EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Ms J Hacker and others		**London Borough of Croydon**

HELD AT: **Croydon** **ON:** **7 to 10 October 2019 (and 5 November and 12 December 2019 in Chambers)**

BEFORE: **Employment Judge K Bryant QC**

Appearances:

For Dr Nicholls and Dr Schwartz: **Ms M Tether (Counsel)**
For Ms J Hacker and others: **Mr D Hutcheon (Counsel)**

For the Respondent: **Mr S Forshaw (Counsel)**

RESERVED JUDGMENT ON A PRELIMINARY HEARING

1. The transfer of the Claimants' employment to the Respondent with effect from 1 April 2013 did not fall within the provisions of regulation 3(5) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

2. That transfer was therefore a relevant transfer for the purposes of regulation 3(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

REASONS

Introduction and history of proceedings

3. There are 14 Claimants in these linked claims as follows:

Name of Claimant	Case No.
Ms J Hacker	2303244/2015
Ms K Naish	2303248/2015
Mr J Burke	2300150/2016
Mrs T Steadman	2300455/2016
Mrs B Tuszkiewicz-Piecarski	2300456/2016
Ms S Corben de Romero	2300568/2016
Ms B Alves	2300569/2016
Ms A Kitt	2300570/2016
Mrs B Whittlesea	2300571/2016
Mrs L Hunt	2300572/2016
Mrs M Abbott	2300573/2016
Mr F Semugera	2300574/2016
Mrs S Nicholls	2300747/2016
Ms E Schwartz	2300748/2016

4. Dr Nicholls and Dr Schwartz (to give them the titles used in their witness statements as opposed to the boxes ticked on their ET1s) are supported by the British Medical Association and the remaining Claimants by Unite; the Claimants will be referred to below as '**the BMA Claimants**' or '**the Unite Claimants**' as appropriate.

5. It was confirmed during the course of the hearing that although, pursuant to an order made by Employment Judge Baron on 22 June 2016, all of the claims are being considered together for the purposes of this PH, the claims have not been consolidated and it may be that if they are to proceed beyond this stage they will need to be separated in so far as different cases give rise to different claims and issues.

6. It is unnecessary to set out here the substantive claims raised by each of the Claimants, save to note that each relies on his or her employment having transferred to the Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('**TUPE**') with effect from 1 April 2013. The factual background to the transfer of their employment will be discussed in more detail below. It is accepted that the employment of each of the Claimants transferred to the Respondent with effect from that date, but it is not accepted that the transfer was pursuant to TUPE.

7. In particular, the Respondent contended in its response to the claims that:

   7.1 the transfer fell within the provisions of regulation 3(5) of TUPE and so was not a relevant transfer; and

7.2 in any event, even if there had been a relevant transfer, the employment of the Claimants would not have been terminated by the transfer and so regulation 4(1) of TUPE was not engaged.

8. Those issues were the subject of a PH lasting 5 days (with another 2 in chambers) in May 2017. In a reserved judgment promulgated on 31 July 2017 the tribunal found against the Claimants on both of the above issues. The Claimants appealed on both issues and Lavender J sitting alone in the Employment Appeal Tribunal ('**EAT**') allowed the appeal, following a 2 day hearing in May 2018, on both counts for reasons set out in a detailed judgment handed down on 23 August 2018.

9. Having allowed the Claimants' appeal on the regulation 3(5) point, Lavender J remitted it to a differently constituted tribunal. On the regulation 4(1) point, Lavender J allowed the appeal and found in the Claimants' favour so no remission was necessary.

10. This PH is the hearing of the regulation 3(5) issue on remission from the EAT.

The basis of the remission / application to adduce fresh evidence

11. In his order dated 23 August 2018, Lavender J remitted these cases to this tribunal on the following basis:

'4. The Appellants' claims be remitted to a different Employment Judge to determine whether the transfer of the Appellants' employment to the Respondent was a relevant transfer for the purposes of Regulation 3(1) TUPE 2006 or whether Regulation 3(5) prevented it from being such a relevant transfer.

5. In making the determination referred to at paragraph 4 of this Order, for the avoidance of doubt, the Employment Judge will not be bound by any findings of fact made by Employment Judge Hall-Smith.'

12. In fact, one of the criticisms made of the judgment of the tribunal following the first PH was that it was hard to tell in many instances what findings of fact had been made by the tribunal. In any event, it is clear from the EAT's order that this tribunal is not bound by any previous findings of fact and so the tribunal has heard evidence from the same witnesses and been provided with the same documentary evidence (with one or two additional documents agreed by the parties) as was before the last PH.

13. At the start of this PH, the Respondent made an application to adduce evidence from a witness who had not given evidence at the previous hearing and whose statement was served on the Claimants some three weeks or so before this hearing. That application was resisted by the Claimants. The tribunal heard argument on the morning of day 2 of the PH and gave its decision shortly before lunch. For reasons given orally at the time, the tribunal did not give the Respondent permission to adduce witness evidence that was not before the previous PH.

Statement of agreed facts

14. Although the findings of fact made by the tribunal following the previous PH are not, as noted above, binding on this tribunal, the previous judgment and reasons have been included in the trial bundle and have been referred to a number of times during the course of this hearing. Indeed, the judgment and reasons were included in the agreed list of documents that the parties asked the tribunal to read before the start of live witness evidence, and which the tribunal spent most of the first day of the PH reading.

