



EMPLOYMENT TRIBUNALS

Claimants: Mr G Smith
Mr D Graaskov
Mr A Habron
Mr B Hart
Ms E Jepson
Mr T Maskens
Ms N Merchant
Mr N Millard
Mr O Sheppard

Respondent: London Ashford Airport Limited

Heard at: Ashford

On: 7th and 8th February 2019 and in chambers on 26 April 2019

Before: Employment Judge Pritchard

Members: Mr P Adkins
Mr S Sheath

Representation
Claimants: Mr A Ross, counsel
Respondent: Mrs R Mohammed, solicitor

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

- 1 The Claimants' complaints that the Respondent failed to comply with Regulations 13 and 14 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 are well-founded.
- 2 The Respondent is ordered to pay each Claimant five weeks' pay to be calculated in accordance with the Regulation 15.

REASONS

1. The Claimants brought claims under Regulation 15 of the Transfer of Undertakings Regulations (Protection of Employment) Regulations 2006 (hereinafter referred to as the "Regulations") alleging failures on the

Respondent's part to inform and consult under Regulation 13 and failure to elect employee representatives under Regulations 13 and 14. In its ET3 Response Form, the Respondent resisted the entirety of the claims. However, at the hearing the Respondent conceded that it had not fully complied with the Regulations as described below.

2. Employment Judge Harrington held a preliminary hearing (case management) on 25 June 2018. Among other things, Employment Judge Harrington ordered that the case would be considered by a full Tribunal.
3. The Tribunal heard evidence from Claimants' witnesses: Dr Steve Jary (Prospect National Secretary for Aviation, Defence and Security); Timothy Ian Maskens (Senior Air Traffic Control Officer); Glenn Smith (Air Traffic Control Officer); and Anthony David Harbron (Air Traffic Control Engineer). The Tribunal also heard evidence from the Respondent's witness: Hani Mutlaq (General Manager). The Tribunal was provided with a bundle of documents to which the parties variously referred together with further documents produced during the course of the hearing. At the conclusion of the hearing the parties made oral submissions, Mr Ross expanding on his written submissions.
4. Because there was insufficient time within the time allocation for the Tribunal to deliberate and reach its decision, the Tribunal members subsequently met in chambers to do so.

Issues

5. It appeared to be common ground (the Tribunal heard no argument to the contrary) that:
 - 5.1. the Claimants were affected employees in relation to a relevant transfer upon the contracting out of Air Traffic Control Services at London Ashford Airport to SafeSkys Ltd;
 - 5.2. the Claimants as individuals had legal standing to bring their claims.
6. The Tribunal also notes the following:
 - 6.1. The Claimants conceded that since the Respondent did not envisage taking measures in connection with the transfer in relation to the affected employees, the duty to consult under Regulations 13(6) and (7) did not arise.
 - 6.2. Although, during the hearing, the Respondent appeared to be suggesting that Tim Maskens was the person whom the Respondent properly informed (presumably, although it was never made clear, on the basis that he was an appointed representative for the purposes of Regulation 13 (3)(b)(i)), the Respondent conceded in submissions that arrangements had not been made for the election of employee representatives. The Respondent nevertheless asked the Tribunal to consider the information that was provided to Tim Maskens and others, and the steps taken to provide it, in mitigation.
 - 6.3. At the commencement of the hearing the Respondent suggested it would

seek to rely on the partial exemption granted to micro-businesses (under Regulation 13A). However, the Respondent did not pursue this argument. That was sensible, not least because the evidence made it clear that the Respondent employed more than 10 employees.

7. At the final hearing therefore, the issues discussed at the preliminary hearing and recorded in the Case Management Order issued by Employment Judge Harrington had been narrowed and/or amended and can be described as follows:
 - 7.1. Whether the Respondent informed the Claimants of the matters set out in Regulation 13(2)(a), 13(2)(b) and 13(2)(d);
 - 7.2. To the extent that some information was provided, whether the Respondent did so long enough before the relevant transfer;
 - 7.3. If the Claimants were to succeed in their complaint, what is the appropriate compensation payable under Regulations 15 and 16?

