EMPLOYMENT TRIBUNALS

Claimants:

Mr S Connaughton	(Third Claimant)
Mr T Deacon	(Fourth Claimant)
Mr J Sherwood	(Tenth Claimant)

Respondents:

Monarch Aircraft Engineering Limited (In administration)	(First Respondent)
Morson Projects Limited	(Second Respondent)

Heard at: Watford Employment Tribunal (in public; by video)

On: **23 February 2022**

Before: Employment Judge Quill (Sitting Alone)

Appearances

For the Claimants:	In Person (Mr T Deacon as lead representative)
For the First Respondent:	No appearance
For the Second Respondent:	Mr N Grundy, counsel

Written Reasons

1. I gave judgment with reasons orally on 23 February 2022. The written judgment was sent to the parties on 8 March 2022. One of the claimants has requested written reasons, and these are those reasons. Because the judgments (for strike out and for costs) followed on, from and referred back to, my decision earlier the same day to refuse an amendment application, I am also supplying written reasons for that decision.

Reasons for Refusing amendment

2. When a judge has to consider a request for an amendment, whether made by a claimant or a respondent, it is a matter to which judicial discretion applies. The judge must take into account all relevant factors and ignore all irrelevant factors. The ultimate test that the judge must perform is to decide whether the balance of injustice and hardship is in favour of allowing the amendment or of refusing it. Allowing an amendment for a claimant will almost certainly have at least some degree of injustice and hardship to the respondent. Whereas refusing to allow an amendment to the claim is almost certainly going to have some degree of injustice and hardship to the claimant. So as I say it is a case of looking at all the relevant facts and circumstances

and weighing up the relative injustice and hardship and making the appropriate decision.

3. Selkent Bus Company Ltd v Moore EAT/151/96set out some of the matters which a judge should take into account. As was emphasised in Vaughan v Modality UKEAT/0147/20/BA by the Employment Appeal Tribunal.

   3.1. Firstly, Selkent is still good law and must always be considered.
   3.2. Secondly Selkent did not purport to set down a mere checklist that would supply the judge with the outcome, and nor did it contain an exhaustive list of the factors that might be relevant.
   3.3. As per Selkent, it is always important for the judge to consider the nature of the amendment application, time limit issues and the manner of the application and the timing and manner of the application itself. However, it is important to bear in mind that doing so is merely part of the overall process of taking into account all relevant matters when deciding where the balance of injustice and hardship lies, and these factors are not, in themselves the test for whether to grant the amendment or not.
   3.4. As per Selkent, the nature of the amendment, time limit issues, and timing and manner of the application are not the only things that might be relevant.

4. The background in this case is that early conciliation commenced on 26 March 2019 and continued until 10 April 2019. There were several named individuals who were prospective claimants. The respondent was Monarch Aircraft Engineering Ltd. The prospective claimants included all of Mr Connaughton, Mr Deacon and Mr Sherwood. The first named claimant was Mr Clark and there was also a Nicholas Evans.

5. On 3 May 2019 a claim was presented to the Employment Tribunal naming Monarch Aircraft Engineering Ltd as the respondent. The first named claimant on that claim form was Mr Clark and, more generally, the list of claimants bringing the claim by that single claim form matched the list of potential claimants on the ACAS Certificate.

6. Unite the Union had also obtained its own ACAS early conciliation certificate in April 2019. However, the union was not named as a claimant in the particular claim form. The claimants were 14 individuals (including the three claimants present for this hearing).

7. There was no attachment to the claim form. In box 8.1 of the claim form, the box for “another type of claim” was ticked and, in the space below, it was written that the “claim for protective award pursuant to r13 TUPE”. I take that to be a reference to (and nobody argued otherwise) Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

8. Box 8.2 had four lines of text. That said:

   > The claimants were employed by the respondent until 28 December 2018 when their employment transferred to Morson Projects Ltd. There was no consultation with representatives prior to the transfer contrary to r 13 TUPE and in particular the respondent failed to provide the information required by Regulation 13(2) TUPE. The claimants therefore claim a protective award.

9. Box 9 showed that the claim was for compensation only and it was for 13 weeks gross pay.

10. By letter dated 29 October, Employment Judge Smail asked if the claim against the respondent should be stayed because the respondent was in administration. It also asked if the claimants intended to proceed against Morson Projects Ltd.

11. On 18 December 2019, after a reminder from the tribunal, the solicitors who were acting for all 14 of the claimants wrote back to say that they agreed that the claim against the first respondent should be stayed. The claim had been issued, but the first respondent had not by then, and has still not, presented any response. The same email of 18 December 2019 said that the claims were for protective awards, gave reasons that no claim against the Secretary of State had been brought by time, and then (in the third paragraph) referred to Regulation 15(9) of TUPE and stated that they would like to add Morson Projects Ltd, on the basis that it was the alleged transferee, and should be added as a second respondent.

