

Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016,  
2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016,  
2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016

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# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE HALL-SMITH

## **PRELIMINARY HEARING**

**BETWEEN:**

Ms J Hacker & Others                      Claimants

AND

London Borough of Croydon              Respondents

**ON:** 13, 14, 15, 16, 17 March 2017; (Chambers) 18, 19 May 2017

**APPEARANCES:**

For the BMA Claimants:                      Ms Melanie Tether, Counsel

For the Unite Claimants:                      Mr Darryl Hutcheon, Counsel

For the Respondent:                              Mr John Cavanagh, QC and  
Mr Simon Forshaw, Counsel

## **JUDGMENT**

THE JUDGMENT OF THE TRIBUNAL is that:

The transfer of the Claimants' employment with the PCT to the Respondent involved an administrative reorganisation of public administrative authorities or the

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

transfer of administrative functions between public administrative authorities within the meaning of regulation 3(5) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, and accordingly the transfer did not involve a relevant transfer within the meaning of the Regulations.

## **REASONS**

1. At a preliminary hearing on 22 June 2016 Employment Judge Baron listed a five day open preliminary hearing before an Employment Judge to determine the following issues, namely
  - 1.1 Whether or not there was a relevant transfer for the purposes of Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 from the Croydon PCT to the Respondent taking into account the provisions
    - (i) Regulation 3(5) and
    - (ii) Regulations 3(1) TUPE
  - 1.2 If there was a relevant transfer whether each of the Claimant's employment with the Croydon PCT was transferred pursuant to the operation of Regulation 4 of the 2006 Regulations.
2. The Claimant's Tribunal claims arise out of changes to the terms and conditions of employment of the 14 Claimants by the Council.
3. The 14 Claimants in the proceedings are as follows:

<b>Claimant</b>	<b>Case Number</b>
Ms J Hacker	2303244/2015
Ms K Naish	2303248/2015
Mr J Burke	2300150/2016
Ms T Steadman	2300455/2016
Ms B Tuskiewicz-Piecarski	2300456/2016
Ms S Corben DeRomero	2300568/2016
Ms B Alves	2300569/2016
Ms A Kitt	2300570/2016
Ms B Whittlesea	2300571/2016
Mrs L Hunt	2300572/2016
Mrs M Abbott	2300573/2016
Mr F Semugera	2300574/2016
Mrs S Nicholls	2300747/2016

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

Ms E Schwartz

2300748/2016.

4. At the hearing before me, the Respondent was represented by Mr John Cavanagh, QC, and Mr Simon Forshaw. The Claimants Hacker, Naish, Burke, Steadman, Tuskiewicz-Piekarski, Corben DeRomero, Alves, Kitt, Whittlesea, Hunt, Abbott, Semugera, (The Unite Claimants) were represented by Mr Darryl Hutcheon, Counsel and the Claimants Dr Nichols and Dr Schwartz were represented by Ms Melanie Tether, Counsel. The agreed documents numbered 1 to 1938 were contained in four lever arch files and there were two bundles of authorities.
5. I heard evidence from the Claimant's Dr Schwartz, Dr Nicholls (the BMA Claimants) and from Mr Burke (Unite). I also heard evidence from Mr Stephen Morton, Head of Health and Wellbeing at the Council, who was called on behalf of the Respondent.
6. At the outset of the hearing I considered skeleton arguments prepared by the parties' representatives. There was also a statement of agreed facts.
7. The statement of agreed facts included the following
  - 7.1 The Claimants were employed prior to 1 April 2013 by the Croydon Primary Care Trust ("the PCT"). They each worked in the PCT's Public Health Team, headed by the Director of Public Health, which was responsible for the provision of public health functions in the Croydon area and, to a lesser extent, other parts of South West London where relevant agreements were in place.
  - 7.2 The Public Health Team in the PCT had a discrete departmental structure, and was headed by the director of public health.
  - 7.3 The statement of facts included the roles held by each of the 14 Claimants, which are not repeated in these reasons.
  - 7.4 The Health and Social Care Act 2012 introduced national changes to the Health Care system. PCT's were abolished with effect from 1 April 2013 and their public health functions were largely transferred to Local Authorities with the remainder transferring to other Public Bodies, including NHS England and Public Health England.
  - 7.5 In Croydon, various public health functions were transferred from the PCT to the London Borough of Croydon on 1 April 2013. The PCT was abolished with effect from 1 April 2013.

