THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		*Respondents*
(1) Mr P Hesslewood **(2) Mr S Summerson**	**AND**	**(1) Safeguard Group Services Limited** **(2) QW Security Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shield** **On:** **18 & 19 December 2017**

Before: **Employment Judge Johnson** **Members:** **Ms L Jackson**
Ms R Bell

Appearances

For the Claimant: **Mr M Sprack of Counsel**
For the First Respondent: **Ms K Irvine, Litigation Consultant**
For the Second Respondent: **Mr D Bayne of Counsel**

JUDGMENT

The claimants' complaints that the first respondent had failed to inform and consult them in respect of a transfer of employment to the second respondent is not well-founded and is dismissed.

REASONS

1 The two claimants were represented by Mr M Sprack of counsel; the first respondent was represented by Ms K Irvine, litigation consultant, and the second respondent by Mr D Bayne of counsel. There was an agreed bundle of documents marked R1, comprising an A4 ring binder, containing 182 pages of documents. Both claimants gave evidence. Mr Steven Black and Mr Adrian Line gave evidence for the first respondent and Mr Ian Harrison gave evidence for the

second respondent. All of the witnesses had prepared formal, signed witness statements, which were taken "as read" by the Tribunal, subject to supplemental questions, questions in cross-examination and questions from the Tribunal.

2 The claimants presented their claims to the Tribunal in October 2016. The claims were brought against their former employers, Safeguard Group Services Limited (the first respondent) and their current employers QW Security Limited (the second respondent). The claims were for arrears of wages, failure to provide itemised wage slips, failure to supply written statements of terms and conditions of employment and failure to inform or consult about a TUPE transfer. All of the claims against the second respondent were compromised via an ACAS COT3 agreement. The only remaining claim to be heard by the Tribunal was each claimant`s complaint that the first respondent had failed to inform and/or consult about a TUPE transfer.

3 At a private preliminary hearing on 6 October, Employment Judge Buchanan set out those remaining issues which were to be decided by the Employment Tribunal as follows:-

3.1 Were the claimants employees of R1, who were affected by a relevant transfer or by measures taken in connection with it?

3.2 If so, did R1 inform anyone of the relevant information set out in regulation 13(2) of TUPE in writing?

3.3 If so, did R1 consult with appropriate representatives as defined in regulation 13(3) of TUPE?

3.4 If so, did R1 consult long enough before the relevant transfer?

3.5 Did R1 envisage measures in relation to affected employees and if so, did R1 consult with a view to seeking agreement as to the measures?

3.6 Were there special circumstances which made it not reasonably practicable for R1 to perform the duty to inform and consult and if so, did R1 take all such steps towards this performance as were reasonably practicable?

3.7 Has R1 given notice to R2 in accordance with Regulation 15(5) of TUPE, that it was not reasonably practicable for R1 to perform the duty in regulation 13(2)(d) for the reason that R2 failed to give the information at the requisite time in accordance with regulation 13(4) of TUPE?

3.8 Do the claimants have the right to advance the claim under Regulation 15 of TUPE?

3.9 If the claimants are entitled to compensation, who is to be made liable for that compensation? (The claimants accept that they have previously settled all claims against R2 and in such circumstances the claimants accept that an award cannot be made against R2 pursuant to Regulation 15(9) of TUPE)

3.10 Has the claim been advanced within the time limit imposed by Regulation 15(12) of TUPE as extended by Regulation 16A of TUPE? If not, should time be extended pursuant to Regulation 15(12) of TUPE?

4 In his closing submissions to the Tribunal, Mr Sprack for the claimants acknowledged that the only outstanding issues from that list are those at 3.3 and

3.6 above, namely whether the first respondent consulted with appropriate representatives as defined in Regulation 13(3) of TUPE and were there special circumstances which made it not reasonably practicable for the respondent to perform the duty to inform and consult and if so did the first respondent take all such steps towards its performance as were reasonably practicable.

5 There was very little, if any, dispute over the facts of this particular case. Mr Bayne had helpfully prepared a "second respondent's outline chronology", the contents of which are not challenged by the claimants or the first respondent.

6 The first respondent provides security services to various clients in various locations. Those services include the provision of security guards. Each claimant was a security guard employed by the first respondent. Mr Summerson's employment began on 5 June 2014 and Mr Hesslewood's employment began on 15 July 2014. Both worked at Tursdale Business Park in County Durham. The site was operated by the Philadelphia Estate Company. The first respondent's services were provided to Philadelphia Estate Company.

