EMPLOYMENT TRIBUNALS

Claimants: **Mr J Buglass & Mr P Hopper**

Respondent: **(1) Securitas Security Services Limited**
(2) Ryandale Limited
(3) Pallion Engineering Limited

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Reserved Judgment sent to the parties on 13 January 2020, is corrected as set out in block type at paragraph 4.

Employment Judge A.M.S. Green

Date 30 January 2020

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: **(1) Mr James Buglass**
(2) Mr Phillip Hopper

Respondent: **(1) Securitas Security Services Limited**
(2) Ryandale Limited
(3) Pallion Engineering Limited

Heard at: North Shields.

On: 7 & 8 November and 2 December 2019 (deliberations)

Before: (1) Employment Judge A.M.S. Green
(2) Mrs M Clayton
(3) Mr S Hunter

Representation
Claimants: Mr P Lott - Solicitor
Respondent: (1) Ms J Young – in house employment counsel
(2) Mr C McDermott – Director
(3) Mrs J Callan - Counsel

RESERVED JUDGMENT

1. The claims against the third respondent are dismissed upon withdrawal.

The unanimous decision of the Tribunal is as follows:

2. The claims against the second respondent are dismissed.
3. The claims against the first respondent for automatic unfair dismissal under the Transfer of Undertakings (Protection of Employment) Regulations 2006 are dismissed.
4. The claims against the first respondent for failure to inform and consult under Transfer of Undertakings (Protection of Employment) Regulations 2006 are dismissed.

5. The claims against the first respondent for a statutory redundancy payment are upheld and the first respondent is ordered to pay the first claimant £5,496.66 and the second claimant £9,865.80.
6. The claims against the first respondent for notice pay are upheld and the first respondent is ordered to pay the first claimant £3,080.76 and the second claimant £4,613.76.
7. The claims against the first respondent for holiday pay are upheld and the first respondent is ordered to pay the first claimant £171.15 and the second claimant £269.14.
8. The claims for ordinary unfair dismissal are dismissed.
9. The first respondent failed to provide the claimants with updated written particulars of employment under Employment Rights Act 1996, section 1 and are ordered to pay the first claimant £563.76 and the second claimant £939.60.

REASONS

The Claims

1. For ease of reading, we have referred to the parties by their names. Mr Buglass and Mr Hopper presented claims for ordinary unfair dismissal, failure to provide a written statement of particulars of employment, statutory redundancy payment, breach of contract for failure to pay notice, failure to pay holiday pay on termination of employment. They claim that their employment transferred from Securitas to Ryandale on or around 11 February 2016 and that they were automatically unfairly dismissed under Transfer of Undertakings (Protection of Employment) Regulations 2006, regulation 7 ("TUPE"). They claim that their employment transferred by virtue of a service provision change. They also claim that Securitas, Ryandale and Pallion failed to inform and consult them about the proposed transfer as required to do so under TUPE. Alternatively, they claim that if there was not a relevant transfer under TUPE, they were unfairly dismissed by Securitas. If Securitas can establish that their dismissals were fair by virtue of redundancy, Mr Buglass and Mr Hopper claim a statutory redundancy payment.

The issues

2. The parties have agreed a joint statement of issues which is set out in the Appendix to this judgment.

Documentation and hearing

3. The parties filed and served their evidence bundle in advance of the hearing. The following people adopted their witness statements and gave oral evidence:

    a. Mr Buglass
    b. Mr Hopper
    c. Stuart Hillier – Securitas' branch manager

d. Ben Austin – Securitas' HR and TUPE advisor
e. Geraldine McStea – Securitas' service delivery manager
f. Colin McDermott – Ryandale's director and manager
g. Jeremy Flax – Pallion's executive director

4. **The claims against Pallion were withdrawn after Mr Buglass and Mr Hopper gave evidence but before any of Ryandale's witnesses gave evidence. Mrs Callan then withdrew from acting and Mr Flax gave evidence as a witness at the request of the Tribunal.**

5. We heard closing oral submissions and were also provided with written submissions at the hearing.

6. After the hearing, we invited further written representations from Mr Buglass, Mr Hopper and Securitas' representatives on any **Polkey** considerations that might be relevant in relation to the question of procedural unfairness as these had not been dealt with in any detail during the hearing. We duly received further written received further written representations on 16 December 2019 which we have considered.

Basis of our decision

7. In reaching our decision, we have considered the oral and documentary evidence, the written and oral submissions and our record of proceedings. The fact that we have not referred to every document produced in evidence should not be taken to mean that we have not considered it.

Burden and standard of proof

8. Mr Buglass and Mr Hopper must establish their claims on a balance of probabilities.

Findings of fact

9. Mr Buglass and Mr Hopper were employed by Securitas as security guards. Their employment was transferred to Securitas under a TUPE transfer from another employer with effect from 11 March 2014. Their continuity of employment was preserved so that Mr Buglass had been continuously employed by Securitas since 31 May 2005. Mr Hopper's continuity of employment was also preserved with effect that he had been continuously employed by Securitas since 12 February 2004. Neither of the men were provided with updated terms and conditions of employment when their employment transferred to Securitas.

10. Pallion were originally a shipbuilding company but refocused their business into property management. They own the Pallion Yard in Sunderland (the "Yard"). The Yard has 12 tenants including Ryandale. Pallion required security services at the Yard. In particular, they needed people to control entry to and from the Yard via a gatehouse with an entry barrier. The gatehouse formed part of Ryandale's premises. Pallion contracted with Securitas to provide those services [177-227].

