 29 February 2020. The ET decided that the claimant's employment with Broadland Guarding Services Ltd ("Broadland") did not transfer to the respondent pursuant to the provisions of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"). As a result of that conclusion, the claimant's claim for automatic unfair dismissal against the respondent was dismissed. The ET rejected the claimant's claim that her employment had transferred by virtue of a service provision change ("SPC") within the meaning of **regulation 3(1)(b)(iii) TUPE**. Specifically, the ET found that the activities carried out before and after 1 July 2018 (the alleged transfer date) were not fundamentally the same. The central issue on this appeal is whether the ET was entitled to reach this conclusion.

2. On 9 April 2020 the claimant served her notice of appeal on the Employment Appeal Tribunal ("EAT"). Following consideration on the papers, her appeal was rejected by HHJ Auerbach pursuant to **Rule 3(7) Employment Appeal Tribunal Rules 2013** ("EAT Rules"), and the claimant was informed by a letter dated 10 November 2020. The appeal was subsequently permitted to proceed following a Rule 3(10) Hearing in front of HHJ Katherine Tucker on 17 June 2021.

3. Before her dismissal on 30 June 2018, the claimant was employed by Broadland as a CCTV operator. Until that date, Broadland had provided CCTV operators to the respondent to work in their CCTV control room between the hours of 6 pm and 6 am. The claimant was supplied by Broadland in addition to another member of staff. On 28 May 2018 Broadland gave one month's notice to the respondent to end the contract. The claimant's case was that the respondent's Careline staff, who had previously worked alongside her in the control room, now undertook the CCTV monitoring, so that essentially the same activities were carried out after the alleged transfer date as had been undertaken beforehand.

4. The claimant originally brought proceedings against her previous employers Broadland as the second respondent. However, she clarified at the outset of the substantive hearing before the ET that her only claim was for automatically unfair dismissal against the London Borough of Richmond upon Thames (who were the first respondent below). It was then agreed that the second respondent could be removed as a party from the proceedings. Equally, the Registrar directed that it was not necessary for Broadland to be named as a respondent to this appeal.

5. As the ET noted in paragraph 3 of its reasons, the questions for it to resolve were: (a) was there a relevant transfer within the meaning of **regulation 3 TUPE** and, if so, (b) was the TUPE transfer the sole or principal reason for the dismissal? In paragraph 4 of its reasons, the ET explained that the respondent defended the case as follows:

“(a) There cannot be a TUPE transfer because the activities carried on by the First Respondent after the transfer date were fundamentally different;

(b) As at 1 July 2018 the First Respondent intended the activities to be carried out for a short term duration only, until March 2019, when the First Respondent anticipated that the CCTV services would be merged with the London Borough of Wandsworth ('LBW').”

6. At the hearing, the claimant gave evidence, as did the respondent's witnesses: Keith Free, the Careline and CCTV Manager, and Pauline Ollett, the HR Business Partner. The claimant only asked questions of Mr Free.

### **The Grounds of Appeal**

7. At the Rule 3(10) Hearing the claimant was represented by Ms T O'Halloran of counsel pursuant to the ELAAS Scheme. The Judge permitted the appeal to proceed and set it down for a full hearing, but it is clear from her order sealed on 21 June 2021 that permission was granted on the basis of the amended grounds of appeal. This was a reference to a document dated 17 June 2021. The terms of the order indicated that it was before the Judge. Paragraph 4 of her order provides that there be “leave to amend the Notice of Appeal in accordance with the form produced to the Tribunal today by Ms Tara O'Halloran”. In the 'Reasons Allowed to Proceed' document completed by the Judge, she

said:

“I consider that the amended grounds of appeal (which set out succinctly the points which the Appellant, Claimant below and who represented herself) sought to advance.

They are reasonably arguable and should, in my view, be determined at a full hearing”

8. More recently, in an email sent on 16 November 2021, the claimant asked the EAT for permission to revert to reliance on her original grounds of appeal when it came to the full hearing, supplemented by the skeleton argument she had prepared for the Rule 3(10) Hearing. By an email sent on 19 November 2021, the respondent opposed this course. The application was rejected by the Registrar, whose decision was set out in an email to the parties dated 25 November 2021. The Registrar pointed out that HHJ Katherine Tucker had not given permission to proceed on the basis of the original grounds of appeal, which had earlier been rejected by HHJ Auerbach.

9. The claimant appealed the Registrar's decision. Her appeal was refused by HHJ James Tayler, as set out in an order sealed on 9 December 2021. In his reasons, the Judge noted that HHJ Auerbach had found that the original notice of appeal (running to 69 paragraphs) was discursive and did not clearly identify the alleged errors of law; that for the Rule 3(10) Hearing the claimant had prepared a lengthy skeleton argument running to 96 paragraphs, which again lacked the clarity necessary to identify the alleged errors of law; and at the Rule 3(10) Hearing HHJ Katherine Tucker had had the advantage of counsel's concise amended grounds of appeal, and she had permitted the appeal to proceed on that basis.

10. Having set out the sequence of events which I have also summarised, the Judge said this in paragraphs 5 and 6:

“The Appellant thereby seeks to do away with the clarity established by the amended Grounds of Appeal and put in its place two lengthy documents that are lacking in the clarity required for a Notice of Appeal.

