



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Judgment of the Employment Tribunal in Case No: 4112056/2021 Heard at  
Edinburgh, on the Cloud Based Video Platform, on 10<sup>th</sup> of January 2023

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Employment Judge J G d'Inverno

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Mr Roy U Pettigrew

Claimant  
In Person

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Universal Student Living Ltd

Respondent  
**Represented by:**  
Mr A Glass, Solicitor

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is:

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(First) That the claimant has not established that, at the material times for  
the purposes of his complaint, he was a person possessing the protected  
characteristic of Disability in terms of section 6 of the Equality Act 2010.

(Second) The claimant lacking Title to Present and the Tribunal lacking Jurisdiction to Consider his complaints of Discrimination because of the protected characteristic of Disability, the same are dismissed for want of Title and Jurisdiction.

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(Third) That the "TUPE Complaint" which is given notice of by the claimant at section 8, page 7 of his ET1. is a complaint which enjoys no reasonable prospect of success and is struck out in terms of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 Rule 37(1)(a).

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**Employment Judge: J d'Inverno**  
**Date of Judgment: 18 January 2023**  
**Entered in register: 20 January 2023**  
**and copied to parties**

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I confirm that this is my Judgment in the case of Pettigrew v Universal Student Living Ltd and that I have signed the Judgment by electronic signature.

## REASONS

1. This case called for Open Preliminary Hearing on the Cloud Based Video Platform on 10<sup>th</sup> January 2023 at 10 am. The claimant appeared in person, the Respondent Company was represented by Mr Glass, Solicitor.

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### The Issues

2. The Open Preliminary Hearing was fixed for the consideration and determination of the following two Preliminary Issues:

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(a) Whether, at the material time for the purposes of his complaints, that is in the period 1<sup>st</sup> January 2019 to 30<sup>th</sup> June 2019, the claimant was a person possessing the protected characteristic of Disability for the purposes of section 6 of the Equality Act 2010, by reason of all or some of the physical and mental impairments (medical conditions) of which he gives notice of relying in his pleaded case, and in the “Scott Schedule” at pages 82 to 85 of the Joint Bundle, those being; “Anaphylaxis Shock, Musculoskeletal Issues, Anxiety and Depression”;

(b) Whether in, section 8 paragraph 7 of his ET1 at page 31 of the Joint Bundle (“the Bundle”), the claimant gives notice of a relevant and competent complaint of failure to consult in respect of a Regulation 3(1)(a) of the TUPE Regulations 2006 “Relevant Transfer” and, if he does not, whether the “TUPE Complaint” which is given notice of at section 8, page 7 of his ET1 should be struck out as enjoying no reasonable prospect of success which failing should be made the subject of a Deposit Order.

### **Sources of Documentary and Oral Evidence**

3. In accordance with the Tribunal’s Directions, parties had lodged a Joint Bundle extending to **155** pages and which included **at pages 97 to 146** the claimant’s GP’s medical records (“his medical records”) for the years 2012 to 2019 and including the period January to June 2019, to some of which reference was made in the course of evidence and submission.

4. The claimant gave evidence on oath and answered questions in cross examination and questions put by the Tribunal.

### **Findings in Fact**

5. The claimant had given evidence at a previous Open Preliminary Hearing which proceeded before Employment Judge Bradley on the 20<sup>th</sup> of June

2022. While the principal focus of that Open Preliminary Hearing was upon issues other than those before the Tribunal at today's Hearing, some of the procedural matters recorded, and some of the Findings in Fact made, by Judge Bradley, are respectively relevant to and binding upon the Tribunal for the purposes of, today's Hearing. Those are accordingly set out below:-

“Preliminary Hearing 25 April 2022

13. The case was next considered by EJ Kearns at the Telephone Conference Preliminary Hearing on 25<sup>th</sup> April noted at paragraph 1 above. She ordered this Hearing and specified the issues for it. At paragraph 1 of her Note, EJ Kearns recorded that *“although the claims have become better focused by the Further and Better Particulars he lodged recently, the precise nature of the claims requires additional information in order to understand them properly.”* Accordingly, she ordered the exchange of a table or Scott Schedule requesting and providing the information currently missing from the claimant's Further and Better Particulars which (information) was required in order to understand the claims being advanced. The Schedule containing the questions and the claimant's answers to them are pages 75 to 86, lodged on 30<sup>th</sup> May.

