



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**  
Mr M Bridger

AND

**Respondent**  
G. L. Mears and Sons  
(A Partnership)

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT Southampton (by video) ON**

**8 and 9 January 2024**

**EMPLOYMENT JUDGE GRAY**

### **Appearances**

For the Claimant: Mr Korn (Counsel)  
For the Respondent: Mr Henry (Consultant)

### **JUDGMENT**

The judgment of the Tribunal is there was a relevant transfer of the Claimant's employment to "Lawsons Whetstone Ltd" under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). As a consequence, all the Claimant's complaints, save for the failure to inform and consult under TUPE, fail and are dismissed.

In respect of the complaint for failure to inform and consult under TUPE, which is well founded, the Tribunal makes a declaration to that effect and orders the Respondent to pay appropriate compensation of 3 weeks' pay (weekly earnings are £648.17 gross) to the Claimant (so £1,944.51 in total).

JUDGMENT having been delivered orally on the 9 January 2024 (and sent to the parties on the 19 January 2024), and written reasons having been requested by email from the Claimant dated 19 January 2024, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

### **REASONS**

1. The Claimant relies upon an ACAS certificate dated 27 October 2022 to 8 December 2022.
2. By claim form submitted on the 6 January 2023 the Claimant claimed unfair dismissal (saying he was dismissed on the 1 August 2022), for a redundancy payment, notice pay and holiday pay.
3. It means matters complained about on or after the 28 July 2022 are in time, so the Tribunal has jurisdiction in this case.
4. The agreed list of issues to be determined in this claim (as at pages 97 to 102 of the agreed hearing bundle and repeated below) was discussed and confirmed as was the hearing timetable.
5. It was agreed that matters of liability would be determined first. It was also agreed that regulations 3(1)(b)(iii) and 3(3)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) were particularly relevant to the matters in this claim, which focuses on whether there was a service provision change or not.
6. In short, the Respondent asserts that it had a contract with Pavestone to do the haulage work for the Basingstoke Building Supplies (BBS) brand of retail building merchants. That brand was then acquired by Lawsons in May 2022 and the Respondent continued to provide the same service, until Lawsons took it in house on 1 August 2022.
7. The Claimant asserts that there was not an organised grouping of employees and/or the Claimant was not principally assigned to the BBS haulage work and/or there was a change of client in line with case authority of **Hunter v McCarrick [2013] IRLR 26**.
8. After oral judgment was delivered on matters of liability, submissions were made by the parties on matters of remedy and after deliberation, remedy was then determined, and judgment also delivered orally.

9. The parties agreed list of issues was as follows:

**1. Transfer of Undertakings (Protection of Employment)**

1.1 The Respondent avers that the Claimant's employment transferred to "Lawsons Whetstone Ltd" under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE 2006**"). Was there a 'relevant transfer' on 1 August 2022? Namely:

1.2 Immediately prior to 1 August 2022, was the Claimant employed as part of an organized grouping of employees for the purposes of carrying out activities on behalf of a client?

1.3 Did those activities cease to be carried out by a contractor, to be carried out by the client on its own behalf?

**Evaluation of Claimant's Work Based on Diary Entries**

1.4 What proportion of the Claimant's work, as detailed in the diary entries from 27 August 2021 to 27 July 2022, was dedicated to services for BBS compared to other clients?

1.5 How does the Respondent interpret the significance of the varied nature of the Claimant's work, as evidenced by the diary entries, in the context of determining whether a service provision change occurred under TUPE?

1.6 Was the Respondent aware of the Claimant's work for clients other than BBS, and how did this impact the Claimant's role and responsibilities?

1.7 How does the Respondent justify the decision to consider the Claimant's employment as transferred under TUPE considering the evidence suggesting varied work engagements?

1.8 What is the Respondent's response to the specific diary entry on 27 July 2022 which references the transfer of the company?

**Analysis of Invoicing and Discrepancies**

1.9 How does the Respondent explain the discrepancy between the hours worked by the Claimant for BBS, as evidenced by the diary entries and tachograph data, and the amount invoiced for a full day's work?

1.10 Can the Respondent provide a justification for invoicing £500 (a full day's work rate) on occasions where the diary entries and tachograph data indicate that the Claimant only worked one or two hours for BBS?

1.11 How does the Respondent reconcile the tachograph data showing limited use of the lorry (between one to three hours) with invoicing for a full day's work?

