



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103764/2022

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Held in Glasgow on 16 and 17 November 2022

Employment Judge S MacLean

10 **KONE plc**

Claimant
Represented by:
Mr T Merek, Advocate
[Instructed by:
Ms B Msi –
Inhouse Counsel]

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ADL Lift Services Ltd

Respondent
Represented by:
Ms G Kennedy- Curnow,
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal that there was not an organised grouping of the respondent's employees whose principal purpose was the provision of servicing and repairs of lifts in respect of housing stock, tower and low rise in North Lanarkshire Council area (Lot 1). Accordingly, the Transfer of Undertakings (Protection of Employment) Regulations 2006 do not apply.

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REASONS

Introduction

1. This preliminary hearing took place in person to determine whether the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applied to the contract to provide servicing and repairs of lifts in respect of the housing stock, tower and low rise in North Lanarkshire council area (Lot 1) which transferred from the respondent to the claimant on 1 April 2022.

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2. The Tribunal heard oral evidence for the respondent from: Brian Harkin, managing director; James Taylor, driver; David Graham, service engineer; and David Morrow, technical manager. For the claimant, the Tribunal heard evidence from Peter Dolan, service engineer; Stephen Quinn, operations manager; Lisa Young, sales manager; and Kirsty Wallis, head of employee relations.
3. The Tribunal was also referred by the parties to two arch lever files of documents and a supplementary set of documents provided by the claimant.
4. The Tribunal has set out facts as found that are essential to reasons or to understanding of important parts of the evidence in relation to the issues that had to be determined at this preliminary hearing. The Tribunal carefully considered the submissions during its deliberations and has dealt with the points made in submissions whilst setting out the facts, law and application of the law to those facts. It should not be taken that points were overlooked, or facts ignored, because the fact or submission was not part of the reasons in that it was presented to the Tribunal by the parties.

The preliminary issue

5. The preliminary issue for the Tribunal to determine was whether immediately before the service provision changed on 1 April 2022, was there:
- a. an organised grouping of the respondent's employees whose purpose was the provision of servicing and repairs of lifts in respect of housing stock, tower and low rise in North Lanarkshire Council area (Lot 1)?
 - b. If so, was it the principal purpose of the grouping?
 - c. If there was an organised grouping with a principal purpose to service and repair lot 1 who were they?

The relevant law

6. Regulation 3(1)(b) of TUPE states that TUPE applies to a "service provision change" in which "activities cease to be carried out by a contractor on the client's behalf and are carried out instead by another person (a subsequent

contractor) on the client's behalf" (regulation 3(1)(b)(ii)). This concerns a change of contractor usually following a retendering process. It is sometimes referred to as a "second generation contracting out".

- 5 7. Under regulation 3(3) for a service provision change to amount to a "relevant transfer" immediately before the service provision change there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of activities concerned on behalf of the client.
- 10 8. Regulation 4 provides that except where objections 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 the subject of the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have the effect after the transfer as were originally
15 made between the persons so employed and the transferee.
9. The Tribunal's first step in assessing whether there has been a service provision change should be to identify the relevant activity or activities (*Kimberly Group Housing Limited v Hambley & others* 2008 ICR 1030).
- 20 10. In the case of *Eddie Stobart Limited v Moremen* [2012] ICR 919, the EAT held that for regulation 3(3)(a) the organisation of the grouping must be more than merely circumstantial – the employees must have been organised intentionally.
- 25 11. *Ceva Freight (UK) Limited v Seawell Limited* [2013] SC 596, in Inner House of the Court of Session held that an organised grouping of employees requires a conscious organisation by the employer of its employees where the grouping has as its principal purpose the carrying out of the activities in question. There may be no organised grouping even where employees carry out practical tasks in connection with the contract.
- 30 12. *Edinburgh Home-Link Partnership v City of Edinburgh Council* UAEATS/0061/11 provides that in relation to the issue of assignment, the

question has to be asked in respect of each individual employee. A link of an employee to their relevant client activity is not sufficient for assignment under regulation 4. The question is: was the particular employee prior to the transfer assigned to the organised grouping of employees which was organised to have as its principal purpose the carrying out of activities for which the client contracted on the client's behalf? To find that an employee is assigned, the Tribunal has to be satisfied as to the nature and extent of direct provision of client services in the particular activities concerned for which the client had contracted to have carried out on its behalf.