12. I will set Regulation 15 out in full, and then comment on parts of it:

> **15.— Failure to inform or consult**
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> (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—
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> (a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;
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> (b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
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> (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—
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> (a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and
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> (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.
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> (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.
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> (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 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.

(13) Regulation 16A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (12).

13. It should be noted that Regulation 15(9) refers to the possibility of joint and several liability (as between transferor and transferee) for two awards that the Tribunal might make. It refers to an award under paragraph 11 of Regulation 15, which I do not need to discuss further for present purposes. However, it also refers to an award under sub-paragraph 8(a) of Regulation 15. Regulation 15(8) refers to the claim(s) that can be brought against the

transferor under Regulation 15(1) and paragraph (8)(a) says that, if well-founded, the Tribunal is able to order the transferor to pay appropriate compensation to such descriptions of affected employees as may be specified in the award. Thus, Regulation 15(9) states that the transferee "shall be" jointly and severally liable for such an award, if one is made against the transferor.

14. Paragraph 1 of Regulation 15 starts by saying that "where an employer has failed to comply with the requirement of Regulation 13 or Regulation 14 a complaint may be presented to an Employment Tribunal on that ground". However, it is important to then read each of paragraphs (a), (b), (c) and (d) because they continue the sentence just mentioned (ie the start of Regulation 15(1)). So a claim can be brought by any of the affected employees if the claim is an allegation of failure in relation to the election of employee representatives, that is Regulation 15(1)(a). The claim can also be brought by any of the affected employees under Regulation 15(1)(d). However, importantly, Regulation 15(1)(d) starts by saying "In any other case". In other words a case that is not within (a), (b) or (c). (b) and (c) refer to the claims that are brought by, as the case may be, failure relating to employee representatives or failure relating to representatives of a trade union.

15. On 10 February 2020 (page 29 of the bundle), as well as supplying the address for service for the second respondent, Morson Projects Ltd (which was to become the second respondent), under the heading "Joinder Application" the solicitors wrote: "In addition we wish to make an application to substitute Unite the Union as a claimant in this matter on the basis that we understand that it was a recognised union as at the date of transfer". So it is noteworthy that the text of the paragraph actually suggests that there will be a "substitution". The natural meaning of that particular word, taken in isolation, tends to imply that the request was that Unite would replace the original 14 claimants and only Unite then would be the claimant going forwards. However, the heading of the paragraph as I just mentioned was "Joinder Application".

16. By order of EJ Smail, Unite was added as an additional claimant and Morson Projects Ltd was added as an additional respondent and it was given time to file its response which it did. The response form is on page 33 of the bundle and the grounds of resistance starts on page 40.

17. At paragraph 3, under the heading "Jurisdiction", the grounds of resistance stated

> Morson accepts that there was a TUPE transfer of 62 employees on the 28 December 2018 from Monarch Aircraft Engineering Limited ("Monarch") to Morson. The affected employees (including the Claimants in this case) were represented either by Unite the Union, who were at all relevant times a recognised Trade Union for the purpose of the consultation regarding the transfer, or members of the Joint National Consultation Committee ("JNCC") who were employee representatives.

18. So in other words it was saying that there were employee representatives in respect of each of the employees and specifying who those employee representatives were. Paragraph 7 set out which claimant was alleged to have the union as the appropriate employee representatives and which was

said to have the JNCC. Paragraph 5 set out that, for those employees represented by JNCC, there were two claimants (none of the three for this hearing) who were members of JNCC and who were conceded to be appropriate representatives with standing to bring the claim.

19. The Grounds of Resistance objected to adding or replacing Unite as a claimant. At paragraph 4 of the grounds of resistance

> In light of the above, Morson contends that the Tribunal does not have jurisdiction to hear the claims in respect of those Claimant's represented by Unite as they have not been presented by the correct Claimant, namely, Unite the Union. Morson objects to the joinder of Unite as a party to these proceedings. In the alternative, If Unite is a party to these proceedings, this should be in substitution for those Claimants it represented and not in addition to them.

20. Morson argued that the individual claimants did not have standing to bring the claims in question, and paragraph 12, referred to Regulation 15. In other words there was an assertion that the claims could either be brought under Regulation 15(1)(b) or 15(1)(c) but not otherwise and that only 2 of the original 14 claimants (plus Unite, if added) had standing to bring the claims contained in the claim form presented on 3 May 2019.

21. A telephone preliminary hearing took place, for case management purposes, on 25 June 2020. The claimants named in the orders from that hearing were all of the 14 individuals plus, at item 15, Unite the Union was named as a claimant.

22. At that hearing all of the 15 claimants were represented by the same counsel. The first respondent, of course, did not appear. The second respondent was represented by a solicitor.