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

7.6 In conjunction with the transfer of certain public health functions from the PCT to the Local Authority “transfer schemes” were put in place by the Secretary of State for Health pursuant to powers conferred on him by the Health and Social Care Act 2012. In Croydon:

- a. One transfer scheme was implemented transferring property, contracts and other assets and liabilities from the PCT to the Local Authority;
- b. Another transfer scheme was implemented to transfer in the employment of staff from the PC to the Local Authority.

7.7 The Health and Social Care Act 2012, (Croydon Primary Trust) Staff Transfer Scheme 2013 (the Croydon Transfer Scheme) related to transfer of staff from the PC to the PCT to the Local Authority.

7.8 The Croydon Staff Transfer Scheme provided at paragraph 3

***3-(1) this paragraph applies to any person who, immediately before the transfer date, was an employee of the transferor and –***

***(a) is identified in columns 1 to 3 of a table in this schedule; or***

***(b) as, on or after 1 March 2013 but before the transfer date, been notified in writing by the transferor or transferee that they are to be transferred to the transferee on that date.***

***(2) subject to subparagraph (5). Any person whom this paragraph applies is, on the transfer date to be transferred to the employment of the transferee.***

***(3) subject to subparagraph (5) the contract of a person to whom this paragraph applies –***

***(a) is not terminated by the transfer; and***

***(b) has effect on and after transfer date as if originally made between that person and the transferee.***

7.9 The majority of employees working in the Public Health Team

Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016

transferred to the employment of the Local Authority;

7.10 Accordingly, all of the Claimant's became employed by the Local Authority from 1 April 2013 in the same role as they had held immediately prior to the transfer.

7.11 The Claimants continued to be employed by the Local Authority until at least April 2015. Thereafter, they have resigned, been dismissed or been dismissed and re-engaged.

### The statutory and legal framework

8. Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provides that

**(3) a regular transfer (1) these regulations applied to**

**(a) a Transfer of an Undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom and to another person where there is a transfer of an economic entity which retains its identity;**

**(5) an administrative reorganisation of Public Administrative Authorities or the Transfer or Administrative functions between Public Administrative Authorities is not a relevant transfer.**

9. Regulation 4 of TUPE provides

**(4) effect of relevant transfer on contracts of employment**

**(i).....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 the subject of relevant transfer, which would otherwise be terminated by the transfer, with any such contract shall have effect after the transfer as of allegedly made between the person still employed and the transferee.**

10. It was the Respondent's contention that TUPE did not apply to the transfer of the Public Health Team from the PCT to Croydon on 1 April 2013 because it involved the administrative re-organisation of Public Administrative Authorities and of the transfer of administrative functions between public

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

administrative authorities. As a separate issue the Respondent contended that in any event the Claimants could not rely upon the protection afforded by TUPE 2006 because the effect of the Croydon staff transfer scheme was that the Claimants' employment had not been terminated by the transfer.

11. In broad terms, the Claimants contended that the transfer from the PCT to Croydon fell within the scope of TUPE 2006 and that they were thereby afforded the protection of their Employment Rights because the transfer involved the transfer of an economic entity within the meaning of Regulations 3(1) TUPE.
12. The Claimant's also contended that the operation of the Croydon staff transfer scheme did not oust the rights of the Claimant under TUPE because Regulation 4(1) must be construed in a manner consistent with the Claimant's rights under the Directive 2001/E3/EC (Acquired Rights Directive) and the Directive had to be construed strictly, bearing in mind the social objectives pursued by the Directive. Article one of the Directive provides
  - a. ***this Directive shall apply to any Transfer of an Undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.***
  - b. ***Subject to subparagraph (a) and the following provisions of this article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is essential or ancillary.***
  - c. ***This Directive shall apply to public and private undertakings engaged economic activities whether or not they are operating for gain. An administrative reorganisation of Public Authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.***
13. A significant part of the evidence before me was directed to the issue of identifying a public administrative authority and whether the activities of the Public Health Team were economic activities, and whether the Public Health Team constituted an economic entity within the meaning of Regulation 3(1) TUPE. It was the Respondent's contention that the team had been carrying out administrative functions within the meaning of Regulation 3(5) when it

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

transferred.

