EMPLOYMENT TRIBUNALS

Claimant: Mr S Edwards

Respondents:
1. Sport Taekwondo UK Limited t/a GB Taekwondo
2. English Institute of Sport
3. Altius Healthcare Limited

Heard at: Manchester **On:** 21-25 May 2018
5 and 6 November 2018
28 January 2019
1 February 2019
(in Chambers)
16 May 2019
(in Chambers)

Before: Employment Judge Feeney
Mr D Wilson
Mr A J Gill

REPRESENTATION:

Claimant: Mr D Reade QC
1st Respondent: Mr M Budworth, Counsel
2nd Respondent: Ms N Siddall, Counsel
3rd Respondent: Mr J Boyd, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. There was TUPE transfer and service provision change to the first respondent.

2. The claimant's claim that he was automatically unfairly dismissed because of the transfer succeeds

3. The claimant's case that he was unfairly dismissed contrary to section 98(4) Employment Rights act 1996 succeeds

4. The claimant's claim that he was automatically unfairly dismissed because of protected disclosures under section 103A Employment Rights Act 1996 fails

5. The claimant's claim that he was automatically unfairly dismissed because of raising health and safety issues contrary to section 100(1)(a) and (e) fails and is dismissed

6. The claimant's claims that he suffered detriments due to making protected disclosures and/or on health and safety grounds fails and is dismissed

7. The claimant's claim that there was a failure to inform and consult as required by section 13 TUPE Regulations succeeds as against the first respondent

8. The claimant's claims of wrongful dismissal/for notice pay and for unpaid holiday pay succeed as against the first respondent.

REASONS

1. By a claim form dated 12 April 2017 the claimant brought a claim of unfair dismissal, automatic unfair dismissal related to a transfer of undertaking, dismissal for health and safety reasons, detriment due to making a protected disclosure, wrongful dismissal, failure to inform and consult in relation to the transfer and for holiday pay.

The Issues

2. The issues for the Tribunal to decide are:

TUPE Transfer

(1) Was there was there a service provision change/transfer of the activities carried on by the second respondent for the first respondent to the first respondent and/or the third respondent pursuant to regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), in particular:

(i) What are the relevant activities?

(ii) Did the claimant constitute an organised grouping of employees which had as its principal purpose the performance of the activities?

(iii) Did the activities (or a part thereof) cease to be carried out by the second respondent, and did they continue to be carried out by the first or third respondent on the first respondent's behalf?

(iv) Did the activities or part thereof remain fundamentally the same when being carried out by the first or third respondent?

(v) Did the first respondent intend the activities would be carried by it or the third respondent as a task of short-term duration?

(2) Was there a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to the first or third respondent where there is a transfer

of an economic which retains its identity pursuant to regulation 3(1)(a) TUPE?

(3) If yes to either (1) or (2), was the claimant assigned to the organised grouping of employees that is subject to the relevant transfer such that the employment of the claimant thereby transferred to the first or second respondent on or about 20 December 2016 by the operation of TUPE?

Protected Disclosure

(4) Did the claimant make a protected disclosure to the second respondent pursuant to section 43B(1) of the Employment Rights Act 1996 in or about April 2016 as alleged at paragraph 20 of the claim form and/or paragraph 39 by an email of 21 November 2016?

Dismissal

(5) By whom was the claimant dismissed on or about 20 December? Was it the first, second or third respondent?

(6) What was the reason, or if more than one reason the principal reason for the claimant's dismissal?

(7) Was the reason, or if more than one reason the principal reason for the claimant's dismissal the transfer identified at (1) or (2) if such a transfer occurred?

(8) If the sole or principal reason for the claimant's dismissal was the transfer, was that reason an ETO reason entailing changes in the workforce in accordance with regulation 2(2) of TUPE, and was the claimant's dismissal for that reason fair?

(9) Was the reason, or if more than one reason the principal reason for the claimant's dismissal, health and safety reasons contrary to section 100(1)(a) and/or section 100(1)(e) Employment Rights Act 1996 ("ERA")?

(10) Was the reason, of if more than one reason the principal reason for the claimant's dismissal the making of the protected disclosures alleged at paragraph 4 herein or either of them contrary to section 103A of ERA?

(11) Was the claimant unfairly dismissed contrary to sections 94-8 of ERA?

Detriment

(12) Did the first respondent refuse to acknowledge that TUPE applied so as to transfer the claimant's employment if it was so transferred?

(13) If the first respondent did refuse to acknowledge the transfer's transfer pursuant to TUPE was it thereby subjecting the claimant to a detriment on health and safety grounds contrary to section 44 of ERA and/or thereby subjecting the claimant to detriment on the ground that he had made a protected disclosure contrary to section 47B of ERA?

Breach of Contract

(14) Was the claimant wrongfully dismissed contrary to section 86 of ERA?

Information Consultation

(15) If there was a transfer as alleged at paragraph (1) or (2), was the claimant an employee affected by the transfer?

(16) If there was a transfer, did the respondents or any of them act in breach of their obligations under regulation 13 TUPE in respect of the claimant?

(17) If the second respondent failed to comply with its obligations as regards the claimant, was that failure caused by the first respondent or the third respondent's failure to provide the requisite information under regulation 13(4) TUPE so that special circumstances existed which made it not reasonably practicable for the second respondent to comply with its obligations?

(18) If is appropriate that the first or third respondent is ordered to compensate the claimant as regards any failures of information consultation in accordance with regulation 15(8)(b) TUPE?

Holiday Pay

(19) Is the claimant entitled to a payment in lieu in respect of untaken holiday entitlement at the date of the termination of his employment?

ACAS

(20) Did a relevant Code of Practice apply to the dismissal of the claimant?

(21) Should an award be uplifted because of the failure of the dismissing employer to comply with the ACAS Code of Practice?

(22) If so, to what extent?

Witnesses

3. The Tribunal heard from the following witnesses:

- Simon Edwards — Senior Physiotherapist (the claimant)
- Gary Hall — Performance Director (first respondent) GH
- Jayne Ellis — Chief Executive (first respondent) JE
- David Jones — Sports Physician (second respondent) Da J
- Victoria Griffin — Ex-employee of the second respondent VG
- Ian Horsley — North West Regional Physiotherapy Lead (second respondent) IH

- Jane Johnston — Head of HR (second respondent) JJ
- Simon Spencer — Head of Physiotherapy (second respondent) SS
- Doug Jones — Managing Director (third respondent) Do J

4. There was an agreed bundle but a number of documents were added including Board minutes from 16 December 2016 and an excel spreadsheet regarding issues the claimant was intending to deliver for the first respondent and the progress made in achieving them.

Credibility

5. We had no doubts in this case about the credibility of the claimant, however, the difficulty the claimant had was that he was only party to a certain amount of information and that he framed his interpretation of events based on his perception and beliefs. In relation to Mr Gary Hall we were addressed, particularly by R2 on his lack of credibility. We did have doubts about Mr Hall's credibility in respect of the TUPE issues, as his correspondence with R2 regarding the TUPE issues appeared entirely disingenuous however in relation to his belief that a clean break was needed in respect of R2's medical team we accept this was his genuine feeling if it was irrational in respect of the claimant and it was clear that he was hoping that R2 would resolve the problem of the claimant in order to avoid R1 having to accept a transfer of the claimant. We also accept that Doug Jones gave genuine evidence however he had an interest not in our view in avoiding the effects of TUPE but in emphasising the expertise which he and his organisation held and the improvements he felt they had achieved with the respondent 1.

Findings of Fact

The Tribunal's findings of fact are as follows:

6. The first respondent is the National Body responsible for promoting the sport of Taekwondo and organising Great British participants to attend international competitions such as the Olympics. The second respondent is a publicly funded Body tasked with supporting the needs of athletes in different sports. The second respondent was assisted in providing it services to the first respondent by MIHP - Manchester Institute of Health and Performance. Initially they were based there and used by agreement MIHPs equipment. The third respondent is a private company providing sports related services including physiotherapy. The claimant has been a physiotherapist all his working life. Previously he worked for a rugby club called Sale Sharks, and we understand that he knows Mr Doug Jones, MD of the third respondent, from his time at Sale Sharks.

7. In February 2014 the claimant applied for a job as Senior Physiotherapist with the second respondent. The second respondent had entered into a service agreement with the first respondent on 16 September 2013. The claimant was interviewed by the first and second respondents and he understood from the website where the job had been advertised that the intention was to work solely with the first respondent. This was also the discussion at the interview about this and this was also the reason why the Mr Hall, the first respondent's performance director,

attended the interview as they would need to be satisfied they wanted to work with the claimant.

8. The claimant was offered the job on 11 March 2014 for a role working as Senior Physiotherapist full-time with the first respondent. He began working for the second respondent on 1 May 2014. At the time he undertook treatment of athletes at the second respondent's offices at Sports City in Manchester as the first respondent did not have suitable facilities. He occasionally would attend an athlete at a venue if the injury was serious. At the time there were several other second respondent staff who provided physiotherapy support to the first respondent. Victoria Griffin, a full-time Level 2 physio; two full-time strength and conditioning coaches, RI and DF; DB, Lead Performance Analyst; and YR, Performance Analyst. The Head of Medicine was Dr Dave Jones (DaJ). He worked for the second respondent but provided services to various different sports and worked part-time undertaking approximately two days' work a week with GBT i.e. the first respondent.

9. The claimant's evidence which we accept was that during his work with the first respondent some of the junior athletes were uneasy about reporting injuries as they may have to be pulled from training and this would make them unpopular with their coaches. He also believed that coaches were telling them to carry on training when physio or medical staff had told them not to as they were running the risk of a serious injury. He said he had a conversation in June with Sarah Broadband (SB) the Programme Director for the first respondent, who stated it was a decision for the athlete and the coach and if they went against the physio or doctor's advice it was "their call".

10. In or around February 2015 GH asked the claimant whether he would be interested in being employed directly by the first respondent, but the claimant was happy where he was and was non-committal. The claimant points to this as a sign that Mr Hall was happy with his performance. Mr Hall communicated to the claimant his frustrations with DJ and VG within the second respondent as he felt they were inflexible and were holding the team back. He also made disparaging comments about IH who he felt interfered too much. The claimant felt uncomfortable but now says that he felt GH's comments were motivated because they were raising legitimate concerns about athlete welfare and high injury levels and GH felt they were obstructing him and his athletes. The claimant advised GH at the time that physios had professional obligations to uphold HCPC standards and had a general duty of care. The claimant said that GH would say that the second respondent was a necessary evil until he could get his own training venue. In the claimant's first appraisal in March 2015 with GH, DoJ and SB. He did raise the fact that he felt some athletes were not taking advice and were exposing themselves to the risk of injury. At this point in time it was an amicable conversation and no major issues arose.

11. There was an incident in September 2015 when GH complained about VG to the second respondent, accusing her of gross misconduct regarding the treatment of an athlete with a ruptured ankle ligament. The advice had been she should not train and therefore when VG was asked to strap her ankle up so she could train VG wished to check the situation first. VG reiterated the advice but this resulted in an argument between GH and VG. However, the second respondent thought that VG had done the right thing. VG raised a grievance in October 2015 about this incident. The relationship between the medical team and GH became increasingly strained.

12. Concerns were passed on about athletes, including on 12 November 2015 DaJ emailed GH and Jayne Ellis (JE) regarding an athlete who following hip surgery they felt was being pushed to do more than he felt was appropriate in the accelerated rehabilitation plan against his and VG's advice.

13. In early November the first respondent advised the second respondent that they intended to restructure their medical support to move towards a one team approach. They proposed they would stop using the second respondent and would switch to an alternative service provider, namely Harris and Ross for physio and soft tissue and strength and conditioning services, and the doctor services would be provided by a 24/7 GP service. The first respondent was also due to move into new premises at "Ten Acres" in December 2015.

14. There were negotiations regarding the implications of this proposal between the first and second respondents, and the indications were that the first respondent wanted to keep the claimant and RI one of the strength and conciliatory coaches but not VG and DaJ. There were negotiations as to whether TUPE would apply to transfer them all to Harris and Ross or whether they might be redundant. The discussion between the 2nd respondent's employees was that they believed this was motivated by GH who wanted to oust certain members of EIS for having raised welfare issues, and DaJ felt it was because he had raised issues regarding welfare concerns with VG that R1 did not want them.

15. On the same day, 19 November, GH circulated an email notifying R2 of the restructure when the EIS people still thought TUPE was under negotiation, and GH served notice on the second respondent the same day to terminate the service position relating to the lead doctor role, (DJ), the strength and conditioning role (RI) and the second physio role (VG) but not the claimant.

16. The 2nd respondent's Head of Physiotherapy [IH] was preparing a report on what we will describe as safeguarding issues as a convenient shorthand and he asked the claimant by email on 24 November if he had anything to add to the claims that the first respondent had failed to protect the welfare of their athletes. The claimant did not contribute to the report. DJ, VG and IH did so and were intending to present it to UK Sport. The claimant says that he hoped that because he had a good relationship with GH he would be able to improve the organisation from within.