11. Peter Callaghan worked for Pallion and had overall responsibility for the contract. Unfortunately, he died on 24 July 2019. The date of the contract was 23 January 2017. The initial term of the contract was 1 year. Thereafter it provided that either party could terminate the contract without cause on giving the other 90 days' written notice [222]. They provided security cover for 168 hours per week [220]. The services comprised one security officer working two shifts: 7am to 7pm and 9pm to 7am, 24 hours per day, 7 days a week [182]. Securitas invoiced Pallion for the work. Pallion collected contributions from the tenants to cover their share of the cost of the security services.

12. Mr Buglass and Mr Hopper were assigned to work at the Yard. Mr Buglass worked an average of 36 hours per week over three shifts. Prior to 11 February 2019, he worked Friday to Sunday from 7am to 7pm. He was paid £7.83 per hour. Mr Hopper worked an average of 60 hours per week on the same rate as Mr Buglass. He worked night shifts on Monday to Thursday and a day shift on Saturday. They sat in the gatehouse, operating the barrier to control vehicles coming and going from the Yard. On 11 February 2019, their employment came to an end.

13. Mr Flax worked in London and had overall management responsibility for Pallion. He liaised with Mr Callaghan about the contract and events at the Yard. In March 2018, he contacted Mr Callaghan to inform him that Sunderland City Council (the "Council") were proposing to build a road through the Yard and that part of the land owned by Pallion would be subject to a compulsory purchase order. There had been a public inquiry into the road scheme, and he understood that the Council would provide security services at the Yard from February 2019. He initially believed that this would be from 4 February 2019. However, the timetable slipped, and it was not until 9 May 2019 that the Council's nominated contractor, Edge Construction, took over the security work at the Yard.

14. The compulsory purchase of land by the Council was not the only reason why it was anticipated that there would be changes to who provided security cover at the Yard. Pallion were also unhappy with the quality of the services that Securitas were providing and they were also disputing Securitas' invoices. Matters came to a head in or around July 2018 when Secutitas agreed to reduce the level of services that they provided from 24 hours to 12 hours per day and Ryandale agreed to provide some of the services that Securitas had been providing. The hours were reduced from 168 to 108 per week.

15. At the heart of this dispute is the nature and extent of the services provided by Ryandale and whether these were to be provided on a short-term basis. Ryandale's version of events was that this was only ever intended to be a short-term arrangement pending the Council taking over the security work. In this we regard, we note Mr McDermott's evidence. The starting point is his witness statement where he states that Ryandale were regularly asked by Pallion to perform tasks around the Yard. This was because they had the manpower and the work was put forward on an FOC basis (i.e. free of charge). He then states that in July/August 2018, Pallion asked if Ryandale would take over the gatehouse work to take registration numbers of vehicles coming and going and to operate the barrier. Initially, this was to be for one week on an unpaid basis. He then states that after meeting Peter

Callaghan, Pallion needed Ryandale to cover the gatehouse work until further notice and the arrangement was that Ryandale would cover the cost until such time as matters had been resolved guarding the Council's compulsory purchase of land at the Yard. Put another way, Pallion were conceding that Ryandale could at some stage invoice Pallion for the work and this is what eventually happened.

16. Ryandale invoiced Pallion for services rendered. We were referred to invoices for March 2019, 31 days @ 24 hours per day [298]. There was another invoice dated 27 March 2019 [299]. There was a further invoice for the period April 2019 to 7 May 2019 [319]. As already noted above, Edge Construction assumed responsibility for security services from 9 May 2019.There was no evidence of Ryandale rendering invoices to Pallion for the period August 2018 to February 2019. We accept Mr McDermott's evidence that these invoices would be paid once the sale of the land to the Council had gone through. Ryandale were paid in May 2019.

17. The arrangement between Ryandale and Pallion was explored further when, under cross examination, Mr McDermott confirmed that the matters continued from August 2018 to February 2019. Ryandale covered the Monday to Friday day shifts. From 11 February 2019 onwards, Ryandale took over the night shifts as well. From that date, Securitas fell out of the picture completely.

18. The process culminating with Securitas leaving the Yard escalated in January 2019. On or around 22 January 2019, Pallion told Securitas that they wanted to terminate the contract and related this to the Council's road project moving to another phase. They told Securitas that another contractor would take over the security work and served notice of termination with immediate effect. They did not give Securitas the requisite 90-day notice and Securitas complained to Pallion about this on 22 January 2019 [244]. Securitas also tried to contact the Council to get details of the new contractor.

19. On 4 February 2019, Securitas approached the Pallion to ask for details about the new contractor. Pallion refused to provide the information. Securitas also requested 90 days to consult with staff. On 1 February 2019 Pallion had told Securitas that it would extend the contract by 1 week.

20. It is very clear on the evidence that Securitas believed that there was a service provision change whereas Pallion and Ryandale did not think that there as a service provision change [241 - 260; 263-270]. In her witness statement, Ms McStea states that since January 2018, she had conducted TUPE consultations five times with approximately 50 security officers. She had experience of working with TUPE. She was the Service Delivery Manager for Securitas and worked from their Gateshead office. When she saw Mr Flax's email of 22 January 2019 [244] she was not 100% clear at that time whether TUPE would apply or whether security services at the Yard were to cease completely.

21. Once Ms McStea knew that Pallion wanted to end the services on 4 January 2019 she spoke to Mr Callaghan and to Mr Flax. She could not give them any detail as to whether Securitas was going to start redeployment consultation with Mr Buglass and Mr Hopper or if the Yard was terminating

services altogether or if TUPE applied requiring Securitas to go through information and consultation on any measures. She could not do this because she had not been given any information from Pallion. It was an unsettling time for everyone. However, she claims in her witness statement that she did not believe that Mr Buglass and Mr Hopper's roles were not at risk of redundancy because she believed that there was a service provision change.