- 10 13. *Costain Limited v Armitage* UKEAT/0048/14 provides that for an organised grouping to exist, the employer must have deliberately put the employees together into a team in order to carry out the work for the client. When deciding whether an employee has been assigned to a group, it is important not to assume that every employee who carries out work for the client is part of the transferring group. The fact that an employee was working on the transferring activities immediately before the transfer is not on its own sufficient to show assigned to the grouping. In determining whether the individual was assigned, the Tribunal should look at all the facts of the case.

Findings in fact

- 20 14. Since 2011 the respondent has been engaged in the business of supplying, installing and maintaining lifts throughout the UK. The respondent employs approximately 25 employees.
15. The claimant is a construction, modernisation and service maintenance company focused on lifts, escalators and doors with branches and employees based across the UK.

The respondent and Mears

16. Over a number of years, the respondent has built up a relationship with Mears Group plc (Mears). Initially the respondent was invited to deal with reactive callouts.

17. In July 2015 the respondent quoted Mears for the supply of two engineers to cover maintenance and callouts during 8am to 4.30pm Monday to Friday. The works comprised monthly cyclical maintenance, callouts and contractual response times on 64 housing lifts in the Motherwell/Wishaw area. The quote was accepted.
18. The contract provided a callout response time (within one hour of receiving an order). The respondent considered callouts the priority. All work required a qualified lift engineer using double man manning.
19. From 2015 Ian McCorkindale, manager was responsible for Mears with whom he had day to day contact. He was a “one stop shop” for Mears. Mr McCorkindale was involved in administrating the Mears’ work; estimating repair costs; procuring parts; allocating work to service engineers employed by the respondent; advising service engineers by telephone; and from time to time visiting sites.
20. Around 2015 the respondent employed David Graham, service engineer. Mr Graham focussed on servicing lifts in the Motherwell and Wishaw area. He would drive to sites and spend around an hour and a half per visit. He also attended breakdowns at leisure centres and sports centres. He worked Monday to Friday and was on the callout rota.
21. The respondent also provided services to Mears including providing services in respect of lifts in leisure facilities and schools in the North Lanarkshire area.
22. Mears employed Russell Barbour, lift engineer. From 2015 Mr Barbour serviced lifts and attended call outs in the Airdrie and Coatbridge area. Mr Barbour did not drive.
23. The respondent employed James Taylor as a driver/journeyman for Mr Barbour for which the respondent received payment from Mears of an additional engineer. Mr Taylor collected Mr Barbour and drove him to various sites in Airdrie, Coatbridge and sometimes Cumbernauld. Mr Taylor accompanied Mr Balfour on service, callouts and visited the motor rooms. Mr Barbour and Mr Taylor also attended schools and leisure buildings both call

outs and maintenance but mostly callouts. Mr Barbour and Mr Taylor attended random callouts from the call centre. The call outs could be up to ten a day.

24. Around April 2016 Mears agreed to accept “the cost of an additional engineer of £4,109, taking this to a total of four engineers covering our lift maintenance”.
25. From around August 2018 the respondent employed Peter Dolan as a minor repair/call out engineer. Mr Dolan did his own driving but did not have a fixed route. He worked on repairs but could be available for maintenance. He worked on maintenance and repair all types of lifts, high rise, schools and offices when required.
26. Mr McCorkindale was involved in administration during the day, estimating repairs and procuring parts. The maintenance work rota “just run itself and repeated itself”. The rota would be sent to the tablets of Mr Graham and Mr Dolan who Mr McCorkindale knew were available to him. While in their vans they would receive calls from the call centre to attend callouts. Mr Graham continued to focus servicing. Mr McCorkindale was never in charge of Mr Balfour and did consider Mr Balfour to be part of the team.
27. The respondent had clients other than Mears who David Morrow, technical manager managed.