17. The claimant indicated he would be interested under this proposed restructure to take the Head of Physical Conditioning although he was concerned at where his medical advice would be coming from under the restructure as DaJ would not be transferring. The claimant accepted this position and emailed Jayne Ellis on 2 December to confirm. The first respondent agreed at this point it would be a TUPE transfer to Harris and Ross.

18. As a result of the concerns raised by DJ, VG and IH, Jeremy Beard (JB), the Chairman of the first respondent, was appointed to conduct an internal investigation into their reports, described in the tribunal as whistleblowing.

19. On or around 7 December the first respondent's National Training Centre at Ten Acres opened and the claimant was based there 100% of the time. He only treated first respondent athletes elsewhere on the rare occasion that he needed specialist equipment which was not available at Ten Acres he used MIHP. VG did not join the claimant at Ten Acres; she was redeployed to work out of the

Manchester Institute of Health and Performance (MIHP) by the second respondent and therefore did not carry out any work for the first respondent. DaJ was in a similar position, although he was available at MIHP he did not attend Ten Acres.

20. In late January 2016 the first respondent withdrew their notice to the second respondent and stated they would continue to use them for physiotherapy services and would no longer continue with the proposal to use Harris and Ross. It appears that UK Sport had told GH that he could not change the provider at that point in time because the Olympics were so near, he would have to wait until after the Olympics.

21. The support being provided by the second respondent to the first respondent was set out in a work schedule which stated that the claimant to continue working for EIS but based full-time for the first respondent at Ten Acres in the post of Leader for Physical Conditioning and Rehabilitation. Further physio support was going to be provided by other EIS colleagues, Morag Sheridan and Rachel Carter. DaJ was still to be used as the doctor. It was agreed on 2 February that Jayne Ellis (JE) from the first respondent would line manage the claimant and his other colleagues and would coordinate with EIS Technical Leads about appraisals, so there would be a dual management.

22. In respect of the whistle-blowing investigation a separate independent review was set up into working practices within the first respondent, the claimant did not see this report until these proceedings but cast doubt on its independence as the chair was a partner at the law firm long associated with the first respondent.

23. The claimant was asked in March 2016 to provide some case studies relating to hip injuries sustained. The claimant said at the time he did not realise it was for the independent review but he provided as much information as he could, given that he was extremely busy in the run-up to the Olympics. He provided three case studies and was asked for more information by email from Jayne Ellis but then was told that he did not need to provide this.

24. A safeguarding report was made by David Jones in March 2016 regarding an athlete who was in hip pain who they felt was being asked to train at too high a level, and this had been supported by a consultant hip surgeon's (Professor F) advice. The claimant says after this GH wanted to use a different hip surgeon and stated that second opinions should be sought where Professor F was involved. The claimant points this out to highlight that GH did not want such issues exposed but GH says it was nothing to do with the safeguarding report but that he was losing faith in the surgeon who he felt resorted to surgery too much and that the surgery often failed to resolve the problem with the injury reoccurring. Therefore, he took advice from a doctor from a professional premier league football Club. Following this change there has been a marked reduction in hip injuries. We accept this explanation and there was evidence of hip injuries reducing.

25. The claimant had a further appraisal on 19 April 2016. There was a negative comment from a coach the claimant believed was disgruntled because the claimant had advised one of the top athletes that he was not fit to train. The claimant felt he was working in difficult circumstances because he had introduced a daily meeting to discuss injuries but the coaches were reluctant to attend. He tried to use this meeting to update on injuries and advise who needed 'an eye kept on them'. He also did not have access on site to a doctor. He continued to refer to DaJ but he was at MIHP.

26. On 19 April 2016 the claimant reported to GH a female athlete who had been kicked in the nose and felt that she was stunned and possibly concussed **(Athlete A)**. The claimant undertook a SCAT test, (a sports concussion test), and the athlete failed against ten symptoms: she was dizzy, felt sick, her eyes were in separate orbits and she was confused, so the claimant arranged an urgent referral with a doctor at MIHP and a diagnosis of concussion was confirmed.

27. An email stated that a follow-up assessment should take place the next day on 20 April at MIHP with Dr Jim Kerr. GH's response on seeing the email was to seek a second opinion from an MHIP neurologist after Dr Kerr's assessment. The claimant believed that a diagnosis 24 hours after the incident was unreliable and pointless. The claimant's perception was that GH was reluctant to accept a conclusion diagnosis as this would mean the athlete could not train or compete.

28. The claimant was feeling under greater pressure as in the past DaJ had raised concerns about athletes but now the claimant would have to speak directly to GH about whether athletes should train or not dependent on their injuries. He felt prior to this that he had been out of the loop and the pressure was on DaJ. He felt that because it was now his responsibility that GH was becoming more uncomfortable with him.

29. A debate followed between the claimant, GH and another employee of the first respondent, PG, with GH and PG being sceptical about the test. GH was upset because the athlete could not fight, which might affect her future because she would not be able to compete at the German Open that coming weekend in April and therefore might not qualify for high profile events such as the Olympics. The claimant said that GH said to him if he [the claimant] "continued to send athletes suspected of concussion to the doctor or declared them as concussed then the coaches would stop bringing them to me for assessment".

30. The claimant was really shocked by this, which would be contrary to his professional HCPC duty to act in the athlete's best interest and he told GH this. He felt GH was prioritising performance over welfare. He said he had to follow EIS protocol and if the athlete was concussed she was concussed. He said to the claimant "why do you have to do these tests?" and said he was going to ring Mike Loosemore, a Boxing physician, to ask what they did in Boxing about concussion. While we accept the claimants' version of what was said we find GH was passionate about his sport and was trying to find a solution to a difficult problem.

31. The independent doctor who had assessed the athlete contacted the athlete's parents. The athlete's parents sent an email saying they understood the risk but they were going to go to the competition anyway under their own steam. JB asked GH about it and he said he was not aware of the father's intention. However, the claimant did not believe this as he believed GH was in contact with the parents. He felt GH was assisting the parents. whilst officially appearing to concur with the medical advice. However, we find this whilst this was the claimant's genuine belief there was no evidence to corroborate this and the claimant could only rely on his perception**.**

32. The claimant also raised the issue of baseline test which should be done every year so that there is a record against which an athlete can be judged when for e.g. they appear concussed as it provided a point of reference as to for e.g. how

good the athlete's memory was normally. We understand the principle but it was an issue between the claimant and R1 how to resolve this given these tests had not already been done.

33. When the claimant went to Germany with GH and other team members he felt GH was not as friendly with him, and GH and the athlete's father went off by themselves in the evening. The claimant told GH that she should not fight as she risked brain injury. GH complained about his interference. The claimant's colleague. RC, said she intended to advise the Judges of the concussion diagnosis if it looked like the athlete was going to fight, however the athlete withdrew from the competition the night before. The claimant felt this was the first time he had openly challenged GH in relation to an issue. However, emails were disclosed which showed that the family had said A would not be competing and that R1 had requested written confirmation of that at one point. Accordingly, although the claimant's perception was genuine we find that his perception was wrong.

34. In January 2016 the claimant had started to have more meetings with the first respondent about how the first respondent wanted things doing going forward. A spreadsheet was provided with the claimants aims and objectives, recording what he was doing to try and meet them and how well he was doing in meeting them.

35. On 14 April the claimant received a new communications policy from JE. The claimant fundamentally disagreed with the policy as he felt it would be breaching GMC, CSP and HCP regulations, and it was risking his own professional qualification and potentially criminal proceedings. He felt it was asking him to disclose to the first respondent medical information gathered in confidential consultations with the athletes.

36. An email from Jayne Ellis of 14 April stated that:

> "It is acknowledged that any person, athlete, patient has the right to control disclosure of their medical information and determine who has access to what information. It is in the best interest of an athlete to share information that could put them at risk during training and competition but they are not required to do so."

37. The policy required the medical professional or physiotherapist to gain permission on what the athlete would like to share with the coach and support team regarding their injury or illness. It said there should be no reference to pulling or removing the athlete from competition or training when discussing injury. The injury itself should be focussed on. If the athlete wanted to discuss it they should not do so, which would lead any discussions about that if the athlete gave permission for the information to be shared.

38. The claimant objected to part of the policy which required him to notify to the Performance Director an athlete who was being treated but withholding consent, which he though was potentially a breach of confidentiality as it would be possible to work out who that was. Other members of the second respondent were not happy with it and a number of drafts were produced. The claimant met with the second respondent and he and DaJ explained that they felt it breached confidentiality. By 22nd April the second respondent's Rod Jacques and Simon Spencer were content with the latest draft of the policy, however the claimant continued to be unhappy with the draft he had sight of at the time.

39. The claimant also attended a team building meeting with a Communications specialist and he explained why he felt it was a breach of confidentiality, a breach of GMC/HCPC rules and the duty to act in the best interests of his patients. The claimant felt GH became very incensed with him in this meeting but the claimant refused to budge even though RJ and SS of the second respondent had stated they were happy with the agreement, but RJ had advised the claimant he should not sign it if he was unhappy. The claimant believed that GH's treatment of him changed from this point onwards. The claimant relies on what he said at this meeting as a protected disclosure.

40. On 20 July the claimant attended a Polish athlete **(Athlete B)** who had travelled from Poland to assist the first respondent's team with the Olympics preparation. The claimant found him severely concussed and unconscious having been hit by a heavyweight athlete. Having applied tests he stated that he should not train until he had been symptom free for 24 hours and was concerned when he saw him training on 22 July at an intense level. He felt that the graduated return to play policy was being ignored and he raised his concerns with his coach and complained to JE. He said JE was "dismissive, shrugged her shoulders and did not attempt to stop the training session".

41. On the same day while the claimant was treating Athlete B he was approached by the strength and conditioning coach, RI, to assess another athlete, **Athlete C,** who had collapsed and lost consciousness while doing weights in the gym. The athlete, C, was not fully conscious. He was dazed and became aggressive towards the claimant, and the claimant believed he might be suffering from post-traumatic amnesia and called an ambulance. He was subsequently told by the coach that athlete C had taken a "ding" earlier in the day during a training session and they had been forced to stop, but it had not been passed to the claimant for medical assessment or to a doctor and the claimant asked why but had no answer. GH explained the coach had not seen the incident and the athlete presented as unaffected. The athlete was diagnosed with concussion at the hospital.

42. The claimant then said GH was angry about this and wanted a second opinion and said he would take him to see another doctor at the Head Injury Clinic in Alderley Edge. A second assessment took place which also confirmed concussion and referred the athlete to a neurosurgeon.

43. The second doctor rang the claimant to after the consultation to express his concern that GH had attended with the athlete, that the athlete had not spoken during the assessment and the doctor was concerned that duress was being placed on him, the doctor, to overturn the diagnosis and say there was no concussion. He confirmed the assessment by sending an email to GH and the claimant. GH was angry and shouted at the claimant, "I'm in the fucking business of winning medals. I don't want to know what's in that letter [letter from the doctor]. What are you fucking hoping to achieve by telling me?". GH said, "He has missed too much training already. What are Boxing doing? They must be doing something differently. They get punched in the head all the time". The claimant insisted on reading the letter from the doctor out to him and then left. The athlete was sent to a heart specialist and to another Neuro Specialist at MIHP. GH said this was because it was not apparent what had caused the blackout. In the end in our view the incident was dealt with properly.

44. The claimant attended Rio 2016 Olympics and the team were very successful, achieving three medals.

45. Regarding the independent review panel, the outcome of their report was dated 6 July 2016 although it is not clear when it was given to UK Sport. The claimant was not allowed to see the report. DJ was allowed to see a small part of it but he was not permitted to take it away and he was supervised whilst reading it. DJ and VG who had raised the concerns had not been interviewed by the panel, and the panel had decided that the concerns had been raised as retaliation for EIS having been given notice. DJ felt their concerns had been swept under the carpet by the report.

46. On 19 September the first respondent gave the second respondent three months' notice to terminate the provision of medical services which included the physiotherapy service the claimant provided. Notice was to expire on 19 December,

47. The decision was recorded in the Board minutes of 12 September which stated:

> "GH shared the proposed service provider plans which included the termination of medical service from EIS. GH stated that we would serve notice in the next week and put job advertisements out following this. GH stated that we would directly hire a physiotherapist and a sports rehabilitation therapist, both full-time, and a doctor two days a week. EIS would continue to provide the following services: strength and conditioning, performance analysis and performance lifestyle."

48. It was noted that as a result of ceasing services with the second respondent R1 would no longer have access to certain equipment at MIHP. GH emphasised that the medical team would truly become part of the first respondent as a result of the changes. There was a discussion about what would happen if there were no appointments made in time, and it was said:

> "GH stated that if we struggled to recruit then we will ensure that there is a temporary service put in place via MIHP. Given the current situation this would be better than delaying the termination process."

It said later on:

> "GH stated that he does not think Simon Edwards will re-apply for his job as it would mean leaving the EIS."

GH had no grounds for this opinion.

49. Jane Johnston the second respondents HR manager wrote to Jayne Ellis on 20 September stating:

> "I have passed a copy of the letter from GB TKD giving the EIS notice to end medical services from 19 December 2016. As you will recall from our discussions last November 2015, we are now required to explore with you whether 'TUPE' might apply to your ongoing service provision and we are particularly thinking about physiotherapy services. To help me to make this

> assessment it would be really helpful if you could let me know what TKD plans are beyond the 19 December in this regard and we can take it from there."