15. One passage in the tribunal's previous reasons recites the content of a statement of agreed facts that had been provided by the parties. The tribunal has not been provided with the statement of agreed facts at this PH, but that was on the basis, agreed by all parties, that it was adequately recorded in the previous reasons. The tribunal therefore repeats and adopts the following passage from the previous tribunal's reasons (with typos corrected) and notes that these remain facts that are agreed by all parties:

> *'7.1 The Claimants were employed prior to 1 April 2013 by the Croydon Primary Care Trust ("the PCT"). They each worked in the PCT's Public Health Team, headed by the Director of Public Health, which was responsible for the provision of public health functions in the Croydon area and, to a lesser extent, other parts of South West London where relevant agreements were in place.*
>
> *7.2 The Public Health Team in the PCT had a discrete departmental structure, and was headed by the Director of Public Health.*
>
> *7.3 The statement of facts included the roles held by each of the 14 Claimants, which are not repeated in these reasons.*
>
> *7.4 The Health and Social Care Act 2012 introduced national changes to the Health Care system. PCTs were abolished with effect from 1 April 2013 and their public health functions were largely transferred to Local Authorities with the remainder transferring to other Public Bodies, including NHS England and Public Health England.*
>
> *7.5 In Croydon, various public health functions were transferred from the PCT to the London Borough of Croydon on 1 April 2013. The PCT was abolished with effect from 1 April 2013.*
>
> *7.6 In conjunction with the transfer of certain public health functions from the PCT to the Local Authority "transfer schemes" were put in place by the Secretary of State for Health pursuant to powers conferred on him by the Health and Social Care Act 2012. In Croydon:*
>
> *a. One transfer scheme was implemented transferring property, contracts and other assets and liabilities from the PCT to the Local Authority;*

b. Another transfer scheme was implemented to transfer the employment of staff from the PCT to the Local Authority.

7.7 The Health and Social Care Act 2012 (Croydon Primary Care Trust) Staff Transfer Scheme 2013 ("the Croydon Staff Transfer Scheme") related to the transfer of staff from the PCT to the Local Authority.

7.8 The Croydon Staff Transfer Scheme provided at paragraph 3:

'3(1) this paragraph applies to any person who, immediately before the transfer date, was an employee of the transferor and–
(a) is identified in Columns 1 to 3 of a table in the Schedule; or
(b) has, on or after 1st March 2013 but before the transfer date, been notified in writing by the transferor or transferee that they are to be transferred to the transferee on that date.
(2) subject to sub-paragraph (5), any person to whom this paragraph applies is, on the transfer date, to be transferred to the employment of the transferee.
(3) subject to sub-paragraph (5), the contract of a person to whom this paragraph applies–
(a) is not terminated by the transfer; and
(b) has effect on and after transfer date as if originally made between that person and the transferee.
…'

7.9 The majority of employees working in the Public Health Team transferred to the employment of the Local Authority.

7.10 Accordingly, all of the Claimants became employed by the Local Authority from 1 April 2013 in the same role as they had held immediately prior to the transfer.

7.11 The Claimants continued to be employed by the Local Authority until at least April 2015. Thereafter, they have resigned, been dismissed or been dismissed and re-engaged.'

Evidence and other documents

16. At the start of this PH, each of the representatives handed up a written opening / skeleton argument. Before closing submissions each of the representatives handed up written closing submissions. There was also an agreed bundle of authorities and a further supplementary authorities bundle provided by the Respondent. The tribunal is grateful to the parties' representatives for their helpful written (and oral) submissions all of which which it has taken into account when deliberating this matter but which it is not necessary to set out in detail below.

17. The tribunal was also provided with an agreed trial bundle in four volumes.

18. Witness evidence was called on behalf of the Claimants from three of their number, namely (in the order they were called):

    18.1 Dr Ellen Schwartz, Consultant in Public Health;
    18.2 Dr Sara Nicholls, Consultant in Public Health;
    18.3 Mr Jimmy Burke, Senior Public Health Principal.

19. The Respondent then called Mr Stephen Morton, the Respondent's former Head of Health and Wellbeing.

20. Each witness gave evidence by reference to the same witness statement as had been adduced at the previous PH.

Findings of fact

21. As already noted above, it is agreed by all parties that the Claimants' employment transferred from Croydon Primary Care Trust (the '**PCT**') to the Respondent with effect from 1 April 2013 and that each Claimant continued after the transfer in their pre-transfer role. This is confirmed by contemporaneous documents, including organisation charts showing the pre and post-transfer department structure.

22. It is also agreed that the Public Health Team (the '**Team**') had a discrete departmental structure before the transfer. It retained a discrete structure after the transfer, with the majority of the members of the Team continuing in the same roles.

23. The Team was involved in public health in the Croydon area and, to a lesser extent, other parts of South West London where relevant agreements were in place. The work of the Team is considered in more detail below.

24. The tribunal has heard and read evidence concerning the functions of local public health systems, including a document produced by the Faculty of Public Health. There appears to be no dispute as to the key functions or 'pillars', namely (1) protecting public health, (2) improving public health and (3) ensuring the proper provision of health services. There was some debate as to whether 'public health intelligence' should be seen as a fourth key function or as something that provides support for the other three, but it is clear that, however it is described, public health intelligence forms an important part of public health provision.

25. The first key function, health protection, is usually carried out by a number of public bodies. It includes such things as the control of infectious diseases and protection from environmental hazards.

26. The aim of the second key function, health improvement, is to reduce health inequalities, for example where a section of the population suffers disproportionately.

27. The third key function, health services, involves service planning, commissioning and the assessment of clinical effectiveness.

28. The public health intelligence role in Croydon included the maintenance of a public health library available to public health professionals both within and outside the PCT and, post-transfer, the Respondent. Two part-time staff worked exclusively on this.

