EMPLOYMENT TRIBUNALS

Claimants: Ms S Hulme and others
(see attached schedule)

First Respondent: Phonetic Group Limited
Second Respondent: Secretary of State for Business and Trade

Heard at: Manchester by CVP **On:** 18 October 2023

Before: Employment Judge Humble

REPRESENTATION:

Claimant: Mr Byrne, Solicitor
First Respondent: Not in attendance
Second Respondent: Not in attendance

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claims for protective awards fail and are dismissed.

2. The claims for unfair dismissal fail and are dismissed.

3. Mr Hitchener (case number 2417387/20) and Mr King (case number 2417390/20) did not attend the hearing and were not represented. Their claims are dismissed under rule 47.

4. The claims for a failure to consult under Regulation 15 succeed. The first respondent is ordered to pay each of the claimants thirteen weeks pay, which is quantified in the Annex to this Order save for the claim of Mr Wilson (case number: 2417392/20) which is yet to be quantified and is the subject of a separate order.

REASONS

The Hearing

1. The hearing took place on 18th October 2023 by CVP video link. The claimant was represented by Mr Byrne, Solicitor, and evidence was given by Mr Sam Hill and Mr Jonathon Bass. The respondents did not appear and were not represented at the Hearing.

2. There was an agreed bundle of documents which extended to 268 pages. Evidence in chief was taken as read based on the witness statements provided and the tribunal asked some questions of both witnesses by way of points of clarification. Submissions were taken from Mr Bryne on the afternoon and Judgment was reserved.

The Proceedings and the Parties

3. Mr Byrne explained that he was acting for all of the claimants, except for Mr Hitchener and Mr King from whom he said he could not obtain instructions and had therefore ceased acting. In the absence of Mr Hitchener and Mr King, and without any explanation having been provided for their absence, those claims were dismissed under rule 47.

4. The respondents to this claim were originally Phonetic Limited, Silk Insurance Brokers Limited, and the Secretary of State for Business and Trade. Phonetic Group Limited was later added as a respondent. Phonetic Limited, following a creditors voluntary liquidation, was dissolved on 27 December 2021, and the claim against Silk Insurance Brokers Limited was dismissed on withdrawal on 3 July 2023, leaving Phonetic Group Limited and the Secretary of State as the remaining respondents.

5. The respondents did not attend the hearing. A brief response form had previously been submitted by Phonetic Limited and Phonetic Group Limited in November 2020, and a more detailed “amended response” was submitted on 16 December 2020 on behalf of Phonetic Group Limited and Silk Insurance Brokers Limited. The Secretary of State did not submit a response form until much later in the proceedings, in about late July 2023. The tribunal read and took account of those documents.

Issues

6. The following issues were identified and agreed at a previous preliminary hearing, on 3 July 2023:

   <u>Redundancy collective consultation</u>

(1) Did the first respondent (Phonetic Limited now in administration) fail to comply with obligations pursuant to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992?

(2) Specifically did the first respondent:

a) fail to properly elect employee representatives for the purpose of information and consultation; and

b) fail to adequately inform and consult the affected employees and/or appointed representatives.

(3) Should the tribunal find that consultation did take place, did it take place in good time before the first of the proposed dismissals took effect?

(4) Was the information about the proposed redundancies provided to the claimants in writing and/or was it deficient?

(5) Did the first respondent fail to inform and consult with employees/appointed representatives with a view to avoiding redundancies, reducing the number of any redundancies, mitigating the consequences of any redundancies, and in good faith with a view to reaching agreement?

(6) If the first respondent did fail to comply with that obligations as set out in point (1) above what if any protective award pursuant to section 189 and/or 190 and/or 191 and/or 192 of the Trade Union and Labour Relations (Consolidation) Act 1992 are the claimants entitled to?

<u>TUPE</u>

(1) It has been decided by judgement dated 6 April 2023 that there was a relevant transfer between the first respondent [Phonetic Limited] and the fourth respondent [Phonetic Group Limited] in accordance with regulation 3(1)(a) of the TUPE Regulations.