14. The completed Scott Schedule provided information on; Disability; the claim of a failure to make reasonable adjustments; the alleged protected disclosures; the alleged detriment; the failure to consult under TUPE; and the claim of Unfair Dismissal. At this Hearing the claimant confirmed that his Unfair Dismissal claim was made against H 4 S only.

.....  
 .....

Evidence

17. The claimant gave evidence and was cross examined.

## Findings in Fact

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21. His (the claimant's) written case is now contained within; his ET1 Form; his Agenda; the F&BPs; his Scott Schedule; and his written submission. He completed the Form and the Agenda himself. The other material was prepared by the Law Clinic. They were prepared based on information which he had provided to them. The claimant met with the Law Clinic on or about the 21<sup>st</sup> of January 2022. On or about 3<sup>rd</sup> February. A Statement of Facts was prepared by the Clinic for the claimant which he approved shortly thereafter. The claimant could not recall if or if so when he gave the Law Clinic his ET1, the Note from the PH in January 2022 or the letter of 5<sup>th</sup> November 2021 from the Tribunal.

22. The Scott Schedule alleged that: various adjustments should have been implemented in the period January to June 2019 relative to his disability; ..... the Schedule alleged that there was a TUPE transfer on 29 or 30<sup>th</sup> July 2021 between the respondent and "H 4 S" and that there was a failure to inform or consult about it .....

24. The claimant suffers from anxiety. He did so when he submitted his ET1. He has been assessed by the Benefits Agency as being unfit for work in the longer term. The claimant had a telephone appointment with his GP on the 24<sup>th</sup> of February 2022. The GP then wrote a "To Whom It May Concern letter" on 28<sup>th</sup> February. As at 28<sup>th</sup> February 2022 he was assessed as unfit for work due to depressive and anxiety symptoms. The GP's letter recorded: the claimant's commentary of a recent deterioration in his health, particularly mental health, his mood and levels of generalised anxiety; the claimant's opinion that he would not manage to represent himself at the upcoming Hearing; and his understanding that the claimant was seeking to postpone the Hearing until he felt mentally stronger and more able to prepare for it. It recorded the GP's opinion that in light of the claimant's current mental state the request to postpone was reasonable. It also recorded that after review, it was necessary to commence antidepressant medication."

6. The claimant also incorporates his Disability Impact Statement at pages 90 to 93 of the Bundle, within his written pleaded case.

5 7. On the oral and documentary evidence and relative submissions presented, the Tribunal additionally made the following Findings in Fact restricted to those necessary for the determination of the Preliminary Issues before it.

8. The physical and mental impairments (medical conditions) of which the  
10 claimant gives notice of relying upon as giving rise to his possession of the protected characteristic of Disability in terms of section 6 of the Equality Act 2010, at the material time for the purposes of his claim, are:-

- Anaphylaxis Shock
- 15 • Musculoskeletal Issues
- Anxiety and Depression

9. The “material time” for the purposes of the claimant’s complaints of section  
20 20/21 EqA 2010 Discrimination, and in respect of which the first Preliminary Issue for consideration at today’s OPH falls to be determined is, the period 1<sup>st</sup> January to 30<sup>th</sup> June 2019, the same being the period during which the claimant alleges failures in a duty to make reasonable adjustments and in consequence Discrimination occurred in terms of EqA sections 20 and 21, **(the relied upon Scott Schedule pages 82 to 85 of the Bundle).**

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10. During the period January to June 2019, (the material time), the claimant  
attended two appointments with his GP only; one on the 6<sup>th</sup> of March 2019 regarding what he described to his GP as having been an allergic reaction, and one on the 19<sup>th</sup> of March 2019, at which he reported finger, knee and  
30 elbow joint pain.