Respondent’s arrangements during the COVID restrictions and afterwards

28. From around March 2020 Mr Balfour was shielding from COVID-19. He returned to work for only brief spells before retiring around December 2021. Mears did not replace him.
29. During the COVID-19 restrictions Mr Dolan had a more regular route. He focussed on residential repairs; schools and leisure centres were closed for some of the time. If he needed a hand/assistance he would contact Mr McCorkindale.

30. Mr McCorkindale worked from home providing administrative support for Mears. Mr Taylor would work between Mr Graham and Mr Dolan. Mr McCorkindale would decide who was working with whom depending on the work to be done. When schools and leisure centres were open, they would attend callouts and some servicing.
31. Around September 2021, the respondent successfully tendered for maintenance work of around 369 lift units in the South Lanarkshire area which had previously been undertaken by the claimant.
32. Mr McCorkindale returned to work full time in September 2021. He did not visit sites but continued to provide advice and support when asked by Mr Graham or Mr Dolan.
33. Mr Graham spent on average one and a half hours per visit. Callouts were variable but there was one most days. He attended schools for breakdowns and leisure centres for service and breakdowns.
34. Callouts were a very significant portion/priority of Mr Dolan's work. He started with maintenance but the rest of his day was spent on callouts. The work covered high rise, schools and offices in the North Lanarkshire area.. He would spend one week a month in the Forth Valley on alternate days and also approximately two days a month covering Ibrox.
35. By early 2022 Mr Graham, Mr Dolan and Mr Taylor were maintaining and attending in hours callouts to Mears' lifts in the North Lanarkshire area as directed by Mr McCorkindale or the call centre.
36. On 8 February 2022, Mears issued a tender document for Lot 1 which was housing stock, tower and low rise. It was due to commence on 1 April 2022. The specification required servicing to 102 residential lifts which involved maintenance visits of about one per month per lift. In terms of the tender, the contractor required to be on site within one hour of receiving an order to assess the situation giving priority first to the releasing of many persons providing it is safe to do so.

37. All work, including night call, had to be carried out by a qualified lift engineer in accordance with the lift manufacturer's instructions using double man manning. An apprentice was not allowed to be the lead man. They must only assist a qualified lift engineer.
- 5 38. On 4 March 2022 the respondent was advised that the proposed contract had been awarded to the claimant. A standstill period was in force until 14 March 2022.
39. The parties and others were also invited around February 2022 to tender for the contact for the provision of cyclical lift maintenance, in hours repairs, out of hours response repair for corporate, public and leisure buildings (Lot 2).
10 On 4 March 2022 the claimant and the respondent were advised that the proposed contract had been awarded to Orona Limited. A standstill period was in force until 14 March 2022.
40. On 7 March 2022, before the claimant knew that it had been tendered
15 successfully Martin Brennan, operations director of the respondent wrote to the claimant advising that the respondent considered that, "There are currently 4 employees who we consider a being assigned to this undertaking". He advised that more detail information about the staff would be forwarded in due course.
- 20 41. Ms Young, sales manager of the claimant sought clarification by email sent on 8 March 2022 that the respondent was claiming TUPE applied to four engineers specifically for Lot 1 which was the only lot awarded to the claimant. Mr Brennan replied by email on 9 March 2022 asking if the "TUPE of four personnel" impacted the claimant's bid and if so, the claimant should contact
25 Mears urgently. Ms Young again asked for clarification that there were four engineers dedicated for Lot 1 (102 lifts) and not four combined over Lot 1 and Lot 2.
42. Mr Brennan replied by a subsequent email sent on 9 March 2022 at 19:14:
*"To clarify, at no stage did I stipulate 4 engineers anywhere in my
30 correspondence.*

We were instructed by Mears to supply 4 engineers to this contract and they will transfer to you, I note that we also have 1 engineer[s] mate on this contract who will also transfer to you.