50. Around this time the claimant recalled a meeting with JE who advised him to see GH as notice had been given to R2. She said that he would have a while to make a decision and he understood she was suggesting he could stay with R2 or transfer to R1. (What did he say about it?). It did not have a clear recollection of this conversation

51. On 21 September however, the claimant met with GH who said that as R2 had been found to have committed serious medical malpractice things were going to change, the claimant mentioned he had spoken about a transfer with JE but GH said that was not appropriate given the independent reviews findings. He said it was nothing personal, he had done a good job but R1 needed to move on from R2.

52. Jayne Ellis emailed the second respondent on 21 September after his meeting with GH headed regarding Simon Edwards. It stated:

> "I just wanted to drop you a note to let you know that Gary spoke to Simon today regarding our future plans for medical service. Simon is quite upset about it and has left work today not in a great place. Please can one of you catch up with him to give him some support."

53. GH then wrote to Jane Johnston on 21 September. This stated:

> "As EIS will be aware, no doubt, the independent review panel was very critical of the medical service provided to GBT by the ES medical staff. It can be no surprise to you that GBT wishes to end that service and to start afresh. GBT remains contracted with EIS in respect of the provision of other staff. The least that EIS can do in the circumstances is to arrange for Simon Edwards to be transferred to a position elsewhere prior to 19 December. That would be the best for all concerned and would remove any uncertainty about the position. I have just explained this to Simon at this request and it is clear it would be in his best interests if you are able to confirm his continued employment by EIS without delay."

54. He did not answer her questions.

55. On 22 September R1 had approached MIHP to ask them to help find physio cover for three foreign tournaments and DoJ of R3 was asked if he could cover the Serbian open the French Open and Baku. However, it was clearly a blow to the claimant and we are surprised the claimant did not challenge the first respondent more about it at the time.

56. DoJ evidence was from taking part in the tournaments that all the athletes liked the claimant but felt he was spread too thinly.

57. On 29 September Jane Johnston sent an email to the claimant attaching the following letter that she had sent to Mr Hall:

> "…As you will be aware, both the EIS and you as the current recipient of services have an obligation under the TUPE Regulations 2014 to determine if the regulations apply to this service change provision. The EIS asserts that

> TUPE does apply given that you are continuing to require these services and have decided to take them in-house. Furthermore, you have progressed to advertise externally for the jobs that our practitioners currently deliver for GB TKD. To this end I would request GB TKD's written position taking account of the TUPE regulations in relation to this service provision change and that you confirm that TUPE does apply. This will then enable the two organisations to commence consultation meetings with our current employees and we will begin to share the employee liability information with you so that you can ensure you maintain the contractual obligations under the regulations."

58. Ms Johnston also confirmed to Mr Edwards that if TUPE did not apply and he did not manage to secure a suitable alternative with EIS, EIS would have to make him redundant.

59. On 29 September Ms Johnston also sent a letter to the claimant which was headed "Confirmation of Notice" and stated:

> "Further to the meeting held on Monday 26 September 2016 and our previous conversations I am now writing to confirm that EIS has now received formal notice in writing from GB TKD of their intention to cease the provision of medical and physio services from us from 19 December 2016. As a result of this news we have met and confirmed that EIS is seeking GB TKD's position with regard to TUPE and a potential transfer of you to them under the regulations. As soon as we have had a reply we will of course share this with you. If TUPE applies your employment would transfer across to GB TKD with effect from 20 December and there would be no redundancy situation. Should there be no TUPE transfer than unless between now and 19 December we are able to successfully redeploy you into another role then we will have no option but to reluctantly have to accept your role is redundant and you would leave on 19 December 2016…"
>
> R2 relied on this letter as the giving of notice if there was not a TUPE transfer to R1 or R3.

60. On 6 October 2016 Mr Hall replied:

> "I do not believe that TUPE applies as amongst other things the EIS staff are intermingled with other staff and there is no organised grouping. But even if it did:
>
> - I do not believe that TUPE would apply to the doctor as he is part-time and only provides limited hours to the GB programme.
>
> - VG has not worked for us for some time, is no longer employed by EIS so TUPE could not apply to her either.
>
> - I can see a possible argument in relation to Simon Edwards if he is still employed in the role when the contract terminates on 19 December, but in the unique circumstances which are recorded within the independent review report we ask that Simon is now transferred to another role within EIS to ensure that the question does not arise. It is not in the interests of EIS or Simon to have any argument/uncertainty or indeed publicity about this.

- GBT needs a fresh start and I ask you to work with me to ensure this happens."

61. Our understanding of this letter is that in fact Mr Hall, subject to the organised grouping point, accepts that Mr Edwards should TUPE but believes because of the difficulty between the two organisations, which he believes the claimant is tainted with, the claimant should not move to the first respondent's organisation. He does not suggest this was in any way an actual exemption to TUPE regulations such as an ETO reason but rather is appealing to the moral high ground.

62. There had been late disclosure of board minutes from 10 October 2016 which provided an update on the situation and records that the claimant had applied for three jobs within EIS. It was also recorded that the report was not particularly critical of the claimant rather DJ and VG.

63. Meanwhile the in-house jobs were advertised with a closing date of 17 October. The three jobs advertised were Performance Medical Practitioner, Lead Physiotherapist and Sports rehabilitation therapist. There was nothing in the job description for the physio role which indicated it would be any different from the role the claimant was undertaking.

64. In 6 November 2016 the claimant emailed Jane Johnston and said:

> "I've just had a text from Jayne Ellis saying I might want to consider working out of the MIHP for the next two days as they are interviewing but was up to me. Clearly this is for my job. I have taken legal advice over this now and my lawyer's opinion is very interesting. I have decided to go in as normal if only to show that I still believe it's my job. I hope that this also makes them feel uncomfortable."

65. Nigel Walker replied to this, saying:

> "I spoke to Gary Hall about this matter on Friday morning and we agreed he would not appoint to your role since TUPE applies. I know this situation is incredibly difficult for you at the moment but rest assured I am doing everything within my power to minimise the stress you are under…"

66. The claimant then complained that Jayne Ellis started to be more difficult with him, complaining about where he was on 11 November when he said he had made it clear that he was speaking at a conference in Salford. The claimant also said GH sent athletes to another physiotherapist. Further the claimant was expecting to go to international events including the Serbian and French open and the grand prix final in Baku. He was told he was not needed. It is now clear that DoJ was asked to cover these, ostensibly so that the athletes at home would still receive a service from the claimant. We find that this was part of a process of reducing R1's dependency on the claimant in anticipation of the end of the contract. In fact the claimant in his letter below recognises this.

67. On 21 November JJ wrote to Mr Hall saying, "We are now at the stage when we need to undertake consultation with Simon and yourself to discuss the TUPE transfer of Simon to GB TKD from 19 December", and that Mr Hall told her he would

get back to her with some dates. Again, at this point he seems to have agreed with Nigel Walker that he would not appoint to the role and to be agreeing with Jane Johnston that he would meet with her to discuss the TUPE transfer. The second respondent had assumed since 6 November that the claimant's transfer had been agreed by GH.

68. On 21 November 2016 the claimant wrote to Mr Hall as follows:

> "GB Taekwondo is not addressing the fact that TUPE will apply to transfer my employment to GBT once the contract with EIS comes to an end. I am aware my employer has already asserted that TUPE applies and I have taken some legal advice. What is particularly concerning to me is that despite being aware of the relevance of TUPE GBT is pressing on regardless and interviewing for my role of Lead Physio on its website (see attached). I refer to our meeting on 21 September where you told me TUPE doesn't apply because there was a finding in the whistle-blowing review which confirmed that EIS had committed serious medical malpractice. I was however told by you that whilst it wasn't me personally that it wasn't appropriate for me to TUPE across. You added that it wasn't personal and that actually you felt I'd done a good job and then went on to say that it was your decision not to use EIS and that as it was your organisation it needed to move away.
>
> I believe that this is a direct retaliation for the whistle-blowing being made and I am not prepared to lose a high-profile career with the country's top athletes in Taekwondo, a sport I'm 100% committed to, without understanding the basis on which you assert TUPE doesn't apply…My position is that TUPE applies and at the point at which the contract with EIS ends my rights are to transfer over to GBT on the same terms. If you disagree please confirm the basis on which you now do so. Please also provide confirmation by return you will suspend the ongoing recruitment exercise to appoint a new physio team until such time as this dispute is resolved.
>
> Also, I would like to add I find it extremely concerning that all of a sudden, I am not required to attend tournaments I have always attended with GBT and that you are suddenly appointing other suppliers of physio services. I believe this is a deliberate attempt by you to distance me from Taekwondo professionals."
>
> He also made a subject access request.
>
> The claimant relied on this communication as a protected disclosure in respect of failing to comply with a legal obligation re adhering to the TUPE regulations. He did not refer specifically to any previous whistleblowing by himself regarding the treatment of athletics.

69. Around the same time EIS were discussing a position with Judo in Walsall with the claimant. But ultimately he felt the commuting would be too much.

70. On 25 November 2016 Jane Johnston chased up Gary Hall for some dates and he said he would get back to her at the end of the week.

71. There was then an undated letter **(**probably Monday 28th November) from Mr Hall to Jane Johnston which stated:

> "I have considered the position over the weekend. Since we do not accept that there will be a transfer under TUPE as I have made clear throughout, and as it appears that EIS is likely to find Simon an alternative role anyway, there seems no point in having a meeting of the sort proposed, it would simply confuse the situation. I gave a brief summary of the legal position as advised to me by our solicitors in my letter of 29 October. I should also put you on notice I believe that Sport Taekwondo UK Limited will be entitled to claim against EIS under the NGB agreement for any loss caused by EIS failure to reallocate Simon on termination of the role at Sport Taekwondo.
>
> It is outrageous that you should seek to hold us over a barrel like this (and incidentally leave your employee to get increasingly desperate and angry) when Sport Taekwondo has acted entirely in accordance with its contract with you. The solution has always been and remains in your own hands. If you choose not to reallocate Simon that is a problem entirely of your own making.".

72. On 30 November 2016 the claimant recorded to Jane Johnston and Nigel Walker that an athlete had told him that the Programme Manager, Jayne Ellis, had told the athlete the new physio was not starting until February, that there will be no full-time cover in the interval, so he would have to use either the Scottish Institute of sport or the Intensive Rehabilitation Unit following an operation he was due to have in December/January.

73. Around the time of the Paris Open 25-27 November DoJ says that GH told him they had a preferred candidate for the in-house physio role who currently worked with a premiership football club, this provides some corroboration for GH's evidence regarding the Liverpool candidate. Subsequently DoJ sent GH proposals to act on a consultancy basis with his new recruits to help with injury prevention.

74. The first respondent in time responded to the claimant on 30 November 2016 regarding his data subject access request and the letter referred to above**.**

75. Jane Johnston replied on 1 December 2016 to Mr Hall's letter. She said:

> "EIS have made repeated attempts to engage fully with GBT on this issue. EIS have sought to better understand GBT's plans and whether this would give rise to TUPE applying since notice of termination was served. EIS has tried to progress matters in its letter to GBT dated 29 September 2016 in which it made clear its position on TUPE and sought your written position.
>
> We have received correspondence from GBT but at no point have you set out the legal basis for arguing that TUPE does not apply. Further, you have not complied with your legal obligation as transferee to provide EIS with the information if requires to fully discharge the information consultation obligations provided under TUPE. We therefore set out again in detail its position in respect of TUPE in the hope that GBT will engage fully with this issue moving forward.
>
> <u>Application of TUPE</u>
>
> As outlined above, the EIS have to date consistently asserted that TUPE applies in this instance. We do not propose to repeat the contents of our

> earlier correspondence of 20 and 29 September. Nonetheless we submit that TUPE will plainly apply to transfer the employment of Simon Edwards from EIS to GBT on or around 19 December.
>
> SE has been providing physiotherapy services to GBT on a full-time basis since 1 May 2014. He is deliberately organised by reference to GBT and as the principal and indeed sole purpose of providing physiotherapy service to GBT. These services were provided to GBT via EIS. GBT has exercised their contractual right to service notice on EIS and this contract will end on 19 December 2016. The physiotherapy services provided to GBT will plainly continue beyond this date, whether provided by another service provider or taken in-house by GBT."

76. Ms Johnston goes on to say that she believes that this is very clearly a TUPE situation under section 3(1)(b). She went on to ask Mr Hall why he has not provided his position in detail when he has advised he has received legal advice, and expressed surprise at his language using the words "outrageous" and "over a barrel". She urged him to set out a detailed explanation of the legal basis upon which he concluded TUPE did not apply. She intended to proceed on the basis that TUPE did apply. They also wanted to ensure that TUPE consultation took place, and for this they needed GBT's participation and GBT had initially indicated they would take part, but obviously since 28 November this was no longer the case.

77. She also pointed out that TUPE applies "irrespective of the desires of the party or the need for a clean break". Equally the "unique circumstances which are recorded within the independent review report" referred to in his letter of 6 October would not be of any relevance to the application or otherwise of TUPE. They were risking litigation from Simon Edwards in terms of failure to consult and unfair dismissal if they denied the application of TUPE. Ms Johnston also denied that under the NGB agreement there was any reference to GBT being able to pursue losses against EIS if they failed to re-allocate Simon Edwards within EIS.

