EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Mr J Secrett & Others	v	**Galloway Travel Group & Others**

(OPEN) PRELIMINARY HEARING

Heard at: Bury St Edmunds **On:** 2 and 3 July 2018

Before: Employment Judge Laidler

Appearances:

For the Claimants:

Day 1 - Mr J Secrett, in person
Mr T Robinson (until approx. 2.30pm), Mr S Moore and Mr A Preece, claimants

Day 2 - Mr J Secrett in person,
Mr S Moore, claimant.

For the Respondent: Miss S Tharoo, Counsel.

JUDGMENT

1. **The claims of a failure to inform and consult under Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2016 ('TUPE') brought by Mr Secrett and Mr Moore are dismissed on withdrawal.**

2. **There was no 'relevant transfer' within the meaning of Regulation 3 of TUPE and therefore all the other claims of a failure to inform and consult under Regulation 13 must fail and are dismissed.**

3. **The employer of the Claimants was Galloway European Coachlines Ltd, the 2nd Respondent and all claims against Galloway Coach Travel Ltd, the**

1st Respondent and Appleblossom Holdings Ltd, the 3rd Respondent fail and are dismissed

4. **All claims brought by Mr Godbold, Mr Wood and Mr Potter are dismissed on withdrawal**

5. **The claims brought under Regulation 30 of the Working Time Regulations 1998:**

   5.1 The following are dismissed on withdrawal:

   Mr Secrett
   Mr Green
   Mr Moore
   Mr Preece
   Mr Eastall
   Mr Watts
   Mr Bilton
   Mr Haggar
   Mr Webb
   Mr Wood
   Mr Bilton
   Mr Haggar
   Mr Eastall
   Mr Fanals
   Mr Gilder
   Mr Harding
   Mr Holder
   Mr Roxburgh
   Mr Stringer
   Mr Robinson
   Mr Cree
   Mr Monk
   Mr Beckingham

   5.2 The following are dismissed on a failure to show cause in compliance with the order of the 24 February 2018 as to why that claim should continue:

   Mr Hines

   Mr Meale

   Mr Nash

   Mr Slater

   Mr Zatorski

Holiday pay claims

6. **Of the Claimants who have not already withdrawn their claims prior to this hearing the following are dismissed on a failure to show cause in compliance with the order of the 24 February 2018 as to why that claim should continue**

   6.1 Of the group of Claimants listed in paragraph 11.1 of the Case Management Summary of 24 February 2018;

   Mr Cass

   6.2 Of the group of Claimants listed in paragraph 11.2 of the Case Management Summary of 24 February 2018:

   Mr Hines
   Mr Bilton
   Mr Cree
   Mr Gilder
   Mr Monk
   Mr Roxburgh
   Mr Webb
   Mr Preece

   6.3 Of the group of Claimants listed in paragraph 11.3 of the Case Management Summary of 24 February 2018:

   Mr Beckingham
   Mr Fanals
   Mr Green
   Ms Meale
   Mr Richards
   Mr Robinson
   Mr Slater
   Mr Stringer
   Mr Wood
   Mr Zatorski

7. **The holiday pay claims of Mr Secrett and Mr Moore are dismissed on withdrawal by them at this hearing.**

8. **It follows that no claims continue.**

REASONS

1. This was the preliminary hearing listed at the case management discussion on 24 February 2018 to determine: -

   Whether or not there was a relevant transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

   the claimants bringing claims of a failure to inform and consult within the meaning of Regulation 15.

2. There were various preliminary matters that the Tribunal needed to deal with before it could deal with the TUPE issue.

3. As has been noted above in the heading to these reasons Mr Secrett appeared and spoke on behalf of the claimants, but Mr Robinson, Mr Preece and Mr Moore also attended, with only Mr Moore attending on the second day. No other claimants attended. Save for a few discreet matters it was only Mr Secrett who addressed the tribunal.

4. The respondent had served witness statements on behalf of: -

   4.1 Mr David Cattermole, Managing Director of the respondent.

   4.2 Mr Garry Raven, Managing Partner of Barrons Chartered Accountants and a Fellow of the Institute of Chartered Accountants.

   The Judge determined that it was necessary to read those statements before any preliminary matters could be dealt with.

5. Having done so there were two principle matters that needed to be dealt with: -

   5.1 Mr Secrett's submission that the respondent had not complied with the Employment Tribunals Rules when making disclosure as they had failed to comply with the Civil Procedure Rules (CPR) and in particular Part 31 dealing with disclosure and inspection of documents and the associated Practice Direction 31A.

   5.2 Mr Secrett's application for further disclosure.

6. Prior to dealing with those applications the Judge asked Mr Secrett to confirm when he stated the TUPE transfer took place. Mr Secrett's position was that it was hard to say when it was. He accepted that he did not even know whether it had happened. The first proposed Share Purchase Agreement was dated 31 March 2016. That had envisaged a completion in December 2016 and that then moved to March 2017. However, in December 2016 a Bernie Miles of Galloway was in correspondence with Tony Fisher of FJG Solicitors. Mr Fisher wrote on 23 December 2016 that the position does appear "precarious" from a legal perspective. Mr Secrett submitted that Mr Fisher had said that variation documents needed to be prepared, but they were not and by May 2017 it is argued that Mr Raven was suggesting that they dispense with the "meddling

advice" of Mr Fisher. Mr Secrett referred to his words in an email that he sent in May 2017 seen at page 197 of the bundle.

7. Mr Secrett submitted that the initial Share Purchase Agreement had altered beyond all recognition Mr Fisher stating that the deal had moved a long way and needed to be documented. Garry Raven however referred in his emails in May to "we are now doing the deal live" and that he would calculate the consideration.

8. One of the schedules to the Share Purchase Agreements is the calculation of consideration, but that has not been disclosed.

9. As to what was agreed after May 2017, there was a board meeting on 5 June 2017 but it was un-minuted. Seen in the bundle at page 222 however was a request from Garry Raven to Sean Callaghan of BTMK Solicitors to draft a "base legal agreement to cover the sale of…shares to Bill Hiron and myself". Mr Secrett said that that email had surprised him when it was disclosed as any agreement was subject he believed to instructions to Tony Fisher and to Blackhouse Solicitors. He submitted that that email of 22 June expressed that an agreement had been made between the seller and the buyer. He has not seen the draft agreement and does not think that Galloway Travel Group have.

