Case No: 2208175/2017
2208177/2017
2208178/2017
2208180/2017

EMPLOYMENT TRIBUNALS

Claimants: **(1) Duncan Ferguson**
(2) John Kevill
(3) Andrew Lax
(4) Byron Pull

Respondents: **(1) Astrea Asset Management Ltd**
(2) Lancer Property Asset Management Ltd
(3) Abbotstone Property Services Ltd
(4) Intensive Management Support Ltd
(5) Giles Easter

Heard at: **London Central** **On:** **9-12, 15 October 2018**
Before: **Employment Judge Goodman**

Representation
Claimants: **Mr. D. Reade QC**
Mr M. Delehanty, counsel

Respondents (1) and (5): **Mr S. Devonshire QC**
Mr E. Capewell, counsel

RESERVED JUDGMENT

1. The second and third claimant were not assigned to the relevant group of employees and their claims of unfair dismissal fail because they did not transfer.

2. The first claimant was unfairly dismissed. Any award is increased by 25 % for failing to follow the ACAS Code. There is no reduction for conduct or contribution.

3. The fourth claimant was unfairly dismissed. Any compensation for unfair dismissal is reduced by 100% for conduct. Any award would have been increased by 25% for failing to follow the ACAS Code.

4. The first claimant's claims of disability discrimination and part-time worker discrimination do not succeed.

5. The first respondent failed to inform the second, third and fourth respondents of measures relating to the transfer and is ordered to pay each of the four claimants three weeks' pay.

6. The terms of the contract at transfer relating to bonus and termination payment are void because varied by reason of the transfer. The varied terms as to salary, pension contribution and holiday are not void.

7. Issues relating to remedy will be decided at a further hearing on **Monday 11 February 2019.**

REASONS

1. These claims arise from the transfer of the management of the assets of the Berkeley Estate in central London from the second respondent ("Lancer") to the first Respondent ("Astrea") on 29 September 2017.

2. It is agreed that this was a relevant transfer (specifically, a regulation 3(1)(b) service provision change) for the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

Unfair Dismissal

3. The first claimant was dismissed on 5 October 2017, soon after the transfer. The other three had already been dismissed on transfer. All claim they were unfairly dismissed, whether by reason of the transfer or otherwise.

4. The issues were identified at a case management hearing on 18 April 2018.

5. There are preliminary issues for the first and third claimants, Messrs. Lax and Pull, who were employed by the fourth and fifth respondents, which are service companies: (1) was either an employee, as defined in regulation 2 of TUPE, of any transferor, and if yes, (2) was either "assigned", immediately before the transfer, to the organised grouping that transferred.

6. If they were, then together with the first and second claimants (Ferguson and Kevill) the Tribunal must decide the reason for their dismissals. If it was the transfer, the dismissals are automatically unfair. If it was another reason, the Tribunal must consider whether it was a potentially fair reason, and whether a reasonable employer would have dismissed for that reason. The first respondent purported to dismiss for gross misconduct in agreeing new, and (in their view dishonestly) inflated contracts of employment for themselves, and in obstructing requests for information by transferee and owner.

7. If the Tribunal finds they were unfairly dismissed, the first respondent (transferee) argues compensation should be reduced to zero for contributory fault, and (if unfair for lack of process) that a fair dismissal process would have made no difference to the outcome. The Tribunal has then to consider whether any award should be increased or reduced for failure to follow the ACAS Code on Discipline. Other than this, assessment of remedy was to be postponed to a further hearing.

Discrimination Claims

8. The first Claimant (Mr Ferguson) was dismissed a few days after the others. He also claims:

   8.1 his dismissal was because of disability, namely his wife's terminal illness (Equality Act section 13), or because of something arising from disability, namely his need to take time off to provide or arrange care for her (section 15). If it was the latter, the Tribunal must decide whether section 15 extends to associative disability.

   8.2 and/or it was because he was a part-time worker. The respondent denies he was a part-time worker.

   Both disability and part-time worker discrimination claims should normally be heard by a three person Tribunal. In this case the parties agreed (as permitted in section 4(2)(e) Employment Tribunals Act 1996) hearing by Judge alone.

