EMPLOYMENT TRIBUNALS

Claimant: Mr P Burrows

Respondents: Kingdom Services Group Ltd (1)
Guarding Solutions & Training Services Ltd (2)

Heard at: Manchester **On:**22-24 August 2022

Before: Employment Judge Phil Allen
Mr I Frame
Ms A Berkeley-Hill

REPRESENTATION:

Claimant: Mr R Lees, counsel
First Respondent: Ms E Evans-Jarvis, solicitor
Second Respondent: Mr S Jagpal, consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was assigned to the organised grouping of employees immediately before the transfer and transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 5 July 2021 from the first respondent to the second respondent.

2. The claimant was unfairly dismissed by the second respondent on 5 July 2021.

3. The second respondent breached the claimant's contract of employment by dismissing him without notice or pay in lieu of notice.

4. The second respondent made an unauthorised deduction of one day's pay from the claimant, for 5 July 2021.

5. The respondents failed to inform and consult the claimant as required under regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The respondents are jointly and severally liable for the award in accordance with regulation 15(9).

6. The claimant's claim for a statutory redundancy payment is dismissed having not been pursued by the claimant.

7. Save for the finding in relation to information and consultation, the claimant's other claims against the first respondent do not succeed and are dismissed.

8. The claimant is awarded a basic award for unfair dismissal of **£16,320** which must be paid by the second respondent to the claimant.

9. The claimant is awarded a compensatory award for unfair dismissal of **£11,947.92** which must be paid by the second respondent to the claimant.

10. The amount which the second respondent must pay the claimant for the unauthorised deduction from wages is **£116.32**.

11. The award for failure to inform and consult as required under regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is 13 weeks pay being **£7,072**. Both respondents are jointly and severally liable for that award.

The above Judgment having been sent to the parties on 25 August 2022 and the second respondent having requested written reasons, the reasons are provided below.

REASONS

Introduction

1. The claimant was employed by the first respondent with continuity of employment from 18 January 1994, having transferred to the first respondent as a corporate security manager on 13 February 2015. When the first respondent ceased to undertake the car park contract for the Manchester University NHS Foundation Trust which included the Manchester Children's' Hospital United Utility car park (the UU car park), the first respondent contended that the claimant transferred to the second respondent who had taken over responsibility for the contract. On 5 July 2021 the claimant was refused work at the site by the second respondent. Neither respondent accepted that they employed the claimant as at that date.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case, on 17 February 2022 and a list of issues was appended to the order made following that hearing. At the start of this hearing it was confirmed by all of the parties that the issues identified remained those to be determined. The claimant claimed automatic unfair dismissal under section 104 of the Employment Rights Act 1996, ordinary unfair dismissal, failure to inform and consult in breach of regulation 15 of TUPE, wrongful dismissal, unauthorised deduction from wages, and a redundancy payment under section 163 of the Employment Rights Act 1996.

3. After the time taken for reading, the claimant's counsel explained to the Tribunal that it had been agreed by the parties that the only issue to be determined was the first issue in the list of issues. The respondents confirmed that they accepted that the claimant had been unfairly dismissed, albeit that each of them denied that they had been the organisation which had unfairly dismissed him.

4. The first issue addressed, under the heading TUPE matters, was:

    a. Was there a relevant transfer from the first respondent to the second respondent, in particular a service provision change where activities ceased to be carried out by the first respondent and were subsequently carried out by the second respondent?

    b. Was the claimant working on the Trust contract at the site at the date of the transfer from the first respondent to the second respondent?

    c. If so, was the claimant assigned to the organised grouping of employees and was the claimant's assignment deliberate with the principal purpose to carry out activities under the contract?

    d. Was the claimant assigned to the organised grouping of employees immediately before the transfer?

    e. Did the claimant's employment transfer under TUPE from the first respondent to the second respondent on 5 July 2021?

    f. Which respondent is liable in respect of each of the claimant's claims?

5. At the end of the first day, the Tribunal re-confirmed with the parties whether the agreement explained, following reading on the first day, meant that the respondents acknowledged that there had been a failure to inform and consult as required by TUPE. The respondents' representatives each confirmed that remained in dispute. The claimant's counsel explained that had not been his understanding of what had been agreed.

6. The issues in the list as they applied to informing and consulting were:

    a. Did the first and second respondent inform and consult with the claimant, or an appropriate representative, about the transfer taking place, the date of the transfer and the reasons for it along with the legal, economic and social implications of the transfer?

    b. Did the first or second respondent envisage that they would take any measures in relation to the claimant's employment?

    c. If so, was the first respondent informed of any measures which the second respondent envisaged to take?

    d. If so, did the first respondent adequately inform and consult the claimant of the measures which it, and or the second respondent envisaged that it/they would take in relation to the claimant's employment?

e. If any representations were given by the claimant or an appropriate representative in relation to the transfer, did the first respondent consider representations and or give adequate reasons for rejecting them?

f. If not, has there been a failure to consult in respect of the TUPE transfer?

7. It was agreed with the parties that only liability issues would be addressed first, with remedy issues to be addressed after the liability issues have been determined.

8. During submissions, the claimant agreed that he was not pursuing his claim for a redundancy payment.

Procedure

9. The claimant was represented by counsel, Mr Lees, at the hearing. Ms Evans-Jarvis, solicitor, represented the first respondent and Mr Jagpal, consultant, represented the second respondent. The hearing was conducted in-person with all parties and witnesses attending Manchester Employment Tribunal.

10. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 252 pages. The Tribunal read only the pages which were referred to in the witness statements or to which it was referred during the hearing. Where a number is referred to in brackets in this Judgment, that is a reference to the page number in the bundle. The Tribunal was also provided with an agreed chronology and an agreed cast list.

11. Each of the witnesses had prepared a witness statement, and those witness statements were read by the Tribunal on the first morning of the hearing. Each witness gave evidence under oath and was cross-examined by the other parties (or at least that opportunity was given) as well as being asked questions by the Tribunal.

12. The Tribunal heard evidence from the claimant and Mr Declan Byrne of USDAW, who gave evidence on his behalf.

13. The first respondent called the following witnesses:

a. Mr Lloyd Burton, Strategic Account Director for the first respondent and the claimant's line manager prior to 5 July 2021;

b. Ms Suzie Batters, People Team Advisor for the first respondent; and

c. Ms Karen Kelly, People Team Manager for the first respondent.

14. The second respondent called the following witnesses:

a. Mr David Potts, CEO of the second respondent (who also described himself as the owner of the second respondent);

b. Mr Gareth Conlon, Operations Manager for the second respondent;

c. Mr Stuart Lindsay, HR & Development manager for the second respondent; and

d. Mr Jaelani Ali, now car parking officer for the second respondent and previously an agency worker engaged by the first respondent to work at the UU car park.