78. The claimant's solicitors on 5 December sent GH a letter setting out their position on the TUPE transfer. In GH's reply the only matter of relevance was that he challenged Mr Edwards was an organised grouping of employees and he asked, "is there anyone else in this organised grouping, and if so who?". This seemed to display a fundamental misunderstanding of TUPE and the European case law which was surprising if he was taking legal advice, which he asserted he was doing. Accordingly we can only conclude that GH was playing for time and trying to pressurise R2 into finding a suitable position for the claimant.

79. Ms Johnston replied on 9 December. She responded to GH's allegation that they were raising matters late in the day by pointing out she had been raising the question with him since September. She stated:

> "I also note you have said you have taken legal advice in respect of this matter. However, I can only assume that the content of your letter does not reflect the legal advice you have taken and rather is a further re-statement of your views in this regard. I say this because many of the points set out in your letter of 7 December 2016 are, as a matter of law, plainly and simply inaccurate."

80. Ms Johnston then went on to discuss how a single person could be an organised grouping of employees. She then explained how TUPE "trumped the NGB services agreement as it was a statutory novation and happens as a matter of law" and pointed out that the force majeure provisions which he referred to in the NGB agreement were not engaged. She went on to say:

> "I had today hoped that the position adopted by GBT was the result of the lack of legal advice in respect of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and its application. You have now however had the full benefit of legal advice in this matter; legal advice which I submit is either wrong or has not been followed. EIS can only assume that GBT are determined to take a gamble and hope that Simon is redeployed by us. This gamble has been taken in complete disregard of GBT's obligation under TUPE and/or the wellbeing of Simon. This gamble may indeed pay off, however if it does not pay off and should Simon not find redeployment then EIS will rely upon the correspondence to date in support of the efforts it has taken to discharge its obligations under TUPE and to treat Simon in a fair and reasonable fashion."

81. Ms Johnston said that she would have suggested a conference call between the respective legal advisers but that now did not appear to be a possibility.

82. The first respondent's legal advisers then wrote to the claimant's solicitor on 9 December 2016 asking then to identify:

(1) What the economic entity was as defined in regulation 3(2), which they believed was transfer;

(2) What the organised grouping of employees was of which he was part and the reasons why they believed he was assigned to it; and

(3) The activities carried on by such an organised grouping.

They wanted a copy of his contract and details of everybody he had worked for other than GBT since May 2014. They refused to agree to his solicitor's request to undertake they would not employ anyone else in the role until the matter was resolved.

83. In relation to the continuing correspondence between R1 and R2 regarding the TUPE situation GH replied to Ms Johnston on 13 December 2016, saying:

> "I am aware that a single employee can constitute an organised grouping of employees for the purposes of TUPE and my letter did not suggest otherwise but asked why you were suggesting Simon was an organised grouping of employees and whether anyone else was in that grouping.
>
> Simply because an employee happens to work on a particular service or contract does not necessarily mean they are caught by TUPE. There still needs to be an organised grouping and the relevant person needs to be assigned to that grouping.

> I would also mention my understanding is that whilst with EIS Simon has worked with athletes other than GBT and has provided services to others via the centralised clinic EIS has at MHIP."

He requested a copy of the contract of employment again. We have to conclude that GH was shifting his ground in that as soon as one objection was pinned down he provided another.

84. On 12 December 2016 the claimant advised EIS that he would not be taking the Judo job in Walsall as it would be a commute of 100 miles a day.

85. On 14 December 20176 Jane Johnston sent another letter to GH. She stated that:

> "The activities in question are the provision of physiotherapy services to GBT. Simon was recruited specifically by the EIS In May 2014 to provide these services to GBT. Since this date Simon has been a full-time dedicated resource to GBT. In late 2015 he agreed to a new title with GBT of Lead of Physical Conditioning. In his role Simon travels with GBT and provides his services at competitions, both nationally and internationally. Outside of the competitions Simon is based at GBT's base at Ten Acres. The decision taken to assign Simon to GBT was clearly and deliberately taken by EIS. In the circumstances it is plain thus fulfils the test necessary for the application of TUPE and is plainly organised by reference to GBT.
>
> Your request for information in this regard is surprising given you are fully aware of the above and have full knowledge of Simon Edwards' activities for GBT. I do not consider it sustainable for GBT to continue to assert that Simon is not part of an organised grouping of employees for these purposes. The position adopted by GBT does not accord with the day-to-day reality of the situation and contradicts the position adopted previously by GBT.
>
> In this respect we refer you the role currently occupied by Simon, namely that of Lead of Physical Conditioning which came about as a result of specific changes that GBT requested. In this regard we refer to a meeting you attended on 12 November 2015 which identified the need for a new role of Lead of Physical Conditioning with a job description specified and recorded by GBT as 'develop, coordinate and lead a comprehensive TKD specific physical conditioning, rehabilitation and return to training programme for all athletes, case managing all injured athletes return to training pathway, gaining input for sports specialist and developing the most appropriate 'accelerated' return to training plan for each athlete'."

86. Ms Johnston also noted that:

> "Jayne Ellis explained that GBT are moving to a one team approach that regardless of the service provider sees practitioners fully seconded into GBT and line managed by Jayne Ellis."

87. She also noted that in November 2015 when GBT were also discussing TUPE in the context of bringing services in-house it was agreed that TUPE applied. JJ accepted there had been very rare occasions when Simon Edwards had seen a non GB Taekwondo athlete but his principal focus was the provision of physiotherapy

services to GBT and that had to be the sole purpose. She said that the contract of employment was confidential and was irrelevant to TUPE but Simon Edwards had agreed it could be disclosed and she sent it with the letter. She advised him that they were unable to transfer him to another job and that they believed TUPE applied.

88. GH replied on 16 December 2016 stating that he still did not agree that it was an organised grouping for the purpose of TUPE. He said:

> "This appears simply to be a case where an employee happens to work on a particular service, albeit for a significant amount of time, but this does not necessarily mean that they are caught by TUPE."

89. He did not go on to explain what he meant by that.

Relationship with R3

90. However, concurrently with some of these events the third respondent had through attending events (which he understood the second respondent could not cover) and speaking to the athletes, had become aware that the contract with EIS was coming to an end. It was GHs evidence that in late November he spoke with Doug Jones (DoJ) about the possibility of him working with the respondent on a consultancy basis. At this stage it was still proposed that an in-house physiotherapist would be recruited.

91. On 21 November Jayne Ellis had sent Doug Jones an email stating temporary cover for GB Taekwondo, and stated:

> "I just wanted to put something on your radar for you to think about. As you may know we are moving our physio and doctor service from the EIS to be centrally employed by GBT. We are well underway with this process and now have an idea of when these people will be in post and the timeframe we need to over between the end of our contract and the start of the new post.
>
> Given that our athletes have now got to know you a bit more I wondered if you have the time to work with the team over the month of January to cover the gap between the two contracts. We would be happy to book appointments into your clinic at the MHIP or to have you working her on a couple of mornings. We are flexible. Can you have a think about this. See if you are interested and if so what that package might look like. Don't worry if you have too much going on already."
>
> Clearly at this point an appointment had been made as otherwise she would not know when the person was likely to start i.e. what their notice period was.

92. This seemed to align with the claimant being told someone was going to start as the new physiotherapist in February.

93. On 1 December Jayne Ellis wrote again stating "great to hear you are keen on providing physio consultancy services to us", and she indicated a time span of 4 January to Friday 24 February.

94. On 1 December Mr Jones agreed the terms suggested.

95. On 9 and 10 December GH was in Baku with DoJ and advised him that the preferred candidate couldn't be appointed as he was too expensive and asked DoJ if he would take the in-house role, evidencing that this was still the intention. He said that he could provide support with the claimant as part of the team but GH said he couldn't as the claimant was taking them to court. DoJ also spoke to the claimant about it who was keen but wanted an apology from GH first. DoJ emailed a proposal on 9 December with the claimant as head physio but working for the third respondent and additional physio support. However, the cost was double R1's budget

96. On 9 December Mr Jones produced a more detailed proposal to deliver medical service to GBT for the 2017/18 season.

97. ON 10 December there was an email from GH to JE stating "this is what Doug has presented as an idea of the service he would like to provide. His costs are way off and he hasn't fully understood how we operate but I would like to talk it through with you…Doug would resolve a lot of our issue with physio provision".

98. Jayne Ellis was aware that Mr Jones was going to use the claimant to do some of the physiotherapy. She stated in an email of 10 December:

> "I am not sure if having Simon in the picture will work but I am willing to give this a try. My preference is always to start a clean slate and get the right people in place to build up to the games as this whole situation has caused too much stress on everyone over the last 16 months and has cost us dearly…you might say it cost us a gold medal. If everyone else agrees with this then I will obviously do my best to make it work."

99. At that point in time the proposal was too expensive. Mr Jones was asked to make it cheaper. In an email on 12 December GH says, "please can you provide your best price for this service as discussed we can assess progress and hours used/unused every couple of months to see what had been done and then agree any service provision amends …look forward to receiving your costs in due course"

100. At the end of an email on 12 December where new costs are proposed Mr Jones says:

> "Happy to look at the service uses monthly and get SLA agreement in place ASAP. I would like an annual rolling contract with a six-month notice period for either party. Happy to keep very low profile until the dust settles. I will chat to SE again today."
>
> He was intending to speak to the claimant because GH had indicated he did not want the claimant working on the contract. In evidence GH stated that 2 board members had expressed the same opinion but this was not minuted and was not In GH's witness statement. Accordingly, we do not accept this was the position.

101. On 13 December JE sent a draft contract to DoJ. At Schedule 1 it refers to a rolling 12-month contract and also refers to a review after three months. On 15 December GH emailed DoJ to say it could be signed off once the 'SE' position was known

102. In the course of the Tribunal Board minutes of 16 December were disclosed., It was extremely concerning that these had not been disclosed already particularly as they were important evidence of R1's thinking at the time and undermined to some extent the case the respondent was asserting. They were also redacted but in respect of the Performance Director's report, (i.e.GH) this is what was said:

> "GH advised that interviews had been conducted for new medical staff. ML had led the interview process for a new doctor…and Dr AL had been appointed as GB TKD's new doctor."

103. Five persons were interviewed for the Lead Physio role. The interview panel was formed by GH, JE, LH and ML.

> "A preferred candidate had been identified but had proved to be 'too expensive' and no appointment had been made at this time…GH advised that a temporary arrangement was in place with an independent contractor, Doug Jones (Altius) providing physio services to GB TKD. GH updated the Board on the position re outgoing EIS physio, Simon Edwards. EIS had been trying to redeploy Simon to no avail. His contract was due to expire on 19 December aligned to GB TKD's agreement for services with EIS."

104. There was then a redacted section included in this same section. We were not asked to consider whether the redaction was appropriate.

105. There was no overt reporting to the Board of the difficulties between EIS and the first respondent regarding whether Mr Edwards should TUPE transfer. Previously GH had told the board the claimant was unlikely to apply for the job, technically that was true as the claimant thought he should be TUPE transferred into it, but he wanted the job and GH gave the impression he did not. By December the position was that GH was relying on R2 to find the claimant another role so that the problem would go away, however this was not proving possible even if the claimant wanted to do that rather than TUPE transfer.

106. The other respondents and the claimant say it is highly suspect that no evidence was produced at all regarding who was interviewed for the lead physio role, who the preferred candidate was, why they proved to be too expensive (and why too expensive is in inverted commas) and why no appointment had been made of potentially a second choice. The respondent's evidence was that the preferred candidate was somebody from Liverpool FC who unsurprisingly required a salary in excess of what GBT could pay. This is supported by DoJ's evidence and as we found him a credible witness as to events we accept that this was the position. However, it was not clear why there was no second choice and of course GH offered the job to DoJ whilst in Baku so an inhouse role was still the preferred option.

107. In addition, the main point to be taken from the board minutes is that there was no overt abandoning of the plan to bring the role in house and the arrangement with the third respondent was clearly described as temporary. This has to be considered in the light of the two/three emails between GH, JE and DoJ around 12/13 December which suggest that the first respondent was looking at a more permanent arrangement with the third respondent. However, we note also that there was no mention in the correspondence with the second respondent of the first respondent changing its plans to bring the role in house. All the correspondence had proceeded on the basis of an inhouse role. In cross examination GH said because 'it

had come on very late' there was not enough time however we do not accept this it points more towards the change of direction not having been agreed.

108. In the light of the board minutes, the lack of any concluded agreement with DoJ and the correspondence with the second respondent we conclude that the plan was still to take the role in house. After all the one team approach had been very important to GH and R1. The email referring to the fact the agreement could be signed off of 15 December was not referred to in the minutes so that from a corporate governance point of view the respondent's approach had not changed.

109. In cross examination by R2 GH stated that there was an ad hoc service between 20 December 2016 and 3 January 2017 and further "it was never our intention to go to a new provider but we ended up doing that" and "the plan was to use MIHP to serve our needs and I think there was no one else available other than R3".