The application was refused by the Registrar by email dated 25 November 2021. The Appellant seeks to challenge that decision. She asserts the amended Grounds of Appeal do not properly reflect the grounds permitted to proceed and those that she wishes to argue. She refers to brief extracts of her original Grounds of Appeal and Skeleton Argument without clearly identifying what additional errors of law she seeks to assert. Had the appellant had any concerns about the amended Grounds

of Appeal, she should have raised them immediately upon receipt of the sealed Order with the amended grounds attached. The amended grounds were approved by HHJ Katherine Tucker; so clearly are the grounds that she permitted to proceed. The Respondent has responded on the basis of the amended Grounds of Appeal and started to prepare the matter for hearing. It would not be in accordance with the overriding objective for the concise amended Notice of Appeal to be replaced by lengthy documents that are lacking in clarity. The appeal against the Registrar's direction is refused.”

11. In her skeleton argument prepared for this full hearing, the claimant again sought to rely on the original grounds of appeal, requesting that it was “in the interests of natural justice” that she be permitted to take this course. The respondent objected. At the outset of the hearing, I explained to the parties that only the amended grounds of appeal were before me, being the only grounds upon which the Rule 3(10) application had been granted. Ms Tuitt nonetheless sought to address me on the original grounds of appeal, saying in particular that the amended grounds were not before HHJ Katherine Tucker and were not the basis of her decision to allow the appeal to proceed. That is plainly and demonstrably incorrect in light of the references that I have already read from the sealed order of 21 June 2021 and the related documentation. During the course of her submissions, I encouraged the claimant to focus on the amended grounds of appeal as they were the matters before me, and I reminded her of this on a number of occasions when her oral submissions returned to the original grounds. Despite the claimant's multiple references to the original grounds, the position remains as I indicated at the outset of the hearing. The only grounds before me are those upon which the claimant has been permitted to proceed to a full hearing. Moreover, she has already unsuccessfully challenged this entirely orthodox approach to the EAT's proceedings in the application she made to the Registrar and in her subsequent appeal considered and rejected by HHJ James Tayler. No basis has been shown for her further attempt to resurrect the original grounds of appeal before me today; nor, as far as I am aware, has HHJ James Tayler's decision been appealed; certainly it has not been successfully appealed.

12. I therefore propose to consider this appeal on the basis of the amended grounds. Nonetheless, as I sought to reassure Ms Tuitt during the hearing, many of the points that she addressed me on are

within the amended grounds of appeal, albeit on occasions expressed slightly differently. Recognising that she is self-represented, I have taken as broad approach as I fairly can to the extent of the amended grounds of appeal in considering this appeal, with the result that the majority of the points that the claimant made to me this morning are within the appeal. However, insofar as she sought to rely on ground 1 of her original grounds of appeal, that she had an unfair hearing below, then she is plainly unable to do so as it does not come within the scope of the amended grounds and HHJ Katherine Tucker's order, save for the specific point regarding the London Borough of Wandsworth ("LBW") identified in ground 4.

13. Accordingly, the grounds of appeal are as follows. Ground 1 is headed "error of law". It says:

"1. The ET erred in its approach as to whether there was a relevant transfer under regulation 3(1)(b) TUPE 2006 by failing to clearly identify the relevant activity and/or adopting too narrow a view of the relevant activity (see *Johnson Controls Ltd v Campbell* [2012] 2 WLUK 411 and *Metropolitan Resources Ltd v Churchill Dulwich Ltd (In Liquidation)* [2009] I.R.L.R 700) since: -

(a) The activity pre and post transfer was essentially the same: operators were carrying out CCTV monitoring (see paragraph 29 of the Judgment);

(b) Mr Free expected and directed Careline staff to proactively monitor CCTV. In an email dated 16 August 2018 to staff, he stated: "...When not engaged on an urgent call I expect staff to answer the radios or monitor the CCTV 24/7"

(c) Mr Free expected staff to proactively answer radios, an activity carried out by the Appellant pre-alleged transfer (p/34 of the ET1);

(d) There was no difference in location or any suggestion of change in equipment when carrying out the task of CCTV monitoring.

(e) The fact that the Careline staff performed some additional duty or function does not negate the application of reg 3(1)(b): see Churchill above.

2. In short, the ET's approach to the categorisation and identification of the 'activities' concerned, and the comparison between activities carried out prior to and subsequent to the change of providers was erroneous and too pedantic, *The Salvation Army Trustee Company v Coventry Cyrenians Limited* [2017] IRLR 410 applied.

3. When reaching its conclusion that activities were fundamentally different, the ET appears to have taken into consideration the alleged service provision change itself: see paragraph 29, which states: "It was a fundamentally different service given that the First Respondent no longer engaged a company to provide CCTV

operatives...". The ET misdirected itself by considering the alleged SPC as evidence of the change in activity itself.

4. The ET failed to identify what if any case law was considered and/or analysed before reaching its conclusion; see paragraph 26 of the Judgment.

5. The ET further failed to ask itself whether, on the facts, the conditions set out in reg.3(3) were satisfied; see Churchill above.”

14. Ground 2 is headed “error of law and/or perversity”. It alleges there was no evidential basis for the ET's conclusion that it did not accept that there was any deliberate action on the part of the respondent to avoid TUPE from applying.