29. There were a number of key themes in the evidence presented to the tribunal. One was the extent to which the Team were involved in policy decisions. Another was the extent to which the Team's work included direct delivery of services to the public as opposed to advice or management of projects commissioner from, and delivered by, others.

30. As to policy, Dr Schwartz accepted during her evidence that, ultimately, public health is a government function. She referred to a 'chain of command' with local politicians setting the direction and that being interpreted and implemented by local officers. She accepted that the public health functions outlined above include analysis, for example analysis of risk, the development of policy and then the implementation of that policy. However, she would not accept that her role or that of others at her level (which was the most senior of any of the Claimants in the structure of the Team both pre and post-transfer) involved any decision-making concerning policy. She accepted that her role involved analysis, assessment and recommendation, often in conjunction with others both within the PCT (or the Respondent post-transfer) and in other bodies, but not policy decisions. She hoped that the advice given, and recommendations made, by the Team would have some influence on policy but did not accept that they were responsible for any policy decisions as such.

31. Mr Morton also accepted in his evidence that the Team's primary role was to provide specialist public health advice and that, broadly, the Team's role was advising and influencing decision-making rather than making policy decisions itself. Policy decisions were generally taken by others, such as the PCT Board pre-transfer and the Commissioning Board post-transfer, of both of which the Director of Public Health was a member.

32. Ultimately, there was little, if any, significant dispute between the parties in their evidence as to the extent to which the Team made policy decisions. The tribunal finds that whilst the Team gave advice and made recommendations on policy matters they were not responsible, save the Director to some extent, for making decisions as to public health policy.

33. Dr Schwartz accepted, and the tribunal finds, that she deputised regularly for the Deputy Director of Public Health but on only a few occasions for the Director of Public Health and only then when her specific skills were required. She did not deputise for the Director in relation to any part he played in policy decisions.

34. The tribunal also heard much evidence as to whether the Team were involved in the direct provision of services to the public or with commissioning services from others, or both.

35. Mr Morton sought in his evidence to emphasise that there was a minimal direct delivery role. He said that for the most part the Team was involved in advising on and managing projects rather than direct delivery of them. He said that direct delivery to the public was better done by those who interact with the public on a daily basis, such as GPs and nurses. He accepted that some in the Team had the relevant skills but he felt that direct service delivery would not be a good use of their time.

36. He accepted that there was some direct service provision. For example, one member of the Team was engaged for a period in giving direct advice to the African community concerning HIV prevention and another was involved in providing direct support in a 'healthy living hub' based in Croydon library. He maintained, however, that the Team was more involved in commissioning service provision from others and that direct service provision was not the core role of the Team.

37. Dr Schwartz was reluctant in her oral evidence to accept that direct service provision immediately before the transfer was a very small part of the Team's work. However, as was pointed out to her, paragraph 46 of her own witness statement says there that both pre and post-transfer 'the vast majority' of services required to discharge the PCT's and then the Respondent's public health functions was by means of contracts with third party providers.

38. The tribunal also notes Dr Schwartz's pre-transfer job description which she accepted is accurate and which gives a job summary including:

'The post holder will work across the full scope of public health including improving health care, health improvement and health protection. The post holder will act in an expert advisory capacity to inform the effective commissioning of healthcare and other services influencing health. …'

39. The job description also refers to leading on *'the communication, dissemination and implementation and delivery of national, regional and local policies, developing inter-agency and interdisciplinary strategic plans and programmes …'*.

40. The tribunal finds that although there was some direct provision of services to the public by the Team both pre and post-transfer, this formed a relatively minor part of the Team's work. Some individuals had a larger element of direct service provision than others, but overall it was a minor part of the Team's role.

41. The tribunal also heard evidence as to the extent to which the Team commissioned services themselves. Immediately pre-transfer there was a separate commissioning directorate within the PCT. The Team did commission some services directly, for example abortion services because it

was felt to be a potentially contentious subject, but for the most part commissioning was done by others, albeit on the basis of advice from the Team.

42. A key document adduced in evidence is titled 'Public health transition project'. This document was created in 2011 in the context of impending changes to the statutory framework for local public health provision, as discussed further below. Its primary author was Mr Morton although it was to be signed off (although the copy the tribunal has seen is not signed) by a number of senior individuals both within the Respondent and the NHS. As set out in the executive summary, the aim of the project was to develop and implement a plan to manage the transition of the public health function from the PCT to the Respondent by 31 March 2013, the date on which it was anticipated that PCTs would be abolished. The document set out relevant background including noting that the Director would be a joint appointment between Public Health England and the local authority, supported by a team of public health professionals to carry out their functions.

43. The document then set out, in an analysis section, five options which had been considered, namely: Option 1 – do nothing, Option 2 – effect the transfer from the PCT to the Respondent once the legislative framework was in place, Option 3 – effect the transfer under the existing legislative regime, Option 4 – transfer some elements of the Team's functions to the Respondent and others to other bodies, and Option 5 – establish the Team as 'a social enterprise providing public health support for the council, GP consortia and other funding bodies.'

