



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110623/2021 & Others and 4110622/2021 & Others

Hearing at Edinburgh on 1, 2 and 3 August 2022; 10 November 2022; and 11
and 12 January 2023; Members' Meetings on 13 January and 3 March 2023

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Employment Judge: M A Macleod
Tribunal Member: A Grant
Tribunal Member: L Grime

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Ms L Smith

Lead Claimants
Represented by
Mr M Haywood
Barrister
Instructed by
Mr P Kissen
Solicitor

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Ms Leah Newman

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30 Rollandene Limited

1st Respondent
Represented by
Mr D Walker
Solicitor

35 Mansfield Care Limited

2nd Respondent
Represented by
Mr G Bathgate
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:

- 5 (1) There was a relevant transfer of the affected staff within the meaning of Regulation 3(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 from the 1st to the 2nd respondent;
- (2) The relevant transfer took place on 29 June 2021 ;
- (3) Laura Smith was an employee of the 1st respondent as at the date of the transfer;
- 10 (4) Laura Smith and Leah Newman should have transferred employment to the 2nd respondent as at the date of the transfer; and
- (5) There was a failure to consult with staff in breach of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992; and
- 15 (6) That there should be a remedy hearing to determine the effect of these findings upon both 1st and 2nd respondents and all claimants, including the lead claimants, on a date to be fixed by the Tribunal following the return of date listing letters.

20 **REASONS**

1. In this case, 17 claimants raised complaints before the Employment Tribunal in which a number of claims were presented to the Tribunal. Following a Preliminary Hearing in April 2022, Employment Judge Sangster determined that there should be lead claimants to represent the claims made by all claimants in these case.
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2. A Hearing was listed to take place on 1, 2 and 3 August 2022. As it turned out, it did not prove possible to conclude the Hearing in that diet, and accordingly further dates were listed commencing 10 November 2022. Unfortunately, owing to the illness of one of the representatives, Mr Haywood, and with the consent of all parties, the Tribunal required to postpone that Hearing. The Hearing then reconvened on 11 and 12
30 January 2023, whereupon it was concluded.

3. The Hearing in January required to be converted into a “hybrid” Hearing, as one of the representatives, Mr Walker, was unwell and unable to travel to Edinburgh. With the consent of all parties, Mr Walker was able to attend the Hearing by Cloud Video Platform, and all parties and the Tribunal were able, with occasional interruptions to the signal, to hear and see each other, and thereby to conclude the Hearing.
4. Prior to the final dates in January 2023, one of the original lead claimants, Angela Conway, withdrew her claim, and following a Preliminary Hearing convened by telephone conference call at short notice on 21 December 2022, she was replaced as lead claimant by Laura Smith. The terms of the Note following that Preliminary Hearing are referred to.
5. The lead claimants were represented throughout by Mr M Haywood, barrister, instructed by Mr P Kissen, solicitor. Mr D Walker, solicitor, appeared for the 1st respondent, and Mr G Bathgate, solicitor, appeared for the 2nd respondent.
6. The following witnesses gave evidence to the Tribunal in the Hearing:
- Mairi Ishbel Wood, Director and Shareholder, 1st respondent;
 - Kenneth Harper Wood, Retired, son of Mairi Wood;
 - Lucy Duffin, Operations Manager, 2nd respondent;
 - Sharon McGowan, Group Operations Manager, 2nd respondent;
 - Frank Pratt, Retired Chartered Accountant;
 - Andrew Richard Hume, Chief Executive, 2nd respondent;
 - Laura Smith, lead claimant, Senior Charge Nurse;
 - Leah Newman, lead claimant, Care Assistant.
7. A joint bundle of productions was presented to the Tribunal and relied upon by the parties in the course of the Hearing. Where reference is made to a document in the joint bundle, we have noted the page number

by adding it in brackets after noting the details of the document. Prior to the final Hearing dates, a supplementary bundle was produced in order to provide evidence relating to the newly-established lead claimant Laura Smith. References to documents within that bundle are prefixed with "S".

- 5 8. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

10 9. The 1st respondent is a limited company which operated the Adamwood Nursing Home ("Adamwood"), at 47C Ravensheugh Road, Musselburgh, East Lothian. Mrs Mairi Wood has been one of the shareholders in the company with her husband, Ian Wood, since it was incorporated in 1989. Adamwood was registered with the Care Inspectorate since April 2002. Mrs Wood, a qualified and registered nurse, was the manager of Adamwood.

15 10. Adamwood was a Care Home which cared for elderly individuals on a residential basis, providing nursing and care services to meet their individual needs. The Home had a maximum capacity of 13 residents, who were either funded by East Lothian Council, the City of Edinburgh Council or privately.

20 11. In 2018, Mrs Wood came to the conclusion that it would be appropriate to sell the business, given that her husband was suffering from Alzheimer'sDisease and required considerable personal care in their home.

25 12. In March 2021, seeking advice from Frank Pratt, a Chartered Accountant and partner in Whitelaw Wells, of Ainslie Place, Edinburgh, Mrs Wood engaged in negotiations with Simply Musselburgh Care Limited ("Simply"). Her solicitor, Stuart Duncan of Davidson Chalmers Stewart LLP, emailed her on 2 March 2021 (122) to say that Simply wished to proceed with the purchase of the business at a purchase price of £150,000, on the basis that they (Simply) would be given a 12 month rent free occupancy of Adamwood House.

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13. On 6 March 2021, Mrs Wood emailed Mr Pratt. She noted that Simply were very keen to conclude the deal as soon as possible, but that she wanted to advise them that she was withdrawing from the negotiations. She did, however, want to be sure of "Andrew's intentions". This was a reference to Andrew Hume, the Managing Director of the 2nd respondent, who was known to the claimant as another care home owner and had been introduced to her by Frank Pratt some years before. She expressed some concern about the affordability of any agreement reached.

14. The 2nd respondent is a care company with ownership and operation of more than 10 care homes.

15. On 7 March 2021, Mr Pratt wrote to Mrs Wood under the heading "Discussions with Andrew". The tenor of the discussions was that the 2nd respondent intended to build and open a new care home in Haddington, likely to be completed by September 2022, to which the residents and staff of Adamwood could be moved. The letter stated (119):

"Good afternoon Mairi.

Thanks for this. I appreciate your concerns and have spoken to Andrew a couple of times in an effort to get this moved forward. I have drafted Heads of Terms which would document and secure the deal for both parties. I attach them for your review. Andrew is happy with them, having

.....OrftQf!Qtf !f g gg fg gy

Basically they state that as soon as the Haddington Home is built he will take staff and residents and pay you an amount. That amount will be calculated on numbers of residents at a rate. As you'll see there is an upper limit of £200k and a lower limit of £140k.

I was keen to ensure that there was a lower limit taking into consideration your concerns about occupancy. Therefore the £140k figure. I have reviewed your occupancy numbers from 2015 to 2020 and they never dip

below 8 and average 11 or 12. The formula on current numbers of 10 private would deliver £175k.

The other factors to consider are:

- 5 *1. under the Simply deal you have to rent Adamwood to them for a year for a peppercorn rent. That really prevents you from winding things up until say June 2022.*
- 2. With Andrew's deal you will enjoy a further 18 months trading and with profits running at circa [redacted] per annum you should be considerably better off.*

10 *Please let me know your thoughts. ”*

16. If the business of the 1st respondent were to be sold to the 2nd respondent, all debts of the company could be paid off, and any balance paid to Mrs Wood and her husband, enabling them to pay off their substantial mortgage and retain the balance for use as pension.
- 15 17. The draft Heads of Terms were attached to that email by Mr Pratt (120).
18. The draft, dated 8 March 2021 , read:

“Heads of Terms

Between Rollandene Limited (RL) and Mansfield Care Limited (MCL)

20 *MCL is to build a new purpose built Care Home facility in Haddington. Building should commence in late summer/early Autumn 2021, building work is anticipated to taken 12-15 months with an expected opening date of September/October 2022.*

On opening of the facility MCL undertakes, immediately, to:

- 25 *1. Take over all employees under TUPE regulations*
- 2. Take over the care of all residents*
- 3. Release the property known as Adam wood for sale/disposal*

The payment by MCL will be calculated as follows:

a) For all residents paying privately a figure of £17,500

b) For all social work funded residents a figure of £10,000

5 *In any event the maximum payable under this arrangement will be no greater than £200,000 and no less than £140,000.*

For the sake of clarity Mrs M Wood will not be one of the transferred employees.

10 *Discussions are ongoing regarding the possibility of one of the wings in the new facility being devoted to residents suffering from dementia in recognition of the work achieved at Adamwood. ”*

15 19. Mr Pratt forwarded the draft Heads to Mr Duncan on 9 March 2021 (121) and invited him to amend the document. He said he would speak to Mr Hume but could not see any difficulty with “moving to a contract position”. Mr Duncan made some amendments to the draft (124) and replied on 11 March 2021 attaching the amended and clean versions (127). He sought to clarify that the 2nd respondent would acquire the business of the 1st respondent, and that the payment would be for the acquisition of the business. He also clarified that the payments for residents would be in respect of each resident.

20 20. Mr Pratt confirmed that he saw no problems with the amendments, and forwarded the document to Mr Hume so he could review it (129).

21. On 15 March 2021, Mr Pratt emailed Mrs Wood and Mr Duncan, with a copy to Mr Hume, to say that “*Andrew is in agreement to what is drafted. We can move to contract Just as quickly as you wish.*”(130).

25 22. Having received this email, Mrs Wood did not proceed with the sale of the business to Simply. Mr Duncan emailed Mr Pratt and asked him to revert to Mr Hume on the basis that it would normally be for the purchasers’ solicitors to prepare the draft agreement, though he understood that Mr Hume may wish to carry out some due diligence first.

