Neutral Citation Number: [2024] EAT 128

Case No: EA-2023-SCO-000047-JP and EA-2023-SCO-000049-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street, Edinburgh EH3 7HF

Date: 30 July 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

MANSFIELD CARE LTD

Appellant

- and -

(1) LEAH NEWMAN AND ORS

First Respondents

(2) ROLLANDENE LTD

Second Respondent

- -
- -

Michael Briggs (instructed by Allan McDougall Solicitors) for the **Appellant**
Paul Kissen (instructed by Thompsons Solicitors Scotland) for the **First Respondents**
David Walker (instructed by Morton Fraser MacRoberts LLP) for the **Second Respondent**

And between :

ROLLANDENE LIMITED

Appellant

- and -

(1) LEAH NEWMAN, LAURA SMITH AND ORS

First Respondents

(2) MANSFIELD CARE LIMITED

Second Respondent

- -
- -

David Walker (instructed by Morton Fraser and MacRoberts LLP) for the **Appellant**
Paul Kissen (instructed by Thompsons Solicitors Scotland) for the **First Respondents**
Michael Briggs (instructed by Allan McDougall Solicitors) for the **Second Respondent**

Hearing date: 17 July 2024

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties by email and release to The National Archives.
The date for hand-down is deemed to be 30 July 2024

SUMMARY

Transfer of undertaking - business transfer - service provision change - regulation 3 Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")
Redundancy - consultation on a proposal to make collective redundancies - section 188 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA")
Employment status - contract of employment - section 230(1) Employment Rights Act 1996 ("ERA")

The provision of residential nursing and care services for a group of elderly persons transferred from one care provider to another; the ET held that this amounted to both a business transfer (regulation 3(1)(a) **TUPE**) and a service provision change (regulation 3(1)(b)). It further held that there had been a failure to consult on proposed redundancies, contrary to section 188 **TULRCA**, on the basis that the proposal related to more than 20 employees - finding that the designation of staff as "bank staff" did not mean they were not employees in this context. The first and second respondents (as designated before the ET) appealed: the second respondent challenged all three findings; the first respondent challenged the finding under **TULRCA**.

Held: in respect of the findings under **TUPE** and **TULRCA**, allowing the appeals; in respect of the finding of employment status, dismissing the appeal.

The ET had permissibly found that the use of the term "*bank staff*" did not preclude a finding of a contract of service, and had reached conclusions open to it in respect of the lead claimant, Ms Smith, in determining that she was an employee, as that term is defined by section 230(1) **ERA**. In particular, the ET had done sufficient to identify the existence of a contract giving rise to an irreducible minimum of obligation on both sides (**Nethermere (St Neots) Ltd v Taverna and Gardiner** [1984] IRLR 240 applied).

The ET had, however, erred in finding there had been a failure to consult for the purposes of section 188 **TULRCA**. To the extent it made any finding of a strategic or commercial decision relating to the future employment of the first respondent's employees (**Kelly v Hesley Group Limited** [2013] IRLR 514 applied), the ET had found only that this contemplated their continued employment, pursuant to a **TUPE** transfer, by the second respondent. It had made no finding that there was any proposal that contemplated collective redundancies.

The ET had also erred in finding that there had been a business transfer (pursuant to regulation 3(1)(a) **TUPE**) of the privately funded residents of the care home, and a service provision change (pursuant to regulation 3(1)(b)). Its reasoning did not support the identification of an economic entity divided in this way, and the decision under **TUPE** could not stand. It could not, however, be said that a finding that there was no transfer was inevitable: that was not the necessary inference from the ET's findings of fact and this question would need to be remitted for reconsideration.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal raises questions as to the approach an Employment Tribunal ("ET") is to take when determining whether there has been a relevant transfer under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** SI 2006/246 ("TUPE"); it also gives rise to a question as to when there is an obligation to consult on collective redundancies for the purposes of section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"); a third issue arises as to the employment status of "*bank staff*", and whether, in the particular circumstances of this case, they fall within the definition of "*employee*", as that term is defined by section 230(1) of the **Employment Rights Act 1996** ("ERA").

2. In giving this judgment, I refer to the parties as the claimants and the first and second respondents, as below. The claimants include Ms Newman and Ms Laura Smith (lead claimants before the ET); the first respondent was Rollandene Limited; the second respondent, Mansfield Care Limited. This is my judgment on the appeals of the first and second respondents against the judgment of the Edinburgh ET (Employment Judge M A Macleod, sitting with members A Grant and L Grime, over six days during 2022 and 2023, with two further days for deliberations), sent out on 17 April 2023. By that judgment, the ET held that there had been a relevant **TUPE** transfer of staff from the first to the second respondent on 29 June 2021; that Ms Smith was an employee (as defined by section 230(1) of the **ERA**), of the first respondent at the date of transfer, and that Ms Smith and Ms Newman should have transferred into the employment of the second respondent on that date; and that there was a failure to consult with staff in breach of section 188 **TULRCA**.

3. The first appeal lodged before the EAT (EA-2023-SCO-000047-JP) was that of the second respondent, challenging each of the ET's findings. The first respondent resists that appeal in so far as it relates to the finding that there was a transfer for **TUPE** purposes, but supports the second respondent in its challenges to the applicability of section 188 **TULRCA** and to the decisions as to Ms Smith's employment status; by its own appeal (EA-2023-SCO-000049-JP), the first respondent presents a challenge to the ET's section 188 determination. For their part, the claimants support the second respondent's appeal against the finding of a **TUPE** transfer from the first to the second respondent, but resist the challenges made to the findings on employment status and consultation under section 188 **TULRCA**.

The facts

4. The first respondent operated the Adamwood Nursing Home in Musselburgh, providing residential nursing and care services for up to a maximum of 13 elderly persons, either funded by a local authority or paying privately. The company was owned by Mrs Mairi Wood and her husband; Mrs Wood was a registered nurse and managed the home.

5. In early 2021, Mrs Wood was seeking to wind down the business. Having initially been in negotiations with another care company, in March 2021, she entered into discussions for the sale of the business to the second respondent, a care company that owned and operated more than ten care homes. The initial intention was that the second respondent would build and operate a new care home to which the residents and staff of Adamwood could be moved. Draft heads of terms were drawn up in accordance with this plan, whereby it was stated that all the first respondent's employees would be transferred under **TUPE**. By 15 March 2021, it seemed that these terms had been agreed by the managing director of the second respondent, Mr Andrew Hume, such that Mrs Wood pulled out of the negotiations with the other care company. It was then left to the second respondent's solicitors to draw up the draft agreement, after due diligence had been completed.

6. In May 2021, the first respondent was required to undertake remedial work in compliance with an enforcement notice issued by the Scottish Fire and Safety Service. The issuing of the enforcement notice seems to have caused the Care Inspectorate to then carry out an inspection of Adamwood on 1 June 2021, which resulted in the issuing of a report giving the care home a mark of 2 (weak) in various respects. Although this rating did not mean that Adamwood would have to close, Mrs Wood found this very stressful and determined that she should cease to run the home.