15. The second respondent also provided a witness statement for Mr Thomas Higgins, security and car parking manager for the Manchester University NHS Foundation Trust. Mr Thomas did not attend the hearing to give evidence and accordingly his evidence could not be challenged by the other parties. The Tribunal only gave his evidence limited weight as a result.

16. After the evidence was heard, each of the parties was given the opportunity to make submissions. They each made oral submissions on the morning of the third day, having been given additional time to prepare on the afternoon of the second day when the evidence had been heard more quickly than expected.

17. After the parties were provided with the Judgment and reasons on the liability issues, the remedy issues were subsequently determined. The parties had agreed many of the relevant matters relating to remedy. These were recorded on a copy of the schedule of loss; with the issues outstanding recorded. Submissions were made by the second respondent's representative and the claimant's representative regarding the issues in dispute, with the first respondent adopting the second respondent's submissions regarding the award for failure to inform and consult. This document includes both the Judgments handed down on the same day and the reasons given, albeit that the remedy Judgment and reasons were handed down later in the day.

Facts

18. The claimant first worked for Aegis Security Services Ltd as a security support officer from 18 January 1994. On 1 February 2007 the claimant became Security Site Manager. On 20 June 2010 he became Corporate Security Guarding Manager (89). On 13 February 2015 the claimant transferred under TUPE to the first respondent. The claimant's evidence was that throughout his employment (until December 2020) he had worked at CIS Tower.

19. In her submissions the first respondent's representative confirmed that it was not disputed that the claimant was a very good employee with twenty-seven years' experience as a security officer. At no stage did anyone from the first respondent have anything but praise for what was agreed as being a good employee.

20. The first respondent's contract with the Manchester University NHS Foundation Trust had been inherited when it had taken over another business. The first respondent was not on the relevant procurement panel to be able to tender to obtain further work from the NHS Trust. Mr Burton's evidence was that the first respondent had been warned in previous years (prior to 2020) that the contract would be ending, but in practice on previous occasions it had continued and been renewed. The contract had, prior to April 2020, included a bed watch contract which included the provision of security staff within hospitals. When the bed watch part of

the contract had ended, the car parks contract had been continued without appearing to have been re-tendered. Those car parks included the Manchester Children's Hospital UU site.

21. The Tribunal was shown an email from the NHS Trust to Mr Burton of 16 September 2020 informing him that the Trust had started a process of retendering security services across all sites including its car parks. Employee liability information was requested. The first respondent was informed that the new service provision was due to take place from 1 April 2021. Mr Burton's evidence was that this request reflected those which had been received before, when the car park service had not in fact been ended and staff transferred. He highlighted that the service did not in fact end on 1 April 2021. There was no dispute that the first respondent was unable to tender for the service as they were not on the relevant panel. It was accordingly clear that the first respondent knew that the car parks contract could be ending in 2021, albeit it did not know with any certainty that it would do so.

22. The first respondent provided the NHS Trust with anonymised information about employees following the request (140). In evidence the first respondent's witnesses were keen to emphasise that the information provided was for the purpose of tendering, it was not full employee liability information as, for example, the names of employees were not provided. It was not disputed that the claimant's details were not included in that schedule of information. He was not working on the contract at the time. The information was provided for seven employees over three locations. Mr Burton's evidence was that the three locations were part of the same contract. Two of those employees were recorded as being located at the UU site.

23. As a result of the proposed cessation of the need for security services by the first respondent's relevant client at CIS Tower, the first respondent undertook redundancy consultation with affected employees. Mr Burton personally undertook the redundancy consultation meetings. The claimant was part of the group of staff placed at risk of redundancy. That consultation commenced on 29 September 2020 (101) and included meetings with the claimant on 6 October, 19 October and 7 December 2020. An email of 1 October to the claimant (102) informed the claimant that his statutory redundancy payment would be £16,140.

24. The first respondent's CIS Tower contract ended on 24 December 2020.The claimant's role at the CIS Tower ceased to exist (there was no transfer or continued service). The first respondent did not have any alternative management vacancies available at the time. The first respondent offered the claimant an alternative role as a security officer. The claimant was not happy with the alternative roles being offered because they were not managerial roles. At some stage during the redundancy consultation in 2020, the first respondent agreed that the other roles would be offered to the claimant on the basis that his pay and terms and conditions would continue, as they had applied to the claimant's management role.

25. On 17 December 2020 the claimant was sent an email which told him that the first respondent had decided not to make his role redundant. That email appended a list of roles which the claimant might wish to consider. The evidence was that the same list was sent to all the employees at risk of redundancy at that time. That list included a role at the Manchester Children's Hospital UU car park. The claimant's

response made clear that he believed the positions had no comparison whatsoever to his current management role. However, the evidence of both the claimant and Mr Burton (albeit not recorded in a document at the time) was that the claimant had said that the only role of those listed which he might undertake was that the role at the Manchester Children's Hospital UU site. The claimant's evidence was that he was unable to travel (at least reasonably) to the other sites and he did not wish to work on a retail site. Mr Burton's evidence was that he understood that to be the case and therefore had closed off the role for the claimant.

26. In an email of 18 December 2020 the claimant raised a grievance (110). That was heard on 4 January 2021, with an outcome on 23 February 2021 (127). An appeal was heard on 25 March 2021, with an outcome on 15 April 2021 (134). The grievance and appeal were not upheld.

27. On 23 December 2020 Mr Burton emailed Ms Kelly (247). In that email, when referring to moving the claimant to the role at the Manchester Children's Hospital UU car park, Mr Burton observed that the contract "*is due to go in April (they have not formally terminated) and this would mean he would TUPE out*".

28. Later, on 23 December 2020, the first respondent's HR team emailed the claimant explaining that his personal pay rate was maintained, and his terms and conditions would not change. The sites available were re-confirmed. The claimant was asked to attend at the Manchester Children's Hospital UU site for training on 29 December 2020. The claimant responded to say that he would not be attending as he was on annual leave until 15 January 2021. On 24 December the claimant was provided with a new training date at the UU car park of 18 January 2021. On 28 December the claimant emailed Ms Kelly (116) to say that he would take up the position but emphasised it was "*under duress and without my consent*". That was based upon the claimant's objection to accepting a non-managerial role, it was not an objection to the particular location or contract.

29. Ms Kelly's evidence was that the engagement of the claimant on the UU car park contract at a personal pay rate was escalated to, and signed off by, the first respondent's MD. There was no document which confirmed that sign off.

30. Between the 18 January and 14 May 2021 the claimant was absent from work on ill health grounds. There was no dispute that the claimant did not actually undertake work at Manchester Children's Hospital UU site prior to 17 May 2021. There was some dispute about whether the claimant had accepted the role in December 2020 or whether, as he himself asserted in evidence, he did not accept it until May 2021.