23. In the summary of the hearing, the judge noted that one defence that was being put forward was that consultation had actually taken place but - more relevantly to the issues that I am talking about now - the other defence that was being put forward was about the status of the claimants and that it was not clear whether Unite the Union was alleged to be the appropriate employee representative for all of the claimants or if it was being alleged that some of the other claimants were - in their own right - appropriate employee representatives and that there had been a failure to inform and consult them in that capacity.

24. The second respondent was given permission to seek further information and the claimants were given permission to amend the claim. At paragraph 2 of the Order:

> The claimants have permission to amend the particulars of claim on the status of the claimants; the details of the causes of action they bring under Regulations 13 to 15 of the 2006 Regulations; and answers to the requests for further information from the Second Respondent.

25. In compliance with those orders, the respondent did seek further and better particulars (page 52 of the bundle). It is notable that at paragraph 1(b) of their request they asked.

> 1. Of "There was no consultation with the representatives prior to the transfer contrary to r 13 TUPE" please provide further particulars as follows:
>
> (b) Please confirm which representatives are referred to and who did they represent.

26. By 7 August 2020, which was the time limit set by Employment Judge Smail, the claimants did serve an amended particulars of claim. In that document the solicitors - who were acting on behalf of all 15 claimants - acknowledge in paragraph 1 that the Tribunal had ordered the claimants to provide an amended particulars of claim which addressed the status of the claimants and the details of the causes of actions that they were bringing under Regulations 13, 14 and 15 of the TUPE Regulations 2006. They asked in paragraph 2 for the amended particulars of claim document (54 and 55 in the bundle), to be read in conjunction with the original ET1 and that is what I have done.

27. Paragraph 3 is the only one under the heading "Status of the Claimants" and it stated:

> The correct Claimant is Unite the Union which is a recognised union for the purposes of Regulation 15(c) of TUPE Regulations 2006. Unite the Union have the right to bring this claim on behalf of all affected employees whether members of the union or not. The Second Respondent have conceded that Unite the Union are a recognised union.

28. My decision is that the reference to "Regulation 15(c) of TUPE Regulations" is a typing mistake. There is not a "Regulation 15(c)". It seems clear to me that it is an intended reference to Regulation 15(1)(c); the parties present at this hearing all accept that that is the case, and, in any event, it is the finding which I make.

29. Under the heading "Causes of Action" it was stated: "The claimants bring claims for a failure to inform and consult under Regulation 15(c)." Again, I am satisfied that that was intended as a reference to Regulation 15(1)(c).

30. The document went on to give some further detail. It spoke about a non-disclosure agreement that a particular person of Unite the Union had been required to sign on or around 21 December 2018. It made the point that a valid consultation requires discussion to seek agreement about measures and that that did not take place. It went on to allege the claimant's / claimants' position, on when the duty to consult arose. Paragraph 6, in context, is a reference to when the duty to consult Unite the Union arose.

31. Paragraph 7 expressly stated:

> The failure to consult the representatives prior to the transfer is a reference to Unite the Union. Unite is a recognised union.

32. The document then referred to some of the requirements in Regulation 13 that were alleged to have been breached.

33. Paragraph 8 was said that there was a failure to comply with the requirements of Regulation 13(6). Although not quoted in the claim document, Regulation

13(6) states:

> (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.

34. Paragraph 9 of the amended particulars document stated:

> The First Respondent failed to provide the information required by Regulation 13(2) TUPE Regulations 2006 to Unite the Union.

35. Although not quoted in the claim document, Regulation 13(2) states:

> (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.

36. The amended particulars document referred, in paragraph 11, to the fact that Mr Bouch was not given various pieces of information: for example, about who the transferee would be, etc. It was stated that that was a failure to comply with the duty set out in TUPE. Mr Bouch was not one of the 14 individual claimants. He is described as “Paul Bouch of Unite the Union”.

37. The final paragraph, paragraph 12, alleged that information had not been supplied in any of the ways that are permitted by Regulation 13(5) of TUPE. Although not quoted in the claim document, Regulation 13(5) states:

> (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.

38. The respondent made a response to that amended particulars. See page 57. The respondent did not necessarily agree that Unite the Union was the appropriate representative for all of the employees. In paragraph 1, it set out its position based on what it said it had been told by the first respondent. It itemised all of the claimants but, in summary, said for all of the claimants that either Unite was the appropriate employee representatives (and specified which) or alternatively for the others that JNCC (Joint National Consultation Committee) was the appropriate employee representatives.