7. As the ET found, at some point in early June 2021 (prior to the meeting on 7 or 8 June), Mrs Wood spoke to Mr Hume and it was agreed that the Adamwood residents would be taken on by the second respondent, moving into two of its existing homes. On either 7 or 8 June 2021, a meeting then took place between Mrs Wood, attending with her son Mr Kenneth Wood, and Mr Hume, attending with the second respondent's operations manager and with the matron of one of the two homes it was proposed would accommodate the Adamwood residents. Although there was a dispute as to what was said at this meeting, the ET was satisfied there had been discussions regarding the staff at Adamwood and that Mrs Wood had left the meeting feeling reassured that not only would the residents be taken over to the second respondent's care homes, but that the

staff would also be looked after. On 10 June 2021, Mrs Wood emailed the Care Inspectorate, and relevant local authorities funding the care of some residents at Adamwood, giving notice that Adamwood would be closing and that, subject to the agreement of families, the residents would be supported in moving from the home from 17 June 2021, pursuant to arrangements agreed with the second respondent, which would also include the employment of Adamwood staff. At that time, there were 29 staff working at Adamwood; 17 being described as "*employees*" (working either full- or part-time), 12 as "*bank staff*".

8. In mid-June 2021, Mr Hume met with the residents' families to confirm the details of the homes to which Adamwood residents were to be moved; he also ensured that the relevant local authorities were content for the residents they funded to be moved to the second respondent's homes. At around the same time, Mrs Wood spoke to staff who were on duty at Adamwood, to tell them that the home would be closing and the residents would be transferring to homes run by the second respondent.

9. On 22 June 2021, Ms Carolyn Casey, a representative of Unison who had been contacted by Ms Newman, met Unison members at Adamwood and sought a meeting with Mrs Wood, who was unable to provide detailed plans for the staff, as she had not been made aware of the second respondent's precise intentions, but said she understood that all would be offered positions. Following this meeting, Ms Casey wrote to Mrs Wood raising her concerns as to how staff at Adamwood had been treated, saying she considered there was a redundancy situation involving over 20 employees such as to give rise to consultation obligations. It seems that Mrs Wood did not respond to that letter; it was her evidence that she could not recall seeing this communication or ever meeting Ms Casey.

10. On 24 June 2021, Mrs Wood again met with the staff on duty at Adamwood, to confirm that the home would be closing. The second respondent's operations manager was also present at this meeting and explained that all staff would be transferring to one of two homes operated by the second respondent, and would be looking after the residents from Adamwood; they would be able to choose which location they preferred.

11. Eight residents of Adamwood were moved to the second respondent's homes over the next week or so, with the final resident leaving on 29 June 2021 (two residents chose not to move to the second respondent's accommodation). Also on 29 June 2021, the second respondent's group operations manager emailed Mr Hume a list of the Adamwood staff, highlighting the names of six individuals who it was said would be "*transferring to Mansfield Care*".

12. Ms Smith was included amongst those highlighted on this list, but was described as "*Bank Contract*". Ms Smith was a registered general nurse ("RGN") who had worked at Adamwood for over 20 years. Although also working as an RGN within the NHS (which she considered her main employment), Ms Smith had continued to work two night shifts per week on a regular basis over an extensive period, with an expectation that this would continue. She was provided with payslips by the first respondent, which showed that she was treated as an employee for tax and national insurance purposes and in respect of holiday entitlement and pension deductions. Her evidence to the ET was clear:

> "75. ... 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."

13. Ms Smith had initially applied for a post with the first respondent shortly after qualifying in 1997; although she had a job as a nurse within the NHS, she had wanted to earn some extra money for a specific purpose at that time; she was appointed following an interview and had continued to work at Adamwood ever since. Given the nature of the nursing services provided at Adamwood, each shift required an RGN to be on duty and Ms Smith was treated as one of the home's RGNs when Mrs Wood was drawing up the "*off duty*" (the list of rotas for each day). As Ms Smith explained:

> "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."

14. When Ms Smith's employment with the first respondent ended, she was provided with a P45, dated 9 July 2021. Having applied to work for the second respondent, after an interview and completion of the relevant checks, Ms Smith was offered a position as RGN at one of the two homes to which Adamwood residents had been transferred. She worked there for four weeks but then decided to leave as the home was much larger than Adamwood and she did not wish to continue working there.

15. As for the first respondent, it ceased its activities when Adamwood closed on 29 June 2021.

The ET's decision and reasoning

The claims and issues to be determined

16. The proceedings before the ET arose from two multiple claims, both brought against the first respondent; one seeking protective awards for a failure to consult on collective redundancies, contrary to section 188 **TURLCA**, the other advancing complaints of unfair dismissal, redundancy pay, unpaid holiday pay, wrongful dismissal and unpaid wages. Having initially entered holding responses denying the claims, by way of further and better particulars, the first respondent asserted a positive case that there had been a relevant transfer under **TUPE** to the second respondent such that there was no redundancy situation and section 188 **TULRCA** did not apply (making an application to join the second respondent to the proceedings); in the alternative, it was contended that the employees of the first respondent at the relevant time numbered less than 20, as those who worked as "*bank staff*" were not to be included in the relevant headcount; in the further alternative, staff were given as much notice as was possible in the circumstances. The application to join it to the proceedings having been allowed, the second respondent entered a response, by which it denied there was a relevant transfer under **TUPE**; alternatively, contended that it had offered each of the claimants employment but they had objected to being transferred; in the further alternative, it submitted that no obligation to consult had arisen under section 188, as there were less than 20 employees at the relevant time.

17. In order to test the arguments raised by the parties, lead claimants were selected. At the full merits hearing, Ms Newman stood as the lead claimant for those who were accepted to have been employees at the relevant time; Ms Smith as the lead claimant for those who had been identified as "*bank staff*". Limiting its decision to questions of liability, the ET identified the issues it had to determine as follows: (1) was there a relevant transfer within the meaning of regulation 3(1)(a) **TUPE**, from the first to the second respondent? (2) was there a relevant transfer as a result of a service provision change, within the meaning of regulation 3(1)(b) **TUPE**? if so, (3) when did the relevant transfer take place? (4) was Ms Smith an employee of the first respondent as at the date of the alleged transfer? (5) should Ms Smith and/or Ms Newman have transferred to the second respondent's employment at the date of the alleged transfer? (6) was there a failure to consult with staff in breach of section 188 **TULRCA**? The ET recorded that the question whether employees had objected to transferring to the second respondent's employment would be a matter to be determined at a subsequent (remedy) hearing.

18. Before setting out its conclusions on the issues thus before it, the ET explained the view it had formed as to credibility of the evidence of those who had been called as witnesses before it (ET, paragraphs 139-149). Relevantly, it found that Mr Hume's evidence was to be treated with "*considerable reserve*" (paragraph 148): as someone who (so the ET found) was "*very familiar with the processes which TUPE required*", he had been "*unwilling to concede any point which might give the impression that at any stage he thought that TUPE might apply*" (paragraph 146).

TUPE

19. The ET found that, while the draft heads of terms had created an expectation in Mrs Wood's mind that the Adamwood staff would transfer to the second respondent under **TUPE**, those terms related to a proposed transfer of residents and staff to a new care home and did not apply to the changed circumstances in June 2021, in respect of which the parties reached a different agreement. The parties had not committed the new agreement to writing but that was not fatal to the potential application of **TUPE**.

20. First considering whether the second respondent had purchased something that could be described as a going concern at the point of the putative transfer (**Spijkers v Gebroeders Benedik Abattoir CV** [1986] 2 CMLR 296), the ET was satisfied that there was, explaining:

> "179. ... 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 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."

