Case Numbers: **2500735/2017, 2500744/2017, 2500747/2017, 2500757/2017, 2500758/2017, 2500759/2017**

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		*Respondents*
	AND	**Lifeline Project Limited (In Administration) (First Respondent)**
Ms G Hollande **Ms B Coleman** **Ms K Piercy** **Ms C Banks** **Ms D Ferry** **Ms J Flounders**		**Hartlepool Borough Council (Second Respondent)**

JUDGMENT ON PRELIMINARY HEARING

Heard at: Middlesbrough **On: 16 November 2017**
Deliberations: 8 December 2017

Before: Employment Judge Shepherd

Appearances

For the Claimants: In person, apart from Ms Hollande who was represented by Mr Devlin
For the First Respondent: No appearance
For the Second Respondent: Mr Sweeney

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claim of failure to inform and consult against the first respondent succeeds and the first respondent is ordered to pay each of the claimants nine weeks' pay.

2. The transfer of the service provision from the first respondent to the second respondent did not transfer the employment of the claimants to the second respondent and the claims against the second respondent are dismissed.

REASONS

1. Ms Piercy agreed to represent the claimants apart from Ms G Hollande who was represented by Mr Devlin. There was no appearance on behalf of the first respondent which was in administration. It had been indicated by the administrators that they did not intend to appear. The second respondent was represented by Mr Sweeney.

2. I heard evidence from:

Gwen Hollande, claimant;
Tina Banks, claimant;
Barbara Coleman, claimant;
Danielle Ferry, claimant;
Karen Piercy, claimant:
Dr Paul Edmondson Jones, Interim Director of Public Health.

3. I had sight of a bundle of documents set out in sections and within two lever arch files. I considered those documents to which I was referred by the parties.

4. The claim of Ms Haran has been dismissed upon withdrawal.

5. I heard submissions from Mr Devlin on behalf Ms Hollande, Ms Piercy on behalf of the claimants in person and Mr Sweeney on behalf of the second respondent.

6. The complaints claims brought by each of the remaining claimants were as follows:

Ms G Hollande – Failure to inform and consult. This is the remaining claim on behalf of Ms Hollande and is only against the first respondent.

Ms B Coleman – Unfair dismissal, Age discrimination, Redundancy payment, Notice pay and failure to inform and consult.

Ms K Piercy – Redundancy payment, Unfair dismissal, Notice pay and failure to inform and consult.

Ms C Banks – Age discrimination, detriment in respect of status of part-time worker, Notice pay, Redundancy payment and failure to inform and consult.

Ms D Ferry – Detriment in respect of status as part-time worker, Unfair dismissal, Notice pay, Redundancy payment and failure to inform and consult.

Ms J Flounders – Pregnancy and maternity discrimination, Unfair dismissal, Notice pay, Holiday pay and failure to inform and consult.

7. This Public Preliminary Hearing was listed to determine whether there had been a transfer of undertaking pursuant to the Transfer of Undertakings (Protection of Employment) regulations 2006 from the first respondent to the second respondent.

8. The claim of Gwen Hollande was in respect of a failure to inform and consult against the first respondent only. I heard the evidence of Ms Hollande first followed by submissions from Mr Devlin on her behalf.

9. In view of the amount of documentary evidence, it was not possible to determine the issues within the time allowed. I heard the oral evidence and submissions and I have now considered the documentary evidence. It was indicated that I should determine the claim of Gwen Hollande and that, if I found in her favour, then I could determine the claims of failure to inform and consult by the remaining claimants against the first respondent.

