EMPLOYMENT TRIBUNALS

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Date 20 May 2014

Case Number: 2300375/2013 & others

Claimant		**Respondent**
Ms S Paul & others	**v**	**1) PFGPS Limited t/a Clapham SPMS** **2) The Awareness Centre Limited** **3) Streatham Neighbourhood Talking Therapies Limited**

EMPLOYMENT TRIBUNAL JUDGMENT

A copy of the Employment Tribunal's judgment is enclosed. There is important information in the booklet 'The Judgment' which you should read. The booklet can be found on our website at www.justice.gov.uk/tribunals/employment/claims/booklets

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

The Judgment booklet explains that you may request the employment tribunal to reconsider a judgment or a decision. It also explains the appeal process to the Employment Appeal Tribunal. These processes are quite different, and you will need to decide whether to follow either or both. **Both are subject to strict time limits**. An application for a reconsideration must be made within 14 days of the date the decision was sent to you. An application to *appeal* must generally be made within 42 days of the date the decision was sent to you; but there are exceptions: see the booklet.

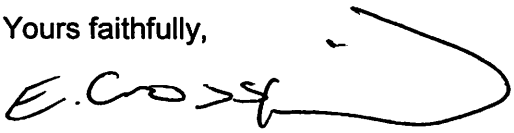
The booklet also explains about asking for written reasons for the judgment (if they are not included with the judgment). These will almost always be necessary if you wish to appeal. You must apply for reasons (if not included with the judgment) within 14 days of the date on which the judgment was sent. If you do so, the 42 day time limit for appeal runs from when these reasons were sent to you. Otherwise time runs from the date the judgment was sent to you or your representative.

For further information, it is important that you read the Judgment booklet. You may find further information about the EAT at –

www.justice.gov.uk/tribunals/employment-appeals

An appeal form can be obtained from the Employment Appeal Tribunal at: Employment Appeal Tribunal, Second Floor, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX or in Scotland at 52 Melville Street, Edinburgh EH3 7HS.

Yours faithfully,



MRS E CROSSFIELD
For the Tribunal Office

Case Numbers: 2300375/2013, 2300411/2013, 2300412/2013, 2300414/2013, 2300418/2013, 2300419/2013 & 2315294/2013

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants
(1) Ms S Paul
(2) Mr JG Burns
(3) Mr G Thomas
(4) Ms J Bennett
(5) Ms A Rochester-Daley
(6) Ms CM Payton

and

Respondents
(1) PFGPS Limited trading as Clapham SPMS

(2) The Awareness Centre Limited

(3) Streatham Neighbourhood Talking Therapies Limited

Held at London South on 8th, 9th, 10th and 11th April 2014 and in chambers on 22 April 2014

Representation	**For Claimants: Ms S Paul and Ms CM Payton**	Mr J McDonald, Counsel
	For Claimants: Mr JG Burns, Mr G Thomas, Ms J Bennett and Ms A Rochester-Daley	Mr JG Burns, in person and lay representative
	First Respondent:	Mr D Gray-Jones, Solicitor advocate
	Second Respondent:	Mr A Solomon, Counsel
	Third Respondent:	No appearance

Employment Judge Pritchard (sitting alone)

Case Numbers: 2300375/2013, 2300411/2013, 2300412/2013, 2300414/2013, 2300418/2013, 2300419/2013 & 2315294/2013

RESERVED JUDGMENT

1 The correct names of the Respondents are as follows:

(i) The First Respondent is PFGPS Limited trading as Clapham SPMS

(ii) The Second Respondent is The Awareness Centre Limited

(iii) The Third Respondent is Streatham Neighbourhood Talking Therapies Limited

and the title to these proceedings is amended accordingly.

2 Streatham Neighbourhood Talking Therapies Limited has been dissolved and is accordingly dismissed from these proceedings. If any party intends to apply to restore Streatham Neighbourhood Talking Therapies Limited to the Register, that party is required to inform the Tribunal within 14 days of the date this Judgment is sent to the parties and thereafter to keep the Tribunal informed as to the steps being taken in that regard.

3 The Claimants' complaints that they were unfairly dismissed are well-founded. Awareness is ordered to pay compensation to the Claimants as follows:

(i) Ms S Paul £6,734.70

(ii) Mr JG Burns £1,087.50

(iii) Mr G Thomas £12,390.83

(iv) Ms J Bennett £13,582.50

(v) Ms A Rochester-Daley £4,623.03

(vi) Ms CM Payton £12,586.00

4 The complaints of Ms S Paul, Mr JG Burns, Mr G Thomas, Ms J Bennett and Ms A Rochester-Daley that PFGPS Limited trading as Clapham SPMS failed to comply with requirements of regulations 13 and 14 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 are well-founded. PFGPS Limited trading as Clapham SPMS is ordered to pay compensation as follows:

(i) Ms S Paul £172.20

(ii) Mr JG Burns £120.00

(iii) Mr G Thomas £239.58

(iv) Ms J Bennett £400.00

(v) Ms A Rochester-Daley £370.26

The Awareness Centre Limited is jointly and severally liable with PFGPS Limited trading as Clapham SPMS in respect of the said compensation payable.

5 The complaint by The Awareness Centre under Regulation 12 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 Limited that PFGPS Limited trading as Clapham SPMS failed to comply with provisions of Regulation 11 is well-founded. PFGPS Limited trading as Clapham SPMS is ordered to pay compensation to the Awareness Centre in the sum of £38,418.56

REASONS

The Claimant's claims

1 The Claimants each complained of unfair dismissal and sought compensation for failure to elect, inform and consult under regulation 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

2 Ms Paul, Mr Burns, Mr Thomas, Ms Bennett and Ms Rochester-Daley ("the Clapham Claimants") claimed against PFGPS Limited trading as Clapham SPMS ("Clapham"). Ms Payton ("the Streatham Claimant") claimed against Streatham Neighbourhood Talking Therapies Limited ("Streatham"). In each case the Claimants also claimed against the putative transferee, The Awareness Centre Limited ("Awareness").

3 In their ET3 responses, amongst other things, Awareness and Clapham denied that the Claimants were employees; rather, it was contended that they were self-employed individuals. That issue was resolved at a Preliminary Hearing before Employment Judge Nash who concluded in her Judgment dated 15 December 2013 that the Claimants were employees (the Clapham Claimants having been employed by Clapham; and the Streatham Claimant having been employed by Streatham). Thus they were entitled to bring their claims before the Employment Tribunal.

4 In its ET3 response Streatham stated that it had requested removal from Companies House records, that it was no longer trading and had no assets. Streatham has taken no further part in these proceedings, either at a Preliminary Hearing before Employment Judge Zuke on 19 July 2013 or at the Preliminary Hearing before Employment Judge Nash referred to above.

Mr Soloman informed the Tribunal that if Streatham had been dissolved, consideration would be given to making an application to restore Streatham to the Register. A Companies House web check shows that Streatham has been dissolved. In these circumstances, there is no legal entity against which proceedings can continue and Streatham will be dismissed from these proceedings. Any party intending to make an application to restore Streatham to the Register is required to inform the Tribunal within 14 days of the date this Judgment sent to the parties of such intention and thereafter to keep the Tribunal informed as to the steps being taken.

Awareness's claim against Clapham and Streatham

5 By ET1 presented on 22 February 2013, Awareness brought claims against Clapham and Streatham under regulation 12 of TUPE by reason of their respective failures to provide Employee Liability Information in respect of the Claimants. Clapham resisted Awareness's claim on the basis that it had been presented outside the applicable time limit and/or that it had provided analogous information relating to the Claimants who were thought to be self-employed and it would not be just and equitable to order an award of compensation. Apart from its response described above, Streatham did provide detailed grounds of resistance in relation to Awareness's claim.

6 It is noted here for completeness that claims brought against Lambeth NHS Primary Care Trust ("the PCT") were dismissed upon withdrawal at an earlier stage of these proceedings; and claims made by other Claimants under these consolidated proceedings were also withdrawn at an earlier stage.

7 At the outset of the Hearing, Clapham conceded that a relevant transfer had taken place, and that the Claimants had been unfairly dismissed under regulation 7 of TUPE, but that liability for those unfair dismissals transferred to Awareness under regulation 4 of TUPE. Awareness conceded the transfer of liability but was seeking a full indemnity under regulation 12 of TUPE from Clapham (and Streatham as appropriate) for all and any losses incurred by reason of not having been provided with Employee Liability Information relating to the Claimants' employment. In particular, Awareness was seeking to offset the entirety of any awards the Tribunal were to make and was also seeking to recover its legal costs by reason of having been forced to litigate.