21. As for whether that going concern transferred to the second respondent, the ET noted that the second respondent had paid a price to the first respondent, calculated by reference to the numbers of residents, and their respective bases of funding, who transferred to its care. Accepting that the second respondent had not wished to take on the Adamwood staff under **TUPE**, the ET found that it had wanted to explore with them whether they would be willing to move to its employment, so it could benefit from their experience and skills; the staff were, therefore, not automatically transferred to the second respondent's employment but were required to apply, undergo interview and statutory checks, and then, if acceptable, they would be offered a position. It was common ground that some tangible assets transferred to the second respondent albeit the ET accepted this was not a significant issue in this case; equally, although it was not in dispute that the second

respondent had not bought or leased the premises previously used by the first respondent, the ET did not consider this provided a definitive answer to whether there was a **TUPE** transfer in this case. The ET recorded that the contracts with eight of the ten residents of Adamwood (whether subject to private or social funding) transferred to the second respondent, and it accepted there was a significant degree of similarity between the activities before and after the alleged transfer, with the residents being provided with nursing care in the two new homes as they had at Adamwood. The ET further noted that those Adamwood employees who moved to the employment of the second respondent:

> "184. ... 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."

22. The ET also had regard to an email that, on 11 June 2021, the second respondent's operation manager had drafted for Mrs Woods to send to one of the relevant funding local authorities, in the following terms:

> "... 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 (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. .." (see the citation at paragraph 189 of the ET's decision)

Although Mrs Woods never in fact sent this email, the ET considered its content was indicative of the parties' understanding at that point; specifically, it found that it:

> "190. ... 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."

23. Accepting that this was "*not the end of the matter*", the ET addressed the second respondent's argument, that there was no economic entity retaining its identity following the move of the residents to the new homes; the ET noted that this submission was advanced on two bases:

> "191. ... 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."

24. The ET was not, however, persuaded:

> "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."

25. The ET found there had been an economic entity that had retained its identity on transferring to the second respondent, reasoning:

> "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 second 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 two homes.
> 194. We considered that it was clear that if the staff transferred over to the employment of the second 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 moved to the new premises, it was inevitable that they would be deployed to look after other residents.
> 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.
> 196. We have therefore come to the conclusion that, considered as a whole, and notwithstanding the absence of any clear agreement between the first and second 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 second respondent, and that the staff working in Adamwood at that date should have transferred under TUPE to the employment of the second respondent."

26. The ET further found there had been a service provision change for the purposes of regulation 3(1)(b) **TUPE**, explaining its reasoning in this regard, as follows:

> "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.
> 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."

Employee status

27. The ET then turned to the fourth and fifth issues it had identified. Addressing the question of Ms Smith's employment status, the ET considered the use of the term "*bank staff*" was unhelpful in understanding the relationship she had had with the first respondent. Having reminded itself of the facts relevant to that

relationship, the ET addressed the questions identified in **Ready Mixed Concrete Ltd v Minister of Pensions** [1968] 1 All ER 433 QBD, as follows:

> "206. ...
> • 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.
> • 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, due to their nature, changing over time).
> • 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 regular service, and indeed to provide additional service in order to ensure that the shifts were covered."

28. The ET continued:

> "207. 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 first respondent. We have already found that Ms Smith considered herself to be under a strong obligation to provide regular service to the first 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 first respondent, not a series of assignments;
> • Ms Smith did, on the facts, undertake a minimum or reasonable amount of work for the first respondent in return for being given that work or pay; she worked 2 nights 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 first respondent as to make it a contract of employment such as to give rise to a claim of unfair dismissal. The first respondent's entire business relied upon Ms Smith and her other "bank staff" colleagues to cover the entire off-duty rota. Without them, the first 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. […]
> 210. It is our conclusion, therefore, that Ms Smith was an employee of the first respondent, and in particular that she was an employee at the point when the transfer took place on 29 June 2021."

Section 188 ***TULRCA***

29. Turning to the question whether there was a failure to consult with staff in breach of section 188 **TULRCA**, the ET proceeded on the basis that, having found that Ms Smith was an employee of the first respondent and that finding was binding in relation to the other "*bank staff*" (ET, paragraph 213), there was a group of more than 20 employees for these purposes. It then stated its finding that no consultation had in fact taken place with the staff at Adamwood:

> "214. ... The evidence demonstrates that the information - that Adamwood was to close and the residents be transferred somewhere else - was disseminated in a desultory and information 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."

30. As for why there had been no consultation, the ET observed:

> "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 such consultation. The staff were simply left to work out what was happening and what they could do to secure their futures."

31. It then stated its conclusion:

> "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."

32. As for where the liability for such awards should lie, however, the ET took the view that would be a matter for further submissions at the remedy stage.

The legal framework

Transfer of Undertaking (Protection of Employment) Regulations 2006

The protections

33. The **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") were intended to give domestic effect within the United Kingdom to the **Council Directive 2001/23/EC** ("the 2001

Directive"). The **2001 Directive** replaced the earlier **Acquired Rights Directive 77/187/EC**; the 2006 **TUPE** regulations replaced earlier **TUPE** regulations of 1981.

34. The purpose of the **2001 Directive**, and of **TUPE**, is to provide a measure of protection for the rights of individuals working for businesses which transfer from one legal entity to another, in particular, by creating a statutory mechanism for the transfer of employment from the transferor to the transferee; thus regulation 4 provides:

> "(1) Except where objection is made under paragraph (7), 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.
> (2) Without prejudice to paragraph (1), ... 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
> (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
> (3) Any reference in paragraph (1) to a person 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.
> ...
> (7) Paragraphs (1) and (2) shall not operate to transfer the contract of 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.
> (8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.
> (9) Subject to regulation 9, where a relevant transfer involves or would involve 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) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.
> (11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer."

35. In order for regulation 4 to apply, an ET must first find that there has been a "*relevant transfer*" within the meaning of regulation 3. Regulation 3 provides that a relevant transfer can occur in two situations: first,

by a business transfer (regulation 3(1)(a)); second, where a service provision change ("SPC") occurs (regulation 3(1)(b)).

Regulation 3(1)(a) - business transfer

36. A relevant transfer in terms of regulation 3(1)(a) (a business transfer) is defined as:

> "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."

37. By regulation 3(2), an "*economic entity*" is defined as:

> "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."

38. It is further made clear, by regulation 3(6), that:

> "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."

39. The requirement under reg 3(1)(a) that there should be a transfer of "*an economic entity which retains its identity*" can be traced back to **Spijkers v Gebroeders Benedik Abattoir CV** 24/85 [1986] 2 CMLR 296 (and reflects the wording of article 1(b) of the **2001 Directive**); in **Spijkers**, the ECJ made clear that:

> "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 activity."

40. In **Spijkers**, the court emphasised that the assessment must be holistic in nature:

> "13. ... 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 building 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 in those activities. ... 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."

41. The fact, and context, specific nature of the assessment was emphasised by the ECJ in **Ferreria da Silva e Brito and ors** C-160/14 [2016] 1 CMLR 26, where it was held that the fact that the entity that was taken over had then been integrated into the putative transferee's structure, without retaining an autonomous organisational structure, was:

> "32. ... irrelevant for the purposes of applying Article 1(1) of Directive 2001/23, since a link was preserved between, on the one hand, the assets and staff transferred ... and, on the other, the pursuit of activities previously carried on by the company that had been wound up. ...
> 33. ... what is relevant for the purpose of finding that the identity of the transferred entity has been preserved is not the retention of the specific organisation imposed by the undertaking on the various element of production which are transferred, but rather the retention of the functional link of interdependence and complementarity between those elements."