31. On 30 April 2021 the claimant was again sent by the first respondent a list of current sites where work was available from which to choose (146). That list included the Manchester Children's Hospital UU site (147). On 6 May the claimant requested more information about the role at that site (150). On 12 May the claimant visited the site to look at travelling distances. He emailed to say he was interested in the vacancy, but sought a reduction in the hours from 60 to 56 (to be worked over four days per week) (148). The reduction was agreed in a letter sent from the respondent on 17 May, signed by the claimant (153). The claimant's evidence was that he decided to accept the role on 13 May 2021. In answer to being asked about why he

accepted it and did not resign, the claimant stated why would he resign when he was employed on the salary that he was at the time. Mr Byrne's evidence was that the claimant decided that he would like to try working in the security officer role, rather than leave his employment.

32. Mr Jaelani Ali worked for the first respondent on the Manchester Children's Hospital UU site (as one of the two staff working there). He was engaged via an agency and worked there for approximately two years. On 16 May 2021 he was told by Mr Burton not to report to work on 17 May as he had been replaced by a permanent employee, since that employee had lost his site and the company was removing Mr Jaelani Ali because he was agency staff. Understandably, Mr Jaelani Ali was not happy about the way that he was treated by the first respondent.

33. When the claimant worked at the Manchester Children's Hospital UU site, he worked alongside one other employee providing security for a staff car park. The claimant's evidence was that he worked 6.30 am to 8.30 pm. He worked alongside another employee between 6.30 am to 2.30 pm. From 2.30 pm the claimant worked alone. The car park was open five days a week. The claimant worked at the site for the first respondent from 17 May until the last shift which he worked prior to 5 July 2021. The assignment was permanent, there being no evidence that it was temporary or for only a defined period. The claimant clearly understood that the role and location was permanent.

34. In his evidence, Mr Lindsay asserted that he had found out that the claimant had not been authorised to be on the relevant site by the NHS Trust. In the statement provided to the Tribunal, Mr Higgins of the NHS Trust stated that on 18 May he had become aware that the claimant had replaced Mr Jaelani Ali without notification or consultation with the Trust. Mr Higgins did not attend the hearing so his evidence could not be challenged, nor could he be asked about the implications of the evidence he gave. Mr Burton's evidence (a witness who did attend the hearing and whose evidence was tested) was that there was no obligation on the first respondent to notify the NHS Trust about staff changes, nor was there any obligation to obtain authorisation. In any event, there was no evidence that the NHS Trust took any steps to stop the claimant working on the contract, or took any formal steps to require his removal while he worked on the site from 17 May until shortly before 5 July.

35. The second respondent was formally appointed to provide security services to the NHS Trust which included the car parks contract. They were informed by the Trust in a letter of 27 April 2021 (albeit there was a standstill period to 7 May) (142). There was no evidence that anyone informed the first respondent of this decision at the time, and it was the first respondent's evidence that until 17 May 2021 no one did so. As at the time and date when the claimant started actively working at the Manchester Children's Hospital UU site, the second respondent knew that it would be taking over the contract, but the first respondent did not (albeit it knew that a tendering exercise was taking place). The claimant's evidence was that he found out from talking to other employees within two to three days of working on the site, as it was common knowledge amongst security officers that the contract had been lost.

36. On 17 May 2021 Mr Lindsay of the second respondent wrote to Mr Burton of the first respondent (154). That letter informed the first respondent that the second

respondent had been informed that they would be taking over the contract with the NHS Trust with effect from 1 July 2021. The second respondent expressly acknowledged that TUPE applied in those circumstances. It said "*We assume, therefore, that you will be notifying those of your employees who normally work on this contract that, with effect from the above date, it is likely that they will become employees of our company*". The letter sought employee liability information.

37. It was Mr Burton's evidence that the letter of 17 May was the first time that the first respondent had been informed about the loss of the contract, albeit he was very keen to emphasise in his evidence that notification from a third party could not be formal notice of termination. The formal notice was only given by the NHS Trust in an email of 28 May (164) and that email informed the first respondent that the second respondent would commence providing the service from 5 July 2021 (rather than the 1 July as the second respondent had said in its letter). There was no explanation provided in the evidence heard by the Tribunal for the delay in the NHS Trust informing the first respondent about the loss of the contract. Whilst the Tribunal has not heard evidence from the NHS Trust, it must be observed that such a delay was far from ideal and might have been detrimental in terms of employees being informed and consulted.

38. The other important element of the second respondent's letter of 17 May 2021 was that in it the second respondent provided the first respondent with information about the measures in connection with the transfer it envisaged in relation to the employees who were affected by the transfer. The measures were: to change employees pay date; and also possibly change of hours. Whilst provided to the first respondent in this letter, there was no evidence that this measures information was ever provided to the affected employees.

39. Mr Byrne of USDAW gave evidence on behalf of the claimant. His evidence was primarily about the help and support which USDAW had provided to the claimant. He confirmed that no trade union was recognised by the first respondent, albeit that USDAW had an ongoing relationship with it because of the members it employed. There was no dispute that there were not any elected representatives in place for the purposes of TUPE.

40. On 2 June the affected employees were notified by the first respondent about the transfer. The Tribunal was provided with a letter from Ms Batters to the claimant (166). That informed him that he would transfer under TUPE to the second respondent as the first respondent would cease to provide the relevant contract. The letter provided the employees the opportunity to put themselves forward as, or nominate, an employee representative (the evidence being that nobody did so). The letter recommended the claimant met with his new employer and suggested some questions he may wish to ask. It outlined (briefly) the right to object to the transfer. The letter did inform the claimant that the transfer was to take place, the proposed date of the transfer, and (very briefly) the reasons for it. It described the first respondent's view that the claimant would automatically transfer. It did not include any reference to the measures which the first respondent envisaged, nor did it include the fact that no measures would be taken. It did not include any reference to the measures which the second respondent had said it envisaged. It did not provide any information about agency workers under the supervision and direction of the first respondent.

41. The claimant's evidence was that he was disappointed when he received the letter as it was the first time that the issue had been brought up with him. His evidence was that there was no formal meeting or discussion with him (or his trade union) in relation to the transfer of his employment and the information given to him was minimal. Other than the 2 June letter, the Tribunal was not shown any other written information provided to the claimant. Ms Batters' evidence when answering questions was that there was no actual on site meetings with the claimant but she spoke to him on the phone (albeit she could not recall when, but could recall it was regarding TUPE and following the second respondent's representative's visit to the stie).

42. The first respondent provided the second respondent with employee liability information on 4 June 2021 (171). That provided the names and details of the eight employees engaged on the contract across four sites. The claimant was included in this schedule. The schedule said that the claimant was 100% assigned to the contract. Mr Potts, the CEO of the second respondent, was made aware of this information by Mr Lindsay on 4 June 2021.