The evidence before the Tribunal

8 At the outset of the hearing, the legally qualified representatives provided the Tribunal with notes variously described as a position statement, an opening note and a skeleton for hearing. After having heard from the representatives in order to achieve clarity as to the issues to be determined, the Tribunal used the rest of the first day of the hearing to read the statements and the documents referred to.

9 Starting on the second day of the hearing, the Tribunal thereafter heard evidence under oath from the following witnesses, interposed according to their availability with the agreement of the parties and the Tribunal:

9.1 Gazelle Robertson (formerly Howard) (contractor and Manager) on behalf of Clapham;

9.2 Dr Paul Heenan, (Director of Clapham) on behalf of Clapham;

9.3 Carolyn Emanuel (former Team Leader and Counsellor at Clapham who transferred to Awareness but left in July 2013) on behalf of Ms Paul;

9.4 Sandra Paul on her own behalf;

9.5 Michaela McCarthy on behalf of Awareness;

9.6 Joseph Gale Burns on his own behalf;

9.7 Graham Thomas on his own behalf;

9.8 Anthony Gough on behalf of the Clapham Claimants (a former employed psychotherapist of Clapham who decided not to transfer to Awareness);

9.9 Angela Rochester-Daley on her own behalf;

9.10 Caroline Payton on her own behalf; and

9.11 Julie Bennett on her own behalf.

10 The Tribunal was referred to a number of documents contained within three lever arch files and within a further ring binder file. In addition, the Tribunal was referred to a number of documents contained within a mitigation bundle. Two of the files contained documents which appear to have been added after the original bundle had been prepared and which did not seem to have been arranged in any particular logical sequence. This was unhelpful. The Tribunal is indebted in particular to Mr Solomon for pointing to the relevant documents to be referred to.

11 At the conclusion of the hearing the representatives made oral submissions, the legally qualified representatives amplifying the content of their written submissions. In the course of his oral submissions, Mr Burns adopted Mr McDonald's legal arguments. Because there was insufficient time on the last day of the hearing to consider the evidence and reach a decision, judgment was reserved.

Issues

12 In light of the concessions that had been made at the outset of the hearing, the Tribunal required the parties to provide an agreed list of issues. This was provided to the Tribunal at the commencement of the second day of the Hearing as follows (but for clarity substituting reference to numbered Respondents for the descriptions ascribed to them above):

Unfair dismissal

12.1 What loss has been suffered because of the unfair dismissals of the Claimants?

12.2 Did the ACAS Code of Practice for Disciplinary and Grievance Procedures apply and, if so, did the Respondents fail to follow the provisions therein?

12.3 If so, what should the Tribunal award as an uplift to the compensatory award?

12.4 To what extent should any compensation awarded be reduced to reflect the possibility that the Claimant's employment would have been terminated fairly in any event ("Polkey?")

12.5 Have the Claimants mitigated their loss?

The Claims under Regulations 13 – 15 TUPE 2006

12.6 Was there a breach of Regulation 13 on the part of the Clapham and Streatham by way of:

12.6.1 Failure to appoint or consult employee representatives according to regulation 13(5)?

12.6.2 Failure to consult appropriate representatives with a view to seeking their agreement to the intended measures according to regulation 13(6)?

12.6.3 Was there a breach of regulations 14 and 15 on the part of Clapham and Streatham by their failure to elect employee representatives?

12.6.4 If so, what is the appropriate award under Regulation 15?

The Claim under Regulation 12 TUPE 2006 by Awareness against Clapham and Streatham

12.7 Was the claim presented within the relevant time limit prescribed under regulation 12(2) ("the end of the period of three months beginning with the date of the relevant transfer")?

12.8 If not, was it not reasonably practicable for the claim to be presented before the end of that period and what further period is it reasonable to allow?

12.9 If so has Clapham and/or Streatham breached their duties towards Awareness under Regulation 11 TUPE 2006?

12.10 If so what compensation is payable to Awareness under Regulation 12(3) – (4)?

Findings of fact

13 As described in the Judgment of Employment Judge Nash, the Claimants were employed as counsellors by Clapham and Streatham respectively. The Claimants were engaged in the provision of talking therapy services.

14 All the Claimants worked on the assumption that they were self-employed until they challenged their employment status as described below.

15 In 2011 the PCT proposed that the provision of talking therapy services could be developed and enhanced by reconfiguring the services into one integrated service. In October 2011 the PCT issued a consultation paper to all stakeholders. The proposal set out in the consultation paper would result in the PCT holding one contract with a provider or group of providers, rather than the multiple contracts then in place, such as those with Clapham and Streatham. All staff, including the Claimants, were informed of the proposal.

16 The PCT then entered into discussions with Clapham and Streatham in order to understand who would be affected by the proposals.

17 Clapham informed the PCT, at its request, that twenty-eight individuals would be affected by the proposal: seven permanently employed and twenty one self-employed staff (which included the Clapham Claimants).

18 In about November 2011 it came to the attention of the Clapham Claimants, or most of them, that a number of so called self-employed counsellors in Somerset had successfully pursued unfair dismissal claims in the Employment Tribunal. It gave them cause to consider whether they might have employment status themselves.

19 It appeared likely that Awareness would be awarded the contract and on 16 April 2012, the PCT provided Awareness with a list of employees whom it was thought would be subject to a TUPE transfer under the proposed arrangements. The Claimants were not included on that list.

20 On 26 April 2012, Clapham emailed the Clapham Claimants asking them to forward their names, start dates and employment status to their team leaders if they wished to be considered as employed as opposed to self-employed, this information to be forwarded to the PCT for consideration. This email included the following:

> "There are implications regarding tax payments when you put yourself forward as employed and it could result in an investigation of your tax payments over the period of you being self-employed to ensure you paid the same amount of tax as if you were on the organisation's payroll as PAYE, which could result in you having to pay back any sums deemed due to the HMRC".

21 Clapham informed the Clapham Claimants in a further email dated 27 April 2012 where they could access TUPE guidance and stated:

> "For those of you who decide to submit your information to [the PCT] please ensure that you have satisfied yourself as to the possible ramifications. This may include seeking legal/tax advice"

22 By letter dated 3 May 2012, the PCT informed Clapham that:

> "... the regulations deem that self-employed staff can acquire employment status given certain conditions and should transfer to the new provider of the Service under TUPE".

Accordingly, the PCT asked Clapham to provide further information about the Clapham Claimants in order to assess their employment status. Clapham sent a spreadsheet to the PCT listing the so called self-employed staff; this list included the Clapham Claimants.

23 The Clapham Claimants responded to Clapham's requests about their employment status as follows:

23.1 Ms Paul said she considered that she was self-employed;

23.2 Mr Burns said he considered that he was self-employed;

23.3 Ms Rochester-Daley said she did not have sufficient information to make an informed decision and reserved her rights;

23.4 Mr Thomas said that he would not be able to fully assess the case in the time-frame given and reserved his rights;

23.5 Ms Bennett said she would not be able to provide the information and documentation that had been asked for in the timeframe given (although the Tribunal notes that she had informed Ms Paul in an email on 3 May 2012 that "...We could end up paying more tax from the time we said we were employees. I am not going to go employee status...")

24 Clapham passed this information to the PCT as a result of which the PCT requested of Clapham further details of the engagement of Ms Rochester-Daley, Mr Thomas and Ms Bennett. As an alternative, the PCT provided opt out forms and requested that the Clapham Claimants sign and return the forms to the PCT. Clapham forwarded the request to the Claimants. Mr Thomas confirmed his wish to retain self-employed status at present. There was no evidence before the Tribunal to suggest that opt out forms were signed by any of the Clapham Claimants or that they responded further at that stage.

25 The Streatham Claimant, Ms Payton, was similarly asked by the PCT to provide information relating to her engagement with Streatham and to confirm her self-employed status. In June 2012 she confirmed her understanding that she was self-employed. Streatham too considered that she was self-employed.

26 In about July 2012, it became known that Awareness had been granted the contract. (The Tribunal notes that this was granted through the PCT's

commissioning body, South London and Maudsley Improving Access to Psychological Therapies – referred to in the documents as SLAM IAPT – but which the Tribunal does not consider is material to the issues to be decided).

27 Awareness's business model involved service delivery through a minority of paid staff providing supervision and a limited amount of counselling. The majority of the service delivery was to be provided by unpaid trainees. Awareness had tendered on the basis of the known employment costs of those individuals who would transfer; this did not include any employment costs that might be incurred should the Claimants transfer.