10. The Judge then asked Mr Secrett when he said the relevant transfer had occurred. His response was that it may not have happened. The Judge therefore queried how there could be a failure to consult within the meaning of Regulation 13 of TUPE. Mr Secrett submitted that sub-section 2 provides that the obligation is to consult "long enough befor a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees". The obligation arises then and it is not necessarily for the transfer to proceed. Mr Secrett however agreed with the proposition put to him by the Judge that the Tribunal still had to identify if there was a relevant transfer for that obligation to arise.

11. Mr Secrett drew attention to Board Meeting minutes of 2 November 2017 (page 242) in which it was noted that the agreement had not taken place at the end of September due to various listed reasons including the Employment Tribunal proceedings brought by Mr Secrett. Mr Secrett stated that was a crucial document as it was not very 'attractive' that the respondent was saying they had not proceeded with the agreement due to this litigation.

12. It was submitted on behalf of the respondent that it was very clear from what had been said by Mr Secrett that this application that there had been a failure to inform and consult could not proceed. Even the claimant appeared to accept there had not been a transfer. It is not appropriate therefore to consider the failure to inform and consult. It is common sense that if there has not been a transfer the Tribunal is no position to determine whether there has been a failure to consult. The claimants are obliged to put forward a positive case. They now say they do not know if there was a transfer. This is completely the wrong way around. The burden of proof is on the claimants to show there was a transfer. If they cannot put forward a positive case the claim must fail at that point.

13. It was submitted further on behalf of the respondent that the claimant seeks to assert that if there was no transfer then one reason is the case itself. It seems to be being suggested that this was a way to circumvent the obligation to consult, and that there will be a transfer immediately after this case has been disposed of, although Counsel accepted they were not the words of Mr Secrett. It is a nonsense however to suggest that that would prevent the claimants bringing a claim if they had one. They brought a claim in July 2017 and if there was a TUPE transfer after that date then there would be no bar to any employees proceeding with another claim if they argued that there had then been a breach of the Regulations.

14. The respondent submitted that as currently put the claim is difficult for it to respond to. A huge amount of time, effort and finance has gone into defending this matter, but the respondent does not know what case it is dealing with. If the claimant cannot even put forward a case that a TUPE transfer pre-dated the ET1 the application must fail.

15. Mr Secrett responded that if the duty arose the claimants' obligation was to make their application to the Employment Tribunal within 3 months. In answer to the Judges question as to when he suggests time ran from, he stated May 2017. He relied upon Mr Moore's grievance at that time in relation to holiday pay. That was when the duty to inform and consult about holiday pay and arrangements arose in anticipation of the transfer. The implications of the transfer were that holiday pay would be paid differently and on a different basis. It would be paid correctly. That led to the distribution of new terms in May 2017 and that is properly the beginning of the consultation period as it was that that led to correspondence between the Operations Manager and the Employee Representatives including Mr Secrett. The duty to inform and consult, pursuant to Regulation 13(7)(b) arose at that point.

16. In terms of when the consultation took place, it took place in May prior and in anticipation of the transfer subject to the agreement of the 22 June 2017. That is the agreement drafted on Garry Raven's instructions that no one has seen. The consultation period went up to the 22 June and at that date Mr Raven asked the solicitors to prepare a base legal agreement. That was on the understanding that he had with David Cattermole in June 2017 and clearly there was an agreement at that time. Mr Secrett referred to page 238 of the bundle where David Cattermole emailed Gary Raven on 16 October 2017 expressing his concern that nearly two and a half years had slipped by since he first met with Bill to discuss Galloway and "We may not be any further forward", he referred to them having "agreed revised terms early in June to get completion by 31 July therefore".

17. Mr Secrett submitted that the consultation period leads up to the agreement which may or may not have concluded the transfer, but the agreement drafted must represent the agreement between the transferor and transferee so there has to have been an agreement. He has not seen the agreement and says that the hearing cannot proceed without seeing the agreement, although he conceded it was just a draft. He stated that by this time it would seem despite protestations there was no agreement. The old Share Purchase Agreement was

not only altered by all recognition but was replaced by the 22 June 2017 agreement.

18. For the respondent, it was argued that it was non-sensical to say that changes in regard to payment of holiday pay related to whether there was a TUPE transfer. It would have been completely wrong of the respondent not to have informed and consulted on those changes, but there is no relationship between the two and the consultation with regard to holiday pay cannot found an argument that it created a consultation period under TUPE.

19. As Mr Raven's witness statement makes clear, his instructions were to draft an agreement and it never got beyond being a draft which was not even shared with the respondent who instructs counsel. It was never discussed between the proposed transferor and transferee. Mr Cattermole is here and can confirm that. As it has never been shared with the respondent, the respondent cannot disclose it. Mr Raven is not the client. He has just been invited to give evidence.

20. There was an adjournment whilst the Judge considered the best way to proceed. On returning the parties were advised that as the witness statements had been disclosed and the witnesses were here the Judge would hear their evidence. The application would not be dismissed at this stage. The costs of this hearing had already been incurred and the Tribunal would wish to make a ruling on the TUPE point. Firstly, the Tribunal would deal with issues with regard to disclosure and would then timetable the rest of this 2-day hearing to enable time for the witnesses to be cross examined and submissions made on the TUPE point and for there then to be time to case manage the other claims.

Disclosure – the failure to comply with the CPR Practice Direction 31A

21. Mr Secrett pursued this application.

22. The claimant relied upon Birmingham City Council v Bagshaw & Others UKEAT/0107/16. He drew the Tribunal's attention to paragraph 6 in which it had been accepted that the relevant Rules in the Employment Tribunal Regulations 2013 were the overriding objective in Rule 2 and Rule 31 which "empowers the Tribunal to order any person to disclose documents or information to a party as might be ordered by a county court". Mr Secrett submitted that at the hearing on 24 February 2018 the order had been for disclosure under the CPR. He argued that in Bagshaw the court went on to refer to the CPR as follows:-

> "Reading across to the Civil Procedure Rules (CPR) these provide at paragraph 31.17 that a court (including the county court) may make an order for disclosure by a third party, providing that the documents are likely to support the case of the applicant or adversely affect the case of one or other parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or to save costs. This is the test of relevance and necessity."

23. It is to be noted that in that case the Employment Judge had ordered a third party, Birmingham City Council to disclose all interlocutory orders and

judgments of the Employment Tribunal in the possession of its legal department in six named equal pay multiple cases taken against it.