7 The first respondent had at the relevant time, an annual turnover of between £7 million and £8 million. Its annual wage bill was in the order of £6 million. The first respondent utilised the services of a payroll management company called Crownsbury Limited. Each month the first respondent would send to Crownsbury Limited sufficient funds for Crownsbury Limited to process the wage entitlements of all the first respondent's employees, to prepare their wage slips and to transfer the funds received by Crownsbury Limited from the first respondent, relevant sums by way of wages to each of the first respondent's employees.

8 In April, May and June of 2016 there were delays in making payments of wages to the first respondent's employees. Delays were of between 2 and 10 days. The first respondent's unchallenged evidence was that these delays were caused by operational difficulties within Crownsbury Limited and were not the fault of the first respondent.

9 In early July 2016, the first respondent paid to Crownsbury Limited approximately £514,000 to cover payment of the first respondent's employees` wages for the month of June 2016. The Tribunal accepted that this sum was sufficient to discharge the first respondent's wage bill for the month of June and was sent in sufficient time for Crownsbury Limited to process the wages of all of the employees. However, none of the first respondent's employees received their wages on 15 July. Nothing was received by any of them. Those employees began to contact the first respondent's HR Department to enquire as to why their wages had not been paid and when they would be paid. The first respondent's HR staff could not give a meaningful explanation as to why the wages had not been paid. In the absence of such a meaningful explanation, some of the employees began to make abusive, intimidating and threatening comments to the first respondent's HR Department and office staff.

10 Steven Black, a director of the first respondent, attempted to contact Crownsbury Limited by telephone but could obtain no response. He then travelled to Crownsbury Limited's office in Leeds on Saturday, 16 July and found their office to be empty and deserted. Only then did Mr Black realise that Crownsbury Limited had effectively disappeared with £514,000 of the first respondent's money. The matter was reported to the police, who adopted the position that this was a civil matter between the first respondent and Crownsbury

Limited and as at the date of this Tribunal hearing, no criminal action or prosecution has been taken against Crownsbury Limited or any of its officers.

11 The Tribunal accepted Mr Black's evidence that theft of such a huge sum of money was, as described by Mr Bayne for the second respondent, a "calamitous event". The first respondent did not have adequate reserves of cash to be able to discharge its liability to its staff in respect of wages for the month of June. The Tribunal accepted Mr Black's evidence that he did everything he possibly could to try and chase up debts which were then due to the first respondent and to persuade his other clients to provide payment of invoices which had not then yet fallen due for payment. Despite Mr Black's best endeavours, insufficient funds could be obtained or raised to discharge the outstanding wages liability.

12 The reaction of some of those employees who had not received their wages became more and more unpleasant, particularly towards the first respondent's HR Department and office staff. Some of the security guards refused to report for work, on the basis that they would not carry out any work if they were not to be paid. Rumours began to spread that the staffs' wages had not been paid because of a shortage of funds, although no official announcement was made to the staff about what had actually happened. Mr Black's explanation was simply that he was doing everything possible to try and locate Crownsbury and the missing money and to raise funds from other sources so as to enable the staffs' wages to be paid.

13 Some of the first respondent's clients began to express concern, both verbally and in writing, about the security guards on their sites not having been paid and the impact that this was having or may have upon the quality of service provided by those security guards. In particular, when some of the first respondent's security guards had failed to attend for work, the first respondent was alleged to have sent untrained replacements, which caused concern to the clients. Some of those clients were sufficiently concerned to begin to look for alternative sources of security cover.

14 Mr Simon Hetherington acted as agent for Philadelphia Estates and he was concerned about the first respondent's ability to honour their contract and provide adequate security cover for the site at Tursdale. On 22 July he enquired of the second respondent as to whether they could provide a quotation for undertaking security work at the Tursdale site. His e-mail of 22 July at 14.44 appears at page 112 in the bundle and says, "The sites are currently operated by Safeguard in Leeds and we are considering removing the contract". The second respondent's quotation was sent to Mr Hetherington at 13.05 on Wednesday, 27 July. On Thursday, 28 July at 12.32 Mr Yellowley of the second respondent, informed his colleagues that they had secured the work at the Tursdale site. By e-mail Mr Yellowley informed his colleague Mr Ian Harrison in the following terms:-

- Ian – as soon as you find out about their preferred contract start date from Simon our client (hopefully one month minimum) let us all know.
- Ian – as soon as you obtain the TUPE contact name/e-mail address and contact number over at Safeguard Security the incumbent, send it over and I will write to them requesting their TUPE return. On receipt I will recheck my quote calculations, I am sure we will match but we must do a belt and braces approach.