Purely for information purposes we also have 2 admin staff who work on this contract however as neither of them are assigned specifically to this contract we do not believe that either of them will transfer to you. However, between them they did spend roughly 75% of their time carrying out administration for this contact.”

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43. Ms Young responded by suggesting a telephone call. She reiterated that she was seeking confirmation that the five staff were assigned to the 102 lifts as she knew that the respondent’s agreement with Mears was for more than the 102 lifts awarded to the claimant.

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44. Mr Harkin and Ms Young had a telephone conversation. He confirmed that the respondent would start gathering the information about the personnel that the claimant needed.

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45. On 17 March 2022 the claimant was advised that the standstill had passed with no objection. The claimant sent the respondent the list information the claimant required.

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46. A template was sent on 23 March 2022 to capture the required information together with a list of the lifts within Lot 1. The claimant confirmed that the information was for details of the engineers who were dedicated or spent the majority of their working time on the 102 lifts and possibly log cards by way of additional verification.

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47. The claimant received the completed template with four unnamed employees’ details of that included date of birth, position, qualification, length of service, location, basic working hours, basic annual salary, pension arrangements, percentage of time on contact, annual leave entitlement, sick pay and notice period. Three of the employees were described as service engineers spending 95 percent of their time on the contract and one described as an engineer’s mate spending 100 percent of their time on the contract.

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48. The respondent's jobsite visit sheets are inaccurate. All work done by an employee on a particular contract was not necessarily recorded. Mr Taylor did not record his work. Mr Dolan, Mr McCorkindale and Mr Graham noted their work.
- 5 49. Ms Young attended a pre-start meeting with Adrian Parsler, contracts manager, Mears who commented about the respondent's purported resourcing of the contract that he had only seen one engineer.
- 10 50. Within the lift industry, it is standard practice for service engineers to be available for servicing callouts and attendance across a number of different customers. Engineers tend to have geographical routes and organise their work to ensure they carry out all necessary planned services and maintenance and repairs within the customer service level agreements. Where callouts come in, an engineer would then ensure they attend the site within the agreed timeframes. As such, engineers are available to a number of different customers. This practice of being "available" across a number of different customers is a recognised practice and standard within the industry contracts. Being available to a customer does not require an engineer to work purely on specific contracts.
- 15 51. The claimant took over the contract from 1 April 2022. The claimant has a dedicated area service manager responsible for several clients, 1000 lifts including the 102 lifts in Lot 1. The servicing of Lot 1 lifts involves two engineers, each visit, the lead is dedicated, and the second engineer is from a pool. There have been 23 callouts during hours per month with around 18 out of hours call outs per month. One within hours callout per day is high.
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- 25 *Observations on witnesses and conflicts of evidence*
52. The Tribunal considered that the evidence of Mr Harkin and Mr Morrow was superficial. Mr Harkin gave evidence about the respondent's historical relationship with Mears and how it had evolved since 2015. Mr Harkin had an overview but no day-to-day involvement. Mr Morrow was not involved in managing Mears' work. Mr Brennan who sent emails in March 2022 did not give evidence.
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53. There was a lack documentary evidence about the contractual arrangements between the respondent and Mears. A quotation dated 8 July 2015 was produced in relation to maintenance and calls “for 64 housing lifts in the Motherwell/Wishaw” area and an email exchange in April 2016 in relation to an additional engineer, taking it to a total of four engineers covering “our lift maintenance”. There was no clarity about the number of lifts involved or whether they were residential. From the oral evidence of the respondent’s witnesses and Mr Dolan the number of lifts that were residential varied. The services provided by the respondent to Mears went beyond maintenance and within hours callouts of residential lifts during 8am to 4.30pm Monday to Friday. There was servicing and callouts to council offices, schools and leisure facilities/sports centres in the North Lanarkshire area. There was evidence from various witnesses confirming that the affected employees attended schools, leisure centres and offices. The Tribunal could make no findings about who else was involved in this work or the basis upon which the respondent was paid for these services.
54. The documents produced: job sheets and invoices provided little assistance to the Tribunal in determining the issues. There was no dispute that the respondent invoiced Mears for four engineers. While there was no evidence that the invoices were not paid, there was also no evidence that Mears accepted that four engineers were required to do the work or specifically to what contract the invoices related. The engineers were not identifiable from the invoices. The Tribunal also noticed that for example in August 2020, in addition to the invoice for four engineers there was also an invoice for “Coatbridge lift maintenance for 1 off engineer”. There were also invoices in 2021 for “yearly maintenance for 5 off engineers” and for “yearly lift maintenance for 4 off engineers” ostensibly covering the same period but relating to different job numbers. This may have related to cover for Mr Balfour while he was shielding but that was unclear from the evidence.
55. Job site visit sheets that were produced provided the date and time of visits between January 2019 and February 2022. It was this information that formed the basis of the claimant’s Lot 1 job site analysis (prepared by Ms Wallis).