Findings of fact

8. As its name suggests, the Respondent operates an airport. It is situated at Lydd in Kent.
9. The Claimants were members of the Respondent's air traffic control service as follows:

Tim Maskens	Senior Air Traffic Control Officer (SATCO)
Daniel Graaskov	Air Traffic Control Officer (ATCO)
Glen Smith	Air Traffic Control Officer (ATCO)
Elizabeth Jepsom	Air Traffic Control Officer (ATCO)
Nichola Merchant	Part-time Air Traffic Control Officer (ATCO)
Ben Hart	Air Traffic Services Assistant (ATSA)
Oliver Sheppard	Air Traffic Services Assistant (ATSA)
Nathan Millard	Air Traffic Services Assistant (ATSA)
Tony Harbron	Air Traffic Engineer (ATE)

10. Air traffic control is a highly regulated activity. The Civil Aviation Authority (CAA) regulates Air Service Navigation Providers (ANSP) / Air Traffic Control Units. ATCOs and ATEs are individually licensed by the CAA.
11. The Tribunal was told that it was not uncommon for air traffic control services to be contracted out to specialist providers. In May 2016, SafeSkys, an ANSP, undertook a review of the Respondent's air traffic control staffing at the airport and submitted a report. The key findings were:
 - The limited time the SATCO actually attends
 - The inefficient watch roster – no consistency in the number of staff attending daily and ad hoc (and hence wasteful) shift patterns used
 - The inefficient use of resources and the spare capacity that exists but is not exploited
 - The inefficient use of ATSAs

The Respondent was invited to outsource its air traffic control service to SafeSkys.

12. In September 2016, at the Respondent's request, SafeSkys provided the Respondent with its revised proposal for the delivery of air navigation services. Among other things, the proposal concluded that the Respondent's air traffic control service was overstuffed and that Safeskys could provide the required level of service with a reduction of full time staff. It was thought that staff reductions would generate substantial savings over a five-year period and benefit the Respondent which would no longer have responsibility for the day to day operation of air traffic control. Furthermore, Safeskys was of the view that it would be possible to roster sufficient staff to provide air traffic control services at night meaning that income-generating night flights could be reintroduced. Safeskys envisaged that "most" or "the majority" of the Respondent's air traffic control staff would transfer from the Respondent to Safeskys under the Regulations. A footnote in SafeSkys' proposal document made reference to anecdotal evidence that the SATCO may not be performing to required standards and if that proved to be the case SafeSkys reserved the right to change the SATCO and recruit a more customer focussed/responsive individual. In any event, SafeSkys proposed that the SATCO could work as an operational controller more frequently. SafeSkys confirmed that it would "comply with all TUPE legislation".
13. The Tribunal notes that at the time SafeSkys carried out its reviews, the Respondent's air traffic control included an ATCO on maternity leave and an ATSA in addition to the Claimants. However, they were no longer employed by the Respondent at the date of the transfer referred to below. The Respondent's Wildlife Control Officer (WCO), although part of the Respondent's air traffic services complement, was not included in the reviews and it was not proposed that he would transfer to SafeSkys under the Regulations.
14. SafeSkys' proposal was that it could provide the services for a fixed priced including salaries at £363,573 together with overheads of £63,140 and a fee for phase in for year one only of £4,160.
15. The Tribunal was shown a copy of a draft contract between SafeSkys and the Respondent for the provision of air traffic control services. The effective date of the contract is expressed as "the date of formal approval of the CAA". This document, containing various manuscript amendments to the fees to be charged by Safeskys, was signed by the Respondent on 22 February 2017 but the document was not signed by Safeskys.
16. The Tribunal was shown a second contract which was said to be the final version signed by both parties on 27 February 2017. The contract, which has a term of three years with extensions by mutual agreement, was to become effective on a "date to be agreed". The services to be provided under the contract are described as follows:

Air Traffic Control Services by a Manager Air Traffic Services, 3 full time Air Traffic Control Officers and one part time ATCO on a shift basis. In addition, initially there will be one Air Traffic Services Assistant and on part time Air

Traffic Engineer. We will retain one ATCA and during early 2017 we will look at recruiting an apprentice and training them to assist with administration duties in the tower.