39. Although the amended claim referred to the fact that Mr Bouch had been required to sign a non-disclosure agreement, the amended response did not attempt to deal with any suggestion that the fact (if true) that he had been required to sign a non-disclosure agreement meant that he or Unite was not an appropriate employee representative. The allegation that Mr Bouch or Unite was not an appropriate representative (whether because of the NDA or for any other reason) is not an allegation that was contained in the amended claim (or in the original ET1). On the contrary, the amended particulars of claim made it expressly clear that Unite the Union was the appropriate employee representatives. The allegation about the NDA was put forward as an allegation that the content of the inform/consult meeting with Bouch/Unite did not meet the statutory requirements, not that meeting was with someone who had lost (or never had) the status of appropriate representative.

40. Subsequently, in February 2021, a preliminary hearing took place by telephone. I was the judge for that hearing. The claimants were represented by counsel (I think the same counsel that had represented them at the earlier hearing). That preliminary hearing listed a final hearing for three days before a full panel to take place starting 23 February 2022 and continuing on the next two days. Case management orders were made for the preparation of that hearing including a bundle to be prepared by 13 May 2021, witness statements by 17 June 2021 and skeleton arguments to be exchanged by 14 February 2022. On 3 and 4 February 2022, all of the claims except three were withdrawn. The 12 withdrawn claims included the claim by Unite the Union and all of the claims brought by any members of the JNCC.

41. Today, I have to consider three amendment applications.

42. There is an amendment application made by Mr Deacon submitted on 30 January 2022 and that was submitted to the respondents on that date as well as being sent to the Employment Tribunal. It was in the format of a new claim form which is set out at page 483 of the bundle. At Box 8.2 (489 of the bundle) it stated

> The Claimants were employed by the first Respondent until 28 December when their employment transferred to Morson Projects Ltd, the second respondent.
> Between announcement and TUPE transfer there was no meaningful consultation with representatives. JNCC and Unite representatives signed a Non Disclosure Agreement at meeting on 18 December in which the first respondent informed JNCC and Union representative of its intensions to sell parts of the company and liquidate others.
> After TUPE was announced to all employees generally, there was no time to engage in any meaningful consultation as there were only two full business days between announcement and transfer.
> The signed NDA prevented JNCC and Unite representatives access to employees to allow them to consult and carry out their duty under TUPE regulations s.13(8)
> TUPE regulations s.15(9) makes the transferee jointly and severally liable with the transferor in respect of compensation payable.

43. There was also attached an amended particulars of claim (501 of the bundle) which says in paragraph 3 “the claimants represented by the JNCC wish to contest that the JNCC were the legitimate body to be consulted for the TUPE transfer”. It states that although the JNCC was recognised in agreements for

collective bargaining to consult on pay and conditions it does not automatically follow that they should be appropriate body for TUPE consultation.

44. So Mr Deacon's application was submitted in writing on 30 January 2022. Mr Connaughton today at the hearing adopts that as the basis of his amendment application. He has not made an application prior to today.

45. For those two claimants the argument is that Unite the Union was never recognised as far as their employment was concerned. That is, they do not seek to argue that Unite was not recognised for any categories of employees; they argue, however, that it was not recognised for employees "of a description" which included them. In rebuttal of an argument that, if Unite was not the appropriate representative, then it must have been JNCC, their primary argument is that JNCC was not the appropriate representative for TUPE consultation (for the reasons mentioned in paragraph 3 of the proposed amended particulars). Their fall-back position is that, regardless of what the situation would otherwise have been, the NDA meant that neither Unite nor the JNCC were appropriate employee representatives.

46. Mr Sherwood's application was not made in writing. It was made orally today at the hearing. His position is slightly different in relation to Unite. He accepts that there was an agreement of sorts that recognised Unite for a description of employees which includes him, but he disputes that it was a formal recognition agreement and further disputes that it was the type of agreement that would mean that Unite the Union would be the appropriate employee representatives for TUPE. Other than that he adopts similar arguments to Mr Deacon including that the NDA means that Unite or the JNCC could not have been appropriate employee representatives in any event.

47. I have been asked also to take account of document with the heading "witness statement" on page 503 of the bundle, signed by Nathan Willock, dated 1 February 2022. I have read that and that refers to his being asked to sign the NDA. He was a representative of Unite the Union according to this document. He says that his opinion is that, by signing the agreement, he was unable to discuss with any Unite the Union members anything that was discussed in the meeting regarding current and future employment for members. He mentions without naming them that other members of Unite and JNCC representatives attended the meeting and were also asked to sign the NDA.

48. In terms of time limits for claims brought under TUPE Regulation 15, by Regulation 15(12)(a) the time limits for this type of claim, under Regulation 15(1), is three months from the date on which the relevant transfer is completed. That would be extended to a month after the ACAS early conciliation ended (10 April 2019) which is long before these amendment applications were made, which was February 2022.

49. I acknowledge when considering time limits that, as originally drafted the ET1, did not specify the particular theory that was being pursued. It did not, for example, expressly rule out the possibility that the individual claimants might have been seeking to allege that because of Regulation 13(3) the appropriate employee representatives were not the Union - as per 13(3)(a) - and were

not the JNCC - as per potentially 13(3)(b)(i) - and for that reason the employer was obliged to conduct or arrange for elections satisfying Regulation 14(1).