22. Under cross examination, Ms McStea said that she had only attended one meeting with the Council in the summer of 2018. She said that there was some discussion about ongoing service provision. At that point the Council said that the contract had been put out to tender, but they did not know if the contract for the security services would be outsourced or if the Council would do the work themselves. Securitas did not know at that point if they were going to continue to provide the services. She saw the plans for the new road. This meeting coincided with when Pallion were discussing reducing costs for security services with Securitas. Overall, during the meeting with the Council, security was only discussed briefly. She was not involved with any follow up meetings with the Council and she was not informed in October 2018 of the date of an expected change of service provider. She could not recall being aware of Mr Flax's email of March 2018 dealing with the expected change. She was not aware of the Council's proposal to provide security services from March 2019. She was, however, very clear about her lack of involvement with Pallion prior to 22 January 2019. We have no reason to doubt her evidence.

23. Even when Mr Flax provided further information on 22 January 2019, it was insufficient for Ms McStea meaningfully to inform and consult with Mr Buglass and Mr Hopper. All she knew at that stage was that there was going to be a change of service provider, but she did not know who that would be. Mr Buglass and Mr Hopper called Ms McStea and told her "the big bosses had a meeting" and they asked her "were we involved?" (i.e. Securitas). She told them that she had not been involved and she could not give them any information. She did not know the date when there would be a transfer. She knew that the contract had been extended to 4 February 2019. It was subsequently extended to 11 February 2019. However, she went on holiday from 7 February 2019 and she was not aware that the contract would come to an end on 11 February 2019.

24. In her statement, she then says that she was unable to provide Mr Buglass and Mr Hopper with any information regarding the new employers because Securitas did not have that information. She could not recall the exact date of those conversations. In her view, it was unlike any TUPE consultation that she had previously done because of Pallion's resistance to providing Securitas with any information. She assumed that TUPE applied and consequently, no alternative employment was offered to Mr Buglass and Mr Hopper because she thought their employment was being transferred.

25. On 11 February 2019, Ryandale told Securitas that Pallion had appointed them to provide security services at the Yard. Prior to that, Ryandale had not contacted Securitas about this. On 11 February 2019, Chloe Stone, Securitas' HR and TUPE advisor, emailed Ryandale, Mr Hiller and Ms McStea at 16:32 informing them of this [266]. In her oral evidence, Ms McStea said that she did not receive that email. However, we are satisfied

that Securitas knew about the email and what Ryandale were saying. Ms Stone stated that in her opinion, this was a TUPE transfer and that from 11 February 2019, she believed that Ryandale would be Mr Buglass and Mr Hopper's employer. She provided Ryandale with employee liability information as required under TUPE. She requested Ryandale to provide details of any further measures that they were contemplating taking or to confirm if there were no measures.

26. At 16:50 hours on 11 February 2019, Ms Stone emailed Mr Buglass and Mr Hopper [267 & 269] informing them of the proposed transfer and that she understood it would take place on the same day and that TUPE applied. She confirmed that she would be sending Ryandale employee liability information. She told them that she was waiting to hear from Ryandale whether any measures would be applied and would pass that information on to them once she knew. She told them that Securitas management would visit the Yard to consult them. She told them of their right to elect a representative. She referred to current job vacancies at Securitas which could be found on their website if they wanted to stay with them. If they were interested in applying for an internal vacancy they were told to contact their line manager in the first instance. She told them that she thought that Ryandale would visit the Yard to make a group presentation and to discuss the transfer with them. The email provided general information about TUPE [268].

27. Prior to 11 February 2019, Mr Buglass was aware that something was going to happen but there was no consultation until that date. In fact, when he was cross examined, he said that he was told that 3 February 2019 would be his last shift. He understood that he would not be going to Pallion anymore because "we were told the Council was coming in to take over as they would have equipment next to the gatehouse". He thought that the Council might want them as security guards as they were parking their kit next to the gatehouse. However, despite this, he went to work on 10 February 2019 and finished at 11am and thought it was his last shift at the Yard. He expected Securitas to contact him to tell him where he would be going after that date. He seemed to think that he would continue to be employed by Securitas. When he came off shift, he went home and went to bed. He got up and read Ms Stone's email. He never returned to work. He said that Ms McStea knew he didn't want to transfer, and no one asked him what he wanted to do. He compared what happened with the previous TUPE transfer that he went through and was upset and irritated about how he was now being treated. This was self-evident when he was giving his evidence. He became quite exercised and banged the table with his hand. We believed that he was sincere when giving his evidence.

28. Mr Buglass knew that Ryandale had been providing their own people when Pallion cut Securitas' hours in August 2018. Two of Ryandale's people said they were not trained as security officers and they did not have a licence. They didn't want to take Mr Buglass and Mr Hopper's jobs off them.

29. Prior to 11 February 2019, Mr Hopper did not recall speaking to Ms McStea about a possible TUPE transfer. He remembered that he knew that the contract was coming to an end but did not know what would happen to him at that stage. He said that he had not read Ms Stone's email. When pressed on this, he said that although it would have been sent to him, his brother,

who is a union official, would have looked at it. He did not know who was taking over the work. Mr Hopper's line manager, Ward, told him to report to work at the Yard on 11 February 2019 however when he arrived on 11 & 12 February 2012, he was sent away. He said that he was no longer needed although he did not know what Ryandale were going to do at the Yard. He did not ask Ryandale why he was no longer needed although he knew he had lost his job. His evidence was, however, unclear in this regard, because he was also asked who would be doing his job to which he replied "Ryandale Windows". He also knew that the Council had bought land at the Yard.