44. Although the document recommends that Option 2 be adopted, it is of note that Option 5 was clearly considered and analysed. In the SWOT (ie Strengths, Weaknesses, Opportunities and Threats) analysis set out in the document for Option 5, some potential down-sides to this option were raised, including the risk that the Respondent and GP consortia may not wish to commission services from the Team if it were a separate social enterprise, and that the need to generate income may skew the Team's work to focus on income-generating activities and to neglect others. However, there was no suggestion in this document that there was any necessary or insurmountable barrier to the outsourcing of the entire Team's functions to a social enterprise; rather, the suggestion was that if this option were chosen there may be issues that could affect its viability. Indeed, in a later section of the document there is reference to exploring alternative models for delivering the public health function; the example given is: *'a social enterprise may be able to operate at lower cost than if it were physically based in council premises or using council systems'* although there would be *'a higher risk of failure and of disrupting business continuity.'*

45. Dr Schwartz's evidence was that this option was not just a theoretical one to be instantly dismissed. She said that it was considered as a serious option at the time. She accepted, however, that she is not aware of any other local authority outsourcing its entire public health function below the level of

Director of Public Health, although she was aware that several other teams were considering such an option at the time.

46. Mr Morton accepted in evidence that Option 5 survived the second draft of the document and was the subject of detailed discussion and, although rejected, that it was given serious consideration. When asked in evidence whether it would have been impossible to implement, he said that it could have been set up but he thinks it would have failed almost immediately, although he could not be sure of that.

47. The tribunal accepts that Option 5 was given serious consideration by Mr Morton and others within the PCT and that it was not included by Mr Morton as a purely theoretical, but unviable, option. Rather, it was included because it was felt at the time that it was a real possibility, albeit one that was ultimately not the preferred option.

48. The tribunal has also heard and read evidence concerning an entity known as the Public Health Action Support Team or PHAST, which is a Community Interest Company. Its website states that PHAST offers independent public health expertise in all three traditional public health areas (ie the three key functions outlined above) and that its work includes delivering projects and providing training as well as providing interim public health staff to organisations with a temporary skills gap. With regard to projects, it says that it can 'work at any stage of a project, from research and evidence reviews to health needs analyses, modelling, evaluation, service redesign, commissioning advice, service specification and performance management.'

49. It was put to Dr Schwartz in cross-examination that the Team could not be replaced by PHAST. She replied that you could not replace the Director but theoretically the remainder of the Team could be replaced and its functions outsourced apart from the specific statutory functions of the Director.

50. Mr Morton was asked in cross-examination materially the same question as recorded in the previous tribunal's reasons (and at ¶91 of the EAT's judgment), ie whether he accepted that all or almost all of the Team's work can be, and is, offered by non-state actors in the same market. He said that, yes, it can be but in reality on a wholesale basis he did not believe that it is. In other words, he did not accept that all of the Team's work is in fact offered wholesale by non-state actors in a market, but he did accept that it could be.

51. It was recorded by the previous tribunal (and noted in the EAT's judgment) that Mr Morton had accepted at the last PH that 'all or almost all of the work done by the Public Health Team can be, and in fact is, offered by non-state actors operating in the same market' (emphasis added). If, as seems likely, this form of words was put to Mr Morton as a single question (as it was during this PH) then it was, and remains, a complex question. The tribunal has been asked by the Claimants' representatives to make a finding in line with the answer recorded in the previous tribunal's reasons. However, the tribunal is not bound by the findings of the previous tribunal and when the question was put at this hearing in much the same form Mr Morton accepted the 'can be'

part but not the 'in fact is' part, even when the question was put a number of times. The tribunal accepts Mr Morton's explanation that at the last hearing he meant to accept the 'can be' part of the question but did not intend to accept the 'in fact is' element. However, even the acceptance of 'can be' is important in the context of this case as discussed further below.

52. Mr Morton accepted during his evidence that the 'bread and butter' tasks undertaken by the Team were not things that the state must necessarily do, although the responsibility for those tasks ultimately remains that of the Director. He also accepted that he could see no reason why PHAST could not provide advice on public health matters. It was put to him that the services the Team dealt with are also offered in the private sector, and he said that they could be commissioned from the private sector but the responsibility would stay with the Director and the Respondent.

53. The tribunal finds that on this matter there was little dispute between the evidence of the parties' witnesses. It was agreed that the Director has number of statutory functions relating to public health and that these could not be outsourced. It was agreed that the Director's functions are usually carried out with the assistance of the Team. However, although the Director would typically look to the Team, which reports to him / her, for advice and support, the work of the Team below the level of Director could, at least in principle, have been outsourced.

The statutory framework

54. The tribunal has heard and read evidence concerning the statutory framework for the functions of the Team and the legislative changes that resulted in the transfer from the PCT to the Respondent. This has already been set out to some extent in the extract from the previous tribunal's reasons as set out above. The Health and Social Care Act 2012 (the '**2012 Act**') introduced national changes to the health and social care system. PCTs were abolished with effect from 1 April 2013 and their public health functions were largely transferred to local authorities, with the remainder being transferred to other public bodies, such as NHS England and Public Health England. In Croydon, various public health functions transferred from the PCT to the Respondent on 1 April 2013.

55. Until that date the National Health Service Act 2006 (the '**2006 Act**') imposed various duties on the PCT including:

    55.1 To make arrangements to secure continuous improvement in the quality of health care provided by it and by other persons pursuant to arrangements made by it (which included the promotion and protection of public health) (section 23A);
    55.2 To make arrangements with a view to securing that it received advice from persons with professional expertise relating to the physical or mental health of individuals which was appropriate for enabling it effectively to exercise its functions (section 23);

55.3 To prepare, at such times as the Secretary of State may direct, a plan which set out a strategy for improving (a) the health of the people for whom it was responsible, and (b) the provision of health care (including the promotion and protection of public health) to such people (section 24).