50. However, regardless of any argument that might have been made in 2019, or at the preliminary hearing on 25 June 2020, or in response to the orders made at that hearing, that the ET1 was so unspecific that it was drafted widely enough to include the types of argument just mentioned, the fact is that, by 7 August 2020, it was clear to the respondents that the claim being pursued was only on the basis that Unite the Union were the appropriate employee representatives. In other words, as the claim stood from 7 August 2020 onwards, there was no alleged failure to arrange elections etc because the specific claim brought was under Regulation 15(1)(c) and only Regulation 15(1)(c). Since 7 August 2020, the claim has been brought on the basis that there had been a failure to inform and consult the union (as the appropriate representatives of the affected employees) and that was 18 months before today's hearing. 7 August 2020 was around about six months before the preliminary hearing which took place in February 2021. Since then, for the last 12 months, the respondents have been preparing for the February 2022 final hearing on the basis that the case that they would have to meet is the one I have just described. They were not on notice that there would be any need for them to attempt to defend a claim alleging that the transferor had been obliged to comply with Regulation 14 and had failed to do so, nor any claims based on a theory that the transferor had misidentified the appropriate employee representatives as per Regulation 13(3).

51. There is no satisfactory explanation for the lateness of the application to amend. The claimants' position (I take it to be the position of all three of them) is that their former solicitors and/or the union that have got things wrong. Their argument is that they have good claims and that the unions should not have dropped out. They suggest that the reason dropped the claim and potentially that the reason the unions and/or the solicitors are no longer representing them is that they think that there might be some sort of conflict of interest as a result of evidence being disclosed about the NDA.

52. Suffice it to say that the issue of the NDA having been signed was identified by the solicitors as long ago as 7 August 2020 and specifically highlighted in the amended particulars of claim document. So the solicitor were aware of it, and so were all 15 claimants. Even if not actually aware of the NDA, the claimants are deemed to be aware of it based on the fact that the amended claim was submitted in their name. The document was submitted on their behalf by their solicitors.

53. 18 months ago, in August 2020, Unite the Union (and the other claimants) asserted that they wished to rely on the existence of the NDA as being relevant to the claim under Regulation 15(1)(c). Even if there has been newly disclosed evidence about the NDA (and, by implication, about its being binding on the signatories and/or the union) then that is not a change of circumstances, and not something that should have been unforeseen as of 7 August 2020. The argument in the amended particulars was not that the NDA was invalid, or that it had not been signed.

54. Any recently disclosed evidence about the NDA would not be an explanation for why these 3 claimants would like to change their position set out in the 7

August 2020 document. If they had wanted to argue that an NDA that was binding on Mr Bouch and/or on the union meant that Mr Bouch and/or the union could not be "appropriate representatives of any affected employees" then they could have put forward that argument in August 2020 (or earlier).

55. I therefore do not think that there is a good explanation for the lateness of the attempted change of position.

56. I also think that it is relevant that at the hearing a year go there were applications by the respondent for disclosure orders to be made against the administrator for the first respondent. I made my decisions on those applications on the basis of the claim as it was being presented at the time. In other words, at the time, it was all of the claimants' position that Unite the Union was the appropriate employee representatives. Had it been flagged up by the claimants that potentially exact details of the NDA were going to be relevant to the identity of the appropriate employee representatives (or there was going to be any other argument raised by the claimants' side about the identity of the employee representatives) then potentially at least that might have affected the outcome of the disclosure applications. Certainly there would have been different arguments to have been considered.

57. The respondents have been preparing for this case and preparing their witness statements and the hearing bundle and doing their disclosure on the basis of the case as identified on 7 August 2020. Today was supposed to be Day 1 of a 3 days hearing to decide the case on that basis. Therefore, the balance of injustice and hardship is in favour of rejecting the amendments. If the amendments were permitted then that would mean either:

    57.1. A hearing taking place on 24 and 25 February 2022 on a significantly changed basis. That would not be fair to the respondents at this juncture.
    57.2. Postponing the hearing and having it take place in the future, on a significantly changed basis. It would not be proportionate to postpone the case in these circumstances. It would mean that I was allowing the claim to go forward based on a new cause of action (under Regulation 15(1)(d)) more than 3 years after the relevant transfer, and around 12 months after the final hearing had been listed following a full discussion at two preliminary hearings.

58. So, for those reasons the amendment applications are refused in all 3 cases.

Reasons for striking out

59. In this matter there is an application by the respondents to strike out the claims on the basis that they have no reason prospects of success. The Employment Tribunal Rules of Procedure Regulation 37 deals with strike out.