24. Mr Secrett then referred to the CPR themselves. In particular, he referred to the following:-

> "**Standard disclosure—what documents are to be disclosed**
>
> 31.6 Standard disclosure requires a party to disclose only—
>
> (a) the documents on which he relies; and
>
> (b) the documents which—
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case; and
>
> (c) the documents which he is required to disclose by a relevant practice direction.
>
> …
>
> 31.10.2 – Procedure for standard disclosure:-
>
> "(1) The procedure for standard disclosure is as follows.
>
> (2) Each party must make and serve on every other party, a list of documents in the relevant practice form…"

25. Reference is then made to Practice Direction 31A and Mr Secrett took the Tribunal to paragraph 3.1 of the Practice Direction which provides as follows: -

> "The List
>
> 3.1 The list should be in form N265.
>
> …
>
> Disclosure Statement
>
> 4.1 A list of documents must (unless rule 31.10(a) and (b) applies) contain a disclosure statement complying with rule 31.10. The form of disclosure statement is set out in the annexe to this practice direction.
>
> 4.2 The disclosure statement should: -
>
> (1) Expressly state the disclosing party believes the extent of the search to have been reasonable all the circumstances; and
>
> (2) In setting out the extent of the search (see rule 31.10(6)) draw attention to any particular limitations on the extent of the search which were adopted for proportionality reasons and give the reasons why the

> limitations were adopted, eg the difficulty or expense that a search not subject to those limitations would have entailed or the marginal relevance of categories of documents omitted from the search.
>
> 4.3 Rule 31.10(7) applies – the details given in the disclosure statement about the person making the statement must include his name and address, and the office or position he holds in the disclosing party or the basis upon which he makes the statement on behalf of the party.
>
> …"

26. Mr Secrett assumed that where reference was made in the case of Bagshaw to the CPR, it meant that all provisions in them on disclosure applied to the Employment Tribunal. The form has to be signed as to the search made for all documents. If either the solicitor or the respondent had to complete the form, they would have had to have referred to the search made, and to the 22 June agreement without which Mr Secrett argues he is severely hampered. That agreement was easily searchable for and could have been disclosed.

27. The Judge posed the question that Mr Raven was not a party to these proceedings and it appears that only he has seen this draft. Mr Secrett referred back to the Bagshaw case in which disclosure had been made against a non-party.

28. It was suggested by Mr Secrett that if the respondent had wished to withhold or redact documents, they should have made an application at the 24 February 2018 hearing to that effect. He referred to paragraph 7 of the Bagshaw decision which stated as follows:-

> "The proper approach to the application of the two-stage test was articulated by Eady J in Flood v Times Newspapers Ltd [2009] EWHC411 under reference to the various relevant authorities. One such authority is the House of Lords decision in Science Research Council v Nassé [1980] AC1028 which is authority for the proposition that if disclosure is necessary for the fair disposal of the proceedings it must be ordered despite any confidentiality attaching to the documents. Where confidentiality is an issue, the court or tribunal concerned should first inspect the documents to consider whether justice could be done by adopting special measures. A more recent exposition of the proper sequence in considering an application for disclosure in the Employment Tribunal context can be found in Plymouth City Council v White UKEAT/0333/13."

29. It was pointed out by the Judge to Mr Secrett that in the Bagshaw case the issue of confidentiality was not raised, and this is recorded at paragraph 21 of the decision. The issue there was with tribunal judgments and orders. Mr Secrett's response was that the confidentiality argument should have been raised.

30. On behalf of the respondent it was submitted that the Employment Tribunal Rules do not refer to or require any prescribed form. Assistance is to be gained from the CPR as to the basis of disclosure, but there are not any other formal requirements and Bagshaw is not authority for the proposition that there are.

31. The Judge referred to the Presidential Guidance which can be found online dealing with General Case Management. There was a short break whilst a

copy was produced for Mr Secrett. There is a specific Guidance Note in it dealing with disclosure of documents, and it was submitted there is nothing in there about a prescribed form or a disclosure statement.

The claimants' application for specific disclosure

Schedules 4 – 7 of the Share Purchase Agreement redacted in full

32. Mr Secrett argued that if the agreement has schedules to it, then it is a nonsense to say they are not relevant. The Judge questioned how they were relevant to the issue of whether there was a TUPE transfer. Mr Secrett's position is that they are part of the agreement and should be included in the disclosure.

33. The Judge referred to the index to the Share Purchase Agreement and from that it can be seen what the schedules refer to: -

> "Schedule 4 – Warranties
> Part 1 – General warranties
> Part 2 – Tax warranties
>
> Schedule 5 – Tax Covenant
>
> Schedule 6 – Completion Account
>
> Schedule 7 – Maintainable Earnings Payments"

34. The Judge asked Mr Secrett why those schedules would be relevant to the issue of whether there was a TUPE transfer. Mr Secrett submitted that Schedule 6 the Completion Account, would show what assets were considered and how the consideration was calculated. If other assets and/or income streams were included in a calculation of consideration that takes the agreement into the realms of a TUPE transfer and outside a Share Purchase Agreement. Without seeing the schedules Mr Secrett said that he could not say whether they were relevant or not.

35. For the respondent it was submitted that matters had evolved at this hearing. It was notable that the way the matter is now put is that there was a transfer on 22 June 2017. There is a significant question about the relevance of the Share Purchase Agreement now. The claimant said this morning that the conditions of the Share Purchase Agreement had not been reached and that matters had moved on significantly. The respondent now questions the relevance of this agreement in its entirety.

36. Various emails and documents have been redacted, as have these schedules where they contain sensitive commercial information. Many of the claimants are no longer employed by the respondent but are employed by rivals. It is not in anyone's interests for the details of commercial transactions to be placed in the public domain.

37. Further, the parts of documents that have been redacted are not relevant to the question of whether there was a TUPE transfer. Inevitably, factors will be taken

into account to determine the appropriate price for shares. That does not mean it was not a Share Purchase Agreement. The information that has been redacted demonstrates the bargaining position of the party. It shows how the company has been valued and is all commercially sensitive information, and has no bearing on the TUPE transfer point.

38. In the event that the Judge wished to see the documents before making a decision, the respondent had brought them for the Judge. What one gleans is the basis for a future price and how it would be calculated however, everything was conditional and not intended to come to fruition immediately.

39. The claimant argued that this is a matter that should have been raised at the last hearing. The respondent however answered this by stating that there had not been disclosure then therefore it could not be dealt with at that point.