23. Mrs Wood was of the view that she could trust both Mr Pratt and Mr Hume, and therefore that there was no rush to conclude the full agreement. It is clear from the evidence that at this point, in March 2021, Mrs Wood believed that an agreement in principle had been reached, and that Mr Hume's perspective was that nothing had as yet been agreed. In his evidence he said that there was an agreement in draft, and not Heads of Terms.
24. However, a development took place in May 2021, when Adamwood was inspected by the Scottish Fire & Safety Service, and on 25 May 2021 an Enforcement Notice was issued to Adamwood regarding some safety issues in the Home. On 28 May 2021, the Care Inspectorate issued a letter of serious concern to Adamwood following receipt of the Scottish Fire & Safety Service Enforcement Notice, which had required significant remedial action, including replacing all windows with reinforced glass. The 1st respondent required to undertake to carry out the remedial work in compliance with the Enforcement Notice.
25. Further, on 1 June 2021, the Care Inspectorate undertook an unannounced inspection following the letter of serious concern, following which they produced a report (21 Off). Using a 6 point scale where 1 is unsatisfactory and 6 is excellent, the report found that the leadership, setting and Covid-19 care and support all merited a mark of "2 - weak".
26. The report emphasised that although the improvements made had met the letter of serious concern, the sustainability of those improvements required to be demonstrated. The Care Inspectorate said that people's safety was compromised because of poor quality assurance processes and a lack of management oversight, and because of poor maintenance of the Home, particularly relating to reducing risks of fire and the need to upgrade doors and glass.
27. Mrs Wood was extremely disappointed about these ratings given by the Care Inspectorate.

28. Mrs Wood was then asked, in early June, to attend a meeting at the headquarters of East Lothian Council, who provided funding for some of the residents in Adamwood.
29. She found this a very stressful time, and accordingly, although she considered that the Home was safe and that steps had been and would be taken to address the points made in the Care Inspectorate report, she had to decide whether or not to continue running the Home. She contacted Mr Pratt and informed him of the terms of the report. As a result, a meeting was arranged between Mrs Wood, Mr Pratt and Mr Hume in order to discuss how to proceed.
30. Mrs Wood's position was that the terms of the Care Inspectorate report did not mean that the Home was going to close. In his evidence, Mr Hume repeatedly stated that the Home was going to close, and that Mrs Wood had to get out of the business with dignity.
31. The terms of the Care Inspectorate report did not state that the Home required to close. It made some strong criticisms of the running of Adamwood, and it issued an Enforcement Notice, but action was expected of the business running Adamwood in order to address the terms of the Notice.
32. Mr Hume suggested in cross-examination by Mr Walker that he was aware that Adamwood was going to close because Mrs Wood had told him so. This was not put to Mrs Wood by the solicitor for the 2nd respondent, but we did not find this to be believable. That statement was completely inconsistent with both the terms of the report and the evidence of Mrs Wood, which we found to be credible.
33. In any event, it was clear that Mr Hume had received a similar rating for one of the Homes for which the 2nd respondent was responsible, in Troon, but in respect of which a 5 year plan was being sought by the Care Inspectorate (165). Mr Hume also confirmed, in cross-examination by Mr Walker, that he had a care home in Jedburgh which was awarded a 1

rating in 2019, but which was not closed. It was or should have been clear to Mr Hume that a 2 rating did not mean that Adamwood had to close.

5 34. Mrs Wood gave evidence that she met with Mr Pratt and Mr Hume on an uncertain date in early June, prior to 7 June, at which it was agreed that the staff and residents would be transferred to 2 Homes run by the 2nd respondent on the same terms as had been agreed in the Heads of Terms.

10 35. Mr Pratt's evidence was that he was away on holiday for the 1st 10 days in June, and that he was never in attendance at a meeting with Mr Hume and Mrs Wood. He also said that he would not have attended such a meeting, on the basis that he had a conflict of interest, namely that as well as being the 1st respondent's long-standing accountant, he was also a director of the 2nd respondent, a fact of which Mrs Wood only became aware at around this time.

15 36. Mr Hume did not give evidence about a meeting conducted at that time with Mrs Wood and Mr Pratt, but about a meeting on 7 or possibly 8 June 2021, at which Mrs Wood's son Kenneth was also present. Mr Hume was not asked about an earlier meeting in either examination in chief or in cross-examination.

20 37. There was a meeting, therefore, on 7 or 8 June at which Mrs Wood, Mr Wood (her son), Mr Hume, residents' families and staff were in attendance.

25 38. The Tribunal is left to conclude that there was no meeting involving Mr Hume, Mr Pratt and Mrs Wood, but that there was a conversation between Mrs Wood and Mr Hume prior to the meeting on 7 or 8 June, because there had been an indication by both Mrs Wood and Mr Hume that the residents would be taken on by the 2nd respondent. It is not clear how that conversation took place, but it must have been before the meeting of 7 or 8 June, which would not have been arranged without
30 some form of arrangement between Mrs Wood and Mr Hume. Mrs Wood conceded in cross-examination that she may have had a phone call with

Mr Pratt, though continued to insist that there was a meeting involving the 3 of them.

39. Mrs Wood attended the meeting of 7 or 8 June with her son, Kenneth. Mr Hume was in attendance together with Lucy Duffin, the 2nd respondent's Operations Manager, and Margaret Russell, the Matron of Belleville Lodge. Belleville Lodge and Pine Villa were the 2 Homes run by the 2nd respondent to which it was proposed that the residents would be moved, on the basis that both were within approximately 20 minutes' drive of Adamwood. The meeting took place at Belleville Lodge.
40. None of the staff who worked at Adamwood were present at that meeting.
41. There was a divergence between the evidence given by Mr Hume and Mrs Wood about what was said at that meeting.
42. Mrs Wood stated that her son, Ken, asked Mr Hume if there would be a written agreement to confirm the basis upon which the residents would move to the 2nd respondent's Homes, to which Mr Hume replied that there would be no written agreement because they needed to move the residents by the end of the month; she also stated that Mr Hume said that all the staff at Adamwood would be offered jobs in the 2 Nursing Homes on the same terms and conditions upon which they had previously been employed, in order to ensure that there was continuity of care for the residents after they moved. As a result the staff would be moved to the 2 Homes where the residents were to be placed. Finally, she said that there was a discussion about the transfer of certain assets, including beds, hoists and other equipment (set out at 134).
43. Mr Hume stated that he gave Mrs Wood reassurance at the meeting that the standard of care which the residents and their families could expect would be very high; but that he did not say he would take care of redundancies should they arise as he would not discuss financial matters in front of his managers. He said he may have told her that the 2nd respondent would offer the staff jobs, but that there was no exchange

about a written agreement with Ken Wood, nor any discussion about property.

5 44. Ken Wood's evidence was that there was a discussion about staff moving in order to ensure continuity of care for the residents, and that he recalled Mr Hume saying that he would take all the staff, or all the staff who wanted to transfer. He also said that Mr Hume stated that he had staff who dealt with redundancy and that Mrs Wood had no reason to worry about redundancy. He confirmed that there was a discussion about property, including beds, mattresses and other stock.

10 45. Lucy Duffin's evidence was that there was a discussion about the move of the residents, and that reassurances were offered to Mrs Wood about how the 2nd respondent would "support the process". She denied that there were any discussions about roles to be offered to staff, about redundancy or indeed about the staff at all.

15 46. The Tribunal concluded that there were discussions at that meeting about the staff. Ms Duffin's evidence was characterised by a reluctance to engage with the staffing issues, and a focus upon the care of the residents and dealing with the families. Mr Hume, as we comment below in our observations on the witnesses, was not an impressive witness, and we did not consider his evidence to be completely believable. He simply denied that he had said anything about the staff, assets or about money, and that was flatly contradicted by both Mrs Wood and Ken Wood, whose evidence we preferred.

25 47. What is clear, however, is that Mrs Wood emerged from the meeting feeling reassured that not only would the residents be taken over to the 2nd respondent's care homes, but that the staff would also be looked after. In her own evidence, she did not state, though, that Mr Hume assured her that he would take care of any redundancy situation, and we do not find that that was said in the meeting.

48. Following the meeting, on 10 June 2021, Mrs Wood emailed the Care Inspectorate, East Lothian Council and the City of Edinburgh Council (135):

"Good afternoon all,

5 *It is with the heaviest of hearts I inform you that I have submitted my resignation of registration via care inspectorate portal. Please accept this email as my intent to close Adamwood Nursing Home.*

10 *I have suggested a closing date for the service of 24th June however, it is my intention to support the residents to move from 17th June 2021 providing agreement of the families.*

As you may be aware, I have arranged with Mansfield Care Ltd to provide accommodation and support for all residents and employment for all staff.

For full details, this is within the form submitted to the Inspectorate dated 10/06/2021.

15 *Discussions with families, staff and residents have been arranged for Monday 14th, supported by Mansfield Care. Additional meeting time is arranged for Tuesday 15th June to support any queries.*

20 *If you have any queries, please contact [telephone number]. Please bear in mind, I am only one person, I would very much appreciate a co-ordinated response.*

Regards,

Mairi Wood"

25 49. Alison Vikis, of East Lothian Council, emailed Adamwood on 11 June (141) to ask what arrangements had been put in place, given the Council's responsibility to ensure the appropriate placing of East Lothian residents. Mrs Wood forwarded the email to Lucy Duffin and asked for her advice (141). Ms Duffin replied with a suggested email to send to the Council (140):

"Hi Mairi,

Below is a suggested email to send to Alison - it might be helpful to cc me in too.

Dear Alison,

5 *Thank you for your email.*

The arrangements for the residents providing family agreement are as follows:

10 *Thursday 17th - Mansfield Care will support the residents to move over to Belleville Lodge and Pine Villa. I attach a list of proposed residents to each home.*

15 *I will have support from the Adamwood staff and support from Mansfield staff to ensure the physical transition is smooth and comfortable. The staff from Adamwood will move over to Mansfield Care therefor providing continuity of care and support from friendly, known staff to the ladies of Adamwood.*

20 *The arrangements for meeting with families and staff are made for Monday 17th, I will be supported by Mansfield to do this. Mansfield owner, Andrew Hume will be available at Adamwood Tuesday 18th for any questions, or queries. The families are invited to view the homes via video or in person adhering to covid regulations.*

Financially and contractually, the residents will remain on the same terms or better. This has been agreed with Andrew Hume. The same applies to the staff.