By e-mail timed at 15.16 on Thursday, 28 July, Mr Hetherington contacted Adrian Lynn of the first respondent in the following terms:-

> "I understand that some of the guards were informed that they would be paid last night or today but payments haven't been made. As previously identified my clients are concerned that Safeguard are no longer in a position to guarantee continuity of the security provision at the sites, I also understand that untrained personnel have been used for the last two nights at Tursdale, apparently from a firm called Vistech, clearly using untrained subcontractors is clearly unacceptable and should cease immediately. In light of this breach my clients have instructed me to terminate the contract with Safeguard – please accept this as formal notice to do so, please call me so that we can agree an end date."

15 Mr Lynn acknowledged that message on 28 July at 17.46.

16 On Friday, 29 July at 12.23 Mr Hetherington again sent a message to Mr Lynn by e-mail stating:-

> "Further to our telephone conversation I can confirm that QW will be taking over the contract for both sites once we have agreed a notice period in respect of both sites. The end date will have to be mutually agreed as neither of my clients want to be held for any additional charges due to an overlap between providers. I have copied Ian Harrison of QW into this e-mail so that there can be a smooth transition between the firms. I understand that the staff concerned are:-
>
> - Steve Summerson
> - Pat Hesslewood".

17 At 15.16 on 29 July Mr Yellowley sent an internal message to other members of his staff, stating:-

> "I will write to Safeguard Group Services Limited requesting TUPE data …. enabling all to respond quickly and kick start the TUPE transfer, screening and vetting."

18 On Friday, 29 July at 15.31 Mr Yellowley of the second respondent for the first time contacted Mr Lynn of the first respondent, stating:-

> "Adrian, Allow me to introduce myself, I am the appointed commercial director for QW Security Limited. Having taken instructions from our new client Simon Hetherington re our successful security bid, I write to you seeking your TUPE due diligence appertaining to your security officers assigned to the above named security contract. At the time of writing this communication we have no knowledge of the targeted contract start date. I am departing on holiday this evening and not returning until Monday, 8 August 2016. In my absence could you offer your TUPE data return to my colleague (David Bone, Ian Harrison and Susan Prendegast) cc'ed into this correspondence please? We look forward to receiving your TUPE return and thank you for your time."

19 Mr Lynn replied to that message at 15.47 on Friday, 29 July, stating:-

> "Good afternoon Steve. Thank you for your e-mail. I have copied in my HR Department Head and requested that this is sorted asap. Enjoy your holiday and I hope to have a positive outcome on your return."

20 On Monday, 1 August 2016, Simon Hetherington wrote to Mr Lynn at 17.29 in the following terms:-

> "Adrian, further to my e-mail below and for avoidance of doubt unless we agree in writing a mutually acceptable early termination date the notice period will expire on 28 August 2016. I suggest that this is at 23.59 hours."

21 On Tuesday, 2 August at 13.27 Mr Lynn sent to Mr Harrison of the second respondent an e-mail in the following terms:-

> "Further to our conversation I confirm that I am happy for you to approach the officers on the two accounts. Please find attached the ELI information you require to carry out a full consultation."

22 Later on Wednesday, 3 August, at 15.43, Mr Dave Martin the first respondent's duty manager informed his manager Malcolm Johnson that Mr Summerson had rang to say he could not attend for work that night or the following night and that as a result the first respondent did not have any trained or untrained staff for the Tursdale site. Mr Johnson informed Simon Hetherington. By e-mail on 3 August timed at 16.54, Mr Hetherington replied in the following terms:-

> "I don't believe letting my client know at gone 4.00pm that there will not be any cover on site tonight at 5.45pm or tomorrow night is either acceptable nor professional regardless of the position the company is in. This just reinforces my and my client's concern that Safeguard are no longer in a position to provide the services required and this action is considered to be a major material breach of the provisions of the commercial arrangement between Eggerton Limited and Safeguard and consequently my client is terminating the arrangement with immediate effect."

23 At 17.14 on 3 August Mr Hetherington informed Ian Harrison of the second respondent that he would like the second respondent to take over the security provision at Tursdale with effect from 5.45pm on Wednesday, 3 August.

24 On Thursday, 4 August, Mr Harrison met with both claimants and completed the forms "individual consultation meeting – TUPE" which appear at pages 168-181 in the bundle.

25 The Tribunal found that the earliest date and time by which the first respondent's officers could have been aware of the possibility of a TUPE transfer was when Mr Hetherington sent his e-mail to Mr Lynn on 29 July at 12.23 stating, "I can confirm that QW will be taking over the contract for both sites once we have agreed the notice period in respect of both sites. The end date will have to be mutually agreed as neither of my clients want to be held for any additional charges due to the overlap between providers."