43. As he explained in his evidence, Mr Potts observed that the claimant: was paid at a significantly higher hourly rate than all other officers allocated to the car parks; was entitled to thirty weeks full company sick pay when the other officers were only eligible to statutory sick pay; had a greater entitlement to annual leave than others; and was eligible for death in service benefit. Mr Potts' evidence was that he felt that the claimant being included in the schedule was unfair to the claimant and the other officers. Mr Potts in his oral evidence also explained that he knew that Mr Jaelani Ali had been treated badly having been removed from the contract and that the NHS client wanted Mr Jaelani Ali to work on the contract, and he was keen to keep the client happy as the contract was just starting. Mr Potts instructed Mr Lindsay to make immediate enquiries with the first respondent as to how and why the claimant had been placed on the site. In his statement, Mr Potts gave evidence that he had worked out that the second respondent would effectively have to pay an extra £16,000 per year in employing the claimant, which his evidence was that they would be unable to reclaim from the Trust.

44. Mr Lindsay's evidence when asked about the decision, was that it was made when the second respondent initially received the employee liability information which included the claimant. The claimant stood out, because the claimant was on considerably more favourable terms and conditions. When asked if the second respondent had not accepted the claimant because of his pay rate, he explained that was not the sole reason, but he would say that it influenced the decision. He felt that the claimant's terms and conditions were not in, what he described as, the spirit of the transfer, when everybody else which the first respondent was looking to transfer were on the national minimum wage. He said the decision not to transfer the claimant was because of the claimant's favourable terms and conditions.

45. It was clear from the evidence of Mr Potts and Mr Lindsay that the second respondent's decision that the claimant would not be accepted as transferring was initially made on or around 4 June 2021.

46. The Tribunal was provided with the exchange of emails between the respondents about the inclusion of the claimant in the employee liability information

for the contract and related matters. It is not necessary to re-produce the entire exchange, but some of the key points were as follows:

a. On 8 June (178) Mr Lindsay confirmed that the measures would consist of a change in pay date to the 10th of each month for all staff and a change of hours which applied to one site only. In the same email he stated that the claimant had informed the second respondent that the claimant had been on the contract for only three weeks, which he said was after the 10 May contract award date and "*can you please clarify this as the employee has informed us that he has arrived from another contract of Kingdom which was unfortunately lost and therefore not part of the TUPE, given what Paul Burrows has stated*";

b. Later on 8 June (178) Ms Batters confirmed that the first time the first respondent (or at least the HR team there) had been informed of the contract loss was 17 May after the claimant had already started working on the site. In the same email she also said that she would get the "*measures out to all employees this week*". There was no evidence that she did so, or that she provided the measures information to the claimant directly;

c. On 9 June (177) Mr Lindsay said "*we cannot accept that Paul will form part of the TUPE transfer – all parties were informed on the 10th May regarding contract award, and he was moved to the site after this date and therefore not part of the contract at the time of contractual award*". He went on to say that transfer would be unfair on the claimant because his pay and hours would be subject to change as the client would not facilitate, or agree to, an employee on that rate of pay and the contractual benefits did not form part of the contract in question – when asked about what he said in this email, Mr Lindsay explained that was in essence what he believed at that particular time as that is why he had written it;

d. On 10 June 2021 (179) Mr Potts stated (in an email which was to Mr Lindsay and not the first respondent) "*We agree that the Kingdom officers on site are part of a defined group who carry out specific car parking duties*" and he went on to say "*Each of these officers are and have previously been paid at NMW rate*" and "*We believe that Mr Burrows was parachuted into this contract to serve Kingdoms purposes and as such we will not accept him on TUPE*";

e. Some argument was heard about Ms Batters email of 11 June (175) in which she said that the first respondent had filled a live vacancy on site when the claimant was moved into the UU work. The Tribunal found that what was said in that email to be somewhat disingenuous, as the first respondent had moved an agency worker off the site or contract in order to be able to move the claimant in;

f. On 17 June (175) Mr Lindsay concluded "*This is our third and final indication that Mr Burrows will not be subject of the TUPE. We do not wish to discuss this further*"; and

g. On 18 June (174) Ms Batters asserted that the claimant did transfer under TUPE which was something which he said occurred by operation of law (which is, of course, correct) and "*Simply put, the regulations make clear the position and whether you (or we) want Mr Burrows to transfer or not, he will by virtue of these regulations*".

47. A representative of the second respondent attended the site and spoke to the other employee of the first respondent who worked on the contract. When the claimant spoke to that person, his evidence was that he was told that he was not part of the transfer and did not need to provide his details. Mr Byrne raised this on the claimant's behalf with the first respondent, but was told by the first respondent that its position was that the claimant was part of the transfer to the second respondent on 5 July 2021.

48. On 28 June Mr Byrne asked for copies of the email correspondence between the respondents. On the same date (184) the email trail was provided to him. That trail included within it the second respondent's measures information, albeit the first respondent did not highlight that content. The Tribunal was not shown any evidence that it was sent to the claimant. There was some limited evidence about telephone conversation(s) between Mr Byrne and Ms Batters.

49. On 30 June 2021 Mr Byrne wrote to Mr Lindsay about the claimant, explaining that he had been advised that the claimant would TUPE transfer to the second respondent. He invited the second respondent to contact him if they wished to discuss the situation. The second respondent did not respond. It also did not contact the claimant. Mr Potts' evidence was that conversations with individuals might raise that individual's expectations and therefore he instructed the second respondent's mobilisation team not to directly contact the claimant.

50. There was no dispute that the other employees working on the contract for the first respondent transferred to the second respondent under TUPE. They commenced working for the second respondent on 5 July 2021. The second respondent had obtained details regarding things such as bank details and uniform sizes from the transferring employees. They did not obtain that information from the claimant.

51. The claimant was advised by his trade union representative to arrive for work as normal on 5 July 2021. He did so. Mr Conlon's evidence was that the claimant was already on the site when he arrived at 6.30 am on 5 July. His evidence was that he politely stated that the claimant did not form part of the rota and said his best course of action was for the claimant to contact his line manager as the second respondent was unable to assist him further. In his evidence Mr Conlon emphasised that he did not remove the claimant from the premises, however he also accepted that his position was that the claimant was not to work for the second respondent on the day. The claimant was polite in his interaction with Mr Conlon and left the location. The claimant was provided with nothing in writing from the second respondent. Mr Conlon's evidence was that he was surprised that the claimant had attended work on that day, which reflected that the second respondent appeared to have put no plan in place to discuss matters with the claimant, even though they knew he might arrive for work on that day.

52. The first respondent paid the claimant his pay due up to 4 July 2021. Neither party paid the claimant for 5 July 2021. The claimant asserts that he is due pay for that day as he attended work. The claimant was not paid any notice or redundancy pay by either party. Neither party provided the claimant with any work or opportunity to work on or after 5 July 2021. In his claim form, the claimant gave the date of termination of his employment as 5 July 2021 (13).