25 *If you wish to talk to Mansfield Care about these arrangements, please contact Lucy Duffin [telephone number]. She is aware of your queries.*

Kind regards

Mairi Wood"

50. There is no evidence that that email was ever sent to East Lothian Council. Essentially, Mrs Wood seemed to believe that Ms Duffin would send it to the Council, and Ms Duffin believed that it was for Mrs Wood to do so. As a result, the email was not sent.

5 51. In June 2021, there were 29 staff working at Adamwood. Mrs Wood described them as a mixture of 17 full time or part time employees, and 12 bank staff.

52. In mid-June, Mr Hume met with the residents' families to confirm the details of the Homes to which their relatives were to be moved. He
10 described the families as being shocked that their relatives were being moved at such short notice, though he sought to reassure them, to give them the choice of the 2 Homes to which they were to be moved and to encourage them to visit both Homes so that they could assess which would be more suitable. He also required to ensure that East Lothian
15 Council and the City of Edinburgh Council were content for the residents which they funded to be moved to the 2nd respondent's Homes.

53. The staff at Adamwood had become aware of rumours that the Home may be closing, at around the time when the Fire Inspectorate report was issued. Laura Smith, one of the lead claimants and a Senior Charge
20 Nurse, asked Mrs Wood whether or not it was true that the Home was closing, to which Mrs Wood replied that it was not. Since work was being done to improve the Home, Ms Smith herself understood that perhaps it was not going to close.

54. Mrs Wood asked some of the staff, who were on duty, to come to a
25 meeting, at some point before 22 June, and told them that the Home would be closing and the residents transferring to new Homes operated by the 2nd respondent. The staff were surprised by this news at this meeting, notwithstanding the rumours which had been circulating.

55. Following that meeting, Ms Newman, a member of the Unison Trade
30 Union, contacted her Unison representative, Carolyn Casey. On 22 June 2021, she and a number of other Unison members went to meet with

Ms Casey at a location close to Adamwood, and then as a group, led by Ms Casey, they went to Adamwood and asked to meet with Mrs Wood. Mrs Wood agreed to meet them, and in order to do so, they went into the garden and met outside. There were approximately 10 staff at that meeting. Mrs Wood was unable to give any detailed information as to the plans for the staff as she had not been made aware of the 2nd respondent's precise intentions at that stage, although she understood that all staff would be offered positions by the 2nd respondent.

56. Ms Casey then wrote to Mrs Wood on 23 June 2021 (201). She referred to a letter sent and delivered on 17 June 2021, but no copy of any such letter was produced to the Tribunal. However, the text of the letter appears to incorporate the terms of the previous letter, as below.

57. In her letter, she went on:

"We request a response to previous communication unfortunately we have not received any contact written or verbal from yourself.

Members of your staff are also Unison members and are looking for a response. This is an extremely unsettling time and the impact on the Adamwood staff cannot be underestimated. Hence again we request communication with yourself to achieve an outcome. Letter below as previously sent.

Unison members have contacted myself for advice and support when informed verbally~at the end of ~ashjff on ihe l tl!~june that the~care home •• will be closing and potentially as soon as the 24th of June 2021.

This has come as a shock to our members and some of our members have not been informed as yet. This is of course a concern with no consistency with what is being verbalised to some staff and not others. No written exchange has been received by any of our members.

I write to request a direct response for our members and engagement with myself as their trade union representative. As you are aware we were able to meet yesterday, this was arranged with yourself with the

members but you appeared confused at my attendance, although I am led to believe this had been discussed and agreed with yourself. At our brief meeting you were unclear re any date for closure or possible plans re Redundancy.

5 *As I attempted to discuss yesterday there is an obligation to meet with your staff and myself as a trade union representative. We would wish to seek clarity on the process and plans for closure you are using, you did voice yesterday that you are not involved with any trade union and felt this was not required. You did accept a note of my name mobile and*
io *email.*

You also stated yesterday that all staff will be offered a position with Mansfield Care but this would be in one of their already established homes and not in Adamwood as residents are being moved to other care homes over the next week or so. This in our opinion does not mitigate you
15 *as the present employer.*

In our opinion this is a redundancy situation and you have legal responsibility under the redundancy regulations. We are advised you are an employer of over 20 staff and must follow a collective consultation.

1. *You require to state the reasons for redundancy*

20 2. *Advice (sic) us of number and category of redundancy*

.....3,..Number of employees in each category

4. *How you plan to select employees for redundancy*

5. *How you will carry this out*

6. *How you plan to calculate the redundancy payments.*

25 *As we also discussed yesterday this of course is an extremely emotional and upsetting time for your members. I understand this is also the case for yourself but clarity is required re process that is being used and clear consistent engagement with staff.*

Unison is supporting the majority of your employees and are looking for full involvement in this process.

I will await your reply at your earliest convenience.

Yours sincerely,

5 *Carolyn Casey CPN"*

58. In her evidence, Mrs Wood stated that she did not recall seeing the letter, nor did she recall Ms Casey.

10 59. On 24 June, Mrs Wood conducted a meeting with the staff who were on duty at the time, in the conservatory of Adamwood. The individuals who were present at that meeting were Leah Newman, one of the lead claimants; Kerry Brash; Janet Capaldi; Joyce Radzynski; Jackie Ross; Christina Smith; Kate Hogg; Roberta Wanless and Helen Casey. Lucy Duffin was also in attendance. Mrs Wood believed that all of the staff at that meeting already knew that Adamwood was closing. Ms Duffin
15 explained to the staff that they would be transferring to one or other of the 2 Homes operated by the 2nd respondent, namely Belleville Lodge or Pine Villa, and that they would be looking after the residents from Adamwood. They could choose according to the location which was closer to their own home.

20 60. Mrs Wood was upset at the meeting, as were the staff. Leah Newman, who was in attendance at the meeting, said that the news came "out of the blue". They were told that the Home would be closing within the next few weeks, depending on how long it took to move the residents to their new places of residence.

25 61. Ms Newman said at that meeting that she did not want to move to either of the new Homes, as she did not wish to travel further than she was currently travelling, that she had family commitments (particularly to her son) and that she wished to work in a more homely environment as she had at Adamwood.

62. The other staff who were present at the meeting were generally unenthusiastic about the prospect of moving to another Home and indicated that they did not wish to do so.

5 63. The residents were moved out over the next week or so, and the final resident left Adamwood on 29 June 2021. Mrs Wood confirmed this to be the case to Janet Smith at the Care Inspectorate on 29 June 2021 (144). Ms Smith responded that day to confirm that she would cancel the registration of the Home on the following day. She expressed sadness at this development, and said that she fondly remembered her "lovely visits
10 to Adamwood".

64. On 29 June 2021, Sharon McGowan emailed Mr Hume a list of the staff from Adamwood, with approximate length of service and contract type, highlighting in yellow the staff who were "transferring to Mansfield Care" (143). The staff list was produced at 149.

15 65. The list set out the details of the staff as follows:

<i>Christina Smith</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
<i>Joyce Radynski</i>	<i>Staff Nurse</i>	<i>Permanent Contract 24 hours/week 30 years service</i>
<i>Laura Smith</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
20 <i>Kate Hogg</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
<i>Angela Conway</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
<i>Moira Peters</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
<i>Sally Dickson</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
<i>Demi Gray</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
25 <i>Marie Cumming</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
<i>Vicky Brash</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>

	<i>Francis Buddie</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
	<i>Jacqueline Ryan</i>	<i>Staff Nurse</i>	<i>Bank Contract</i>
	<i>Janet Capaldi</i>	<i>Care Assistant</i>	<i>Permanent Contract</i> <i>36hrs/week 28 years service</i>
5	<i>Leah Newman</i>	<i>Care Assistant</i>	<i>Permanent Contract</i> <i>32.5hrs/week 10 years service</i>
	<i>Kerry Brash</i>	<i>Care Assistant</i>	<i>Permanent Contract</i> <i>12hrs/week 2 years service</i>
10	<i>Lynne Fairgrieve</i>	<i>Care Assistant</i>	<i>Permanent Contract</i> <i>38hrs/week 4 years service</i>
	<i>Mariola Jeziorska</i>	<i>Care Assistant</i>	<i>Permanent Contract</i> <i>38hrs/week 5 years service</i>
	<i>Liz Brennan</i>	<i>Care Assistant</i>	<i>Permanent Contract 8hrs/week</i> <i>30 years service</i>
15	<i>Ina Shankie</i>	<i>Care Assistant</i>	<i>Permanent Contract</i> <i>38hrs/week 3 months service</i>
	<i>Kayley Hughes</i>	<i>Care Assistant</i>	<i>Permanent Contract</i> <i>38hrs/week 8 months service</i>
	<i>Joanna Mostowik</i>	<i>Care Assistant</i>	<i>Bank Contract</i>
20	<i>Jackie Ross</i>	<i>Cook/Domestic</i>	<i>Permanent Contract</i> <i>31hrs/week 12 years service</i>
	<i>Aga Stopa</i>	<i>Care Assistant</i>	<i>Permanent Contract</i> <i>38hrs/week 10 months (mat</i> <i>leave)</i>
25	<i>Roberta Wanless</i>	<i>Care Assistant</i>	<i>Permanent Contract 38</i> <i>hours/week 12 years service</i>

	Anna Wojcik	Care Assistant	Permanent Contract 38hrs/week 4 months service
5	Helen Casey	Cook	Permanent Contract 40hrs/week 12 years service (sick leave)
	Steven Falconer	Chef	Permanent Contract 50hrs/week 3 years service
	Ted Wojciechowski	Handy Man	Permanent Contract 40 hrs/week 4 years service
10	Sylwia Zielinska	Domestic	Permanent Contract 20hrs/week 2 months service

66. The names highlighted in yellow on the staff list provided to Mr Hume are shown in bold above.
67. Laura Smith commenced employment at Adamwood approximately 20 years ago. She qualified as a Registered General Nurse (RGN) in 1997. At the point when she joined Adamwood, Ms Smith was working as a registered nurse in the Breast Unit at the Western General Hospital, Edinburgh. A colleague informed her that Mrs Wood was looking to employ qualified nurses at Adamwood. She applied for a post, and was appointed following interview. At that time, she required to earn extra money on top of her main employment at the Western General Hospital in order to afford renovations on her flat. Throughout her employment with Adamwood, her main employment remained with the NHS at the Western General Hospital.
68. Ms Smith did not receive a written statement of terms and conditions of employment from the 1st respondent.
69. In Adamwood, each shift required to have an RGN working so as to take responsibility for the nursing care of the residents, including initiating treatment or medical assistance, ensuring the staff were working to the

highest standards and maintaining the safety of the residents as the highest priority. The RGN would also require to supervise the work of the carers and work together with them to attend to the needs of the residents.