26 Even then, there was intended to be a 28 day notice period, which was only set out in Mr Hetherington's e-mail of 1 August at 17.29, stating that the termination date would be 28 August at 23.59 hours. The immediate termination of the contract did not take place until 3 August at 16.54.

27 The Tribunal accepted the evidence of both Mr Black and Mr Lynn to the effect that from 15 July onwards they were using their best endeavours to recover the money which had been stolen by Crownsbury Limited, to raise funds from other sources and to preserve their existing contracts and existing employees. Throughout this period the first respondent's administrative staff were having to cope with considerable hostility from a number of those staff whose wages had not been paid. The Tribunal found that the maximum period of time during which any TUPE consultation could possibly have taken place was from Thursday, 28 July at 16.13pm when they first learned that the Tursdale contract was being terminated, until Wednesday, 3 August when the TUPE transfer actually took place. That was effectively no more than 4 working days. During that time, the respondent's officers continued their efforts to try and locate Crownsbury Limited and the stolen money, tried to preserve their clients and retain their employees, whilst dealing with considerable hostility from some of those employees who had not received their wages.

The law

28 The relevant statutory provisions engaged by the claims brought by each claimant are contained in Regulations 13 and 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The relevant extracts are set out below:-

> **"Duty to inform and consult representatives**
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> (1) In this regulation and regulations 13A, 14 and 15 reference 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 –
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> (a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
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> (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 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 have become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be taken, that fact.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7) he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

15 Failure to inform or consult

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground –

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;

(c) in the case of failure relating to representatives of a trade union, by the trade union; and

(d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show –

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duties; and

(b) that it took all such steps towards its performance as were reasonably practicable in those circumstances.

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under subparagraph (8)(a) or paragraph (11)."

29 Mr Sprack's case on behalf of the claimants was simply that the first respondent had failed to inform or consult with the claimants or their trade union pursuant to Regulation 13. That they had failed to inform or consult the claimants or their trade union was accepted and admitted by the first respondent. The first respondent's position was that there were special circumstances which rendered

it not reasonably practicable to perform that duty and that they had done all that was reasonably practicable in the circumstances.

30 The principal issue for the Tribunal to decide was therefore whether or not there were special circumstances, and if so whether they rendered it not reasonably practicable for the first respondent to inform and consult with the claimants and/or their trade union.

31 The first respondent's case was that the calamitous series of events which began on 15 July 2016 when their £514,000 was misappropriated by Crownsbury Limited up until the loss of the Tursdale contract with effect from 3 August 2016 amounted to "special circumstances" which rendered it not reasonably practicable to perform the duty to inform and consult.

32 The phrase "special circumstances" is not defined anywhere in the TUPE regulations 2006. Furthermore, the wording of Regulation 13(9) is very similar to that set out in Section 118(7) of the Trade Union and Labour Relations (Consolidation) Act 1992, which sets up a "special circumstances" defence when an employer has failed to carry out the statutory duty to consult trade union representatives about proposed redundancies. The arguments and authorities put forward by Mr Sprack on behalf of the claimants are that the case law on the meaning of "special circumstances" in the context of redundancy consultations also applies in the context of information and consultation about proposed transfers. Mr Sprack specifically referred to the case of **Clark's of Hove Limited v Bakers Union [1978] ICR 1076**, when the Court of Appeal said that circumstances are only "special" if they are "exceptional, out of the ordinary or uncommon". The situation must therefore usually be unexpected or have very specific and unusual characteristics. Even where those special circumstances are shown, the employer must still take all steps towards compliance and are reasonably practicable in the circumstances of the case. The Court of Appeal in the **Bakers Union** case pointed out that insolvency is not on its own a "special circumstance". Far from being "exceptional or out of the ordinary", insolvency is in fact a fairly common occurrence. In the Court of Appeal's view, whether special circumstances exist will depend entirely on the cause of the insolvency. If for example, sudden disaster strikes a company, making it necessary to close, then plainly that would be capable of being a special circumstance, and that is so whether the disaster is physical or financial. However, where the insolvency is due to a gradual running down of a company, the Tribunal may be entitled to conclude that there are no special circumstances. In the **Bakers Union** case the company was in financial difficulties and required approximately £100,000 to meet its obligations. Because of an adverse report on its affairs, a crucial loan was refused. The last hope that some of the company's shops might be sold off, proved to be ill-founded and redundancy notices were sent out. The Court of Appeal upheld the Tribunal's finding that these facts disclosed no special circumstances.