42. In domestic case-law, the leading guidance as to the approach that an ET should adopt in identifying whether or not there was an "*economic entity*" remains that provided in the judgment of the EAT in **Cheesman & Others v R Brewer Contracts Ltd** [2001] IRLR 144 (approved by the Court of Appeal in **McCarrick v Hunter** [2012] EWCA Civ 1399), as follows:

> "10. ... (i) As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective. … (ii) In order to be such an undertaking, it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible. … (iii) In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower. … (iv) An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity. ... (v) An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which the work is organised, its operating methods and, whether appropriate, the operational resources available to it. […]"

43. As for whether there has been a transfer of that economic entity, the EAT in **Cheesman** continued:

> "11... (i) As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed. (ii) In a labour-intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question by also taking over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic activity. … (iii) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation. … However, whilst no authority so holds, it may, presumably, not be an error of law to consider the "decisive criterion" in (i) above in isolation; that, surely, is an aspect of its being decisive, as one sees from the "inter alia" in (i) above, "the decisive criterion" is not itself said to depend on a single factor. (iv) Among the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended. (v)

> In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on. … (vi) Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets (vii) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer. (viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer. … (ix) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor … (x) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such contractual relationship. … (xi) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer. … (xii) The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub-contractor and the start by the successor."

44. In observing (at sub-paragraph (xi)) that the reason why employees are not taken on might be a relevant factor in the ET's assessment, the EAT in **Cheesman** adopted a similar approach to the Inner House in **Lightways (Contractors) Ltd v Associated Holdings Ltd** [2000] IRLR 247, where it was made clear that:

> "23. ... it is ... legitimate to have regard not only to the events directly constituting the transaction but also to the surrounding circumstances. Those circumstances may include the attitudes adopted by a party in anticipation of the transaction. In ECM (Vehicle Delivery Services) Ltd v Cox [1999] IRLR 559, the Court of Appeal held that the employment tribunal was entitled to have regard, as a relevant circumstance, to the reason why the alleged transferee had not taken on certain employees of the alleged transferor, that reason being an attempt to avoid the application of the 1981 Regulations. I agree with that approach. If the evidence discloses that a transaction has been deliberately structured with a view to avoiding the regulations applying, a tribunal is entitled to scrutinise with care whether that attempt has or has not been successful. A declared intention that TUPE will apply, made prior to the transaction by the alleged transferee, may make even easier an inference of transfer."

Regulation 3(1)(b) - SPC

45. A transfer by way of service provision change ("SPC"), is defined by regulation 3(1)(b) **TUPE** as:

> "a situation in which-
> (i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
> (ii) activities cease to be carried out by a contractor on a client's behalf and are carried out instead by another person on the client's behalf ("a subsequent contractor"); or
> (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf […] and are carried out instead by the client on his own behalf,
> and in which the conditions set out in paragraph (3) are satisfied."

46. The conditions in paragraph (3) are:

> "(a) Immediately before the service provision change- (i) There is an organised grouping of employees situated in Great Britain which has as its principle 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 a 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."

47. As Elias LJ pointed out in **McCarrick**, the extension of protection to employees where there is no transfer of an undertaking (or part) for the purposes of regulation 3(1)(a) but where there is a change of service provision:

> "11. ... has no equivalent in the Directive. It applies where a client contracts out a service, or takes it back in-house, or transfers the service from one provider to another. Employees assigned to the service transferred will become employed by the new employer providing that service. In a case where the service is brought back in-house that will be the client itself. The concepts of an undertaking and a service provision are not mutually exclusive: many transfers of a service provision will also constitute a transfer of an undertaking, but this will not necessarily be the case."

48. In construing the legislative provisions relating to a SPC transfer, Elias LJ further observed:

> "22. ... there is ... no conflict between a straightforward construction and a purposive one: the natural construction gives effect to the draftsman's purpose. There are no underlying EU provisions against which the statute has to be measured. The concept of a change of service provision is not complex and there is no reason to think that the language does not accurately define the range of situations which the draftsman intended to fall within the scope of this purely domestic protection."

In taking this view, Elias LJ agreed with the views expressed by Underhill P (as he then was) in **Eddie Stobart Ltd v Moreman** [2012] ICR 919, at paragraph 19:

> "19. ... No doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in the specified circumstances they "go with the work" (though the assumption that in every case that will benefit, or be welcome to, the employees transferred is not universally true). But it remains necessary to define the circumstances in which a relevant transfer will occur, and there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible."

49. In contrast to regulation 3(1)(a), in defining a SPC, the legislative language focuses on the "*activities*", (and see paragraph 30 **Metropolitan Resources Limited v Churchill Dulwich and ors** [2009] ICR 1380 EAT). In **Ceva Freight (UK) Limited v Seawell Limited** [2013] CSIH 59, the Inner House provided guidance as to the approach that an ET is to take when determining whether there has been a SPC for the purposes of regulation 3(1)(b):

> "29. In our opinion, ..., in considering whether this condition may be satisfied in a particular case an appropriate starting point will be the "activities". The term "activities" is, of course, also used in paragraph (1) of regulation 3 as a central element in defining a service provision change. In that context it is in our view evident that it refers to the prestations by way of service or services which (in the variety of service provision change in the present case) required to be provided by the contractor in terms of his contractual arrangements with the client and which, following the cessation of those arrangements, are then performed by the client himself on his own behalf. ...
>
> 30. Having thus identified the scope and nature of the activities, the focus must then pass to the manner in which the contractor has arranged for the performance of the service prestations, or, perhaps more technically, reflecting the wording of the regulations, how the activities are "carried out". Plainly, in very many cases the employees engaged in providing the services to the client ... will also be providing services to other clients or customers. The extent to which their working time is devoted to the client will vary greatly. Accordingly, for obvious reasons, the notion that there be a transfer of their contracts of employment would be vested with much uncertainty. Hence one finds the requirement in paragraph (3)(a)(i) of regulation 3 that there be "an organised grouping of employees" having as its "principal purpose" the carrying out of the activities in question. The requirement is necessary in order to give practical definition - or to set discernible parameters - to the important event, from the perspectives of each of the contractor, the client ... and the employee, of a transfer of the contract of employment.
>
> 31. Having regard to that consideration we agree with the view expressed by the Employment Appeal Tribunal at paragraph 18 of its judgment in *Eddie Stobart Ltd* v *Moreman* that the concept of an organised grouping implies that there be an element of conscious organisation by the employer of his employees into a grouping - of the nature of a "team" - which has as its principal purpose the carrying out *de facto* of the activities in issue.
>
> 32. ...
>
> 33. It appears to us to follow from the structure and wording of the regulations that where the activities are carried out by the collaboration, to varying degrees, of a number of employees who are not organised as a grouping having as their principal purpose the carrying out of the activities for the client, it is not legitimate to isolate one of that number on the basis that the employee in question devoted all, or virtually all, of his or her working time to assisting in the collaborative effort. ...
>
> 34. ... where the activities are carried out by a plurality of employees, the reference in the definition to a single employee does not, in our view, warrant disaggregation of that group of employees."

50. In focusing on the "*activities*" in issue, for the purposes of regulation 3(1)(b)(ii), it is not necessary that these should constitute *all* the activities carried out by the outgoing provider; as Simler J (as she then was) observed in **Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and ors** [2016] ICR 606 EAT:

> "17. ... The word "activities" is not defined, and nor is it qualified in any way by words that could have been used to qualify it. For example, the provision could have said "the activities", "all of the activities" or "the principal activities". There is nothing in the **Regulations** that expressly requires that the relevant activities should constitute "all of the activities" carried out by the outgoing contractor."

