Neutral Citation Number: [2022] EAT 31

Case No: EA-2020-000828-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 October 2021

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MISS V CLARK **Appellant**
- and -
(1) KIM MIDDLETON
(2) BLACK DOG HYDROTHERAPY LTD
Respondent

- -
- -

Mr N Sharples (instructed by GMB Legal Department) for the **Appellant**

Hearing Date: 21 October 2021

- -

JUDGMENT

SUMMARY

TRANSFER OF UNDERTAKINGS

The claimant worked for a micro-business which was transferred by its sole owner to a company formed by another employee of that business. Following the transfer, and the transferee proposing changes to the terms of employment, the claimant resigned. She complained of a failure by the transferor to comply with **TUPE 2006** Regulation 13, and brought unfair dismissal and wages and holiday pay claims against the transferee. In so far as the transferor had not informed the claimant of the post-transfer measures proposed by the transferee under Regulation 15(2)(d), the transferor claimed that this was because the transferee had failed to comply with its duty to give her the requisite information under Regulation 13(4). That potentially exposed the transferee to an award under Regulation 15(8)(b) in the event of that defence succeeding.

Shortly before the employment tribunal hearing the claimant and the transferee reached a settlement though ACAS which was followed by a withdrawal and a dismissal.

The tribunal held that the transferor's defence to the Regulation 15(2)(d) complaint succeeded, but that the effect of the dismissal upon withdrawal in respect of the transferee was that the tribunal was precluded from making a Regulation 15(8)(b) award against it. It did not err in so finding.

The tribunal found that the transferor had failed to inform the claimant pre-transfer of the transferee's identity, but made a zero award of compensation in that respect. It erred by describing this as a "very technical breach" and by categorising it as a breach of Regulation 13(2)(b), not of Regulation 13(2)(a). Given the importance of knowing the actual identity of the employer, a zero award was wrong. The matter was remitted for fresh assessment of the award in that respect.

HIS HONOUR JUDGE AUERBACH

Introduction

1. This appeal concerns aspects of the provisions of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("**TUPE**") relating to the duties of transferors and transferees to consult and inform. I will start by setting out the particular individual Regulations that are relevant to this appeal, beginning with Regulation 13:

> **"Duty to inform and consult representatives**
>
> **13. —(1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.**
>
> **(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—**
>
> > **(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;**
> >
> > **(b) the legal, economic and social implications of the transfer for any affected employees;**
> >
> > **(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and**
> >
> > **(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.**
>
> **(3) For the purposes of this regulation the appropriate representatives of any affected employees are—**

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b) in any other case, whichever of the following employee representatives the employer chooses—

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

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

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

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

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not

> **reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.**
>
> **(10) Where—**
>
> > **(a) the employer has invited any of the affected employee to elect employee representatives; and**
> >
> > **(b) the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time,**
> >
> > **the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.**
>
> **(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).**
>
> **(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer."**

2. Regulation 13A provides that a microbusiness employing fewer than ten employees is not obliged to invite the employees to elect appropriate representatives if none exist, but may instead proceed as if each employee was such a representative. It was common ground that this applied in the present case. Accordingly, I can pass over Regulation 14, concerning the election of employee representatives. Regulations 15 and 16 read:

> **"Failure to inform or consult**
>
> **15.—(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—**
>
> > **(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are**

affected employees;

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

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

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

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

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

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

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

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

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

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

practicable for the employer to comply with such a requirement.

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

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

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

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

(10) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which an order under paragraph (7) or (8) relates and that—

> **(a) in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order;**
>
> **(b) in respect of an order under paragraph (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.**

(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him.

(12) An employment tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—

(a) in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed; or

(b) in respect of a complaint under paragraph (10), the date of the tribunal's order under paragraph (7) or (8),

or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

Failure to inform or consult: supplemental

16.—(1) Section 205(1) of the 1996 Act (complaint to be sole remedy for breach of relevant rights) and section 18 of the 1996 Tribunals Act (conciliation) shall apply to the rights conferred by regulation 15 and to proceedings under this regulation as they apply to the rights conferred by those Acts and the employment tribunal proceedings mentioned in those Acts.

(2) An appeal shall lie and shall lie only to the Employment Appeal Tribunal on a question of law arising from any decision of, or arising in any proceedings before, an employment tribunal under or by virtue of these Regulations; and section 11(1) of the Tribunals and Inquiries Act 1992(1) (appeals from certain tribunals to the High Court) shall not apply in relation to any such proceedings.

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

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

(a) in the case of an employee who is dismissed by reason of redundancy (within the meaning of sections 139 and 155 of the 1996 Act) the date which is the calculation date for the purposes of any entitlement of his to a redundancy payment (within the meaning of those sections) or which would be that calculation date if he were so entitled;

(b) in the case of an employee who is dismissed for any other reason, the effective date of termination (within the meaning of sections 95(1) and (2) and 97 of the 1996 Act) of

his contract of employment;

(c) in any other case, the date of the relevant transfer."

3. Regulation 16A provides for an extension of time to present a claim, to facilitate early conciliation, in equivalent terms to provisions made in other instruments in relation to most other claims in the employment tribunal.

Factual background and the course of the litigation in the employment tribunal

4. The claimant in the tribunal, Ms Clark, began working in 2015 for a business run by Mrs Middleton as a sole trader, under the name Black Dog Hydrotherapy, which provided hydrotherapy treatment for injured dogs. As of 2019 there were only five employees, including the claimant. Another employee at that time was known then as Janet Slade-Andrews, and that is how the tribunal referred to her, as shall I.