28 The Tribunal accepts that had Awareness been informed that the Claimants were affected employees then Awareness would have included their employment costs in the tender pricing and accepted them as transferring employees. The Tribunal's finding in this regard is supported by the fact that Awareness was happy to accept the transfer of an individual named Ms Drew when it became known that she should transfer despite the fact that she was not on the original transfer list.

29 It was understood by Clapham and Streatham that employed staff would transfer to Awareness but not the so called self-employed staff – which included the Claimants.

30 On 4 July 2012, the Streatham Claimant was informed that because she was considered self-employed she would not transfer to the new provider. She was not actually given formal notice of the termination of her contract.

31 On 19 July 2012 Clapham wrote to the Clapham Claimants giving them notice that that Clapham would no longer have responsibility for the provision of talking therapy services from 1 November 2012 and that their contracts with Clapham would end on 31 October 2012.

32 In August 2012, the PCT prepared TUPE consultation documents to be presented to affected employees of Clapham and Streatham. It was not thought that the Claimants were affected staff by reason of their supposed self-employment.

33 The consultation document:

33.1 included, amongst other things the fact that the transfer was to take place, the proposed date of the transfer and the reasons for it;

33.2 did not expressly set out the measures Clapham or Streatham envisaged they would, in connection with the transfer, take in relation to any affected employees or, if it were envisaged that no measures would be taken, that fact. Nevertheless, the consultation document did state that terms and conditions would remain the same and that pension rights upon transfer would be protected. As stated above, the Claimants were not thought to be affected employees;

33.3 did not expressly set out any measures which it was envisaged Awareness would take in relation to the affected employees;

33.4 set out the legal implications of the transfer;

33.5 did not expressly set out any economic and social implications of the transfer for the affected employees;

33.6 did not include any information about agency workers (although there was no evidence before the Tribunal to suggest that Clapham or Streatham used agency workers).

34 The consultation document set out a timetable for consultation and it was proposed that one to one meetings would take place with affected employees. The Claimants were not included on the list of affected employees. Copies of the consultation document were sent to all staff.

35 Although the consultation document did not relate to them, Clapham sent copies of the consultation documents to the Clapham Claimants in September 2012 as a matter of courtesy.

36 The Streatham Claimant was also provided with a copy of the consultation document.

37 There was no evidence to suggest that Clapham or Streatham recognised an independent trade union or that employee representatives had been appointed or elected who had authority to receive information and to be consulted about the transfer. Neither Clapham nor Streatham made arrangements for the election of employee representatives.

38 The proposed changes were discussed with the Claimants in broad terms at team meetings. However, since they were considered to be self-employed, there was no formal consultation expressly said to be in accordance with TUPE.

39 A number of "mobilisation meetings" took place in the period August 2012 to February 2013. Those meetings were variously attended at different times by representatives of the PCT, Clapham, Streatham and Awareness who discussed the practical aspects of the proposed service provision changes.

40 The notes of the mobilisation meeting that took place on 21 August 2012, which was attended by representatives of Awareness, record:

> "JM stated that those people who had been identified on the original TUPE list were those that would transfer. There were two counsellors in Streatham who were now stating that they were eligible to transfer under TUPE although this was being discussed with the PCT's legal team"

41 There was a conflict of evidence as to whether Ms McCarthy had been informed by Ms Emanuel that a number of individuals from Clapham were also challenging their employment status. The Tribunal prefers Ms

McCarthy's clear evidence to that of Ms Robertson and finds that Awareness knew nothing about any Clapham staff asserting that they had employment rights, or that they should be included in the TUPE transfer, until the Claimants' ET1 Claim Forms were received on 4 February 2013. The Tribunal further accepts Ms McCarthy's evidence that while she was aware that Clapham engaged a number of self-employed staff, she was not aware of any potential claims until the claims themselves were received by Awareness on 4 February 2013.

42 On 31 August 2012, Awareness asked Clapham to provide Employee Liability Information in relation to each employee eligible to transfer. The Tribunal heard disputed evidence as to whether Awareness sent a detailed letter dated 5 September 2012 to Clapham requesting Employee Liability Information and what it involved. Ms Robertson said she did not receive this letter. The Tribunal accepts that the letter was prepared on the day stated, not least because the metaprint shows that the letter was prepared and printed on 5 September 2012 and was not thereafter amended. Whether or not the letter was sent, and whether or not it was sent but not received, Clapham did not provide Awareness with Employee Liability Information relating to the Clapham Claimants. The extent of the information provided by Clapham about the Clapham Claimants was the list of names of self employed staff provided to the PCT referred to above. There was no credible evidence to suggest that PCT provided this list to Awareness.

43 In October 2012, Mr Gale Burns, Ms Paul and Mr Thomas emailed the PCT requesting they be transferred to Awareness. The PCT's response was that it was an issue for Clapham. Mr Burns, Ms Paul and Mr Thomas therefore raised formal grievances with Clapham. Those grievances were collectively considered by Ms Emanuel who had regard to a number of criteria relating to their engagement and concluded, having also taken into account the previous self-declarations of self-employment by Mr Burns and Ms Paul, that they were self-employed. When Ms Bennett too raised a grievance, Ms Emanuel informed Ms Bennett that the decision as to employment status related to her also.

44 By letter dated 25 October 2012, Mr Burns, Ms Paul, Mr Thomas and Ms Bennett appealed against Ms Emanuel's findings. They asserted that that they were employees and set out in some detail why that was the case. At this stage, Ms Rochester-Daley also appealed. Ms Emanuel referred Ms Rochester-Daley to her findings and suggested that she ask to be included in the appeal. Thus, all the Clapham Claimants were now appealing against Clapham's decision that they were self-employed.

45 Ms Robertson (then Howard) considered the grievance appeal and concluded that Ms Emanuel's conclusion was correct - that the Clapham Claimants were self-employed.

46 The employment of all the Claimants ended on 31 October 2012. On 1 November 2012 Awareness became responsible for the provision of talking therapy services. The employment of various employees of Clapham and Streatham transferred to Awareness under TUPE. The Claimants did not transfer, their employment having been terminated by Clapham on the assumption that they did not have the protection of TUPE because they were self-employed.

47 With regard to the Claimants' relevant employment details and efforts to replace their lost income, the Tribunal makes the following findings:

Ms Paul

47.1 Ms Paul was born on 2 April 1955. She commenced employment with Clapham on 1 October 2008. At the time of her dismissal she was working 7.5 hours on Wednesday of each week. Her gross weekly pay was £172.20; her net weekly pay was £127.00.

47.2 Ms Paul had other employment on the days she was not working for Clapham. After she had received notice of termination of her contract on 19 July 2012, Ms Paul took no active steps to mitigate her loss until 25 November 2012 when she applied for an advertised position with Awareness; she was not short-listed for that position. Having been informed that Awareness was again advertising for counsellors, she re-applied on 18 December 2012; however she was informed that the post had been filled. In addition, Ms Paul applied for the following permanent and locum positions:

47.2.1 December 2012 - staff counsellor at the Royal Marsden;

47.2.2 December 2012 and again in November 2013 – registered with the Pulse employment agency;

47.2.3 December 2012 – registered with Healthcare Locums;

47.2.4 June 2013 – applied for Head of Psychological Support at the British Red Cross;

47.2.5 October 2013 – requested to increase her hours in her NHS job;

47.2.6 January 2014 – applied for Counsellor Practitioner at Guy's and St Thomas' NHS Foundation Trust

47.3 Ms Paul's efforts have been unsuccessful and she has not replaced her lost income. Ms Paul has been unable fully to commit time and energy into seeking additional employment because she has been heavily involved in supporting her recently widowed sister and her two young children, and also her elderly parents.

Mr Burns

47.4 Mr Burns was born on 2 November 1952. He commenced employment with the Clapham on 1 October 2008. At the time of his dismissal he was

working 7.5 hours one day each week at the rate of £16.00 per hour. His gross weekly pay was therefore £120.00.

47.5 Mr Burns had other employment on days he was not working for Clapham, including a private practice. His main efforts were concentrated on replacing his lost income by building up his private practice. He updated his entry with his professional body, subscribed to a directory service and created his own website. He also tried to develop his range of training delivery and from February 2012 joined an organisation as an associate. Mr Burns' practice has grown, albeit on an erratic basis. He has been hampered to some degree by reason of a chronic fatigue condition.

47.6 Mr Burns did not produce any accounts or other records and was unable to demonstrate his losses. He accepted in cross-examination that his income had probably increased globally from all sources.