11. During the relevant period June to July 2019, the claimant's medical records disclose no mention by him or observance by his doctors of: Anxiety, Depression or Musculoskeletal Issues.
- 5 12. The records which cover the period 2012 to 2021 inclusive, disclose only two occasions in which the claimant consulted his GP for low mood and anxiety, the first being February 2021 and the second September 2021 respectively 1% and 214 years after the material time for the purposes of his complaints.
- 10 13. Throughout the relevant period January to July 2019, the claimant remained fit to work and did work. During that period the claimant was not signed off as unfit for work at any point.
14. In the relevant period January to July 2021 the claimant was not referred for  
15 any specialist treatment or counselling.
15. In the relevant period January to July 2019 the claimant's medical records do not record the prescription of any medication for him.
- 20 16. The deterioration in the claimant's general state of health, Judge Bradley finds at paragraph 24 of his Findings in Fact, occurred shortly before 28<sup>th</sup> February 2022, whereas the alleged failures to make adjustments of which the claimant makes complaint occurred in January to July 2019 some 3 years to 3% years earlier.
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17. The claimant's medical records for the relevant period January to July 2019 contain no record of and disclose no mention of the symptoms and impact which the claimant gives notice of his relying upon in his Disability Impact Statement, (pages 90 to 93 of the Bundle), such as driving and or walking  
30 his dog.
18. Beyond the claimant's bald assertion, made in the course of cross examination by way of disagreeing with that proposition when put to him, there was no evidence presented at the Hearing that any of the claimant's

relied upon conditions had impacted upon his ability to carry out day to day activities at the material time, that is in the relevant period January to July 2019.

- 5 19. The medical evidence presented indicates that the claimant was first prescribed Zopiclone to help him sleep and Diazepam for anxiety on a short term basis to be taken as required in September of 2021, that is some 2 years after the alleged discriminatory conduct.
- 10 20. The medical records disclose no evidence of a diagnosis of anxiety until at the earliest some 18 months after the alleged discriminatory failure to make adjustments.
21. The medical evidence discloses no diagnosis of depression at any time.
- 15 22. An Emergency Department Report addressed to the claimant's GP relating to an attendance by the claimant at the Emergency Department on the 28<sup>th</sup> of March 2021, records that the claimant presented reporting that, earlier that day, he had experienced lip/tongue tingling, facial swelling and a purpuric rash on his right hand which he had self treated with Piriton, and the claimant's anecdotal and unspecific reference to what he described as past "allergic reactions" in the preceding two years. On medical assessment the claimant appeared normal and no adverse reaction was detectable.
- 20 23. The medical records presented indicate that no clear allergic trigger has ever been identified in respect of the claimant.
- 25 24. The claimant's GP records, relating to the 6<sup>th</sup> of March 2019 attendance, record no diagnosis of allergic reaction and record that the claimant did not at that time require adrenalin or an epi pen and further, that the claimant was discharged with no treatment required.
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25. Neither the 6<sup>th</sup> March 2019 entry in the claimant's Medical Records, nor 28<sup>th</sup> March 2021 Emergency Department Report constitute medical evidence of the claimant suffering from Anaphylaxis Shock or other allergic reaction at the material time.

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26. The Report of Dr Forsyth, Consultant Immunologist dated 17<sup>th</sup> September 2021 expresses opinion that genuine allergy was unlikely to be the explanation for the symptoms which the claimant anecdotally described to him as having been earlier experienced by him but which he did not detect on examination.

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#### Findings in Fact Continued **TUPE**

27. The claimant's amendment purports to incorporate a claim of failure in a duty to consult upon a "Relevant Transfer for the purposes of the TUPE Regulations 2006.

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**28.** The whole specification and notice given of that claim is to be found at paragraph 7 in the section 8 paper apart to the claimant's proposed amended ET1 and which is produced at page 31 of the Bundle. The averment is in the following terms:-

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*"7. On 29<sup>th</sup> July 2021, University Student Living was taken over by Homes for Students Ltd. It is believed that this was a transfer under the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The claimant was not informed or consulted about this transfer."*

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29. No further specification or particularisation of the "TUPE claim" is provided.

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30. In the course of his submissions the claimant confirmed that the claim was one which he sought to advance in terms of there having occurred a Regulation 3(1)(a) of the 2006 TUPE Regulations, "Relevant Transfer".