15. Ground 3 is headed “Failed to give adequate reasons and/or perversity”. The central complaint made here is that the ET's finding that after 30 June 2018 the CCTV monitoring was reactive rather than proactive was contradicted by the email sent by the respondent's key witness, Mr Free, on 16 August 2018. It is said that the ET's judgment is silent as to how it resolved this contradiction. Ground 3 also repeats the ground 1 complaint that the ET failed to identify the case law it considered and analysed, and it also alleges that the ET erred in failing to state what it found to be the principal reason for the dismissal. The claimant confirmed in correspondence prior to this hearing that she no longer relied upon the contention within ground 3 that Mr Free had made certain concessions in his evidence.

16. Ground 4 is headed “error of law” and contends that the ET erred in failing to adjourn the hearing to allow the LBW to be added as an interested party.

17. At the outset of the hearing, I clarified with the parties that I would permit the claimant to refer to a pack of additional documents that had been added to the bundle from page 306.

### **The Employment Tribunal's reasoning**

18. The ET explained that a preliminary matter had been dealt with at the outset of the hearing regarding the claimant's request to join the LBW to the proceedings. The claimant had also made this application previously and it had been rejected by Employment Judge Martin. She had appealed that determination to the EAT, and her appeal had been rejected both at the sift stage pursuant to rule 3(7) and at a rule 3(10) Hearing. Nonetheless, the claimant sought to pursue it again at the outset of the

substantive hearing. The ET addressed this in paragraph 12 of its Reasons, as follows:

“12. The issue was explored with the parties during this hearing and Counsel for the First Respondent said that he could not see why LBW should be added as a party and added that if the Claimant won her claim, the First Respondent would not attempt to deflect blame or liability on to LBW but that the First Respondent would pay any compensation ordered by the Tribunal. Leaving liability aside, the only relevance of the First Respondent’s combined services agreement with LBW was because the First Respondent’s secondary defence was that there was not a TUPE transfer because the activities would only be carried out for a short term duration, until the merger of the services with LBW in March 2019. The Tribunal’s attention was drawn to documents in the bundle which showed that the decision to merge the CCTV services with LBW was made in June 2018 and intended to come into effect in March 2019. The Claimant was therefore asked what value there would be in adding LBW in light of what had been said and she could not give a good reason.”

19. From paragraph 17 onwards, the ET set out its findings of fact. The ET said that Broadland had provided the CCTV monitoring service to the respondent from 2005 in exactly the same way as it had up to 30 June 2018. The claimant worked four days on and four days off. At paragraph 19, her role was described as follows:

“...Her job, and that of the other CCTV operator provided by the Second Respondent was to operate and monitor surveillance cameras situated around the borough in order to safeguard the public, prevent and detect crime. CCTV footage was used by police to solve crimes and no doubt also used as evidence to prosecute offenders. She would respond to safety related calls from the Police, Clubs, Pubs, Venues and various shops on the high street.”

20. In the next paragraph, the ET continued:

“The Tribunal was also able to get a good picture of what the Claimant did from the logs which were completed by CCTV operatives which recorded what they did during their shift. From looking at those logs, it was clear that there was a great deal of what was referred to during the hearing as “proactive monitoring”; this meant looking at each camera, checking that it was functioning correctly and monitoring what was going on in the area where the particular camera was located.”

21. Then in the next paragraph, paragraph 21:

“The Claimant proactively monitored 12 screens from the control room where she was based and which is shared with staff working principally for the Careline operation provided by the First Respondent...”

...

22. The ET then quoted a passage from Mr Free's witness statement. Seen in context, it is apparent that this was adopted as part of the ET's findings. That passage said:

*“The Careline activity is by far the main activity as it is a life critical service providing emergency response to the most vulnerable in our borough. Careline is delivered by staff responding to alarms triggered by service users which are routed through the call answering system. The alarm brings up the user’s address, personal and medical details, next of kin, responder’s details and any other relevant information. Based on the information provided by the service user, through the speaker in the alarm in their home, and the details on the system, the operators make decisions and judgement calls regarding the appropriate response to the alarm that has been triggered. This can vary from providing re-assurance to calling the emergency services. These calls can be very time-consuming as it is often necessary to make several related calls, to family, responders, social workers etc. whilst keeping the service user informed and supported. Additionally, the Careline staff respond to all out of hours calls for council services from 1700 hours to 0900, which includes calls for social workers, emergency response, alarms on council properties and a wide variety of other demands, including calls about noise nuisance, littering or “fly-tipping” and dustbins not being emptied. Between 2200 and 0600 a single member of the Careline staff covers all of the above. That was the case both before and after 1 July 2018.”* (original emphasis)

23. As to the position after Broadland's notice took effect, the ET found the following in paragraphs 23 and 24:

“23. Upon the expiry of the contract, the First Respondent decided to divert the funding that had historically paid for the services of the Second Respondent and this meant that from 1 July 2018 the First Respondent chose not to employ full time CCTV operatives to provide the same service that the Second Respondent had done between 6pm-6am.