47.7 In about December 2012, Mr Burns made enquiries of Awareness; despite not making a formal application for a position he was nevertheless rejected for it. The Tribunal is unable to infer anything suspicious or sinister by that fact.

Mr Thomas

47.8 Mr Thomas was born on 19 January 1969. He commenced employment with Clapham on 1 July 2010. At the time of his dismissal he was working 11 hours each week for Clapham (3.5 hours on Mondays and 7.5 hours on Wednesdays) He was paid at the rate of £21.78 per hour. His gross weekly wage was therefore £239.58.

47.9 Mr Thomas had other employment on the days he was not working for Clapham, including a private practice conducted mainly in the evenings. In the period commencing 19 July 2012, when he was given notice of termination of his contract, to November 2013 when he was notified that he would commence full time employment on 9 December 2013, Mr Thomas made applications for four posts. He also lobbied for an increase of hours at the Terrence Higgins Trust where he was employed. He did not register with any agencies for locum work. He did not concentrate on increasing his private practice, preferring to seek employment which he thought would give him job security. He earned £350 from employment with Off the Record in the period.

47.10 On 9 December 2013 Mr Thomas commenced employment with the Terrence Higgins Trust and thus fully mitigated his loss. The contract with the Terrence Higgins Trust is due to end in March 2015 and is dependent upon continued funding.

47.11 Mr Thomas did not produce any records or accounts relating to his employment and self-employment.

Ms Bennett

47.12 Ms Bennett was born on 27 March 1954. She commenced employment with Clapham on 1 October 2008. At the time of her dismissal she was working 21 hours each week on Mondays, Tuesdays and Wednesdays. She was paid at the rate of £21.78 per hour. In her schedule of loss Ms Bennett states that her gross weekly income was £400; the Tribunal accepts this is the correct figure and assumes that a calculation has been made to arrive at an average weekly income by reference to the number of weeks worked each year.

47.13 In addition to her work at Clapham, Ms Bennett undertook other self-employed paid work. In an attempt to mitigate her loss she made enquiries of BUPA for vacant posts, joined the BACP website to help increase the number of private clients, joined a group to support lawyers requiring counsellors, joined an employee assistance programme (which has increased her income), increased her hours at the Mountview Academy of Theatre Arts, and completed a mindfulness course in order to increase her skill set. She only applied for one post in the period up to the Tribunal hearing. Ms Bennett did not register with any agencies, having been informed by friends that there were few jobs available.

47.14 In evidence, Ms Bennett produced a summary of earnings from 6 April 2012 to 5 April 2013 which had been prepared by her tax adviser. Ms Bennett also produced a letter from her tax adviser which showed that, in the adviser's opinion, Ms Bennett's income had reduced by an average of £1,633 per month following the termination of her contract with Clapham until 5 April 2013.

47.15 In the period April 2013 to April 2014 Ms Bennett earned an additional £2,480.00 from work at the Mountview Academy and £1,680.00 from work on an employee assistance programme. Her mitigation earnings in the period from date of dismissal to the Tribunal hearing total £4,344.00 gross. Ms Bennett did not produce any records relating to her earnings after 5 April 2013.

47.16 Ms Bennett had no idea how much tax she paid or the rate at which her income was taxed.

Ms Rochester-Daley

47.17 Ms Rochester-Daley was born on 8 March 1963. She commenced employment with Clapham on 22 June 2010 (not May 2010 as mistakenly stated in the Judgment of Employment Judge Nash which is the date she applied for the position; this has no material effect on any of the calculations relating to loss). She was paid at the rate of £21.78 and said she worked 21 or 22 hours each week. However, she made it clear in cross examination that her hours were variable and that her average gross weekly pay was £370.26 as set out in her schedule of loss.

47.18 Ms Rochester-Daley took the following steps in order to mitigate her loss of income:

47.18.1 In October 2012, she applied for the post of Senior Practitioner with MIND but was unsuccessful;

47.18.2 In November 2012, she applied for the post of Telephone Assessment Counsellor but was unsuccessful;

47.18.3 In December 2012 she applied for and in January 2013 registered with Pulse employment agency but was unsuccessful;

47.18.4 In January 2013 she obtained maternity cover posts to work two half days; that work continues.

47.18.5 In April 2013, she obtained further maternity cover work at Dulwich Medical Centre but which ended in November 2013.

47.18.6 In April 2013, she applied for the post of Counsellor at Lordship Lane Surgery but received no reply;

47.18.7 In May 2013, she applied and registered for counselling work with an employment assistance programme;

47.18.8 In May 2013, she successfully applied for the post of part-time counsellor at Nunhead GP surgery;

47.18.9 In May 2013, she applied for a part-time counsellor post at the Princess Group Practice but was unsuccessful;

47.18.10 In May 2013, she applied for the post of part-time counsellor at Albion Street Health Centre but was unsuccessful;

47.18.11 In addition to the above, Ms Rochester-Daley searched the internet for work opportunities.

47.19 By the time Ms Rochester-Daley commenced her employment with Nunhead GP surgery she had completely mitigated her loss.

47.20 At the end of October 2012, Ms Rochester-Daley underwent surgery and had no income during the following four weeks' convalescence. At the date of the hearing, Ms Rochester-Daley was working half days at four surgeries.

47.21 Although Ms Rochester-Daley referred in a statement to a table of information relating to her income from December 2013 to the date of the hearing, the document was not produced in the bundle of documents. However, in her schedule of loss Ms Rocester-Daley's shows a gross "replacement salary" of £23,665 in the period 31 October 2012 to 4 April 2014 which gave rise to loss which can be calculated at £3,743.92.

Ms Payton

47.22 Ms Payton was born on 29 April 1944. She commenced employment with Streatham on 1 October 2008. At the time of her dismissal she was working 14 hours a week. Her gross weekly pay was £322.00. During the period she was employed by Streatham, Ms Payton did not undertake work elsewhere.

47.23 Ms Payton took the following steps to mitigate her loss:

47.23.1 Ahead of the termination of her contract, she applied for a Sessional Lecturer post at Birkbeck College in June 2012 but was unsuccessful;

47.23.2 In July 2012 she offered her services to Awareness as a Supervisor but was told that she must await the outcome of the TUPE exercise. In October 2012 she was informed by Awareness that they would be undertaking supervision internally and therefore her services would not be required;

47.23.3 In December 2012, she applied for a locum counsellor post at LSE but was unsuccessful;

47.23.4 In the three months following her dismissal, Ms Payton thought about what she wanted to do. She had acquired a private patient in October 2012 and decided to build a private practice; she arranged for a leaflet to be printed and acquired business cards. She informed a local surgery of her proposal;

47.23.5 On 20 March 2013, Ms Payton obtained supervision work at Waterloo Community Counselling;

47.23.6 Although in July 2013 she was offered one afternoon's supervision work, that offer was withdrawn due to lack of sufficient funding;

47.23.7 Ms Payton was interviewed by CPF Counselling but was not offered a post because she could not offer the hours required;

47.23.8 In November 2013, Ms Payton commenced paid work for Coin Street Family Support and Outreach Service in Waterloo which provides her with 3 hours paid work each month;

47.23.9 In December 2013, Ms Payton registered on the "find a therapist" pages of the BACP website. She also joined a London-based organisation for counsellors and psychotherapists;

47.23.10 From the date of termination of her contract with Streatham to the date of the hearing Ms Payton has earned £11,935 gross.

48 The Tribunal accepts the evidence of the witnesses as follows. Mr Burns told the Tribunal there was a considerable demand for counsellors in the South London Boroughs but that individuals were generally unwilling to pay for private treatment. He also thought there was an oversupply of therapists in the area. Ms Emanuel told the Tribunal that most of the clients in Clapham would not be able to afford to pay privately for therapy; however, she also

gave evidence that there was a healthy demand for counsellors and that she worked as a part-time locum through an agency, had been doing so while employed by Awareness, and had obtained adequate work about one month after leaving that employment in June 2013. Mr Thomas told the Tribunal that his search of the internet showed that there were many agencies with which counsellors could register but made the point that there was no guarantee of work. Mr Gough told the Tribunal that he has found it difficult to increase his private practice and that the supply of counsellors outstrips demand. The Tribunal also heard evidence, which it accepts, that many of the posts advertised by agencies required specific qualifications such as foreign language skills or cognitive behavioural therapy certification.

49 There was no credible evidence to suggest that had the Claimants become employed by Awareness that their employment would have been terminated.