30. After being turned away by Ryandale, he contacted Ms McStea who told Mr Hopper he would get paid whether he was needed or not. We believe that Ms McStea said this because she thought that his employment had transferred to Ryandale under TUPE. Mr McDermott knew that Mr Buglass and Mr Hopper were not needed, and he had been assured by Mr Callaghan that this was a matter between Pallion and Securitas which was subject to a contract dispute. Mr Callaghan told Mr McDermott to tell Mr Buglass and Mr Hopper they were not needed.

31. The arrangement between Pallion and Ryandale going forwards from 11 February 2019 was fluid. Mr McDermott was clear in his evidence that he initially understood from Peter Callaghan that it would continue until March 2019. However, the timetable slipped with the Council and eventually the arrangement came to an end on 9 May 2019. He understood from Mr Callaghan that matters with the Council providing security cover had been delayed and he asked Ryandale to continue to provide cover. Cover was provided by a bricklayer and Mr McDermott's son, Dale, who was also an employee. They also brought someone in from outside. He understood that once the Council assumed responsibility, Ryandale would not be required for gatehouse duties.

32. What is clear to us is that the arrangement for security cover between Ryandale and Pallion was intended to be a short term, stop gap measure that was beyond Ryandale's control. It was never intended to go beyond the time that the Council was to provide its own security cover at the Yard. The variable was the end date when the Council would take responsibility for security and this changed. It slipped from March to May 2019. Furthermore, Mr McDermott had known Mr Callaghan for 30 years and he believed that he was helping Pallion out on a short-term basis. He had asked Mr McDermott to do him a favour and that is what he did. He did not know what Securitas had been asked to do at the site and only knew what Mr Callaghan had asked him to do. Despite this, the evidence concerning what was done by Mr Buglass and Mr Hopper up to 11 February 2019 and what was done by Ryandale personnel after 11 February 2019 was fundamentally the same: they performed gatehouse duties controlling ingress and egress from the Yard. The only area of difference in the evidence was whether monitoring CCTV continued. We do not regard that as a core activity. The core activity was manning the gatehouse and operating the barrier.

33. Regardless of what was agreed between Pallion and Ryandale, one fact is clear and undisputed; Mr Buglass and Mr Hopper continued to attend the site to do their job and Securitas contained to pay them until 11 February 2019 as shown by their payslips [286-297]. On 11 February 2019 both Mr Buglass and Mr Hopper were told by Ryandale that their services were not

required despite being told by Securitas that their employment was transferred from them to Ryandale under TUPE. From both men's perspective one fact is clear: neither had a job. Their employment had terminated on 11 February 2019. They felt let down.

34. We now turn to what has happened to Mr Buglass and Mr Hopper since losing their jobs. Mr Buglass is 62 years old and has not worked since 11 February 2019. He has made some efforts to register for jobs online and we accept his evidence that he is not good with working with computers. He has minimal qualifications and he does not have a driving licence. He must use public transport or his bicycle to find work. He has been receiving Universal Credit since 15 March 2019. He receives a Merchant Navy Pension. Has no other sources of income. After he lost his job, he did not ask Securitas whether they had any alternative employment because he did not think he could because he was no longer employed by them. He expected them to come to him. He thought that Ryandale would contact him with work, but they did not do that.

35. Mr Hopper is 59 years old and has not worked since his employment ended. He received a combination of Job Seekers Allowance and Universal Credit since 15 March 2019. From 15 August 2019, he has only been receiving. Universal Credit. He has been looking for work in Sunderland. He has registered with Northern Rights who help people look for work. He approached G4 S and Bridges Security for work but with no luck. He got nothing back from them, not even an interview. He cannot drive and uses public transport. Other than attending the Yard on 11 and 12 February 2019 he has not contacted Securitas for work although he believed that they would have contacted him if they had any vacancies.

Applicable Law

Service provision change under TUPE

36. The representatives agree that if TUPE applies in this case, it arises because there has been a service provision change. Regulation 3(1)(b) of TUPE applies to service provision changes where the conditions set out in regulation 3(3) are satisfied. There are three scenarios under which a service provision change occurs. For present purposes, regulation 3(1)(b)(ii) potentially applies. It provided that "where activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (A "subsequent contractor") on the client's behalf. This concerns a change of contractor, usually following a tendering exercise and is sometimes referred to as "second generation contracting out". In this scenario the client is Pallion. The putative transferor is Securitas and the putative transferee is Ryandale.

37. For there to be a service provision change there must be activities ceasing to be carried out by one person and subsequently being carried out by another. TUPE does not define activities and we must look to case law for guidance.

38. We remind ourselves that in **Kimberley Group Housing Ltd v Hambley and Ors and another 2008 ICR 1030, EAT** the EAT suggested that an employment tribunal's first step in assessing whether there has been a service provision change should be to identify the relevant activity or activities. In **Johnson Controls ltd v Campbell and anor EAT 0041/12** the EAT noted that in identifying an "activity" is a question of fact and degree and involves a holistic assessment by the Tribunal. The matter is not simply decided by enumerating tasks and asking whether, quantitatively speaking, most of those same tasks are done before both before and after the putative transfer.

39. The first condition to be satisfied for there to be a service provision change is that "immediately before the service provision change there is an organised grouping of employees situated in Great Britain which has its principal purpose the carrying out of activities concerned on behalf of the client.

40. The BIS Guide (the "Guide") states that this requirement is intended to confine TUPE's coverage to cases where the old service provider (i.e. the transferor) has in place a team of employees to carry out the service activities and that the team is essentially dedicated to carrying out the activities that are to transfer. The Guide goes on to give an example where this requirement would not be met "if a contractor was engaged by a client to provide, say a courier service, but the collections and deliveries were carried out each day by various different couriers on an ad hoc basis, rather than an identifiable team of employees, there would be no "service provision change" and TUPE would not apply.