5 70. Ms Smith would provide Mrs Wood with a list of dates when she would be available over a period of time, and she would put the "off duty" together. The off duty is a document which is completed with the rotas for each day. Mrs Wood had a responsibility to ensure that each shift was covered with adequate numbers of staff, including an RGN. Mrs Wood herself
10 would cover some shifts as the RGN. When the off duty, or rota, was established, it would be put up in the duty room, and Ms Smith would complete all the shifts allocated to her, so far as possible, to complete the off duty.

15 71. A sample of the off duty was produced in the supplementary bundle at p1 (S1). It was referred to as a "timesheet". However, it was understood to be an off duty chart showing the scheduled cover for each shift, prepared in advance of the relevant shifts, rather than a timesheet denoting the hours actually worked afterwards.

20 72. Each of the names on the left hand column on S1 relates to an RGN, including Ms Smith, for June 2019. She was marked down for 2 nightshifts, on 7 and 25 July. S2 was a copy of the off duty for July 2019, apparently showing that Ms Smith did no shifts during that month. Ms Smith was surprised to see this, and in evidence suggested that it
25 may have been incomplete, as there were no months during her time with Adamwood in which she did no work. There was a period before this that she was unable to work due to illness, but she had recovered by July 2019 and therefore could not understand why the off duty showed her as having no shifts. In August 2019 (S3), Ms Smith was noted as covering 7 nightshifts, on 5, 6, 18, 19, 22, 25 and 29 August. The pattern for
30 Ms Smith appears to have been relatively similar throughout the succeeding months, and in June 2021 she was on the rota to cover 7 nightshifts (S11).

5 73. Ms Smith was provided with payslips by the 1st respondent (S12ff). these demonstrate that the 1st respondent paid her each month subject to the deduction of PAYE tax and national insurance, and also that she was paid holiday pay every 3 months according to the number of hours which she had worked in that period. Each month also saw the deduction of a sum in respect of her employer's pension.

74. No payslip was produced in respect of July 2019.

10 75. When asked about the terms of 149, which describes her as a Staff Nurse with a bank contract, Ms Smith specifically said that she did not wish to be a bank nurse or an agency nurse as she wanted stability and certainty about her income, with a degree of regularity of the shifts she received. She was aware that if she had registered with the NHS nurse bank, she could have been moved around different locations and that she was not guaranteed work. In working for the 1st respondent, she was able to provide her available shifts in advance, and be aware that Mrs Wood would require her to do those shifts.

15 76. If she were on the off duty to carry out a shift on a particular date, she made every effort not only to carry out that shift, but also to cover any further gaps in the off duty which she was aware of, in order to provide that assistance to Mrs Wood which she could. There were restrictions on her availability to work for the 1st respondent on the basis that she was employed by the NHS to work at the Western General Hospital, which always had to be her priority;

20 77. On the termination of her employment, she was provided with a P45 by the 1st respondent (S21) dated 9 July 2021 .

25 78. Ms Smith was very concerned to learn that Adamwood was closing, and to have 2 weeks' notice to make a decision about her future. She decided that she would contact the Operations Manager for the 2nd respondent, and was referred to Margaret Russell to discuss any vacancies at Belleville Lodge. Ms Smith met with Margaret Russell, completed an application form and a PVG check form, and was interviewed. Ms Russell

agreed that she could accommodate Ms Smith's desired shifts, and offered her the position of RGN at Belleville Lodge.

- 5 79. Ms Smith accepted the position, though with some reservations as she had not had the opportunity to see the whole of Belleville Lodge, owing to Covid restrictions. Her pay was to be at a slightly higher rate than that which she was paid by the 1st respondent, though she was not to receive payment for breaks as she had at Adamwood. Ms Smith worked at Belleville Lodge for some 4 weeks but decided to leave at the end of the rota to which she was committed. She had by then found that the Home
10 was much larger than Adamwood and decided that she did not wish to continue working there.
- 15 80. Following her departure from Belleville Lodge, Ms Smith experienced a period without the additional employment over and above her NHS position which she had grown accustomed to. She found new employment at a Nursing Home in Cramond, Edinburgh, at a higher rate of pay than that offered by either the 1st or 2nd respondent.
- 20 81. Leah Newman commenced working at Adamwood as a Care Assistant in September or October 2009.
82. She was interviewed by Mrs Wood, shown around the Home and offered the position subject to a clear PVG certificate. She was initially deployed to different shifts but due to her personal circumstances she changed to working only day shifts by the point when the Home closed.
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- 25 83. Ms Newman worked the shifts which she was allocated by Mrs Wood. Occasionally she would be unable to carry out her shift, due to illness, or if an issue arose in her personal life, she would seek to swap with one of her colleagues.
84. By the time her employment at Adamwood ended, Ms Newman was working 32.5 hours per week, on a permanent contract.
- 30 85. Ms Newman did not work in any other employment throughout her time working at Adamwood.

5 86. Her last shift at Adamwood was on 29 June 2021. She commenced working on the NHS Lothian Nurse Bank on 15 October 2021, having been persuaded by her trade union representative that it would represent a good opportunity. She now works when she is able to, based on the shifts which are offered to her on the Bank.

10 87. She was aware that others were taking up the opportunity to work with the 2nd respondent after Adamwood closed, but having been happy in a small environment at Adamwood she was not attracted to the prospect of working for a larger company and she took no steps to inquire as to whether or not she would be able to work in one of the 2nd respondent's Homes. In addition, she did not want to travel to either of the Homes.

15 88. When working with the 1st respondent, the claimant received payslips (194ff) She was paid the same gross amount each month (£1,295.67 until 30 April 2021, and £1,366.08 thereafter); her pay was subject to the deduction of PAYE tax and national insurance; she was a member of the 1st respondent's pension scheme, and so deductions in that respect were taken from her pay each month; she was paid in respect of sick leave (for example, in April 2021 (197), albeit that this was statutory sick pay rather than contractual sick pay); and she worked a consistent pattern of 7 days on and 2 days off, followed by 8 days on and 4 days off.

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25 89. When asked if she felt obliged to work the shifts she was given, Ms Newman answered that she wanted to work those shifts. When pressed on the matter, she said that—she-did—not “feel obliged” to do those shifts. The Tribunal interpreted that exchange as meaning that she was content and did not feel forced to carry out the shifts given to her, but not that there was an optional element to it. It seemed to us, very simply, that the use of the word “obliged” carried with it a meaning which Ms Newman did not understand in the way it was being put to her.

Submissions

30 90. The parties presented submissions to the Tribunal. A brief summary of those submissions follows, but the parties may be assured that the

Tribunal read carefully and took the parties' submissions both written and oral into account in reaching its decision.

91. For the 1st respondent, Mr Walker presented a very lengthy and full submission, to which he spoke briefly.

5 92. He submitted that there was a transfer of an undertaking under from the 1st to the 2nd respondent under Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) (TUPE). He also maintained that there was a service provision change from the 1st to the 2nd respondent under Regulation 3(1)(b) of
10 TUPE.

93. He referred to 10 employee claimants who were entitled to be transferred under TUPE to the 2nd respondent. They included Leah Newman, one of the lead claimants in this litigation.

15 94. The relevant transfer took place, he submitted, over a period of around one week up to 29 June 2021. As a result, there was no liability on the part of the 1st respondent to any of the employee claimants, and no redundancy situation.

20 95. He distinguished the situation of the bank staff, which included Laura Smith, the other lead claimant. He argued that they were not employees of the 1st respondent, and therefore lacked the right to transfer under TUPE to the 2nd respondent; or that if they were employees, they had the right to transfer. In any event, not being employees, they have no right to claim unfair dismissal or statutory redundancy pay from the 1st respondent.

25 96. There was no mutuality of obligation between the 1st respondent and Laura Smith. She and her colleagues, including Angela Conway, were casual workers.

97. Mr Walker argued that Laura Smith only worked 2 shifts in June 2019 and none in July 2019, and no explanation was given as to why that was.

- 5 98. There was no failure to consult in breach of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) as there was no failure to consult collectively. There was no proposal to dismiss 20 or more employees at 1 establishment within a 90 day period as there were only 17 employees employed by the 1st respondent during the material time.
99. Mr Walker then referred to another claimant, Kayley Hughes, whose failure to comply with Tribunal Orders should see her claim struck out.
- 10 100. The other 9 employees, he submitted, were not unfairly dismissed. There was no requirement for a selection process as the Home was closing down, and the 1st respondent informed the employees that the 2nd respondent would be offering them jobs on the same terms and conditions other than location. Leah Newman declined this offer of employment with the 2nd respondent when it was raised at the meeting on 15 16 June 2021.
101. The bank staff were also informed that they would be offered employment with the 2nd respondent. Angela Conway and Laura Smith both accepted jobs with the 2nd respondent.
- 20 102. If the Tribunal holds that any of the claimants were dismissed by the 1st respondent, he submitted that the dismissals were fair.
- 25 103. If the Tribunal holds that there was no TUPE transfer and/or that bank staff claimants were employees of the 1st respondent under the Employment Rights Act 1996, then a further Hearing may be required to determine such claims other than those relating to Angela Conway, Laura Smith and Leah Newman.
104. Mr Walker made a number of suggested findings in fact, and then made submissions as to the credibility and reliability of the evidence given.
- 30 105. He argued that the Tribunal should find that Mrs Wood was a credible and reliable witness, and should take into account that her evidence in chief was presented by way of witness statement, that that statement was not

5 challenged on many of the main aspects of the case, and that as a 79 year old person she had to give her evidence in trying circumstances, including external noise from roadworks which necessitated the adjournment of the Hearing. He also pointed out that some of the evidence given by witnesses for the 2nd respondent was not put to Mrs Wood in her evidence, and therefore should not be taken into account in reaching findings in fact.