9. Mr Easter, the fifth respondent, Astrea's CEO, is named solely in the disability discrimination claim.

New Contracts and the Money Claims

10. An important issue, because it relates to the first respondent's reason for dismissing, is the determination of the terms and conditions on which the claimants were employed at the time of transfer. Their contract terms were substantially improved in several ways in the weeks preceding transfer (the "new contracts"). The first respondent argues:

   (1) these terms were void under TUPE regulation 4(4) because the sole or principal reason for the variation was the impending transfer

   (2) in any case they were not formally and validly agreed

   (3) they are voidable in equity at the suit of the employer or anyone standing in the employer's shoes - if so, did the transferor affirm the contracts, and does the transferee stand in the transferor's shoes

   (4) if validly agreed, they were agreed in breach of the directors' duties to exercise powers for a proper purpose, the reason for the improvements

being to enrich the claimants at the transferee's expense rather than for good commercial reasons – sections 171 and 172 Companies Act 2006. If so are they void or voidable?

(5) the new terms should be disallowed as in breach of the EU abuse principle, to which TUPE is subject

(6) not in the list of issues, but added later, following disclosure, whether these were real agreements, or shams intended to take effect only if the claimants transferred.

11. If the contract terms are valid, there is a claim for failure to pay for holiday outstanding on termination. Assessment of what holiday was in fact outstanding is postponed to a remedies hearing.

12. There are also claims for substantial termination bonuses, brought as unlawful deductions from wages. The Tribunal must assess whether they were properly payable. If it is held that the new contracts' term on termination bonus was valid, the first respondent argues that the claimants were in repudiatory breach of their contracts by reason of gross misconduct, and so forfeited the contract right. Formally, these are claims in contract, and they are reserved to the court rather than the Tribunal, because of the cap on the Tribunal's contract jurisdiction. The parties accept that some findings here may give rise to issue estoppel there.

Consultation and Information

13. There are claims of failures to inform or consult pursuant to regulation 13 of TUPE. This duty lay with the second, third, and fourth respondents, who say they could not inform or consult because the first respondent (transferee) provided information late or not at all. For that reason, they say, if there is a declaration as to failure to inform or consult, there should be no monetary award. The first respondent (transferee) also argues that for the claimants to bring claims against the transferor respondents (second, third and fourth respondents) is a breach of the EU avoidance principle because they were the people - as directors, owners and controllers of the transferor respondents – who were in default.

Evidence

14. The Tribunal heard live evidence from the first three claimants – Duncan Ferguson, John Kevill and Andrew Lax. The fourth claimant, Byron Pull, did not attend. A letter of 4 October 2018 from his GP, Dr. CWK Parry, states he has a history of cardiac disease which is exacerbated by stress, that he has been very stressed about the impending hearing, that his health has deteriorated as the hearing has approached, and that on examination he advised him to avoid stressful activity or conditions. His witness statement is available, and I have treated it with caution where it conflicts with documents.

15. For the respondents, evidence was given by the first respondent's

CEO, Giles Easter (who is also fifth respondent) and by Mustafa Kheriba, its director.

16. The Tribunal was provided with a bundle of nearly 3,500 pages in 8 volumes.

17. The bundle contained many transcripts of meetings and telephone discussions Mr.Easter had both with the claimants and with those he reported to in Astrea. Tribunals often read transcripts of meetings, but an unusual feature here is that in all cases they were recorded covertly. Mr Easter's explanation is that he recorded discussions because he had to start up a complicated property asset management business with little help, and needed to grasp many facts in a short time. That does not explain why he should not mention to his interlocutors he was doing this. Both socially and professionally covert recording is universally regarded as outrageous, and a gross breach of trust, (in the UK at least – in the experience of the Tribunal there are people brought up outside Western Europe who see nothing wrong with it) Anyone reading these reasons who has social or business dealings with Mr. Easter will want to take care. While the accuracy of the transcripts is uncontested, the claimants point out that the person making the recording has the advantage of knowing his words are for the record, so while the others speak openly and without inhibition, the transcript may not be good or whole evidence of his own thinking at the time.

18. The claimants also complain that not all the recordings have been disclosed. The respondents say that is because although relevant they are not necessary to decide the issues. The claimants also say there is a suspicious lack of emails from Mr Easter's superiors. The resondents say these issues were discussed at a recent case management hearing, when E J Glennie made orders, and that ADFG (who own Astea) are not a party. I bear in mind, when making findings in contested matters of fact and inference, that there may be other documents.