5. As of midnight on 30 September 2019, the business was transferred to a limited company, Black Dog Hydrotherapy Limited. The tribunal referred to the company as "Black Dog". I will refer to it as "BDHL". BDHL had been incorporated on 19 September 2019 by Mrs Slade-Andrews. It was common ground that this transfer amounted to a relevant transfer as defined in **TUPE** Regulation 3. The claimant accordingly initially transferred into the employment of BDHL. But there was subsequently a breakdown in the relationship and she resigned.

6. On 21 February 2020, having obtained ACAS early conciliation certificates in respect of both Mrs Middleton and BDHL, the GMB trade union presented the claimant's claim form to the tribunal. The claim form identified the first respondent as BDHL and the second as Mrs Middleton, but the grounds of claim put them the other way around. The tribunal treated Mrs Middleton as the first respondent and BDHL as the second respondent. I shall continue to refer to each of them by name.

7. In her grounds of claim, the claimant set out her case that Mrs Middleton had failed to comply with her obligations to inform and consult under Regulations 13 and following of **TUPE**. She also gave her account of her dealings post-transfer with Mrs Slade-Andrews and her husband, in particular in relation to the tabling of a proposed new contract of employment to which the claimant objected and other matters. She went on to give an account of her resignation and its aftermath. The grounds stated that she was bringing claims against BDHL for wages, holiday pay and unfair dismissal.

8. In the final paragraph 26, under the heading "Protective Award", it was stated:

> **"The claimant brings a protective claim against the 1st Respondent for 13 weeks' gross pay in respect of her failure to comply with her obligations to inform and consult under Regulation 13 TUPE."**

9. Mrs Middleton's grounds of resistance gave her account of matters. It asserted that, prior to the transfer, she had complied with her duties to inform and consult. At paragraph 19 she wrote:

> **"R1 denies that she failed to comply with her duties to inform and consult pursuant to TUPE. In the alternative, R1 avers that in the event of a finding of any failure by R1 (which, for the avoidance of doubt is denied), any failure was as a result of R2's failure to properly notify R1 about any measures envisaged and that liability for any protective award made, if at all, should therefore fall to R2."**

10. BDHL's response document gave its account of matters, both before, and in rather more detail after, the transfer. It defended the claims for wages, holiday pay and unfair dismissal. Its final paragraph under the heading "Protective Award", paragraph 21, stated:

> **"R2 denies that C is entitled to the relief sought at paragraph 26 of the Grounds of Claim, or any relief."**

11. A separate claim was presented by another employee who had transferred to BDHL, against BDHL only. On 14 April 2020, there was a case management preliminary hearing (PHCM) held in

relation to both claims. The claimant was represented by Mr Sharples of GMB, who is a solicitor. Her former colleague was represented by another solicitor. Mrs Middleton was in person and BDHL was represented by counsel. The tribunal identified the common ground that both claimants had worked for Mrs Middleton, that there was a relevant transfer from her to BDHL on 1 October 2019 and that the business was a microbusiness. The claimant's claims were identified as including a claim under Regulation 15 that R1 failed to inform and/or consult her as to the transfer. Attached to the minute was a list of issues that had been agreed in relation to the claimant's claim. In relation to the Regulation 15 claim, these were set out as follows:

> **" 14. Did R1 notify C1**
>
> **14.1. The fact that a transfer was to take place, the date or proposed date of the transfer and the reasons for it?**
>
> **14.2. The legal economic and social implication of the transfer for any affected employee, if any?**
>
> **14.3. The measures which R1 envisaged she would take in connection with the transfer, or if no measures, were to be taken of that fact?**
>
> **14.5. Was there a requirement for the above information to be supplied in writing to C1 and C2?**
>
> **14.6. Was it supplied in writing?**
>
> **14.7. Did R2 envisage taking any measures?**
>
> **14.8 Did R2 notify R1 that it envisaged taking such measures?**
>
> **14.9. Was information supplied long before the relevant transfer and, if appropriate, was consultation undertaken long enough before the relevant transfer?**
>
> **14.10. If R1 did breach its duty under Regulation 13 to what extent, if at all, should there be joint and several liability with R2."**

12. The directions indicated that the cases of the claimant and her former colleague would be

listed for hearing together. However, at some point before the full merits hearing, the claimant's former colleague settled and withdrew her claims against BDHL.

13. On 31 July 2020 a settlement was concluded between the claimant and BDHL through the auspices of ACAS. The claimant was represented in that process by Mr Sharples and BDHL by a solicitor. On 31 July 2020 Mr Sharples emailed the tribunal, copying in BDHL's solicitor. The body of the email read as follows:

> **"We write to advise that the Claimant's claims against the second respondent, Black Dog Hydrotherapy Ltd, are no longer being pursued and are hereby withdrawn. We would have no objections to all claims against the second respondent under case no. 1801214/2020 being dismissed.**
>
> **The Claimant's claim against the first respondent, Kim Middleton, is still being pursued."**

14. On 17 August 2020 the tribunal promulgated a judgment of EJ Deeley reading as follows:

> **"The complaint against Black Dog Hydrotherapy is dismissed following a withdrawal by the claimant.**
>
> **The claimant's remaining claims against Kim Middleton will proceed to a hearing on 18th-20th August 2020."**

The employment tribunal hearing and decision

15. The full merits hearing took place at Leeds on 18 and 19 August 2020 before Employment Judge Wade, Miss Y Fisher and Mr M Elwen. The written judgment and reasons were promulgated on 11 September 2020. The decision identifies the parties as the claimant and Mrs Middleton. It records that the claimant was represented by Mr Sharples and Mrs Middleton by a solicitor appearing pro bono – Mrs Gray. The judgment was expressed as follows: "The claimant's claim for a 13 week protective award is dismissed."

16. I pause to observe that "protective award" is a term used in the **Trade Union and Labour Relations (Consolidation) Act 1992** in respect of awards made arising from the duty of collective consultation and information-giving in relation to collective redundancies. It is not actually a term used in **TUPE**, but it is clear that the tribunal meant by this expression to refer to an award arising from the Regulation 15 complaint.