106. Mr Kenneth Wood gave evidence which was credible and reliable.

107. Mr Walker challenged the evidence of Lucy Duffin as being inaccurate in some respects, and inconsistent in her recollection of what happened at certain meetings.

108. The evidence of Sharon McGowan was vague and of questionable relevance, he said. Mr Pratt's evidence was tainted by his failure to disclose to Mrs Wood the clear conflict of interest which he had between the two respondents given his previous involvement with both.

109. Mr Walker reserved his strongest criticism for the evidence of Mr Hume, and insisted that it was not credible or reliable in several material respects. He pointed out examples in which Mr Hume's evidence was contradicted by contemporaneous written evidence.

110. He also submitted that Mr Hume prevaricated by making statements which did not address directly the question which he had been asked.

111. Mr Walker then summarised the legal provisions which were relevant to the Tribunal's analysis of the case, and invited the Tribunal to find that the 1st respondent was not liable for any of the claims made.

112. Mr Bathgate, for the 2nd respondent, observed that the claimants' pleaded case is only directed against the 1st respondent, and not his client. He referred to Rule 36 of the Employment Tribunals Rules of Procedure, and pointed out that where 2 or more claims give rise to common or related issues, and the Tribunal makes a decision on those common or related issues, that decision will be binding on all parties.

113. He pointed out that there are some matters of evidence which are common or related issues, but some are individual to each of the claimants. For example, if the Tribunal were to find that there was a TUPE transfer, evidence would need to be led in order to determine whether or not any or all of the claimants objected to the transfer.

114. He argued that while Mr Walker suggested that matters which were not put to Mrs Wood should not be admissible, the correct view of this is to determine the weight to be attached to the evidence, not its admissibility. This is not a case before the Inner House but a Tribunal hearing trying to find out what had happened.

115. He submitted that Ms Smith was not an employee, and that there was no mutuality of obligation between her and the 1st respondent. There requires to be that irreducible minimum to establish employment status, and it is not there according to the evidence. As a result, Ms Smith's case should be dismissed. If the Tribunal were not to agree with that proposition, Mr Bathgate said that Ms Smith became an employee of the 2nd respondent and accordingly there was no claim for unfair dismissal against his client.

116. So far as Ms Newman was concerned, he adopted Mr Walker's submission in relation to her status as an employee.

117. He maintained that the necessary minimum of 20 employees has not been reached in this case, and accordingly the protective award claim must fail.

118. Mr Bathgate went on to make more detailed submissions about whether or not there was a TUPE transfer or a service provision change. There is insufficient evidence to demonstrate that any affected employee was allocated to look after any particular resident. There needs to be evidence of an organised grouping of employees carrying out activities in relation to the particular client, and therefore there was no service provision change in this case.

- 5 119. He observed, with regard to a TUPE transfer, that the Tribunal needs to consider whether there was an economic entity which transferred, and whether it retained its identity on transfer. It is a question of fact for the Tribunal to determine in relation to each question. In his submission, any entity did not retain its identity but was subsumed within the identity of the 2nd respondent.
120. He also argued that there was no significant transfer of goodwill or assets, but there was a business arrangement for the transfer of residents. No TUPE transfer has been established.
- 10 121. Mr Bathgate submitted that the evidence demonstrates that even if there were a transfer, Leah Newman clearly objected to it. Evidence would be required from the other claimants in order to determine that question in relation to each of them.
- 15 122. If Ms Smith were to be found to have been unfairly dismissed, any compensation should be restricted to a basic award since she resigned from the 2nd respondent's employment when she had no job to go to and found another job within a month.
123. For the claimants, Mr Haywood presented a written skeleton submission, to which he spoke.
- 20 124. He submitted that the question of whether the claimants objected to the transfer is not a common matter between the claimants. However, it was clear that k4s Newmsin did not know ...jwiticit..she.was ...todo vuittr regard to TUPE.
- 25 125. He submitted that while Mrs Wood was an impressive person, and all the respondents witnesses gave their evidence in challenging circumstances, that does not make them immune to criticism. The absence of documentation is a distinctive feature of this case. No members of the 1st respondent's staff ever had a written contract. The respondents have become entrenched in their positions, and their evidence, he argued, generally lacked reasonable concessions.
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126. He made a number of observations about the evidence given by the parties. The consequences which normally follow a TUPE transfer do not appear to have done so here. Something has gone badly wrong if a transfer did occur.

5 127. Either there was no transfer, and the staff were made redundant by the 1st respondent, or there was a transfer and they were dismissed by either of the respondents in consequence of the transfer, and therefore they were automatically unfairly dismissed.

10 128. It cannot be maintained that if the transfer did not happen, there was still consultation. It does not accord with the evidence.

129. Mrs Wood repeatedly said that she did not require to close Adamwood. Mr Haywood suggested that there were surely more options for her to address the needs of the staff rather than to argue with the other respondent.

15 130. The claimants maintain that while the respondents suggested that there were permanent and bank staff, this was not a distinction that existed in practice.

20 131. Mr Haywood submitted that the suggestion that the staff were employees only for each shift is inconsistent with their pay being administered over each month. Even though the month of July 2019 is missing from the payslips, holiday pay still accrues and since some rights carry over from month to month, that is inconsistent with a single shift contract.

25 132. The nub of the case, he said, is whether there existed the irreducible minimum of mutuality of obligation. This is not the same situation as a bank worker on the NHS bank, but a situation where an individual worked in a single location for 20 years. In terms of the formality of the arrangement, a paper boy would be at one end of the spectrum, but Ms Smith in Adamwood was at the other. There was a sufficiently formal relationship to demonstrate a course of dealing, and in addition, there were staff who had long service and a credible sense of loyalty to their

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service. Adamwood was dependent on a regular crop of RGNs, 1 of whom was said by them to be a permanent member of staff.

5 133. Mr Haywood pointed to the evidence of Ms Smith, in which she spoke about regular shifts and her sense of obligation, that due to loyalty she and other staff tried to keep the care home going and that she depended upon the income. It is inconceivable that she would have continued to work for 20 years without a steady stream of income to rely upon.

10 134. There was also a significant degree of control over the RGNs. There is no doubt, he submitted, that Mrs Wood was in charge and that the nurses had to attend at night so that the Home could continue to operate. They were integral to the business, not coming in from the outside. Ms Smith asked who her boss would be if not Mrs Wood - this is not analogous to the NHS bank.

15 135. There were occasions on which shifts were not worked, but that is not dispositive. They would cover each other as a team when there was illness. This is different from substitution.

20 136. He went on to submit that if the Tribunal were to agree that the RGNs were employees, as at June 2021, the 1st respondent had more than 20 employees and they were obliged to consult them about redundancy, more than 30 days prior to dismissal. That did not happen. He suggested that it may not be entirely possible to say precisely when each meeting occurred.

25 137. The 1st respondent says that there was no recognised Trade Union and therefore the role of the Trade Union representative was a red herring. However, there is a requirement to allow for the election of a representative within the body of affected employees, and there is no evidence that that happened.

138. Mr Haywood submitted that there was, therefore, a failure to consult the affected employees. The protective award should be taken at its highest

unless there is any mitigation, and in this case it is difficult to see any mitigation arising from the evidence.

Observations on the Evidence

139. It is appropriate, when assessing the divergent evidence given by different witnesses in this case, to make some observations about the evidence and the witnesses presented.

140. Mrs Wood's evidence largely came from her witness statement, the only witness to be afforded this means of giving evidence. We found Mrs Wood to be generally a good and sincere witness, worthy of the clear respect in which she was held by her staff. There were aspects of her evidence which were rather vague, which is understandable both due to the passage of time and her observable frailty. In our judgment, Mrs Wood's intentions were unimpeachable, and to a large extent her understanding of the circumstances in which she found herself were as a result of advice and representations made by others, including her former solicitor, Mr Pratt and Mr Hume. We believed Mrs Wood to be seeking to assist the Tribunal by telling the truth to the best of her ability, and we accept Mr Walker's submission that there were a number of areas in which her evidence was simply unchallenged, or points were not put to her.

141. Kenneth Wood's evidence was of relatively brief compass, but we found no reason not to believe what he told us. His evidence requires to be treated with a certain amount of caution as he did not have a significant involvement in the matters giving rise to these claims. However, he was helpful insofar as he was able to be.

142. Lucy Duffin and Sharon McGowan, who were both called as witnesses for the 2nd respondent, gave evidence which was not, generally, very clear or of great assistance. Ms Duffin had a tendency to distance herself from the commercial and human resources aspects of the business and of her involvement in the process, leaving it slightly unclear as to what she was in fact responsible for. She was not clear on specifics, especially dates,

and given her administrative background it seemed odd that she did not maintain records of meetings which could, from her perspective, become important. We were not confident that we could place much reliance upon the evidence of either Ms Duffin or Ms McGowan.

5 143. Mr Pratt's evidence was reasonably straightforward, but his position was rather compromised by the clear conflict of interest which he had as between the 1st and 2nd respondent. Mrs Wood in particular was surprised to discover, relatively late in the process, that Mr Pratt was not simply acting as her long standing accountant but also as a director of the 10 2nd respondent. We are unable to find any good reason why Mr Pratt did not make this clear at an earlier stage. While Mr Pratt's actions are not the subject of any criticism in the substance of the claims made her, we treat his evidence with some reserve given the lack of clarity as to his precise position in the process which led to the transfer of the residents.