51. As for "*the client*", in **Ottimo Property Services Ltd v Duncan** [2015] IRLR 806 EAT, it was held

that, pursuant to section 6 of the **Interpretation Act 1978**, this is to be read so as to include the plural, "*clients*". Whether singular or plural, however, "*the client*" must be identifiable as the specific client on whose behalf the activities are being carried out; see **McCarrick** at paragraphs 37-38. Where "*the client*" is said to comprise more than one legal entity, it must, therefore, still be possible to identify a commonality of intention for the purposes of regulation 3(3)(a)(ii); see **Ottimo** at paragraph 48.

Section 188 Trade Union and Labour Relations (Consolidation) Act 1992

52. By section 188(1) **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") it is provided that:

> "(1) 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 about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by the measures taken in connection with those dismissals."

53. In **Kelly v Hesley Group Limited** [2013] IRLR 514 the EAT expressed the view that (adopting the approach of the Advocate General in **Keskusliitto v Fujitsu Siemens Computers** [2010] ICR 444 ECJ) the obligation to consult for these purposes would only arise:

> "18. ... once the crucial operational decision is taken and the employer is then contemplating or intending the collective redundancies made necessary by that decision."

See also **Akavan Erityisdojen AEK v Fujitsu Siemens Computers** C-44/08 [2009] IRLR 944 ECJ, where it was explained:

> "48. ..., the consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or plan for collective redundancies has been taken."

Employee status

54. The definition of an "*employee*" is contained at section 230(1) of the **Employment Rights Act 1996** ("ERA"), which provides that an "*employee*" is:

> "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

55. The definition is thus predicated on the existence of a contract; for these purposes, "*contract of employment*" is defined at section 230(2) as:

> "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

56. Although there must be a contract between the parties, in determining whether that is a "*contract of employment*", the ET is therefore engaged in a question of statutory, rather than contractual, interpretation (**Rainford v Dorset Aquatics Limited** [2021] 12 WLUK 203 EAT at paragraph 17(1), and see **Autoclenz Ltd v Belcher** [2011] UKSC 41 and **Uber BV v Aslam and Others** [2021] UKSC 5). This question is to be answered by an objective assessment of all the relevant facts; the label given to the relationship by the parties can be a relevant consideration, although it will not be determinative: ultimately, it is for the ET to carry out the requisite multi-factorial assessment and to decide what weight to give the various factors that arise in the case before it (see **Revenue and Customs Commissioners v Atholl House Productions Ltd** [2022] EWCA Civ 501 at paragraphs 122-123).

57. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 1 All ER 433, McKenna J set out the basic requirements for a finding of a contract of service:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …."

58. In **Nethermere (St Neots) Ltd v Taverna and Gardiner** [1984] IRLR 240 CA, in referring to the decision in **Ready Mixed Concrete**, Stephenson LJ characterised the requirements identified by McKenna J as demonstrating that:

> "There must ... be an irreducible minimum of obligation on each side to create a contract of services."

59. This mutual "*minimum of obligation*" was further explained by the EAT in **Cotswolds Developments Construction Ltd v Williams** UKEAT/0457/05, as follows:

> "55 ... it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is *some* obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. ... It is plain, therefore, that the existence and exercise of a right to refuse work ... [is] not critical, providing that there was at least an obligation to do some. ... Although Kerr LJ dissented in the result [in **Nethermere (St Neots)**], he too expressed the "inescapable requirement" as being that the purported employees "… must be subject to an *obligation to accept and perform some minimum*, or at least reasonable, amount of work for the alleged employer.""

60. In **Nethermere (St Neots)**, the court had been concerned with cases involving home-workers, who were able to fix their own hours of work, take holidays and time off when they wished, and could vary how much work they were willing to take on, or even to take none, on a particular day. Acknowledging that these might be relevant factors for the ET to consider in determining whether or not there was a contract of service, Dillon LJ was clear that they would:

> "... not as a matter of law negative the existence of such a contract."

Going on to observe (see p 635B):

> "I find it unreal to suppose that the work in fact done by the Applicants for the company over the not inconsiderable periods which I have mentioned was done merely as a result of the pressures of market forces on the Applicants and the company and under no contract at all."

61. A similar approach was also adopted by the EAT in **Khan v Checkers Cars Ltd** UKEAT/0208/05:

> "26. ... (c) The phrase "mutuality of obligation" should be understood as referring to an obligation to provide some minimum of work. It does not require the would-be employee to be obliged to work whenever asked by the purported employer. It permits the purported employee to refuse work, although this may involve a factual assessment as whether any refusal is so extensive as to deny the existence of an obligation even to do a minimum of work."

The approach on appeal

62. In considering the reasoning of the ET, I remind myself of the guidance provided by Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021 IRLR 1016 at paragraphs 57-58. In particular, I bear in mind the need to read the ET's decision fairly and as a whole, avoiding an overly pernickety critique (see *per* Mummery LJ in **London Borough of Brent v Fuller** [2011] ICR 806 CA, at p 813; cited in **DPP v Greenberg** at paragraph 57(1)). The reasoning provided by the ET should, however, enable the parties to understand why they lost (or won) (*per* Bingham LJ in **Meek v City of Birmingham District Council** [1987] IRLR 250 CA; cited in **DPP v Greenberg** at paragraph 57(3)) and the appellate tribunal to understand how it reached the decision it did (**English v Emery Reimbold & Strick Ltd** [2002] EWCA Civ 605, [2003] IRLR 710, *per* Lord Phillips MR at paragraphs 9-21). It is, moreover, not the role of the appellate tribunal to comb through an obviously deficient decision for signs of missing elements in the reasoning, to then try to construct an adequate set of reasons (**Anya v University of Oxford** [2001] EWCA Civ 405, [2004] ICR 828, *per* Sedley LJ at paragraph 26).

The appeals and the parties' submissions

The appeals

63. The second respondent pursues ten grounds of appeal. The first six relate to the ET's findings under **TUPE**: (1) under regulation 3(1)(a), the ET erred in holding (paragraph 196) that "*there was a transfer of undertaking in relation to privately funded residents*"; (2) equally, under regulation 3(1)(b), the ET erred in holding (paragraph 197) there was a SPC "*in relation to the socially funded residents ...*"; (3) in any event, under regulation 3(1)(a), the ET erred in failing to identify the "*economic entity*" said to have transferred; (4) moreover, the ET failed to identify which employees were assigned to which of the two transferring entities for the purposes of regulation 4; (5) the ET also erred in affording excessive weight to the intention of the parties; and (6) the ET erred in its approach to regulation 3(1)(a) given it had made no findings consistent with any retention of identity. As for the application of section 188 **TULRCA**, the second respondent pursues two grounds of challenge: (7) the ET erred in finding a failure to consult when there was no proposal to dismiss; and (8) to the extent that it was said that a proposal to dismiss could be inferred from staff objections to transferring to the second respondent, that could not amount to a dismissal for section 188 purposes. By its final two grounds of appeal, the second respondent challenges the ET's decision relating to Ms Smith's employment status, contending: (9) the ET erred in holding she was an employee of the first respondent absent a finding of mutuality of obligation; and (10) it further erred in finding she was an employee when it had found only that she had an obligation to work born out of "*a sense of loyalty and obligation personally*" (paragraph 209), which could not form the basis of any obligation in law.

64. By its appeal (also raised as a cross-appeal to the second respondent's appeal), the first respondent raises one ground of challenge, contending that the ET erred in finding there had been a failure to consult under section 188 **TULRCA** when there was no evidence, or findings of fact, to support any conclusion that the first respondent had dismissed or proposed to dismiss any of the claimants.