10. Having considered all the evidence, both oral and documentary, provided for this Public Preliminary Hearing, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that I made from which I drew my conclusions:

10.1. In 2014 the second respondent, Hartlepool Borough Council entered into an arrangement whereby it commissioned five projects in respect of substance misuse and recovery support. This was based on a recovery model and service level agreements were reached as follows:

a. Structured Psychosocial Interventions, Relapse Invention and After-care – the Service Level Agreement in respect of this project was entered into between the second respondent and an organisation DISC (Developing Initiatives Supporting Communities).

b. Service User and Family Support – the Service Level Agreement in respect of this project was entered into with the first respondent, Lifeline Project Ltd.

c. Recovery and Reintegration – the Service Level Agreement in respect of this project was entered into with DISC.

d. Harm Reduction and Needle Exchange – this Service Level Agreement was between the second respondent and DISC.

e. Education, Training and Employment – the Service Level Agreement was between the second respondent and the first respondent.

10.2. In April 2015 the second respondent entered into a contract with the first respondent for the provision of a substance misuse recovery support service. At that time employees transferred from the DISC to the first respondent. The

service provided by the first respondent operated on a "traditional recovery coordination with clinical support model". The contract required the first respondent to deliver five strands of work which were almost identical to those set out in the Service Level Agreements referred to in paragraph 10.1. above.

10.3. From 1 April 2015 the first respondent operated the substance misuse recovery support service and continued to organise the employees in accordance with the previous five activities.

10.4. On 25 July 2016 the second respondent notified the first respondent that a decision had been made by the second respondent's Finance and Policy Committee to bring the Substance Misuse Recovery Support Services in-house and the contract to provide the service by the first respondent would end on 31 March 2017.

10.5. The service operated by the second respondent from 1 April 2017 is based on NICE (National Institute of Clinical Excellence) clinical guidelines and utilises the Recovery Neurological, Biological, psychological and Sociological (NBPS) system of evidence-based Psychosocial Interventions(PSI) to change mindsets. This focuses on intervention to promote long-term change for service users. The first respondent was to take the Substance Misuse Recovery Services In-house. However, it did not intend to carry out all of the five activities which had been carried out by the first respondent and DISC in 2014 and by the first respondent alone from 2015.

10.6. On 6 February 2017 Ruth Johns, interim HR team leader for the first respondent wrote to Louise Wallace at the second respondent indicating that the first respondent contended that the service to be delivered by the second respondent in connection with substance misuse would be fundamentally the same as that provided by the first respondent and it was the first respondent's belief that TUPE would apply and all employees would transfer over. Louise Wallace replied indicating that the second respondent accepted that there would be a transfer under Regulation 3 (1) (b) (iii) of the activities that were to be continued. It was stated:

> "… The service will no longer provide the clients with the recovery worker and those assessed as ready for change will be referred to the PSI team where there are six posts and therefore we would expect Lifeline PSI workers to transfer as the PSI activity will continue. The new model means that the activities of the recovery coordination team will no longer be undertaken. The service is therefore being undertaken in a fundamentally different manner."

10.7. The position of the first and second respondents did not change. The first respondents maintaining that TUPE applied to all employees engaged by the first respondent in the delivery of the service and the second respondent maintaining that was not the case.

10.8. Gwen Hollande stated that, as a recovery support coordinator, she did not contend that she was assigned to the element of the service that transferred to the second respondent. She stated that the first respondent failed to properly inform and consult. She said that she was not assigned to the service which was to transfer but her job was affected because the ending of the contract meant that her role was redundant.

10.9. On 14 March 2017 Ruth Johns, Interim HR Team Leader of the first respondent wrote to all Lifeline Hartlepool staff stating:

> "Further to the consultation meeting on 9 March 2017 and discussions over the last few months it is with regret that we can confirm that the contract for the Hartlepool Substance Misuse Service will be transferring to Hartlepool Borough Council. I confirm that the transfer date is 1 April 2017.
> We believe that this amounts to what is known as a 'relevant transfer' under the Transfer of Undertakings (protection of Employment) Regulations 2006.
> However, as mentioned during the consultation meeting on 9 March 2017 Hartlepool Borough Council are in dispute with Lifeline regarding the transfer, Lifeline has obtained legal advice and maintain that all employees are eligible to transfer.
> Therefore we have now entered into formal consultation with yourselves. This means the employees who are working in the above service will transfer to the new employer, Hartlepool Borough Council, on their existing terms and conditions of employment.
> I understand that this may be an uncertain and difficult time for you and I would like to thank you for your continued commitment to Lifeline Project. It is our intention to fully cooperate with Hartlepool Borough Council and should there be any further updates will enter into further consultation with you."