41. The organisation of the grouping must be more than merely circumstantial. The employees must have been organised intentionally. The employees must be organised in some way by reference to the requirements of the client.

42. The next condition will only be satisfied if the organised grouping of employees which has as its principal purpose the carrying out of activities on behalf of the client, existed immediately before the service provision change.

43. Regulation 3(3)(a)(ii) of TUPE provides that for a transfer by way of a service provision change to occur is that it must be shown that "immediately before the service provision change…the client intends that the activities will, following the service provision change, be carried out by the transfer other than in connection with a single specific event or task of short term duration. This provision is central to the TUPE issues in this case.

44. There are two different interpretations for regulation 3(3)(a)(ii). One interpretation is that the provision excludes from TUPE activities carried out in connection with (i) all single specific events, and (ii) all tasks of short-term duration. This would suggest for example, that the award of a contract relating to a single specific event would be excluded, no matter how long that event is intended to take. An alternative reading is that an event or task must be both "single specific" and of "short-term duration" if the exclusion is to apply.

45. The Guide favours the latter interpretation. It provides two examples that would be caught by the regulation 3(3)(a)(ii) exclusion. The first is where a client engages a contractor to organise a single conference on its behalf — this is held up as an example of a ‘one-off service’ (i.e. a single specific event). The Guide goes on to state that ‘to qualify under this exemption, the one-off service must also be “of short-term duration”’. To illustrate that point, it provides the example of two different contracts for the provision of security to the Olympic Games. The first contract, providing security advice to the event organisers over a period of years up to the Games, would relate to a single specific event, but its longevity would mean that it would not be excluded by Reg 3(3)(a)(ii). The second contract, to protect the athletes' security during the Games itself, would be a single specific event that was of a sufficiently short duration to come within the exclusion and thus fall outside the scope of the SPC rules.

46. The view expressed in the Guide is, however, muddied by conflicting opinions in the EAT. The first case to be considered is **SNR Denton UK LLP v Kirwan and anor 2013 ICR 101, EAT** where the EAT held that there had not been a transfer by way of a service provision change, because the identity of the client had changed. Although it was not necessary for the disposal of the appeal, Mr Justice Langstaff (President of the EAT) nevertheless set out his tentative view that regulation 3(3)(a)(ii) only applies to events or tasks that are both ‘single specific’ and of ‘short-term duration’. As for what would amount to ‘short-term’ in this context, Langstaff P noted that duration is not to be judged from a historical perspective but in the broader context of employment relationships as a whole. Langstaff P thought it relevant that, at the time that the 2006 TUPE Regulations were made, it would take a year for an employee to obtain many employment rights. An employee might expect to receive at most 12 weeks' notice from the employer and could in some circumstances give as little as one week and would have three months within which to bring a claim of unfair dismissal. These considerations, plus the circumstance of the particular employment, all create a context within which ‘short-term’ must be judged. Accordingly, the question will be one of fact and degree for the tribunal.

47. The next case in the sequence was **Liddell's Coaches v Cook and Ors 2013 ICR 547, EAT**, where a division of the Appeal Tribunal presided over by Lady Smith agreed with Langstaff P's observations on the meaning of ‘short-term’, but disagreed with his conclusion on the statutory wording. Here, the EAT interpreted regulation 3(3)(a)(ii) disjunctively — i.e. such that ‘single specific events’ stand apart from ‘tasks of short-term duration’ as distinct categories of excluded transfers. In the EAT's view, a single specific event is, by definition, of short duration, and so it would be tautologous if the words ‘of short-term duration’ were intended to qualify ‘single specific event’ as well as ‘task’. It considered that the DTI Guide (since replaced by the Guide, but without changes to the passages on regulation 3(3)(a)(ii)) was wrong to suggest that a single specific event could be of long-term duration. To take the DTI's example, a contract to provide security advice over several years to the organisers of the Olympic Games could still be regarded as connected to an event of short-term duration. There was a flaw in the DTI's thinking, which was to conflate ‘activities’ with an ‘event’ — the Olympic Games are a single specific event, and so activities done in connection with it — even those done over a period of years — may be excluded from TUPE. Applying this reasoning to the facts of the case, the

EAT held that the employment tribunal had been entitled to find that a one-year contract between a local authority and a coach operator to transport schoolchildren to other schools while their school was being rebuilt was excluded from TUPE under regulation 3(3)(a)(ii). Although there were flaws in the tribunal's reasoning — for instance, the EAT did not agree that the construction of a school could properly be categorised as an 'event' — its conclusion that, viewed in context, the contract was 'short-term', given that local authority transport contracts were usually awarded for three years or more, was sufficient for the Reg 3(3)(a)(ii) exclusion to be engaged.

48. Demurring from Lady Smith's analysis in **Liddell's Coaches**, the EAT in **Swanbridge Hire and Sales Ltd v Butler and Ors EAT 0056/13** took the view that the words 'of short-term duration' in regulation 3(3)(a)(ii) qualify 'event' as well as 'task'. Mrs Justice Slade opined that a 'single specific event' is not self-evidently short-lived. She gave the example of a leak in an oil pipeline, which would be an 'event' capable of continuing for a considerable period of time. Slade J also indicated that, unlike the employment tribunal in the instant case, she would not consider an 18-month project to insulate and lag five industrial boilers at a power plant an 'event'. In her view, this was clearly a 'task'.

49. Slade J's analysis in **Swanbridge** was endorsed by the EAT in **Horizon Security Services Ltd v Ndeze and anor EAT 0071/14** and given that it tallies with that of the President in **SNR Denton UK LLP v Kirwan and anor** would appear to be the preferred approach. However, all of the above EAT views on the meaning of regulation 3(3)(a)(ii) are technically obiter (i.e. non-binding), since none of the cases turned on the point — Langstaff P observed that the distinction between the two interpretations of the provision gave rise to a 'somewhat theological question'. It is, perhaps, telling that we have yet to see a case involving a single specific event that is not of short-term duration.