14. The skeleton argument on behalf of the Unite Claimants helpfully posed two key factual questions namely

- a. What were the teams function/activities (specifically, or at least most importantly at the time of and immediately before and after the transfer)?
- b. Were those activities inherently unnecessarily state administrative activities; or were they “economic” such that they could equally be carried out by non-Governmental organisations (in the private and third sectors)?

15. In his submissions Mr Cavanagh referred me to what he alleged amounted to the public health functions of Government, which he defined in broad terms as functions associated with protecting and improving the health of the public.

16. By way of historical background Mr Cavanagh commenced with the establishment of PCT's and in particular to the National Health Service Act 2006. The duty on PCT's pursuant to s.22 of the 2006 Act was to “administer the arrangements’ .....for the provision in its area of (medical services) and to perform such management and other functions relating to those services maybe prescribed.

17. The National Health Service Act 2006 provided the following in sections 18, 23A and 24. Section 18 of the 2006 Act provided

**Primary Care Trusts**

- (i) **The Primary Care Trusts established by the Secretary of State continuing existence.**
- (ii) **But the Secretary of State may by order (a PCT order) –**
  - (a) **vary the area in England for which a Primary Care Trust has established**
  - (b) **The abolished Primary Care Trust,**
  - (c) **Establish a new Primary Care Trust for the area in England specified in the order with a view to the exercising functions in relation to the health service.**

Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016

18. S.23A of the 2006 Act provided

**23A – arrangements for improving quality of health care**

- (i) **Each Primary Care Trust must make arrangements to secure continuous to the quality of health care provided by it and by other persons pursuant to arrangements made by it.**
- (ii) **In discharging its duty under subsection (1) a Primary Care Trust must have regard to the standard set out in statements under s.45 of the Health and Social Care Act 2008.**
- (iii) **“Healthcare” means –**
  - (a) **Services provided to individuals for in connection with the prevention, diagnosis or treatment of illness, and**
  - (b) **the promotion and protection of Public Health.**

19. S.24 of the 2006 Act provided

***(i) Each Primary Care Trust must, at such times as the Secretary of State may direct, prepare a plan which sets out a strategy for improving –***

***(a) The health of people for whom it is responsible, and***

***(b) The provision of healthcare to such people.***

20. Section 24(8) of the 2006 Act defined healthcare as

***(a) Services provided to individuals for and in connection with the prevention, diagnosis or treatment of illness, and***

***(b) The promotion and protection of Public Health.***

21. Section 4(6) of the 2006 Act provided that PCT's when exercising their functions should have regard to *“any plan prepared or reviewed by it, and to any plan in relation to which it has participated.”* The statutory plan for the PCT in Croydon was included in pages 1238 to 1340 of the Tribunal bundle.

22. On 30 November 2010 the Secretary of State for Health presented a white



**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

paper to Parliament “healthy lives, healthy people: our strategy for Public Health in England”.