17. Mr Sharples accepted before me that Mrs Slade-Andrews attended the full merits hearing only in the capacity of a witness for Mrs Middleton. Indeed, he told me that she gave her evidence on day one and it was then indicated that she would not be returning on day two, and she did not do so.

18. The tribunal opened its written reasons with the following:

> **"1. This claim was one of two claims presented to the Tribunal (Miss Clark and another employee) concerning their employment at Black Dog Hydrotherapy Ltd ("Black Dog") following a transfer of that business from Mrs Middleton in September last year. Both claims against Black Dog were settled and dismissed following withdrawal; in the claimant's case, this was recorded in a Judgment sent to the parties on 17 August 2020. Mrs Middleton's operation of the business had been as a hobby or interest, albeit generating employment for a number of staff.**
>
> **2. In grounds of claim running to 25 paragraphs against Black Dog, including constructive unfair dismissal, the complaint made this sole complaint against Mrs Middleton at paragraph 26: "The Claimant brings a protective claim against the 1st Respondent for 13 weeks' gross pay in respect of her failure to comply with her obligations to inform and consult under Regulation 13 TUPE'."**

19. The tribunal noted that it was accepted that Regulation 13A applied. It set out Regulation 15. It referred to paragraph 19 of Mrs Middleton's grounds of resistance and observed that "[s]he had therefore given the requisite notice pursuant to paragraph 15(5) and Black Dog was, in any event, a party." At paragraphs 7 – 9 the tribunal said:

> **"7. During this hearing, the Tribunal heard from Mrs Slade-Andrews (the sole director and owner of Black Dog)**

> **as a witness for Mrs Middleton. Mr Sharples pointed out the potential conflict between Mrs Middleton and Mrs Slade-Andrews (in the context that both their statements had been drafted by Mrs Gray): if the Tribunal did not accept Mrs Slade-Andrews' evidence to the effect that (1) she had informed the claimant of the transfer and the social, economic and legal implications on behalf of Mrs Middleton, and (2) there were no measures envisaged by Black Dog, then Black Dog could be jointly and severally liable for any award arising.**
>
> **8. The difficulty with that submission was that there was no protective award complaint under paragraphs (1) and (7) of Regulation 15 against Black Dog directly: the claimant had chosen to pursue Mrs Middleton only pursuant to paragraph. The route to liability for Black Dog was via joint and several liability or paragraph 9, if Mrs Middleton's defences did not succeed, or paragraph 8(b) by an award against Black Dog directly, if they did. The Tribunal identified to Mr Sharples that Black Dog had been released from the proceedings because claims against the company had been dismissed. The company was not represented in this hearing.**
>
> **9. As to the potential conflict, there is no property in a witness and if Mrs Slade-Andrews, in circumstances of her company previously being professionally represented but released through settlement, chose to appear as a witness for Mrs Middleton, that was a matter for her. The Tribunal was satisfied that a fair hearing could take place and there was no application to adjourn or amend the claim from the claimant."**

20. The tribunal noted that the witnesses were the claimant, Mrs Middleton and Mrs Slade-Andrews, who, as I have noted, appeared as a witness for Mrs Middleton. As to the facts the tribunal found that, come the spring of 2019, Mrs Middleton told Mrs Slade-Andrews and other employees that she (Mrs Middleton) wished to retire from September; and there was a very firm expectation that Mrs Slade-Andrews and her husband would be taking over the undertaking. I will set out the next few paragraphs of the tribunal's findings of fact in full:

> **"15. Through 2019 the Andrews' were gathering information and making plans for changes that might take place if they did take over, including cutting the hours of one member of staff, and changing contracts of employment, and those plans were afoot from April of 2019. The transfer was not certain, however - in early August Mrs Slade-Andrews told the claimant that she was unsure whether she was taking over.**

> **16. By later in August things had become clearer and Mrs Middleton sat down with three of the employees (aside from the claimant) with Mrs Slade-Andrews present and told them of the retirement and that Mrs Slade Andrews was taking over on 30 September. They were the words she used, and that nothing would change. Mrs Slade-Andrews said that some things would have to change because there would be one less therapist (Mrs Middleton) and there was a potential impact from that on income and administrative support. The three staff were also told that P45s would be issued and their pensions would move to be provided by Mrs Slade-Andrews. Mrs Slade-Andrews did not tell Mrs Middleton or those three staff of any changes to their terms, or proposals for that, at that stage.**
>
> **17. Mrs Middleton had refreshed her knowledge of the Transfer of Undertakings Regulations before that meeting. She is a certified and previously chartered accountant and she had been involved in a TUPE transfer when her husband went through a similar succession issue in 2001 or thereabouts.**
>
> **18. Mrs Middleton did not use the word TUPE when she was discussing matters with those members of staff, but the principle enshrined in the regulations was that their employment would transfer to Mrs Slade-Andrews and without change (apart from pensions) and that was discussed alongside the necessary change in the pension provision.**
>
> **19. The claimant was then fully aware of the retirement date from discussions amongst all the staff, but particularly after 12 September, from exchanges between her and Mrs Slade-Andrews, with whom she had a close friendship and working relationship.**
>
> **20. The claimant and Mrs Slade-Andrews discussed all manner of consequences and matters involved in Mrs Middleton's retirement. The claimant had suggested that Mrs Slade-Andrews might want to set up a limited company if she was going to take over. That was also something Mr Andrews had also encouraged. The claimant and Mrs Slade-Andrews also discussed a potential name change for the business because of the name, 'Black Dog' and its potential association with depression, from which the claimant suffered.**
>
> **21. It was also an option for Mrs Slade-Andrews to allocate a share/include the claimant as a co-owner or in the business, or indeed to change its name, had she chosen to do so, but she chose not to do either of those things."**