50 Upon service of the ET1 Claim Forms on 4 February 2013, Ms McCarthy promptly made an appointment with the Awareness's solicitor whom she met on 7 February 2013. She then met with Awareness's solicitor and with counsel on 18 February 2013. As well as presenting ET3s in response to the claims, Awareness presented its ET1 to the Tribunal on 22 February 2013 claiming against Clapham that they had failed to provide Employee Liability Information.

Applicable law

Transfer of Undertakings

51 The TUPE regulations applicable to this case are as follows:

11. Notification of Employee Liability Information

(1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a relevant transfer —

(a) in writing; or

(b) by making it available to him in a readily accessible form.

(2) In this regulation and in regulation 12 "employee liability information" means—

(a) the identity and age of the employee;

(b) those particulars of employment that an employer is obliged to give to an employee pursuant to section 1 of the 1996 Act;

(c) information of any—

(i) disciplinary procedure taken against an employee;

(ii) grievance procedure taken by an employee,

within the previous two years, in circumstances where a Code of Practice issued under Part IV of the Trade Union and Labour Relations Act 1992 which relates exclusively or primarily to the resolution of disputes applies;

(d) information of any court or tribunal case, claim or action—

(i) brought by an employee against the transferor, within the previous two years;

(ii) that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and

(e) information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to regulation 5(a).

(3) Employee liability information shall contain information as at a specified date not more than fourteen days before the date on which the information is notified to the transferee.

(4) The duty to provide employee liability information in paragraph (1) shall include a duty to provide employee liability information of any person who would have been employed by the transferor and assigned to the organised grouping of resources or employees that is the subject of a relevant transfer immediately before the transfer 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.

(5) Following notification of the employee liability information in accordance with this regulation, the transferor shall notify the transferee in writing of any change in the employee liability information.

(6) A notification under this regulation shall be given not less than fourteen days before the relevant transfer or, if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter.

(7) A notification under this regulation may be given—

(a) in more than one installment;

(b) indirectly, through a third party.

12. Remedy for failure to notify employee liability information

(1) On or after a relevant transfer, the transferee may present a complaint to an employment tribunal that the transferor has failed to comply with any provision of regulation 11.

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months beginning with the date of the relevant transfer;

(b) 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 that period of three months.

(3) Where an employment tribunal finds a complaint under paragraph (1) well-founded, the tribunal—

(a) shall make a declaration to that effect; and

(b) may make an award of compensation to be paid by the transferor to the transferee.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances, subject to paragraph (5), having particular regard to—

(a) any loss sustained by the transferee which is attributable to the matters complained of; and

(b) the terms of any contract between the transferor and the transferee relating to the transfer under which the transferor may be liable to pay any sum to the transferee in respect of a failure to notify the transferee of employee liability information.

(5) Subject to paragraph (6), the amount of compensation awarded under paragraph (3) shall be not less than £500 per employee in respect of whom the transferor has failed to comply with a provision of regulation 11, unless the tribunal considers it just and equitable, in all the circumstances, to award a lesser sum.

(6) In ascertaining the loss referred to in paragraph (4)(a) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to any damages recoverable under the common law of England and Wales, Northern Ireland or Scotland, as applicable.

(7) ....

13 Duty to inform and consult representatives

(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.

(2A) Where information is to be supplied under paragraph (2) by an employer –

(a) this must include suitable information relating to the use of agency workers (if any) by that employer and;

(b) "suitable information relating to the use of agency workers" means-

(i) the number of agency workers working temporarily for and under the supervision and direction of the employer;

(ii) the parts of the employer's undertaking in which those agency workers are working; and

(iii) the type of work those agency workers are carrying out.

(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.

14. Election of employee representatives

(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) and (i).

15. Failure to inform or consult

(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).

16. Failure to inform or consult: supplemental

(1) ....

(2) ....

(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) ....

(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.

52 The time limit set out in Regulation 12(2) is the same as the time limit applicable to certain other employment related claims. The words "not reasonably practicable" are to be given the same meaning whenever they appear in an equivalent context in comparable legislation; see GMB v Hamm EAT246/00.

Compensation for unfair dismissal

53 Section 118 of the Employment Rights Act 1996 provides that where a Tribunal makes an award for unfair dismissal the award shall consist of a basic award and a compensatory award.

54 Section 119 of the Employment Rights Act 1996 provides that the amount of the basic award shall be calculated by:

54.1 Determining the period, ending with the effective date of termination, during which the employee has been continuously employed;

54.2 Reckoning backwards from the end of that period the number of years employment falling within that period; and

54.3 Allowing the appropriate amount for each of those years of employment

55 The appropriate amount means:

55.1 One and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

55.2 One week's pay for a year of employment in which he was not below the age of twenty-two, and

55.3 Half a week's pay for each year of employment not falling within the above subparagraphs

56 Where twenty years of employment have been reckoned, no account shall be taken of any year of employment earlier than those twenty years. For the purpose of calculating the basic award the amount of a week's pay shall not

exceed £430.00 where the appropriate date falls on or after 1 February 2012 but before 31 January 2013.

57 Section 123 of the Employment Rights Act 1996 provides that the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to the action taken by the employer. The loss shall be taken to include:

- Any expenses reasonably incurred by the Claimant in consequence of the dismissal
- The loss of any benefit which he might reasonably be expected to have had but for the dismissal

58 In ascertaining the loss the Tribunal must apply the same rule concerning the duty of a person to mitigate his loss as applies to damages under the common law of England and Wales

59 The limit on the amount of the compensatory award that could be awarded to each Claimant in relation to their dismissals in this case must not exceed £72,300.

60 Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

61 Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that if in the case of certain proceedings (including proceedings relating to unfair dismissal) it appears to the Employment Tribunal that –

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,

the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25% (in unfair dismissal cases this applies to the compensatory award under section 124(a) of the Employment Rights Act 1996).

62 Paragraph 1 of the ACAS Code of Practice: Disciplinary & Grievance Procedures (2009) explains what the code is all about:

> "This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.
>
> - Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.
>
> - Grievances are concerns, problems or complaints that employees raise with their employers.
>
> The Code does not apply to redundancy dismissals or the non renewal of fixed term contracts on their expiry".

63 The Polkey principle established by the House of Lords is that if a dismissal is found to have been unfair then the fact that the employer would or might have dismissed the employee anyway had the employer acted fairly goes to the question of remedy and compensation reduced to reflect that fact.

Conclusion

Remedy for unfair dismissal

64 Before turning to the compensation to be awarded to the individual Claimants, consideration is given to the Claimants' submissions, although not put with great force, that in dismissing them Clapham and Streatham failed to comply with the ACAS Code of Practice. Consideration is then given to the Polkey issue.

65 The Tribunal is not persuaded that the claims to which these proceedings relate, insofar as they relate to the dismissals, concern matters to which the Code of Practice applies. The purpose of the Code is expressly stated in the Code itself: to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace. This case does not touch on disciplinary matters.

66 The Tribunal finds support for its conclusion in the judgment of the Employment Appeal Tribunal (EAT) in Lund v St Edmund's School, Canterbury UKEAT/0514/12/KN in which applicability of the ACAS Code of

Practice was considered. In that case the EAT stated, at paragraph 12 of its judgment:

> "So although there are particular occasions to which the Code does not apply – dismissals for redundancy and the non-renewal of fixed-term contracts on their expiry – it is intended to apply to those occasions when an employee faces a complaint which may lead to disciplinary action or where an employee raises a grievance. If the employee faces a complaint which may lead to disciplinary action (whether because of his misconduct or his poor performance), the Code applies to the disciplinary procedure under which the complaint is to be investigated and adjudicated upon...The important thing is that it is not the ultimate outcome of the process which determines whether the Code applies. It is the initiation of the process which matters. The Code applies where disciplinary proceedings are, or ought to be, invoked against an employee"

The EAT held that because the initiation of the process involved the employer's disciplinary procedure, or ought to have involved the disciplinary procedure, the Code applied regardless of the fact that the Employment Tribunal had found the reason for the dismissal had been for some other substantial reason.

67 Mr McDonald submitted on behalf of Ms Paul that Clapham's failure to hold meetings to consider the grievances raised by the Clapham Claimants was a breach, albeit minor, of the Code of Practice. Mr Gray-Jones submitted, in terms, that because Clapham believed the Clapham Claimants were self-employed, the breach was not unreasonable. Given that Employment Judge Nash has found that the Claimants were employees, and were employees when the grievances were raised, the Tribunal is unable to conclude that Clapham's breach was not unreasonable. However, the grievances were fully set out and responded to in writing. In the Tribunal's judgment, it would have made little or no difference to the outcome had meetings been held to consider them. The compensatory awards of the Clapham Claimants will be subject to an uplift of 5% which, in the circumstances, the Tribunal considers just and equitable.