23. Under the heading ‘Executive Summary’, page 639, paragraph 4 provided:

**Subject to Parliament, Local Government and Local Communities will be at the heart of improving health and well being for their populations and tackling inequalities. A new integrated public health service – Public Health England – will be created to ensure excellence, expertise, and responsiveness, particularly on health protection, where a national response is vital.**

24. Paragraph 4.17 of the White Paper, page 690, provided that Directors of Public Health would be employed by Local Government and jointly appointed by the relevant Local Authority and Public Health, England. Paragraph 4.17 continued

**There will be the strategic leads for public health and Local Communities, working to achieve the best possible public health and well being outcomes across the whole local population, in accordance with locally agreed priorities and they will be professionally accountable to the chief medical officer and part of the Public Health England professional network.**

25. Paragraph 4.20 of the white paper, page 691 provided:

**To be the most effective leaders possible of Public Health in their areas Directors of Public Health will have a number of critical tasks, set out in more detail in the annex including:**

- **Promoting health and well being within Local Governments;**
- **Providing and using evidence relating to health and well being;**
- **Advising and supporting GP consortia on the proper relation as to aspects of NHS Services;**
- **Developing an approach to improving health and well being locally, including promoting equality and tackling health and equalities;**

Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016

- Working closely with Public Health England, Health Protection Units to provide Health Protection as directed by the Secretary of State for Health, and
- Collaborate with local partners on improving health and well being; including GP consortia, other local directors of public health, local businesses, and others. Paragraphs 4.31 of the white paper, page 693 provided “Public Health England will allocate a ring fenced budget, weighted for inequalities, to upper tier and unitary authorities and Local Government for improving the health and well being of local populations. The ring fenced budget will fund both improving populations health and well being, and some none discretionary services, such as open access, sexual health services and certain immunisations. There will be scope as now to prove budgets locally in order to support Public Health work.

26. The Health and Social Care Act 2012 came into force on 27 March 2012 and provided the following, pursuant to section 12 by inserting section 2B into the 2006 National Health Service Act namely

- (i) *the Secretary of State must take such steps as the Secretary of State considers appropriate for the purpose of protecting the public in England from disease or other dangers to health.*
- (ii) *The steps that may be taken under subsection (i) include –*
  - a. *The conduct of research or such other steps as the Secretary of State considers appropriate for advancing knowledge and understanding;*
  - b. *providing microbiological or other technical service (whether in laboratories or otherwise);*
  - c. *providing vaccination, immunisation or screening services;*
  - d. *providing other services or facilities for the*

Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016

*prevention, diagnosis or treatment of illness;*

*e. providing training*

*f. providing information and advice;*

*g. making available the service or any person of any facilities.*

27. The 2012 Act, by the incorporation of section 2B into the 2006 Act and provided

*i each local authority must take such steps as it considers appropriate for improving the health of the people in this area*

*ii The Secretary of State may take such steps as the Secretary of State considers appropriate for improving the health of the people of England.*

*iii the steps that may be taken under subsection (1) or (2) include –*

*a. providing information advice*

*b. providing services or facilities designed to promote healthy living (whether by helping individuals to address behaviour that is detrimental to health or any other way);*

*c. providing services or facilities for the prevention, diagnosis or treatment of illness;*

*d. providing financial incentives to encourage individuals to adopt healthier lifestyle;*

*e. providing assistance (including financial assistance) to help individuals to minimise any risks to health arising from their accommodation or environment;*

*f. providing or participating in the provision of training for persons working or seeking to work in the field of health improvements;*

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

***g. making available the services of any person or any facilities.***

28. Primary Care Trusts were abolished by s.34 of the Health and Social Care Act 2012.
29. There was very little conflict of evidence between the witnesses. The fundamental issue before me appeared to determine whether on the agreed facts and evidence, against the background of the statutory framework and the relevant authorities, the various public health functions which were transferred from the PCT to the London Borough of Croydon on 1 April 2013 constituted a relevant transfer, namely whether the team which transferred from the PCT to the Respondent constituted an economic entity.
30. I was grateful to the parties' representatives who provided me with a history of the development of the approach of both the ECJ and the National Courts on the issue of what amounts to a relevant transfer as defined by the Directive and later considered by judicial authorities. The starting point is the decision of the ECJ in **Henke-v-Gemeinde Schierke and Verwaltungsgemeinschaft Brocken [1997] ICR 746.**
31. In **Henke** the reference to the Court of Justice involved a preliminary ruling on the question of whether there had been a transfer of an undertaking, business or part of a business within the meaning of Article one (1) of the Directive. It was held that the transfer which had been carried out between a municipality and an administrative collectivity related to activities involving the exercise of Public Authority and that any aspects of an economic nature could only be ancillary and that the transfer of administrative functions between public administrative authorities did not constitute a transfer of an undertaking business of part of a business within article 1(1) of the then relevant Directive.
32. The Judgment in **Henke**, referred to as the **Henke** exception, was incorporated into article 1(c) of the acquired rights Directive 2001. In addition to **Henke**, I was referred to **Sanchez Hidalgo-v-Asociacion de Servicios Aser and Sociedad Cooperative Minerva [1999] IRLR 136** where the ECJ considered a case involving a Local Authority which had transferred Home Help Services from one contractor to another. At paragraph 24 of its Judgment the Court stated,