53. On 31 July 2021 the claimant wrote to both the first and second respondent in separate letters asking if he had been dismissed, asking to appeal against the dismissal, and raising a grievance. Neither respondent responded to the claimant's letter.

54. The Tribunal was not shown a copy of either of the respondents' commercial contracts with the NHS Trust. The Tribunal was not shown or given evidence about how the contracts were costed, or whether there was any warranties or indemnities provided about the staff transferring or the costs of those staff. Mr Potts' evidence was that he did not go back to the NHS Trust to discuss an increase in the cost of the contract, as a result of the claimant's potential transfer to it. By including this paragraph in the Judgment, the Tribunal is not criticising the parties' presentation of the case, but it records the evidence to which it was referred. The commercial deal was not a matter for the Tribunal.

The Law

55. This case involves consideration of the Transfer of Undertakings (Protection of Employment) Regulations 2006, which is referred to in this Judgment as TUPE. It is important to remember that the regulations are there, as the title makes clear, as a protection of employment measure. They provide employees with rights on the transfer of a contract, when the law would not otherwise afford them any protection. Those rights include: not to be dismissed because of a relevant transfer; and to transfer with all rights, powers, duties and liabilities under or in connection with the employment contract transferred.

56. It is also appropriate to observe that one obvious and unavoidable implication of staff transferring under TUPE, is that they may need to be employed by the transferee alongside other staff doing the same work on different terms and conditions (that is unless the employer chooses to level up all employees pay and benefits, something which they are not obliged to do).

57. There was no dispute in this case that there was: a service provision change; that there was an organised grouping of employees which had as its principal purpose the carrying out of activities (security) on behalf of a client (the NHS Trust); and that the activities would be continued by the second respondent after the transfer for that client. The only issue in dispute (at least regarding the application of TUPE) was whether the claimant was part of that organised grouping of activities such that he was assigned to the entity transferring and would transfer under TUPE.

58. Regulation 3(3)(a) provides that the relevant organised grouping of employees is required "*immediately before the service provision change*".

59. Regulation 2 provides that assigned means "*assigned other than on a temporary basis*".

60. Regulation 4 requires that a person must be "*assigned to the organised grouping of employees that is subject to the relevant transfer*".

61. The temporary exclusion reflects the fact that, to be protected by TUPE, the contract must be one which would otherwise have been terminated by the transfer (without the protection of TUPE) as provided by regulation 4. If the assignment was temporary; then the contract would not have been so terminated.

62. There has been considerable case law about assignment. The Judgment in the European case of **Botzen** [1985] ECR 519, C-186/83 is usually the staring point. That case said that the test was whether it had been established that the employee was assigned to the part of the undertaking or business transferred. The test is not one simply of time worked; it is one which requires consideration of all the relevant factors.

63. Being involved in the carrying out of the relevant activities immediately prior to the transfer, will not necessarily mean that the employee was assigned to the organised group. That is clear from **Argyll Coastal Services Ltd v Stirling** UKEATS/0012/11, a case upon which the representative of the second respondent relied. The concept of an organised grouping implies that there must be an element of conscious organisation by the employer of its employees, in the nature of the team, which has, as its principal purpose, the carrying out of the activities in question. In another case upon which the second respondent's representative relied **Seawell v Ceva Freight (UK) Ltd** [2012] IRLR 802 Lady Smith said:

> "*It remains my view that the description 'organised grouping of employees' connotes a deliberate putting together of a group of employees for the purpose of the relevant client work – it is not a matter of happenstance…*
>
> *Turning to the relevance of reg. 4, the issues of (a) whether or not there existed an organised grouping of employees which satisfied the requirements of reg. 3(3)(a)(i) and (b) whether or not a particular claimant or claimants were assigned to that grouping are, as was observed by the President in the Eddie Stobart case at paragraph 16, analytically distinct. It is not difficult to envisage circumstances involving, for instance, a clear organised grouping of employees whose principal activity was work for client X where an individual employee working with them at the date of transfer could not be said to have been assigned to the grouping since he normally did other work and was only helping out, on a temporary basis eg to cover another employee's annual leave. Identification of the existence of an organised grouping of employees logically comes first though*"

64. The Tribunal has considered these authorities and what has been quoted. However, the Tribunal would observe that the reference to a matter of happenstance in the passage cited, was focussed upon whether or not there was an organised grouping of employees (not something which is in dispute in this case) rather than on whether any particular individual was assigned to the organised grouping of employees.

65. The parties also referred to the decision of the Employment Appeal Tribunal in **Eddie Stobart Ltd v Moreman** [2012] IRLR 356 (also mentioned in the citation above). That was a finding that employees who picked items in a warehouse in practice principally for a particular client (but without even necessarily knowing who they were picking for), were not an organised grouping of employees who transferred by virtue of the fact. Underhill J said of organised grouping of employees:

> "*In my view that necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. The statutory language does not naturally apply to a situation where, as here, a combination of circumstances – essentially, shift patterns and working practices on the ground – mean that a group (which, NB, is not synonymous with a 'grouping', let alone an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. The paradigm of an 'organised grouping' is indeed the case where employers are organised as 'the [client A] team', though no doubt the definition could in principle be satisfied in cases where the identification is less explicit*"

66. Of assignment he said:

> "*if the touchstone was whether a particular employee was assigned to a recognised team principally serving a particular client, the answer would normally be evident (though no doubt there would sometimes be marginal cases)*"

67. A Tribunal needs to define the organised grouping of employees first and then determine whether the claimant was assigned to that organised grouping.

68. The Tribunal also needs to be alert to attempts by employers to evade the regulations by fraudulent assignment or reassignment of employees, as, for example, set out in **Carisway Cleaning Consultants Ltd v Richards** EAT/629/97. That case involved an employee, about whom there had been some complaints, who was offered a transfer between locations on 10 October to another permanent job with a salary increase. He accepted and commenced working on the new job, only to be told that the contract was to transfer under TUPE to a new provider on 15 or 16 October. That new provider denied that the employee was employed in the part transferring. The move was described as a sleight of hand and being due to an improper and fraudulent motive. The Tribunal observed that the increased salary made the contract profitless for the new provider. The Tribunal found that the claimant "*had been gulled, deceived; it was a sham. He was persuaded to go to* [the new provider] *by fraud and what is fraudulent is void*". The Tribunal in that case found that the claimant did not transfer and that finding was one of which the Employment Appeal Tribunal said it was very hard in the circumstances to see how they could have reached any other conclusion. Judge J Hull QC said:

> "*Was he indeed part of the undertaking which was being transferred? He was not. He was only there because he had been defrauded into going there. The Tribunal we think were well entitled to say that. So in those circumstances we accept the submissions which were made to us by Mr Swift. We uphold the decision of the Tribunal and we dismiss the appeal* "

69. The EU abuse of law principle also requires that transferors and transferees must not seek to obtain fraudulent or wrongful advantage from the rights derived from the relevant EU directive.