21. The tribunal found that there was no written sale and purchase agreement and indeed no cash

changed hands. There was simply an inventory of assets drawn up and a note made of the number of booked sessions which Mrs Slade-Andrews would be responsible for delivering following the transfer. The tribunal continued:

> **"24. To some extent it is properly described as a gentleman's/gentlewoman's agreement made and finalised in the first and last weeks of September 2019 - Mrs Middleton was on holiday for the two middle weeks. Mrs Slade-Anderson did not incorporate the company with the name Black Dog Hydrotherapy Limited until 19 September 2019."**

22. The tribunal further found as follows:

> **"26. During August and September the day to day management was transferring to Mrs Slade Andrews. In the final week of September there was an international cycling event in Harrogate and the premises were closed.**
>
> **27. The Tribunal considers that the agreement was reached in principle earlier on in 2019, but in detail very late in the day, not least because of the late coming into being of the transferor. The precise calculation of the number of sessions owed to clients was not done until the week of the cycle event later in September, when they were also refurbished by Mrs Slade-Andrews.**
>
> **28. There was no communication of the final and necessary details of the transfer in writing to staff, but the claimant organised Mrs Middleton's retirement party with clients, and she was involved in communicating the change in the ownership and was involved in work to refurbish the premises in the last week of September. It was clear that she knew the date of the transfer from verbal communications from Mrs Slade-Andrews and others.**
>
> **29. The transfer took effect at midnight on 30 September. It was not until 21 October, when seemingly out of the blue staff were sent letters and new contracts of employment from Mrs Slade-Andrews, that Black Dog (the limited company) was the new employer."**

23. The tribunal went on to find that the new contracts removed rights to two weeks' full sick pay and to paid breaks, and they varied provisions relating to hours. It found that Mrs Slade-Andrews had proposed as early as April 2019 cutting one member of staff's hours, and that reducing hours was

clearly envisaged by her before the transfer date. It added:

> **"We further find that the other material contract changes or measures, which directly affected the claimant, were also being envisaged by Mrs Slade-Andrews, or more accurately, Black Dog, before the transfer date."**

24. The tribunal rejected Mrs Slade-Andrews' evidence that contract changes were not envisaged pre-transfer. It found that there was a wealth of evidence of that and that all the changes were envisaged before the transfer date. The rationale, it said, was clear. Whereas Mrs Middleton had run the operation as a hobby, it was now to be run for profit. The tribunal continued:

> **"35. Ultimately then, and perhaps unsurprisingly given the chain of events above, relationships broke down, and the claimant resigned.**
>
> **36. The claimant's claims in connection with that resignation alleging constructive dismissal and so on against Black Dog have been withdrawn and dismissed. The claimant's witness statement for this hearing addresses only the complaint against Mrs Middleton."**

25. In the section dealing with the law, the tribunal included the following:

> **"38. As to Regulation 15, the Tribunal initially agreed with Mr Sharples that a complaint could not be brought directly against Black Dog Hydrotherapy Limited as 'the Employer', pursuant to Regulation 15(1). However, in our deliberations it is clear from Regulation 15(7) that a protective award complaint can be brought against a transferee."**

26. In the concluding section, the tribunal found that the claimant was informed of the date of, and reason for, the transfer by Mrs Slade-Andrews, effectively on behalf of Mrs Middleton, but that BDHL was only incorporated at the eleventh hour. Although there may have been an expectation that the transfer would be to a limited company, the fact that the transferee would be BDHL was not communicated to the claimant or her colleagues pre-transfer. I will set out the concluding paragraphs of the tribunal's decision in full:

"47. To Mrs Middleton's knowledge, there were no measures proposed to the running of the business, nor any social or economic implications. The fact of the transfer to a limited company is, in our judgment, a legal implication which should have been communicated – employees are entitled to know if Mrs Slade-Andrews, unlike Mrs Middleton, is to be protected by limited liability. For these reasons we find that Mrs Middleton has failed as employer to comply with a duty pursuant to the Regulations and the complaint to that extent is well founded.

48. As to Mrs Middleton's Regulation 13 2(d) obligation to inform long enough before the transfer to consult, where measures are envisaged, we refer to our findings about the communications that were going on between Mrs Slade-Anderson and the claimant about the potential changes (concerning others) directly. We have found that Mrs Slade-Anderson and her husband envisaged further changes or measures but had not communicated any of them to Mrs Middleton. It was also the case that Mrs Slade-Anderson and the claimant believed Mrs Middleton would resist such changes in respect of one member of staff. It was not therefore reasonably practicable or doable for Mrs Middleton to have known about the envisaged changes, when they were being kept from her. Her defence in that respect succeeds.

49. We are therefore left with one very technical breach of the Regulations on the part of Mrs Middleton in a micro business from which she drew very little or no financial reward. We have directed ourselves in accordance with Suzie Radin Ltd and the provisions in Regulation 15 (8) and 16 (3): 'Where a Tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may – (a) order the transferor subject, to paragraph 9, to pay compensation to that description of employees…'.

50. In deciding to award compensation the punitive principle applies: we start at 13 weeks for the gravest of breaches, and then take into account mitigating circumstances and the nature of the breach and discount appropriately.

51. We consider that the circumstances of this case are exceptional, including duplicity towards Mrs Middleton by Mrs Slade-Anderson, the nature of the undertaking, the very late incorporation of a limited company as transferee, and the consequent very limited nature of the breach by her - not informing the claimant directly or through Mrs Slade-Anderson that the identity of the transferee was a limited company with the name Black Dog Hydrotherapy Limited, That was doable in the period between 19 September and 30 September, but was not done albeit Mrs Middleton was away on the date of incorporation. We also take into account that in that period the claimant will have in all likelihood come to know of that fact through her work in any event. We also take into account that the failure was remedied by 21 October by the provision in writing of confirmation of the new employer's name.