110. On 21 December JE emailed DoJ to discuss R3 seeing an athlete but she also says, "I know discussions are happening regarding a longer term plan for Altius to work with us ...but I wanted to know that the first few weeks of January are still OK for you to cover…"

Whilst this supports the fact that there was no long-term plan re R3 had been agreed it might suggest the in-house proposal was falling by the wayside if it were not for the board minutes. In any event this is now 21 December, after the point when if C was going to transfer he would have already done so and the option of using R3 on a more permanent basis would not have arisen.

111. There was then no further recorded communication until on 29 December 2016 Gary Hall wrote to Doug Jones stating:

> "Good to speak with your earlier and happy that a plan is coming together (also great to hear that Simon has found some work with you but will not be involved with GBT for the foreseeable)."

It was intended that there would be three physiotherapists: Mr Jones himself, Laura Robson, senior physiotherapist, and Tom Payne, junior physiotherapist, and Mr John Rochford, a rehabilitation therapist.

112. By 30 December it seemed to be more or less agreed and Gary Hall wrote to Jennifer Howe in the first respondent's finance department:

> "Hi Jen, just to confirm we have secured a new physio service by Altius and Doug Jones. The monthly cost will be £6,166.67 which is based on what we currently pay. This position shall be reviewed in March when we assess the overall service provided and make any adjustments needed

113. Returning to Mr Edwards' situation, he was made redundant by EIS, and EIS say that they undertook sufficient consultation to make this a fair redundancy if there was no TUPE transfer.

<u>Redundancy Consultation by the Second Respondent</u>

114. The second respondent relied on the following:

(1) On 29 September 2016 they gave notice to the claimant of the termination of his employment by way of redundancy. A clear date of notice of termination was given and the claimant accepted this as his leaving date. The also relied on consultation as follows:

(a) An email of 9 October 2016 indicating a meeting between the claimant and Jane Johnson. However, this was not a formal meeting to discuss the redundancy.

(b) An email exchange between Nigel Walker and the claimant on 6 November stating that Mr Hall had agreed not to appoint to his role because TUPE applied on 6 November 2016. Mr Walker stated he was happy to speak over the phone if he wanted.

(c) A catch-up meeting on 18 November between Jane Johnson and Simon Edwards.

(d) Similarly, a meeting on 23 November, described as a "catch-up".

(e) On 23 November Ms Johnson referred to the fact that the claimant was going to spend some time with judo on 14 December to see how things went. This was in relation to potential alternative work for the claimant; a judo post in Walsall.

(f) A further catch-up on 30 November.

(g) There was also a role in gymnastics which the claimant withdrew from on 14 November.

(2) The claimant decided on 12 December that Walsall was too far a commute for him.

115. In respect of the differences between the service offered by R2 and that by R3 we heard the following evidence.

Equipment Differences

116. As the first respondent argued that the service and particularly the equipment as used post the second respondent's involvement was different and that that is relevant obviously to the TUPE issues, we record the evidence given here from Jayne Ellis and Doug Jones:

(1) Jayne Ellis referred to a fully fitted out clinic provided by the first respondent to the third respondent. However, she herself noted that this in fact had been the case following the move to Ten Acres in respect of the second respondent.

(2) Regarding consumables, braces, injury supports and crutches; an ultrasound machine and arrangements for its use and development; a zero gravity treadmill (i.e. Alter G); an isokinetics machine to analyse injury profiles, bio-mechanics, gait, etc.; hydrotherapy pool facilities and usage; an iCool hydrotherapy system and facilities for research and development aspects of treating para athletes none of the equipment

transferred to the first respondent when the second respondent's services were terminated. The situation now, she said, was that:

(i) Respondent 1 provides a clinic room for respondent 3 to provide consultations to athletes. This was provided to EIS [i.e. the second respondent] after the move to Ten Acres.

(ii) The first respondent has entered into separate arrangements with a third-party supplier, Ossur, in respect of the provisions of consumables, braces, injury support and crutches and the third respondent provide any additional kit.

(iii) Respondent 1 now buys its hydrotherapy, Alter G and isokinetics service from MIHP.

(iv) Respondent 3 provides the necessary facilities for research and development of para athletes and in fact one of the physiotherapists currently providing the services via the third respondent is now training to be a national classifier in respect of this.

(3) She said that the major difference was physiotherapy was provided as part of a medical package before by the second respondent and now that was not the case. Further, she said the differences with the third respondent were a multidisciplinary team meeting every Wednesday and she mentioned nothing else.

117. Doug Jones for the third respondent also gave evidence regarding the differences in activities. It was his case that the previous service was biased towards performance and was failing and the new service put athlete welfare first, that the second respondent had provided a reactive service whereas the third respondent was more proactive in order to prevent injuries rather than just treating injuries. He said the differences were:

<u>Management structure</u>

(i) Under the second respondent technical leadership was provided off site by the second respondent's management. While Jayne Ellis managed them in Ten Acres, she was in charge of the performance of the team.

(ii) The claimant's job was described as "lead of Physical Conditioning". Again, Mr Jones believed that a difference in terms of the second respondent concentrating on improving physical performance and the third respondent concentrating on athlete health and wellbeing.

(iii) In respect of management, Mr Jones himself was responsible for all aspects of technical management. [He seems to imply by a doctor as well – see paragraphs 83-85 of his witness statement].

<u>Resources</u>

(iv) Mr Jones stated that the third respondent had engaged expert consultants in Pilates, chiropody, podiatry, injury prevention warm-up, hydrotherapy, orthosis fitting, sports massage and biomechanical gait analysis consultant in addition to physiotherapy cover. He suggested that the second respondent only provided massage, and it was off site and rarely booked in. The third respondent offered massage on site ensuring athletes received regular massages.

(v) Extra hours are paid for by the first respondent and hours are fully flexible, increasing or decreasing depending on what is needed.

(vi) The services were provided consistently every week of the year, not 46 as committed by the second respondent. This enables specialists to still look after the athletes at home and a physiotherapist to travel to overseas tournaments separately.

(vii) The second respondent had not been able to provide cover for all tournaments and the cover back at the premises was limited.

Injury data recording and analysis

(viii) The third respondent did this twice a year on their standard 50-point plan whereas the second respondent only did this once a year and the data was not up-to-date enough as a result.

(ix) On a quarterly basis the third respondent reports on athlete injury incidence, trends and proposed strategies to deal with any issues arising. Again, because this was only done by the second respondent once a year and reported back after six months it was not up-to-date and not preventative enough.

(x) The third respondent can detect live trends and spikes in injury that can addressed immediately.

(xi) The data is recorded by their own medical team and not an organisation off site as with the second respondent.

Hip Injury Case Studies

(xii) The claimant had been asked to carry out some research into hip injuries, which he had done, but the result was not thorough enough and the third respondent tackled this by investigating what seemed to be causing the injuries and seeking good practice across UK Sport's medicine and relying on their more up-to-date information. They also encouraged earlier injury reporting so that the injury would not become chronic. They had the confidence of the athletes to do this and developed a specific warm-up to help with preventing hip injuries.

(xiii) Soft tissue therapy was increased (i.e. massage).

(xiv) Pilates also helped with this.

(xv) Mr Jones said there had not been one hip operation conducted on a GBT athlete since January 2016 as opposed to possibly five hip operations in 2016.

(xvi) Injuries were reported daily and a daily injury report using a traffic light system was compiled and was accessible by GBT coaches who got the report every day, and this enabled immediate treatment.

(xvii) There was also a weekly medical meeting to discuss any changes in athletes' injury status and action plans.

(xviii) There was a quarterly meeting between the third respondent and GBT CEO which enabled issues to be escalated early.

(xix) Mr Jones stated that the service was clearly much more wide-ranging and proactive than that provided by the second respondent through the claimant.

<u>Second respondents evidence on similarities/differences…</u>

(1) In relation to the differences between the provision by the second respondent and the third respondent, the claimant advised under cross examination that he undertook screening work when employed by the second respondent for the first respondent which GH broadly agreed with;

(2) There were daily meetings and improved return to training pathways;

(3) Specialist off-site equipment had been used by the second respondent in the past;

(4) The second respondent had instigated an annual or bi-annual report on athletes based on data captured from the second respondent's Ultra system. The Ultra system allowed the targeting of training to avoid provoking injury, and he had sought to undertake injury surveillance but that had been halted by GH.

118. Ian Horsley gave evidence on behalf of the second respondent to the effect that:

(1) Pilates had been available before provided by Victoria Griffin;

(2) The second respondent had access to bio-mechanicals and lower limb analysis by agreement with Salford University, including podiatry;

(3) Massage was available albeit off site;

(4) The second respondent had a longstanding screening exercise in place to locate injury trends which had led to, for example, the creation of bespoke padding;

(5) The second respondent recognised the need for increased athlete availability – that was one of its KPI's;

(6) There were separate methods of doing the same thing, comparing the third respondent's stated methodology to the second respondent's screening is screening, and that athletes were subject to a daily or weekly assessment.

119. Simon Spencer gave evidence that having considered R3's SLA he felt it was essentially the same as R2s. He suggested it was nonsense to suggest any physiotherapy service would only be reactive as it was obvious to any professional physiotherapist that prevention is always required. He had also reviewed the original proposal which include the claimant and in his view, it was almost identical. The service was described as 'sport specific interim management screening and performance related services general management of an elite sport medical service at the GBKT performance centre to individual elite athletes" It was in his opinion exactly the same as R2's provision. whilst of course he was appearing for R2 we found his evidence persuasive. He opined that all the elements of the job were intertwined and you could not emphasize one at the expense of another. He advised the claimant was undertaking a hip injury study but had been hampered by the build up to the Olympics, that he was looking expert advice from a R2 employee to analyse injury data that R2 had a biomechanics team that they had hydrotherapy equipment which did not need expertise to run, that R2's physios were trained in Pilates and could deliver it themselves. He accepted hip injury rates had gone down under R3 but the rate of injury was always unpredictable.

120. In respect of this last point it was evident that a different medical approach had led to an improvement. GH had given evidence to this effect. Whilst R1 sought to impugn SS's evidence as he could not know how R3 delivered the section he said he was able to give an analysis of the intention from the documentation.

Claimant's Evidence

121. The claimant's evidence on the pre-transfer activities was that he was pro-active and preventative, he pointed to the examples in his job description and the matters referencing the Excel spreadsheet. In respect of questions from the bench he described bespoke training regimes for athletes which he designed to avoid injury and he advised that he spoke to respondent 2's data analysis person on a daily basis to obtain data as regards all athletes.

The Law

A Transfer

122. Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 states that:

> "The transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another employer where there is a transfer of an economic entity which retains its identity."

123. The articulation of case law in **Cheesman v Brewer Contracts Ltd [2001]** addresses the definitions in regulation 3(1)(a). In relation to the definition of an economic entity, **Cheesman** says, referring to four cases:

"From those four cases we distil the following. We shall attempt, although it is not always a clear distinction, to define considerations between those going to whether there is an undertaking and those, if there is an undertaking, going to whether it has been transferred. The paragraph numbers we give are references to the numbering the IRLR reports of the ECJ's Judgments, thus:

(i) As to whether there is an undertaking there needs to be found a stable economic entity whose activity is not limited to performing one specific work's contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objection – **Sanchez Hidalgo [1999]**; **Allen [2000]** and **Vidal [1999]**. It has been held that the reference to one specific work's contract is to be restricted to a contract for building (see **Argyle Training [2000] EAT**);

(ii) In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible (**Vidal [1999]** paragraph 27; **Sanchez-Hidalgo [1999]** paragraph 26);

(iii) In certain sections such as cleaning and surveillance the assets are often reduced to the most basic and the activity is essentially based on manpower (**Sanchez-Hidalgo [1999]** paragraph 26);

(iv) An organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors or production, amount to an economic entity (**Vidal [1999]** paragraph 27; **Sanchez-Hidalgo [1999]** paragraph 26);

(v) An activity of itself is not an entity. The identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it (**Vidal** paragraph 30; **Sanchez-Hidalgo** paragraph 20 and **Allen** paragraph 27).

124. In relation to whether there has been a transfer, **Cheesman** says:

"(i) As to whether there in any relevant sense a transfer the decisive criteria for establishing the existence of a transfer is whether the entity in question retains its identity as indicated inter alia by the fact that its operation is actually continued or resumed;

(ii) In a labour intensive it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skill, of the employees specifically assigned by its predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity;

(iii) In considering whether the conditions for the existence of a transfer are met, it is necessary to consider all the factors characterising the

transaction, that each is a single factor and none is to be considered in isolation. However, whilst no authority so holds it may presumably not be an error of law to consider 'the decisive criteria' in (i) above in isolation; that surely is an aspect of it being decisive although, as one sees from the inter alia in (i) above, the decisive criteria is not itself said to depend on a single factor;

(iv) Among the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period, if any, in which they are suspended;

(v) In determining whether or not there has been a transfer account has to be taken inter alia of the type of undertaking or business in issue, the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried out;

(vi) Where an economic entity is able to function without any significant tangible or intangible assets the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets;

(vii) Even where assets are owned and required to run the undertaking, the fact that they do not pass does not preclude a transfer;

(viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, the mere fact does not justify the conclusion there has been a transfer;

(ix) More broadly the mere fact that the service provided by the old and new undertaking providing a contracted out service or the old and the new contract holder are similar does not justify the conclusion there has been a transfer or an economic entity between predecessor and successor;

(x) In the absence of any contractual link between the transferor and the transferee may be evidence that there has been no relevant transfer but is certainly not conclusive, as there is no need for any such direct contractual relationship;

(xi) When no employees are transferred the reasons why that is the case can be relevant as to whether or not there was a transfer (ECM [1999]);

(xii) The fact that work is performed continuously with no interruption or change in the manner or performance is a normal feature of a transfer of undertaking but there is no particular importance to be attached to a gap between the end of work by one subcontractor and the start of the successor (**Allen [2000]** paragraphs 32-33).