*The **TUPE** appeal*

The second respondents' case

65. The second respondent says it is clear (*per* paragraphs 196 and 197 of the ET's decision) that the ET found two transfers had occurred simultaneously: one, of the privately funded residents, by way of a business

transfer; the other, of the socially funded residents, by way of a SPC. That conclusion was not foreshadowed in the ET's reasoning and was inconsistent with its finding at paragraph 193. The conclusions stated at paragraphs 196 and 197 could not be disregarded and were fatal to the decision (grounds (1) and (2)). Although possible to find two different forms of transfer, an ET would need to consider the questions identified by regulation 3 in respect of each (business transfer and SPC); that had not been done. In particular, in finding there was a SPC, the ET had failed to identify "*the client*", and - to the extent "*the client*" comprised residents or funding authorities - any commonality of interest (*per* **Ottimo**). Moreover (ground (3)), in considering if there had been a business transfer, the ET erred in identifying whether an economic entity (consisting of privately paying residents or otherwise) existed: "*responsibility for caring for the group of 8 residents*" (ET, paragraph 193) was an economic activity, it was not synonymous with an entity (*per* **Cheesman** paragraph 10(v)). This error also tainted the approach to the question whether any economic entity had retained its identity (ground (6); **Cheesman** paragraph 11); the ET failed to properly weigh the factors it found militating against such a finding (that the second respondent did not use the tangible assets that had transferred, or the Adamwood premises; that few staff moved to the second respondent, and those that did were not dedicated to the care of former Adamwood residents, who had moved to two separate homes). More generally, (ground (4)) the ET failed to identify which employees were assigned to the two transferring entities (fatal to its finding of SPC (**Ceva Freight**), but also a requirement under regulation 4). Further (ground (5)), the ET gave undue weight to the parties' intentions.

66. The second respondent submits that, given the factors identified as militating against a transfer (as summarised in relation to ground (6) above), it could only be concluded that there had been no **TUPE** transfer.

The submissions of the first respondent

67. For the first respondent, it was acknowledged that the ET's finding that the transfer of residents had given rise to two separate transfers (business transfer of the privately funded residents, and a SPC of those residents who were socially funded) was a surprise and the objections made to the conclusions thus stated at paragraphs 196 and 197 (grounds (1) and (2) of the second respondent's appeal) could not be dismissed as merely pernickety criticisms. That said, considered in the context of the facts of this case (involving the transfer of nursing and care services for a particular group of residents), contrary to ground (3), the ET had

weighed up all the relevant factors (*per* **Spijkers**) and, while accepting paragraph 193 might have been better worded, it could not be said that it had erred in its approach to the identification of an economic entity, nor, contrary to ground (6) that it had impermissibly found the entity had retained its identity (applying **Cheeseman**); in particular, the fact that residents, staff, and equipment had been integrated into the second respondent was not fatal to there having been a relevant transfer (**Silva e Brito**); equally, the fact that the staff did not all transfer was not determinative and the ET was entitled to have regard to the reasons why they had not done so (**Cheesman** paragraph 11 (xi)). As for the SPC finding, it was apparent that the ET had found this fell under regulation 3(1)(b)(ii) and it was not fatal that it had not identified the client (whether the residents or the local authorities), but had focused on the relevant activities (see **Metropolitan Resources** paragraphs 27-30). The question of assignment (ground (4)) did not arise as the second respondent was a single legal entity and the ET was not determining the particular cases of each individual employee. As for ground (5), the ET had been entitled to consider the intention of the parties (per **Lightways (Contractors)**), but had, in any event, been clear this was not determinative.

68. The first respondent says the finding of transfer should be upheld (any error at paragraphs 196 and 197 not being fatal).

The claimants' position

69. It is the claimant's case that there was no **TUPE** transfer. They support the second respondent's appeal.

Section 188 ***TULRCA***

The second respondent's case

70. By ground (7), the second respondent contends (*per* **Kelly**) that "*proposes*" must be understood as the taking of a "*crucial operational decision*" in relation to the redundancies. The ET had, however, not made such a finding in the present case; rather, the findings recorded at paragraph 215 would support a finding that there was no proposal to dismiss and were inconsistent with the conclusion (at paragraph 216) that there should have been consultation regarding such a proposal. Ground (8) was put on a contingent basis, albeit the ET had made no findings as to whether individual staff had objected to transferring to the second respondent.

The position of the first respondent

71. The first respondent agrees with ground (7) of the second respondent's appeal.

The position of the claimants

72. The claimants accept (and contend) that, in the event of a **TUPE** transfer, there can have been no breach of section 188 **TULRCA**. Should the ET's finding under **TUPE** be set aside, however, the claimants submit that the ET's findings must mean that there was a proposal to dismiss by reason of redundancy such as to give rise to a duty under section 188.

The employee status appeal

The second respondent's case

73. The second respondent contends that the ET had made no finding of mutuality of obligation between the first respondent and Ms Smith (ground 9); to the extent it had found any obligation, that arose from personal loyalty, not from any contractual obligation (ground 10). It argues that the ET failed to identify the necessary ingredients of a contract: the factors it considered at paragraphs 207-210 described a dynamic that had evolved between two parties over a period of time; contracts require offer and acceptance and cannot emerge out of a state of mutual dependence. The ET needed to identify the contractual terms agreed by the parties and to specify what, if any, obligation then arose; a finding that Ms Smith was required to undertake "*a minimum, or at least a reasonable, amount of work*" (ET, paragraph 209) did not abrogate the requirement for the contract to specify what that was - a requirement to carry out a "*reasonable*" amount of work, in the absence of any finding as to what that entailed, was too vague and could not form the basis of ongoing contractual relationship, such as would give rise to a mutuality of obligations.

The first respondent's position

74. The first respondent does not oppose grounds (9) and (10) of the second respondent's appeal.

The claimants' submissions

75. In respect of the point made at ground (10), the claimants point out that the reference to Ms Smith's sense of personal loyalty was expressly placed in the context of the ET's finding that this had built up due to the mutual obligation and dependence between her and Mrs Wood, which arose from the pre-existing and concurrent mutual legal obligations that underpinned the relationship and had done for a number of years (a factor seen as significant in **Nethermere (St Neots)**). As for ground (9), the second respondent's case was premised on it being a requirement that there had to be some quantifiable minimum obligation on Ms Smith, but that was unnecessary in circumstances where there was an obligation to carry out a reasonable amount of work (see **Khan v Checkers** at paragraph 26(c)), and there was no reason why the contractual requirement should not be expressed in terms of what was "*reasonable*" (as was commonplace in work contracts, e.g. in relation to mobility clauses). In any event, the ET had found that Ms Smith had regularly worked a minimum of two shifts per week over a very long period of time, which gave rise to a sufficiently quantifiable obligation.

Analysis and conclusions

Employee status

76. I have started by considering the position of Ms Smith and the second respondent's appeal against the ET's finding that, as the date of any transfer, she was an employee of the first respondent. The first respondent having raised the question whether "*bank staff*" were to be treated as employees for the purposes of any claim under section 188 **TULRCA**, with the agreement of the parties, Ms Smith's case was selected to be treated as a lead case on this issue. In its findings, the ET was clear that the use of the term "*bank staff*" in the context of the first respondent's workforce was unhelpful, and not certainly determinative of the question whether the individuals in question were "*employees*" of the first respondent at the time of any transfer. In Ms Smith's case, the ET accepted that she would not have accepted a "*bank*" position and this label was a "*misnomer*" as 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*" (ET, paragraph 207).