68 The evidence clearly suggested that had the Claimants been treated as employees and not unfairly dismissed, they would have transferred and their employment continued with Awareness. It is not appropriate therefore to make a Polkey reduction.

69 Turning to the compensation to be awarded to the individual Claimants for unfair dismissal, the Tribunal again notes that the Claimants' evidence was, for the most part, vague and unsatisfactory. However, the Tribunal does not

accept Mr Solomon's submission that the Claimants' evidence was deliberately unhelpful or, if it was being said, that the Claimants deliberately exaggerated the value of their claims in their schedules of loss such that their integrity should be open to question. Nor does the Tribunal accept Mr Gray-Jones submission that in some cases the Claimants' evidence was so vague and unreliable that it is impossible for the Tribunal to determine whether the Claimants have financial loss arising from their dismissal and if so the amount of that loss. There was evidence before the Tribunal and it reaches its conclusions relating to compensation the best it can based upon that evidence.

Ms Paul

Basic Award

69.1 Ms Paul was 57 years of age at the effective date of termination when she had completed 4 full years employment with Clapham. The basic award is therefore: 6 x £172.20 = **£1,033.20**

Compensatory Award

69.2 The Tribunal heard evidence that vacancies that existed for therapists would often entail multi-day working and the Tribunal therefore recognises the difficulty Ms Paul faced replacing work she had undertaken just one day a week for Clapham.

69.3 However, Ms Paul made only one job application in 2013. She was reluctant to apply for positions which would pay at the rate of £15 per hour because she thought she was over-qualified for such positions. Ms Paul told the Tribunal she was reluctant to rely on locum work at this point in her career.

69.4 As Ms Paul told the Tribunal, she was unable fully to commit time and energy into seeking additional employment because of the support she was providing to members of her family: in this regard it cannot be said that the loss sustained by the Claimant in consequence of the dismissal was loss attributable to the action taken by Clapham.

69.5 The Tribunal concludes that Ms Paul did not take reasonable steps to mitigate her loss, or had been unable or unwilling to do so by reason of the caring role she undertook towards members of her family.

69.6 By analogy with the findings in respect of Ms Bennett (see below) it is reasonable to assume that had Ms Paul made reasonable efforts to mitigate her loss, on the balance of probabilities she would have fully mitigated by, say, August 2013. Loss of earnings will be awarded for the period from the date of dismissal to August 2013 which is 40 weeks.

69.7 Loss of earnings: 40 x £127.00 = £5,080.00

69.8 The Tribunal makes no award for future loss.

69.9 Compensation for loss of statutory rights is awarded in the sum of £350.00

69.10 The total compensatory award is £5,080.00 + £350.00 plus 5% uplift = **£5,701.50**.

69.11 The total award for unfair dismissal is £1,033.20 + £5,701.50 = **£6,734.70**.

Mr Burns

Basic Award

69.12 Mr Burns was 59 years of age at the effective date of termination when he had completed 4 full years employment with Clapham. The basic award is therefore: 6 x £120 = **£ 720.00**

69.13 During cross examination Mr Burns conceded that his income had probably increased globally from all sources. In light of that concession, the Tribunal makes no award for loss of earnings. The compensatory award is limited to £350 for loss of statutory rights.

69.14 The compensatory award is therefore £350.00 plus 5% uplift = **£ 367.50**

69.15 The total award for unfair dismissal is £720.00 + £ 367.50 = **1,087.50**

Mr Thomas

Basic Award

69.16 Mr Thomas was 43 years of age at the effective date of termination when he had completed 2 full years employment with Clapham. The basic award is therefore: 3 x £239.58 = **£ 718.74**

Compensatory Award

69.17 Mr Thomas was dismissed on 31 October 2012 and fully mitigated his loss on 9 December 2013. During that period he earned £350 over and above his earnings from other sources. Although Mr Thomas did not register with any agencies which might have provided work opportunities, in particular for locum work, the Tribunal accepts that Mr Thomas found it difficult to find work at times which would not interfere with his other employment and that it was reasonable for Mr Thomas to seek to retain what other employment he had. On balance it is the Tribunal's view Mr Thomas made reasonable efforts to mitigate his loss.

69.18 Mr Thomas did not explain or provide any documents to show his net pay. In cross examination he said that when employed by Clapham he had two other income streams; the figures he gave suggest a total income in the region of £41,000 gross per annum.

69.19 Applying a broad brush approach in order to find the net wage, the Tribunal reduces the gross wage figure by 20%. Thus when employed by

Clapham Mr Thomas earned approximately £191.66 net per week. The period 1 November 2012 to 9 December 2013 is 58 weeks.

69.20 Loss of earnings: 58 x £191.66 - £350.00 = £10,766.28.

69.21 Loss of statutory rights is awarded in the sum of £350.00

69.22 Although Mr Thomas is unsure how long his employment with the Terrence Higgins Trust might last, the Tribunal is unwilling enter into what could only be speculation about the matter. The Tribunal awards no compensation for future loss.

69.23 The compensatory award is £10,766.28 + £350.00 plus uplift of 5% = **£11,672.09**.

69.24 The total award for unfair dismissal is £718.74 + £11,672.09 = **£12,390.83**

Ms Bennett

Basic Award

69.25 Ms Bennett was 57 years of age at the effective date of termination when she had completed 4 full years employment with Clapham. The basic award is therefore: 6 x £400.00 = **£2,400.00**

Compensatory Award

69.26 Ms Bennett worked three days a week for Clapham and would not have had the same difficulties as other Claimants who were seeking to replace one or two days' work. Although Ms Bennett did make some attempts to obtain fresh employment and managed to achieve replacement earnings of £4,344.00 gross, she made only one job application in the period up to the Tribunal hearing and did not register with any agencies.

69.27 The Tribunal concludes that Ms Bennett did not take reasonable steps to mitigate her loss.

69.28 Whilst noting the difficulty Ms Bennett would have had in obtaining fresh employment in the job market, as noted above, Ms Rochester-Daley was able to fully mitigate her loss by May 2013 and Mr Thomas by December 2013. It is reasonable to assume that had Ms Bennett made reasonable efforts to mitigate her loss, on the balance of probabilities she too would have fully mitigated by, say, August 2013. Loss of earnings will be awarded for the period from the date of dismissal to August 2013 which is 40 weeks.

69.29 Gross loss in the period from date of dismissal to May 2013 was 40 x £400 = £16,000. Deducting 20% for tax and National Insurance gives £12,800 net. Again adopting a broad brush approach without the benefit of detailed evidence, the Tribunal deducts £2,500 to reflect earnings from alternative sources, an approximate sum which might reasonably be thought applicable to the period in question. Net loss of earnings is therefore £10,300.00.

69.30 The Tribunal awards no compensation for future loss of earnings.

69.31 Loss of statutory rights is awarded in the sum of £350.00.

69.32 Total compensatory award is £10,300.00 + £350.00 plus 5% uplift = **£11,182.50**

69.33 The total award for unfair dismissal is **£13,582.50**

Ms Rochester-Daley

Basic Award

69.34 Ms Rochester-Daley was 49 years of age at the effective date of termination when she had completed 2 full years employment with Clapham. The basic award is therefore: 3 x £370.26 = **£ 1,110.78**

Compensatory Award

69.35 There can be little doubt that Ms Rochester-Daley took reasonable steps to mitigate her loss. As a result, as she conceded in cross examination, she had fully mitigated her losses by May 2013.

69.36 Ms Rochester-Daley was unable to say what her net losses were from the date of dismissal to May 2013 or provide any documents which might assist the Tribunal in calculating the loss. However, it is reasonable to assume that the loss of £3,743.92 must that attributable the period ending May 2013 when Ms Rochester-Daley mitigated her loss. That must be a gross loss.

69.37 In order to arrive at a net loss figure the Tribunal applies a broad brush deduction of 20% to account for income tax and National Insurance (bearing in mind Ms Rochester-Daley will have a tax free personal allowance) to give £2,995.00 net.