However, the respondent's position was that job site visit sheets were inaccurate as they did not record all the work done. The respondent invited the Tribunal to prefer of the oral evidence of Mr Dolan, Mr McCorkindale, Mr Graham and Mr Taylor. The Tribunal considered that the job site visits sheets further complicated the position. They include 22 sets of initials who attended sites some of whom worked on other contracts or were subcontractors. Mr Taylor's initials are not included although there is reference to Mr Balfour. According to Mr Harkin, two different sets of initials related to Mr McCorkindale. Some visits were out of hours callouts.

56. The Tribunal was mindful that the respondent had undergone a successful tendering process in 2021 for 369 units in the South Lanarkshire area. While the Tribunal appreciated that the size and administrative resource of the respondent was not the same as that of the claimant, the Tribunal felt that in an industry where work is regularly put out to tender the respondent demonstrated a remarkably cavalier attitude towards recording how employees were allocated to contracts and in particular Lot 1. Mr Harkin said that in a utopia engineers would be dedicated to a particular piece of work but in reality, it was fluid and there was a flow between areas.

57. While some employees, including Mr Dolan kept timesheets they were not produced. During the preliminary hearing Mr Dolan said that he had retained time sheets; he had not been asked to produce them. The Tribunal's impression was that understandably neither the claimant nor the respondent was aware of this which is why Mr Dolan was not asked to produce his timesheets. The Tribunal did however find it surprising for the reasons previously stated that the respondent did not retain timesheets for those employees who had been asked to complete them.

58. The evidence of Mr Taylor, Mr Dolan, Mr Graham and Mr McCorkindale was in the Tribunal's view given honestly based on their recollection of events. The Tribunal felt that their evidence was a vague; there was a lack of clarity about when, what work was undertaken and by whom particularly in late 2021/early 2022. They referred to working mainly in "Lot 1" which was Mr Harkin's evidence. However, when pressed and asked about other buildings

in the North Lanarkshire area Mr Taylor, Mr Dolan, Mr Graham and Mr McCorkindale confirmed that many of the buildings that were in Lot 2 were frequently attended on callouts and especially leisure buildings and sport centres were also attended for regular maintenance. The Tribunal did not consider that these witnesses were being evasive but rather they lacked an understanding about of what Lot 1 comprised.

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59. The Tribunal's impression was that the respondent wanted to provide Mears with a "one stop shop". Mr McCorkindale was Mears "go to person". The priority was call outs. The respondent was fluid and responsive to Mears' needs. While Mr Barbour was not the respondent's employee the Tribunal was surprised that Mr McCorkindale was unaware when Mr Barbour retired given that Mr McCorkindale said that Mr Taylor, Mr Graham and Mr Dolan were "the employees available to him".