24. The Tribunal finds that this fundamentally changed the whole character of the service provided by the Second Respondent. Without the full time operatives provided by the Second Respondent, any monitoring of the CCTV cameras was left to the Careline staff. They were already overloaded with Careline duties and therefore the extent to which they were physically able to perform CCTV monitoring was minimal. Mr Free said in evidence that their Careline duties took up 95% of their time. It is clear from the email at page 218 of the bundle that they weren't providing the service because Mr Free was receiving complaints about it. They were forced to provide only reactive support service as when needed. We heard that as Careline staff were on calls all of the time, they could not simply go over to the CCTV desk even if the the phones were ringing. Calls went unanswered. The Tribunal accepts that with only one member of staff on Careline in the evenings, the monitoring service provided by the First Respondent was minimal. Whatever the rights or wrongs of the decision taken by the First Respondent, the demand on budgets are such that the money for the service disappeared to pay for something else. The Tribunal does not accept that there was any deliberate action on the First Respondent’s part to do this or not fund the service to avoid TUPE applying.”

24. The ET returned to this topic at paragraphs 28 and 29 when setting out its conclusions. Having noted that the first respondent's case was that “the activities after the transfer date were fundamentally different”, the ET said as follows:

“29. At a high level, the First Respondent was continuing to provide a CCTV monitoring service, but this was the extent of any similarity. It was a fundamentally different service given that the First Respondent no longer engaged a company to provide CCTV operatives and for all the reasons made clear in the above findings of fact. Not only did the amount of monitoring significantly reduce but the type of monitoring changed considerably. Cameras were not checked and there was no routine surveillance of areas in which the cameras were situated. Calls from the police and public remained unanswered as this was no longer a service that the First Respondent could routinely provide. Proactive support, which played such a large part of the Claimant’s role, had disappeared over night. The above picture is supported by the logs and there is a stark difference in the activities logged pre and post 30 June 2018.”

25. The ET then went on to explain that given this finding, it did not need to determine the secondary contention regarding short duration. Then, at paragraph 31 the ET observed that as there was no TUPE transfer, the sole or principal reason for the claimant's dismissal was not a TUPE transfer and therefore the claim for automatic unfair dismissal must fail.

**Relevant law**

26. **Regulation 2(1) TUPE** provides that a “relevant transfer” means a transfer or a service provision change to which the Regulations apply in accordance with regulation 3. As relevant, **regulation 3** states:

“3.—(1) These Regulations apply to—  
...  
(b) a service provision change, that is a situation in which—  
...  
(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.  
...

(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.”

27. In **Metropolitan Resources Ltd v Churchill Dulwich Ltd** [2009] ICR 1380 (“**Metropolitan Resources**”) HHJ Burke QC considered the definition of a SPC, observing that the question of whether the definition was met in an individual case was “essentially one of fact” (see paragraph 27). In paragraph 28 he explained that there was no need for the tribunal to adopt a purposive construction. As regards the activities carried out before the alleged transfer by the transferor and afterwards by the alleged transferee, he said the following at paragraph 30:

“30. The statutory words require the employment tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A common sense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the tribunal in the present case. The tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the tribunal on the evidence in the individual case before it.”

28. Accordingly, the question is one of facts and degree, and in considering whether the activities undertaken after the alleged transfer are fundamentally the same as those carried out before it, minor

differences between the nature of the task will not take the circumstances outside of the definition of SPC.

29. At paragraph 31, HHJ Burke cited the earlier judgment of Langstaff P in **Kimberley Group Housing Limited v Hambley and others** [2008] ICR 1030, including his observation at paragraph 27 that “the first question for the tribunal is to identify the relevant activities or as it may be relevant activity. It is only when that has been done ... that the tribunal can see whether or not those activities come within” the relevant definition in regulation 3(1)(b). Furthermore, in paragraph 37 HHJ Burke said:

“...Equally, as it seems to me, the addition, in the hands of a replacement contractor, who is performing all of the services carried out by his predecessor, of some additional duty or function is unlikely, unless the addition is of such substance that the activity then being carried on is no longer essentially the same as that carried on by the predecessor, to negate the existence of a transfer under regulation 3(1)(b). It is for the tribunal in each case to assess, on the facts, taking into account any material differences, whether the alleged transferee is performing essentially the same activity as that of the alleged transferor...”

...

30. *Metropolitan Resources* was cited and applied by Langstaff P in **Johnson Controls v Campbell & Anor** UKEAT/0041/12 (“**Johnson Controls**”). As regards the identification of the "activity" for these purposes, he said at paragraph 6:

“We would add that the identification of “activity” is critical in many cases. The case before us is an example of that. An activity may be more than the sum of the tasks that are performed in respect of that activity, but a Tribunal must be careful to ensure that it does not take so narrow a view of that which “activity” consists of, in the case before it, as to forget that the context in which it decides “activity” is the context in which it is ever likely that employees' continued employment will be affected. If for instance the activity performed by a given employee is after a service provision change to be performed by two or three employees in the transferee or, in a 3(1)(b)(iii) situation, by the client itself, then it may well be that the approach of the Tribunal should recognise that the same activity may well be carried on, though it is performed now by three people rather than by the one person who earlier performed it. These questions are, however, fundamentally questions of fact and degree.”