31. On 29<sup>th</sup> July 2021 , Homes for Students Ltd acquired Universal Student Living Ltd.
32. The acquisition proceeded by way of a share sale. Extracts from the Share Purchase Agreement dated 31<sup>st</sup> March 2021 are produced at pages 147-149 of the Bundle.
33. On 28<sup>th</sup> July 2021, notification of Homes for Students Ltd, as a person with significant control of Universal Student Living Ltd, was issued and filed at Companies House (pages 150-151 of the Bundle). The notification confirms that Homes for Students Ltd hold *“directly or indirectly, 75% or more of the shares in Universal Student Living Ltd”*
34. In the course of the acquisition, a total of 100 shares from Universal Student Living Ltd were transferred to Homes for Students Ltd on the 28<sup>th</sup> of July 2021 (confirmation **statement** produced at pages **152-154 of the Bundle**).
35. Following the transfer of shares there was no change in the identity of the claimant's employer.

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#### The Applicable Law - The Protected Characteristic of Disability

The written legal submission prepared on the claimant's behalf by the University of Strathclyde Law Clinic, contains a statement of the applicable law in relation to possession of the protected characteristic of Disability, with which I respectfully agree, viz:-

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“Disability is a protected characteristic under the Equality Act 2010 (section 4). The legislation provides that a person has a disability if they:

- Have a physical or mental impairment (section 6(1)(a), and

- The impairment has a substantial and long term adverse effect on the individual's ability to carry out day to day activities (section 6(1)(b))

5 The Equality Act elaborates that the effects of an impairment are considered long term if it has lasted, or is likely to last, for at least a 12 month period, or is likely to last for the rest of the affected person's life (Schedule 1, section 2(1))

The legislation further states:

10 *If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. (Schedule 1, section 2(2))*

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#### Applicable Law - "Relevant Transfer"

A "relevant transfer" for the purposes of the TUPE Regulations 2006 is described in Regulation 3(1)(a) as follows:-

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#### "3 A Relevant Transfer

(1) These Regulations apply to:-

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- (a) A transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity".

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## Summary of Submissions

## For the Claimant

5 36. The claimant read through the written “Legal Submissions for the  
 Claimant” which he indicated had been prepared on his behalf by the  
 Law Clinic. No disrespect is intended to the Law Clinic by its terms not  
 being rehearsed in their entirety. They are summarised as follows.  
 Beyond the Statement of Applicable Law which I have already recorded  
 10 above these contained a section headed “Relevant Facts’, albeit  
 prepared in advance of the Hearing, that is to say before any evidence  
 had been presented, and which is introduced by the assertion that “*The  
 claimant whilst employed by the respondent had multiple complications  
 with his health including arthritis which contributed to musculoskeletal  
 15 problems particularly in the claimant's shoulder. The claimant also  
 suffered from anxiety and depression during the course of his  
 employment* .....  
*In March 2019 the claimant had a severe Anaphylaxis reaction and was  
 hospitalised* .....  
 20 *during the Coronavirus pandemic the claimant was compelled to travel  
 to work whilst he was suffering with poor health as a result of his  
 aforementioned conditions .... the claimant felt his mental health  
 deteriorated significantly whilst in employment with the respondent and  
 latterly Homes for Students ..... the claimant was forced to run the site  
 25 with little help, thus causing him further stress and worry ..... the  
 claimant feels these extra tasks which were expected of him were  
 unreasonable for someone with arthritis and musculoskeletal problems*

30 37. None of the above asserted “relevant facts” were the subject of  
 admission or agreement between the parties. On the contrary the  
 respondent put the claimant to his proof in respect of the same to the  
 extent that they were not confirmed by his medical records or other  
 medical documentary evidence produced. Separately, and in any

event, with the exception of the instance in March 2019 which, on the medical evidence produced the Tribunal has found the claimant has not established was a severe “Anaphylaxis reaction”, the asserted relevant facts were not said to relate to the relevant period, that is the material time for the purposes of the claimant’s complaints, namely January -  
5 June 2019. Rather, the time period by which they were qualified was repeatedly said to be “*during the course of his employment* and again “*whilst in employment with the respondent and latterly Homes for Students*”<sup>1</sup>.

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38. **Under a heading “The Application of the Law to the Facts”**

and, under reference to Walker v Sita Information Networking  
**Computing Limited UKEAT/0097/12**, the Tribunal was reminded, in the submission, that the guidance for the Equality Act emphasises the  
15 consideration of the effects of an impairment rather than its cause, that being a proposition with which the respondent’s representative took no issue and which the Tribunal found to be uncontroversial.