40. In addition to the schedules there were other documents that had been redacted. Other than that, Mr Secrett had all the documents he had requested save for some pages of an email chain in May and June 2007 at pages 192-194 of the bundle. He was to find his copies and discuss with counsel whether they could be in the bundle.

41. Mr Secrett then said he may wish to see the instructions given for the preparation of the draft agreement on 22 June 2017.

42. Referring to the Presidential Guidance Mr Secrett relied on paragraph 13 which stated that the hearing bundle "should contain only the documents that are to be mentioned in witness statements …". Gary Raven refers to the 22 June agreement in his witness statement and the Tribunal is hoping to hear from him. Mr Secrett would want to put questions to him but cannot cross examine him on the document if he does not disclose it.

43. Mr Secrett submitted that a transfer does not just happen. There is always an agreement. Most of the time taken with disclosure in this case has involved the Share Purchase Agreement. He accepted that that now seems to have been overtaken by the new draft agreement produced on 22 June. To the extent that the old Share Purchase Agreement is irrelevant but only to the extent that the terms are not repeated in the new agreement. He cannot see what terms are redundant unless he sees the new agreement. He cannot see what the terms of the agreement were at the time in May and June when the duty to inform and consult arose. The respondent will say it did not arise as there was a Share Purchase Agreement, but how can we know till we have looked at the 22 June agreement? The whole purpose of this hearing is to examine the agreement and see if there was a TUPE transfer. How hampered is the Tribunal? The Tribunal can look at the agreement and see if the application of a failure to inform or consult can proceed.

44. For the respondent Miss Tharoo made it clear that one party to the proposed agreement never saw the draft. There were instructions to draft it. That was not even the first step to an agreement. Mr Cattermole is here to give evidence as to whether it was even seen by the respondent.

45. The unredacted documents and the schedules to the Share Purchase Agreement were given to the Judge and there was an adjournment whilst the Judge considered these.

Decision on disclosure

Prescribed form under the CPR

46. The Employment Tribunal Rules do not require disclosure to be provided by the completion of any prescribed form or the signature of a disclosure statement. It is quite clear that the reference to the county court in Rule 31 is to the type of disclosure that the Tribunal may order. The CPR therefore gives the Tribunal guidance as to what can be ordered.

47. There is nothing in the Presidential Guidance which deals specifically with the disclosure of documents to state that the disclosure must be on any or the CPR prescribed form. It is of note that when dealing with witness statements the Presidential Guidance actually states (paragraph 18) that a statement of truth is not required on a witness statement. If the disclosure had to be made on a prescribed form of any kind the Employment Tribunal Rules would provide that but they do not. There has therefore been no breach of any provisions by the respondent in not putting the disclosure on such a form.

Disclosure – Schedules 4-7

48. Consideration was given to the decision in Plymouth City Council v White UKEAT/0333/13 referred to in the case of Bagshaw. In this case the EAT stated that the sequence in a disclosure application is: -

> "(1) The Judge must first consider if the document sought is relevant (if it is not, then it will not be ordered to be disclosed).
>
> (2) If it is relevant, the next question is whether it is necessary for the fair trial of the case for it to be ordered to be disclosed. Where there is objection, the Judge should examine the document itself so as to consider whether or not in a contention that it is confidential it should still be disclosed.
>
> (3) If the document is relevant and necessary, and is to be disclosed, the Judge should consider whether there is a more nuanced way of disclosing the material so as to respect confidentiality and the Judge may then decide to order the document to be disclosed wholly or partially, usually by the system now known as redaction.
>
> (4) The disclosure Judge having read the disputed documents should not conduct the full hearing unless the parties agree."

49. Having considered the disclosure letter and schedules 4-7 the Tribunal is satisfied that they are not relevant to the issue to be determined of whether there was a relevant transfer within the meaning of TUPE. That therefore is the end of the matter with regards to disclosure of the documents. The Tribunal

and the parties will not be assisted by their disclosure in making submissions as to whether a TUPE transfer had occurred or not.

The 22 June draft

50. From the submissions made by Mr Secrett on the 22 June 'agreement' it did also appear that the Share Purchase Agreement was no longer the relevant document.

51. The tribunal would not order disclosure of the draft agreement of June 2017. It was a draft. There is no evidence it was ever an agreement or that one of the parties to it even saw it. To suggest that it could in any way provide evidence of a transfer was an argument without merit.

Redactions

52. With regard to redactions made to documents, the Tribunal is satisfied that they were appropriate and do not impede a fair trial of the issues. They have been made to blank out confidential information of a personal nature or that which is commercially sensitive. The majority of the redactions cover individuals direct dial telephone numbers, home addresses, direct email addresses, figures/percentages/rates and confidential information with regards to negotiations are not necessary or relevant to the determination of the issues.

53. The Tribunal is therefore satisfied that there should be no further disclosure and the claimant's application for specific disclosure is refused.

54. With regards to the email chain Mr Secrett had required in the bundle, the respondent believes that relates solely to the holiday pay issue and cannot have any bearing on the TUPE point, but has no objection to it going in the bundle.

<u>Timetable for the rest of the hearing</u>

55. Having given that decision to the parties the Judge wished to timetable the rest of the hearing so that the evidence could be heard, then submissions and then the Judge's decision on the TUPE point be given.

56. Mr Secrett said that he could not say how long it would take him to cross examine the witnesses without the agreement of 22 June. It was made clear to Mr Secrett that a decision had already been given that that document which was only a draft was not going to be ordered to be disclosed. Mr Raven is a non-party and the Judge was not prepared to make an order (which actually had not been sought) for him to disclose it.

57. Mr Secrett therefore submitted that he did not see how the hearing could proceed fairly. He did not accept the redactions and would not be able to cross examine Mr Raven on the agreement that is now being withheld. He did not see how any hearing could now be held.

58. For the respondent it was submitted there needed to be clarity as to where the matter is progressing. They need to proceed expeditiously and the claimant should indicate whether he pursues his application or not. If he does then there needs to be a timetable allowing time also for case management of the remaining claims.

59. Mr Secrett did not see how he could effectively pursue his argument that there was a TUPE transfer as he could not properly put his case. He did not know whether he was going to cross examine the witnesses or not. He wondered what the point of pursuing his application that there was a failure to consult was, if he could not cross examine the witnesses.

60. The Judge therefore directed that the hearing would be adjourned for the day and that at the commencement of the second day there would be further discussion about the timetable and to enable there also to be time for case management of the other claims. The matter adjourned at 4.40pm.