31. Having reviewed the factual findings made by the ET in that case, Langstaff P said at paragraph 13:

“...The identification of the activity is, as the cases have held, a question of fact and degree. It being a question of fact and degree, the question for us therefore on appeal is whether the Judge was entitled to come to that factual conclusion. He would not be entitled to do so if he approached the issue of identification of the activity by some wrong approach, nor would he be entitled to reach that conclusion if it were perverse to do so. As to the approach, he was asking himself the question that was proposed by HHJ Burke QC in the **Metropolitan** case at paragraph 37 by asking whether the alleged transferee, in this case the client, was performing essentially the same activity as that of the alleged transferor, in this case Johnson Controls. The underlying approach was therefore undoubtedly correct.”

32. At paragraph 18 he continued:

“...In our view, the Tribunal, faced with the question, which is its initial and critical question as identified by **Kimberley**, has to decide what an activity is. Mr Brittenden, who appears for UKAEA, argues that Mr Rose's analysis is an over-analysis where it seeks to separate the how from the what. He points to the fact that small differences quantitatively between a service provided before a putative transfer and that occurring after can be critical, as they were in **the Enterprise Management** case, when the description adopted by the Tribunal was 15 per cent of the work no longer being carried on after as it had been before. We accept that identifying what an activity is involves an holistic assessment by the Tribunal. The Tribunal is trusted to make that assessment. Its evaluation will be alert to possibilities of manipulation, but it is not simply to be decided by enumerating tasks and identifying whether the majority of those tasks quantitatively is the same as the majority was prior to the putative transfer.”

33. In **Department for Education v Huke & Anor** UKEAT/0080/12/LA ("**Huke**"), Lady Smith applied the principles I have identified and also noted in paragraph 21:

“... equally, it cannot be a matter of simply asking whether activities carrying the same label continue after the alleged transfer. In the factual assessment which the tribunal requires to carry out, it seems plain that they must consider not only the character and types of activities carried out but also quantity. A substantial change in the amount of the particular activity that the client requires could, we consider, show that the post transfer activity is not the same as it was pre transfer. Thus, in the **OCS Group** case, the tribunal found that the contract post transfer was for a substantially reduced service which was materially different and TUPE did not apply.”

34. At paragraph 32 she reiterated that changes in the volume of work are relevant to considering whether or not the activities carried out before and after the alleged transfer are essentially the same, and at the end of paragraph 35 she said:

“Equally, where the volume of work undergoes a substantial diminution, it may lead to the conclusion that the activities being carried out are not essentially the same as before, even if the same categories of work apply. As HHJ Burke QC

observed, the assessment is a matter of both fact and degree.”

35. Later cases have continued to reiterate that the question of whether the regulation 3(1)(b) definition is met in any individual case is one of fact and degree for the assessment of the fact-finding tribunal. For example, see **Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and others** [2016] ICR 607 (“**Arch Initiatives**”), Simler P (as she then was) at paragraph 19.

36. In **The Salvation Army Trustee Company v Bahi & Ors** [2017] IRLR 410, Judge David Richardson observed as follows in paragraph 22:

“...On the one hand, they should not be defined at such a level of generality that they do not really describe the specific activities at all. Thus it would be wrong to characterise a fully catered canteen as merely the provision of food to staff (see *OCS Group* at paragraph 22). On the other hand, the definition should be holistic, having regard to the evidence in the round, avoiding too narrow a focus in deciding what the activities were (see *Arch Initiatives* at paragraph 38). A pedantic and excessively detailed definition of 'activities' would risk defeating the purpose of the SPC provisions.”

37. As Mr Lee emphasises, in all of these cases cited bar one (**Huke**), the appeal to the EAT was unsuccessful, irrespective of whether it was the claimant or the respondent who had succeeded below. As he says, this underscores that the question is one of fact and degree for the fact finding tribunal, so that the EAT will only intervene if there has been an error of law in that tribunal's approach or a perverse decision. In **Arch Initiatives** Simler P (as she then was) said at paragraph 43:

“Once again, these were pre-eminently findings of fact and degree for the employment judge. Another Tribunal might well have taken a different view of these facts without any error, nor is it necessary that this appeal tribunal should agree with the finding. Once it is accepted that the legal approach adopted by the tribunal is correct and the findings of fact are not perverse, the employment judge's assessment must be respected...”

...

38. In **Huke**, a case where the appeal was allowed and the case remitted to a differently constituted tribunal, the situation was a stark one. The tribunal's decision there that there had been an SPC had wholly failed to address a very substantial diminution in the volume of the work in question.

### **Submissions: the claimant**

39. As regards the ET's approach to the question of whether the activities were fundamentally the same, the claimant says that the ET failed to follow the legal guidance in the **Metropolitan Resources** and **Johnson Controls** cases, adopted too narrow a view of what the activities were and focused on minor differences between the activities before and after the alleged transfer date and thereby failed to appreciate that the activities were fundamentally the same. Ms Tuitt also submitted to me that the ET misdirected itself in focusing in effect on the change in her availability, in that before the alleged transfer she was available to undertake the CCTV monitoring full time, whereas after the alleged transfer the Careline staff only had limited availability to do so, as it was not the main part of their duties. She said employee availability was irrelevant and should not have been taken into account by the ET as the activity itself was still there to be done. I will refer to this as the availability argument when I return to it in my conclusions.

40. The claimant also said that the ET's conclusion was a perverse finding of fact, and in that regard, she relied in particular on Mr Free's email, which I will come to. Ms Tuitt also drew my attention to the terms of regulation 3(3), in particular submitting that the reference to an organised grouping of employees in regulation 3(3)(a)(i) was satisfied here in terms of the activity that she was carrying on prior to the transfer.