50. However, the following cases are examples of two employment tribunal decisions in which it was concluded that no service provision transfer had occurred because the task in question was of a short-term duration:

    a. **Gillard v Catercare Solutions Ltd and Ors ET Case No.2701897/12:** G was employed by CS Ltd as a kitchen assistant, working in a residential care home owned by SRH. In April 2012, environmental health inspectors twice visited the home and raised serious concerns about the cleanliness of the kitchen and the food hygiene qualifications of those working in it. CS Ltd was given a short time frame in which to put matters right, and when it failed to do so, its contract was terminated. SRH then engaged an employment agency to provide temporary kitchen staff for a period of three months while the tendering process for the catering contract ran its course. When G subsequently claimed that she had been unfairly dismissed, an employment tribunal rejected the contention that there had been a transfer to SRH. It accepted the submission that SRH needed to take emergency action to ensure the residents continued to be fed. This clearly fell within the meaning of a specific event or task of short-term duration, with the result that TUPE did not apply

b. **<u>Mahdi and Ors v ICTS UK Ltd and anor ET Case No.3300116/14</u>**: ICTS Ltd had a contract with Middlesex University to provide security services at several sites. One such site was closed in 2012, and the claimants were assigned by ICTS to guard these vacant but valuable premises. In July 2013 the site was purchased by AUCMS, a Malaysian university. ICTS offered to enter a new contract with AUCMS, but in the meantime continued to provide its security services. In November AUCMS informed ICTS that it would be appointing a new security company, FCS Group, with effect from 11 November. FCS Group denied that ICTS's employees had transferred to it: ICTS had continued to supply security to an empty site, whereas FCS Group's role would be to provide security to a multi-million-pound construction and renovation scheme. The employment tribunal agreed that AUCMS had engaged FCS Group to perform activities in connection with a task of short-term duration.

51. It is the task — as opposed to the particular contractor's involvement in it — that must be of short-term duration in order to be caught by regulation 3(3)(a)(ii) exclusion. In **<u>Mustafa and anor v Trek Highways Services Ltd and anor 2016 IRLR 326, EAT</u>**, Transport for London (TFL) contracted out its highway maintenance services to AS Ltd, which in turn entered into a sub-contract with THS Ltd whereby the latter agreed to provide traffic management services. The main contract between TFL and AS Ltd was due to end on 31 March 2013. In early March 2013 a commercial dispute arose between AS Ltd and THS Ltd, and on 8 March THS Ltd suspended its staff and sent them home. On 20 March the sub-contract between AS Ltd and THS Ltd was terminated by consent. AS Ltd provided the traffic management service on a temporary basis until 1 April, at which point a new contractor took over but refused to take on THS Ltd.'s former staff. An employment judge held (among other things) that there was no service provision change from THS Ltd to AS Ltd. One of his reasons for reaching that conclusion was that the only intention that could be inferred on the part of TFL on 20 March was that AS Ltd.'s involvement in the traffic management service would be a matter of short-term duration because of the new contract coming into force on 1 April. However, the EAT overturned that decision and remitted the case. The question was not whether TFL intended AS Ltd.'s involvement to be of short-term duration; it was whether the task in respect of which AS Ltd was to be involved was of short-term duration. The judge had failed to address that question. In light of his findings, it was difficult to conclude other than that the provision of the traffic management service was never intended by TFL to be a task of short-term duration; even on 20 March, it was intended to be an ongoing task, given the imminent commencement of the new contract.

Automatically unfair dismissal under TUPE

52. Regulation 7(1) of TUPE provides that where, either before or after a relevant transfer, any employee of the transferor or transferee is dismissed that employee shall be treated for Employment Rights Act 1996 ("ERA") purposes as unfairly dismissed if the sole or principal reason for the dismissal is "the transfer". In other words, a dismissal in such circumstances is deemed to be automatically unfair.

53. Regulations 7(2) and (3) provide that a dismissal will not be automatically unfair where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after the relevant transfer ("ETO"). The dismissal may still be found to be unfair as an ordinary unfair dismissal. In other words, the ETO dismissal is only potentially fair. Where such a dismissal occurs, the Tribunal must determine the issue of fairness by applying the "reasonableness test" as set out in ERA 1996, section 98(4).

Duty to inform and consult under TUPE

54. Regulation 13 of TUPE obliges transferors and transferee to inform and consult in respect of affected employees. This term is defined in regulation 13(1) and includes employees of the transferor or the transferee who might be affected by the transfer or may be affected by measures taken in connection with it.

55. Regulation 13(2) provides that the duty to inform must take place long enough before a relevant transfer to enable the affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of the following:

    a. The fact that the transfer is to take place, the date or proposed date of the transfer and the reason for the transfer.

    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 Aker, that fact.

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

56. The duty to consult arises where measures are envisaged being taken.

57. The duty to inform and consult is expanded in regulation 13(3) to cover appropriate representatives of affected employees. This is relaxed in relation to micro-businesses that employ fewer than ten employees and allows employers to inform and consult directly with affected employees in certain specified circumstances.

58. Under regulation 13(9) employers have an excuse for not complying with the duties to inform and consult if there are special circumstances which render it not reasonably practicable to do so. They must, however, take all such steps to fulfill the duty as are reasonably practicable in the circumstances. If the question of reasonable practicability reaches a Tribunal, the burden is on the employer to show that the special circumstances defence should apply (regulation 15(2)).