> **52. For these reasons we exercise our discretion to award no compensation be payable by Mrs Middleton.**
>
> **53. It will also be apparent from our findings that had a Regulation 13 complaint been presented directly against Black Dog Hydrotherapy Limited, or had the complaints in the claim form not been withdrawn and dismissed against Black Dog Hydrotherapy Limited, we might have been in very different territory. Black Dog, through Mr and Mrs Slade-Andrews, envisaged measures and did not inform the claimant or other employees long enough before the transfer for consultation with a view to reaching agreement to take place. That arguably resulted in the departure of two staff. That is not a minor breach.**
>
> **54. If we are wrong (as we may be) that the dismissal judgment against Black Dog prevents us awarding compensation under Regulation 15(8)(b), in these exceptional circumstances we do not exercise our discretion to do so: it seems to us to be outwith the interests of justice for compensation to be awarded against a party who has been released from the proceedings and been unrepresented (which arose through the claimant's withdrawal against that party and/or failure to bring a Regulation 13 complaint directly against that party) to face a penal remedy of this kind."**

The Appeal

27. There are four grounds of appeal, all of which were permitted to proceed to this hearing. Mrs Middleton put in an answer indicating that she intended to resist the appeal relying on the tribunal's reasons. BDHL's answer indicated that it too resisted the appeal, relying on the tribunal's reasons, but asserted also that BDHL had "reached a commercial settlement" with the claimant prior to the tribunal hearing as a result of which the tribunal could not make a judgment on the merits of the case against BDHL. There was an accompanying letter which indicated that BDHL was not in a position to appear or be represented at the EAT's hearing.

28. In the run-up to the EAT's hearing, Mrs Middleton sent in a short skeleton and indicated that she would not be attending or represented. This document reiterated, in summary, aspects of her case that she had in fact complied with her duty to consult and had given as much information as she had. However, she admitted that she did not inform employees of the identity of BDHL, but she submitted that they all knew that Mrs Slade-Andrews would be forming a limited company.

29. A document was sent to the EAT by BDHL in late September 2021 making a number of submissions. It submitted that, by virtue of what it called the out-of-court settlement and the withdrawal, and/or having regard to applicable time limits, it was not now open to the claimant to seek to pursue further matters against Black Dog. It indicated that a further skeleton argument would follow in October, but in fact none was received. For the claimant, a skeleton argument was tabled by Mr Sharples, together with a hearing bundle and authorities. I heard oral submissions from him.

30. In light of the references made by BDHL to the ACAS COT3, I directed Mr Sharples to provide me with a copy of it, but I note that its terms are confidential and that the tribunal was not provided with a copy, although it plainly was aware of the fact that a settlement had been reached between the claimant and BDHL.

The Grounds of Appeal, Argument, Discussion and Conclusions

31. Ground one contends that the tribunal erred at paragraph 38 in stating that the claimant could have brought a complaint directly against BDHL. That this was wrong in law, submitted Mr Sharples, was clear from the EAT's decision in **Allen v Morrisons Facilities Services Limited** [2014] IRLR 514. In that case, it was held that Regulation 13(1) admits of a claim, in respect of a given affected employee or employees, only against their employer at the time when the failure of compliance is said to have occurred. So a claim by or in respect of employees who pre-transfer were employed by the transferor, in respect of the duties which it owed in respect of them, can be brought only against the transferor. The fact that those employees may later have become employed by the transferee does not enable that claim to be brought, or brought additionally, against it.

32. Further, there is no freestanding right to bring a claim against the transferee complaining of a failure by it to provide information to the transferor as required by Regulation 13(4). It is only if the transferor successfully relies on such a failure, so as to defend a claim against it of

non-compliance with Regulation 13(2)(d), that the transferee's failure can give rise to an award in favour of affected employees against the transferee. The claimants in **Allen** having withdrawn their Regulation 13 claims against the transferor in that case, had thereby cut off their only route to an award against the transferee arising from a failure by it to comply with Regulation 13(4).

33. I pause to observe that **Allen** was concerned solely with an attempt to obtain an award against the transferee in that case, arising from a failure by it to comply with Regulation 13(4), which had led in turn to a failure by the transferor to comply with Regulation 13(2)(d). It should be noted that there is also a route under Regulation 15(9) by which a transferee will be jointly and severally liable for any other failure by a transferor to comply with its duties. But that route too is parasitical on there being some relevant successful claim against the transferor.

34. As an isolated proposition, what the tribunal says in the second sentence of paragraph 38 is not wrong. Regulation 15(7) does make provision for an award to be made against a transferee. But that is because transferees, as well as transferors, have obligations under Regulation 13 in respect of their own affected employees; and, in an appropriate case, a claim can be brought against a transferee who is said to have breached those duties.

35. However, Mr Sharples' point was that what the tribunal meant in paragraph 38, read as a whole, was that Regulation 15(7) would have given the present claimant a direct route to pursue her Regulation 13 complaint against the transferee. That this was the tribunal's meaning was apparent from its later observations at paragraph 53. That proposition was wrong, said Mr Sharples, because, as the claimant was an employee of Mrs Middleton at the relevant time, it was only Mrs Middleton who had a duty to comply with Regulation 13 in respect of her; and it was Regulation 15(8), not Regulation 15(7), that provided for the claimant's potential remedies in respect of that complaint.

36. I agree with Mr Sharples that the tribunal erred in this regard. It did occur to me that perhaps

the tribunal thought that it would have been an option for the claimant to present a Regulation 13(1) complaint against BDHL, alleging a failure by it to comply with the duty to consult or inform her about proposed transfer-connected measures, occurring in point of time following her becoming its employee post-transfer. But if that was what the tribunal was thinking, that would have been erroneous too, as no such duty is imposed by Regulation 13: see in particular **Amicus v City Building (Glasgow) LLP** [2009] IRLR 253.