41. She concluded by submitting in her oral address to me that endorsing the ET's approach would give rise to a loophole that would enable employers to restrict the effectiveness of the TUPE provisions.

**Submissions: the respondent**

42. The respondent submitted that the ET asked itself the right question posed by regulation 3(2A) and adopted an approach consistent with the earlier authorities, that it considered the evidence and answered the correct question based on that evidence. Accordingly, no error of law was disclosed by its reasons, and it cannot be said that the decision is one that no reasonable Tribunal could come to.

43. The respondent notes that the EAT has repeatedly emphasised that the question of whether the activities carried out before and after the alleged transfer are fundamentally the same, is a matter

of fact and degree for the tribunal to determine, and in this instance the ET rightly focused on the fundamental difference it had identified. In addition, Mr Lee submits that the email from Mr Free supported rather than contradicted the respondent's case.

44. Mr Lee also submitted that the claimant had failed to identify evidence in support of her contention that the ET's conclusion was perverse and that the only conclusion it could have arrived at was that the activities were fundamentally the same after the alleged transfer date. He submitted that although the ET did not set out the case law it relied on, this did not provide a freestanding ground of appeal in the absence of any indication that there was a misdirection, and he said that insofar as the claimant complained about the ET's failure to address other aspects of the SPC definition and/or the reason for the dismissal, there was no need for it to do so as the tribunal had in any event rejected the claimant's case that there was a transfer within the applicable definition.

45. As regards ground 4, the decision not to join LBW to the proceedings, Mr Lee contended that this was a case management decision the ET was entitled to make. Furthermore, even taking the matter at its highest, the position of LBW could only be relevant to the short-term-duration line of defence, which in the event the ET did not need to determine.

### **Conclusions**

46. I start by considering whether the ET asked itself the correct question. Pursuant to regulation 3(2A) and the authorities I have discussed, that question was whether the activities carried out by another person were “fundamentally the same as the activities carried out by the person who had ceased to carry them out”. It is evident from the opening sentence of paragraph 24 and the second sentence of paragraph 29 of its Reasons (which I have already set out) that the ET did ask the right question and concluded that the activities undertaken by the respondent were fundamentally different to those which Broadland had previously carried out before the alleged transfer date.

47. Next, I turn to the ET's reasoning. The reasons why the activities provided by the respondent were found to be fundamentally different were as follows. Firstly, Broadland had provided a full-time CCTV operator between the hours of 6 pm and 6 am, whose entire role was to proactively monitor

the CCTV footage on the 12 control room screens and to respond to safety-related calls from the police, pubs, clubs and high street stores. As indicated at paragraph 20 of its Reasons, the ET found as a fact that the role involved “a great deal” of proactive monitoring. Secondly, by contrast, after the alleged transfer date, any monitoring of the cameras was undertaken by the one member of Careline staff on duty as an addition to their main Careline duties, which were described by the ET in paragraph 21. The ET found as a fact that these employees were already “overloaded with Careline” duties” and therefore the extent to which they were able to perform CCTV monitoring was “minimal” (see paragraph 24 of the Reasons). Thirdly, the CCTV monitoring that they did perform was “only reactive support service” and that even then calls went unanswered (paragraph 24). Fourthly, as the ET found in its paragraph 29, not only did the amount of monitoring undertaken reduce very considerably, but the type of monitoring that was undertaken changed considerably; there was no proactive monitoring. As the ET put it, “Proactive support, which played such a large part of the Claimant’s role, had disappeared over night”.

48. Absent any specific error of law, which I will come on to address, these findings provide a legally sufficient basis for the conclusion that the activities pre and post transfer were fundamentally different. Whether or not a different tribunal (or indeed this appeal tribunal) would have come to the same conclusion is not in point.

49. As regards her perversity challenge, the claimant would have to show that no reasonable tribunal could have concluded that the activities were fundamentally different. In light of these factual findings, any perversity argument falls a long way short of this. During the course of her submissions, I asked the claimant what evidence she relied on to support her perversity argument and the only evidential material that she directed me to was Mr Free's email, which I will address in relation to ground 3.

**Ground 1: paragraphs 1 -2:**

50. I now turn to the specific criticisms that the claimant makes. In essence the complaint here is that the ET failed to clearly identify the relevant activity and/or adopted a too narrow and pedantic

approach to what the relevant activity was. I do not accept that the ET failed to identify the relevant activity. I have already set out its reasoning in this respect. It was plainly alive to the significance of how the activity was characterised. The opening sentence of paragraph 29 of its Reasons shows that the ET was aware that the activity could have been characterised as the provision of a CCTV monitoring service, but it then went on to explain why it considered that this would be superficial and inadequate and would not reflect the fundamental changes that had taken place. Further, I do not agree that the ET took an unduly narrow or pedantic approach to the characterisation of the relevant activity in circumstances where they found that the main part of the claimant's role had “disappeared overnight”. Engaging in minute comparisons with previously decided cases is not a fruitful exercise, as the question for the EAT in those cases too was whether the correct test applied, not whether the EAT agreed with the conclusion reached. Nonetheless, in light of the criticism that the ET took too narrow an approach, I observe, as will be apparent from the citations that I have already given, that the scale of change between the role previously undertaken by the claimant and the activities carried out after the alleged transfer appears to be substantially greater than the degree of change in a number of the earlier authorities where a tribunal's decision that the activities were fundamentally different was upheld by the EAT.