56. The tribunal has been provided with a copy of a government White Paper: 'Healthy Lives, Healthy People: Our strategy for public health in England', which preceded the 2012 Act. This was presented to Parliament by the Secretary of State for Health in 2010. It outlined what was described as a *'radical shift in the way we tackle public health challenges.'* It referred to localism being at the heart of the new system, with *'devolved responsibilities, freedoms and funding'* and Directors of Public Health being the *'strategic leaders for public health and health inequalities in local communities.'*

57. The tribunal also notes the statement in the White Paper, in the context of the requirement that Directors of Public Health be employed by upper-tier councils or unitary authorities to lead public health efforts, that *'*[w]*e will keep to a minimum the constraints as to how local government decides to fulfil its public health role and spend its new budget.'* Later in the White Paper there is reference to opportunities being opened up for local authorities to take *'innovative approaches to public health including new partners'*. Both the White Paper and a later 2011 document produced by the Department of Health titled 'Local government leading for public health' emphasise the possibility that local authorities may wish to work with a range of partners across civil society in fulfilling their new public health functions, including increased choice from a range of potential providers. There is reference, for example, in the 2011 document to the potential role of staff-led enterprises such as social enterprises, staff-led mutuals, joint ventures and partnerships. This, it was said, *'will allow providers to compete for services within the market'*.

58. The 2012 Act came into force on 27 March 2012, but the key provisions for present purposes came into force on 1 April 2013. PCTs (including the PCT) were abolished pursuant to section 34.

59. Section 12 of the 2012 Act inserted the following new section into the 2006 Act:

> *'**2B Functions of local authorities and Secretary of State as to improvement of public health***
> *(1) Each local authority must take such steps as it considers appropriate for improving the health of the people in its area.*
> *(2) The Secretary of State may take such steps as the Secretary of State considers appropriate for improving the health of the people of England.*
> *(3) The steps that may be taken under subsection (1) or (2) include—*
> *(a) providing information and advice;*

(b) providing services or facilities designed to promote healthy living (whether by helping individuals to address behaviour that is detrimental to health or in any other way);
(c) providing services or facilities for the prevention, diagnosis or treatment of illness;
(d) providing financial incentives to encourage individuals to adopt healthier lifestyles;
(e) providing assistance (including financial assistance) to help individuals to minimise any risks to health arising from their accommodation or environment;
(f) providing or participating in the provision of training for persons working or seeking to work in the field of health improvement;
(g) making available the services of any person or any facilities.

(4) The steps that may be taken under subsection (1) also include providing grants or loans (on such terms as the local authority considers appropriate).

(5) In this section, "local authority" means—
(a) a county council in England;
(b) a district council in England, other than a council for a district in a county for which there is a county council;
(c) a London borough council;
(d) the Council of the Isles of Scilly;
(e) the Common Council of the City of London.'

60. Section 30 of the 2012 Act inserted a new section 73A into the 2006 Act as follows:

'73A Appointment of directors of public health
(1) Each local authority must, acting jointly with the Secretary of State, appoint an individual to have responsibility for—
(a) the exercise by the authority of its functions under section 2B, 111 or 249 or Schedule 1,
(b) the exercise by the authority of its functions by virtue of section 6C(1) or (3),
(c) anything done by the authority in pursuance of arrangements under section 7A,
(d) the exercise by the authority of any of its functions that relate to planning for, or responding to, emergencies involving a risk to public health,
(e) the functions of the authority under section 325 of the Criminal Justice Act 2003, and
(f) such other functions relating to public health as may be prescribed.
(2) The individual so appointed is to be an officer of the local authority and is to be known as its director of public health.
…'

61. The tribunal has also been referred to the provisions of the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch

Representatives) Regulations 2013 (SI 2013/351) which impose specific duties on the Respondent, including to:

61.1 provide for the weighing and measuring of children (regulation 3);
61.2 provide or make arrangements to secure the provision of (a) health checks to be offered to eligible persons in its area (regulation 4), (b) open access sexual health services in its area (regulation 6), and (c) a public health advice service to any clinical commissioning group whose area falls wholly or partly within the Respondent's area (regulation 7);
61.3 provide information and advice to specified persons and bodies with a view to promoting the preparation of appropriate local health protection arrangements (regulation 8).

TUPE

62. The key, indeed sole, issue for this PH concerns regulation 3 of TUPE which provides, in so far as material, as follows:

> *'**3 A relevant transfer***
> *(1) These Regulations apply to—*
> *(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;*
> *…*
> *and in which the conditions set out in paragraph (3) are satisfied.*
> *(2) In this regulation 'economic entity' means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*
> *…*
> *(4) Subject to paragraph (1), these Regulations apply to—*
> *(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;*
> *…*
> *(5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer.*
> *…'*

Guidance from relevant case law

63. During the course of their submissions, the parties referred the tribunal to a number of authorities, both domestic and European, as follows:

CJEU cases
EC Commission v Italy (C-118/85) [1988] 3 CMLR 255;
Klaus Höfner and Fritz Elser v Macrotron GmbH (C-41/90) [1993] 4 CMLR 306;
Dr Sophie Redmond Stichting v Bartol and others (C-29/91) [1992] IRLR 366;