(2) As there was a relevant transfer as set out above, was there a requirement, and as such a failure by the first and fourth respondents to fail to inform and consult with the claimants pursuant to regulation 13 and 14 and/or 15 and/or 16 of the Transfer of Undertakings (Protection of Employment) Regulations 2006?

(3) If so, what level of appropriate compensation does the tribunal consider just and equitable having regard to the seriousness of the failure of the respondents to comply with their duty

(4) Was the sole or principal reason for the dismissal of the claimants (those with sufficient service only), (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?

At the outset of the hearing, the tribunal identified the following further issues which it indicated would also require consideration:

a) In relation to the Protective Award, whether the employer was proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.

b) In relation to the TUPE transfer, and in assessing liability for any protective or unfair dismissal awards, whether any part of Regulation 8 was operable such as to disapply Regulations 4 and 7.

The Law

7. In relation to the protective award, the Employment Tribunal applied the law at sections 188-192 of the Trade Union and Labour Relations (Consolidation) Act 1992.

8. In relation to the TUPE issues, the tribunal had regard to Regulations 4, 7, 8, 13 14, 15 and 16 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. We do not recite those provisions in full here save for Regulation 8, which is of particular relevance, and provides as follows:

8.—(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.

(2) In this regulation "relevant employee" means an employee of the transferor—

(a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or

(b) whose employment with the transferor is terminated before the time of the relevant transfer in the circumstances described in regulation 7(1).

(3) The relevant statutory scheme specified in paragraph (4)(b) (including that sub-paragraph as applied by paragraph 5 of Schedule 1) shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee's employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.

(4) In this regulation the "relevant statutory schemes" are—

(a) Chapter VI of Part XI of the 1996 Act;

(b) Part XII of the 1996 Act.

(5) Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes.

(6) In this regulation "relevant insolvency proceedings" means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.

(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.

9. The tribunal were not drawn to any specific case law but, in relation to the Protective Award, had regard to the principles laid down in the Woolworths litigation, USDAW and another v. WW REALISATION 1 LTD (in liquidation) and

others; ; LYTTLE and others v. BLUEBIRD UK BIDCO 2 LTD; ; RABAL CAÑAS v. NEXEA GESTIÓN DOCUMENTAL SA and another [2015] IRLR 577. In relation to the TUPE insolvency issue, reference was made to case of Oakland v Wellswood (Yorkshire) Ltd [2009] IRLR 250 and the first instance case of Bowater and others v NIS Signs Limited (in liquidation), 1901191/2009.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal made findings of fact only on those matters which were material to the issues to be determined and not upon all the evidence placed before it):

10. All of the claimants were employed by Phonetic Limited ("PL"), a telemarketing business. On or about 25 March 2020, as a consequence of the Covid-19 pandemic lockdown and an associated reduction in work, most of PL's employees were laid off and placed on the government's furlough scheme. Some employees, including Mr Hill who gave evidence before the tribunal, continued to work from home until about April 2020 when they were also placed on furlough.

11. On or about 30 June 2020, the claimants received a letter from PL which stated that it had "appointed liquidators" and that the company, "will cease to trade with immediate effect on 30 June 2020 and, as a result your employment is terminated with immediate effect by reason of redundancy." The letter went on to state that the claimants could make claims for statutory redundancy payments and various other payments from the Redundancy Payments Service, and provided instructions on how to make such claims. The termination date of 30 June 2020 was consistent with the claim form submitted on behalf of the claimants and with the evidence given at the hearing by Mr Hill and Mr Bass.

12. In the event, for reasons which were not explained, there was a delay before PL appointed a liquidator. A further letter dated 18 August 2020 was sent from Leonard Curtis Business Rescue and Recovery to the claimants which stated that PL had commenced liquidation proceedings and they had been appointed to "assist in the formalities". The proposed date for the nomination of the liquidator was 26 August 2020. Mr Byrne, during his closing speech, submitted on behalf of the claimants that in fact the liquidator was not appointed until 18 September 2020. In support of this contention, he provided the tribunal with a copy of a screenshot from Companies House which had that date on it. However, the screenshot showed only the date of the filing of the document at Companies House, and upon 'clicking' the online document itself, this showed that PL gave formal notice of the appointment of the liquidator and of a Creditors Voluntary winding up on 26 August 2020, which was consistent with the letter. It was therefore held that PL appointed the liquidator on 26 August 2020. The company was subsequently dissolved on 27 December 2021.