10.10. On 21 March 2017 a meeting took place in which the first respondent informed the employees that the second respondent would only be employing around 50% of the existing staff. The first respondent remained of the view that they believed that the TUPE regulations applied to all staff. There were one to one meetings in which employees were informed whether they were to be employed by the second respondent or not.

10.11. The employees who were not transferred had lost their jobs and were advised to turn up for work as usual on 3 April 2017 but they were told that there were no positions within the new structure for them. The employment of the claimants came to an end and no redundancy or notice payments were made.

10.12 The claimants, apart from Gwen Hollande, are of the view that the new model is fundamentally the same as the previous model run by the first respondent and that their employment should have transferred to the second respondent.

The Law

11. The Transfer of Undertakings (Protection of Employment) Regulations 2006 state:

3 A relevant transfer

(1) These Regulations apply to –

… (b) a service provision change, that is a situation in which –

… (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied.

(2A) References in paragraph (1) (b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who ceased to carry them out.

(3) the conditions referred to in paragraph(1)(b) are that –

(a) immediately before the service provision changed-

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

(ii) the client intends that the activities will, following the service provision change, be carried out by the transfer re-other than in connection with a single specific event or task of short-term duration; and

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

4 Effect of relevant transfer on contracts of employment

(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, that any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

12. Duty to inform and consult representatives

13 (1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a)the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b)the legal, economic and social implications of the transfer for any affected employees;

(c)the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d)if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

(a)if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b)in any other case, whichever of the following employee representatives the employer chooses—

(i)employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have

authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii)employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

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

(7) In the course of those consultations the employer shall—

(a)consider any representations made by the appropriate representatives; and

(b)reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

(10) Where—

(a)the employer has invited any of the affected employee to elect employee representatives; and

(b)the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer.

13 Election of employee representatives

14.(1) The requirements for the election of employee representatives under regulation 13(3) are that—

(a)the employer shall make such arrangements as are reasonably practicable to ensure that the election is fair;

(b)the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all affected employees having regard to the number and classes of those employees;

(c)the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;

(d)before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under regulation 13 to be completed;

(e)the candidates for election as employee representatives are affected employees on the date of the election;

(f)no affected employee is unreasonably excluded from standing for election;

(g)all affected employees on the date of the election are entitled to vote for employee representatives;

(h)the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;

(i)the election is conducted so as to secure that—

(i)so far as is reasonably practicable, those voting do so in secret; and

(ii)the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of paragraph (1) has been held, one of those elected ceases to act as an employee representative and as a result any affected employees are no longer represented, those employees shall elect another representative by an election satisfying the requirements of paragraph (1)(a), (e), (f)

14 Failure to inform or consult

15.—(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—

(a)in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

(b)in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;

(c)in the case of failure relating to representatives of a trade union, by the trade union; and

(d)in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a)that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b)that he took all such steps towards its performance as were reasonably practicable in those circumstances.

(3) If on a complaint under paragraph (1) a question arises as to whether or not an employee representative was an appropriate representative for the purposes of regulation 13, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employees.

(4) On a complaint under paragraph (1)(a) it shall be for the employer to show that the requirements in regulation 14 have been satisfied.

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

(6) In relation to any complaint under paragraph (1), a failure on the part of a person controlling (directly or indirectly) the employer to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a)order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b)if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

(10) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which an order under paragraph (7) or (8) relates and that—

(a)in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order;

(b)in respect of an order under paragraph (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.

(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him.