***Similarly the fact that the service or contract in question has been contracted out or awarded by a Public Body cannot exclude application of Directive 77/187 if neither the activity of providing a home help service to persons***

Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016

*in need nor the activity of providing surveillance involves the exercise of Public Authority (see to this effect, Henke). Furthermore Directive 77/187 covers any person who is protected as an employee under National Labour Law ...*

33. In **Collino-v-Telecom Italia SpA 2002 ICR 38** it was held that the transferred activity involving the operation of Italian Telecommunication Services to a private company did not come within the Henke exception.
34. I do not consider it necessary to refer to all the authorities I was referred to but I shall focus on those which, in my judgment, had a particular relevance to the submissions advanced on behalf of the parties.
35. In **Scattolon-v-Ministero dell'Istruzione, dell'Universita e dela Ricerca [2012] ICR 740** the Court held that where a transfer related to an economic activity it falls within the scope of the (Directive) and that the Public Law or Private Law nature of the transferor and the transferee is of little importance in that regard. At paragraph 43 of the Judgment in **Scattolon** the term "economic activity" was defined as covering any activity consisting in offering goods or services on a given market.
36. **Ambulanz Glockner-v-Landkreis Sutwestpflz [2002] 4CMLR21** held that patient transport services in Germany constituted an economic activity. **Bettercare Group Limited-v-The Director General of Fair Trading [2003] ECC 40** which involved a case before the Competition Commission Appeal Tribunal (Northern Ireland) held that the activities of a health trust in contracting out to independent providers of private care homes involved economic activities.
37. In her evidence to the Tribunal Dr Schwartz agreed that most public health functions of the Primary Care Trust transferred to Croydon Council and that local Public Health functions were there to improve the health of the public. Dr Schwartz also agreed that there were three domains namely health protection, health improvement and health services and that the role of the Council was a collaborative working with different players.
38. A significant focus of the evidence was on the commissioning role of the Council for services such as, sexual health services, weight management, healthy living, and smoking cessation. In his evidence to the Tribunal Mr Morton, Head of Health and Wellbeing at Croydon stated that after the transition the available budget rose to £22 million. The Council was responsible for procuring functions and public health has an involvement in procuring such services as advised by the Public Health Team.

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

39. In cross examination Mr Morton agreed that the Public Health Team had been involved in a significant to the commissioning of sexual health services. After the transfer or transition the Council's legal team were involved in the commission process and the Council tightened up the way in which the services were commissioned.
40. The handover certificate from Croydon PCT to Croydon Council, page 1846 to 1847, relating to adult weight management service was stated by Mr Morton in his evidence as representing the bulk of commissioning, together with smoking cessation, page 1841. In her witness statement Dr Schwartz said that in her experience the PCT had been primarily a commissioning body and that only a few small functions were provided in-house.
41. In cross examination Dr Schwartz was asked how much of her working week were spent on procurement. Dr Schwartz stated that she led what her team did but a very little of her own time was spent on procurement which she put at 2%. In relation to documentation Dr Schwartz stated she had to see the documents to make sure that they were fit for the purpose namely embodying Public Health Principles. When asked whether Public Health was a Governmental function Dr Schwartz replied "yes ultimately it is. Strategic objective is given by local officers." When asked about her role as a public health professional Dr Schwartz replied that her role was different from a public health professional in a pharmaceutical company.
42. On behalf of the BMA Claimants, Dr Schwartz and Dr Nicholls, Ms Tether submitted that the activities undertaken by Croydon were economic and that both the transferor and transferee must be public administrative authorities to fall within the exemption under Regulation 3(5) TUPE. She submitted that the PCT was not a public administrative authority within the meaning of Regulation 3(5) and that Regulation 4 had to be construed and given effect by dis-applying the Croydon Transfer Scheme.
43. Public Health activities were not fundamentally different in kind from other health care services and that health protection was only a small part of the Public Health Team. Health prevention was no different in kind from the treatment of those injured or unwell and that the activity involved in such could be carried out both in the public and private sector. There was a large market for health promotion.
44. Ms Tether referred to ***Aston Cantlow and Wilmcote –v-Wallbank [2004] 1AC*** a case in which the phrase "public authority" was considered. At paragraph 7 of his speech Lord Nicholls of Birkenhead stated