15 144. Mr Hume gave evidence in difficult circumstances. His time in the witness box spanned 3 hearings, and he required to remain on oath over a period of months. In addition, the physical circumstances of the Hearing were adversely affected by significant noise generated by roadworks in the street outside the Tribunal building, and that proved to be distracting for 20 all concerned.

145. That said, however, we did not find Mr Hume to be an impressive witness. From the outset of his evidence, and in particular under cross-examination by Mr Walker for the 1st respondent, he was combative and 25 unwilling to respond directly to questions put. At one point, in the direct observation of one of the Tribunal members, he addressed a remark very aggressively towards Mrs Wood, which led to a brief confrontation with her solicitor. When challenged by the Employment Judge, he continued to argue his point until advised that if he had an issue with one of the legal representatives in the room, he should direct himself to the Judge who 30 would deal with the matter. Only after this did he settle down and resume his evidence. We considered this conduct to be unnecessarily hostile, and were, in any event, unclear as to its purpose.

146. Mr Hume's consistent approach, in our view, was to try to minimise the terms of any agreements reached with Mrs Wood, and to seek to rely upon the absence of any written contracts, in demonstrating his point that TUPE did not apply to these circumstances. Given that he accepted that his company is responsible for the management of 11 Care Homes, most of which had been affected by TUPE transfers, we were bound to conclude that Mr Hume was very familiar with the processes which TUPE required, but was unwilling to concede any point which might give the impression that at any stage he thought that TUPE might apply.

147. There was evidence about the invoice which he issued to Mrs Wood shortly before the first Hearing in this case. We have not made many findings in fact about this because it did not appear to us to be relevant to the issue of TUPE. Indeed, it appears to be a dispute which may require to be played out in another court. However, we found Mr Hume's actions, and timing, in raising this matter to be quite extraordinary, and his explanation for not pursuing the issue immediately - that he did not want the Tribunal to be affected and nor did he wish to place extra pressure upon Mrs Wood - to be disingenuous. Further, we were entirely unclear as to whether he accepted that there were particular payments to be due on the transfer of the residents, and if so, what they were, given that he made some payments but not the whole amount, for reasons which were never fully explained.

148. Accordingly, we treat the evidence of Mr Hume with considerable reserve, as we considered that he was seeking, in giving that evidence, to advance his case at every turn, rather than addressing himself to each question as it was put. He appeared to be very defensive and unwilling to address the details of the matter. Where there was a conflict between the evidence of Mr Hume and that of Mrs Wood, we preferred that of Mrs Wood as being more credible and reliable.

149. Finally, we heard from both Ms Smith and Ms Newman. We found both witnesses to be patently honest and sincere in their evidence. Ms Smith was introduced to the proceedings as a lead claimant at a very late stage,

and was plainly very nervous. However, she emerged as a clear and straightforward witness who was seeking to assist the Tribunal, and we found her evidence credible and reliable. Similarly, Ms Newman was a good and truthful witness, in our judgment. She was rather guarded when it came to questions about her motivation for not wishing to move to Belleville Lodge or Pine Villa, particularly relating to a family matter, but we accepted that she was reluctant, for good reason, to disclose personal issues in a public forum. We did not consider that that in any way diminished her credibility or reliability.

io The Relevant Law

150. Whether or not there is a relevant transfer is determined by Regulation 3, the operative provisions for the purposes of these claims being:

“3 A relevant transfer

(1) *These Regulations apply to—*

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

(b) *a service provision change, that is a situation in which —*

.....

(ii) *activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (‘a subsequent contractor’)*

.....

and in which the conditions set out in paragraph (3) are satisfied.

(3) *The conditions referred to in paragraph (1)(b) are that —*

(a) *immediately before the service provision change —*

(i) *there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;*

(ii) *the client intends that the activities will, following the service provision change, be carried out by the transferee other than in*

connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

5

.....

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor. ”

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151. The effect of a transfer is set out in Regulation 4. For the purposes of these claims the operative parts provide:

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“(1)a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

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(2) Without prejudice to paragraph (1), but subject to regulations 8 and ...on the completion of a relevant transfer -

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

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(b) any act or omission before the transfer is completed,in respect of that contractshall be deemed to have been an act or omission of or in relation to the transferee.

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(3) ^{re JereriCe} p gg ph loTeTpef on employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.”

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152. Regulation 4(7) provides that paragraphs (1) and (2) shall not operate to transfer the employment and the rights, powers, duties and liabilities

under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee. Regulation 4(9) also states that where a relevant transfer involves a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

10 153. Regulation 7(1) provides:

15 *“7. — (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—*

- 20 *(a) the transfer itself; or*
(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. ”

154. Thus a person who is dismissed before the transfer in circumstances where the sole or principal reason is the transfer or connected with it in a particular way is still covered by Regulation 4.

25 155. Mr Walker referred the Tribunal to the case of **Spijkers v Gebroeders Benedik Abattoir Cv [1986] 2 CMLR 296**, and in particular to paragraphs 21 and 22:

30 *[21] Consequently it cannot be said that there is a transfer of an enterprise, business or part of a business on the sole ground that its assets have been sold. On the contrary, in a case like the present, it is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activities.*

[22] *To decide whether these conditions are fulfilled it is necessary to take account of all the factual circumstances of the transaction in question, including the type of undertaking or business in question, the transfer or otherwise of tangible assets such as buildings and stocks, the value of intangible assets at the date of transfer, whether the majority of the staff are taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between activities before and after the transfer and the duration of any interruption of those activities. It should be made clear, however, that each of these factors is only a part of the overall assessment which is required and therefore they cannot be examined independently of each other.*”

156. We were also referred to **Metropolitan Resources Limited v Churchill Dulwich Limited (in liquidation) UKEAT/0286/08**, paragraphs 27-30; **Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and Others [2016] ICR 607**, paragraphs 17 and 18; and **McTear Contracts Limited v Bennett and Others UKEATS/0023/19**; **Mitie Property Services UK Limited v Bennet and Others UKEATS/0030/19**, paragraph 41.

157. Section 230 of the Employment Rights Act 1996 (ERA) provides as follows:

(1) *In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

(2) *In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

(3) *In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under) —*

(a) *a contract of employment, or*

(b) *any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes*

to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

5 *and any reference to a worker's contract shall be construed accordingly. "*

158. Reference was made to the case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433 QBD**, it is appropriate to have reference to its terms, in which
10 Mr Justice MacKenna set out the following questions:

- Did the worker agree to provide his or her own work and skill in return for remuneration?
- Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?
15
- Were the other provisions of the contract consistent with its being a contract of service?

159. This approach had been described by Mummery J in **Hall v Lorimer [1992] ICR 739** as having as its object the painting of a picture from the
20 accumulation of detail. The view there expressed was that the overall effect could only be appreciated by standing back from the detailed picture which had been painted, viewing it from a distance and making an informed, considered and qualitative appreciation of the whole. Turning to the more recent treatment of the issue, in **Autoclenz v Belcher [2011]**
25 **ICR 1157**, there Lord Clark of Stone-cum-Ebony had stressed (at paragraph 29) that the question in every case must be what was the true agreement between the parties.

160. We were also referred to **Cotswold Developments v Williams [2006] IRLR 181**, paragraph 61:

30 *"(a) was there one contract or a succession of shorter assignments?"*

(b) if one contract, is it the natural inference from the facts that the claimant agreed to undertake some minimum, or at least some reasonable, amount of work for Cotswold in return for being given that work, or pay?

5 *(c) if so, was there such control as to make it a contract of employment so as to give rise to rights of unfair dismissal, as well as a right to holiday pay?*

10 *(d) if there was insufficient control, or any other factor, negating employment, whether the claimant was nonetheless obliged to do some minimum (or reasonable) amount of work personally?"*

161. Section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULCRA) provides that where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult the appropriate
15 representatives of the affected employees. The claimant brings his complaint under section 189 of TULCRA, in which section 189(1)(d) entitles him to make such a claim as an individual affected by the redundancy.

162. The Tribunal may, under section 189(2) and (3), make a protective award,
20 ordering the employer to pay remuneration to the claimant for the protected period, which begins with the date on which the first of the dismissals to which the complaint relates takes effect or the date of the award, whichever is the earlier, and is of such length that the Tribunal determines to be just and equitable in all the circumstances, having
25 regard to the seriousness of the employer's default in complying with the requirements of section 188, but shall not exceed 90 days.

Discussion and Decision

163. The issues in this case are, in our view:

30 **1. Was there a relevant transfer within the meaning of Regulation 3(1)(a) of TUPE of TUPE, from the 1st to the 2nd respondent?**

2. Was there a relevant transfer as a result of a service provision change from the 1st respondent to the 2nd respondent in terms of Regulation 3(1)(b) of TUPE?
3. If so, when did the relevant transfer take place?
- 5 4. Was Laura Smith an employee of the 1st respondent as at the date of the alleged transfer?
5. Should Laura Smith or Leah Newman have transferred employment to the 2nd respondent at the date of the alleged transfer?
- 10 6. Was there a failure to consult with staff in breach of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992?

164. We have left aside any questions of remedy or of protective awards, on the basis that it was agreed by the parties and the Tribunal during the course of the Hearing that there would require to be a separate remedy Hearing to determine such issues, including whether or not any of the staff refused to transfer, if there was the opportunity to do so. Further, we have not sought to make findings in fact relating to the claimants other than the lead claimants, on the basis that we do not wish to make assumptions about their circumstances or actions which do not arise from clear evidence.

165. We seek to address the issues in turn, then, as follows:

1. Was there a relevant transfer within the meaning of Regulation 3(1)(a) of TUPE of TUPE, from the 1st to the 2nd respondent?
- 25 2. Was there a relevant transfer as a result of a service provision change from the 1st respondent to the 2nd respondent in terms of Regulation 3(1)(b) of TUPE?
3. If so, when did the relevant transfer take place?

166. We take these issues together on the basis that they are, to some extent, related.

5 167. It is appropriate to start by considering the effect of the agreed Heads of Terms, which were the subject of different revisions but which finally found their expression in the document prepared on 10 March 2021 (126).