The Second Day

61. On commencing on the second day Mr Secrett stated there were a number of documents that the Tribunal had ruled were irrelevant and were not to be produced, including the agreement of 22 June. He knew that if he asked Garry Raven to produce that document the Tribunal would order that he need not do so. He referred to management accounts and the action of his colleague Bill Hiron who is not a witness. The position of that agreement up until yesterday had been the subject of Mr Secrett's application for an unless order or strike out. If he were to proceed with cross examination of the witnesses, he would have been unable to refer them to documents that they have referred to in the witness statement. He had been considering the Presidential Guidance that the Judge referred to yesterday. The bundle should only include documents in the witness statements for cross examination. The documents referred to in the witness statements are relevant but are not in the bundle. There is prejudice to the claimants.

62. The Employment Tribunal Rules include the overriding objective which includes ensuring the parties are on an equal footing and dealing with cases fairly and justly. The second limb of the test in Birmingham City Council v Bagshaw refers to the decision in White which the Tribunal referred to yesterday. That case touches on relevance, necessity and confidentiality. The Employment Tribunal Rules only refer to relevance. In order to have a prospect of success he needed to see the draft agreement. He also needed to see other documents referred to in the witness statements. Without seeing them Mr Secrett did not see how there could be a fair disposal and did not see how examination of those documents has been carried out to the extent to determine whether they may well assist him or the other side. The draft agreement may well assist either side. It may assist the claimants.

63. Since the Tribunal has refused to order disclosure of the draft agreement the claimant is hampered and on an unequal footing. Mr Secrett said that he could not cross examine whether or not an agreement was reached in relation to the relevant transfer. If that is the position his claim of failure to inform and consult

had no reasonable prospects of success. There was no purpose in proceeding further with an examination of the witnesses as his claim had no reasonable prospects of success. He did not see that the Tribunal could arrive at a position where each party was on an equal footing and carry out a fair scrutiny as to whether the TUPE transfer had occurred.

64. As it was now unreasonable to proceed Mr Secrett said that he had to withdraw the claims of a failure to inform and consult, and that Mr Moore the only other claimant who remained present also agreed. Mr Moore was asked directly by the Judge whether he also agreed to withdraw, and he did.

65. For the respondent it was submitted that there were other claimants who were not present and it was therefore only appropriate as the witnesses were here that they be called and the Tribunal give a judgment on the issue.

66. There was an adjournment for the Judge to consider the respective parties' positions.

67. The Judge determined it was only in accordance with the overriding objective that the matter proceed. The witnesses would be called and the Judge may have some questions for them. A full decision with reasons would then be given on the TUPE issue. That would however be reserved to enable there to be time to case manage other matters.

68. The following gave evidence on behalf of the respondent: -

    68.1 David Cattermole, Managing Director of the respondent.

    68.2 Garry Raven, Managing Partner of Barrons Chartered Accountants and a Fellow of the Institute of Chartered Accountants.

69. Mr Secrett having indicated he did not intend to put any questions to them each witness was called to answer questions put to them by the Judge. Some of these questions were based on issues that arose from the case of Guvera Ltd v Butler, Blinkbox Music Limited & Others UKEAT/0265/16 which Mr Secrett had indicated at the hearing on 24 February 2018 he intended to rely upon. The evidence of these witnesses remains unchallenged and is accepted by the Tribunal. From the evidence given the Tribunal finds the following facts.

The Facts

70. The Tribunal is satisfied that the employer of all of the drivers involved in these proceedings was Galloway European Coachlines Limited. Steven Moore's contract of employment was seen in the bundle providing that entity as his employer. All of the claimants were given the opportunity at the hearing on 24 February 2018 to advise the Tribunal why they maintained that the other two named respondents, Galloway Coach Travel Limited and Appleblossom Holdings Limited should not be dismissed from these proceedings, but have failed to do so. They are now dismissed.

71. David Cattermole became Managing Director of the three respondent companies on 1 October 1997. His co-directors are Roger Stedman and John Miles (also known as Bernie). All three of them had been planning to retire for the past few years.

72. They were initially considering selling the business to their then senior management team including Richard Smith and Dan Rogers, but unfortunately those negotiations did not progress. Richard Smith is Mr Cattermole's son-in-law.

73. As Mr Cattermole and his two co-directors wished to retire they approached Oasis Europe who are corporate financial advisors to act as their agent regarding any sale of the business. They were keen to ensure there would be a future for Galloway following their retirement and that Galloway remained in a similar format to the current business. They began negotiations with Bill Hiron and Garry Raven who are Directors of a coach and bus company based in Essex, Stephensons of Essex Limited.

74. Gary Raven was not only a partner of Barrons Chartered Accountants but also retained as: -

    74.1 An employed part-time financial director of Stephensons of Essex Limited having commenced in that capacity on 1 June 2015.

    74.2 a Director by Eastern Transport Holdings Limited.

    74.3 Company Secretary for Stephenson's of Essex Limited (and all associates of that entity).

    74.4 a part-time employee of Galloway European Coachlines Limited.

75. Mr Raven has worked in his capacity as financial director with Bill Hiron, Managing Director of Stephensons of Essex Limited ("Stephensons") who was approached by Oasis Europe with regard to the sale of the business of Galloway. Discussions ensued but despite this by November 2015 they were unable to consider proceeding with an acquisition in the circumstances of the Galloway Travel Group ("Galloway"). It was apparent however to Mr Raven and Mr Hiron that the Directors of Galloway did want to sell and retire. They therefore agreed to meet to discuss ways forward. It was agreed that changes would need to be made to the commercial operations of Galloway including securing material contracts with National Express before Bill Hiron and Gary Raven could consider Eastern Transport Holdings (ETH) purchasing the shares.

76. Subsequently it was agreed that the parties would enter into a Conditional Share Purchase Agreement. The Tribunal heard from Mr Raven that he and Mr Hiron did not really wish to enter into such an agreement, but accepted reluctantly the need to generate some documentation. This is how the Conditional Share Purchase Agreement dated 31 March 2016 came into being. This document was seen in the bundle. The whole of the actual agreement (save for the omitted schedules) was seen. This comprised of 24 clauses

together with schedules 1-3. The agreement was between Apple Blossom (Holdings) Limited and Eastern Transport Holdings Limited. It expressly stated:-

> "The seller has agreed the sale and the buyer has agreed to buy the sale shares subject to the terms and conditions of this agreement."