> 37.— Striking out
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;

60. Striking out a claim is considered to be a draconian step because it means that the claim is dismissed without evidence having been heard. Generally it should only be done in clear cases and should not necessarily be done in cases where there is a dispute of fact between the parties. Having a mini trial to decide disputed of fact is not usually appropriate on strike out applications and, in any event, I have not heard evidence today.

61. When there is a strike out application by the respondent against the claimant, it is appropriate to take the claimant's case at its highest. Generally speaking that means assuming that the claimants will be able to prove any disputed facts which they need to prove. At the very least, there would need to be reliable and unambiguous contemporaneous documents contradicting the claimant's case before it was decided to strike out a case on the basis that the claimant had no reasonable prospect of proving a disputed fact, once disclosure had taken place, and evidence heard, etc.

62. If the employment judge's decision is that are no reasonable prospects of success, it does not automatically follow that the claim should be struck out. It is still a matter of discretion.

63. When exercising discretion, it is appropriate to consider (along with all other relevant factors) that the tribunal system does not exist so that hopeless cases can carry on all the way to be heard at a final hearing. It is appropriate to take account the needs of other users who also need the resources of the tribunal in order for their cases to reach a final hearing. It is appropriate to take into account the effects on the respondent of allowing a claim to continue if it in fact has no reasonable prospects of success.

64. When a strike out application is made against a litigant in person it is important for the judge to take into account (if relevant) the equal treatment bench book and - in any event - to make sure to understand the claimant's case as fully as possible from all the available material and not simply rely on answers given to oral questions during the hearing.

65. In this matter, I have already made decisions earlier today on the amendment applications. I gave with detailed reasons which went through the history of the litigation, and of the parties' positions. I am not going to repeat everything I said there. I have read the skeleton arguments of the parties, read the background papers, and listened to what each party has had to say.

66. For the reasons that I explained earlier on the claim that is being brought is specifically a claim under Regulation 15(1)(c) of TUPE. It is a claim that alleges that there was a failure to comply with a requirement of Regulation 13 or 14. However, specifically it is a claim which is a "failure relating to representatives of a trade union" that has to be brought by the trade union.

67. The claimants have accepted that none of them were employee representatives within any of the definitions in Regulation 13(3). They were not union officials, not members of the JNCC, and not specifically elected for TUPE purposes.

68. Regulation 16(1) of TUPE by reference to the Employment Rights Act 1996 section 205 specifies that the only remedy for the rights conferred by

Regulation 15 are those contained within TUPE itself. In other words the only remedy is to bring a complaint to the Employment Tribunal.

69. As was decided by the Employment Tribunal in Nationwide Building Society and Benn UKEAT/0273/09 referring back to Court of Appeal decision on similar provisions in the 1992 Act in Northgate HR Limited and Mercy where there is a complaint as to breach of the obligation to provide information to the employee representatives such a complaint could only be presented by the representatives and not the employees.

> 59 In Mercy the Court of Appeal considered the standing of an employee to bring a claim for a protective award under the collective consultation provision of Employment Relations (Consolidation) Act 1992 ('ERCA') sections 188 and 189. The employers contended that an individual employee had no standing to bring such a claim save in the circumstances specified in section 189(1). Lord Justice Maurice Kay held at page 416c:
>
> "I accept the submission of Mr Wynne, on behalf of Northgate, that section 189(1) is a carefully devised provision, defining and restricting standing to bring a complaint, and that where, as here, the complaint is as to breach of the obligation to provide information to appropriate employee representatives, such a complaint can only be presented by "any of the employee representatives to whom the failure related". At that stage, the statute deals with the complaint as a collective rather than an individual matter and limits standing, no doubt so as to prevent the possibility of numerous individual challenges which are not supported by appropriate representatives."
>
> 60 In our judgment the principle relied upon in Mercy is equally applicable to the right to bring a claim for breach of the information and consultation provisions of TUPE. Howard v Millrise Ltd [2005] IRLR 84 was a case in which an employee could rely on the information and consultation provisions of TUPE. That was because the regulation 10 of the 1981 Regulations expressly provided that where an employer failed to comply with the requirement to invite the election of representatives, information should be given to affected employees. In default the individual affected employees had a right to present a claim for breach of the Regulation. That was not the situation in this case. In this case the Claimants would have had no standing to bring a claim for breach of regulation 13(6). Regulation 16(1) by reference to section 205(1) ERA provides that the sole remedy for breach of the provisions of TUPE is a complaint to an ET. The right to bring such a complaint is provided and circumscribed by the Regulations. We do not accept the submission that all that section 205(1) does is to preclude a complaint other than to an ET. In any event the Claimants brought no such claims, and there had been no determination of a claim for breach of regulation 13(6).