10 168. It appears that the 1st respondent takes the view that while these were not converted into a finalised contract between them and the 2nd respondent, the Heads of Terms should be taken as an “analogous transaction”, in relation to which the parties were of the view that TUPE applied.

15 169. However, in our judgment, we require to treat the Heads of Terms with some caution. The premise upon which the Heads of Terms were agreed was that the 2nd respondent was to build a “new purpose built Care Home facility in Haddington”; and that on the opening of the facility, the 2nd respondent would acquire the business of the 1st respondent, and accordingly take over all the employees under TUPE, take over the care of all residents and release the property at Adamwood for sale or disposal.

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25 170. It is clear that at that stage, in March 2021, the parties believed that a TUPE transfer would take place, when the new Haddington care home opened and the residents and staff would transfer there. However, as is clear from the evidence, the Haddington care home had not opened by the time of the alleged transfer; none of the residents nor staff were in fact transferred there, nor did the parties think it would be appropriate for them to do so; and therefore the Heads of Terms were not implemented as drafted.

30 171. The agreement in the Heads of Terms was that each private resident would attract a figure of £17,500 and each social work funded resident a

figure of £10,000. It appears that there was some understanding on the part of the parties that those figures would be translated into the transfer of residents to Pine Villa and Belleville Lodge.

172. In our judgment, it was clear from the evidence that the Heads of Terms raised an expectation in the mind of Mrs Wood that when residents were to transfer to the responsibility of the 2nd respondent, they would do so on the basis that TUPE would apply and that the figures to be paid in respect of each resident would be paid according to the Heads of Terms. This, in our view, is critical to her understanding of the events which followed. It was also our conclusion that Mr Hume, with considerable experience of TUPE transfers, was aware that the situation had changed and was careful not to agree Heads of Terms in respect of the moves in June 2021.

173. The fact that the Heads of Terms dealt with an analogous transaction does not mean that the agreement enshrined therein can be taken to apply to the transfer of residents to Pine Villa and Belleville Lodge. It plainly and expressly applied to the transfer of residents, and staff, to a new Haddington care home, but did not apply to the circumstances in which the parties reached a different agreement in June 2021.

174. It should also be said that defining precisely what the agreement was between the parties in June 2021 is very difficult, partly because, in our judgment, Mrs Wood assumed that the previous agreement held good, and Mr Hume took the opposite view, and partly because, for these reasons, the parties never committed their agreement to writing so as to clarify their mutual understanding as to the application of TUPE.

175. However, a written agreement is not necessary between the parties for TUPE to apply to the transaction before us. It is a matter of applying the statutory tests to determine whether or not there was the transfer of an undertaking, in relation to the privately funded residents, or a service provision change in relation to the socially funded residents.

176. Mr Haywood, for the claimants, made a submission that there was lack of clarity in the evidence about what was agreed, by whom and ultimately when, and that that was indicative of the confusion which reigned in the final days of Adamwood.

5 177. In light of the **Spijkers** judgment, it is necessary to consider whether what was purchased by the 2nd respondent was a going concern at the point of the alleged transfer. While there is some doubt as to the precise arrangement reached between the 1st and 2nd respondent, particularly as to the price which appears to be the subject of an ongoing dispute
10 between them, it is clear, in our view, that the 2nd respondent took over responsibility for the 8 residents who transferred to their homes, who had previously been cared for by the 1st respondent, and paid a price calculated according to the details of those residents to the 1st respondent.

15 178. It is clear that the price paid by the 2nd respondent is lower than the sum which the 1st respondent believed to have been agreed, and that this remains in dispute between the parties, but for the purposes of this Tribunal, it is not necessary to resolve that dispute. At least part of the price agreed has been paid by the 2nd respondent; if they did not agree it,
20 then there was no reason for them to pay anything to the 1st respondent. The amount is not a matter for us to determine, but there was plainly an agreement between the respondents that the transfer of the residents to the 2nd respondent's premises came with a cost calculated according to the number and funding basis of each of those residents.

25 179. Was there a going concern at the point of transfer? In our judgment, there was. The 1st respondent was carrying out the business of caring for elderly residents at Adamwood. Adamwood closed when the last resident was moved out. That the 1st respondent considered that they could no longer afford to or manage to look after the residents to the standard
30 required does not alter the fact that as at June 2021 they were still caring for them, and that came to an end when, by agreement, they transferred 8 of those residents to the premises of the 2nd respondent.

180. The two who did not transfer were moved elsewhere, according to the wishes of their families, as we understood it.

181. Mr Walker submitted that the 2nd respondent wanted to take all of the employees and bank staff into their employment to look after the transferring residents. Our interpretation of the evidence was that they did not want to take those staff under TUPE, but wanted to explore with the staff whether or not they were willing to move to their employment to benefit from their experience and skills. As Mr Haywood said, the evidence demonstrated that the factual consequences of a TUPE transfer did not occur in this case as the staff were not transferred automatically to the employment of the 2nd respondent, but required to apply, undergo interview and statutory checks and be offered a position if acceptable to the 2nd respondent.

182. Mr Walker submitted that tangible assets did transfer, albeit not required. There was a list of items which were said to have been transferred (134). Mr Hume was dismissive of this list, and indeed of the state of repair of some of these items. We did not consider this to be a significant aspect of the matter, but took the view that these assets did transfer to the 2nd respondent, even if they had no use for them due to their condition. That is essentially a matter for them.

183. Mr Walker submitted that the contracts with each of the residents, whether private or social, transferred to the 2nd respondent. As a matter of fact, this is correct and we accepted this to be the case.

184. He also argued that there was a significant degree of similarity between the activities pre- and post-transfer, that is, that the residents were provided with nursing care in both places, and that there was no suspension or disruption of the activities. Certainly, we accept this to be the case. The residents moved to the new care homes and were immediately cared for in their new premises. The employees who did move to the employment of the 2nd respondent did so in order to look after the residents who transferred, though as we understood the evidence,

they were also deputed to carry out more general caring duties with regard to other residents in the homes.

185. Following the transfer of the residents, Adamwood closed and the 1st respondent ceased its activities. The 1st respondent no longer took responsibility for caring for any residents, and Adamwood, as we understand it, was placed on the market for sale. Their business ceased as at 29 June 2021.

186. The 2nd respondent denied in their ET3 that they had purchased the business carried on at Adamwood as a going concern. It is true that they did not take over the business at Adamwood, but in our judgment, they did take over 8 of the 10 residents who had been cared for there. That they did not buy or lease the premises does not, in our judgment, provide a definitive answer to whether there was a TUPE transfer in this case.

187. We also discount the email of 18 October 2021 (199) from Mrs Wood's former solicitor to her expressing a view about whether or not there was a transfer of an undertaking here. That was a view expressed by a solicitor at a particular point in time, but we are unable to determine what weight should be accorded to that opinion, partly because we do not know what information was provided to him (nor what question he was asked) and partly because he did not give evidence. It was clear, in our view, that Mrs Wood understood that TUPE would apply at the time of the alleged transfer.

188. There was, in addition, an email which was drafted by Lucy Duffin, of the 2nd respondent, to be sent to Alison Vikis at East Lothian Council, one of the funding Councils, on 11 June 2021 (140). That email was not sent to Ms Vikis by Mrs Wood, but it is indicative of the parties' understanding at that stage.

189. In that email, Ms Duffin proposed that Mrs Wood should say:

".../ will have support from the Adamwood staff and support from Mansfield staff to ensure the physical transition is smooth and

comfortable. The staff from Adamwood will move over to Mansfield Care therefor (sic) providing continuity of care and support from friendly, known staff to the ladies of Adamwood. ..

Financially and contractually, the residents will remain on the same terms or better. This has been agreed with Andrew Hume. The same applies to the staff. ..”

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190. In our judgment, this plainly demonstrates an intention, as at 11 June 2021, for the 2nd respondent to take not only residents but the staff from Adamwood. While there is no reference to TUPE, the fact that it was said that the residents would remain on the same terms or better, and that the same applied to the staff, indicates that it was the 2nd respondent's understanding and therefore intention that they would take on the staff from Adamwood on the same terms and conditions. Given Mr Hume's very considerable experience of TUPE transfers across his homes, we conclude from this that he intended and understood that TUPE would apply to the staff moving across to Mansfield Care from Adamwood.

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191. However, that is not the end of the matter. Mr Bathgate, for the 2nd respondent, submitted strongly that there is no economic entity retaining its identity following the move of the residents to the new homes. He argued this, as we read it, on two bases: firstly, that the residents were moved to 2 homes, rather than one, and therefore if they amounted to an economic entity that would be dissipated in that distribution; and secondly, that the staff were not assigned to the particular residents after they moved across and accordingly it could not be said that they were retained in a coherent form.

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192. The difficulty with this argument is that the 2nd respondent did not set up any clear arrangement as to where the Adamwood staff would be deputed, since so few of them actually moved to their employment. While it is clear that staff were not assigned to particular residents in Adamwood (or that if they were, we heard no evidence to that effect), they were

assigned to the care of those residents who were then transferred to the care of the 2nd respondent.

5 193. In our judgment, there was an economic entity - namely, the responsibility for caring for the group of 8 residents who moved to the care of the 2nd respondent - and that retained its identity notwithstanding the distribution of the residents to two different homes. That was simply a matter of practicality: they were subject to the care of the same provider, and thereby the same company responsible for the 2 homes.

10 194. We considered that it was clear that if the staff transferred over to the employment of the 2nd respondent, they would not have been restricted to the care only of the residents who were transferring at the same time. That would be a very limited use of the staff resources and time, and once they had move to the new premises, it was inevitable that they would be deployed to look after other residents.

15 195. That does not, of itself, in our judgment, preclude a finding that there was a TUPE transfer or a service provision change in relation to the undertaking.

20 196. We have therefore come to the conclusion that, considered as a whole, and notwithstanding the absence of any clear agreement between the 1st and 2nd respondents as to the arrangements to be made, there was a transfer of an undertaking in relation to the privately funded residents who transferred in the days leading up to and including 29 June 2021 to the care of the 2nd respondent, and that the staff working in Adamwood at that date should have transferred under TUPE to the employment of the
25 2nd respondent.