17. The contract price included year one salaries of £277,701, overheads of £50,800, and a fee for phase in for one year only in the sum of £3,540.
18. On 13 September 2017, Glenn Smith was contacted by a former colleague who had heard rumours at a meeting concerning the outsourcing of the Respondent's air traffic control service to Safeskys; also, that an employee of Safeskys, Bruce Greenall, had announced that from the following week he would be the new SATCO at Lydd Airport. Glenn Smith, a member of Prospect, informed Steve Jary of what he had heard.
19. By email dated 16 October 2017, Hani Mutlaq informed Tim Maskens that the Respondent was in the process of outsourcing air traffic control to Safeskys, a CAA approved Air Navigation Service Provider. Tim Maskens was informed that the Respondent would hold two meetings with the members of air traffic control, on 18 and 19 October 2017, to introduce Safeskys and to brief the team of the change and the way forward. Hani Mutlaq instructed Tim Maskens to arrange for the members of the team to attend either one of the meetings at the most convenient time for them.
20. Tim Maskens replied by email the following day complaining that Hani Mutlaq had provided insufficient notice of the consultation meetings and provided no prior detailed information. Mr Maskens asked for the consultation to be postponed for a short while until proper timely arrangements could be made. Tim Maskens also said he was "surprised" and felt "humiliated" that, as the manager responsible for air traffic control and the Air Navigation Service Provider representative to the CAA, he had not been included in discussions.
21. In reply, Hani Mutlaq informed Tim Maskens that at this stage employees were being transferred under the Regulations and sought to assure him that CAA changes would be conducted fully in accordance with the regulatory requirements. Tim Maskens was told that he would be able to meet Directors of Safeskys who would be visiting in the next couple of days. Mr Mutlaq said he hoped to ensure a seamless transfer.
22. A number of email exchanges followed in which Tim Maskens informed Hani Mutlaq of the requirement to inform and consult in accordance with the Regulations. In an email dated 18 October 2017, Hani Mutlaq explained that the Respondent was "aiming to start the transfer by 1 November 2017".
23. In the event, the Claimants did not attend the meetings proposed by the Respondent.
24. By email and letter dated 20 October 2017, Steve Jary invited the Respondent to enter into a voluntary recognition agreement with the Prospect union. The Respondent promptly declined.
25. By email dated 20 October 2017, Tim Maskens informed the air traffic control

team of the Respondent's intentions to outsource the service.

26. By email dated 23 October 2017, the Respondent notified the affected employees in an attached letter as follows:

Dear all

By now you will know that Safeskys (An Air Partner Company) has been awarded the contract to manage Air Traffic Control Services at Lydd for a minimum of three years.

This letter is to introduce the company to you and hopefully allay any worries you may have about your new Air Navigation Service Provider (ANSP). This is a TUPE (Transfer of Undertaking {Protection of Employment}) transfer which means that your terms and conditions must be replicated by the incoming provider. If there are any differences between the documentation confirming your current terms and conditions and those which will shortly be supplied by Safeskys, please let Safeskys know. The TUPE transfer will take place on 1 November 2017.

Firstly, SafeSkys is an Air Traffic Control company wholly managed by UK CAA qualified ATCOs so they fully understand the issues of contracted services.

The key SafeSkys people who you may meet during the handover are:

*....
....*

Bruce Greenall ADV / ADI / APP /APS. ATCO for over 30 years. SafeSkys ATC Consultant who will assist with the changeover.

...., Head of Operations. Not an ATCO but will be your HR line manager

....

On SafeSkys taking over the management of the Air Traffic Control Services at Lydd they do not envisage any measures or changes to your terms and conditions following this transfer of the services to SafeSkys' team. Therefore there will be no consultation.

....

27. The email was sent to the air traffic control email address which was accessible by those on duty in the control tower and, Tony Harbron's case, to his work email address.
28. It is unlikely that Ben Hart would have seen the email at all since he was either on leave or off work at the time. Tony Harbron was on leave but saw the email when he accessed his work emails on 24 October 2017. It is unlikely that Nichola Merchant would have seen the email until she attended work on 27 October 2017. However, copies of the letters were also posted to the Claimants' home addresses.