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39. There thereafter follows a submission that, “*The medical report from the claimant’s General Practitioner shows that based upon the claimant’s medical records he is disabled. The records demonstrate that the claimant suffers from a degenerative cervical spine diagnosed May 2007 which contributes to severe neck pain ... in the claimant’s medical report dated 12<sup>th</sup> June 2008 the claimant’s disability analyst stated that*  
20 “*the client has indicated a significant level of disability*”. In the medical report dated 30<sup>th</sup> June 2008 the claimant’s registered medical practitioner confirmed that the claimant’s medical evidence “fully supports the claimant’s stated level of disability for their cervical spondylosis and nerve entrapment”.

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40. None of the documents so described at paragraph 39 above, whether medical reports or medical records were produced and no oral evidence was given by the claimant in relation to them, it appeared from the claimant’s answers to questions put to him in cross examination that

any such documents/assessments as those referred to in the submission related to an assessment of "disability" for the separate purposes of entitlement to incapacity benefit/mobility allowance which the claimant had received on a temporary basis in the period of time between 2007 and 2008. The claimant confirmed at cross examination that he was not now and had not been since 2008 in receipt of any such benefit or allowance. An assessment of "disability" for such a separate statutory purpose does not constitute the possession of the protected characteristic of disability for the purposes of section 6 of the Equality Act 2010.

41. The only reference to the "relevant period" (January - June 2019) contained within that section of the submission is in the following terms:- "The claimant's medical reports show that he suffered from his first episode of Anaphylaxis on the 3<sup>rd</sup> of March 2019". That is a matter which the Tribunal has found, on the evidence presented, that the medical records/reports do not establish and which has not otherwise been established in fact. The submission then goes on to make reference to the claimant being prescribed certain medications since February 2021, that is a period commencing some one year and eight months after the material time. There then follows a bald statement to the effect that "*The claimant had been suffering with these issues throughout his employment with Universal Student Living ..*" The evidence presented does not support such a Finding in Fact and in particular a Finding that the claimant was so suffering during the relevant period January - June 2019.

42. What follows thereafter is an uncontroversial theoretical analysis of the requirements of the elements of:-

- Adverse effect on normal day to day activities
- Is the effect substantial; and

- Is the effect long term.

43. The submission concludes by stating that the author concludes that *“the claimant has a disability and had a disability whilst in employment with the respondent [the Tribunal’s emphasis] and, “that it puts him at a substantial disadvantage. The disability is both a physical and mental impairment namely the claimant suffers from a Degenerative Cervical Spine, Osteoarthritis, Anaphylaxis, Anxiety and Depression, which has a substantial adverse impact on the claimant’s day to day activities ....*  
5  
10 and that the claimant’s symptoms *“have recurred previously and are likely to recur again ...”*

44. The submission concludes by inviting the Tribunal to *“find inference from the above points that the claimant satisfies [present tense - the Tribunal’s emphasis] “the criteria of disability under the 2010 Act due to the substantial, long term adverse effect that the impairment has on the claimant’s ability to carry out day to day activities.”*  
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45. The written submission prepared by the Law Clinic did not extend to the issue of TUPE.  
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46. The claimant however read from notes prepared for him by the Law Clinic. Under reference to the case of Jackson Lloyds Limited and Mears Group Pic v Smith and another [2014]- UKEAT/0127/13/LA, and to the factors which the EAT found had been established in fact in that case, the claimant invited the Tribunal to hold that a *“coextensive but separate TUPE transfer\* in respect of which the respondent had failed to consult, had occurred following and notwithstanding the acquisition, by sale purchase, of Universal Student Living Ltd by Homes for Students Ltd which took place on the 29<sup>th</sup> of July 2021.*  
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47. In the course of his submission the claimant asserted that following the share sale acquisition he had signed a new Contract of Employment with the acquiring company Homes for Students Ltd, implying although

not expressly stating, that the identity of his employer had changed. This was the first occasion, on which the claimant had made such an assertion or had given notice of such a position. No such document was produced in the course of Hearing nor was one contained in the Joint Bundle. The claimant himself gave no oral evidence about that matter in the course of the Hearing. The claimant, in his submission, provided no specification of when or of the circumstances in which the alleged new Contract was signed by him, other than that it occurred at some time "after the acquisition date".