77. Clause 2 sets out "conditions precedent". It provided: -

> "2.1 Completion of sale and purchase of the Share Sales is subject to and conditional upon:
>
> (a) The Conditions in paragraph 1 to paragraph 12 (inclusive) of part 1 of schedule 2 being satisfied (or waived by the buyer in accordance with clause 2.6) on or before the Long Stop Date.
>
> 2.2 If any one or more of the conditions is not fully satisfied (or waived by the buyer in accordance with clause 2.6) by the Long Stop Date, this agreement shall automatically terminate with immediate effect as provided in clause 2.3.
>
> 2.3 If this agreement terminates in accordance with clause 2.2 or is terminated pursuant to clause 5.6(c) or clause 7.6(a) it will immediately cease to have any further force and effect except for:
>
> (a) Any provision of this agreement that expressly or by implication is intended to come into or continue in force on or after termination of this agreement (including clause 1 (interpretation), clause 2.2 and this clause 2.3 (conditions precedent), clause 8 (limitations on claims), clause 11 (confidentiality and announcements) and clause 16 (entire agreement) to clause 24 (governing law and jurisdiction) (inclusive) each of which shall remain in full force and effect.
>
> (b) Any rights, remedies, obligations or liabilities of the party's that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the agreement which exists at or before the date of termination."

78. In the definition section the Long Stop Date is defined as "30 November 2016 or such later date as may be agreed in writing by the buyer and seller".

79. Schedule 2 was provided in full without redactions. It is a three and a half page document. Part 1 lists "Conditions to completion" and expressly provided that Roger Stedman, David Cattermole and John Miles remain as Directors of the company until completion. It also provided that the following individuals remain employed until completion, unless either replaced by an alternative approved by the buyer or agreed to be a redundant position prior to completion; Richard Smith, Dan Rogers, Charles Pratt, Ian Stocker, Workshop Manager, Karen Price HR Manager, Andy Cook, Operations Manager and Liz Palfrey, Commercial Manager.

80. There were also conditions with regard to the respondent's operator's licence.

81. There was an express provision at clause 8 of schedule 2 that: -

> "No person has commenced or threatened to commence any proceedings or investigations against the company or any subsidiaries which would (in the buyer's reasonable opinion) have a material effect on its business."

82. Part 2 of schedule 2 dealt with conduct of business between exchange and completion, and provided that the company and its subsidiaries would carry on business "in the normal course and in the manner provided" in this part of the schedule.

83. Clause 2 of that part listed various matters with which the company would not deal unless the buyers written consent had been given, and this included the disposal of material assets and/or shares, or the entering into borrowing of certain levels.

84. What can be seen quite clearly (and this does not require sight of schedules 4-7 which have not been disclosed) is that this was a conditional agreement.

85. Charles Pratt, the Financial Controller resigned on 22 August 2016 stating his intention to leave the business on 30 September 2016.

86. David Cattermole made an announcement to staff on 31 March 2016 by email headed "Intended Acquisition by Eastern Transport Holdings Limited". He said that the Directors were delighted to announce, "that it is intended that Eastern Transport Holdings Limited (ETH) will acquire the business operations of GTG on 30 November 2016". This email also provided that with the delivery of the announcement "the Directors of GTG intend to delegate day-to-day involvement in the business with immediate effect handing over operational management to the existing senior management team of Richard Smith, Dan Rogers and Charles Pratt" not to ETH. The Tribunal accepts the evidence given that this was announced as the senior management team had highlighted their concerns that employees within the business felt there was no clear route for succession of the company and were concerned the directors were approaching retirement age. A statement to the press was also made and an article appeared in Coach and Bus Weekly on 4 April 2016.

87. There was then extensive correspondence with National Express the contact with which represents a material multi-million-pound contract for Galloway, and ETH would not consider buying without this contract remaining in place.

88. By letter of 12 April 2016 National Express wrote to Richard Smith expressing their concerns regarding any change of control and drawing attention to the key provisions of the Operator Agreement which included that it was a condition the sole controllers of the operator remain those persons who were controllers at the date the agreement was entered into. The letter concluded: -

> "We also request that you supply name, address and contact details of the proposed new Controller so that we may make direct contact after our initial meeting to assist in our assessment of the suitability, capability, experience and standing of the proposed controller."

89. After detailed correspondence further proposals were put to National Express by letter of 10 November 2016 from David Cattermole, where he stressed that the new contract would remain with Galloway there just being a "change of shareholders". Discussions were still proceeding in December, but there was still major uncertainty at that point. The company was without a Financial Director. There was a misunderstanding on the part of John Mills and Bernie Miles who believed that the transaction might complete in December and that led to the comments being made by Tony Fisher to which the claimant alludes.

90. On 4 June 2017 Gary Raven sent an email to David Cattermole, Bernie Mills and Roger Stedman capturing his "personal thoughts regarding the position that we all find ourselves in and to bring some strategy to the evaluation process". He emphasised that it had always been the intention of himself and Bill Hiron to purchase the entire business of Galloway and "had we have been able to gain the necessary comfort for the issues that we raised at the outset with yourselves and indeed were covered by the SPA agreement that John insisted upon preparing then that transaction would have completed long ago. Simply, we have not been able to gain comfort." He set out material points of concern.

91. There was a Board Meeting on 5 June 2017 which was not minuted.

92. On 14 June Gary Raven was advised by David Cattermole that Richard Smith intended to resign.

93. It was at this point that Mr Raven instructed a new solicitor, Sean Gallagher of BTMK, to prepare a further draft agreement by email dated 22 June 2017. Mr Raven confirmed that he received a draft but no further work was performed upon it by himself and it was never provided to Galloway.

94. Mr Cattermole confirmed that to this Tribunal.

95. Mr Cattermole also confirmed that it had been his practice over the years to take on outside advisory services where he needed specialised advice and support, and this is what he had done with Mr Raven. Mr Raven was very clear and this Tribunal accepts that at no time did he or his colleague Bill Hiron have any control over the respondent organisation. They could not hire and fire, and had no authority to and nor did they wish to enter into contracts. He is a chartered accountant in his own practice and it was very important to him that a clear line be maintained.

96. One of the matters the claimant relies upon in support of his contention that there was a TUPE transfer is the indication given by the respondent in May 2017 that holiday pay had been incorrectly calculated. This was an email from Richard Smith dated 12 May 2017 headed "Revised Driver's Contracts" and stated: -

> "Please find attached copies of a proposed letter/contract that will be going out to all drivers and staff next week proposing revisions to the current contract.
>
> The main proposal is to bring holiday pay in line with the hours actually worked by staff and not just the flat 10 hours currently paid.