29. Tim Maskens raised concerns that CAA compliance might be affected by the transfer although he thought that any such transfer should proceed without any major problems providing:

- *TUPE is fully complied with in every regard and*
- *The staff all agree to the transfer on the understanding that all the existing terms and conditions will be honoured, and*
- *All the relevant CAA procedures have been followed and approvals/Designation granted by the date of Transfer*

30. By way of an email sent to the control tower, Hani Mutlaq sought to assure the Claimants that:

... the agreement with SafeSkys does require that no changes to the level of staff and this is why TUPE is followed, if there will be any changes to the staff level then a consultation with the staff is a must but since I have confirmed to all that there will be no consultation therefore no changes to staff level or their contracts main terms and conditions.

You have all missed the chance to speak to SafeSkys directors during their last visit....

The CAA approval have [sic] not been granted yet and this is another condition with the agreement that the CAA approval is a must and as I said earlier TUPE is part of the approval and the CAA have confirmed that they will grant the approval provided that the level of staff will remain the same.

I will put you in touch with Bruce SafeSkys contract manager Bruce Greenall whom you have to meet and plan things ahead.

....

31. By email dated 31 October 2017, Bruce Greenall informed Tim Maskens:

As of the 1st November, you become an employee of SafeSkys. This is a simple TUPE transfer of pay and conditions and you will not notice a thing initially. Your pay will come from SafeSkys and not Lydd Airport.

I will be your SafeSkys contract manager so as of tomorrow, please refer all ATC matters through me and I will become the link between ATC and Hani Mutlaq and other Lydd Airport management. You will continue as the SATCO but I will be in effect Contract Manager ATS.

...

My forward plans are to validate my licence at Lydd....

32. Tim Maskens replied:

....

Yes, this has all been a bit of a rushed affair. I only had formal written notice on 26 October.

Yes, I am now fully aware of TUPE – and all of the terms and conditions which will automatically transfer to SafeSkys, which I presume you will know from the ELI and any due diligence performed as part of the contractual negotiations with Hani. I note you use the word ‘initially’ but actually TUPE offers significant protections for a considerable time after the Transfer.

Your second paragraph does not accord with the contents of my letter, in terms of reporting line or your own role and title. Are you saying that I will no longer represent ATC at Management and other meetings?

...

33. To which Bruce Greenall replied:

....

As contract manger, you report directly to me. I reserve the right to attend whatever meetings are beneficial in the running of the unit.

....

34. And added:

....

The TUPE transfer happens tomorrow but nothing ATC procedure wise will change.

Hani will remain the accountable manager and I shall report to him on staffing matters only.

You will remain the SATCO and your responsibilities and duties remain as they are now.

....

35. Tim Maskens remained concerned that CAA approval had not been granted and that the Respondent's contract to outsource the services should not be implemented until CAA approval had been granted to SafeSkys. Tim Maskens raised his concerns with the CAA. Andy Hughes of the CAA informed Tim Maskens, in terms, that the transfer could take place provided the Respondent remained the authorised ANSP, and the existing organisational structure, reporting lines, air traffic control processes and procedures remained the same. Tim Maskens understandably believed this to be a departure from the CAA's own CAP670 procedure which states, among other things:

Change of Provider of Air Traffic Control Services

...

The Aerodrome Licence and the Approval or Designation to provide ATS are granted by the CAA. In all cases an ANO Approval or Designation to provide ATC services must be granted by the CAA before operations by the new Provider can commence. ...

36. The transfer took place on 1 November 2017. The Claimants' employment transferred to Skyways.

37. Skyways was granted CAA approval on 14 March 2018.

Applicable law

38. Insofar as relevant to the issues to be determined, the Regulations provide as follows:

Duty to inform ...representatives

13 (1)

(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 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.

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

- (a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or
- (b) in any other case, whichever of the following employee representatives the employer chooses—
 - (i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this

regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;

- (ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

Election of employee representatives

14(1) The requirements for the election of employee representatives under regulation 13(3) are

Failure to inform or consult

15 (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 ...