13. This case was the subject of an earlier preliminary hearing of 6 April 2023 at which the following Judgment was handed down on that same date:

    "a) There has been a transfer of an economic entity from the first respondent [PL] to the fourth respondent [Phonetic Group Limited ("PGL")] pursuant

to Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

b) For the avoidance of doubt the business in its entirety transferred from the first respondent to the fourth respondent. The claimants listed in the attached schedule were all assigned to the first respondents business, which transferred."

14. Unfortunately, the tribunal did not have the benefit of the findings of fact made by that earlier tribunal. For some reason, the claimants had not requested written reasons of the decision and there was no other indication as to the findings. Mr Bryne said that he was not present at the earlier hearing, which was conducted by Counsel, and he had no note from Counsel on the findings; he was only informed that the claimants had "won". Three main findings would have assisted this tribunal in its decision making: the date of the transfer of undertakings; the date of the dismissals; and whether the tribunal had given any consideration to Regulation 8 when reaching its decision.

15. In respect of those three points: the date of the transfer of undertakings was identified (following a written request made by the Secretary of State for Business and Trade), in a letter dated 17 October 2023 in which Employment Judge Butler stated, "the date of the transfer of undertakings was 7 September 2023"; the date of the dismissals is dealt with in the conclusion to this decision; and, in relation to Regulation 8 (7), the tribunal took the view that, this was not considered by the tribunal at the preliminary hearing on 6 April 2023. There were two reasons which led the tribunal to that view: firstly, the judgment itself made reference only to Regulation 3 and no reference Regulations 4(3), 7(1) or 8; and, secondly, the issues to be determined at that hearing made no reference to those Regulations. The issues had been identified at an earlier preliminary hearing, of 11 November 2022, as follows:

"(a) Was there a relevant transfer between the first respondent and the third and/or fourth respondents in accordance with regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE')?

(b) Was there a service provision change between the first respondent and the third and/or fourth respondents in accordance with regulation 3(1)(b) of 'TUPE'?

(c) if so, were the claimants or any of them assigned to any part of the first respondents business which transferred?"

16. Accordingly, having established that PL had appointed a liquidator on 26 August 2020 and that the transfer took place on 7 September 2020, this tribunal was required to consider the implications of those insolvency proceedings. The tribunal had identified Regulation 8 as an issue at the outset of the hearing and Mr Byrne was instructed to address the effect of that Regulation in his submissions. He was given additional time during two separate recesses to examine the point so that he could do so.

17. Mr Byrne's submission focussed upon Regulations 8(1) to (4). The tribunal pointed out however that Reg 8(7) might be applicable since this was a proposed liquidation by way of a Creditors Voluntary winding up whereas Regulations 8(1) to 8(4) were only applicable where insolvency proceedings

were opened "…not with a view to the liquidation of the assets of the transferor". Mr Byrne conceded that this might be applicable but also submitted that the liquidation of PL was an attempt by the owners to avoid the business transferring to the new company, PGL. There was evidence from Mr Bass that, "Anne Bagnell [who was a director of PL, PGL, and Silk Insurance Limited] was still in business post-liquidation but under another company name" and that PGL and Silk Insurance Limited were dealing with one of PL's clients, Certas Energy. Similar evidence was provided by Mr Hill to the effect that he continued to work for Mrs Bagnall's companies after 30 June, initially for Silk Insurance Limited, and later for PGL where he dealt with this same client. Mr Byrne maintained that there should still be a finding for a protective award, and for automatic unfair dismissals for those employees with the requisite service.

18. The tribunal reserved judgment to enable it to give some further consideration to the case, and in particular to the insolvency issue.