(12) An employment tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—

(a)in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed; or

(b)in respect of a complaint under paragraph (10), the date of the tribunal's order under paragraph (7) or (8),

or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

15 Failure to inform or consult: supplemental

16

(3) "Appropriate compensation" in regulation 15 means such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

(4) Sections 220 to 228 of the 1996 Act shall apply for calculating the amount of a week's pay for any employee for the purposes of paragraph (3) and, for the purposes of that calculation, the calculation date shall be—

(a)in the case of an employee who is dismissed by reason of redundancy (within the meaning of sections 139 and 155 of the 1996 Act) the date which is the

> calculation date for the purposes of any entitlement of his to a redundancy payment (within the meaning of those sections) or which would be that calculation date if he were so entitled;
>
> (b)in the case of an employee who is dismissed for any other reason, the effective date of termination (within the meaning of sections 95(1) and (2) and 97 of the 1996 Act) of his contract of employment;
>
> (c)in any other case, the date of the relevant transfer.

16. I was referred to the case of Rynda (UK) Ltd v Rhijnsburger [2015] ICR 1300 in which Jackson LJ stated:

> "I would summarise the principles which emerge from the authorities as follows. If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within regulation 3 of TUPE. The first stage of this exercise is to identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a "grouping" for the principal purpose of carrying out the listed activities."

17. In the case of Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and others UKEAT/0267/15/R.N. the summary of the judgment of Simler J states

> "1. The service provision change regime is not to be construed as requiring that all the activities carried out by the putative transferor before the relevant date for the client sees and are carried out by a single putative transferor re-after the change, save where there is a reduction or increase on a qualitative basis when they can be a division between more than one putative transferee. "Activities" is undefined and unqualified and is not to be read as analogous or co-extensive with the word "service"

18. In relation to regulation 13 I was referred to the case of Unison V Somerset County Court UKEAT/0043/09/DA in which it was provided that the "affected

employees" whose representatives the employer must inform and consult about a relevant transfer are those who will be or may be transferred, those whose jobs are in jeopardy by reason of the proposed transfer, and those who have internal job applications pending at the time of transfer.

19. I heard submissions from Mr Devlin on behalf of Gwen Hollande, Ms Piercy on behalf of the other claimants and Mr Sweeney on behalf of the second respondent. I have not set those submissions out in detail that I have considered them carefully in reaching my conclusions.

Conclusions

20. It was accepted by all parties that there was a transfer. The question was what had transferred. There had been five Service Level agreements. Three of those services had been provided by DISC and two by the first respondent.

The five Service Level Agreements were in respect of:

Structured Psychosocial Interventions, Relapse Invention and After-care.
Service User and Family Support.
Recovery and Reintegration.
Harm Reduction and Needle Exchange.
Education, Training and Employment.

21. From 1 April 2015 the first respondent continued to deliver these 5 services within one contract. These were the activities carried out by the first respondent prior to the transfer to the second respondent on 1 April 2017.

22. The second respondent did not take on all the activities which had been carried out by the first respondent. The activities taken on by the second respondent were only the Psychosocial Interventions (PSI) activities. The evidence of Mr Edmondson Jones was clear in this regard and the documents supported it. With regard to the evidence of Gwen Hollande, she accepted that there was only a transfer of part of the activities and that she had not been assigned to that activity. The other claimants were of the view that the drugs misuse service had transferred. Had I found that to be the case then I would have found that the activities which the second respondent carried out after the transfer were fundamentally different to those which the first respondent carried out prior to the transfer. The activities carried out by the first respondent were focused on recovery coordination with clinical support whereas the

second respondent uses a model which is based on NICE clinical guidelines using psychosocial interventions to change mindsets.

23. There was a Service Provision Change pursuant to regulation 3(1)(b)(iii) in respect of the PSI activities. The other activities that had been carried on by the first respondent on behalf of the second respondent were not transferred to the second respondent.