### Summary of Submissions for the Respondent

48. Under reference to the oral and documentary evidence produced, the respondent's representative invited the Tribunal to hold that the claimant had not established, on the balance of probabilities, that he had suffered from a physical or mental impairment which, at the material time for the purposes of his complaint, that is January - June 2019, which had had a substantial and long term adverse effect on his ability to carry out normal day to day activities.

49. He submitted that the evidence presented was wholly insufficient to support a Finding in Fact that at the material time the claimant was a person possessing the protected characteristic of Disability in terms of section 6 of the Equality Act 2010. He submitted that the claimant had failed to discharge the burden of proof of establishing disability status, at the material time for the purposes of his complaints, and that accordingly the Tribunal lacked jurisdiction to consider the claim of Discrimination in terms of sections 20 and 21 of the Equality Act 2010 said to arise by reason of failure in a duty to make adjustments allegedly arising in terms of section 20 of the Act.

50. Under reference to the extracts from the Share Purchase Agreement and the Companies House Notice of Relevant Legal Entity and Confirmation Statement **produced at pages 147 to 154 of the Bundle,**



the respondent's representative invited the Tribunal to find in fact that the acquisition had proceeded by way of Share Purchase Agreement, a mechanism which had not engendered any change in the identity of the claimant's employer and, that the identity of the claimant's employer not having changed, no "relevant transfer" had occurred for the purposes of Regulation 3(1)(a) of the TUPE Regulations 2006. That, he submitted, was the correct conclusion in law for the Tribunal to reach on the evidence presented and on the relevant Findings in Fact which, based upon that evidence, he invited the Tribunal to make. That being so it would be for the claimant to prove, and for the purposes of today's Hearing to give notice in his pleaded case of an offer to prove, facts which, if proved, could displace that conclusion.

51. Under reference to the evidence presented and to the Notice of the claim set out at paragraph 7 of the section 8 paper apart to the claimant's ET1 (rehearsed in full at paragraph 28 above), he submitted that the claimant had not done so and did not do so. He invited the Tribunal to hold that the averments relied upon by the claimant, which encapsulated the totality of the claim of which he purported to give notice, did not give notice of a relevant and competent complaint of failure to consult on the occurrence of a "relevant transfer" in terms of paragraph 3(1)(a) of the TUPE Regulations 2006. The Tribunal accordingly lacking jurisdiction to consider the complaint of which notice was actually given at paragraph 7 of the part 8 paper apart to the ET1, that complaint fell to be dismissed.

#### Discussion and Disposal

##### The Protected Characteristic of Disability

52. In the case of *Goodwin v Patent Office* ICR 302, the EAT set out, at page 308, guidance on the approach to be adopted by Tribunals to determining disputed possession of the protected characteristic of Disability, indicating that it will be helpful for the Tribunal to consider each of the following four questions:-

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- Did the claimant, at the material time for the purposes of his claim, have an impairment which is either physical or mental?
- 10
- Did the impairment, at the material time for the purposes of his claim, affect the claimant's ability to carry out normal day to day activities
  - Was the adverse effect on the claimant's ability to carry out normal day to day activities substantial, at the material time for the purposes of his claim; and,
  - Was the adverse effect long term.
- 15
53. Each of the four questions must be answered in the affirmative as a condition of possession of the protected characteristic.
- 20
54. The question of status requires to be ascertained at the "material time"<sup>5</sup>, that is to say at the time of the alleged discriminatory acts or omissions, in the instant case, in the period 1<sup>st</sup> January to 30<sup>th</sup> June 2019.
- 25
55. The physical and mental impairments (medical conditions) on which the claimant, in his pleaded case, gives notice of relying for the purposes of giving rise to his possession of the protected characteristic of Disability, at the material time for the purposes of his claim (that is in the period 1<sup>st</sup> January to 30<sup>th</sup> June 2019 are, variously (that is individually or collectively):-
- 30
- "Anaphylaxis Shock",
  - "Musculoskeletal Issues"
  - "Anxiety and Depression"