1.12 Does the Respondent acknowledge the accuracy of the tachograph data as a true representation of the Claimant's usage of the vehicle?

1.13 What is the Respondent's policy in relation to invoicing clients for partial day's work vs a full day's work?

1.14 Does the Respondent have any records or documentation that can clarify the nature of the work assignments for BBS on the days where there is a discrepancy between the work performed and the invoicing?

1.15 How do these discrepancies in work hours and invoicing impact the assessment of the Claimant's employment in the context of a service provision change under TUPE?

1.16 Does the Respondent consider these discrepancies relevant to the determination of whether the Claimant predominantly worked for BBS in the period leading up to the alleged transfer?

*Failure to consult*

1.17 If there was a 'relevant transfer':

1.17.1 Did the Respondent have a duty to inform the Claimant of that transfer?

1.17.2 If so, did the Respondent inform the Claimant long enough before the transfer? (Reg 13(2) and/or 13A TUPE 2006)

1.17.3 Did the Respondent have a duty to consult the Claimant on that transfer?

1.17.4 If so, did the Respondent adequately consult the Claimant? (Reg 13(6)-(7) TUPE 2006)

**2. Unfair dismissal**

2.1 Was the claimant dismissed? The Claimant claims that he was dismissed, effective 1 August 2022. The Respondent denies dismissing the Claimant. It is common ground that the Claimant's employment with the Respondent ceased on or around 31 July / 1 August 2022.

2.2 What was the reason or principal reason for dismissal? The Respondent says the reason was some other substantial reason, being that the Claimant resigned of his own volition.

*Constructive (unfair) dismissal*

2.3 Was the Claimant constructively dismissed? Namely:

2.3.1 Did the Respondent do the following things:

2.3.1.1 Fail to inform and consult regarding the transfer or any measures which would take place which could affect the Claimant.

2.3.1.2 Fail to provide the Claimant adequate notice of the purported transfer. The Claimant asserts that such notice was given on 29 July 2022 for the first time.

2.3.1.3 Fail to offer the Claimant the right to object to the purported transfer.

2.3.1.4 Conceal a redundancy situation as a TUPE, thereby avoiding the payment of statutory redundancy pay.

2.3.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.3.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the respondent; and

2.3.2.2 whether it had reasonable and proper cause for doing so. 2.3.3 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.3.4 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.3.5 If the Claimant was constructively dismissed, was that dismissal also unfair?

**3. Wrongful dismissal / Notice pay**

3.1 If the Claimant was dismissed, was that dismissal wrongful?

3.2 Was the Claimant entitled to notice of dismissal? The Claimant asserts that his notice period was 8 Weeks.

3.3 Was the Claimant given notice of dismissal, or paid in lieu of that notice? The Claimant asserts that he was neither given notice, nor paid for that notice period.

3.4 Did the Claimant have accrued holiday entitlement? If so, was the Claimant entitled to payment in lieu of that entitlement upon dismissal? If so, was the Claimant paid in lieu of outstanding holiday entitlement?

#### **4. Unauthorised deductions**

4.1 Alternatively, did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? The Claimant claims

4.1.1 Payment in respect of 8 weeks' notice

4.1.2 Compensation for accrued holiday pay of 3.5 days.

#### **5. Remedy (Unfair dismissal)**

5.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

5.1.1 What financial losses has the dismissal caused the Claimant?

5.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.1.3 If not, for what period of loss should the Claimant be compensated?

5.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

5.1.5 If so, should the Claimant's compensation be reduced? By how much?

5.1.6 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

5.1.7 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

5.2 What basic award is payable to the Claimant, if any?

5.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

#### **6. Remedy (Failure to consult regarding TUPE)**

6.1 Is the Claimant entitled to compensation for a failure to inform and consult the Claimant? (Regulation 15(1) TUPE 2006)

6.2 If so, the Tribunal should make a declaration to that effect (Regulation 15(8) TUPE 2006).

6.3 Should the Tribunal make 'appropriate compensation' under Regulation 15(8)(a), namely such an amount as the tribunal considers just and equitable in all the circumstances, having regard to the seriousness of the failure by the Respondent to comply with the duty, and not exceeding 13 weeks' pay (Regulation 16(3))

### **The Facts**

10. I heard evidence from the Claimant and from Mr Mears on behalf of the Respondent.

11. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties.

12. Although there are no written contractual documents to record the various legal relationships between the parties, and between the Respondent and Pavestones and then Lawsons, there were actually not many factual disputes in this claim.