70. The EAT has further emphasised this issue and the need to be alive to the danger of a contractor cherry picking certain employees, or what it described as, an unsavoury employer moving employees thought to be less satisfactory to a part of the undertaking which was to be transferred, and those thought worth keeping would be moved out of the transferred part. That was in a case not cited by the parties (and which involved very different facts) **Bademosi v Securiplan** EAT/1128/02.

71. It is also worth highlighting that there is nothing in TUPE which prohibits the transfer of employees where: their information is not provided at tender stage; and/or where the employee is not employed in the undertaking at the time that the contract is awarded to the transferee. In a great many practical situations, the employees assigned to the undertaking will change between the provision of information for tender and the actual transfer following contract award. Those assigned may also change between contract award date and transfer, albeit in circumstances where that time is short that will require careful consideration of assignment and, in particular, the issues of whether the employee has been assigned on a temporary basis and the need to be alert to attempts by employers to evade the regulations by fraudulent assignment or reassignment of employees.

72. The duty to inform and consult regarding TUPE is set out in regulation 13. It applies to all affected employees (not just those who transfer). Long enough before a relevant transfer to enable the employer to consult the appropriate representatives, regulation 13(2) and (2A) sets out a list of information which must be provided.

73. Regulation 13(2) says the information is:

> *(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.*
>
> Regulation 13(2A) says the information to be supplied is:

(a) this must include suitable information relating to the use of agency workers (if any) by that employer; and

(b) 'suitable information relating to the use of agency workers' means

(i) the number of agency workers working temporarily for and under the supervision and direction of the employer;

(ii) the parts of the employer's undertaking in which those agency workers are working; and

(iii) the type of work those agency workers are carrying out.

74. Regulation 13(6) provides that "*An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures*".

75. Regulation 13(11) provides for circumstances where the employer has given the employees the opportunity to elect representatives and they have not done so (where there is also not a recognised union or unions). It says "*he shall give to any affected employees the information set out in paragraph (2)*"

76. Where there has been a failure to inform and/or consult as required, a claim can be brought under regulation 15(1)(d) of TUPE. Where there is no recognised trade union and no elected representatives, an individual can bring such a claim themselves. As was agreed with the parties, Regulations 15(8) and 15(9) of TUPE provide for the transferor and the transferee to be jointly and severally liable for any compensation awarded. The Tribunal has no power to apportion liability between the transferor and the transferee according to blame.

77. This Judgment does not reproduce what was said in submissions by the representatives, but all matters which they raised were considered and they are only referred to where it was felt appropriate and necessary to do so.

Conclusions – applying the law to the facts

78. It is appropriate to start this decision by confirming that the Tribunal found the claimant to be a genuine and truthful witness who had been placed in an unenviable position through no fault of his own. After twenty-seven years of continuous employment he was placed in a position where he no longer had any employment, without either respondent accepting that he had been dismissed by them (or indeed responding to the appeal/grievance which he raised).

79. The first issue identified in the agreed list of issues was: was there a relevant transfer from the first respondent to the second respondent, in particular a service provision change where activities ceased to be carried out by the first respondent and were subsequently carried out by the second respondent?

80. It was not in dispute that there was a relevant transfer from the first respondent to the second respondent or that there was an organised grouping of

employees who transferred. The grouping of employees was the employees of the first respondent employed to undertake the work on the car park security contract for the NHS Trust. There was no dispute that the seven other employees listed in the employee liability information provided by the first respondent to the second respondent on 4 June 2021 who transferred because they were part of an organised grouping of employees whose principal purpose was carrying out the car park security work for the NHS Trust.

81. The second question in the list of issues asked was: was the claimant working on the Trust contract at the site at the date of the transfer from the first respondent to the second respondent? As was agreed by all of the parties, the answer to that question was clearly: yes he was. From 17 May 2021 until immediately before 5 July 2021 the claimant did work undertaking car park security on the UU site. That security service was part of the NHS Trust contract.

82. The third and fourth issues in the list of issues in practice needed to be considered together. Those questions were the ones at the heart of the primary dispute before the Tribunal: was the claimant assigned to the organised grouping of employees and was the claimant's assignment deliberate with the principal purpose to carry out activities under the contract; and was the claimant assigned to the organised grouping of employees immediately before the transfer?

83. The Tribunal found that: the claimant was genuinely and deliberately assigned to the organised grouping of employees whose principal purpose was carrying out the activities for the NHS Trust under the contract; his assignment was deliberate; and he was assigned to the organised grouping of employees immediately before the transfer. As already confirmed, from 17 May until immediately before 5 July 2021, the claimant did work undertaking car park security on the UU site provided as part of the contract with the NHS Trust and as part of the organised grouping of employees who were assigned to the work on that contract.

84. The Tribunal did not find that the claimant was shoe-horned or dumped into the contract or the work. The claimant chose the site as the one at which he wished to work, from a list of available options. He could have chosen to have worked at other sites. He did not wish to do so, primarily due to location and the wish not to work in retail premises. He chose the UU site as the preferred place of work and, once he did so and commenced working, he was assigned to the organised grouping of employees whose principal purpose was carrying out the activities for the NHS Trust under the contract.

85. The Tribunal needed to consider whether the claimant was assigned on a temporary basis. If he was assigned on a temporary basis, regulation 2 provides that he would not be included within the definition of being assigned in the regulations meaning that he would not transfer. It would also mean that his contract would not have been one which would otherwise have been terminated by the transfer as required by regulation 4 (for TUPE protection to apply) as, if the assignment was temporary, then the contract would not have been so terminated.

86. There was, in practice, no evidence which supported a potential finding that the claimant was assigned to the work on a temporary basis. The claimant had been offered the role as a permanent assignment and he had accepted it on a permanent

basis. There is a difference between the fact that the claimant had only worked as part of the undertaking for a limited time, and him being assigned on a temporary basis. The claimant had in this case only been part of the undertaking for a limited time, but the assignment was in no real sense temporary.

87. The Tribunal heard submissions which related to the claimant's employment from 24 December 2020 (when his work at the CIS Tower ceased) and 17 May 2021 (when he actually started working on the UU site). There was a dispute between the respondents about whether the claimant had formally accepted working at the UU site in December or in May. The Tribunal did not need to decide whether or not the claimant would have been assigned to the undertaking between December 2020 and 17 May 2021 if the transfer of the work had occurred during that period. The facts as they occurred were relevant to the context and decision about whether the claimant was actually assigned to the organised grouping of employees whose principal purpose was carrying out the activities for the NHS Trust under the contract and whether he transferred on 5 July 2021. The facts as found by the Tribunal were that the claimant and the first respondent were in discussions about the claimant's role and the site upon which he would work if he returned to work as a security officer from December 2020. The claimant had clearly identified the UU site as the site he had chosen, if he was to undertake work as a security officer from December 2020. The claimant did not in fact undertake any work prior to May due to holidays and ill health. In May 2021, he re-confirmed his choice of site when the options were again offered to him.