77. In thus explaining its rejection of the reference to "*bank staff*" in Ms Smith's case, it seems to me clear that the ET was expressing a finding of a contractual obligation of service that she owed to the first respondent. The second respondent objects that the ET did not expressly set out its findings as to the offer made to Ms

Smith, and her acceptance of that offer and on what terms; it contends that such findings were required to enable the ET to then determine whether the requisite irreducible minimum of obligation existed between the parties. That, however, is a challenge that, in my judgement, fails to engage with the ET's findings of fact in this case: that is, that, after interview, Ms Smith had been offered a position with the first respondent as one of its cohort of RGNs, and that she accepted that position, thereafter working for the first respondent (for which she was appropriately remunerated), undertaking two night shifts per week on a regular basis for some 20 years. On the basis of those findings, the ET reached the entirely permissible decision that, over the period in question, Ms Smith had a continuing contractual relationship with the first respondent (not simply a series of contracts for each assignment), that she considered herself under an obligation to undertake a minimum amount of work for the first respondent, under the control and direction of Mrs Wood, and that she would have been required to give notice had she decided to leave. That, I am satisfied, provides sufficient findings as to the existence of a contract between the first respondent and Ms Smith, that gave rise to an irreducible minimum of obligation on each side so as to amount to a contract of service (*per* **Ready Mixed Concrete**, **Nethermere (St Neots)**, and **Cotswolds Developments**).

78. That conclusion is not undermined by the fact that the ET characterised the obligation upon Ms Smith as being to "*undertake a minimum or reasonable amount of work*". The ET had permissibly concluded that the absence of a document recording the parties' respective obligations was not fatal (ET, paragraph 206) and had gone on to find that Ms Smith was part of the first respondent's cohort of RGNs, deployed by it, as required, to provide the necessary care to residents (ET, paragraphs 207 and 209). As such, the ET found Ms Smith had an expectation that she would be required to work at least two nights per week (ET, paragraph 209), and it was satisfied that she had, in fact, worked two nights a week on a regular basis for an extensive period (some 20 years) (ET, paragraph 209). To the extent that Ms Smith might have been free not to work additional shifts as requested by the first respondent (although that would seem contrary to the ET's findings at paragraphs 206 and 207), that would not, in any event, negative the existence of a contract of service (**Nethermere (St Neots)**, **Cotswolds Developments**, **Khan v Checkers**).

79. By ground (10), the second respondent further contends that the ET had only found that Ms Smith had a moral obligation (arising from a sense of personal loyalty to Mrs Wood); that, it argues, was insufficient to found the legally binding contractual duty required. This submission arises from the ET's reference to what it

found to be Ms Smith's "*sense of loyalty and obligation personally to Mrs Wood*" (ET, paragraph 209). As the claimants point out, however, this has to be seen in context; in particular, the ET went on to state that this "*was built up due to the mutual obligation and dependence between them*", which would seem to refer back to its earlier finding of a long-standing contractual relationship, whereby Ms Smith expected to be provided with at least two shifts per week and, as a matter of fact, had worked for the first respondent on that basis for a very long period of time. A sense of personal loyalty to an employer might well be a feature of many contracts *of* service; contrariwise, that might be a less common characteristic of those who work under a contract *for* services. The ET was entitled to see this as a potentially relevant factor; I do not infer that it thereby confused what might be seen as a moral sense of loyalty with a contractual obligation.

80. For all the reasons provided, I am satisfied that the ET made no error of law in its approach to the question of employment status in relation to Ms Smith. Grounds (9) and (10) of the second respondent's appeal are duly dismissed.

Section 188 ***TULRCA***

81. Considering next the ET's decision of a breach of the duty imposed by section 188 **TULRCA**, it is common ground that this cannot stand (albeit that the claimants would still seek to pursue their case in this regard if the ET's finding under **TUPE** were to be set aside).

82. Having determined that more than 20 employees of the first respondent were to be affected by the closure of Adamwood, the ET went on to find that there had been no consultation under section 188 on the part of either respondent. There was no claim before the ET of a failure to consult under **TUPE** itself (see regulations 13-16 **TUPE**), but the ET's finding that there had been a relevant transfer (or transfers) would suggest that the employees in question (assuming they had been assigned to the organised grouping of employees subject to that transfer) should not have been dismissed but should simply have transferred to employment with the second respondent. Even if it were possible that the ET had in mind that there could be a proposal for collective redundancy dismissals notwithstanding a transfer under **TUPE**, it would still have needed to make the requisite finding of such a proposal; that is, that the crucial operational decision had been taken such as to necessitate the contemplation of collective redundancies (*per* **Kelly**). To the extent that it made any finding of a strategic or commercial decision relating to the future employment of the first

respondent's employees, however, the ET seems only to have found that this contemplated their continued employment, pursuant to a **TUPE** transfer, by the second respondent. Thus, the ET found that Mrs Wood had understood that the first respondent's staff were all to be taken on by the second respondent (ET, paragraph 215), and that this had similarly been the intention of the second respondent itself (ET, paragraph 190).

83. Given the findings made by the ET, I am unable to see that its conclusion at paragraph 216 (that "*there was a failure to carryout consultation in respect of proposed redundancies*") can stand. I therefore allow the first respondent's appeal and ground (7) of the second respondent's appeal. In these circumstances, it is unnecessary for me to reach any conclusion on ground (8).

TUPE

84. Turning then to the ET's findings under **TUPE**, I consider that the real issue raised by this appeal arises from the ET's stated conclusions at paragraphs 196 and 197 of its decision: that is, that there was both a business transfer of the privately funded residents, *and* a SPC of those residents who were socially funded. These conclusions were not foreshadowed at any previous stage of the ET's reasoning (in oral submissions, these conclusions were described as a "*plot twist*"), and there is no explanation as to how it is said that there had been an economic entity comprising the privately funded residents of Adamwood (or how such an entity then retained its identity), or as to how the ET had identified an organised grouping of employees that had the principle purpose of carrying out of nursing and caring services to the socially funded residents. As Mr Walker (on behalf of the first respondent) fairly conceded, the objections raised by the second respondent's appeal in this regard (grounds (1) and (2)) cannot be dismissed as "*pernickety critiques*" (as decried by Mummery LJ in **Brent v Fuller**). The ET's reasons should be sufficient to enable the parties to understand why they lost (or won) (**Meek**), and to allow an appellate tribunal - adopting a fair reading of the decision as a whole - to understand the process of reasoning that led the ET to the conclusion it reached (**English v Emery Reimbold**). In the present case, however, the ET has not identified and recorded those matters critical to its decision that there was a business transfer of privately funded residents and, at the same time, a SPC of those who were socially funded. On the face of the ET's reasons, those conclusions cannot stand. The question that then arises is whether that must be fatal to the ET's judgment under **TUPE**.

85. In respect of the finding of a SPC transfer, I consider that the answer must very clearly be in the

affirmative. Proceeding on the assumption that the ET had seen this as a SPC falling within regulation 3(1)(b)(ii) (although not stated by the ET, a fair reading of its decision would suggest that it had in mind a transfer from one contractor to another), there is no identification of "*the client*" for these purposes. Mr Walker says it can be inferred that "*the client*" must refer to either the residents in question or to the local authorities funding their care (it being possible for "*the client*" in this context to refer to more than one individual or entity; *per* **Ottimo**); in either event, he says it cannot be fatal to the ET's decision, given that its focus was correctly on the "*activities*" (see **Ceva Freight**). I am, however, not persuaded. Even allowing that "*the client*" might comprise more than one legal person (**Ottimo**), it must still be possible to identify the specific client on whose behalf the activities are being carried out and who has the relevant intent for the purposes of regulation 3(3)(a)(ii) (*per* **McCarrick**); that is not something that can be discerned from the reasoning provided in this case. Equally, even allowing that the "*activities*" need not constitute all the activities carried out by the first respondent (**Arch Initiatives**), it should be possible to identify the scope and nature of the activities being carried out on behalf of that client, and the organised grouping of employees which had, as its principal purpose, the carrying out of those activities (see **Ceva Freight**). The function of the EAT is not to seek to construct an arguable line of reasoning that might support the ET's conclusion (*per* **Anya**), and I am unable to see that the reasons provided in this case explain how it was determined that a relevant transfer by way of a SPC had occurred.