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60. The Tribunal noted that Mr McCorkindale had been working from home from 2020 and did not attend sites in 2022. When Mr Barbour was shielding from COVID-19 from March 2020 on Mr McCorkindale's direction Mr Taylor accompanied either Mr Graham or Mr Dolan. This continued after Mr Barbour retired in December 2021. Mr Taylor said was "put out with Mr Graham". Mr McCorkindale said that when Mr Balfour left Mr Taylor was kept on and was assigned to "whoever". Mr Dolan referred to working sometimes with Mr Taylor. Mr Dolan's focus was on callouts. Mr Dolan did attend some callouts for other clients of the respondent. It was unclear to the Tribunal how the respondent addressed the two-man contractual requirement. Mr McCorkindale said that employees attending adjacent buildings were taken as addressing the two-man requirement. While it was suggested that this was rare, the Tribunal was unconvinced that was so.

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61. Mr Quinn, Ms Young and Ms Wallis were credible and reliable witnesses. The Tribunal considered that they answered questions honestly in an attempt to be of assistance to the Tribunal. The Tribunal's impression was that they genuinely attempted to obtain information from the respondent that would enable the claimant to form a view about whether any of the respondent's employees transferred to the claimant.

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62. Mr Quinn's evidence focussed on how the work was undertaken by the claimant since it acquired the contract. He was able to comment on industry standards. Mr Quinn candidly accepted that he could not comment on how the respondent dealt with the contract, but he did not consider that there was any reason for things to be different before the transfer as the frequency of call out requests were not influenced by the how resources were managed by the parties. The Tribunal accepted Mr Quinn's explanation that the cyclical maintenance and number of call outs were unlikely to have changed after 1 April 2022.
63. Ms Wallis's evidence related to the Lot 1 job site analysis that she prepared on receipt of the job sheets provided to her by the respondent covering the period January 2019 to February 2022 providing details of 5,831 visits. Ms Wallis was not provided with any worksheets. She had no information about Mr Taylor and limited information about Mr McCorkindale. Her analysis on the information provided to her was that Mr Dolan made an average of eight visits to Lot 1 lifts each week. Ms Wallis candidly accepted that her analysis was based on limited information.
64. Ms Wallis had not been provided with the job reports that were produced by the respondent for the preliminary hearing. The job reports referred to a job number, a date, engineers' initials and start/finish time. There was little explanation of these documents. Mr Harkin described them as "snapshot". The Tribunal had difficulty matching job reports to the job sheets that were produced and did not considered that this was the Tribunal's function. While there were over 400 job reports produced the Tribunal did not find them of assistance in determining the issues.

Deliberations

65. The Tribunal did not understand there to be any issue between the parties that this was a service provision change case. It was also undisputed that the relevant activity or activities was the provision of servicing and repairs of lifts for housing stock, tower and low rise in North Lanarkshire Council area (Lot

- 1). This involved providing cyclical inspections, maintenance and repairs of 102 residential lifts in the North Lanarkshire area.
66. The dispute was whether there was an organised grouping of the respondent's employees whose principal purpose was the provision of servicing and repairs of lifts in respect of housing stock, tower and low rise in Lot 1.
67. The Tribunal referred to the issues to be determined. The first was whether there was an organised grouping of the respondent's employees whose purpose was the provision of servicing and repairs of lifts in respect of housing stock, tower and low rise in North Lanarkshire Council area (Lot 1).
68. The parties' submissions relating to the issues were structured differently. The respondent's submission was that Mears required the minimum attendance of a squad of "two men" one of whom must be a qualified engineer. From the invoices and job sheets the respondent said that Mears required four employees. The respondent employed four employees to specifically work on "the contract".
69. The claimant's position was that from the evidence there was a lack of organisation let alone purposeful organisation of resourcing of employees for specifically Lot 1.
70. The Tribunal heard evidence extending back to events in 2015. The Tribunal agreed with the claimant's submission that the timing for the relevant analysis is immediately before the service provision change in April 2022 although some of the historical narrative was needed for background to the analysis.
71. The Tribunal referred to the findings that it was able to make. The respondent had a longstanding agreement with Mears in respect of callouts and maintenance of lifts in the North Lanarkshire area. This included but was not limited to servicing and callouts in respect of residential lifts. Mr McCorkindale was the principal contact for Mears for whom he would do whatever was asked by Mears.