59. The defence will be narrowly construed. Circumstances need to be exceptional or out of the ordinary (**Clarks of Hove Ltd v Bakers' Union 1978 ICR 1076 CA**). The special circumstances must exist at the time when the obligation to inform and consult arises rather than as an explanation given in hindsight. In **Scott and Ors v Guardian Facilities and anor ET Case No 23340014/08** the Tribunal found that although the transfer had happened very quickly, the loss of business at short notice was neither exceptional no extraordinary and that the transferor had been on notice that the contract was at risk for seven months. There were no special circumstances for the purposes of regulation 13(9).

60. The question of who can bring a claim for failure to inform and consult was decided in **Howard v Millrise Ltd (in liquidation) and anor 2005 ICR 435 EAT**. There it was held that an affected employee had standing to bring a claim for breach of regulation 13 where an employer had failed to invite affected employees to elect representatives or, in the absence of any election, to provide the requisite statutory information to the employee himself or herself.

Ordinary Unfair dismissal

61. An employee who wishes to claim unfair dismissal by reason of redundancy must first show that he or she has been dismissed within the meaning of section 136 (1) ERA. There are various mechanisms for a dismissal including where the employer terminates the employee's employment contract with or without notice.

62. Section 98 ERA indicates how the Tribunal should approach the question of whether a dismissal is fair there are normally two stages:

    a. First the employer must show reason for the dismissal and that it is one of the potentially fair reason is set out in section 98 (1) and (2) ERA.

    b. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair under section 98 (3 A) and (4) ERA. This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reasons given.

63. Redundancy is a potentially fair reason for dismissal (section 98 (2) (c) ERA. In many cases, an employer's liability in respect of a redundancy dismissal will be fully discharged by the payment of statutory or, where appropriate, contractual redundancy pay. However, it remains open to an employee to argue that his or her "redundancy" dismissal was unfair for several reasons including that although a redundancy situation existed, the dismissal was, nevertheless, unreasonable (section 98 (4) ERA).

64. A dismissed employee may complain, for example, that he or she was unfairly selected for redundancy; that it was unreasonable for the employer to have dismissed him or her for redundancy where alternative work was available; or that the employer's redundancy procedure was defective, perhaps owing to a failure to consult.

65. In the case of click **Polkey and AE Dayton Services Ltd 1988 ICR 142, HL** the House of Lords firmly established procedural fairness as an integral part of the reasonableness test. It was held that a failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, it would have been “utterly useless” or “futile”. Regarding redundancy dismissals, this meant that the employer will not normally act reasonably unless he warms and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation.

66. The consideration of alternative employment for employees selected for redundancy will often be an important part of a fair and reasonable redundancy procedure. In **Thomas and Betts Manufacturing Ltd v Harding 1980 ICR 255** the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek alternative work. As a general rule, the Tribunal will expect an employer with sufficient resources to take reasonable steps to ameliorate the effects of redundancy, including giving detailed consideration as to whether suitable alternative employment is available.

Redundancy and redundancy payment

67. Redundancy is defined in section 139 (1) ERA and the definition applies both to the claims for redundancy payments and to unfair dismissal claims. An employee may be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his or her employer has ceased or intends to cease to carry on its business in the place where the employee was so employed.

68. An employer must pay a redundancy payment to an employee who is dismissed by reason of redundancy (ERA, section 135).

Notice pay

69. ERA 1996, section 86 lays down minimum periods of notice required to terminate a contract of employment. These are minimum periods of notice and displace shorter contractual notice periods. An employer must give an employee one week’s notice for each completed year of continuous service up to a maximum of twelve weeks’ notice.

Written particulars of employment

70. ERA, section 1 provides that, not later than two months after the beginning of an employee’s employment, the employer must give him or her a written statement of his or her employment particulars. The particulars that must be provided are in section 1(3). Employers are required to keep the written statement up to date. No later than 1 month after a change in any particulars required to be included in the section 1 statement, the employer must give the employee a written statement containing particulars of change (section 4(1) and 3(a)).

71. Employment Act 2002, section 38 provides that a Tribunal must award compensation to an employee where, upon a successful claim being made under any of the Tribunal jurisdictions listed in Schedule 5, it becomes evident that the employer was in breach of his duty to provide full and accurate written particulars under ERA, section 1. The list of jurisdictions is wide and includes redundancy payments, breach of contract and breach of the Working Time Regulations 1998. The Tribunal must award the minimum of two weeks' pay and may, if it considers it just and equitable in the circumstances, award the higher amount of four weeks' pay. A week's pay is calculated in accordance with ERA, sections 220-229.

Holiday pay

72. Regulations 14(1) and (2) of the Working Time Regulations 1998 provide that a worker is entitled to payment in lieu where his or her employment is terminated during the course of the leave year and on the termination date, the proportion of statutory annual leave he or she has taken under regulation 13 and 13A of the Working Time Regulations 1998 is less than the proposition of the leave year that has expired.

<u>Application of the law to the facts</u>

73. We do not find that there was a service provision change under regulation 3(1)(b)(ii) of TUPE. Whilst we accept that there was an organised grouping of employees (i.e. Mr Buglass and Mr Hopper) who were employed to provide security services by Securitas to their client Pallion and whilst we accept that those activities continued to be performed by Ryandale after 11 February 2019 those activities were essentially a specific event (provision of security services) for a short duration. They were never intended to be more than a stop gap measure and continued for approximately 3 months. Even if one was to back date the arrangement to August 2018 when the services were modified to reduce Securitas' hours and to introduce Ryandale, this would still fall to be a short duration of 8 months. We do not think, in any event, that the correct starting point for quantifying duration should be August 2018. At that time, whilst Securitas knew that it was possible that the security services might ultimately be taken over, it did not know whether it would be by the Council directly or by another contractor. All that was known was that the Council planned to compulsorily purchase land owned by Pallion which would lead to a different service provider at some stage in the future. Furthermore, it did not have a firm date as to when those services would be taken over. Securitas only knew for certain that Ryandale were taking over the remainder of the services at the Yard on 11 February 2019. We accept that Securitas had attempted to ask Pallion and the Council for information prior to that date without success.