13. Mr Mears confirmed in oral evidence that it was in 2013 that through verbal agreement between himself and the Pavestone depot manager, when Basingstoke Building Supplies (BBS) (which was accepted by the Claimant in cross examination is a brand) was created, the Respondent would help with transport for the newly created BBS.

14. Mr Mears states in his witness statement (paragraph 2) that ... "The Claimant was employed by the Respondent from 7 April 2014 to 31 July 2022 as a Haulage Driver. The Claimant was specifically employed to undertake driving work on the BBS contract. When the work for this contract increased a second driver was employed to assist with the work on 8 August 2016."

15. This was maintained by Mr Mears in cross examination when it was put to him that there is no document that says the Claimant was employed to undertake work on the BBS contract. Mr Mears confirmed that there was no paperwork to say the Claimant was doing anything for anybody else. The Claimant was employed to do haulage for the BBS contract, verbally, the Claimant knows that, but it was not written down.

16. At paragraph 5 of his statement Mr Mears confirms ... "The Claimant was part of a group of employees whose principal purpose was to provide delivery of goods to customers of BBS. The invoices for April to June show that on each

working day (Monday to Friday) the Respondent had two vehicles & Drivers undertaking work on the contract. The second driver finished at the end of June 2022. From July 2022, BBS were only invoiced for one 16T Grab Truck and Driver. The defect reports show that on each of those days, the Claimant was the allocated driver. The Claimant did not work at weekends.”.

17. What Mr Mears asserts evidentially is consistent with the oral evidence of the Claimant in cross examination (noting that his witness statement contained a significant inaccuracy where he confirms he received a letter in April 2021 about an increase in pay (paragraph 3) that he then denied receiving in oral evidence).
18. In oral evidence the Claimant confirmed a number of times that he would only do other things if there was no work for BBS. He also stated that 80 to 90% of his time was with BBS.
19. In paragraph 5 of his witness statement the Claimant refers to examples of other work being done on 14 days in a time window of 27 August 2021 to 15 March 2022. That is a period of 29 weeks, or 145 working days (taking 5 working days a week). So, 14 days out of that is just under 10%, so completely consistent with the Claimant spending 90% of his time with BBS.
20. This is also consistent with the invoices and tachograph records presented to this Tribunal. It was also demonstrated in oral evidence that when the Claimant did do something else other than BBS work it was either after doing something for BBS first (for example on 27 August 2021, page 148), or where there could be no BBS work, for example when it snowed, and the Claimant used the snow plough.
21. It is also not in dispute that the Respondent had two vehicles with BBS livery on them.
22. It is then on or around the 26 May 2022 (paragraph 4 of Mr Mears witness statement) that Lawsons takes over the BBS brand from Pavestone. The Claimant in cross examination confirmed that as a brand BBS was sold to Lawsons in May. The Claimant feared that a redundancy situation would arise as a result (paragraph 7 of his statement).
23. The invoicing then continues with Lawsons in June and July 2022 (pages 221, and 223 to 224). The Claimant does not evidence that he was doing something other than BBS work in this period.
24. Mr Mears explains in paragraph 6 of his witness statement ... “I was always aware that the new owners of BBS may consider taking the service “in house”. On or around 31 May 2022 I spoke with both drivers to inform them of this and to assure them that I would seek alternatives to keep the employment running.”.