Commission of the European Communities v United Kingdom (C-382/92, C-383/92) [1994] ICR 664;
Sat Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol) (C-364/92) [1994] 5 CMLR 208;
Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA (SEPG) (C-343/95) [1997] CMLR 484;
Henke v Gemeinde Schierke and another (C-298/94) [1997] ICR 746;
Sanchez Hidalgo and others v Asociacion de Servicios Aser and another (C-173/96, C-247/96) [1999] IRLR 136;
Collino v Telcom Italia SpA (C-343/98) [2002] ICR 38;
Ambulanz Glöckner v Landkreis Südwestpfalz (C-475/99) [2002] 4 CMLR 21;
Mayeur v Association Promotion de l'Information Messine (APIM) (C-175/99) [2002] ICR 1316;
Federación Española de Empresas de Tecnología Sanitaria (Fenin) v Commission of the European Communities (C-205/03) [2006] 5 CMLR 7;
Scattolon v Ministerio dell'Instruzione, dell'Università e della Ricerca (C-108/10) [2012] ICR 740;
Piscarreta Ricardo v Portimão Urbis EM SA and others (C-416/16) [2017] ICR 1451;
Domestic cases
Kingston v British Railways Board [1984] ICR 781, CA;
Governing Body of Clifton Middle School and others v Askew [1997] ICR 808, EAT;
Highland Council v Walker EAT/817/97, unreported 25 November 1997;
Dundee City Council v Arshad EAT/1204/98, unreported 14 January 1999;
Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners [1999] 1 WLR 701, HL;
Bettercare Group Limited v The Director General of Fair Trading [2003] ECC 40, CCAT(NI);
Adult Learning Inspectorate and others v Beloff UKEAT/0238/07, unreported 30 January 2008;
Law Society of England and Wales v Secretary of State for Justice [2010] EWHC 352 (QB), [2010] IRLR 407;
Advisory Conciliation and Arbitration Service (ACAS) v Public and Commercial Services Union (PCS) [2018] IRLR 1110, EAT

64. The parties also referred the tribunal to the judgment of Lavender J sitting in the EAT on the appeal against the judgment of the previous tribunal in these cases, which was handed down on 23 August 2018 and is reported at [2018] IRLR 988 and [2019] ICR 542.

65. The tribunal has taken into account all of the cases to which it has been referred during the course of this PH, but in light of Lavender J's detailed and helpful judgment in the EAT in these cases, which includes a careful review of relevant case law, it is unnecessary to review the case law again in detail in these reasons.

66. The following is a summary of the key points, for present purposes, from Lavender J's judgment (and the case law to which he refers therein) (paragraph numbers refer to those in the EAT's judgment):

66.1 At ¶20, Lavender J sets out what he describes as some uncontroversial propositions:

66.1.1 TUPE exists to give domestic effect to the Acquired Rights Directive (2001/23/EC) (the '**Directive**');

66.1.2 TUPE is to be interpreted, so far as possible, in accordance with the Directive;

66.1.3 When considering what amounts to an 'undertaking' for the purposes of TUPE, it is relevant to look at EU competition law, which uses the same term with the same definition;

66.1.4 Regulation 3(5) of TUPE gives effect to article 1(1)(c) of the Directive which itself was introduced to reflect the decision of the CJEU in *Henke* (a decision under the predecessor provisions of the 1977 Directive);

66.1.5 The 1977 Directive (and 1981 TUPE) provisions did not contain an equivalent to article 1(1)(c) of the Directive (or regulation 3(5) of TUPE); it follows that regulation 3(5) is merely identifying something which would not be a relevant transfer in any event;

66.2 Two points are central (¶26): it is necessary to:

66.2.1 Consider the activities exercised by the state in the particular case, and

66.2.2 Determine whether those activities belong to (a) exercising public powers, or (b) carrying on an economic activity by offering goods and/or services on the market;

66.3 The two alternatives, ie exercising public powers or carrying on an economic activity by offering goods and/or services on the market, are mutually exclusive (¶45);

66.4 With regard to economic activity:

66.4.1 The definition is settled: any activity consisting in offering goods and services on a given market (¶47);

66.4.2 It is relevant to consider whether the activity consists of the provision of goods and services, as opposed to, for example, merely acquiring goods or services (¶48(1));

66.4.3 The purchasing or commissioning of goods or services cannot of itself constitute an economic activity, but a body which supplies goods or services on a market is carrying on an economic activity, both in supplying those goods or services and in purchasing goods or services for the purpose of that supply (¶42);

66.4.4 It is therefore relevant to consider whether there is a market for the relevant goods and services (¶48(2));

66.4.5 If there is a market, then the provisions of goods and services on that market is an economic activity even if the goods and services are provided free of charge and/or without a view to making a profit; what is relevant is whether the activity is capable of being carried on, at least in principle, by a private undertaking with a view to profit (¶49);

66.4.6 There can be a market even if the goods or services are being provided to the state or a state-authorised entity (¶50(1)) or by one state body to another (¶50(2));

66.4.7 An entity may be an undertaking (within the meaning of TUPE) even if it is a public law entity, is publicly funded, acts in the public interest and/or acts pursuant to statutory functions (¶51);

66.5 With regard to the exercise of public powers or public authority:

66.5.1 The cases in which article 1(1)(c) of the Directive has been considered use a number of different expressions, but the central concept is that 'exercising public powers' is not an economic activity (¶52);

66.5.2 It can be difficult to determine whether a particular activity does or does not fall within this concept, but that is what the court or tribunal has to determine (¶53);

66.5.3 It is clear that the exercise of public powers or public authority does not include everything that a public authority does (¶54);

66.5.4 Previous cases help to illustrate where the line is to be drawn, but do not lay down a single, definitive, test (¶54);

66.5.5 It is relevant to ask (¶55) whether the activity:

66.5.5.1 is necessarily carried out by public entities;

66.5.5.2 is a core state activity;

66.5.5.3 has always been carried out by public entities;

66.5.5.4 involves the exercise of prerogatives outside the general law or privileges of official power;

66.5.5.5 involves the exercise of rights and powers of coercion;

66.5.5.6 is a public service to which any idea of commercial exploitation with a view to profit is alien;