> I have copied all drivers' representatives into this email so you have a heads up should you be questioned, but in the majority of cases drivers will be better off and whilst on holiday will not see a potential reduction in pay which currently is the case."

97. Mr Secrett replied the same day stating that there was no need to put statutory rights with regard to holiday pay into a contract and "currently the firm has not informed the drivers of their statutory rights to holiday pay". He went on to state: -

> "I have been asked by some drivers the date from which this right arises and so far have been unable to remember. If however the letter is sent together with any proposed amended statement of terms the question will arise, and further the issue of compensation for retrospective breach of statutory right by underpayment going back to the latest of the commencement of employment and the date of the statutory right."

98. Mr Smith responded that they had had to change the contracts to remove the 10 hours that were stated as that was incorrect and they wanted to put how it was worked out to make sure all understood how the system worked. Should there be any claims going forward they would deal with them as they happened and for reference the maximum any claim could go back would be two years.

99. Mr Secrett responded on 14 May 2017. He had calculated that if there were 70 drivers then the annual 28 days holiday pay shortfall of £10 cost gross £19,600 per annum. He stated the difference between 2 years £39,200 and the years which each driver could claim was obvious. He suggested some arrangements were made whereby compensation could be agreed. Mr Smith responded that the business would deal with any claims as they came in.

100. Mr Secrett wrote to Richard Smith and Dan Rogers on 30 May 2017, a document headed 'Contracts of Employment TUPE 2016'.

101. He referred to Regulation 4 of TUPE reminding Mr Smith that all liability in connection with contracts of employment shall be transferred to the transferee on a transfer. He stated that he believed that the failure to recognise the obligations to pay holiday pay in accordance with the proceeding 12 week average imposed by the Working Time Regulations 1998 constituted a breach the effects of which had been accumulating in quantum since that time. He did not believe that the 2-year limit allowed by "Section 2 deduction from wages (limitation) regulations 2014" applied to claims for contractual breaches dating back to commencement of employment or 1998 whichever is the later.

102. He believed that provisional calculations suggested there were arrears of holiday pay of approximately £300 per annum times the number of drivers and other variable hours paid employees amounting to £20,000. That figure represented the arrears owed to a workforce of 70 comprising all those workers during each of the proceeding years back to 1998 whether or not they are currently employed, retired, dismissed or resigned. For two years the figure was £40,000 and back to 1998 it was £380,000. He stressed that the burden of liabilities flowing from the transferor's breach would pass to the transferee upon

completion of the transfer. For that reason, the liability must be disclosed to the transferee. Section 11 of TUPE he stated imposed the obligation upon the transferor to notify the transferee of employee liability information including contracts of employment and arrears of holiday pay.

103. He expressly stated: -

> "If the transferee establishes a complaint for lack of due diligence in this respect he may claim for compensation and contractual loss of not less than £500 per employee (section 12 TUPE) the contract (transfer) would normally provide independent rights to rescind or for penalties."

104. Mr Secrett's misunderstanding of the position was emphasised by his 'Drivers' Representative Grievance' dated 29 June 2017. In this he set out the provisions at s.222 of the Employment Rights Act 1996, and his understanding of TUPE. He expressly stated at paragraph 3:-

> "On 12 May 2017 pursuant to section 13 TUPE Richard Smith emailed drivers' representatives enclosing a new contract and covering letter to be sent to all employees. It refers to holiday pay rates and gives examples of increases of holiday pay as a result of these changes without referring to any claim for compensation for past underpayments. The quantum of arrears of underpayment are described by JAS (service rep) on 14 May when the actual letter goes out to all employees on 22 May the worked examples have been removed and the contract is already signed by the operations manager and dated 22 May 2017. The changes described as 'proposed change we wish to make to your contract of employment' and the employee is told 'to accept these changes to your holiday pay from 7 July 2017 … you need to sign a new statement of main terms of employment. There is no mention of arrears entitlement or the legal obligations and rights imposed by EPA 1996.

Mr Smith was not emailing the drivers pursuant to any obligation under TUPE but because the respondent intended to correct the method by which holiday pay was calculated.

105. He went on that the employees affected intended to claim compensation for this breach of TUPE. He stated: -

> "This compensation sought is punitive against the employer and the starting point of 90 days per employee should be examined in light of the circumstances described in this claim [section 15 TUPE and Shields Automotive Ltd v Langdon; GMB v Suzy Radin Ltd 'The Suzy Radin Guidelines'] conservatively for each 60 drivers paid gross £1,500 per month this would amount to a total of £270,000. The second limb of the claim is for arrears of holiday underpayments. The third limb of the application is that drivers are all working subject to the new contracts which are to be referred to the ET as being void and therefore in default under their existing contracts which are in breach of section 222 EPA 1996."

106. Mr Secrett asserted that the variation of the contract was void. He said that under section 4 of TUPE the variation:

> "was made as the sole or principle reason was the transfer itself. Further or alternatively the variation was not for a reason connected with the transfer that is economic, technical or organisational. Since the economic effect upon the

employer/transferor will increase the rate of holiday pay it would be to the employer's economic detriment."

107. It was also alleged the variation was void under section 13 of TUPE in that: -

> "The legal economic and social implications of the variation of the contractual terms are not properly, fairly, fully or equitably explained. The reason for the change is to bring the term relating to holiday pay in line with the EPA 1996. It is not a change that the employer is making in order to benefit employees. It is a recognition that holiday payments have been being unlawful short since the commencement of the employees' employment but this is deliberately concealed from employees as is the liability of employer for unlawful underpayments flowing from this breach."

108. Mr Secrett then concluded his letter by referring to the fact he had started early conciliation with ACAS and that the respondent was distorting the situation which is that: -

> "(a) There was going to be a transfer.
>
> (b) In order to effect that transfer ELI information had to be given to ELH and to JAS.
>
> (c) Because of the advice given by JAS the transfer failed and the company avoided penalties and compensation to ELH.
>
> (d) The failure to provide correct information to JAS warranting compensation under section 15(8) is not avoided because the transfer is no longer proceeding.
>
> (e) The employees are still working under void contracts. A certificate has now been issued by ACAS enabling him to proceed to ET to refer the contracts and claim compensation."