25. The Claimant confirms in paragraph 6 of his statement ... "On 31 May 2022, I was informed by Graham Mears verbally that Lawsons Whetstone ("Lawsons") would be taking over the BBS business from Pavestones and, as such, this would cancel the Respondent's dealings with Pavestones. The client of the Respondent was always Pavestones. I was informed that a meeting took place between the Respondent and Lawsons to discuss transport arrangements and it was decided this would be reviewed on a monthly basis. At no point was it mentioned that my employment could potentially transfer over under TUPE."
26. The understanding about the potential applicability of TUPE is consistent between the parties as Mr Mears confirms in paragraph 7 of his witness statement that he subsequently became aware of TUPE and raised the matter with Lawsons by email dated 21 July 2022 (page 106). Mr Mears writes in the email ... "Following on from our conversation yesterday and after consultation with the Road Haulage Association, I believe Mark Bridger and Peter White fall in the TUPE regulations. They are both HGV drivers and have been working for Basingstoke Building Supplies for a number of years."
27. The first response from Lawsons (email dated 25 July 2022 at page 107) says TUPE does not apply.
28. Mr Mears then challenges this by email dated 27 July 2022 (page 108).
29. By email dated 28 July 2022 (page 110) Lawsons respond saying they ... "are prepared to TUPE over Peter and Mark". They request the employment contract details.
30. There is then a letter dated 28 July 2022 from the Respondent (page 111) that says it encloses the contractual information of the two employees and asks for details of any measures so they can then consult with the employees.
31. Lawsons does not respond saying there are to be any measures taken.
32. Chronologically there is then a meeting between Mr Mears, the Claimant and his colleague (who also worked on the BBS work) on the 29 July 2022.
33. There is a transcript of that meeting because of the Claimant's covert recording of it. Although initially in oral evidence the Claimant asserted that the meeting didn't really focus on TUPE, when referred to the pages of the transcript (pages 118 to 126) he acknowledged that he had got that wrong as there were multiple references to TUPE.
34. The transcript records Mr Mears telling the employees they fall in the TUPE category and from Monday (1 August 2022) they will both work for BBS. It is confirmed that the employment contract will be the same. The only suggested change being they would probably get new vehicles.

35. They record Mr Mears saying (page 122) that he has been told if he made the employees redundant, he would be liable for tens of thousands of pounds of mitigation.
36. Mr Mears is not recorded in the transcript as expressly dismissing either employee.
37. The letter dated 29 July 2022 at page 112 to the Claimant from the Respondent, it was acknowledged by Mr Mears, was handed to the Claimant at the end of the meeting on 29 July 2022. It says:

“...with effect from 1st August 2022 your employment with G L Mears & Sons will be transferred to Lawsons (Whetstone) Ltd.

We are treating this as a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and we will be consulting with Employee Representatives about the transfer. We will be giving all affected employees the opportunity to put themselves forward to be elected as an Employee Representative. If you are interested in putting yourself forward for this role, please let me know by return.

As a consequence of the transfer, your service with us will be transferred to your new employer with no loss of continuity. Also, following the transfer, your new employer should maintain your existing Terms and Conditions of Employment. In order that Lawsons (Whetstone) Ltd can correctly observe your terms and conditions of employment, we will provide them with sufficient information about your employment to facilitate a smooth transfer.”

38. No request is made for election and no election of representatives was arranged.
39. It was put to the Claimant in cross examination that there was nothing to really consult on, and the Claimant responded with maybe his right to object to being transferred.
40. The Claimant then confirms in his witness statement at paragraph 13 ... “I received a WhatsApp message from the Respondent on 1 August informing me that Leanne Parry would try to contact me regarding my intentions (page 117). I then receive a WhatsApp message on 2 August from Jim Lawsons asking me to attend a meeting (page 127).”. Embedded in the WhatsApp message is a letter from Lawsons. Although not a clear copy it refers to there being a transfer to them and the Claimant not attending work on the 1 August 2022.
41. It is then on the 11 August 2022 that the Claimant informs Lawsons through his representative that he did not deem his employment had transferred under

TUPE and informed them that he would not be carrying out any work on behalf of the Company (paragraph 16 of the Claimant's statement and pages 135 to 136 of the bundle).

42. There is no resignation communicated by the Claimant to the Respondent at any time. At paragraph 11 of his witness statement the Claimant says that after the meeting on the 29 July 2022 ... "This obviously came as a complete shock to me and I felt immense disappointment in the way in which I had been treated after 8 loyal years' service. I didn't understand why my employment was transferring to a completely different company when the role I undertook was much more varied than predominantly working for the Respondent providing services to BBS (and then Lawsons)". The Claimant acknowledges his employment was transferring; he just didn't understand why.
43. There is no express objection to being transferred by the Claimant.
44. The Claimant confirmed in oral evidence that he would have transferred to work for Lawsons if it were a TUPE transfer, but he did not believe it was TUPE based on what his legal advisers told him.

#### **Law on matters of liability**

45. Whether there was a TUPE transfer or not requires determination first in this claim.
46. The relevant regulations are the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations").
47. Regulation 3(1) provides that the Regulations apply to – (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity; (b) a service provision change, that is a situation in which – (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 (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or (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.
48. Regulation 3(3) provides that the conditions referred to in paragraph 1(b) are that – (a) immediately before the service provision change – (i) there is an

organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client; (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

49. Regulation 4(1) provides that: 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.
50. Regulation 4(2) provides that: Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), 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 the organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
51. Regulation 4(3) provides that: 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)...
52. Regulation 7(1) provides that: Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is – (a) the transfer itself; or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. The effect of Regulations 7(2) and (3) is that where there is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer, the automatically unfair dismissal provisions of regulation 7(1) do not apply, but rather the dismissal is treated as a redundancy dismissal which is potentially fair under section 98 of the 1996 Act.
53. Regulation 13 requires both the transferor and the transferee to consult with employees ahead of a relevant transfer.