66.5.5.7 has an exclusively social function;

66.5.5.8 is typically that of a public authority;

66.5.5.9 is carried out in the public interest;

66.5.5.10 involves providing services in competition with those offered by operators pursuing a profit motive;

66.5.6 The importance of the above factors may vary from case to case and none is a definitive statement of the necessary and sufficient conditions for finding that an activity involves the exercise of public power or authority (¶56);

66.5.7 The functions-based approach requires the focus to be on the activities of the transferred entity and not on the wider activities of the transferor as a whole (¶¶61-62);

66.6 Where a transferred entity has some activities of an economic nature and others which involve the exercise of public powers, in other words a mixed case, the tribunal or court should consider whether the economic activities can properly be described as 'ancillary' activities; if they are merely ancillary then that will not prevent the case from falling within regulation 3(5) (¶¶64-68);

66.7 The EAT was not persuaded that it is helpful to see regulation 3(5) of TUPE (and article 1(1)(c) of the Directive) as an exception that should

be strictly construed; however, it is right to say that its application should be kept within its proper bounds (¶46).

Discussion and conclusions

67. The tribunal discussed with the parties at the start of day 2 of the PH their respective positions on a number of matters which appeared to the tribunal to be of relevance to the regulation 3(5) point. In summary:

    67.1 Both the BMA and Unite Claimants accepted that the answer to the regulation 3(5) issue would apply to the entire Team, save for those whose employment did not transfer to the Respondent and with the possible exception of the Director of Public Health. The Respondent said that its primary case was that the answer applied to all of the Claimants, and the answer was that there was no relevant transfer because of regulation 3(5), but it reserved its position to argue that if regulation 3(5) was not engaged in this case then it may be engaged for some of the Claimants but not others. The Claimants replied that this was the first time any question of severability had been raised by the Respondent and it was now too late for them to raise such an argument.

    67.2 All parties agreed that the question for the tribunal under regulation 3(5) was essentially a binary one: were the Team engaged in economic activities or public administrative functions? If the former then TUPE would apply but if the latter then regulation 3(5) would be engaged and there would have been no relevant transfer. This is consistent with the judgment of Lavender J, as summarised above, to the effect that economic activities and the exercise of public powers for the purposes of regulation 3 of TUPE are mutually exclusive.

    67.3 All parties also agreed that there was no need for the tribunal to consider, as a separate question, whether the Respondent or any part of it is a public administrative authority; the regulation 3(5) issue only required consideration of the functions being transferred.

68. The tribunal notes, with regard to the point discussed under ¶67.1 immediately above, that as matters transpired the Respondent in its closing submissions did not pursue an argument for the engagement of regulation 3(5) of TUPE for some but not all of the Claimants.

69. The tribunal also notes that the role of the Director of Public Health is clearly distinct from the roles of all others in the Team. The Director occupies a statutory role with statutory responsibilities and some input into policy decisions. The role of the Team who support the Director in carrying out his statutory functions does not involve decision-making as to policy matters or any direct statutory responsibilities. That being so, and since the focus of all parties' submissions has been on the activities of the Team other than the Director, the following discussion will adopt a similar focus.

70. The starting point, then, is to ask what activities were undertaken by the Team, ie to consider what the Team actually did, immediately prior to the

transfer. The tribunal does so on the basis that although it has only heard evidence from 3 of the Claimants, it is necessary to consider the activities undertaken by the entire Team since all parties accept (at least as their primary case) that the answer to the regulation 3(5) question should be the same for all members of the Team (save for the Director) who transferred from the PCT to the Respondent.

71. It is also important to consider what the Team actually did whilst recognising the overall context in which they were doing it. The Respondent says that the tribunal should not lose sight of the wood for the trees, ie should not analyse the activities of the Team at such a detailed level that the public health nature of the work being done is not recognised. It is said that if one chops any activity down to a sufficiently basic level then it could be found on a private market, but in this case it is important to keep in mind the context of the relevant function, ie public health. The tribunal accepts that it is therefore important to keep the broader picture in mind. On the other hand, the tribunal also accepts that it is important to look at the actual activities being carried out, albeit in their overall context, rather than just to look at matters from 'a lofty vantage point' (to borrow the BMA Claimants' phrase). The tribunal needs, in short, to look at the trees whilst also bearing in mind the wood of which they are part.

72. The tribunal has already found that the Team commissioned services from third parties but that this formed a relatively minor part of its overall role. In any event, commissioning services of itself cannot be an economic activity: see ¶¶42(1) and 79(3)(a) of Lavender J's judgment in the EAT in these cases.

73. The tribunal has also found that the Team was involved in some direct service provision. This, the tribunal accepts, could have been provided by others on a market with a view to profit. Some individuals did more than others, but overall direct service provision also formed a relatively minor part of the Team's activities.

74. Similarly, the provision of training and the public health library, ie part of the public health intelligence role, could be provided by others on a market with a view to profit, but this was again a relatively minor part of the Team's activities.

75. Those aspects, the tribunal has concluded, could properly be described as ancillary to the Team's core activities.

76. The tribunal has also considered the evidence, and its findings, as to senior members of the Team standing in, on occasions, for the Director. That would not, the tribunal finds, involve economic activity. The Director has a statutory role with statutory duties of a public nature. However, deputising for the Director was a very minor part of anyone's role.

77. What, then, were the Team's key activities? The tribunal has already found that the Team's activities did not include decision-making as to policy. Rather, their key activities were analysis and assessment of public health

needs, advice on policy matters and on how to address those public health needs and management of services they had commissioned from third parties.