197. We have also concluded that in relation to the socially funded residents, there was a service provision change and that the staff should therefore have transferred to the employment of the 2nd respondent.

30 198. We accept that this is not precisely the claim which the claimants have made, in that they only directed their claims against the 1st respondent

However, the 2nd respondent having been introduced as a party to the proceedings, it was necessary for us to determine whether or not there was a transfer of an undertaking or a service provision change, which plainly has major implications for the 2nd respondent.

5 **4. Was Laura Smith an employee of the 1st respondent as at the date of the alleged transfer?**

5. Should Laura Smith or Leah Newman have transferred employment to the 2nd respondent at the date of the alleged transfer?

10 199. We have taken these two issues together, but address them in turn.

200. We recognise that the Hearing was set down to address the issues as they related to the lead claimants, but that the decisions made in relation to those lead claimants would be binding upon the other claimants. That has given rise to some awkwardness, particularly in relation to the
15 question of remedy and also as to whether or not the claimants rejected the opportunity to transfer, and it is necessary for the Tribunal to take care to defer any such individual questions to a later Hearing as required.

201. So far as Laura Smith is concerned, we have taken into careful account the evidence which she gave relating to her own circumstances, and her
20 understanding of the way in which work was allocated to her and to the others.

202. Firstly, it is necessary to understand what was meant by the phrase "bank staff", which was frequently used to describe Ms Smith and her colleagues, primarily, as we saw it, to demonstrate that there was a
25 casual relationship between Ms Smith and the 1st respondent.

203. Reference was made to the NHS nurse bank, and indeed we heard evidence that at least one of the claimants has now moved to that bank. The arrangement there, from the evidence and without seeing any contractual documentation defining the relationships on the nurse bank, is
30 that a body of staff are placed on a register, known as the bank, and

when staff are needed in a particular ward or department, the members of the bank may be called upon to complete a shift there on a day when they are required. There is, as we understand it, no obligation upon the bank administrator to offer any shift on any day to any particular member of the bank, nor is there any obligation on the part of the bank staff to accept a shift when it is offered. In other words, there is no mutuality of obligation between bank and bank staff with regard to the offer or acceptance of work.

204. In our view, the use of the term "bank staff" is unclear in the context of this case, and in particular in the circumstances of Ms Smith, and unhelpful in developing an understanding of the nature of the relationship she had with the 1st respondent.

205. We considered that the following evidence was significant in relation to the circumstances of Ms Smith:

- 15 • Ms Smith commenced employment with the 1st respondent shortly after qualification as a Registered General Nurse (RGN) in 1997, and was employed by them for approximately 20 years;
- Her primary employment was as a staff nurse in the Western General Hospital in Edinburgh, working in the Breast Unit;
- 20 • She took on employment with the 1st respondent in order to supplement her salary, after a colleague informed her that Mrs Wood was looking for staff nurses at Adamwood;
- It was necessary for the 1st respondent to deploy a qualified RGN to each shift;
- 25 • Ms Smith would provide her availability to Mrs Wood in advance of each week, as would the other RGNs, and Mrs Wood would then complete the off duty rota to ensure that all shifts were completed;

- Ms Smith would be deployed to night shifts, according to her availability;
- 5 • Occasionally, Ms Smith would provide additional cover to ensure that an RGN was on duty at all times, when colleagues were unavailable;
- Similarly, if Ms Smith was not available to carry out shifts, she would not make herself available in advance; or if she became unwell, she would not be in a position to cover the shift but would endeavour to contact a colleague to do so in her place;
- 10 • Ms Smith was not provided with a written statement of terms and conditions of employment by the 1st respondent;
- For the most part, she worked 2 night shifts per week on a Tuesday and a Friday, and was paid accordingly. On occasions, she worked additional shifts to help out, and was paid for those shifts. Since her hours varied, her holiday pay would be
15 calculated each 3 months in arrears and paid thereafter;
- Ms Smith did not want to work for the NHS nurse bank as she wanted stability and regularity in her working arrangements; for the same reason she did not wish to be contracted to a nursing
20 agency;
- Ms Smith's working relationship with the 1st respondent remained very stable and regular throughout the approximately 20 years she worked at Adamwood. She understood, as did the other RGNs, that the off duty rota required her and her colleagues to
25 provide regular and certain service to the 1st respondent in order to ensure that all shifts were covered each week.
- Ms Smith's payslips, or the sample disclosed to the Tribunal (S12ff), confirm that she was paid subject to the deduction of PAYE tax and National Insurance (although no actual deductions

were made for National Insurance on the payslips produced), and also subject to the deduction of pension payments. Holiday pay was remitted to her each 3 months, on the basis of the number of hours actually worked over that period.

5 206. We reviewed the authorities in considering whether or not Ms Smith was an employee or an independent contractor, and sought to address the questions in the **Ready Mixed Concrete** case:

- 10 • Did the worker agree to provide his or her own work and skill in return for remuneration? It is clear that Ms Smith did provide her own work and skill in return for remuneration.

- 15 • Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant? In our judgment, there was a sufficient degree of control on the part of the 1st respondent for Ms Smith to be in a relationship of master and servant. Had she not had her primary employment with the NHS, we do not believe that this would have been an issue at all; the nature of the relationship was plainly one in which she was providing regular and consistent service over a period of more than 20 years to the same employer in the same location to the same group of residents (albeit, 20 due to their nature, changing over time).

- 25 • Were the other provisions of the contract consistent with its being a contract of service? In our judgment, the absence of a written statement of terms and conditions does not preclude a clear understanding of the nature of the relationship. She was paid and taxed as an employee; her service was regular and consistent; she was not, in our view, free to refuse to carry out shifts, other than the ways which are expected in an employment relationship, that is, when she was unwell or on holiday; and the 1st respondent was wholly dependent upon her to carry out her shifts. She considered herself under a strong obligation to provide her 30 regular service, and indeed to provide additional service in order to ensure that the shifts were covered.

207. In our analysis, this is not a situation where bank staff were called upon in order to supplement a cohort of regular employees; Ms Smith and her RGN colleagues were the cohort of regular employees. To call them bank staff is a misnomer, and we consider that it would be misleading to assume that the nature of the relationship was one where there was a degree of freedom available to Ms Smith as to whether or not she worked. We accepted Ms Smith's evidence that she would not have accepted a bank position. She required the work, and the pay which came with it, to be regular, initially to help her pay for renovations on her flat and later to provide for her family.

208. The Tribunal then considered, for completeness, whether the irreducible minimum of mutuality of obligation existed between Ms Smith and the 1st respondent. We have already found that Ms Smith considered herself to be under a strong obligation to provide regular service to the 1st respondent; we must determine whether or not she was under such an obligation.

209. Taking into consideration the **Cotswold Developments** decision, we have found that:

- There was one contract between Ms Smith and the 1st respondent, and not a series of assignments;
- Ms Smith did, on the facts, undertake a minimum or reasonable amount of work for the 1st respondent in return for being given that work or pay; she worked 2 night shifts per week, regularly over an extensive period of time, and expected to do so. She relied upon that work because, as she conceded frankly, she relied upon the money it brought her. She plainly felt a sense of loyalty and obligation personally to Mrs Wood, and we consider that that was built up due to the mutual obligation and dependence between them.
- There was such control exercised by the 1st respondent as to make it a contract of employment such as to give rise to a claim

of unfair dismissal. The 1st respondent's entire business relied upon Ms Smith and her other "bank staff" colleagues to cover the entire off duty rota. Without them, the 1st respondent's business would have collapsed. Had Ms Smith left, she would have required to provide a period of notice to allow Mrs Wood to find a replacement, which she would have required to do. Mrs Wood plainly managed Adamwood, and deployed Ms Smith and others to carry out the shifts necessary to take care of the residents. In our view, there is no doubt that Mrs Wood was in charge of the work there, and supervised that work carried out by Ms Smith and others.

210. It is our conclusion, therefore, that Ms Smith was an employee of the 1st respondent, and in particular that she was an employee at the point when the transfer took place on 29 June 2021 .

211. There is no dispute that Leah Newman was an employee of the 1st respondent at 29 June 2021 .

212. It is accordingly our judgment that both Ms Smith and Ms Newman were part of the undertaking at the date of the transfer, and therefore that their employment should have transferred to the 2nd respondent at that date.

6. Was there a failure to consult with staff in breach of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992?

213. On the basis that we have found that MsSmith was an employee of the 1st respondent, and that that finding is binding in relation to the other claimants in her group as lead claimant, it is our conclusion that the 1st respondent had a group of more than 20 employees.

214. In our judgment, there is no basis for any finding that consultation took place under section 188 of the 1992 Act by the 1st (or 2nd) respondent. There was no recognised Trade Union at Adamwood, and no option on the part of the staff to elect a recognised representative. The evidence demonstrates that the information - that Adamwood was to close and the

residents be transferred elsewhere - was disseminated in a desultory and informal manner. Nothing was provided in writing to the staff and there was uncertainty and, frankly, rumour rife within the workplace in the days leading up to 29 June 2021 .

5 215. While it may well be that the reason for this was that Mrs Wood considered that there was no need to consult since she understood that the staff were all to be taken on by the 2nd respondent under TUPE, the question for this Tribunal is whether or not there was any consultation with the staff as to the proposal of redundancy. In this case, there was no
10 such consultation. The staff were simply left to work out what was happening and what they could do to secure their futures.

216. We find, therefore, that there was a failure to carry out consultation in respect of proposed redundancies, and that protective awards should be made.

15 217. As to where the liability for such awards rests, we have carefully considered this and have concluded that this should be a matter for further submissions based on the findings which we have made in relation to TUPE at the remedy hearing to be listed.

20 218. However, since it will be necessary to consider the question of remedy separately in relation to the claimants, based on all of the conclusions reached in this Judgment, we defer our determination of this issue until we have heard further submissions on this point from each of the parties.

25 **Employment Judge: M Macleod**
Date of Judgment: 14 April 2023
Entered in register: 17 April 2023
and copied to parties