54. Regulation 13(2) sets out the information which must be the subject of that consultation.

55. Regulation 13A refers to the duty where there is a 'Micro-business' – where the employer employs fewer than 10 employees.

56. I have been referred to and have considered the following cases:

- a. **Eddie Stobart Ltd v Moreman [2012] IRLR 356** - the EAT held that, for Reg 3(3)(a) purposes, the organisation of the grouping must be more than merely circumstantial — the employees must have been organised intentionally.
- b. **Seawell Ltd v Ceva Freight (UK) Ltd 2013] IRLR 726.**
- c. **Hunter v McCarrick [2013] IRLR 26.** - Each of the three types of SPC listed in Reg 3(1)(b) refers to 'a client' and then to 'the client'. This wording has been held to mean that for an SPC to take place, the activities must continue to be carried out on behalf of the same client.
- d. **Howard v Millrise [2005] IRLR 84.** - held that, where no appropriate representatives already exist, the employer in question is actually under a statutory obligation to invite the affected employees to elect such representatives.

57. Whether there is a dismissal or not is also in dispute between the parties. A dismissal is defined by section 95 of the Employment Rights Act 1996 as being:

**95 Circumstances in which an employee is dismissed.**

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;  
and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

58. The Claimant asserts that he was dismissed by the Respondent. It is therefore for the Claimant to demonstrate that section 95 of the Employment Rights Act 1996 is satisfied. This was explored in closing submissions and the parties each submitted further written submissions on this aspect.

59. I was referred to *Alcan Extrusions v Yates [1996] IRLR 327* by Claimant's Counsel. The EAT confirmed in that case that very substantial departures from an original contract of employment could amount to the termination of the original contract and its replacement by the offer of an inferior contract of employment (a Hogg and Dover College type of dismissal). Whether the letter or letters from the employer in any given case represented departures which were so substantial as to be a withdrawal of the whole contract was a matter of degree and a question of fact for the tribunal.

60. Claimant's Counsel acknowledged that the facts are not identical to those in the present case but submits the employer's conduct, namely the non-payment of salary after 29th July 2022, amounted to a repudiation of the contract by the Respondent and in law could amount to a dismissal under Section 95(1)(a) in the same way as any other fundamental change in the contractual terms could do so.

61. The Respondent's Representative submitted in response that the present case contains no such substantial change in the contract terms. On the contrary, the Respondent had arranged with the client company to transfer the terms of employment without substantial change, that being the purpose of TUPE.

### **The decision on matters of liability**

62. It is clear from the facts in this case, which as noted are not really in dispute, that the Claimant spent most of his time (90% plus) working on the BBS work. This appears to be 100% when Lawsons takes over the BBS brand at the end of May 2022.

63. It is also clear from the evidence that the Claimant was intentionally organised to carry out the work for BBS 'as and when required'. This is particularly so when the arrangement continued with Lawsons in June and July 2022.

64. The Respondent is always aware that the new owners of BBS may consider taking the service "in house". This is a live possibility from on or around the 26 May 2022 when Lawsons becomes the client and communicated to the

Claimant on the 31 May 2022. The Claimant fears this could result in a redundancy situation.