125. More generally the cases also show:

(1) The necessary factual appraisals to be made by the National Court (ECM and Allen);

(2) The directive applies where following the transfer there is a change in the natural person responsible for the carrying on of the business who by virtue of that fact incurs the obligation of an employer vis-a-vis the employees of the undertaking, regardless of whether or not the ownership of the undertaking is transferred;

(3) The aim of the directive is to ensure continuity of employment relationships within the economic entity irrespective of any change of ownership (**Allen** paragraph 23) – and domestic law illustrates how readily the courts will adopt a purposive construction to counter avoidance (see **Litster v 4th Dry Dock Company [1989]** regulation 3(1)(b) service provision change).

Service Provision Change

126. A transfer is also a transfer where it is a service provision change. The relevant provisions are:

(b) A service provision change, that is a situation in which –

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

(ii) activities cease to be carried out by the contractor on a client's behalf (whether or not those activities had previously been carried out by the client or 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) below are satisfied;

(2) …

(a) references in paragraph 1(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

(3) The conditions referred to in paragraph 1(b) are that:

(a) Immediately before the service provision change:

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the

carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not wholly or mainly consist of the supply of goods for the client's use.

127. In **Enterprise v Connect-Up [2012] EAT** the EAT reviewed the authorities and provided the following analysis:

(1) The prospective SPC in this case arises under 3(b)(ii), that is where 'activities' ceased to be carried on by a contractor (here, Enterprise) on a client (LCC) behalf and are carried on instead by a subsequent contractor (Connect).

(2) The expressed activity is not defined in the regulations, thus the first task for the Employment Tribunal is to identify the relevant activities carried out by the original contractor. That was the issue on appeal in OCS where the appellant's challenge to the activities identified by the Employment Tribunal failed.

(3) The next (critical) question for the present purposes is whether the activities carried on by the subsequent contractor after the relevant date (here 1 April 2009) are fundamentally or essentially the same as those carried on by the original contractor. Minor differences may be properly disregarded. This is essentially a question of fact and degree for the Employment Tribunal.

(4) Cases may arise (for example Clear Springs) where the division of services after the relevant date, known as fragmentation, amongst a number of different contractors means that the case falls outside the SPC regime as explained in **Kimberley** (paragraph 35).

(5) Even where the activities remain essentially the same before and after the putative transfer date as performance by the original and subsequent contractors, an SPC will only take place if the following conditions are satisfied:

(i) There is an organised grouping of employees in Great Britain which has as its principal the carrying out of activities concerned on behalf of the client;

(ii) The client intends that the transferee post SPC will not carry out the activities in connection with a single event of short-term duration;

(iii) The activities are not wholly or mainly the supply of goods rather than services for the client's use.

(6) Finally, by regulation 4(1) the Employment Tribunal must decide whether each claimant was assigned to the organised grouping of employees.

128. In **Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust UKEAT [2016]** the EAT rejected an argument that the fragmentation of service meant that TUPE could not apply:

> "Instead regulation 3(1)(b)(ii) identifies an SPC as a situation in which 'activities' cease to be carried out by the outgoing provider and are carried out instead by another person. The word 'activities' is not defined and nor is it qualified in any way by words that could have been used to qualify it, for example the provision could have said 'the activities' or 'all the activities' or 'the principal activities'. There is nothing in the regulation that expressly requires that the relevant activities should constitute all of the activities carried out by the outgoing contractor. Nor in my judgment is there any justification for substituting or equating the word 'activities' with the word 'service'. That could have been done but it was not. It seems to me to the fact the service that is subject to the SPC can comprise activities connotes that the relevant activities in a particular case may be a subset of the whole of the activities carried out by the transferor, as Ms Tether submits. Mr Gorton's reliance on the absence of any express reference to part of an activity in contrast to the reference to part of an undertaking does not support his argument in the light of the wording of the regulations. Given that this regulation is framed by reference to 'activities' rather than 'service' it was unnecessary to provide expressly that there can be an SPC in relation to part only. Since 'activities' is undefined there is nothing in principle to prevent some only of the activities that form part of the service from being considered in the context of an SPC.
>
> As the regulations and authorities to which I have been referred and some of which I have referred to above make clear, the first question for a Tribunal in every SPC case is whether the activities that cease to be carried out by the outgoing person and are carried out instead by the incoming person after the relevant date are fundamentally or essentially the same, and that question is a question of fact for the factfinding Tribunal. There is no need to read into any limitation such as Mr Gorton contends for because limiting conditions are expressly provided by the SPC regime itself. The limiting conditions are those identified at regulation 3(iii). Of particular relevance in this case and in most cases is the requirement that immediately before the relevant date there must be an organised grouping of employees that has as its principal purpose the carrying out of the activities concerned on behalf of the client. In other words, not only must the activities be fundamentally the same both before and after the putative transfer date but there must be an organised grouping of employees, and that organised grouping of employees must have as its principal purpose the carrying out of the activities that cease and are carried out instead of by the incoming person. The words of regulation 3(1)(b) and 3 have their ordinary straightforward meaning and their application to an individual case is one of fact and degree for the assessment of the factfinding Tribunal."

129. In addition, regulation 3(vi) states:

> "A relevant transfer –

(a) may be affected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transfers by the transferor."

Other cases to consider

130. In **Notts Healthcare NHS Trust v Hamshaw EAT [2011]** it was said that:

> "It is common ground that, as both domestic and the European case law demonstrate, the determination of whether a relevant transfer has occurred is a highly fact-sensitive judgment. Mr Brown nevertheless submits that these findings are flawed. Mr Brown's next argument is that the findings of fact concentrate on the difference between the old and the new arrangements rather than on the similarities between them. This is not, in my judgment, a valid criticism…it is legitimate in considering an argument that an economic entity has retained its identity to focus on the differences and see what they add up to. This is what the Judge did in the present case…As the Employment Judge observed in the present case, a mere change in the manner in which services are delivered does not preclude a determination that there has been a relevant transfer but I do not consider that *Porter* is or could be authority for the proposition that if the object of the undertaking (in this case the provision of care and support for vulnerable adults) remains the same, that is the decisive or crucial pointer towards the transfer.
>
> Service provision change is a wholly new statutory concept. It is not defined in terms of economic entity nor of other concepts which have developed under TUPE 1981 or by community decisions on the acquired rights directive prior to April 2006 when the new regulations took effect. The circumstances in which a service provision change is established are, in my judgment, comprehensively and clearly set out in regulation 3(1)(b) itself and regulation 3(3). In contrast to the words used to define 'transfer' in TUPE 1981, the new provisions appear to be straightforward and their application to the individual case, in my judgment, essentially one of fact.
>
> In this context there is, as I see it, no need for an Employment Tribunal to adopt a purposive constructive as suggested by Mr Cooper as opposed to a straightforward and common sense application of the relevant statutory words to the individual circumstances before them, but equally and for the same reason there is no need for a judicially prescribed multifactorial approach as advanced by Mr Bourne such as that which has necessarily arisen in order to enable the Tribunal to adjudge whether there was a stable economic entity which retained its identity after what was said to be a transfer falling within what is now regulation 3(1)(a)."

131. The first respondent relied on **OCS Group v Jones EAT [2009]** to explore the point of whether the economic entity or activities were the same. In this case BMW car plant at Cowley had food and beverage facilities at a handful of kiosks around the plant making up a catering service. After OCS lost the catering contract to MIS the plant still had a catering service but MIS operated it a reduced fashion. It closed the drinks bar and the cooked food offering was stopped. The kiosk sold sandwiches and salads, etc. instead. The EAT held that this was not just a change of menu, it

represented a substantial difference in the activities themselves. Jones, therefore, did not transfer.

Health and safety/PID Detriment

132. The claimant relied on the detriment of failing to acknowledge the application of TUPE for his section 44 and section 47B Employment Rights Act 1996 claims.

133. If the detriment is established it is for the respondent to establish the reason for the detriment. The claimant relied on section 48(2) Employment Rights Act 1996 which says that:

> "On a complaint under subsection (1), 1Z(a) or 1(b), it is for the employer to show the ground on which any act or deliberate failure to act was done."

134. Section 44 "Health and Safety

(1) An employee has the right not to be subjected to any detriment by any act or deliberate failure to act by his employer done on the ground that

…

(c) being an employee at a place where –

(i) there was no representative or safety committee; or

(ii) there was such a representative or safety committee but was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety

135. It was also contended that failure was a detriment contrary to section 47B of the Employment Rights Act 1996:

Section 47B – Protected Disclosures

"(1) A worker has a right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. A worker has the right not to be subjected to any detriment by any act or deliberate failure to act done by –

(a) By another worker of W's employer in the course of that other worker's employment; or

(b) By an agent of W's employer within the employer's authority on the ground that W has made a protected disclosure.

(2) Where a worker is subjected to detriment by anything done as mentioned in subsection (1)(a) that thing is treated as also done by the worker's employer.

(3) For the purposes of subsection (1)(b) it is immaterial whether the thing is done with the knowledge or approval of the worker's employer."

136. Further, in respect of the protected disclosure claim, section 43B describes disclosures qualifying for protection as follows:

"(1) In this part a 'qualifying disclosure' means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…"

137. The claimant relies on section 43B(b).

Unfair Dismissal/Automatically Unfair Dismissal

Automatically unfair dismissal

138. Section 100(1)(a) and section 100(1)(e) of the Employment Rights Act 1996 state as follows:

Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason, or if more than one the principal reason, for the dismissal is that:

(a) Having been designated by the employer to carry out activities in connection with preventing or reducing risk to health and safety at work the employee carried out or proposed to carry out any such activities;

(b) …

(c) …

(d) …

(e) Being an employee at a place where –

(i) there was no such representative or safety committee; or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety."

Protected disclosures

139. It is automatically unfair contrary to section 103A of the Employment Rights Act 1996 to dismiss someone for making a protected disclosure:

> "An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure."

Transfer related

140. Further, the claimant relied on regulation 7(1) of TUPE for an automatically unfair dismissal. This says:

> "Where either before or after a relevant transfer an employee of the transferor or transferee is dismissed that employee is to be treated for the purpose of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer."

141. This does not apply if there was an Economic technical or organisational reason entailing changes in the workforce (7(2) and (3))

142. The claimant relied on **Hare Wines vs Kaur EAT 2017** where the proximity of the dismissal to the transfer was a ground for accepting the transfer was the reason.

Section 98(4) Unfair Dismissal

143. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within Section 98(2) "Some other substantial reason" is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

> "A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee."

144. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

> "The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

145. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982]** states that the function of the Tribunal:

> "…is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

146. The Tribunal must not substitute its own view for the range of reasonable responses test.

147. In addition, the employer must follow a fair procedure before deciding to dismiss taking the ACAS Code of Practice and any procedures of its own into account

Information Consultation – Regulation 13

148. Regulation 13 of the Transfer of Undertaking (Protection of Employment) Regulations 2006 says:

> Duty to inform and consult representatives
>
> "(1) In this regulation and regulations 13A, 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 resource of 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 employee 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 if 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 or regulation 4 or, if he envisages that no measures will be so taken, that fact."

149. Regulation 14 sets out the requirements for employee representatives to be elected for the purposes of regulation 13.

150. Regulation 15(1) states:

> "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 the employees who are affected employees;
>
> (b) In the case of any other failure relating to the employee representatives by any of the employee representatives to who the failure related;
>
> (c) In the case of a failure relating to representatives of a trade union by the trade union; and
>
> (d) In any other case by any of its employees who are affected employees.

151. Section 15(4) states:

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

152. The second respondent relied on the provision of regulation 15(4)(v):

> "On a complaint against the 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 the 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."

Breach of Contract

153. The claimant claims under section 86 of the Employment Rights Act 1996 that he was wrongfully dismissed. This establishes his statutory right to notice pay where a contract is terminated depending on length of service. It is the claimant's case that the second respondent failed to give him notice and that the letter of 29 September was not the giving of notice. This claim is made under the Tribunals contract jurisdiction.

Holiday Pay

154. The claimant was entitled to holiday pay in respect of untaken holiday entitlement as at the date of the termination of his employment, but no such payment has been made with the second respondent saying this was either the first respondent's or the third respondent's responsibility, the first and third respondents stating that it was the second respondent's responsibility as there was no TUPE transfer.