70. In this particular case that means that the claims as explained in the 7 August 2020 particulars could only brought by the unions. At least, that is the position on a narrow (but in my view, correct) reading of the amended particulars of claim which asserted that Unite the Union was the appropriate representatives for all the affected employees. Even on a wider view, that some employees would have JNCC as appropriate representatives (and it was Morson, rather than the claimants, who had raised that possibility), none of these 3 claimants allege that they were members of the JNCC in any event.

71. Therefore none of the claimants have any reasonable prospects in succeeding in a claim brought under Regulation 15(1)(c) because the Tribunal would be bound to apply the binding decisions of the Employment

Appeal Tribunal and would be bound to decide that these 3 claimants had no standing to bring the claims and that, therefore, the claims are bound to fail on that basis regardless the merits, or otherwise, of any arguments that there had been no adequate information, consultation, etc, as required by TUPE.

72. For those reasons it is my decision that the claims are struck out in their entirety and that the final hearing which had originally been due to start today and had been postponed to 24 and 25 February 2022 (to accommodate this preliminary hearing) will therefore no longer take place.

Reasons for awarding costs

73. In this matter I have given decisions earlier today already about the amendment application and then about strike out. I am not going to repeat everything I said there. But I draw on what I said there when giving these reasons.

74. Rule 76 deals with when a cost or preparation time order may or shall be made and that includes

> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
> (b) any claim or response had no reasonable prospect of success

75. To be clear, and to deal with some of the points raised by the claimant, when I decided that the claims had no reasonable prospects of success I was making that decision on the basis that these claimants had no reasonable prospects of success of succeeding in claims brought under Regulation 15(1)(c) of TUPE. I acknowledge that the claimants have said throughout today's hearing, and in the documents prepared in advance of the hearing, that they believe that they could prove that adequate consultation did not take place. They do not necessarily think the claim would have failed had the union continued with it. I made no findings one way or the other or decisions one way or the other as to whether or not an appropriate claimant would have had reasonable prospects of success in pursuing the particular arguments that the claimants have mentioned for asserting that the inform/consult exercise did not comply with TUPE requirements.

76. The background - as discussed more extensively earlier - is that the other 12 claims were withdrawn on 3 and 4 February including the claim by Unite the Union.

77. I and the second respondent have been provided with some background information about what preceded the withdrawals, and, more specifically, these 3 claimants' decisions to continue, because the claimants have waived privilege over certain correspondence.

78. Around 24 January 2022, the claimants were notified by their then solicitors that - in the solicitor's opinion - the claims had no reasonable prospects of success and should be withdrawn and that the claimants were at risk of costs if they continued with the claims instead of withdrawing them.

79. Around 31 January, the claimants' solicitors wrote to them to say that they had not been authorised to withdraw the claims and to reiterate that there was a risk of costs. The letter asserted that any cost award would be against the claimants and that neither the solicitors nor the union would be responsible for that. I am making no comment one way or the other about whether that latter proposition is correct. My only comment is that that is what the claimants were told in writing, by their own legal representatives.

80. On 31 January (page 479 of the bundle), Mr Deacon wrote to the Tribunal acknowledging that Unite was no longer representing the claimants. He asks the Tribunal to consider (in his words) annulling the joinder application. I infer from that remark that these 3 claimants were aware of the history of the matter, given that "joinder application" was the heading that the solicitors had used when making the application to have Unite included in the claim.

81. On 4 February, the respondents' solicitors wrote to the claimant giving a costs warning. I do not need to read out from the letters extensively. They quoted Rule 76(1) and the quotation was accurate. They argued that the claim had no reasonable prospects of success. They argued that the claimants were acting unreasonably by pursuing it and they said why they made those arguments. They refer to the letter to the Tribunal, which contained the strike out application dealt with by me earlier today and they went on to make some comments about the consultation which I do not think are particularly relevant to this costs application because I have made no decisions about whether the consultation was or was not adequate.

82. The letter went on to say what their estimated costs were and gave the claimants the opportunity to withdraw by Tuesday 8 February with no costs application being made.

83. The letter said that if the claimants did not withdraw by 8 February, there would be further costs incurred by the Respondent, in particular because papers would be submitted to counsel and that counsel would be working on the case including preparing skeleton arguments. The orders made in February last year required skeleton arguments to be produced.

84. The costs schedule that has been produced is at a rate of £225 per hour for solicitor Vicky Beattie. That rate is for all the solicitors' costs, with one exception. There is one hour on 16 February 2022 review conducted by a partner with a charge out rate of £275 per hour.

85. £7677.50 is the solicitors charges and then brief fee is £6000. All figures exclude VAT.

86. In terms of Rules 76(1)(a) and (1)(b):
    86.1. the claims did have no reasonable prospects of success for the reasons which I gave when striking them out.
    86.2. my decision is that it was unreasonable for the claimants to continue with the litigation once they as individuals had been notified by their solicitors that the claims could not succeed and that there was a risk of costs against them.