***.....the phrase "a Public Authority" in s.6(1) is essentially a reference to a body whose nature is Governmental in a broad***

Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016

***sense of that expression. It is in respect of organisations of this nature that the Government is answerable of the European Convention of Human Rights. Hence, under Human Rights Act 1998 a body of this nature is required to act compatibly with convention rights in everything it does. The most obvious examples of Governmental departments, Local Authorities, the Police and the Armed Forces. Behind the instinctive classification of these organisations as bodies whose nature is Governmental lie factors such as a possession of special powers, democratic accountability, public funding whole or in part an obligation to act only in the public interest and a statutory constitution...***

Ms Tether said that the test to be applied for a public administrative authority is a matter of EU Law and she asked whether Croydon Council had special powers. The context was all important.

45. The extent of the Public Health Team's activity was caught by the Directive and in circumstances where majority of the activities were economic in nature it followed that there was a Transfer of Undertaking. Ms Tether urged me to read **Bettercare** from end to end. The members of the Public Health Team were involved in the procurement process.
46. In relation to the "Ouster" issue the Secretary of State had not intended to oust TUPE and she referred to **Pfeiffer-v-Deutsches Rotes Krauz Kreisverband WaldshuteV [2005] ICR 1307** in which the Court reinforced the point that the National Court was bound to interpret National Law so far as possible in the light of the wording and the purpose of the Directive concerned.
47. Mr Hutcheon on behalf of the Unite Claimants submitted that the Tribunal should focus on what the activities of the team actually were. The activities involved commissioning, research, ie needs assessment, training, maintenance of public health library which were all services offered on a market. The functions of the Public Health Team could be contracted out.
48. Mr Hutcheon pointed out that Mr Morton had accepted that a very significant part of teams activities and that prior to the transfer commissioning had accounted for half of the team's budget. Immediately on transfer the team had a budget of £22m a significant proportion of which was spent on commissioning of sexual health services. Mr Hutcheon referred to paragraph 22 of his written closing submissions in which he pointed out that the Respondent had sought to isolate what was referred to as the procurement stage namely the bidding process and settling of contracts with the intention of suggesting that this was the only part of the commissioning process which

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

could be described as “economic” it did not make sense that drawing up of contracts was economic and its activities were not.