37. I will return presently to what may or may not be the significance of the error on the part of the tribunal correctly identified by ground one.

38. I turn to ground two. This asserts that the tribunal was wrong to conclude that the effect of the dismissal upon withdrawal in respect of BDHL was that BDHL was released from the proceedings so that it could not any longer be the subject of an award under Regulation 15(8)(b).

39. Mr Sharples' skeleton relied once again upon **Allen**. The claimant had not, and could not have, brought, a complaint against BDHL of non-compliance with Regulation 13. Her right to a remedy arising from BDHL's non-compliance with Regulation 13(4) arose from Mrs Middleton's successful defence of the Regulation 13(1) complaint in respect of her obligation under Regulation 13(2)(d). It was not possible for the withdrawal, or the judgment, to bite on a claim which the claimant had not brought. She could only have been precluded from asserting that remedy, had she compromised or abandoned her Regulation 13 claim against Mrs Middleton, or had Mrs Middleton abandoned her defence relying on BDHL having failed to comply with Regulation 13(4). But neither had happened. To the contrary, the withdrawal and judgment both confirmed that the Regulation 13(1) complaint against Mrs Middleton was maintained; and she, for her part, maintained her defence based on BDHL's failure to comply with Regulation 13(4), which indeed ultimately succeeded.

40. As to that, it seems to me that **Allen** indeed establishes that there is no freestanding right

for a complainant to initiate a complaint seeking an award against a transferee on account of a failure to comply with Regulation 13(4), and that such an award may only potentially arise where there is a claim against a transferor in respect of which the transferor relies on that defence. But it does not in my view follow that, once there has been such a complaint instituted against a transferor, and such a defence has been raised by it, it is not then possible for a complainant to compromise or relinquish the potential right to receive such an award from the transferee.

41. In my judgment, it *is* possible for that to happen. The transferee will be a party to the proceedings. Its exposure will have been triggered by the complaint against the transferor and the defence raised by the transferor in response. But that exposure, once triggered in that way, is not akin to that created, for example, by a civil claim for indemnity or contribution brought by a civil defendant against a third party, that might result in an award against the third party in favour of the defendant. The exposure of the transferee in this situation is to an award in favour of the affected employees, or in this case the claimant, not to an award in favour of the transferor. I can see no reason in principle why a claimant could not reach a settlement with a transferee in respect of the claimant's contingent right to receive such an award, nor why a claimant could not relinquish the contingent right to such an award, subject, in both cases of course, to the safeguards which generally apply in relation to compromises of litigation in the employment tribunal.

42. It seems to me that it would in fact be undesirable and contrary to public policy if this were not a possibility. It would mean that where a transferee that faces such a potential exposure wishes to compromise with the claimant in order to draw a line under its own involvement in the proceedings, and where the claimant wishes to reach such a compromise whilst continuing to proceed against the transferor, these two willing parties would be unable to settle that aspect of the litigation in that way.

43. In the course of oral argument, Mr Sharples did concede that such a thing was, on reflection, doctrinally possible, notwithstanding how he had argued matters in his written skeleton. But he

submitted that this was not in fact what happened in this case. In particular, he relied upon two features of the wording of the withdrawal email. The first was that it referred to the "claims" against BDHL. That, he said, could only mean the individual complaints that had been presented against BDHL by the claimant, being of unfair dismissal and for wages and holiday pay. Secondly, he relied upon the statement in the final sentence that the claim against Mrs Middleton was still being pursued.

44. It seems to me that the issue here is not to be determined by reference to what the claimant or Mrs Slade-Andrews subjectively intended or understood to be the position following the dismissal upon withdrawal, but rather what was the effect, reading them objectively and in context, of the relevant communications. As to that, I begin with the following features.

45. Firstly, I should address the point raised in BDHL's skeleton about time limits. The claimant is not now seeking to bring some new complaint against BDHL. She is asserting that she acquired a contingent right to a remedy against it in the course of the tribunal litigation, and that the tribunal was wrong to conclude that she had then lost that right. That right was said to arise from the fact of the original complaint against Mrs Morrison under Regulation 13(1) combined with the defence which she then ran to it, and which was effectively notified to BDHL.

46. I note that there was no issue before the tribunal as to whether the original claim form had been presented in time; and indeed, Mr Sharples having informed me of the dates on which ACAS conciliation began and ended against both respondents, it appears to me that it was, in respect of both of them, in time. I also observe that the relevant Regulations do not stipulate any time limit within which the defence must be raised, in order to trigger the transferee being made a party to the proceedings. I note also that Mrs Middleton raising that defence in her grounds of resistance was treated by the tribunal as effective notice to BDHL for Regulation 15(5) purposes, and there has been no challenge to that aspect of the decision, as such.

47. I note also that the agreed list of issues adopted at the PHCM flagged up a sub-issue as to whether BDHL had notified Mrs Middleton of any measures that it envisaged. That said, the list of issues refers only to the concept of joint and several liability, not to potential sole liability on the part of the transferee under Regulation 15(8)(b). Indeed, it appears to assume that joint and several liability, where it does arise, which would be under Regulation 15(9), is something within the discretion of the tribunal. But that is not the case: see **Todd v Strain** [2011] IRLR 11. This is unfortunate, but I do not think it could be said objectively that on this account Mrs Middleton had abandoned her defence, nor that the claimant had at this point relinquished her potential right to a Regulation 15(8)(b) award.