87. I am not going to comment on whether it was unreasonable for the claims not

to have been drawn withdrawn earlier on. As far as the 14 individuals are concerned, there is an argument that they should have been withdrawn much earlier on: potentially soon after the preliminary hearing in June 2020; potentially soon after the preliminary hearing in February 2021. However, the respondents has not invited me to make any decision on that basis and therefore I do not need to give it any consideration.

88. Thus two of the gateways to making an award of costs have been met. That does not mean that it is automatic that costs are awarded. It means that I must consider whether or not to make an award.

89. Costs are the exception rather than the rule and even when the requirements for a costs order to be considered are met then there still has to be a good enough reason, in all the circumstances, for costs to be awarded.

90. Costs if they are to be awarded are to be compensatory not punitive. I am satisfied that on the breakdown of costs the respondents are not seeking amounts that would be considered punitive. I will discuss the breakdown in more detail slightly later on, I am satisfied that they are seeking reimbursement of sums that have been genuinely incurred in legal costs in preparing this case from 26 January 2022 onwards.

91. The ability to pay is something that I can potentially take into account. In Mr Sherwood's case there was no particular submission made on that point and Mr Connaughton has asked me to take into account and he that he has not got an income at the moment. He was made redundant and he is not currently earning money. He does have some savings. In Mr Deacon's case, he is working at the moment but he is in debt. He has a mortgage and credit card bills to pay. His only method of paying the award would be to borrow the sum of money. I say in passing that if costs are awarded, I might decide that the amount would be payable immediately, but the alternative is that I order that it be paid by instalments.

92. The relevant factors I take into account are those I have mentioned already. The claimants did have solicitors acting for them throughout the litigation. With the benefit of legal advice, the claims were brought. With the benefit of legal advice, Unite was added. With the benefit of legal advice, when Unite was added, the individual claimants did not drop out at that stage. With the benefit of legal advice, the claimants alleged that Unite was a recognised union and had the right to bring the claims relating all affected employees. With the benefit of legal advice, only a complaint under Regulation 15(1)(c) was specified when clarification was required.

93. What happened with the other individual claimant is not particularly relevant. I note in passing that they were withdrawn late in the day but no point has been taken about that by the respondent. My decision, in any event, would have been that the claimants are not in any way responsible for the actions of the other individual claimants. Unite the Union also dropped out late in the day. I do not know, and it is not relevant to my decision, what particular arrangements the claimants have with Unite the Union but the union could have, had it wanted to, continued, with the claim under Regulation 15(1)(c); it chose not to do so. Regardless of the union's reasons for dropping out, the important point is that it was after the union had made that decision that these

remaining claimants were given clear information and legal advice about where that left them. Rather than withdraw, they sought to amend the claim. That is a relevant factor that I should take into account when deciding whether to award costs as I have already taken into account when deciding that the claimants acted unreasonably by continuing.

94. Similarly, the costs warning letter was relevant to my decision that there had been unreasonable conduct by continuing with the claim, and is also relevant to the exercise of my discretion. There was the opportunity for them to withdraw at that point. Had they withdrawn at that point then the respondents would not have incurred the remaining costs identified in the schedule. In particular, they would not have incurred counsel's fee. This was listed for a three day hearing. As a result of the strike out it has been reduced to a one day hearing but the respondents had to prepare for a three day hearing and I do take that into account.

95. I am going to make orders of costs. I am not going to make them on the basis of joint and several liability as requested by the Respondent. I do not think that is appropriate. I have considered their cases individually and I think it is appropriate for me to make individual awards against each claimant and it would not be fair in my opinion for any one of the claimants to be left in the position where they pay their own proportion of costs but are required to contribute to somebody else's as well.

96. I am going to make the same award against each of the three claimants. Their financial circumstances were potentially different. In particular, in Mr Deacon's case, I have taken into account that although he is in work he is in debt and that paying an award would be difficult. We can have a further discussion about whether there is an instalment plan for the award.

97. It is appropriate to give the whole of counsel's fee of £6000 so split three ways that would be £2000 each, before VAT. I do not think that the solicitor's charges are excessive either in the hourly rate or the time spent. However, exercising my discretion I am not going to award the full amount claimed for the solicitor's costs. The amount claimed as I said earlier is £7677.50. I think an appropriate amount for the solicitor's costs would be £4500 and I will split that three ways as well so that's £1500 each, again, before VAT.

98. Following further submissions, I decided that the costs award should £3500 plus VAT against each claimant, so £4200 in total. This was to be payable in accordance with the instalment plan set out in the judgment.

Employment Judge Quill

Date: 9 April 2022

REASONS SENT TO THE PARTIES ON

27 April 2022

FOR THE TRIBUNAL OFFICE