(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 duty; and
- (b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

(3) If on a complaint under paragraph (1) a question arises as to whether or not an employee representative was an appropriate representative for the purposes of regulation 13, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employees.

(4) On a complaint under paragraph (1)(a) it shall be for the employer to show that the requirements in regulation 14 have been satisfied.

(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.

(6) In relation to any complaint under paragraph (1), a failure on the part of a person controlling (directly or indirectly) the employer to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

(7) ...

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

- (a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or
- (b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

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

Failure to inform or consult: supplemental

16 (1) ...

(2)

(3) "Appropriate compensation" in regulation 15 means such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

(4) Sections 220 to 228 of the 1996 Act shall apply for calculating the amount of a week's pay for any employee for the purposes of paragraph (3) and, for the purposes of that calculation, the calculation date shall be—

- (a) in the case of an employee who is dismissed by reason of redundancy....
- (b) in the case of an employee who is dismissed for any other reason, the effective date of termination (within the meaning of sections 95(1) and (2) and 97 of the 1996 Act) of his contract of employment;
- (c) in any other case, the date of the relevant transfer.

39. Mr Ross referred the Tribunal to a number of legal authorities as follows:

- 39.1. LLDY Alexandria Ltd (formerly Loch Lomond Distillery Co Ltd v Unite the Union EATS 0002/14 as authority for the proposition that the reasons for the transfer referred to in Regulation 13(2)(a) must include all the reasons for the transfer;
- 39.2. Institution of Professional Civil Servants v Secretary of State for Defence [1987] IRLR 373 as authority for the proposition that “measures” includes a step or arrangement and “envisages” means visualises or foresees;
- 39.3. Howard v Millrise [2005] ICR 435 as authority for the proposition that, in the absence of a trade union or existing employee representatives, a failure to invite affected employee to elect representatives is a failure to inform;
- 39.4. Cable Realisations Ltd v GMB Northern [2010] IRLR 42, EAT as authority for the proposition that Regulation 13(2) is designed to allow the representatives of affected employees to engage in informed consultation about a wide range of matters relating to a TUPE transfer, whether that consultation is entered into voluntarily or as a result of Regulation 13(6);
- 39.5. Sweetin v Coral Racing [2006] IRLR 252 as authority for the proposition that the nature of damages under Regulation 15 is punitive and that while the Tribunal is entitled to have regard to any loss sustained by the employees, the amount of the award should reflect the nature and extent of the employer’s default. This case mirrored the approach taken in the collective redundancy regime as considered in Susie Radin Ltd v GMB 2004 ICR 893 CA. In that case, it was held that the employer’s complete failure to consult should lead to the maximum award of 13 weeks’ pay.

40. Although 13 weeks’ pay may be the starting point, Tribunals should not approach the provision in a mechanical manner, particularly where some information has been provided and some consultation has taken place. An award is likely to be small where a failure is not deliberate; see for example: London Borough of Barnet v Unison EAT 0191/13.

Conclusion

Failure to elect representatives

41. The Tribunal first considers the alleged failure on the Respondent’s part to elect employee representatives. The Respondent did not recognise an independent trade union (despite Dr Jary’s best efforts) and there were no existing employee representatives appointed or elected by the affected employees having authority from those employees to receive information and to be consulted about the transfer on their behalf. Thus, the duty to elect representatives arose. The Respondent failed to take any steps to arrange elections in accordance with the detailed requirements of Regulation 14. This was a failure to consult;

Howard v Millrise.

42. Furthermore, by failing to arrange for the election of employee representatives, the Respondent thereby completely failed to comply with the duty to provide information under Regulation 13(2) because it requires such information to be provided to the appropriate representatives.

Failure to provide information

Fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it.

43. It is implicit within the wording of Regulation 13(5) that the required information must be provided in writing; the Tribunal takes into account only that information which was provided in writing.

44. The Respondent's letter of 23 October 2017 informed the Claimants of the fact of the transfer and the date upon which it was take place.

45. The reasons given for the transfer were limited to the fact that air traffic control services were to be outsourced to SafeSkys. The letter fails to explain the reasons for the outsourcing itself. It was clear from the Respondent's evidence that there were commercial reasons for outsourcing, those reasons being mainly financial in nature. This was not included in the written notification.