48. Accordingly, immediately prior to the ACAS settlement and the withdrawal and dismissal, the possibility of a Regulation 15(8)(b) award being made, depending on the outcome of the case, remained live. However, I do not agree with Mr Sharples' arguments as to the objective meaning and effect of the withdrawal and the judgment dismissing upon withdrawal. My reasons are these.

49. Firstly, the words "claim" and "claims" do not have a single or consistent meaning or usage in the context of employment tribunal litigation. "Claim" can be used to mean a claim form or the overall proceedings that are initiated by the presentation of a claim form, which are assigned a unique case number. But it also sometimes used to mean a particular complaint contained within a claim form, asserting a distinct cause of action arising under a particular statutory provision. A party may also be said to be entitled to claim a particular remedy or remedies, if a particular complaint (as I call it) is held to be well-founded. Even within the **Employment Tribunal Rules of Procedure 2013**, more than one use of this word is identified in the definitions rule 1. Further, in my experience, judges and tribunals do use the words "claim" and "claims" in both of these different ways.

50. Accordingly, what the withdrawal letter meant by the words "claims" cannot be assumed. It has to be discerned, by divining its sense reading this email objectively in context and as a whole.

51. As to that, I regard the following features as significant. Firstly, the email gives no details or particulars of what it is referring to, beyond the use of the word "claims". It does not state, for example, that it means to refer specifically and only to what I would call the complaints of unfair dismissal, wages and/or holiday pay and not to any other complaints, rights or remedies which the claimant might have, or potentially have, against BDHL.

52. Secondly and importantly, to the contrary, it goes on to state that there is no objection to "all claims" being dismissed and refers there to all claims "under case number 1801214/2020". This conveys the sense that it relates to the position as between the claimant and BDHL in the proceedings under that case number as a whole. This is just the sort of language that employment tribunals are used to seeing used by a party or parties when the intention is not inadvertently to leave anything outstanding in respect of a given respondent, but to make a clean sweep of everything arising in the proceedings in question against that respondent. This second sentence, I conclude, conveys that the claimant was indeed drawing a line under the second respondent's entire involvement in the proceedings under this particular number.

53. The final sentence of the email does not, in my view, convey objectively that the claimant was nevertheless not relinquishing the right to seek a remedy against BDHL through the route of the Regulation 13 claim against Mrs Middleton. Whether or not it is strictly necessary, it is a normal precaution when withdrawing some but not all complaints against a single respondent, to identify and confirm that other complaints are maintained, and what they are. It is also a common precaution in proceedings involving more than one respondent, when withdrawing against one respondent only, to make clear that this does not affect the maintenance of the proceedings against the other or others.

54. The inclusion of such a statement does not by itself therefore signal that the claimant was not only confirming that the proceedings were maintained in respect of the complaint against Ms Middleton, but also that she was not relinquishing the right to seek a remedy against BDHL

arising out of that complaint. Rather, in my view, given the content and objective sense of the main paragraph of the email, one would have expected that if that was the intended sole or at any rate key point of the final sentence, that would have simply been stated explicitly and in terms.

55. I observe that BDHL was, from the outset, a party to the proceedings in case 1801214/2020 in respect of the unfair dismissal and money claims. Had it not already been a party, the service on it of a copy of the response of Mrs Middleton, or other Regulation 15(5) notice, would then have made it a party to those same proceedings under that case number in respect of its possible exposure arising from the Regulation 13 claim against Mrs Middleton and in light of her defence. In the event, it was a party to the proceedings in both respects. I conclude that the natural meaning of the withdrawal email is that the claimant was content for BDHL to be entirely dismissed from those proceedings in all respects, without any distinction, or reservation being made, in relation to the exposure of BDHL in those proceedings to a potential Regulation 15(8)(b) award.

56. I conclude, therefore, that the contents of the withdrawal email would have been enough by themselves to preclude the claimant from seeking a Regulation 15(8)(b) award against BDHL in these same proceedings. But the judgment subsequently issued by the tribunal reinforced the position. Indeed, I note that it provides an example of the varying practices that exist regarding the use of terminology. It uses the word "complaint" in the singular, but plainly not to refer to what I would describe as a single complaint in the sense of one cause of action, but in a wide and general sense.

57. Returning to the employment tribunal's reasons, in paragraph 1 it said that "[b]oth claims", meaning both the overall claims brought by the claimant and those brought by her erstwhile colleague, "against Black Dog were settled and dismissed following withdrawal". It added that in the claimant's case this was recorded in a judgment sent to the parties on 17 August 2020. At paragraph 8 it said:

> **"The Tribunal identified to Mr Sharples that Black Dog had been released from the proceedings because claims against the company**

had been dismissed."

58. In paragraph 54, it referred to its conclusion "that the dismissal judgment against Black Dog prevents us awarding compensation under regulation 15(8)(b)".

59. For reasons I have given, I do agree with Mr Sharples that the tribunal was wrong to suppose that the claimant could have presented a Regulation 13 complaint against BDHL directly, but I do not think that that vitiates its conclusion at paragraph 8, to which it refers back in paragraph 54. That is because it was effectively, as it were, merely eliminating something else from its enquiries. The conclusion reached there, that the effect of the withdrawal and dismissal was that BDHL had been released from the proceedings under this case number entirely, so that it could not now be the subject of an award under Regulation 15, was sound. The tribunal did not err in that respect and therefore did not err when it declined for that reason to make a Regulation 15(8)(b) award against it.

60. But in case I am wrong, I will say something briefly about what the tribunal said at paragraph 54 about the position if *it* was wrong. I can only make limited observations given that I am considering here a counterfactual that I do not consider actually applies. But I would observe that in *this* context, I can see that the error in paragraph 38 about Regulation 15(7) might have had some purchase, as it might be said that the tribunal in this context did attach some weight to its assumption that the claimant could have brought a freestanding claim seeking a remedy under that regulation.