69.38 The Tribunal award no compensation for future loss of earnings.

69.39 Compensation for loss of statutory rights is awarded in the sum of £350.00.

69.40 The compensatory award is £2,995.00 + £350.00 plus 5% uplift = **£3,512.25**

69.41 The total award for unfair dismissal is £1,110.78 + £3,512.25 = **£4,623.03**

Ms Payton

Basic Award

69.42 Ms Payton was 68 years of age at the effective date of termination when she had completed 4 full years employment with Streatham. The basic award is therefore: 6 x £322.00 = **£1,932.00**

Compensatory Award

69.43 There was no evidence to suggest that despite her age Ms Payton wished to retire in the near future. It appeared to the Tribunal that although she wished to build a private practice, Ms Payton took rather half-hearted steps towards achieving it: she spent about three months thinking about it and about five months to prepare a leaflet. Nor did she sign up to any agencies. Although Ms Payton had taken some steps to mitigate her loss and achieved modest earnings from fresh employment, the steps she took were not pursued with any reasonable urgency and the Tribunal concludes that she failed to take reasonable steps.

69.44 Ms Payton was not restricted in undertaking employment any day of the week since she had previously worked only for Streatham. By analogy with the conclusion in relation to Ms Bennett, it would be reasonable to assume that Ms Payton would have obtained fresh employment by August 2013 had she taken reasonable steps.

69.45 At Streatham she was earning £322 gross per week. In the absence of evidence to the contrary, the Tribunal uses the same broad brush calculation and deducts 20% for income tax and National Insurance to give £257.60 net per week.

69.46 Net loss of earnings is 40 x £257.60 = £10,304.00.

69.47 The Tribunal makes no award for future loss.

69.48 Compensation for loss of statutory rights is awarded in the sum of £350.00

69.49 Total compensatory award is £10,304.00 = £350.00 = **£10,654.00**.

69.50 The total award for unfair dismissal is £1932.00 + £10,654.00 = **£12,586.00**

The Claims under Regulations 13 – 15 TUPE 2006

Submissions on the issue

70 The Tribunal sets out the following brief summary of the submissions of the parties on this issue.

71 Mr McDonald submitted on behalf of Ms Paul and Ms Payton, and by Mr Burns adopting those legal submissions on behalf of the other Claimants, that the failures on behalf of Clapham and Streatham were no mere technical breaches. The transfers resulted in all of the Claimants losing their jobs. It also created a radically different model of service provision involving far greater reliance on trainee and volunteer counsellors. The Claimants' ongoing concerns, it was submitted, were never explored by way of the formal consultation process envisaged by Regulations 13 and 14 of TUPE. It was submitted on behalf of the Claimants that the failure was serious and that the starting point for assessing compensation should be 13 weeks' pay and then consider whether there is any justification for a reduction. The failure in this

case was more serious than that in Todd v Strain [2011] IRLR 11 in which 7 weeks pay was awarded. Reliance was placed upon Susie Radin Ltd v GMB [2004] EWCA Civ 180 as affirmed by the EAT in Barnet LBC v Unison UKEAT/0191/13.

72 Mr Gray-Jones conceded on behalf of Clapham that elections were not carried out but submitted that that Clapham took reasonable steps to inform and consult with the Claimants - that Clapham complied with its obligations but against a background of a reasonable belief that the Clapham Claimants were self-employed. This was not a case in which Clapham knowingly disregarded its obligations. If there was a breach, he submitted, it was a technical breach and compensation should be at the lower end of the scale. Mr Gray-Jones relied on London Borough of Barnet v Unison & NSL Ltd UKEAT/0191/13 as authority for the proposition that the starting point should only be the maximum where the employer has not engaged in any consultation at all.

73 Mr Solomon, in his oral submissions, invited the Tribunal to find that that circumstances in which Clapham and Streatham genuinely and reasonably concluded that individuals were self-employed, and the Claimants themselves had considered themselves self-employed, amounted to special circumstances which rendered it not reasonably practicable for the respective Respondent employers to inform and consult under TUPE for the purposes of Regulation 13(9). Mr Solomon submitted that Clapham and Streatham took such steps as were reasonable in the circumstances as required under Regulation 15(2). And if that were not a complete defence to the claim then it would not be just and equitable to punish an employer in those circumstances.

The Tribunal's conclusion on the issue

74 It was not in dispute that both Clapham and Streatham failed to carry out elections for employee representatives as required by Regulations 13(3)(b) and 14.

75 The Claimants were not formally provided with the information required to be provided by Regulation 13(2) within the context of TUPE consultation. However, they were provided with some of that information since it was included in the consultation document sent to the Claimants. In particular, the Claimants were informed of the fact that the transfer was to take place (albeit that it did not include them), the proposed date of the transfer and the reasons for it; and the legal implications of the transfer (although it did not include the implications for the Claimants, again because they were not thought to be affected employees).

76 Although there was some discussion with the Claimants at team meetings about the proposals, the Tribunal is unable to accept that such discussions amounted to the sort of consultation envisaged by Regulation 13(6) and (7). Such consultation must relate to measures the employer intends to take in

relation to an affected employee in relation to the transfer. It was clear that Clapham and Streatham envisaged taking measures in relation to the Claimants – they were to be dismissed. Whilst acknowledging that Clapham considered the Clapham Claimants' grievance relating to their employment status, that does not lead to the conclusion that Clapham complied with the requirement to consider and respond to representations relating to measures that would be taken. The fact is that the Claimants were thought to be self-employed and excluded from formal consultations that were carried out with acknowledged employees who were affected by the transfer. In those circumstances, it cannot be said that the discussions with the Claimants at team meetings, or the consideration of their grievance without a hearing, amounted to meaningful consultation.

77 The Tribunal is unable to accept Mr Solomon's submission that there were special circumstances which rendered it not reasonably practicable for information to be provided and consultation to be carried out. Equivalent provisions relating to a failure to inform and consult employee representatives in a collective redundancy situation appear in section 189(6) of the Trade Union & Labour Relations (Consolidation) Act 1992. Cases decided under that legislation make it clear that what amounts to special circumstances is to be narrowly construed and will only apply if the circumstances are exceptional or out of the ordinary; see Clarks of Hove Ltd v Bakers' Union 1978 ICR 1076. The Tribunal does not accept that a mistaken belief as to the Claimants' employment status amounted to the sort of special circumstances envisaged by Regulation 13(9). To accept that a mistaken belief, in a claim such as this which was made by genuine employees, could amount to special circumstances and provide an employer with a complete defence would, in the Tribunal's view, defeat the purpose of Regulation 13.

78 In Susie Radin, a case concerning the collective redundancy legislation but equally applicable here, Peter Gibson LJ gave guidance to Employment Tribunals as follows:

> "I suggest that Employment Tribunals in deciding in the exercise of their discretion whether to make a protective award and for what period should have the following matters in mind:
>
> (i) The purpose of the award is to provide a sanction for breach by the employer of the obligations in section 188; it is not to compensate the employees for loss which they have suffered as a consequence of the breach.
>
> (ii) The Tribunal have a wide discretion to do what is just and equitable in the circumstances. But the focus should be on the seriousness of the employer's default.
>
> (iii) The default may vary in seriousness from the technical to a complete failure to provide any of the information and to consult.

(iv) The deliberateness of the failure may be relevant as may be the availability to the employer of legal advice as to his obligations under section 188.

(v) How the Tribunal assess the length of the protected period is a matter for the Tribunal but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there were mitigating circumstances justifying a reduction to an extent which the Tribunal considers appropriate"

79 In Sweetin v Coral Racing [2005] UKEAT/0039/05 there was no attempt whatsoever by the employer to comply with its obligations; the first the employees knew about the transfer was when representatives of the new owners announced themselves on the premises. In that case the EAT substituted an award of 13 weeks' pay for the 6 weeks' pay awarded by the employment tribunal.

80 In Todd v Strain the employer made no arrangements for the election of employee representatives and no consultation was carried out although some information, said to be inadequate information, was provided to the employees themselves. In that case the EAT ruled that the case was not one at the extreme end of the scale and that 7 weeks' pay was the appropriate award. It was said in that case that Peter Gibson LJ's guidance in Susie Radin where reference is made to taking the maximum award as the starting point and discounting, if appropriate, for mitigating circumstances is directed at the case where the employer has done nothing at all, and it should not be applied mechanically in a case where there has been some information given and/or some consultation but without using the statutory procedure. This was confirmed in London Borough of Barnet v Unison & NSL Ltd.

81 In the present case, there was no use of the statutory procedure but there was some information and some consultation. In that sense it is similar to Todd v Strain. But the present case has an additional feature: the reason why the statutory procedure was not used was because Awareness and Clapham believed that the Claimants were self-employed and not affected employees. There was no evidence to suggest that the belief was not genuine or held in bad faith. Clapham considered the grievance raised by the Clapham Claimants and had regard to relevant factors: they simply came up with the wrong answer. The breach of was not deliberate.