19. There appears to be little in the way of binding authorities to assist tribunals when assessing whether an insolvency falls within the ambit of Regulation 8(7). There is a case of Oakland v Wellswood (Yorkshire) Ltd [2009] IRLR 250 which has some helpful guidance, albeit that is a case in which the relevant company was initially in administration rather than under a Creditors Voluntary Liquidation ("CVL"). The tribunal also came across the first instance case of Bowater and others v NIS Signs Limited (in liquidation), 1901191/2009 which dealt with the same point under consideration in this case and in which that tribunal, unlike this one, had the benefit of detailed submissions on the point. That case specifically assessed whether a CVL fell within Regulation 8(7) and whether, at the time of the transfer such insolvency proceedings had been "instituted with a view to the liquidation of the assets" and were "under the supervision of an insolvency practitioner". It went on to assess whether the CVL in that case was a "sham". The claimant in this case did not go as far as to state that the CVL was a sham, but it was suggested that at least part of the reason for the CVL was to evade liability for employee claims upon the transfer. In essence this was an argument, even if not exactly framed in these terms, that the insolvency proceedings were opened for a reason other than the "liquidation of the assets of the transferor" under Regulation 8(7).

20. It is irrefutable that, at the point of transfer on 7 September 2020, PL had been dissolved by a voluntary resolution of its members with a view to a CVL and that it was under the supervision of an insolvency practitioner. In Bowater, it was held that a CVL was "analogous insolvency proceedings…instituted with a view to the liquidation of the assets of the transferor…" since "…under domestic insolvency law the liquidation of the assets is the only possible outcome of a CVL". That point seems unarguable. In the Bowater case, the liquidation was openly undertaken with a view to precluding the operation of TUPE, but it was held that "there is no reason to import into the wording of regulations 8(7) any requirement that the liquidation of the assets should be the only or the principal purpose" of the insolvency proceedings and, further held that, "The CVL is not, therefore, a sham in the sense that it purports to be something which it is not". The tribunal agrees with that analysis.

21. The tribunal was not persuaded in this case that this was a "sham" insolvency. There was some evidence that PGL, in which Ms Bagnell was involved,

operated with some of the clients of PL (hence, no doubt, part of the reason that there was a finding of a TUPE transfer) but it does not follow that the liquidation of PL was a "sham" and there was no meaningful evidence presented to that effect. Even if at least part of the intention of the transferor was to evade the effects of TUPE, that does not negate the effect of Regulation 8(7). The transferor was "the subject of bankruptcy proceedings…instituted with a view to the liquidation of the assets of the transferor" and was "under the supervision of an insolvency practitioner at the time of the transfer." The provisions of Regulation 8(7) are therefore met.

22. It follows therefore that Regulations 4 and 7 do not apply to the transfer from PL to PGL. The effect of that is that the claims for automatic unfair dismissal and for a protective award against the transferee, PGL, do not succeed. Further, there can be no finding against PL since, having dissolved in December 2021, it no longer exists. The claims for protective awards and unfair dismissal therefore fail and are dismissed.

23. As an aside, applying the principles from the Woolworths litigation (reference above), it transpired in the evidence of both Mr Hall and Mr Bass that there were two separate groups of employees at two establishments from late 2019 onwards, one at Macclesfield and one at Stockport. In 2020, there were less than 20 employees at Macclesfield, and more than 20 employees at Stockport. Accordingly, even if a protective award had been operable, it would only have applied to those employees engaged at Stockport.

24. The legal position is different in relation to the failure to consult under Regulation 13, 14 and 15. Liability in relation to the duty to inform and consult is transferred under Regulation 15 and is not disapplied by regulation 8(7). Further, liability for a failure to consult is joint and several on the transferor and transferee.

25. In this case, there was no attempt to appoint representatives under Regulation 14 and no attempt to inform or consult to any extent under Regulations 13. While there may have been some mitigating circumstances, namely the pandemic and associated lockdown, no evidence was presented to the tribunal to deal with the point and no explanation was provided in relation to the lack of consultation. The tribunal therefore find that an award of thirteen weeks pay is the appropriate sum. The tribunal find that the PL and PGL are jointly and severally liable for the award.

26. It seems probable that this finding will not benefit the claimants since the Secretary of State is not liable for any award made under Regulation 15, PL is dissolved and PGL has applied to be struck off the register at Companies House, albeit that strike off application has been suspended.

Conclusions

27. The claims for protective award and unfair dismissal are dismissed for the aforementioned reasons. Regulation 8(7) disapplies Regulations 4 and 7 and PL, which would otherwise be liable, no longer exists as a legal entity.