56. It is against the above, given notice of and relied upon impairments, individually or collectively, albeit by focusing consideration on the effects of an impairment rather than on its cause, that the Preliminary Issue of Disability Status before the Tribunal must be determined.
- 5
57. The onus of proof sits with the claimant to establish, on the preponderance of the evidence presented at Hearing and on the balance of probabilities, that each of the four stages of the “Goodwin test” are met in respect of the case given notice of at the material time for the purposes of his complaint. On the evidence presented and on the Findings in Fact made, including in particular Findings in Fact at paragraphs 10 to 26, the Tribunal considered that the claimant had failed to discharge that burden of proof.
- 10
58. The evidence presented and relied upon did not support a Finding that the claimant, at the material time for the purposes of his complaints; had any of the physical or mental impairments on which he gives notice of relying), that individually or collectively any such impairments had the adverse effects on the claimant’s ability to carry out normal day to day activities such as he gives notice of in his Disability Impact Statement, nor that any such effect would have fallen to be regarded, at the material time as long term. On the contrary such medical evidence as was presented tended to support a finding that the above was not the case at the material time namely January - June 2019.
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- 20
- 25
59. Whatever may be said about the state of the claimant’s health as at the date of Hearing of as at the times variously 6 months to an excess of 3 years after the material time at which his subsequent medical records indicate some deterioration, some complained of symptoms and or prescription of medication, in order to hold that it has jurisdiction to consider a complaint of Discrimination, the Tribunal must be satisfied that a claimant was a person possessing the protected characteristic at the material time, that is to say at the time of the alleged discrimination.
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5 60. The evidence presented fell far short of that which would be required to justify a finding of state of fact as described and invited in the conclusion of the claimant's submission, including, in particular, that at the material time for the purposes of his complaint namely January - June 2019 the claimant was a disabled person for the purposes of section 6 of the 2010 Act. On the contrary such evidence as was presented tended to show that such a state of fact did not exist at the material time.

10 61. On the evidence presented the Tribunal is not satisfied, on the balance of probabilities, that the claimant was a person possessing the protected characteristic of Disability for the purposes of section 6 of the Equality Act 2010 at the material time for the purposes of his claims. The claimant accordingly lacks Title to Present and the Tribunal lacks Jurisdiction to Consider his complaint of section 20/section 21 EqA 2010  
15 Discrimination which complaint accordingly falls to be dismissed.

#### Discussion - "Relevant Transfer under the TUPE Regulations 2006

20 62. A "Relevant Transfer" for the purposes of the TUPE Regulations 2006 is described in Regulation 3(1)(a) as follows:

##### "3 A Relevant Transfer

##### (1) These Regulations apply to

25 (a) A transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity"

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63. It is generally accepted that the TUPE Regulations will not apply to a transfer of shares. This is because there is no change in identity of the employer following a share sale. All rights, duties and liabilities in

connection with the employees' Contracts of Employment remain with their employer after the share purchase.

5 64. Notwithstanding, the process of acquisition by transfer of shares will not necessarily preclude all possibility of an internal "TUPE transfer" occurring in circumstances where integration of the two businesses follows a share purchase. The occurrence of the first is not fundamentally incompatible with the occurrence of the second. The case of Jackson Lloyds Ltd and Mears Group Pic, to which the claimant made reference in submission, is authority for that proposition. 10 Whether a subsequent internal transfer has occurred, however, will depend upon the facts of each case and, in general terms, no TUPE transfer will take place unless the third party:

- 15
- Has become responsible for the carrying on of the business;
  - Has incurred the obligations of employer; and or
  - « Has taken over the day to day running of the business.

20 65. The key question therefore, on the facts of each individual case, is whether the third party has "stepped into the shoes of the employer".

25 66. For the purposes of today's Hearing it is sufficient to consider whether in terms of the written notice given in his pleadings, the claimant offers to prove facts which, if proved, would support a conclusion that what is set out at paragraphs 62 and 63 above had occurred.

30 67. Jackson Lloyds Limited and Mears Group Pic v Smith and others UKEAT/0127/13/LA, was a case in which the EAT dismissed an appeal against a decision of the Employment Tribunal, at first instance, which was to the effect that notwithstanding the occurrence of an acquisition which had progressed by way of sale purchase, there had occurred, after the purchase of shares, an internal coextensive but separate

“TUPE transfer” between the entities. The claimant submitted that that was the case which he also advanced against the respondents.