88. Another thing which the Tribunal did not need to determine was whether or not the role as a security officer at the UU site was suitable alternative employment which the first respondent could have required the claimant to accept rather than pay him a redundancy payment. The claimant was placed at risk of redundancy. He ultimately chose to accept the role rather than be made redundant for reasons explained by the claimant and his trade union officer. An employer is obliged when someone is at risk of redundancy to try and seek alternative employment for them as a way of avoiding redundancy. That is what the first respondent did in this case when the CIS Tower work ceased. There can be no criticism of the first respondent for (and certainly no adverse finding arising from) their decision to offer the claimant a role as a security officer with his existing terms and conditions unchanged.

89. The Tribunal considered the need to be alert to attempts by employers to evade the regulations by fraudulent assignment or reassignment of employees and, in particular, the **Carisway Cleaning** decision which was relied upon. That case involved a finding that what occurred was fraud. It was accepted in this case by the second respondent (quite rightly) that it was not arguing that this had been fraudulent. The first respondent was right in her submission, this case was "not on all fours" with that one. She was not right to contend that the case should not be considered at all, we have considered it. However, the circumstances being considered in this case were fundamentally different to those which were found in the **Carisway Cleaning** decision. The timescale between the individual commencing work on the contract and the transfer was substantially longer. The reasons he worked on that contract were different. He was not induced to do so with a salary increase. The Tribunal did not find in this case that there was a sleight of hand, a sham, or any deception. The reason for the claimant's assignment was not due to an improper and fraudulent motive.

90. It was clear to the Tribunal from what was said in the email of 23 December 2020 from Mr Burton to Ms Kelly that there was an expectation that the contract would transfer in 2021, albeit that there was a possibility it might not. The words used ("*is due to go…would mean he would TUPE out*") are not those of a vague possibility, but more consistent with something that is likely to happen. Contrary to the first respondent's submissions, the Tribunal found that the first respondent should, in accordance with best practice, have told the claimant that the role might be, or was, at risk of, transferring when he was considering his options (even though it might not have done). However, the fact that the first respondent did not do so was not a breach of any obligation under TUPE and the Tribunal does not find that the failure to do so was akin to the finding in the **Carisway Cleaning** case. It was fundamentally different.

91. Having considered those specific issues which might mean that the claimant would not have been assigned to the organised grouping of employees whose principal purpose was carrying out the activities for the NHS Trust under the contract, the Tribunal finds that the claimant was so assigned. Whatever the second respondent's views about what TUPE could do or the spirit of the transfer, the Tribunal finds that the claimant was, immediately before the transfer, assigned to the organised grouping of employees whose principal purpose was carrying out the activities for the NHS Trust under the contract. As a result, he did transfer under TUPE from the first respondent to the second respondent on 5 July 2021.

92. In his submissions, the second respondent's representative referred to there being an element of luck about the claimant's position working on the UU site and submitted that was the happenstance referred to by Lady Smith in **Seawell**. As the Tribunal has said, that reference is addressed to whether there was an organised grouping of employees at all. The fact that there may have historically been an element of luck or chance about which employees chose to work in, or were assigned to, a particular contract, does not and could not mean that they were not transferred under TUPE (and afforded the protection the regulations provide).

93. The last question in the list for TUPE was which respondent is liable in respect of each of the claimant's claims? That in practice is simply a question the answer for which follows from the answers to the previous questions in the list. The liability for the claims for unfair dismissal, breach of contract (notice), and unauthorised deduction from wages, followed from the Tribunal's determination that the claimant was assigned to the organised grouping of employees which transferred, did transfer, and, as a result, it is the second respondent who is liable for those claims.

94. The Tribunal did not need to decide whether Mr Jaelani Ali as an agency worker would have transferred had he been assigned to the undertaking immediately before the transfer. The Tribunal did not need to make any decisions about whether taking him off the contract with little or no notice, to accommodate the claimant, was good practice or unfair. The Tribunal also does not need to decide whether he would have transferred had he remained working on the contract. The one thing which Mr Jaelani Ali's evidence assisted in demonstrating, was that the claimant's move to the UU site was a permanent one and was not temporary.

95. Turning to information and consultation, the list of issues recorded the issues to be determined and the Tribunal's decisions are outlined below.

96. The first question was: did the first and second respondent inform and consult with the claimant, or an appropriate representative, about the transfer taking place, the date of the transfer and the reasons for it along with the legal, economic and social implications of the transfer? That question was, in practice, a summary of what needed to be determined in the subsequent issues.

97. The second question was: did the first or second respondent envisage that they would take any measures in relation to the claimant's employment? The second respondent did envisage measures (or at least a measure regarding pay dates) as confirmed in the letter to the first respondent of 17 May and the email from Mr Lindsay of 8 June.

98. The third question: was the first respondent informed of any measures which the second respondent envisaged to take? The Tribunal found that the answer was yes, in the letter from Ms Batters of 17 May and the email from Mr Lindsay of 8 June.

99. The next question was: did the first respondent adequately inform and consult the claimant of the measures which it, and or the second respondent envisaged that it/they would take in relation to the claimant's employment? The information provided to the claimant was contained in the letter from Ms Batters of 2 June 2021. As already explained, the Tribunal found that: it outlined (briefly) the right to object to the transfer; it did inform the claimant that the transfer was to take place, the proposed date of the transfer, and (very briefly) the reasons for it; and it described the first respondent's view that the claimant would automatically transfer, being the implications of the transfer. It did not include any reference to the measures which the first respondent envisaged, nor did it include the fact that no measures would be taken (as the regulation explicitly requires). It did not include any reference to the measures which the second respondent had said it envisaged. It did not provide any information relating to the use of agency workers. On 28 June 2021 an email was sent to the claimant's trade union representative (but not the claimant) which provided the exchanges of emails between the first and second respondent, within which was the second respondent's measures information.

100. The Tribunal found that the first respondent failed to provide the information required by regulation 13(2)(c) and 13(2A) at all. The Tribunal also found that the first respondent was in breach of the requirement to provide the information required by regulation 13(2)(d), as that information was not provided to the claimant and was not provided long enough before the transfer to enable consultation to take place (it being provided on 28 June prior to the transfer on 5 July, when it was provided within a chain of emails).

101. The Tribunal did not address the next issue recorded in the list, as it heard no submissions on it, and it did not have any impact on the decision to be reached.