28. No finding is made as to the precise date of the dismissals in the absence of the findings of the earlier employment tribunal. The relevant date could only be on, or between, 30 June and 7 September 2020. The earlier tribunal found that the claimants were all assigned to PL's business which transferred on 7

September and it appears to be the case therefore that the dismissals took effect on that date. Irrespective of the date when the dismissals took effect during that period, there is no liability attached to PGL because of the operation of Regulation 8.

29. The claim for failure to consult succeeds and PGL is ordered to pay each of the remaining claimants 13 weeks gross pay, save for the case of Mr Wilson for the reasons set out below.

Remedy

30. In relation to remedy, the tribunal accepted the figures provided by the claimants in their respective statements of loss. However, the statutory cap applies to the cases of Martin Young, Jennifer Treanor, and Charlotte Smith. The statutory maximum on a weeks pay at the relevant time was £538 and therefore those three individuals are awarded £6994, which is the maximum payable, rather the uncapped sums which were sought in their statements of loss. No calculation was provided for Angela Bayley, but her gross annual pay was accepted as being £35,364 and therefore the statutory maximum applies to her such that she is also awarded £6994.

31. In the case of Mr Wilson (case number 2417392/20), no statement of loss was provided and there was no other evidence in relation to his pay apparent from the bundle which meant that no order on remedy could be made. A separate order follows this Judgment with which Mr Wilson must comply in a timely manner to avoid his claim been dismissed.

32. The first respondent, Phonetic Group Limited, is therefore ordered to pay the claimant the sums set out in the Annex to this Judgment.

Employment Judge Humble

26th November 2023

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 November 2023

FOR THE TRIBUNAL OFFICE

Annex

Regulation 15: Compensation Awarded

Case Number	Name	Amount
2417372/20	Miss Sophia Hulme	£4381.00
2417373/20	Miss Barbara White	£4018.69
2417374/20	Miss Jennifer Treanor	£6994.00
2417375/20	Mr Phil Griffiths	£4238.00
2417376/20	Miss Natasha Berry	£4041.05
2417377/20	Mr Neil Cameron	£4590.04
2417378/20	Miss Amy Mayers	£4498.00
2417379/20	Miss Charlotte Smith	£6994.00
2417380/20	Mr Jonathon Bass	£4249.96
2417381/20	Mr Christopher Bass	£6249.88
2417382/20	Mr Sam Hill	£3896.10
2417383/20	Mr James Perks	£3684.98
2417384/20	Mr Jamie Baskerville	£2624.96
2417385/20	Miss Lisa Mills	£3783.00
2417386/20	Mr Jordan Daly	£4745.00
2417388/20	Mr Martin Young	£6994.00
2417389/20	Miss Angela Bayley	£6994.00
2417391/20	Mr Alfie Brocklehurst	£4604.08
2417392/20	Mr Paul Wilson	Subject to a separate Order

SCHEDULE OF CLAIMS	
Case Number	**Name**
2417372/20	Miss Sophia Hulme
2417373/20	Miss Barbara White
2417374/20	Miss Jennifer Treanor
2417375/20	Mr Phil Griffiths
2417376/20	Miss Natasha Berry
2417377/20	Mr Neil Cameron
2417378/20	Miss Amy Mayers
2417379/20	Miss Charlotte Smith
2417380/20	Mr Jonathon Bass
2417381/20	Mr Christopher Bass
2417382/20	Mr Sam Hill
2417383/20	Mr James Perks
2417384/20	Mr Jamie Baskerville
2417385/20	Miss Lisa Mills
2417386/20	Mr Jordan Daly
2417387/20	Mr Kieran Hitchener
2417388/20	Mr Martin Young
2417389/20	Miss Angela Bayley
2417390/20	Mr Gary King
2417391/20	Mr Alfie Brocklehurst
2417392/20	Mr Paul Wilson

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2417372/2020 & Others**

Name of case:	**Miss S Hulme & Others**	v	**1. Phonetic Group Limited** **2. Secretary of State for Business & Trade**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 27 November 2023

the calculation day in this case is: 28 November 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
   www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.