5 68. As was made clear by the EAT in Jackson Lloyds Limited and in the English Court of Appeal case of Millam v Print Factory (London) 1991 [2007] EWCA Civ 322, to which the EAT in Jackson Lloyds Ltd referred, in order to establish such a coextensive TUPE transfer where acquisition has proceeded by way of share purchase, a party requires to prove, (and for the purposes of today’s Hearing to give sufficiently  
10 specific notice of an intention to prove), that control of the business in question, in terms of its day to day business activities, has in fact passed to the other entity, in this case to Homes for Students Ltd. The averments at paragraph 7 of the claimant’s proposed amended ET1 give no notice of an intention to prove such a state of fact. There is  
15 nothing in those averments which, if proved, would go to disturb the generally accepted conclusion in law that no TUPE transfer occurs where an acquisition proceeds by way of share purchase. That that was the mechanism by which the acquisition in the instant case proceeded is a matter of fact which the Tribunal has found established on the unchallenged documentary evidence presented. As a matter of  
20 record no oral or documentary evidence was led before the Tribunal that went to contradict that position.

25 69. In the course of his submissions, the claimant, for the first time, asserted that he had signed a new Contract of Employment with the alleged transferee Homes for Students Ltd. No notice of an offer to prove such an occurrence exists in his pleaded case, no such document was produced in the Joint Bundle or separately by the claimant. The claimant himself made no mention of such an occurrence in the course  
30 of giving his evidence.

70. There was no evidence of the claimant having signed a new Contract of Employment with the alleged transferee before the Tribunal at the Hearing, and no evidential weight falls to be attached to the claimant’s

bald assertion, made by him for the first time in the course of his submission, that he did so.

5 71. Although the claimant prayed in aid the case of Jackson Lloyds Limited and Mears Group Pic v Smith and another in the course of his submissions, and made reference to the factors which, in that case had been considered by the EAT to be present and relevant factors indicating the occurrence of a relevant transfer, the case given notice of by the claimant contains no offer to prove the existence of any such factors in relation to the instant acquisition. Nor was any evidence of the occurrence of/the existence of any such factor placed before the Tribunal.

15 72. The respondent's representative who had had no prior notice of the suggestion that the claimant had signed a new Contract of Employment with the alleged transferee, was obliged in the circumstances and let it be assumed that the Tribunal were to accord any weight to the evidentially supported assertion, to reserve the respondent's position in that regard. He subsequently wrote to the Tribunal, having taken  
20 instructions on a contingent basis, stating that the respondent's position was one of denying that any such Contract had been signed with the respondent and reiterating that the claimant's most recent Employment Contract was one dated 28<sup>th</sup> November 2018 and remains with Universal Student Living Ltd, the alleged transferor. The claimant for  
25 his part also wrote to the Tribunal following the conclusion of the Hearing reiterating the assertion made by him in the course of his submissions and proposing to bring forward to the Tribunal further unspecified evidence. Both parties were advised that the Tribunal would not consider further submissions or evidence, in respect of the  
30 Preliminary Issues to be determined, which was tendered by parties following the conclusion of the Hearing but rather, would determine the issues on the evidence, presented and submissions made, at the Hearing.

73. In the circumstances where the Tribunal has found established in fact that the acquisition proceeded by way of share purchase, the Tribunal finds that the claimant's averments, introduced by amendment and appearing at paragraph 7 of the section 8 paper apart to his proposed amended ET1, fail to give notice of a relevant, sufficiently specific and competent complaint of failure to consult on the occurrence of a "relevant transfer" in terms of paragraph 3(1)(a) of the TUPE Regulations 2006; and that the apparent complaint of failure of duty to consult on a TUPE transfer falls to be dismissed.

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**Employment Judge: J d'Inverno**  
**Date of Judgment: 18 January 2023**  
**Entered in register: 20 January 2023**  
**and copied to parties**

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I confirm that this is my Judgment in the case of Pettigrew v Universal Student Living Ltd and that I have signed the Judgment by electronic signature.