The legal, economic and social implications of the transfer for any affected employees

46. Apart from stating that the Claimants' terms and conditions must be replicated, the Respondent's letter of 23 October 2017 fails to address these aspects. Legal implications might include statutory continuity of employment and retention of statutory employment rights associated with it.

47. The economic implications might include such information about SafeSkys to have enabled the Claimants to assess its worth. The Respondent provided no such written information. Similarly, the Respondent provided no information about the Claimants pension entitlements after the transfer.

48. The Tribunal accepts the Claimants' submission that social implications might include the ongoing use of airport assets and facilities. The Respondent failed to provide any information concerning such social implications.

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

49. The question for the Tribunal is: did Mr Mutlaq foresee that SafeSkys would take steps in connection with the transfer?

50. Mr Mutlaq's evidence was that he informed Safeskys that he would not entertain any reduction in staff numbers following the transfer and, on that basis, he did not envisage that Safeskys would take any steps in relation to the

affected employees.

51. In the Tribunal's view, Mr Mutlaq, and hence the Respondent, did envisage that Safeskys would take measures in relation to the Claimants after the transfer. The final version of the contract clearly shows that only one ATSA would be retained; this was a reduction in staff numbers. It was also proposed at an early stage that shifts/working hours would have to change to accommodate proposed night flights and for duties to change. The Tribunal has also had regard to the reduction of salary costs shown in the final contract which appears to be indicative of an intention on the part of SafeSkys to reduce staff numbers. As submitted by the Claimants, the fact that redundancies must have been envisaged is entirely consistent with the relationship between the Respondent and SafeSkys.

52. The Respondent failed to provide this information.

53. Even if the Tribunal were to accept Mr Mutlaq's evidence that he did not envisage that SafeSkys would take measures, apart from stating that terms and conditions would not change, the Respondent in any event failed to inform the Claimants of this fact and is a failure to comply with relevant regulation.

Did the Respondent provide such information as it did long enough before the transfer to enable the Respondent to consult the appropriate representatives of any affected employees?

54. At the earliest, the Respondent provided the Claimants with such information as it did on 23 October 2017, just 10 days before the transfer. It appears that some of the Claimants would have received the information at a later date, when they received the information by post; or not at all in some cases where incorrect addresses had been used. This is against a background in which the Respondent and SafeSkys had been in discussions since at least May 2016; the contract itself signed in February 2017.

55. As the EAT held in LLDY Alexandria Ltd, in accordance with Cable Realisation Limited, an employer has a duty to provide information long enough before the transfer to allow consultation to take place. This does not mean that the information in Reg 13(2) has to be provided at a formative stage. The obligation is only to provide the information "long enough before" the transfer to allow consultation to take place. This includes voluntary consultation.

56. In the Tribunal's view, such information as was provided by the Respondent to the Claimants was not provided long enough before the transfer to allow consultation to be carried out. In this case, the Claimants were working in a highly regulated area. Consultation about the transfer would have necessarily involved discussion about the possible impact on the Claimants' individual licences and involved discussion about the CAA's position on its departure from its own CAP670 policy. Further, information should have been provided long enough before the transfer for consultation about the proposed measures; in the Tribunal's view, 10 days or less, in the circumstances of this case, was insufficient.

Compensation

57. When considering what appropriate compensation should be awarded, the Tribunal must consider what is just and equitable having regard to the seriousness of the failure of the employer to comply with his duty. This requires the Tribunal to consider the seriousness or gravity of the default and any mitigating circumstances.
58. Although the maximum award under Regulation 16(3) applies to any breach of Regulation 13, the duty to consult did not arise in this case.
59. In the Tribunal's view, it would be just and equitable for each Claimant to be awarded five weeks' pay. The Respondent's failures, set out above, were sufficiently serious for such an award to be made. The Tribunal has had in mind Mr Mutlaq's failure to inform the Claimants of the measures which, in the Tribunal's view, he must have envisaged the Respondent would take, irrespective of whether, in the event, such measures were implemented after the transfer. In mitigation, such information as was provided was insufficient.

Employment Judge Pritchard

Date: 26 April 2019