82 In those circumstances the Tribunal concludes that an appropriate "punishment" is to award one week's pay to each of the Clapham Claimants.

83 Awareness is jointly and severally liable with Clapham.

84 The Tribunal is unable to make an order under Regulation 15(8)(a) because Streatham has been dissolved and it is thus not possible to make Awareness

jointly and severally liable under Regulation 15(9). No award can be made in favour of Ms Payton

85 After the Tribunal had considered the evidence in Chambers, but before this Judgment had been prepared, solicitors for Awareness submitted that judgment in the case of Allen v Morrisons UKEAT/0298/13, handed down on 16 April 2014, was directly relevant to the issues in the present case. Awareness submitted that the ruling in Allen meant that Awareness could not be jointly and severally liable. Solicitors for Clapham promptly wrote to the Tribunal and submitted that Allen did not have the meaning contended for by Awareness.

86 Allen concerned a claim made by an employee directly against a transferee on the basis that the transferee had given wrong information to the transferor which amounted to a failure to perform a transferee's obligations under Regulation 13(4). The present case is not one in which the Claimants are complaining that the transferee (Awareness) failed to perform a duty. They are complaining that Clapham and Streatham failed to perform their duties. The submission made by Awareness's solicitors is plainly wrong. The judgment in Allen has no relevance to the present case.

The Claim under Regulation 12 TUPE 2006 by Awareness against Clapham and Streatham

87 The relevant transfer took place on 1 November 2012. Awareness presented its ET1 on 22 February 2013 which was some three weeks after the expiry of the primary time limit provided in Regulation 12(2). The Tribunal is unable to accept that because mention was made at a mobilisation meeting that Streatham employees were questioning their employment status, Awareness was thus put on notice that there had been a failure to provide Employee Liability Information. Whilst Ms McCarthy knew of the existence of self-employed workers, she had no reason to believe they might be employees or any reason to make enquiries about their purported employment status. The Tribunal is satisfied that Awareness only became aware of the fact that there might be employees in respect of whom Employee Liability Information had not been provided on 4 February 2013 when the Claimants' ET1s were served. Awareness was thus ignorant of the fact that other individuals might have been affected employees: this lack of knowledge was fundamental rendering it impracticable for Awareness to present its claim.

88 The Tribunal has had regard to Cambridge & Peterborough NHS Trust v Crouchman [2009] ICR 1306 and the authorities cited therein and the Tribunal has no hesitation in concluding that it was not reasonably practicable for Awareness to have brought its claim within the primary time limit.

89 Upon receiving the Claimants' ET1s, Ms McCarthy promptly made an appointment with the Awareness's solicitor whom she met on 7 February 2013. The Tribunal was provided with no explanation for the delay which took place between 7 February 2013 and 18 February 2013 when she and

Awareness's solicitor met with counsel. Nor was the Tribunal provided with an explanation for the delay which took place between the meeting with counsel on 18 February 2013 and the presentation of Awareness's ET1 on 22 February 2013. When asked in cross examination about the delay, Ms McCarthy simply answered "I am not a lawyer". She had clearly instructed her solicitors and must have relied upon them to comply with relevant time limits.

90 Mr Gray-Jones submitted that justification is required for any additional period of delay and relied on DHL Excel Supply Chain Ltd v Davies UKEAT/0035/09 He submitted that Awareness should have submitted its claim forthwith. In reliance on the ruling in Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10 Mr Gray-Jones submitted that it makes no difference if the delay was caused by Awareness or its advisers.

91 Mr Solomon submitted that the existence of the Claimants was unknown, that Awareness acted amazingly quickly by getting the papers to together, and that the ET1 was presented within days of counsel being instructed. Mr Solomon submitted that the cases cited by Mr Gray-Jones would not assist the Tribunal and that delays in those cases amounted to months in some cases.

92 The Tribunal takes judicial notice that claims of this nature will require instructions to be taken by solicitors acting for a respondent made a party to proceedings; and with regard to a Regulation 12 claim, a claim not commonly encountered in the Employment Tribunals, that counsel might reasonably be instructed.

93 The Tribunal notes that Mr Solomon is not entirely correct in suggesting that the cases cited by Mr Gray-Jones relate to lengthy delays: in DHL the Claimant presented his claim eight days after the expiry of the primary time limit which was within 24 hours of seeking legal advice. That as it may be, the question for this Tribunal is whether, in the circumstances of this case, Awareness presented its ET1 within such further period after the expiry of the primary time limit as the Tribunal considers reasonable. In the Tribunal's view, it did. The claim was presented just 18 days after Awareness became aware of the substantive claims. Ms McCarthy acted promptly in meeting with Awareness's solicitors. It is true that there was no explanation as to why a meeting with counsel could not be arranged the following week but it might reasonably have been for any number of reasons, for example, counsel might have been in court that week. The meeting with counsel took place on Monday 18 February 2013. The Tribunal notes that the Grounds of Resistance and particulars of the Regulation 12 claim are dated 20 February 2013. It is reasonable to assume that Awareness's solicitors needed to take instructions on the document before presenting the ET3 and its ET1 on 22 February 2013. The Tribunal concludes that Awareness presented its claim within a reasonable period and has jurisdiction to consider it.

94 It is clear that both Clapham and Streatham failed to notify Awareness the Employee Liability Information as required under Regulation 11 in respect of the Claimants.

95 Had Awareness been provided with Employee Liability Information relating to the Claimants as employees, they would have been taken on by Awareness. They would not have been unfairly dismissed. By reason of becoming responsible for the payment of the unfair dismissal awards, Awareness has thus suffered a loss which, the Tribunal's view, is attributable to the failures of Clapham and Streatham to provide Employee Liability Information.

96 Proceedings cannot proceed against Streatham which has been dissolved.

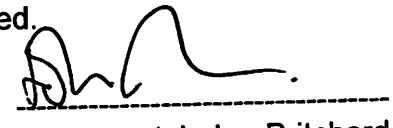
97 There was no convincing evidence that Awareness failed to take reasonable steps to mitigate its loss. The Tribunal is not persuaded by Mr Gray-Jones' submission that by failing to obtain indemnities in its contract with the PCT's commissioning body, Awareness failed to mitigate its loss. There was insufficient evidence as to the negotiation of the contract to support that argument.

98 In the Tribunal's view, it would be just and equitable in the circumstances of this case to award compensation to be paid by Clapham to Awareness in a sum equivalent to the Clapham Claimants' unfair dismissal awards. It is a loss suffered by Awareness which is attributable to Clapham's failure to notify Employee Liability Information in relation to the Clapham Claimants.

99 Turning to Awareness's claim for an indemnity in respect of its joint and several liability to pay compensation for failure to inform and consult, the Tribunal is unable to accept Mr Solomon's submission that this is a loss attributable to the failure to provide Employee Liability Information. Such claims might have presented even if full Employee Liability Information had been provided. In any event, the Tribunal is not persuaded that a joint and several liability to pay compensation is a loss of the kind envisaged in Regulation 12.

100 As for Awareness's claim under Regulation 12 for its legal costs, the Employment Rules of Procedure set out an exclusive set of rules strictly regulating the circumstances in which costs can be awarded. If costs were to be awarded as a loss under Regulation 12, that would circumvent the rules in cases like this. That cannot have been the intention of Parliament when enacting Regulation 12.

101 Awareness's claim is successful to the extent stated.



Employment Judge Pritchard

9th May 2014

Case Numbers: 2300375/2013, 2300411/2013, 2300412/2013, 2300414/2013, 2300418/2013, 2300419/2013 & 2315294/2013

Judgment sent to the parties and entered in the Register on: 20th May 2014

E. Cosgrel

For the Tribunal Office

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2300375/2013 & others

Name of case(s): Ms S Paul & others v Clapham SPMS & Others

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day (*"the calculation day"*) 42 days after the day (*"the relevant judgment day"*) that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 20th May 2014

"the calculation day" is: 1st July 2014

"the stipulated rate of interest" is: 8%

MRS E CROSSFIELD
For and on Behalf of the Secretary of the Tribunals

2 1 MAY 2014

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.justice.gov.uk/tribunals/employment/claims/booklets

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding discrimination or equal pay awards* or sums representing costs or expenses) if they remain wholly or partly unpaid after 42 days.

3. The 42 days run from the date on which the Tribunal's judgment is recorded as having been sent to the parties and is known as "the relevant judgment day". The date from which interest starts to accrue is the day immediately following the expiry of the 42 days period called "the calculation day". The dates of both the relevant judgment day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request a reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.

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* The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 prescribes the provisions for interest on awards made in discrimination and equal pay cases.