49. Training and the library service were not essentially state functions anyone could do it and that all these activities are primarily economic. Mr Morton had accepted the proposition that “all or almost of the work done by the Public Health Team can be, and in fact is, offered by non-state actors operating in the same market”. Pages 1348 and 1349 had contained proposals about what should happen to the Public Health Team following transition. The team operated within market and a competitive market. The activities did not have to be carried out by the state.
50. In relation to the law, Mr Hutcheon referred me to paragraph 58 of **Scattolon** and that Regulation 3(5) should be interpreted narrowly. The Public Health Team did not exercise any special powers and was not analogous to the position in **Diego-Cali-v-SEPG [1997] 5CMLR484** which was a case considering an activity involved in antipollution surveillance of the maritime environment an activity linked to function of policing the Maritime area of the Port of Genoa which fell into the category of a core state activity.
51. The case of ***Bettercare*** was strongly persuasive involving a public health body which commissioned health services. The similarities were very clear and it was not a case ‘a million miles away’ as submitted by Mr Cavanagh on behalf of the Respondent.
52. In relation to the ouster issue, Mr Hutcheon submitted that if it applied it would blow a hole of potentially enormous properties into the protection afforded by TUPE. The Directive should be applied and given effect to see ***Pfeiffer*** paragraph 103.
53. In his closing submissions Mr Cavanagh QC relied upon nine points. He referred to paragraph 14 of Dr Schwartz’s witness statement which described the functions of the Public Health Team prior to 1 April 2013 and following. Dr Schwartz detailed the streams of activity such as providing specialist advice and analysis with respect to the health problems of the population of Croydon and providing strategic advice and leadership to secure improvements in the health of the population of the Croydon area and in the provision of healthcare in the Croydon area including the promotion and protection of Public Health.
54. The relevant function is the protection of Public Health which like the prevention of crime was a function of Government. In **Scattolon** the advocate general pointed out that exclusion from the scope of the relevant Directive is justified not by the public law nature of the entity in issue, but rather, on the basis of a functional approach, by the fact that a transfer



**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

related to activities involving the exercise of public authority.

55. The commissioning function covered about everything of the exercise of Public Authority. Public health was the exercise of public authority and that strategic advice was not economic.
56. The coercive or the exercise of special powers was not the appropriate test. In relation to ***Bettercare*** the fact that some outsourcing is undertaken, it did not necessarily mean that it involved an economic function. Mr Cavanagh referred to ***FENIN-v-Commission of the European Communities [2006] CMLR 7*** in which it was held that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchase goods amounted to an economic activity. Was commissioning part of an underlying administrative function or of an economic function. Mr Cavanagh submitted the ***FENIN*** was a classic commissioning case.
57. Mr Cavanagh further submitted that even if some things were economic in the legal sense what had been done was ancillary not a primary function of the Public Health Team. Public health was the essential function of the health and that any ancillary economic activity was “de minimis”.
58. In relation to the issue that the Primary Care Trust was not a public administrative authority, it carried out a public administrative authority, there was a low threshold of what amounted to a public administrative authority – see ***The Law Society of England and Wales-v-Secretary of State for Justice [2010] IRLR 407***, paragraph 66 and the speech of Lord Hope at paragraph 52 in *Aston Cantlow*.
59. The ***Henke*** exception involves the category of cases where the purpose of TUPE to protect employee’s rights does not apply.
60. In relation to the Ouster point Mr Cavanagh submitted that Regulation 4 of TUPE only applied, if as a result of the transfer the employee had lost his or her job. In the circumstances of this case the transfer scheme had not involved the termination of employment. The Directive should only apply in the absence of any domestic law.

## **Conclusions**

61. In my Judgment, the background to this case is the role of government in the protection and improving the health of the public. Dr Shwartz agreed that Public Health was ultimately a governmental function. In order to undertake its role in public health protection, Government operates through the agency of bodies or organisations such as PCT’s and local authorities.

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

62. I considered that there was significant force in the Respondent's submission that the function of maintaining public health is quintessentially governmental which involves the provision of healthcare services with the aim or intention of improving the health of the population.
63. I bore in mind the fact that the National Health Service Act 2006 established PCT's and provided that healthcare included the promotion and protection of public health. The Health and Social Care Act 2012 provided that each local authority must take such steps as it considers appropriate for improving the health of the people in its area. Both PCT's and local authorities were and are responsible for activities involved in the promotion of and the provision of public health functions.
64. The statutory framework reflects the involvement of government and its responsibility for the provision of public health.
65. The **Henke** exception reflected in Article 1(c) of the Acquired Rights Directive 2001/23/EEC and incorporated into UK domestic law by regulation 3 of TUPE 2006 expressly provides an exception to the general provision of the protection of employees' rights on transfer.
66. The cases I have been referred to such as **Scattolon**, and **Bettercare**, where the **Henke** exception did not apply, involved the transfer of a particular activity, namely the transfer of school cleaners in **Scattolon** and the provision of retirement homes for the elderly in **Bettercare** involved economic activities. They involved particular activities being transferred which were in themselves economic activities, the transfers did not involve the contracting out of the public health responsibilities. The present case was triggered by the proposed changes to the terms and conditions of the Claimants, not by the transfer itself of a particular aspect of the responsibilities of the team from the PCT to the Respondent.
67. In **FENIN** the Advocate-General considered that that the issue was whether the function involved was economic or the exercise of public authority, and that if the function was pursuant to the exercise of public authority, it was not converted into an economic activity, even if it was contracted out. The Advocate-General in **FENIN** stated (AG 66):