102. The next question was: has there been a failure to consult in respect of the TUPE transfer? The first respondent held no meetings whatsoever with the claimant about the transfer. There were telephone conversations between Ms Batters and the claimant, albeit Ms Batters could not recall when the calls took place and only had a

limited recollection of what was discussed (which was not the measures proposed). There was also a telephone conversation or conversations between Ms Batters and Mr Byrne for which the evidence was limited, but again the focus was on the fact of the transfer and not the measures envisaged.

103. Regulation 13(6) requires the consultation to be with a view to seeking agreement as to the intended measures. Such limited consultation as occurred in this case, was about whether the claimant would transfer, not about the measures. Consultation should have been with the claimant himself and not his representative. In the circumstances of this case, the absence of any meeting whatsoever with the claimant about the transfer or the measures, meant that there was in practice simply no genuine consultation whatsoever. The Tribunal found that there was not genuine consultation as required by regulation 13 of TUPE in this case. The Tribunal also found that the proposed change of pay date, was a measure.

104. In its particulars of response, the first respondent denied the claim for failure to inform and consult, and contended that the claimant was provided with the same information regarding the transfer in the same manner as his colleagues. That may have been true, but the fact that the information provided to all transferring staff did not comply with the requirements of regulation 13 did not represent a defence.

105. As agreed by all parties, the respondents are jointly and severally liable for the failure to consult as provided for by regulation 15(9).

106. As a result of the findings made on the transfer and the concessions of the respondents, the Tribunal finds that: the claimant was unfairly dismissed by the second respondent; the second respondent breached the claimant's contract of employment by failing to pay him for a notice period or in lieu of notice; and the second respondent made an unauthorised deduction from wages by failing to pay the claimant the pay due for the 5 July 2021 when the claimant attended at the workplace ready and willing to work.

107. It was not necessary for the Tribunal to determine whether or not the claimant was unfairly dismissed automatically under section 104 of the Employment Rights Act 1996, the respondents having conceded that the claimant was unfairly dismissed by whichever of them dismissed him and no submissions having been made about it.

Remedy

108. The following were agreed:

a. the basic award for unfair dismissal was £16,320;

b. the losses which the claimant incurred before commencing new employment on 30 July 2021 were £2,326.32 (four weeks' pay);

c. his lost earnings thereafter accrued at £158.96 per week (representing the difference between the earnings he would have received with the respondent and those he received from his new employment);

d. the pension loss to be included in the compensatory award was £219.84;

e. there was no award claimed for wrongful dismissal; and

f. a week's pay for the failure to inform and consult award was £544, and, if the claimant was awarded thirteen weeks' pay, the total award was £7,072.

109. The first issue in dispute on remedy was the award for failure to inform and consult. The claimant sought an award of appropriate compensation of thirteen weeks pay. The respondents contended that the award should be a lower amount (it was suggested that a figure somewhere between 50-90% of the total potential award would be appropriate). The respondents particularly emphasised the minor consequences of the absence of consequences arising from the failures to inform and consult found.

110. Under regulation 15 the Tribunal may order appropriate compensation and under regulation 16 that appropriate compensation shall be a sum, which does not exceed thirteen weeks' pay, which the Tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with the duty. The starting point for that award, but also the maximum, is thirteen weeks' pay. The parties agreed that that amount is £7,072. The second respondent submitted, and the Tribunal agreed, that the focus in determining the amount of the award should be focused on the failure to inform and consult, and not the dismissal more generally. However, the Tribunal found that there were a number of pieces of the required information which were not included in the letter of 2 June from Ms Batters to the claimant, and there was no genuine consultation about the measures proposed whatsoever. The first respondent did not pass on to the claimant the measures information which the second respondent had provided in a timely manner, albeit that it did in the end provide it within some emails to the claimant's trade union representative. On that basis, the Tribunal found that an award of thirteen weeks' pay was an appropriate and just and equitable award.

111. The second issue in dispute was the amount which should be awarded as part of the compensatory award for loss of statutory rights. The claimant claimed £500. The second respondent submitted that the amount should be £350. Neither party cited any case law when making their submissions. The Tribunal agreed with the submissions made by both representatives, about awards which are made, and agreed that different amounts under this heading are awarded by different Tribunals and both sums claimed would not be outside the norm (indeed the Tribunal had seen £750 claimed more recently, but that would be very much at the higher end). The Tribunal took into account the claimant's length of service with the respondents. He had very long service and the loss of statutory rights was accordingly particularly significant for him. The sum claimed was less than two weeks pay. On that basis the Tribunal found that £500 for loss of statutory rights was an entirely appropriate award and that was included in the compensatory award.

112. There was a dispute between the parties about the period for which lost earnings should be awarded and included in the compensatory award, after the date when the claimant had obtained new employment. The claimant claimed fifty-six weeks of loss at £158.96, representing the weekly loss between the claimant's pay in his new employment and what his pay would have been from the respondent. The total claimed was £8,901.76. This was in addition to the four weeks loss for the

period prior to the alternative employment being obtained. The second respondent submitted that the amount that would be just and equitable to award should be limited to total losses over twelve weeks. The claimant had given evidence about obtaining new employment and his losses in his witness statement. The second respondent relied upon submissions and did not seek to further cross-examine the claimant about his losses. No evidence was called by the second respondent in relation to remedy and loss.

113. For the compensatory award, section 123 of the Employment Rights Act 1996 provides that the amount to be awarded is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of his dismissal in so far as that loss is attributable to action taken by the employer.

114. The Tribunal found that the claimant, in fact, largely mitigated his losses pretty quickly. He obtained and commenced another job within four weeks. Doing so was laudable. There was no evidence before the Tribunal of other roles for which the claimant could have applied which would have paid him a salary equivalent to his managerial level salary and which he could have obtained and undertaken. The Tribunal did not find a claim for losses for a period of sixty weeks to be unreasonable, where the claimant had found and undertaken a new job with a pay differential. In the circumstances of this case, the Tribunal found that the claimant genuinely took appropriate steps to mitigate his loss. The Tribunal found that it was just and equitable to include within the compensatory award the amount claimed for loss (£8,901.76 following new employment being obtained, in addition to £2,326.32 for the period prior to the new job commencing). The Tribunal therefore awarded the claimant the sixty weeks' loss claimed for the amounts recorded in the schedule.

12. The Tribunal awarded the agreed amount as a basic award for unfair dismissal of **£16,320** to be paid by the second respondent to the claimant.

13. The Tribunal awarded a compensatory award for unfair dismissal of **£11,947.92** to be paid by the second respondent to the claimant.

14. The amount which the second respondent must pay the claimant for the unauthorised deduction from wages is **£116.32**.

115. The award for failure to inform and consult as required under regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006, for which both respondents are jointly and severally liable, is thirteen weeks pay, being **£7,072**.

Employment Judge Phil Allen

8 September 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
9 SEPTEMBER 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.