72. From April 2016 Mears paid the respondent for four engineers (and sometimes five engineers) to provide lift maintenance and callouts in the North Lanarkshire area. There was a contractual requirement to work in pairs, but the respondent did not always do so.
- 5 73. Mears employed Mr Barbour who undertook lift maintenance and callouts primarily in the Coatbridge area. Mr McCorkindale did not consider Mr Barbour to be part of the team and had no responsibility for him.
74. The respondent employed Mr Taylor to drive Mr Barbour to sites and assisting him. Mr Taylor drove Mr Barbour to other service/repair lifts that were not
10 of Lot 1. Mr Barbour retired at the end of 2021. The Tribunal did not understand from the evidence that Mr McCorkindale was aware of Mr Balfour's work schedule or even attendance at work. Mr Taylor followed Mr Balfour's work schedule. There was a lack of clarity about what happened when Mr Balfour was absent and particularly when shielding from March
15 2020.
75. From Mr McCorkindale's perspective the rota for cyclical maintenance and repairs ran itself. Callouts which were a priority were allocated by the call centre depending on engineers' locations.
76. Mr McCorkindale knew that Mr Graham and Mr Dolan were "available to him".
20 Mr Graham worked in Motherwell/Wishaw. He focussed on maintenance of lifts and callouts. Mr Dolan focussed on repairs and callouts. They both had vans.
77. Mr McCorkindale said that he considered Mr Taylor was always part of the team which was surprising given Mr McCorkindale's lack of awareness about
25 Mr Balfour with whom Mr Taylor worked. The Tribunal appreciated that there were times from March 2020 when Mr Taylor did not work with Mr Balfour as he was shielding. What was unclear was what exactly happened to Mr Balfour's work. Mr Graham referred to doing work in Coatbridge. The Tribunal could not make findings about whether this was on a temporary basis
30 while Mr Balfour was shielding and what agreement, if any, was made with the respondent about Mr Balfour's work when he retired. The respondent did

decide to continue employing Mr Taylor although neither Mr Graham or Mr Dolan required a driver and Mr McCorkindale did not attend the sites. Mr McCorkindale was contacted by Mr Graham and Mr Dolan if they needed assistance and he would direct who was to work together. They and Mr Taylor worked on what they were told or directed to do; the focus was on meeting Mears' needs.

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78. While Mr McCorkindale said that he managed Mr Taylor, Mr Dolan and Mr Graham the Tribunal had difficulty understanding how he did so without being aware of Mr Barbour's work allocation and attendance at work. The Tribunal also struggled to comprehend how the team worked in pairs while Mr Barbour shielded in 2020 and then retired in December 2021 given that Mr McCorkindale worked from home during COVID-19 restrictions and did not attend sites in 2022. For this reason, the Tribunal was unconvinced that the respondent's employees rarely worked in close proximity rather than in pairs despite the contractual obligation to do so.

79. Callouts were a priority and engineers would be allocated to jobs by the call centre according to proximity. Mr McCorkindale was not necessarily aware of callouts when they were allocated. The callouts were not limited to residential lifts.

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80. The respondent submitted that four employees were in the organised group. The information provided by the respondent to the claimant around 23 March 2022 provided details of Mr Dolan, Mr McCorkindale, Mr Taylor and Mr Graham. The respondent also submitted that the decision to group these employees to a specific contract was more important than the actual percentage of time they spent on the contract. The respondent's submissions did not address the issue that the respondent had more than one contract with Mears other than to say that the employees were assigned to and worked wholly or mainly on Lot 1 although they occasionally did some work on other contracts, thought this was a minimum.