***Thus, where a purchase is linked to the performance of non-economic functions, it may fall outside the scope of competition law.***

68. Paragraph 21 of the judgment in **FENIN** held,
- ... that there is no need to dissociate the activity of purchasing**

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

**goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.**

69. In the particular circumstances of this case, I consider that the overarching role of both the PCT and subsequently the local authority involved the responsibility of the state through the public health team in the provision of the state's responsibility for public health. The case of Diego Cali is clear authority for the contention that the activity contracted out, namely the contracting out of anti pollution activities involved a governmental activity, namely the protection of the environment. In the closing submissions on behalf of the Respondent, it was noted that the public health team does not bid for contracts and that unlike the position of private health providers; the team is not trying to obtain business. I am not persuaded that the involvement of private providers through the process of commissioning undermines the ultimate responsibility of the Respondent for public health.
70. Dr Schwartz's evidence reinforced the public health role of the team by stating that it was its role to undertake strategic assessment of needs. Dr Schwartz stated that the role of the team was to identify vulnerable groups and to ensure that services were applied appropriately. The team conducts research to enable informed decisions to be made and to inform commissioning. Mr Morton said that the team had responsibility for both pandemic flu preparedness and seasonal flu preparedness and to ensure plans were in place for immunisation and screening.
71. I have concluded that the relevant transfer involved the transfer of administrative functions between public administrative authorities.
72. Turning to the issue of 'ouster', the Respondent contended that in the event that there was a relevant transfer it would not and could not have operated so as to terminate the contracts of employment of any of the Claimants, namely to operate to terminate their contracts of employment with the transferor because their employments had been preserved by the provisions of the Health and Social Care Act 2012 (Croydon Primary Care Trust) Staff Transfer Scheme 2013.
73. The Claimants contended that Regulation 4 of TUPE should be construed by disapplying the words "which would otherwise be terminated by the transfer". Alternatively it was submitted that the Tribunal should disapply the Transfer Scheme on the ground that it was incompatible with the Claimant's rights under the Directive. Disapplying the scheme would have the same effect as a purposive construction of regulation 4 TUPE and would accordingly give

**Case Numbers: 2303244/2015, 2303248/2015, 2300150/2016, 2300455/2016, 2300456/2016, 2300568/2016, 2300569/2016, 2300570/2016, 2300571/2016, 2300572/2016, 2300573/2016, 2300574/2016, 2300747/2016 & 2300787/2016**

proper effect to the Claimant's rights under the Directive.

74. I am not persuaded that this is a case where the Tribunal should disapply the operation of the Transfer Scheme. The provisions of TUPE already provide an exception to the general rule of protection for the rights of employees by the operation of regulation 3(5), which gives effect to the **Henke** exception. The reference to a 'relevant transfer' in regulation 4 of TUPE does, in my judgment, envisage circumstances where the protection afforded by TUPE to contracts of employment does not apply, and regulation 3(5) expressly provides that an administrative reorganisation or the transfer of administrative functions between public administrative authorities is not a 'relevant transfer'.
75. I have concluded that the transfer of the public health team, the Claimants in this case, to Croydon was not a relevant transfer and that in any event the Claimants contracts of employment had not been terminated by the transfer.

Employment Judge Hall-Smith  
Date: 18 July 2017