ACAS Code of Practice

155. The ACAS code of practice on disciplinary and grievance procedures sets out a number of principles to be applied when handling disciplinary and grievance situations in the workplace. It came into force in January 2015. Tribunals have the

power to adjust awards made in relevant cases by up to 25% for unreasonable failure to comply with any provision of the code. In this case we have decided that any uplift due to non-compliance with the code will be dealt with at the remedies hearing.

Submissions

156. This is a short summary of the parties' submissions which in some cases were extremely lengthy. More details or particular submissions will be referred to in the conclusions where relevant.

Claimant's Submissions

157. The claimant's submissions are as follows:

(1) The claimant's primary case is his employment transferred to the first respondent after midnight on 19 December, and by refusing to accept a transfer he was dismissed: The claimant relies on the fact that the claimant was an organised group of employees by virtue of being one person; that at the time the claimant's contract was terminated the respondent intended to take the job in-house; that the claimant's work was solely with the first respondent's athletes; that there was no permanent arrangement with the third respondent at the time of the transfer or even a temporary arrangement in place.

(2) The claimant's second case is that there was a transfer to the third respondent as a successive contractor on or around 29 December 2016: In respect of the third respondent, the original plan was that the claimant would be involved in providing the activities to the first respondent via the third respondent until the first respondent made it clear this was not acceptable, therefore the identity of the undertaking as integrated on-site physio was retained. It may have subsequently changed but at the time that was what was delivered from 2 January. In respect of regulation 3(1)(a) the claimant says that the claimant's activity of physiotherapy was transferred. The claimant was the only person engaged in the activity; the activity was not asset critical; the specialist assets at MIHP were used before and after the transfer; the job advertised as "in-house physiotherapist" was the same job the claimant was doing, and the only reason the claimant did not transfer was because Mr Hall would not accept this.

(3) If there was no transfer, liability rests with the second respondent, the claimant's original employer.

(4) In respect of regulation 3(1)(b) – service provision change: the claimant says that the fact that the service was fragmented, some of it being retained by the respondent, some of it intending to come in-house and actually the medical part coming in-house but the physio part then going out-house, does not prevent it being a service provision change and that the respondent recognised that a service could be part of a number of activities carried out. The activity was rehabilitative and preventative physiotherapy. On the date of the transfer that was the service which the

first respondent intended to bring in-house, the intention being a temporary service from the third respondent.

(5) Section 44 Employment Rights Act 1996 ("ERA") claim (health and safety detriment) and section 47B ERA claim (protective disclosures):

(a) In respect of health and safety, the claimant says that the decision to not TUPE transfer was as a result of the claimant raising health and safety concerns about injury to athletes in relation to athletes A, B and C.

(b) In relation to protected disclosures, the claimant relied on his objection to the communication policy and his email of 21 November. He relies on section 43(1)(b), failing to comply with a legal obligation. Both PIDs were in the public interest: one regarding the welfare of athletes and ethical obligations on patient confidentiality, and the second that a public funded national sporting body was refusing to comply with its legal obligations under TUPE due to activities of whistle-blowers.

(6) Dismissal – the claimant was automatically unfairly dismissed as the reason for his dismissal was either health and safety issues (section 100 (1)(a) or 100(1)(c) of the Employment Rights Act 1996), and regarding protected disclosures section 103A of the Employment Rights Act 1996. Thirdly, that the claimant was dismissed because of the transfer (regulation 7(1) TUPE), the proximity being the reason why the claimant says that TUPE was the reason for his dismissal.

(7) Information consultation –

(a) The first respondent, by refusing to acknowledge there was a transfer, failed to comply with regulation 13. The claimant was clearly an affected employee.

(b) The second respondent does not comply with the obligation to invite elected representatives.

(c) In respect of consultation, the claimant was not provided with any information. The second respondent say they failed to comply because of the first respondent's failure. The second respondent relies on provision 15(4): that it was the transferee's failure.

(8) Breach of Contract – The claimant submits the second respondent did not provide him with notice by their letter of the 29th as the letter was ambiguous.

(9) Holiday pay – the claimant was entitled to holiday pay: the question is who should pay it?

(10) Failure to apply the ACAS Code of Practice in relation to dismissals.

<u>Second Respondent's Closing Submissions</u>

158. The second respondent submits that:

(1) There was a TUPE transfer to the first respondent and adopts the arguments of the claimant, in particular they submit the relevant activities were the provision of physiotherapy services to the first respondent. This was the claimant's sole purpose and he formed an organised grouping undertaking these activities. It was accepted that the respondent's intention was to employ someone directly doing the same job as the claimant. The intention was simply to use the third respondent while an in-house physiotherapist was appointed. That was the position at the point of transfer.

(2) In the alternative the third respondent carried out the activities, with a ten day hiatus over the quiet Christmas period being of no consequence, and that those activities were fundamentally the same. JE could not explain the alleged differences between the provision of the second respondent and the third respondent, and that many of the alleged differences fell away on closer consideration.

(3) The second respondent also says that a 3(1)(a) transfer also occurred, the claimant being an economic entity that would have retained his identity but for the actions of the first respondent, and that the assets argument was weak as the claimant worked with the equipment at Ten Acres or with the equipment at MIHP which is the same as with the third respondent, and that the position would have been exactly the same had the claimant worked directly for the respondent after 19 December. DJ accepted that apart from access to a different pool and the use of a different optigate machine the assets were the same. The claimant was assigned to the undertaking which transferred.

(4) The second respondent supported the claimant's claim in respect of protected disclosures.

(5) Regarding unfair dismissal, if there was no transfer the claimant had been fairly redundant by the second respondent and relied on the matters related above.

(6) The second respondent gave proper notice by their letter of 29 September with termination to take place on 19 December. It was accepted that the notice given was ten days short.

(7) In respect of regulation 13, the second respondent submits that they provided the claimant with all the information available. They could not say what the measures proposed to be taken by the first respondent were as they refused to detail this on the basis that TUPE did not apply. The claimant accepted that the second respondent had contacted the first respondent at the earliest opportunity to attempt to obtain this information and continued to do so. They accepted that no employee representatives were elected but at the time the claimant did not object and as full a consultation as possible took place. No prejudice arose and nothing would have been achieved by the involvement of a representative. If there was a material breach it was de minimis. The second respondent also relied on section 15(8)(b).

(8) Regarding holiday pay, the second respondent accepted that if there was no transfer they would be liable for the same.

(9) Regarding the ACAS Code, the second respondent submitted none applied.

(10) The third respondent submitted that their role was that of a task of short-term duration. The second respondent submitted that was incorrect and it was the clear intention by the end of December that the service would continue long-term. The possibility of termination in March was highly hypothetical and the intention in March was simply to do a review to see whether any improvements were needed.

First Respondent's Submissions

159. The first respondent submitted that:

(1) The claimant had referred to a lot of material which was irrelevant to the issues, in particular what the protagonists felt at the time was the position does not matter: what the protagonists felt previously in a similar situation does not matter: the construction of whether there was a transfer is a matter of fact and law.

(2) There was a significant difference in the type of service being provided after the alleged transfer, and the evidence of Mr Hall, Miss Ellis and Mr Jones showed that the service being provided was significantly different.

(3) The claimant was not an organised grouping of one.

(4) The idea of the third respondent providing a permanent solution was preferred to bring the job in-house by the date of the alleged transfer.

(5) The same points apply to whether it was a community transfer or a service provision change.

(6) If there was a transfer, the behaviour of EIS during their contract was an economic, technical or organisational reason for refusing a transfer.

(7) Regarding the claimant's protected disclosures, there was no public interest or reasonable belief in the public interest in the claimant's protected disclosures in relation to paragraph 20, nor could there be a reasonable belief in a breach of any legal obligation. There was no disclosure of information. Regarding paragraph 39, the email of 21 November was not a qualifying disclosure: there was no public interest, there was no disclosure of information, there was no reasonable belief tending to show a relevant failure.

(8) In relation to the section 100 claim, the first respondent had made all its decisions before the athlete (a)-(d) complaints, and any connection in any event is rejected.

(9) Regarding consultation etc., it is axiomatic that as the first respondent thought there was no TUPE transfer they felt under no obligation to provide any information or consultation.

Third Respondent's Submissions

160. The third respondent submitted that:

(1) The service provision change transfer activities description was far too general and in fact the service provided by the third respondent was significantly different.

(2) They accepted that the claimant was an organised grouping providing reactive performance physiotherapy services to the first respondent, but that thereafter the activities carried out by the third respondent for the first respondent were not the same as those carried out by the second respondent prior to 19 December 2016.

(3) At the point of the alleged transfer, from the evidence it appeared that the first respondent was still intending to take the role in-house on the one team approach. It appears that on 30 November the intention was to replace the claimant in February 2017 and use temporary service providers in the meantime. This was confirmed on 16 December 2016 by Jane Johnson's letter to the claimant (page 423), nor as the third party suggested as a replacement by Mr Hall by 16 December 2016; neither do the late disclosed Board minutes show that anything had changed, and it was clearly indicated the arrangement with the third respondent was intending to be temporary. On the day of the transfer no mention of the third respondent was made in the letter from the first respondent's solicitors to the claimant.

(4) It is also relevant that the third respondent was contacted through MIHP on 22 September to see whether they or someone else could provide physio cover for three tournaments, and that Jayne Ellis' email to Doug Jones of 21 November stated that she wanted to know whether the third respondent could cover the gap between the two contracts (i.e. the new in-house post and the end of the second respondent's contract). Discussions were still ongoing on 21 December although there was thought of having a longer-term plan for the third respondent to work with the first respondent, and a provisional agreement was reached on 30 December with work starting on 3 January, with the temporary agreement being reviewed after the first three months.

(5) In relation to differences between the third respondent's and the second respondent's service, the third respondent submitted:

(h) that the management structure was different;

(ii) that the third respondent provided its own resources in respect of biomedical gait analysis, chiropody and podiatry, Pilates. The service was provided 52 weeks of the year rather than 46. All tournaments were covered;

(iii) the third respondent's approach was much more proactive than the second respondent's approach. There was a much higher level of data analysis and it was provided more immediately.

(6) Regarding whether it was a task of short-term duration, it clearly was intended initially that the third respondent would just cover the "gap" and when an agreement was reached this was only in place until March when it would be reviewed.

(7) There was no "old fashion transfer" to the third respondent, no tangible assets transferred.

(8) The third respondent did not dismiss the claimant on 20 December.

(9) In relation to information and consultation, it is likely the claimant was an affected employee but the third respondent did not fail to provide information under regulation 13; it had no obligation to or alternatively

(10) Otherwise, the third respondent made no submissions.

Conclusions

Was there a service provision change to the first respondent?

161. We find there was a service provision change in this case from the second respondent to the first respondent. We find that as of the date of the end of the second respondent's contract, which was the date of the transfer (midnight on 19 December) the first respondent intended to take the matter in-house and the third respondent was at that point in time only going to provide limited cover until the in-house person started, which was envisaged to be February at this stage. At some point that scenario change, however at the point of transfer the in-house intention stood. If by simply refusing to accept this an employer can avoid the effect of TUPE it would undermine the purpose of the legislation.

162. In respect of a service provision change we find that the claimant was an organised grouping of one person, which is well established European law. He was providing a service after the other EIS members of staff stopped working for the respondent, the sole physiotherapy service provider at Ten Acres. The activities were the same as was evident from the details of the in house job advertised. There was in addition never any disagreement from GH in his correspondence about this rather he concentrated on the one person/organised grouping point and the whole service provided by R2. However it is the activities which are to be considered.

163. Whilst GH did raise an issue that the claimant treated people elsewhere there was no factual foundation to this at all.

164. The reason why we find a service provision change is as follows:

(1) There clearly was an intention to recruit an in-house physio.

(2) There was no suggestion this person's work would be any different from the claimant's. (based on Job advert, claimant's oral evidence, GH's cross examination)

(3) In an identical scenario two years earlier the first respondent had agreed there was a transfer in relation to the claimant, which is of probative value in assessing the similarity of the role (not in relation to whether legally there was a transfer).

(4) There was a conspicuous lack of evidence regarding if and when the intention changed from in-house to the third respondent providing the service. The first respondent argued in submissions it was before 19/20 December, however there was very little evidence of this**,** basically three emails around the 12 and 13 December considering a pitch from DoJ to engage his company to provide a more permanent service.

(5) However, considering all the other evidence we find at the relevant point in time the in-house proposal was still the Respondents adopted proposal we find any change occurred after that date. The evidence we have relied on is:

(a) the advertising of the role;

(b) the interviewing in November;

(c) Jayne Ellis' email to the third respondent on 21 November 2016 which says:

"As you may know we are moving our physio and doctor service from EIS to being centrally employed by GBT…We need to cover between the end of our contract and the start of these new posts…If you have the time to work with the team over the month of January to cover the gap between the two contracts…"

(d) that the third respondent offering to help with the in-house physio in addition to the cover;

(a) the hearsay evidence supported by Jayne Ellis' email that someone was due to start in February;

(b) the first respondent never advised the second respondent that their plans had changed prior to 19/20 December even though the correspondence was intense and proximate with the transfer.

(e) the fact that the 16 December Board minutes were disclosed late

(f) the contents of the 16 December board minutes.