61. I do not, however, think that the tribunal was necessarily wrong to have regard to the fact that BDHL was unrepresented at the August 2020 hearing, in circumstances where, it appears from the decision, Mrs Slade-Andrews did not anticipate that her company could have any further exposure to liability to the claimant. It seems to me that, had there in law still been the possibility, notwithstanding the dismissal upon withdrawal, of a Regulation 15(8)(b) award against BDHL, it would at least have been incumbent on the tribunal to consider what might be necessary to ensure that it had a fair opportunity to be legally represented, if it wished, or otherwise to put its case on that point.

62. Finally, having regard to the answer, and submissions, of BDHL attaching weight and significance to the ACAS settlement, I observe that it might be, had the tribunal concluded, and concluded correctly in law (contrary to my view), that the withdrawal and dismissal did not by themselves preclude a Regulation 15(8)(b) award, that it would then have been invited to give consideration to the implications of the content of the ACAS COT3. But as that document was not before the tribunal, and as that is not something that I have to decide, I will say no more about it.

63. I turn to ground three. This ground contends that the tribunal erred because it failed to make proper findings as to whether there had been a failure to inform the claimant of the legal, social and economic implications of the transfer pursuant to Regulation 13(2)(b). This was put as essentially being a matter of failure to give sufficient reasons, because it was said that the tribunal had not identified with sufficient clarity (if at all) what, if anything, Mrs Slade-Andrews had told the claimant about those aspects. I can address this ground fairly shortly.

64. The list of issues at the PHCM, repeated by the tribunal in its decision with which I am concerned, was, in respect of the information obligation, simply a wholesale lift from the wording of Regulation 13(2), without elaboration. It did not tell the reader what the particular issues were in this case. As to what those issues in fact were, there was no dispute that the claimant was told that there would be a transfer, and was told, or understood, that the legal effect would be to transfer her into the employment of the transferee. The issues of substance related to the failure to identify who that transferee was and the failure of the transferor to inform and consult about measures envisaged by the transferee.

65. Regulation 13(2)(b), relating to "legal, economic and social implications", does not, in my experience, crop up very much in employment tribunal litigation or indeed in the EAT or higher courts. The words are there because they are found in the parent directive, but it is perhaps uncertain what in particular the reference to "economic" and to "social" implications truly adds to the other

requirements. Be that as it may, I asked Mr Sharples whether the particulars of claim in this case identified any other specific matters that the claimant considered were legal, social or economic implications, but about which she was not informed, or in respect of which she was not consulted at the time and should have been. He fairly acknowledged that there were no such particulars. For that reason, it seems to me that there was no error on the part of the tribunal in failing to consider a potential aspect of the claim that was not in fact advanced. This ground therefore fails.

66. Finally, ground four contends that the tribunal erred in its decision at paragraph 52 to award no compensation at all in respect of the failure of Mrs Middleton to notify to the claimant pre-transfer the identity of the transferee. Mr Sharples referred to the guidance in **Sweetin v Coral Racing** [2006] IRLR 252. This recognises that the tribunal has a wide discretion in determining the award, but should focus on the seriousness of the employer's default, which will vary from a technical breach to a complete failure to consult; and it will wish to consider other factors, including whether the failure was deliberate, whether the employer has had any legal advice and so forth. The tribunal can then take account of mitigating circumstances. He referred also to the further guidance in **Todd v Strain** and in **Shields Automotive Ltd v Langdon** [2013] UKEAT/0059/12.

67. Mr Sharples submitted that the tribunal had erred, in particular in two respects. Firstly, the identity of the transferee, that is, the future employer of the claimant, could not be dismissed as a mere technicality. Secondly, the tribunal similarly was wrong to view this as a failure falling under Regulation 13(2)(b) rather than Regulation 13(2)(a). I agree with Mr Sharples on both points.

68. As a matter of law, a transfer may occur, and be effective in terms of the operation of Regulation 4, even though the employee has not been told the identity of the transferee or even that the transfer has occurred. But knowing precisely who one's employer is, is of fundamental importance to any employee. Even where, as in this case, it is known that the new employer is likely to be a newly-formed company, and who its proprietor will be, it still matters to know the name and

identity of the unique legal person who will be the employer. I think that Mr Sharples is right to say that the tribunal therefore should not have viewed this as a mere technicality. It is also a curiosity of the wording of Regulation 13(2) that it does not in terms expressly state that there is a duty to inform affected employees, or the representatives of affected employees, of the identity of the transferee. But there plainly is such a duty; and I agree with Mr Sharples that that is because it is part and parcel of the duty under Regulation 13(2)(a) to inform employees of the fact that the transfer is to take place. An essential facet of being told of that fact, is to be told to whom the transfer will be taking place.

69. All of that said, I do not think that any of the other matters mentioned by the employment tribunal were considerations that it could not properly have taken into account; and the authorities do establish that, whilst it is important to consider the extent and seriousness of the default, other mitigating factors and circumstances can and should also properly be brought into play. Nevertheless, given the fundamental importance of knowing the identity of one's future employer, I do think it was an error to make a zero award in this respect. I will therefore quash that aspect of the tribunal's decision and remit it for fresh consideration of the appropriate award to be made in respect of Mrs Middleton's failure to provide that information in good time prior to the transfer.

(After further submissions)

70. I have been persuaded to remit the matter to a different tribunal. I am mainly influenced by the fact that the tribunal have not just referred to the breach as technical. They have called it "one very technical breach". I think that does tend to suggest that it might be difficult for them to clear their minds of that thought and to come to it afresh; and it is important, whatever the award that is made second time around, that it commands the confidence of both parties. I will therefore direct that remission of that issue, of the award to make in respect of the failure to notify the identity of the transferee pre-transfer, be to a differently-constituted tribunal.