33 In **Industrial Chemicals Limited v Reeks EAT0076/04** the employer was not permitted to rely on a special circumstances defence where the reason for redundancy dismissals was the loss of a large contract for the supply of a particular chemical which was produced at a plant by a workforce of 61 employees. The decision to withdraw the chemical contract was made on 7 August and the workforce was informed on 15 August that production of the

chemical would have to stop on 16 August. The Tribunal (upheld by the EAT on appeal) found that the chronology of events in the employer's circumstances fell a long way short of the special circumstances envisaged by section 118(7).

34 In **Hamish Arner v ASTNS [1979] IRLR 24** the Employment Appeal Tribunal found that there were special circumstances where the company ran into financial difficulties and, having already received one government load, applied for another in December. The application was refused on 12 January, an alternative lender refused a loan on 3 February and the company went into receivership that day. The workforce was dismissed four days later without notice. The Employment Appeal Tribunal held that there were special circumstances where an application for a second government loan in those circumstances made it not reasonably practicable to provide the information required by Section 118(4), until the outcome of the application was known. In **USDAW v Lean Cut Bacon Limited [1981] IRLR 295** the Employment Appeal Tribunal followed the **Hamish Arner** approach and held that special circumstances existed where a withdrawal of a takeover offer by a third party led to a bank immediately placing an ailing company into receivership. Although receivership itself was not unusual in such circumstances, the financial deterioration was sufficiently sudden to be a special circumstance.

35 The Tribunal accepted the submissions of Ms Irvine to the effect that the circumstances in which the first respondent found itself between 15 July and 3 August did amount to "special circumstances". This was a highly unusual situation. The first respondent company was trading comfortably and profitably until the theft of £514,000. That sum represented an enormous proportion of the first respondent's turnover and an even larger proportion of its available cash flow. It represented the entire month's salary bill for the first respondent and its loss meant that the first respondent could not afford to pay any of its staff. That was a wholly unforeseeable event. The Tribunal found that it was entirely reasonable for the first respondent's officers to concentrate their immediate efforts on trying to recover the stolen money and to raise alternative funds to replace that stolen money, so that they could discharge all or at least some of the outstanding wage bill.

36 Mr Sprack's case for the claimants was that it must have become immediately apparent once the loss of the money was discovered, that those employees who had not been paid may fail to report for work, that as a result of that failure the first respondent's clients may seek to terminate their contracts with the first respondent and as a consequence seek to engage other providers to provide security cover. In those circumstances it would be foreseeable that some of the first respondent's employees would transfer to those new providers and this, submitted Mr Sprack, would trigger the obligation to inform and consult about a TUPE transfer.

37 The Tribunal was not persuaded by Mr Sprack's submissions. The Tribunal found that the loss of the £514,000 was a "calamitous" or "catastrophic" event, which was entirely unforeseen and indeed unforeseeable. The loss created a crisis within the first respondent's company, in respect of which it was entirely reasonable for them to try and locate the missing money, obtain funds from elsewhere and seek to preserve their contracts and employees. The Tribunal found that the TUPE transfer only became a possibility at the very earliest when

the first respondent received notice to terminate the Tursdale contract at 16.13 on 28 July. Even then, the first respondent cannot reasonably be described as having been aware of, "the fact that a transfer was to take place". The Tribunal found that the first respondent did not become aware of the fact that a transfer was going to take place, until they were provided with the second respondent's details at 12.23 on 29 July. The request from the second respondent to the first respondent for employee information was not received until 15.31 on 29 July. Even then, the first respondent was reasonably entitled to presume that there would be a 28 day notice period. That was in fact confirmed when the client provided the first respondent with a termination date of 28 August 2016, in its e-mail of 1 August 2016. It was not until 16.54 on 3 August that the client then terminated the Tursdale contract with immediate effect.

38 The first respondent provided the "employee liability information" to the second respondent on 2 August 2016. The Tribunal was satisfied that by then at the latest, the first respondent could reasonably have been aware of the fact that a transfer was to take place and that the date of the proposed transfer would be 3 August 2016.

39 The Tribunal found that these circumstances amounted to special circumstances which rendered it not reasonably practicable for the first respondent to comply with the requirement to inform and consult with the claimants. The first respondent was completely overwhelmed by the series of events between 15 July and 3 August. Those events made it not reasonably practicable to comply with the consultation obligation. For those reasons the claimants' complaints are not well-founded and are dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
4 January 2018