109. These proceedings were then issued on 28 July 2017.

Relevant Law

110. The Claimants claim a failure to inform and consult contrary to the provisions of Regulation 13 TUPE. Relevant provisions of the Regulations are as follows:

> **3. A relevant transfer**
>
> (1) These Regulations apply to—
>
> (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;
>
> (b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

4. Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

13 Duty to inform and consult representatives

(1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

111. It is well established that TUPE does not apply to a transfer of shares in a company which owns an undertaking since there is no change in the identity of the employer in such circumstances.

112. Mr Secrett indicated at an earlier Preliminary Hearing that he relied upon the case of Guvera Limited v Bulter, Blinkbox Music Ltd and another UKEAT/0265/16, although no submissions have been made by him as to its relevance at this hearing. That case has however been considered and some of the Judge's questions to Mr Raven dealt with matters that arose in it. The EAT upheld the tribunal conclusion that in the third of three defined periods there had been a TUPE transfer following a share purchase but in these circumstances as outlined by the Employment Tribunal:

185. Standing back, and looking at the bigger picture, these features, did, it seems to me, reflect a reality in which, from the start of this third period, Guvera did assume day to control [sic] of the business of Blinkbox, crossing a line beyond the element of de facto control, and information acquisition, which comes with being a corporate parent, in a way that amounted to taking over conduct of its day to day activities.

…

190. For all the foregoing reasons I have concluded that, in the wake of Mr [de Vere's] resignation, and effectively from the moment of Mr King's arrival in the London office on 12 May 2015, following Mr de Vere's departure from the scene, Guvera assumed day to day control of the Blinkbox Music business, in a way that went beyond the mere exercise of ordinary supervision or information gathering between parent and subsidiary, and crossed the legal line identified by the Court of Appeal in Millam."

113. In Millam v Print Factory (London) 1991 Ltd [2007] IRLR 526 the Court of Appeal overturned the decision of the EAT to interfere with the finding of an Employment Tribunal that, as a matter of fact, there had been a business transfer following the acquisition of the shares of Fencourt by McCorquodale. The Court of Appeal found:

> **8**
>
> That concentration on the issue of corporate structure led the EAT not to give proper weight and respect to the findings of the ET. Mr Pitt-Payne, sensing difficulties in his way in the actual reason for its decision given by the EAT, in terms of there having been an error of law relating to the company structure, resourcefully argued that what the EAT had actually decided was that the facts as found by the ET could not in law justify the conclusion that there had been a TUPE transfer. True it is that the EAT in its paragraphs 25–26 criticised the weight that the ET had placed on certain elements, such as the integration of the business of Fencourt into McCorquodale, and pointed out that there was lacking in this case what the EAT would have expected to see in a TUPE transfer, evidence of employees or assets being transferred to McCorquodale. But it could not be said, and was not said, that any of those factors was a necessary feature either of a TUPE transfer or of something that was not a TUPE transfer. The evidence was such that it could have led the fact-finding body to conclude either that it did, or did not, indicate a TUPE transfer. But to do what Mr Pitt-Payne attributed to it the EAT had to go further and hold that the evidence made it impossible to conclude that a TUPE transfer had taken place. The EAT did not so hold, and would not have been right in so holding. There was therefore no ground on which the EAT could legitimately interfere with the conclusion of the ET.

114. The tribunal had been right to conclude that the integration of the businesses amounted to a transfer of an undertaking.

115. Whether there has been a transfer of an 'economic entity which retains its identity' can still be considered by applying the guidance in Spijkers v Gebroeders Benedik Abattoir CV: 24/85 [1986] 2 CMLR 296:

> 'It is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activity'

The Tribunal's conclusions

116. It is quite clear from the provisions of Regulation 13 TUPE that the obligation to inform and consult arises in relation to "a relevant transfer". A relevant transfer is defined by Regulation 3.

117. It is further clear on the facts of this case that there has never been a transfer of an undertaking, business or part where there is a transfer of an economic entity which retains its identity.

118. The only concluded agreement was the Share Purchase Agreement and it is clear on the authorities that such does not amount to a transfer in the meaning of TUPE.

119. The claimant appeared to accept on the first day of this hearing that the original Share Purchase Agreement was conditional, that the conditions were never fulfilled and the matter did not then proceed. He then changed his position, as he had after receipt of the witness statements, to the effect that the agreement drafted on 22 June was in some way evidence of a transfer taking place at that time. There was no agreement. It was only ever a draft. It was not even seen by the other parties to it.

120. In a disclosure application dated 21 April 2018 when the claimant applied to strike out the response he referred to his letter to Richard Smith of 30 May 2017 whereby he was "alerting the respondent to the dangers of not disclosing details of any claims or grievances to the transferee under regulation 11 TUPE." And went on to state that "If the transfer was a non-TUPE transfer the respondent could have ignored this warning but disclosure was given and the result was the transferee withdrew from the sale and an important meeting was convened for 5 June 2017".

121. The claimant therefore accepts that the transferee withdrew from the sale, his very own words.

122. He then went on in that application to suggest that since September 2016 the actual transaction started to take place by: -

> "i) The transferee directors Gary Raven and Bill Hiron providing paid management input to the transferor.
>
> ii) Five Stephensons buses loaned for use on SCC contracts.
>
> iii) ETH Director Gary Raven is also the Managing Director of Stephensons buses.
>
> And other examples.
>
> He states this shows that ETH and his Directors were taking:
>
> "day to day control of certain elements of the transferor's business and acting as employer."

123. The Tribunal has no evidence that that was the case. It has considered carefully the case of Guvera Ltd v Butler, Blinkbox Music Limited & Others to which Mr Secrett made reference at the earlier preliminary hearing. The Tribunal accepts that in that case and on its facts the Tribunal found that Guvera did assume day to day control of the business "crossing a line beyond the element of de facto control and information acquisition which comes with

being a corporate parent in a way that amounts to taking over control of its day to day activities".

124. That did not happen here. One of the conditions that Mr Raven and Mr Hiron wanted which was becoming difficult to fulfil was the existing management team to remain in place. There was no transfer of control.

125. It is clear from Mr Secrett's 'Drivers Representatives Grievance' dated the 29 June 2017 that he has decided that Richard Smith emailing about the need to change the drivers' contracts with regard to holiday pay was in some way action taken under TUPE because of a transfer. It was not. It was an entirely separate matter.

126. There being no relevant transfer, the claim of a failure to inform and consult must fail and is dismissed.

127. All the withdrawals and strike outs having been confirmed in the judgment it follows that no claims now remain.

_____

Employment Judge Laidler

Sent to the parties on:

…06/08/2018…….

For the Tribunal:

……..