86. The difficulty with the ET's finding of a SPC arises in part because the reasoning that precedes the conclusions at paragraphs 196 and 197 is really focused on the considerations that arise under regulation 3(1)(a) **TUPE**. Thus, the ET identified the economic entity at the point of transfer ("*the going concern*", ET paragraphs 177-179, or the "*economic entity*", ET paragraph 193), and went on to ask itself whether what then transferred over to the second respondent retained its identity (ET paragraphs 192-195).

87. In carrying out that assessment, contrary to the second respondent's contention (ground (5)), I do not consider the ET erred in having regard to the attitudes of the parties at the relevant time: that was a potentially relevant factor (**Lightways (Contractors)**; **Cheesman** paragraph 11(xi)) and it was for the ET to determine what weight should be given to it. In any event, as the ET made clear (paragraph 191), it did not see the respondents' intentions as determinative, but permissibly had regard to what it found to be the understanding of those involved at the time (see, in particular, paragraphs 188-190). That took on a particular relevance given

the defensive nature of Mr Hume's testimony (ET, paragraphs 146-148), but it also provided contemporaneous evidence of what those most involved understood would be transferring from the first to the second respondent, pursuant to the agreement reached between them. In particular, the ET was entitled to see the apparent understanding that the staff would transfer, on the same terms and conditions, as indicative of how the organisation of the relevant activities were intended to continue post-transfer.

88. The second respondent contends that, in any event, the ET failed in its task in identifying what constituted the "*economic entity*" prior to any transfer, and as to whether that retained its identity thereafter. Mr Briggs submitted that the reference to "*responsibility for caring for the group of 8 residents who moved to the care of the 2nd respondent*" was merely a finding as to the activity that was carried out (akin to the selling of goods; of itself, that was not an entity (per **Cheesman** paragraph 10(v)). Moreover, to the extent that the ET had made findings as to what had transferred to the second respondent, those were only consistent with there being no retention of identity; the decision should be substituted by a finding that there had been no transfer.

89. There is some force in the second respondent's further criticisms of the ET's reasoning; in particular, its identification of the economic entity in existence prior to any transfer is limited to a description of the activities carried out: the care services provided to the elderly residents at Adamwood (ET, paragraphs 179 and 193). As the EAT observed in **Cheesman**, "*an activity of itself is not an entity*". I do not, however, agree that the ET's finding is analogous to a finding of an activity of selling goods: providing care to a group of potentially vulnerable persons is very different from selling goods, and the actual provision of the service, through the staff concerned, will inevitably be a key feature of any entity engaged in this activity. Moreover, as Mr Walker observed in oral submissions, the provision of nursing and caring services required a dedicated group of employees, organised in a particular way (each shift having to have a RGN and a certain number of other staff). Although it is right to say that the ET's particular conclusions at paragraphs 179 and 193 fall short in identifying these features as forming any pre-transfer economic entity in this case, a more holistic reading of the decision permits the identification of an entity formed of an organised grouping of employees, managed in a particular way, and specifically and permanently assigned to the common task of providing nursing and care services to elderly residents in a care home setting.

90. Similarly, the transfer of the residents in question - the customer group for whom the nursing and care

services were provided, and the contracts that each resident had for those services - was entirely capable of amounting to a relevant transfer for the purposes of regulation 3(1)(a) **TUPE**. Each resident went to one of two care homes operated by the second respondent, and continued to receive nursing and care services from those employees of the first respondent who had also transferred. To the extent that few of the Adamwood staff transferred to the second respondent's employment, the ET would have been entitled to consider the reasons why that had been the case (**Cheesman**, paragraph 11(xi)); more generally, the fact that the entity that had transferred had been integrated into the structure of the second respondent need not have been fatal (**Ferreria da Silva**).

91. The difficulty with drawing these points out of the ET's reasoning is that they cannot be reconciled with its further conclusion that there was a business transfer in respect of the first respondent's privately funded residents (ET, paragraph 196). Adopting a holistic approach to the ET's reasoning does not entitle me to cherry pick those findings that would seem to support one conclusion, whilst dismissing other findings that would undermine it. Grounds (1)-(4) and (6) of the second respondent's appeal must be upheld, although I disagree with its submission that it must inevitably be held that there was no relevant transfer for **TUPE** purposes; that does not seem to me to be the inevitable conclusion from the facts found by the ET in this case.

Decision and disposal

92. For the reasons provided:

(1) In respect of the second respondent's appeal against the ET's finding of a relevant transfer for the purposes of **TUPE**, I uphold grounds (1)-(4) and (6) but dismiss ground (5).

(2) In respect of the first and second respondent's appeals against the ET's finding under section 188 **TULRCA**, these are allowed.

(3) The second respondent's appeal against the ET's finding in relation to Ms Smith's employment status is dismissed.

93. As for disposal, while I accept that the ET's judgment under **TUPE** cannot stand, I do not agree with the second respondent's submission that it is inevitable that it should be replaced by a finding to the contrary. In these circumstances, the question whether there was a relevant transfer for **TUPE** purposes must be remitted for reconsideration.

94. In circulating my draft judgment to the parties, I expressed the preliminary view that, having regard to the guidance provided in **Sinclair Roche & Temperley v Heard and Fellows** [2004] IRLR 763 EAT, remission of this matter should be to the same ET. I allowed, however, that all parties should have the opportunity to make submissions on this question and have re-visited the issue of remission in the light of the written representations thus made.

95. For the first respondent, it is contended that remission should be to the same ET, making clear that the only matter being remitted back is the determination of the issue whether there was a relevant transfer under regulation 3(1)(a) **TUPE**. The claimants and the second respondent take a different view, arguing that this matter should be remitted to a differently constituted ET for re-hearing, alternatively that remission should be to the same ET with the opportunity being given to the parties to make further submissions on the question whether there had been a relevant transfer.

96. In my judgement, the appropriate course is for this matter to be remitted to the same ET (to the extent this remains practicable) for reconsideration of the question whether there was a relevant transfer for **TUPE** purposes. Contrary to the submissions of the claimants and the second respondent, I do not consider that the passage of time will render this unfair: the ET's decision was sent out in April 2023 and I would expect the Employment Judge and lay members to be able to refresh their memories of the evidence from their notes and from the (unchallenged) detailed findings of fact relevant to this issue, as set out in their written reasons. Certainly, given the findings already made on the evidence, this would be the more proportionate course, and there is no suggestion of any concern as to the professionalism or fair-mindedness of the ET. As for the extent of the remission, from the submissions of the first respondent on disposal, I understand that its case will be put solely on the basis of there having been a business transfer under regulation 3(1)(a) **TUPE**; that will therefore set the parameters for the ET's reconsideration. This matter having thus been remitted, further case management must be for the ET itself. I would expect that it will find it helpful to receive further submissions from the parties, with particular focus on the case-law and guidance provided in this judgment, but whether that is limited to written representations or allows for an oral hearing must be a matter for the ET.