51. Although not a point made with the same emphasis in the amended grounds of appeal, the main contention that the claimant repeatedly advanced in her oral submissions to me today was her availability argument. As I have already indicated, I have taken a relatively broad view of the scope of the amended grounds and I accept that it is within those grounds for her to raise and develop this point. However, I do not accept that it is a well-founded submission. It is clear from the statutory test and the authorities I have cited, that the focus is upon the activity undertaken and whether and to what degree this changed after the alleged transfer; simply by way of example, see paragraph 6 of **Johnson Controls** (which is one of the paragraphs that the claimant relies on). The ET did just that, focusing on the activity being undertaken and whether it had changed. The reasons behind the change, whilst part of the overall context, were not directly in point save if and insofar as they indicated

deliberate engineering to evade the consequences of TUPE, a proposition that was rejected as I turn to in ground 2. Accordingly, if the activity was fundamentally different, it mattered not whether the reason for that difference arose from staff availability or from other reasons. Furthermore, there is no authority that I am aware of that supports the claimant's submission that if a change arises from availability considerations, it is irrelevant and must be left out of account by the Tribunal. Moreover, that approach would run contrary to the authorities that I have cited from, as I have explained.

52. Turning then to the specific subparagraphs of ground 1, which I have already read, paragraph 1(a) asserts that the activities pre and post transfer were “essentially the same”. That is plainly not correct on the ET's unassailable findings of fact. Paragraphs 1(b) and (c) refer to Mr Free's email, which I will address when I come on to ground 3.

53. Paragraph 1(d) relates to the fact that the equipment did not move location. That is factually correct, but it could not possibly be determinative of the proposition that the activities did not fundamentally change, particularly in light of the ET's factual findings I have highlighted.

54. At paragraph 1(e), referring to **Metropolitan Resources**, the claimant submits that performing some additional duty or function does not negate the application of regulation 3(1)(b). However, as I have set out earlier, the reference in paragraph 37 of the judgment in that case to additional duties was said in a context where the transferee was performing all of the services carried out by the predecessor. Here, to the contrary, on the ET's findings the transferee was not performing the majority of the duties carried out by the predecessor, in particular proactive monitoring, and far from the Careline duties being something additional to the pre-transfer role, they lay at the heart of the activity now being undertaken by the relevant employees. It is also clear from paragraph 37 of HHJ Burke's judgment that it is always a question of fact and degree, and that indeed was the approach taken by the ET in this case.

### **Ground 1: paragraph 3**

55. The claimant suggests here that the ET erred in taking into account the alleged SPC itself. This is based on a passage in paragraph 29 of its Reasons where the ET said, “It was a fundamentally

different service given that the first respondent no longer engaged a company to provide CCTV operatives”. I do not consider this criticism is well-founded. In this sentence, the ET is referring back to its earlier findings of fact, particularly those in paragraph 24. Therein the ET said, “Without the full time operatives provided by the Second Respondent, any monitoring of the CCTV cameras was left to the Careline staff”, and then the ET went on to explain why the activity was fundamentally different. There is no error of law involved in noting that the monitoring role which had previously been undertaken by a full-time CCTV operative was now being undertaken, to the extent that it was being undertaken at all, as an adjunct to a Careline employee's existing and main duties with no additional staffing resources assigned.

#### **Ground 1: paragraph 4**

56. The claimant says the ET erred in law in not identifying the case law that it had considered and analysed. At paragraph 35 of its decision, the ET set out the material provisions of TUPE. It then said at paragraph 26:

“This area of law has been the subject of lots of litigation on the interpretation of the TUPE Regulations and the Tribunal’s attention was drawn to a number of cases by Counsel for the First Respondent which the Tribunal has considered in reaching its decision.”

57. Plainly, it would have been preferable for the ET to have identified the key cases it had been referred to and the principles it drew from them. However, the failure to do so does not in itself amount to a freestanding material error of law. There will only be an error of law if the failure to identify the relevant case law principles led the tribunal to ask the wrong question, give itself a legally erroneous self-direction or otherwise take a legally wrong approach; see for example **Simpson v Cantor Fitzgerald Europe** [2021] ICR 695 per Bean LJ at paragraphs 29 to 32. There is nothing to indicate that anything of that kind occurred here. To the contrary, the ET asked the correct question, as I have already indicated.

#### **Ground 1: paragraph 5**

58. There is nothing in the point that the ET erred in failing to ask itself whether the conditions

set out in regulation 3(3) were satisfied, as on the tribunal's findings the claim failed before it got to that stage. Accordingly, it was simply unnecessary for the ET to consider the regulation 3(3) criteria. As the claimant specifically mentioned the organised grouping criteria before me, I make clear that as the ET's list of issues shows, this point was not in dispute before the ET. Had the claimant succeeded on the disputed issue upon which the ET ruled against her, then this point would have been taken in her favour, but it did not avail the claimant at the stage that I am concerned with, namely whether the activities were fundamentally the same or not.