78. These, the tribunal finds, amount to the provision of services, partly to the Director of Public Health in fulfilling his statutory functions and partly to others within the PCT and then the Respondent and to other public bodies.

79. The question is, then, whether the provision of those services by the Team was on a market. In other words, was the activity being undertaken by the Team capable of being carried on, at least in principle, by a private undertaking with a view to profit?

80. It was Dr Schwartz's evidence that her work could easily be carried out in the private sector as could that of the other members of the Team save for the Director. The Respondent says that the Team's activities are public health functions in respect of which there is no market and nor could there be.

81. It is right that there is no evidence that public health functions ever have been outsourced wholesale by a PCT or, since 2013, a local authority. There is evidence that PHAST provides individuals to fill skills gaps in public health teams and also provides teams to undertake projects but this gives no real indication that public health activities have ever been outsourced on a larger scale.

82. However, the Respondent's argument that there could never be a market for the activities carried out by the Team faces the significant difficulty that it is to a large extent inconsistent with the Respondent's own evidence, both from its witness as given to the tribunal and also from contemporaneous documentation as noted above. Mr Morton did not accept at this PH that all of the Team's work is in fact offered wholesale by non-state actors in a market, but he did accept that it could be. This is consistent with the 2011 'Public health transition project' document produced by Mr Morton and which included as one option the transfer of the Team's functions wholesale to a social enterprise. He accepted that this option survived the second draft of this document and that it was given serious consideration. He said in evidence that he did not think that such an approach would ultimately have been viable but the tribunal has already found that, at the time, it was put forward as a realistic option albeit not the preferred option.

83. As noted by Lavender J (¶79) this is not an easy or clear-cut case but in light of all the evidence seen and heard, the above findings of fact and the guidance in the authorities referred to above, the tribunal has concluded that the key activities of the Team (other than the Director) did involve the provision of services on a market. They were economic activities which were more than ancillary. The cases of the Claimants do not, therefore, fall within regulation 3(5) of TUPE.

84. Since the question under regulation 3(5) is, as the parties accept and Lavender J found, binary, it is not necessary in light of the above finding, ie

that the activities of the Team were economic (and more than ancillary), also to consider whether they involved the exercise of public powers. The two are mutually exclusive. However, the tribunal will look briefly at Lavender J's 10 relevant factors (¶55 of his judgment) as a form of cross-check.

84.1 Were the activities necessarily carried out by public entities? The tribunal has already concluded, in the above discussion on economic activities, that the activities of the Team (as opposed to the Director) were not *necessarily* carried out by a public entity, even if as a matter of fact they always had been.

84.2 Are they core state activities? Again, it is important to distinguish here between the functions of the Director and the activities of the Team which supported those functions. Public health may be a core state activity, although that is far from clear from the authorities, but if necessary the tribunal would have found that the activities of the Team, albeit in the context of public health, were not of themselves core state activities.

84.3 Have the activities always been carried out by public entities? This factor is met in these cases.

84.4 Do the activities involve the exercise of prerogatives outside the general law or privileges of official power? There has been no real argument from the Respondent that this factor is met, either at this PH or before the EAT (see ¶76 of Lavender J's judgment).

84.5 Do they involve the exercise of rights and powers of coercion? Again, there has been no real argument from the Respondent on this point either here or in the EAT: see ¶¶76 and 79(1) of Lavender J's judgment.

84.6 Do the activities amount to a public service to which any idea of commercial exploitation with a view to profit is alien? The answer in respect of this factor again requires a distinction to be drawn between the functions of the Director and the activities of the Team in support of those functions. Commercial exploitation with a view to profit may be unusual given that no PCT or local authority appears to have outsourced its public health team's activities wholesale before, but it is difficult to say that it would have been 'alien', in the sense that it could not conceivably have been carried out in a competitive system, and Mr Morton's evidence is consistent with that conclusion.

84.7 Do the activities have an exclusively social function? Although the BMA Claimants do not accept that this factor is met in the circumstances of these cases, the Unite Claimants accept that the Team's activities had a 'largely' social function. If necessary, the tribunal would have found that this factor was met on the facts of these cases.

84.8 Are the activities typically those of a public authority? Again, if necessary, the tribunal would have found that this factor was met in these cases; the activities of the Team were typically those of, and carried out by, public authorities but that of itself does not detract from the finding above in relation to factor 1 in that 'typically' is not the same as 'necessarily'.

84.9 Are they carried out in the public interest? This factor was clearly met in these cases; the activities of a public health team are carried out in the interest of the public in the relevant area.

84.10 Do the activities involve providing services in competition with those offered by operators pursuing a profit motive? The Team's activities were not in fact in competition with any particular provider pursuing a profit motive, but this factor ties in, it seems to the tribunal, with the settled test for economic activity as discussed above. If services were in fact being provided in competition with profit-motivated operators then that would clearly point towards economic activity, and therefore against the exercise of public powers. However, the absence of actual competition does not mean that the activities cannot be economic; as noted above, what is required is that they were capable of being carried on, at least in principle, by a private undertaking with a view to profit and the tribunal has already found that they were.

85. As noted by Lavender J in his EAT judgment, none of the above factors is decisive. It is also clear that a number of those factors would have been met in these cases. However, the above discussion of the factors does not lead the tribunal to question its earlier conclusion on economic activity.

86. In all the circumstances, the tribunal finds that the transfer of the Team (with the exception of the Director) from the PCT to the Respondent did not fall within regulation 3(5) of TUPE and did, therefore, amount to a relevant transfer for the purposes of regulation 3(1) of TUPE.

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Employment Judge K Bryant QC
16 December 2019 – Croydon