74. Because there was no service provision change, there was no relevant transfer of Mr Buglass and Mr Hopper's employment from Securitas to Ryandale. Securitas mistakenly believed that TUPE applied and tt did not think that there was a redundancy situation. However, as there was no service provision change it follows that they dismissed Mr Buglass and Mr Hopper on 11 February 2019. There is no connection with the dismissals and TUPE and consequently the question of automatic unfair dismissal does not arise.

75. Securitas was obliged to inform and consult appropriate representatives if there is a potential transfer. That did not happen. We do not think that Securitas can be blamed for this. They were essentially in the dark until 11 February 2019 until they were informed that Ryandale would be performing the security work that was being performed by Mr Buglass and Mr Hopper. As soon as that information was provided to them, they contacted both men within half an hour of receiving it. They told them as much as they knew. It might be said that they had known about the Pallion's plans since August 2018 and that they knew that at some stage it was anticipated that the Council would take over the security work either directly or via a contractor and that they could have informed and consulted on what they knew. We do not think that argument has merit because it was still very unclear who would take over the work and when. We accept that this amounts to a special circumstance and that Securitas can rely on the special circumstances defence in regulation 15(2) of TUPE.

76. Despite Securitas' mistaken belief that TUPE applied, we accept that there was in law a redundancy situation and that this is a potentially fair reason for dismissal. This was because there was no longer any requirement for work of the kind performed by Mr Buglass and Mr Hopper at the Yard. They were longer required there and there was no work for them at the Yard.

77. Securitas pleads in it defence that if TUPE does not apply, Mr Buglass and Mr Hopper's positions were redundant. As there was a redundancy dismissal was it procedurally unfair? Clearly this is not a question of unfair selection as there ceased to be a requirement for work that Mr Buglass and Mr Hopper were employed to perform at the Yard. The potential for procedural unfairness arises in relation to the possibility of alternative employment and whether Securitas acted reasonably. Securitas are a large employer and it is reasonable to infer that there would be alternative employment available. It was clear to the Tribunal that Securitas were alive to that possibility because notwithstanding the fact that Securitas mistakenly believed that Mr Buglass and Mr Hopper's employment would transfer to Ryandale under TUPE, they did alert both men of the option of remaining with Securitas and referred them to the internal website which had details of alternative employment. Furthermore, they were invited to contact their line manager if they were interested in pursuing alternative employment further. That was reasonable behaviour on the part of Securitas. Unfortunately, neither Mr Buglass nor Mr Hopper took matters any further. Despite being told about the possibility of internal vacancies and being advised to contact their line manager to pursue matters further if they were interested, they did not do that. Under the circumstances, it is understandable that Securitas believed that neither man wanted to continue working for them. Securitas acted reasonably and it cannot be said that these dismissals were procedurally unfair. They took reasonable steps to ameliorate the effects of redundancy on Mr Buglass and Mr Hopper.

78. This was a redundancy situation, and both Mr Buglass and Mr Hopper would have been entitled to a statutory redundancy payment given their length of service with Securitas. Securitas did not pay them a redundancy payment. They should now make that payment.

79. Both Mr Buglass and Mr Hopper are entitled to notice pay according the statutory minimum period of notice as they were dismissed without notice. Securitas should pay both men their notice.

80. Both Mr Buglass and Mr Hopper are entitled to payment of holiday pay on termination of employment as this was not paid to them. This should be paid.

81. Both Mr Buglass and Mr Hopper were entitled to updated written particulars of employment which were not provided to them on transfer of their employment to Securitas. As they have succeeded in their redundancy payment, notice pay and holiday pay claims they are entitled to a minimum of two weeks' pay. We have seen no reason to depart from awarding them two weeks' pay.

82. We have calculated compensation as follows:

<u>Mr Buglass</u>

Statutory redundancy payment

13 years full employment over the age of 41 x £281.88 (gross weekly pay) = £5,496.66

<u>Notice pay</u>

12 weeks @ £256.73 (net weekly pay) = £3,080.76

<u>Holiday Pay</u>

16.8 days (statutory annual entitlement) / 52 (weeks in year) x 6 (weeks between 01/01/2019 and 11/02/2019) = 1.9 (2) days holiday)

£256.73 (net weekly pay) / 3(days worked per week) x 2 (days holiday) = £171.15

<u>Failure to supply written statement of terms and conditions</u>

2 weeks gross pay (2 x £281.88) = £563.76

Total £9,312.33

<u>Mr Hopper</u>

<u>Statutory redundancy payment</u>

14 years full employment over the age of 41 x £469.80 (gross weekly pay) = £9.865.80

<u>Notice pay</u>

12 weeks @ £384.48 (net weekly pay) = £4,613.76

<u>Holiday Pay</u>

28 days (statutory annual entitlement) / 52 (weeks in year) x 6 (weeks between 01/01/2019 and 11/02/2019) = 3.23 (3.5) days holiday)

£384.48 (net weekly pay) / 3 (days worked per week) x 3.5 (days holiday) = £269.14

<u>Failure to supply written statement of terms and conditions</u>

2 weeks gross pay (2 x £469.80) = £939.60

Total £15,883.30

Employment Judge **A.M.S.Green**

Date 9 January 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

13 January 2020

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FOR EMPLOYMENT TRIBUNALS