## **Ground 2**

59. It is said that there was no evidential basis for the ET's rejection of the proposition that the respondent had deliberately acted to avoid TUPE from applying. I do not accept that. The ET plainly accepted the evidence of Mr Free, who explained the circumstances, in particular at paragraphs 9 - 15 of his witness statement, to which I have been directed. It is not incumbent on a tribunal to identify all the evidence it relies upon in reaching a conclusion; for example, see **DPP Law Ltd v Greenberg** [2021] IRLR 1016, per Popplewell LJ at paragraph 57. Accordingly, the fact that the ET did not refer to this specifically does not in itself provide a basis for inferring it was not taken into account.

60. Furthermore, the context had been one where Broadland, rather than the respondent, had served notice to terminate the previous arrangement, and the ET found as a fact at paragraphs 23 and 24 of its Reasons that the decision not to employ full time CCTV operatives was driven by budgetary pressures. In these circumstances, there was an evidential foundation for the ET's rejection of the proposition that the change in the activities had been designed to avoid TUPE applying to the claimant.

61. The claimant contends that it was perverse for the ET not to find that the change in activities had been engineered to avoid TUPE applying to her employment. In other words, she says that this is the *only* legitimate conclusion that the ET could have reached, despite the evidence and findings I have just referred to. However, the amended grounds of appeal identify no supporting evidence at all in respect of that proposition, and nor was any identified in the claimant's oral submissions to me.

### Ground 3

62. As I have earlier noted, the central complaint here concerns Mr Free's email dated 16 August 2018. The context was that on 14 August 2018 Mr Free had been emailed by a Mr McGann from the Metropolitan Police Service, who was raising concerns that on a number of occasions the radio link to the Council's CCTV monitoring room had not responded to calls made from pubs and security organisations. On 16 August 2018 Mr Free sent a reply to Mr McGann, in which he said that he had spoken with staff and issued an instruction, which he then set out. The material parts of the instruction were as follows:

“Whilst I appreciate that losing the night-time CCTV operator has potentially raised demand on the night duty staff it is not an excuse to fail to answer the radios or respond to police requests. I have had several complaints from the police that, particularly during the night, the radios are not responded to and I would wish to remind you that the general job designation is Careline & CCTV operator. Obviously Careline calls will take precedence but when not engaged on an urgent Careline or out of hours call I expect staff to answer the radios or monitor the CCTV 24/7. I have requested that I am informed by the police of any future issues and trust you will ensure we regain our reputation as a valued partner in the borough strategy against crime and disorder.”

63. I do not accept the claimant's contention that the contents of this email contradict the ET's finding that monitoring undertaken after the alleged transfer date was reactive rather than proactive. Firstly, this email very largely concerns reactive monitoring rather than proactive monitoring. It is about the failure to respond to calls made via the radio link to the CCTV control room. Secondly, Mr Free's quoted communication with staff explicitly recognises that the Careline work is to take precedence. Thirdly, the email states that the monitoring should be undertaken when the relevant staff members are not engaged on Careline tasks. In that sense, it is, as Mr Lee said, aspirational; a proposition reinforced by the context in which it is written, namely reassuring the sender of the original email as to the future. The EAT was fully entitled to find as a fact that in practice, nearly all of the Careline staff's tasks were taken up with Careline duties, so that the extent to which they were able to perform any monitoring was, in the ET's words, “minimal”. Fourthly, the email shows that complaints had been received precisely because even the reactive monitoring was not being

undertaken.

64. The remainder of ground 3 repeats points made under ground 1, save that it is said that the ET erred in failing to identify the reason or principal reason for her dismissal. Ms Tuitt said to me this morning that this was perverse. However, as the ET found that there was no TUPE transfer of the claimant's employment to the respondent, there was no question of the respondent dismissing her, and so the question simply did not arise. The case cited in the amended grounds of appeal, **British Railway Board v Jackson** [1984] IRLR 235, does not assist the claimant at all. It was a case of an express dismissal by the respondent employer.

#### **Ground 4**

65. There is no basis for the suggestion that the ET erred in law in failing to adjourn the hearing to allow the LBW to be added as an interested party. The question was a case management decision, and thus an appeal could only succeed if the determination was not one that a reasonable tribunal could have arrived at and/or there was a misdirection of law. No misdirection of law has been suggested to me. Nor is the decision a perverse one. Indeed, it appears to have been an entirely reasonable decision. There was no contractual relationship between the claimant and LBW. She did not suggest that it became her employer, nor that it had dismissed her. Furthermore, the respondent had indicated that if the claim succeeded, it would not attempt to deflect blame or liability onto LBW and would itself pay any compensation awarded by the ET. In addition to recording this, paragraph 12 of the ET's Reasons noted that the claimant was unable to identify a good reason for joining the LBW. A decision to join LBW plainly would have had substantial consequences in that it would have resulted in an adjournment of the substantive hearing, and the claimant had already appealed unsuccessfully against the earlier decision not to join LBW.

66. For all these reasons, I can detect no error of law in the ET's approach to this matter. Furthermore, the decision made as regards the LBW had no bearing on the outcome of the case, given that the respondent's services agreement with LBW was only relevant (at its highest) to the secondary defence that the activities were to be carried out for a short-term duration, which in any event the ET

did not have to decide and did not decide in light of its conclusion on the primary line of defence.

**Outcome**

67. I therefore dismiss the appeal.