24. It was submitted by Mr Sweeney, on behalf of the second respondent that a particular difficulty was that the first respondent is in administration and has taken no part in the proceedings. “However, it cannot be assumed that any particular employee was assigned to any particular organised grouping, and it is for the claimants to make out their case, as they assert, that they were part of an organised grouping of employees which had as its principal purpose the carrying out of activities which were intended to be and in fact were carried out by R2 on its own after the SPC.”

25. I have considered the position carefully with regard to each of the remaining claimants, the position is as follows:

> Gwen Hollande did not contend that she was assigned to the element of the service that transferred to the second respondent. She was employed as a Recovery Coordinator and was not assigned to the PSI activity.
>
> Barbara Coleman was employed as a Senior Administrator with the first respondent. The main activity of this role was to manage the Administrator/Receptionists and was not assigned to the PSI activity which transferred to the second respondent. She managed the other administrative staff.
>
> Danielle Ferry was employed as an Administrator/Receptionist with the first respondent and was not assigned to the PSI activity and her employment did not transfer to the second respondent
>
> Tina Banks was employed by the first respondent as an Administrator/Receptionist and her role was not assigned to the PSI activity and her employment did not transfer to the second respondent.
>
> Karen Piercy was employed as a Recovery Support Worker by the first respondent within the Recovery and Reintegration Service. This role was not assigned to the PSI activity and did not transfer to the second respondent.

Jemma Flounders was employed as an After Care Worker. She was not assigned to the PSI activity and her employment did not transfer to the second respondent.

26. As none of the claimant transferred to the second respondent, the claims against the second respondent are dismissed.

27. Regulation 13 of the regulations provides that consultation should take place with "affected employees". Mr Devlin on behalf of Ms Holland referred to the case of Unison v Somerset County Court 2009 WL 4872766 in which the EAT made it clear that the affected employees whose representatives the employer must inform and consult about a relevant transfer are those who will be or may be transferred, those whose jobs are in jeopardy by reason of the proposed transfer, and those who have internal job applications pending time of the transfer. I am satisfied that all the employees were affected employees and their representatives should have been informed and consulted.

28. It was submitted by Mr Devlin that the letter of 14 March 2017 from the first respondent to all staff did not say what the various legal social and economic implications would be. The first respondent simply responded to any enquiries by staff to say that the Transfer of Undertakings (Protection of Employment) Regulations 2006 applied. There was no attempt to consult with regard to the measures the second respondent was taking and that it was only taking part of the service. There was no consultation with regard to the claimants' employment ending. The employees were only told that the service was transferring. It was well within the gift of the first respondent to provide information and consultation with regard to the effect on the employees but the first respondent had been bloody-minded and stuck to its position that everyone should be transferring.

29. I am satisfied that there was a failure to inform and consult the claimants about the legal social and economic implications of the transfer. The liability for the failure to inform or consult lies with the first respondent. However, this was not a complete failure to consult as there were some letters and meetings. There was some attempt to inform and consult. However, the first respondent's resolute refusal to countenance the fact that not all the employees would transfer to the second respondent meant that there was insufficient consultation with regard to the legal, social and economic implications of the transfer to satisfy regulation 13. I have to consider the appropriate award pursuant to regulation 15. It is provided in regulation 16 (3) that the appropriate compensation means such sum not exceeding 13 weeks'

pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

30. The failure was not at the most extreme end of the scale so as to justify a maximum award. However, it was a serious failure to consult and taking the approach provided pursuant to the collective redundancy regime, the award is punitive rather than compensatory. The amount of the award should reflect the nature and extent of the first respondent's default. I am of the view that the failure was such that it is just and equitable to order the first respondent to pay an award of 9 weeks' pay to each of the claimants.

29. The remaining claims against the first respondent require a further Preliminary Hearing in order to identify the issues and provide orders. It will be necessary for evidence to be provided in respect of claims of unfair dismissal. The discrimination claims are not clear and I have some difficulty in understanding how they are to proceed following the judgment that none of these employees transferred to the second respondent.

Employment Judge Shepherd
11 December 2017