165. In particular we rely on the board minutes which disclosed no change of direction. We also find that the non-disclosure of these board minutes is significant

as they undermined the position that there was a change in direction prior to the 20 December and therefore their non-disclosure was of benefit to the first respondent.

166. It is true to say that there was discussion about the third respondent providing a fuller service on 9 December which continued to 12 December, between GH and DoJ but this had not been officially agreed On 15 December there was still no agreement. Mr Jones had submitted a proposal which included Mr Edwards on a half-term post, to which on 15 December Gary Hall replied, "Thanks for this, Doug. Once we know the SE position we can look to discuss this further to get this signed off". There is no clarity as to what he meant by the SE position. There was no documentary evidence or email evidence it can only be that he was not going to agree to any proposal which included the claimant.

167. On 21 December Jayne Ellis emailed the third respondent stating:

> "I know discussions are happening regarding a longer-term plan for Altius but I just wanted to confirm the first few weeks of January are still ok for you to cover Monday, Wednesday, Friday."

168. Accordingly, it is clear there was no concluded decision at that point, and given that the Board meeting minutes said only it had not been possible to appoint 'at that time' they did not reflect a decision to change course from the in-house appointment and use R3.

169. The fact that the vacancy was not filled cannot be a determinative factor against the claimant as he should have been in that role as of 20 December, accordingly there never was a vacancy awaiting to be filled. If the vacancy had been filled the situation would be the same.

170. However it is also the case that had our factual finding been different and it was clear that the in house proposal had been abandoned by 19th December (however unappealing R1s conduct was in not advising R2 of this or at least of flagging it up ; and wasting time putting forward at times unsustainable arguments against a TUPE transfer when the job was coming in house), there would be no transfer to R1 (one might say their conduct in this scenario was blameworthy but they were not legally to blame) and the issue then becomes whether there was a transfer to R3

<u>Was there a "ordinary" transfer to the first respondent</u>?

171. Again, we find there was on the basis of the job being brought in-house at the point of the transfer. We find again the claimant was an organised grouping of one; he was employed immediately before the transfer; the activities were the same as the activities undertaken by the claimant when employed by the second respondent. We base this on the advert and job description and the claimant's evidence as before.

172. The main area of dispute in relation to an "ordinary" transfer was in relation to the assets, but it was clear that the intention of the first respondent at the time of the in-house job proposal was simply to rent additional facilities not available at Ten Acres from MIHP, which is exactly the same situation as before only the MIHP facilities were provided via the second respondent: in effect there was no change.

173. We have considered at length the authority relied on by the first respondent and the third respondent (OCS) regarding the provision of sandwiches. However, we factually detect no real change in the activities in this case in relation to the in-house scenario; the physiotherapy service being provided before the transfer was the same as that provided after the transfer. If the service provided by the third respondent was different, that was not a service which was provided even on an agreed temporary basis until 30 December, and therefore has no bearing on what the intention was on 20 December.

Transfer to third respondent

174. If we are wrong in relation to the transfer to the first respondent the following questions arise:

(1) Was there a transfer to the third respondent?

(2) Was is achieved by a series of transactions?

(3) If so, was it only for a task of short-term duration?

175. The initial issue in relation to whether there was a transfer to the third respondent was whether the activities were the same or whether they were different, and if they were different was this the result of a natural evolution over the course of the contract or was it always intended it would be different?

176. The claimant and the second respondent submitted the following in relation to those points.

177. The claimant's evidence established that his pre transfer was proactive and preventative giving examples such as his job description; his witness statement evidence; his response to questions from the bench referencing preventative therapy such as bespoke training regimes for the athletes to avoid injury; that he spoke to the data analysis person at the second respondent on a daily basis to obtain data as regards all athletes; the description of his role which was brought into effect even though there was no transfer to Harris & Ross.

178. GH's evidence was equivocal, saying there was more of an emphasis on proactive and preventative physiotherapy, but that there had always been a desire to get to that point through the claimant's time and it was an evolving process during the claimant's time under the second respondent; and accepted that the three threads of physio (reactive, rehabilitative and proactive) were all matters the claimant had been involved in to different degrees. He said the data collection was now more in depth with more collaboration since the third respondent had come on board. GH also stated that the reduction in hip injuries was brought about by the medical input of the new in-house doctor rather than by the third respondent. The data analysis model referred to by the third respondent was in fact work done by the second respondent's employees subcontracted in.

179. Jayne Ellis also confirmed that the first respondent was working to a more proactive approach when the claimant was in post and that many matters could not be progressed due to the need to be ready for the August Olympics. Her evidence did not exemplify a difference in activities, just a better performance and a better atmosphere.

180. We find that the activities were sufficient similar under the third respondent to support a service provision change. There were some differences but we find these were a natural progression of the service once the third respondent became more embedded with the first respondent, and that this would have naturally happened had the claimant undertaken this role as an in-house physiotherapist. This can be seen from Jayne Ellis' comment that the claimant was working towards this but the Olympics had intervened.

181. Accordingly, if we are wrong in our factual findings in relation to R1 we find that there was a transfer/service provision change to R3 as a result of series of transactions which begins with an interim arrangement from 20 December and moves on to a permanent arrangement on 30 December**.**

182. In relation to whether there was a business transfer to the third respondent, the main contention here was: were the assets different? The main differences seem to be that the first respondent had to provide its own consumables once the third respondent was in place, and that the third respondent had access to a different pool and the use of a different optigate machine, but as was made clear the second respondent had access to the same type of machinery. Ms Ellis's evidence that some equipment had to now be brought in from MHIP is a change without any difference, they used the same equipment via R2 but it was MHIP's equipment in any event.

183. Accordingly, these are differences of no consequence and there was, if we are wrong in respect of the first respondent, a transfer to the third respondent.

184. From 20th December 2016 to 3rd January 2017 we find R3 provided a temporary service however after that it was a permanent arrangement. DoJ's own email says he wanted a 12-month rolling contract with a review in March and we find it was only a review to improve the service if there were any problems, it would not discontinue the service if R1 were unhappy.

185. As a transfer can be affected by a series of transactions if there was no transfer to R1 there was a transfer to R3 on the basis of a verbal agreement with DoJ followed by an in-depth written agreement

Short term assignment

186. The original plan was that R3 would provide its services from 20 December to February, to coincide with the in-house appointment. However, if the in-house position had been abandoned contrary to our findings then we would find that from the middle of December there was an intention to use R3 permanently as soon as an agreement was reached and the 'SE' position was resolved. Therefore, by 20 December R3 was no longer being engaged for a short-term assignment only and they cannot take advantage of this exemption.

Detriment

What was the reason for the first respondent not accepting the claimant's transfer?

187. The first respondent stated that they wanted a clean break with the second respondent's team after their poor experience with the second respondent's team as reflected in the report. Whilst the claimant was not implicated in that report directly, they submitted they wanted to cut all ties with the second respondent. The other respondents, so far as they made submissions, suggested that this was not correct as there was no documentary evidence to support it.

188. The claimant relied on the following matters:

(1) The fact that Jayne Ellis had said she had no problem working with the claimant;

(2) The fact that the claimant was liked by the athletes and coaches (DJ's evidence);

(3) The fact that the claimant was not mentioned in the report at all;

(4) The fact that the Board minutes also acknowledged this;

(5) That GH suddenly in evidence said he had spoken to two Board members who had said they did not want him yet this was not reflected in any documentation, emails or Board minutes.

189. Having said that, the claimant's positive case relies on the respondent failing to transfer him because either they were unhappy with him raising health and safety concerns or because of two protected disclosures.

Protected Disclosures

190. Without deciding whether there were protected disclosures for the moment, we find that the respondent did not decide to not accept the transfer because of the two specific protected disclosures the claimant relies on, and we find this because the respondent already formed an intention not to transfer him. We find this because of the claimant's own documentation in the form of the letter he sent to the respondent on 21 November 2016 reflecting what Gary Hall had said to him. This said:

> "I refer to our meeting on 21 September where you told me that TUPE does not apply because there was a finding in the whistleblowing review which confirmed that EIS had committed serious medical malpractice. I was however told by you that whilst it was not me personally that it was not appropriate for me to TUPE across. You added that it wasn't personal and actually you felt I'd done a good job and then went on to say it was your decision not to use EIS and that as it was your organisation it needed to move away. I believe that this is direct retaliation for whistleblowing being made. I am not prepared to lose a high-profile career…"

191. That letter is evidence of what Mr Hall said to the claimant at the time, and this is consistent with the respondent's case on this matter.

192. Accordingly, it appears that the reason why the claimant was not transferring was because the respondent wanted a clean break from the second respondent's

whole team and that as far as it did relate to whistleblowing it related to DJ and VG actions not the claimant's relied on disclosures.

193. The claimant argues that the reason given is so irrational as to point to another reason namely the protected disclosures being the real reason. However whist we agree the reason was irrational, given there was no personal animus against the claimant, we find it was genuine.

Were the relied-on disclosures protected disclosures?

194. The issue re the communications procedure was a protected disclosure as we find the claimant did have a reasonable belief that the policy may be a breach of his legal obligations in the shape of his regulatory bodies requirements, albeit strictly those might not actually be legal requirements the claimant reasonably believed them to be. In addition, the issue was clearly in the public interest i.e. to ensure that individuals with the care of young people adhere to the requirements of their regulatory bodies.

195. In the case of the second disclosure there was no public interest and the claimant could not reasonably believe there was as essentially it concerned his employment position.

Health and Safety

196. This claim relies on the claimant's complaints regarding Athletes A, B, and C. However, the reasons for not transferring the claimant, or more broadly not wanting to work with him were recorded by the claimant in the 21 September, it was "the association with R2". The claimant argues that the issues re advising the removal the athletes from training were the real reasons as it is only when C raised these issues that GH started to be antagonistic to him, however GH was not antagonistic to him as recorded by the claimant himself, he said he did not have a personal issue with the claimant and thought he had done a good job. We find GH wasn't being disingenuous here and is a contemporaneous reflection of his state of mind. Accordingly, we find that the raising of the health and safety issues were not the reason for the respondent's failure to accept the transfer of the claimant.

197. R1 argued that the decision to move to the one team approach predated the ABC issues being raised as that was the reason for the original proposal to transfer to Harris and Ross however the claimant was clearly going to be transferred in that scenario so it is not a complete answer to the question why his transfer was not accepted in the run up to 19 December.

Unfair Dismissal

198. The claimant's case is that he was unfairly dismissed because of health and safety or the protected disclosures contrary to sections 100(1)(a) or 100(1)(e) of the Employment Rights Act 1996 and section 103A of the Employment Rights Act 1996. For the reasons we have given above in relation to detriment, we find that this was not the case and these claims fail.

199. In relation to an unfair dismissal case, that the claimant was automatically unfairly dismissed pursuant to regulation 7(1) of TUPE, which says:

(1) Where either before or after a relevant transfer any employee of the transferor or transferee is dismissed that employee is to be treated for the purposes of Part X of the 1996 Act as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

200. The claimant referred to the EAT case of **Hare Wines v Kaur EAT [2017]** that proximity can give rise to the conclusion that transfer is a principal reason for the dismissal.

201. Relying on that case we find that the transfer was the principal reason why the claimant was dismissed as the dismissal took place on the date of the transfer, that has to be a paradigm case of proximity. Further, the opportunity arose to dismiss the claimant entirely because there was to be a transfer to provide the services in house.

202. The respondent sought to argue that the reason given for not transferring the claimant i.e. the need following the report to distance themselves from EIS was an economic, technical organisational reason, however we reject this contention. It is nothing in the nature of such reasons and certainly does not have the flavour of any such reason; it had no particular business logic and was more of an emotional response, particularly as the claimant was not associated with the report, had not provided any information for the report and the first respondent knew this. Accordingly, there is no defence to this claim and it succeeds.

203. In addition if we are wrong on that the claimant was clearly unfairly dismissed under section 98 Employment Rights Act 1996 as no permissable reason has been given for his dismissal and no procedure was followed by 1st respondent.

Information and Consultation

204. Clearly the claimant's claim in respect of regulation 13 must succeed as against the first respondent given that we have found there was a transfer.

205. In respect of the second respondent, the second respondent was in breach of the requirement to elect employee representatives.

206. In respect of information and consultation we find that the second respondent provided the claimant with as much information as they possibly could and made every effort to obtain the relevant information from the first respondent, but were unable to do so. Accordingly, the second respondent is able to rely on the first respondent's failure in this case and rely on Regulation 15(4).

207. Any award will be dealt with at the remedy hearing.

Breach of Contract/Holidays

208. It was accepted that the claimant was entitled to these payments and having found there was a transfer to the first respondent, the first respondent is liable for these payments. Again, the amounts in question will be decided at the remedy hearing.

ACAS Code of Practice breaches

209. This is a matter which will also be considered at the remedy hearing as the relevant breaches could only be determined once a decision had been made on the transfer.

Next steps

210. Accordingly, the matter should now be listed for remedy. The parties should agree directions once a date for remedy has been set and if they are unable to agree they should revert to the Tribunal in good time before the hearing.

211. Alternatively, if the parties feel that a preliminary hearing case management would be helpful they have liberty to request the same.

_____

Employment Judge Feeney

Date: 15 October 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

16 October 2019

FOR THE TRIBUNAL OFFICE