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81. The Tribunal was not satisfied on the evidence provided that all the four named employees were organised specifically for Lot 1. There was a rota

which came through monthly to the employees' tablets. The Tribunal understood that Mr Graham and Mr Dolan had tablets. The Tribunal considered that Mr Graham undertook most of the activities on Lot 1. While Mr Graham focussed on maintenance, he attended in hours callouts when so directed. He had his own van. While Mr Taylor sometimes worked with him this was in Mr Balfour's absence or subsequent retirement. It was not a permanent pairing as Mr Taylor also worked with Mr Dolan.

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82. Mr Dolan did not initially have a fixed route, but this changed during COVID-19 restrictions. The Tribunal could not make findings as to what was his route. Mr Dolan started with maintenance, but the rest of his day was spent on callouts. His work covered high rise, schools and offices. Mr Dolan also his own van. Sometime he worked with Mr Taylor or Mr Graham or for other clients of the respondent.

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83. The Tribunal did not form the impression that the respondent consciously organised Mr Dolan, Mr Taylor and Mr McCorkindale to the activities on Lot 1. While they all carried out work in connection with Lot 1, Mr Dolan focussed on repairs and callouts which were not restricted to Lot 1. Mr Taylor was allocated to visits on an ad hoc basis depending on what work was to be done and who needed assistance. While the Tribunal acknowledged the respondent's reluctance to terminate Mr Taylor's employment following Mr Balfour's retirement it was unclear on what basis he was being retained. The nature and extent of the front linework latterly undertaken by Mr McCorkindale for Mears was also unclear but appeared to be insignificant. Mr McCorkindale had a mostly administrative role which was not confirmed to Lot 1. Mr McCorkindale's return to work in September 2021 coincided with the respondent acquiring a significant new client.

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84. Even if there was an organised grouping the Tribunal considered what was the principal purpose of the group. From the findings that the Tribunal was able to make, the Tribunal had some difficulty answering this question.

85. The witnesses (Mr McCorkindale, Mr Graham, Mr Taylor and Mr Dolan) referred to doing work on "Lot 1", but they lacked appreciation about the

number and location of the lifts in Lot 1. Due to the volume of callouts, they attended the Tribunal did not consider that the callouts were restricted to Lot 1. To the contrary the callouts related to office, schools, leisure centres and sports centres. Their evidence also indicated that they were involved in some servicing of non-residential lifts. If there was an organised grouping its principal purpose in the Tribunal's view was attend callouts and servicing any work Mears requested arising in the North Lanarkshire area. The Tribunal not satisfied on the evidence that the principal purpose of the organised grouping was to service and attend in hours callouts to Lot 1.

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10 86. If the principal purpose of the organised grouping was to service and attend in hours callouts to Lot 1 then the Tribunal considered that the fact that Mr McCorkindale, Mr Dolan and Mr Taylor worked on the transferring activities immediately before the transfer was not on its own sufficient to show assigned to the grouping. Looking at all the facts that the Tribunal was able to make
15 for the reasons explained above the Tribunal did not considered that Mr McCorkindale and Mr Taylor were so assigned. Mr Dolan did work on the transferring activities, but the Tribunal was not satisfied for the reason stated that he mainly did so. The evidence was more compelling in relation to Mr Graham, but he objected to transferring to the respondent.

20 87. The Tribunal therefore concluded that there was not an organised grouping of the respondent's employees whose principal purpose was the provision of servicing and repairs of lifts in respect of housing stock, tower and low rise in North Lanarkshire Council area (Lot 1).

25 Employment Judge: Shona MacLean
Date of Judgment: 17 January 2023
Entered in register: 17 January 2023
and copied to parties

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