65. The TUPE question is not raised with Lawsons until the 21 July 2022.
66. Although initially disputed, agreement is confirmed by email dated 28 July 2022 (page 110) when Lawsons respond saying they ... "are prepared to TUPE over Peter and Mark". They request the employment contract details.
67. Those are provided by the Respondent on the 28 July 2022 and Lawsons are asked if they intend to take any measures. Lawsons do not respond to say they will be.
68. There is then a meeting on the 29 July 2022 between Mr Mears the Claimant and his colleague, which confirms they fall in the TUPE category and from Monday (1 August 2022) they will both work for BBS. It is confirmed that the employment contract will be the same. The only suggested change being they would probably get new vehicles.
69. A letter follows this meeting which confirms the transfer to Lawsons on the 1 August 2022 and that there will be no loss of continuity of employment and that the existing terms and conditions of employment will be maintained.
70. There is no dismissal communicated by the Respondent at this time.
71. The letter also confirms that the Respondent will be giving affected employees the opportunity to be elected as an Employee Representative. That does not happen.
72. The Claimant receives a WhatsApp message from the Respondent on 1 August 2022 informing him that Leanne Parry (at Lawsons) would try to contact him regarding his intentions (page 117).
73. The Claimant receives a WhatsApp message on 2 August 2022 from Jim Lawsons asking him to attend a meeting (page 127). Embedded in the WhatsApp message is a letter from Lawsons. Although not a clear copy it refers to there being a transfer to them and the Claimant not attending work on the 1 August 2022.
74. It is then on the 11 August 2022 that the Claimant informs Lawsons through his representative that he did not deem his employment had transferred under TUPE and he would not be carrying out any work on their behalf.
75. There is no resignation communicated by the Claimant to the Respondent at any time. At paragraph 11 of his witness statement the Claimant acknowledges his employment was transferring; he just didn't understand why.

76. There is no express objection to being transferred by the Claimant.
77. I find that there was a service provision change on the 1 August 2022, where Lawsons took the BBS branded work the Claimant was organised to do and principally assigned to do in house so that regulations 3(1)(b)(iii) and 3(3)(a)(i) are satisfied.
78. With that finding I do not need to go on and consider if there were a dismissal within the meaning of Section 95 of the Employment Rights Act.
79. With these findings the relevant complaint for remedy purposes is whether there was a failure to inform and consult.
80. We have a covert transcript from the meeting on the 29 July 2022 between the Respondent and Claimant about the transfer as well as a letter dated 29 July 2022 handed to the Claimant at the end of the meeting.
81. The fact of the transfer and date is confirmed, and that no measures are envisaged. However, it was acknowledged by the Respondent's representative in closing submissions that the Claimant's starting work location would change.
82. The Claimant is invited to elect a representative (so contrary to Regulation 13A(1)(c)), but this does not happen.
83. An award of up to 13 weeks pay is available, and in considering that I need to consider the seriousness or gravity of the default and any mitigating circumstances.

### **The remedy decision**

84. Where a tribunal finds a complaint under Regulation 15(1) to be well founded, it must make a declaration to that effect, and may order the relevant employer to pay 'appropriate compensation to such descriptions of affected employees as may be specified in the award' — Regulation 15(7) and (8).
85. Appropriate compensation is defined by Regulation 16(3) as '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'. Under Regulation 16(4), a 'week's pay' for this purpose is to be determined by reference to Sections 220 to 228 of the Employment Rights Act. A week's pay for this type of award is not subject to a cap.
86. I was referred to **Sweetin v Coral Racing [2006] IRLR 252**. The EAT held that the award is intended to be punitive and therefore the amount of the award



should reflect the nature and extent of the employer's default. In essence, I should consider the seriousness or gravity of the default and any mitigating circumstances. Such circumstances might exist, for example, where the tribunal rejects the 'special circumstances' defence but acknowledges that there were nonetheless mitigating circumstances.

87. I have not been presented evidence to support a "special circumstances" defence.

88. The transfer happens on the 1 August 2022.

89. The Claimant is informed about it on the 29 July 2022.

90. The Respondent is always aware that the new owners of BBS brand may consider taking the service "in house". This is a live possibility from on or around the 26 May 2022 when Lawsons becomes the client and communicated to the Claimant on the 31 May 2022. There is not a "TUPE" view of matters expressed at that time by anybody.

91. There being a TUPE transfer is asserted by the Respondent to Lawsons by email on the 21 July 2022.

92. There being a TUPE transfer is not initially agreed by Lawsons, but it is on the 28 July 2022.

93. Although no measures are proposed, there would be a change of vehicle and work starting location.

94. There is no reason given why the transfer could not be delayed allowing consultation on those matters if needed.

95. Contact is attempted between Lawsons and the Claimant w/c 1 August 2022.

96. On the 11 August 2022 the Claimant informs Lawsons through his representative that he did not deem his employment had transferred under TUPE.

97. Reflecting the seriousness or gravity of the default and any mitigating circumstances, I award three weeks. I consider that to be just and equitable having regard to the seriousness of the failure of the Respondent to comply with the duty.

Employment Judge Gray  
Date: 23 January 2024  
Judgment sent to Parties: 5 February 2024  
For the Tribunal Office