19. Bundles of 56 authorities were provided at the outset, and another volume of 20 on closing. Both sides prepared written case outlines on opening, and written submissions on closing, and were able to make oral submissions as well. I am grateful to counsel for their hard work and lucid analysis of the law and relevant evidence on the issues in this complex case.

20. While the a large part of these reasons was prepared within a few days of the hearing concluding, subsequent listing of consecutive multi-day cases has prevented completion until now.

Findings of Fact

21. The Berkeley Estate comprises around 140 properties in Mayfair and Knightsbridge, currently worth an estimated £5 billion. It is owned by a set of 19 companies registered in BVI, they in turn by Circle Holdings, registered in the Seychelles, and ultimately by the royal family of Abu

Dhabi ("the owner"). For practical purposes the owner gave power of attorney for decision making to a high ranking official, "the signatory". At the time of the transfer this was H.E. Dr Ahmed al-Masrouei. Day to day communication was through his subordinate, Qazi Bhatti of Circle Holdings.

22. The core of the estate was bought from the BP pension fund in 2001. From 2001 until 2004 or so, the estate's assets were managed by John Kevill who was then at GVA. From 2004 the management passed to the seconf respondent, Lancer, of which he was a director.

23. There was an asset management agreement dated 18 November 2005 which provided for 12 months' notice of termination of the agreement.

24. Lancer was a single client business, solely managing the estate. From 2001 to 2005 Lancer with John Kevill arranged additional purchases which increased its value. Thereafter they have investigated further acquisitions but the owner has not proceeded with any.

25. Lancer is owned by Lancer Property Holdings Ltd ("Holdings"). The four claimants are all directors of both Lancer and Holdings, and beneficial owners of Holdings. Holdings owns a number of other property companies. It was explained that this was because until a dispute with two other Lancer shareholders was resolved in 2015, the directors had not paid themselves bonuses, and had instead used the profits of the business to buy property for development and resale. According to the latest statutory accounts, Holdings had annual turnover of £13.6 million, profit after tax of £4.2 million, and shareholder funds of £30.1 million. In the two previous years Holdings had property worth between £10.6 and £8 million in London and the South East.

26. At the time of transfer the claimants John Kevill and Duncan Ferguson were employed by Lancer on contracts of service.

27. John Kevil was Lancer's CEO. He has been a director from 1993, well before the Estate was purchased in 2001. He became an employee of Lancer by a service agreement dated 1 May 2009. According to the contract in the bundle (dated 25 February 2011) he was then paid a salary of £100,000 per annum plus life insurance and medical expenses; there was a discretionary bonus "in the company's absolute discretion", and (by 2013) 25 days holiday, which could not be carried forward year on year. The notice period was 12 months. His salary rose in stages to £500,000 in 2014, plus another £50,000 for pension contribution. It did not increase again until the new contracts in 2017.

28. As mentioned, the shareholder dispute had led to a freeze on salary and bonus from 2012 to 2015. When it was settled the remaining Lancer directors agreed in December 2015 to an immediate bonus of £250,000 each, but not to change base remuneration or fees.

29. A year later, in December 2016, the directors reviewed the bonus policy for staff and directors, and on directors it is recorded: "in general, the directors have not awarded themselves annual bonuses, other than in a period of exceptional activity or profitability. These occurrences are relatively few, with only two large bonuses, one being paid following a 4-5 year period of activity to validate and obtain a performance fee from the client". It went on to state that salaries and fees were usually not increased:

> "unless the group had achieved significant improvements in the security of asset value of the group as a whole, which can be expected to be maintained".

30. Duncan Ferguson was Lancer's Head of Asset Management. His employment began on 11 November 2003, but with credit for service with a related company from 2001. A service agreement of November 2007 shows salary of £100,000 p.a., and terms as to benefits, bonus, holiday and notice similar to Mr. Kevill. His salary increased year on year, and by 2014 was £350,000 per annum, plus a £35,000 pension contribution.

31. The claimants Andrew Lax and Byron Pull were not employed by Lancer but by their own service companies – the third and fourth respondents respectively, "Abbotstone" and "IMS". Lancer contracted with the service companies to obtain their services. Andrew Lax was Lancer's chairman and Byron Pull Finance Director.

32. For Byron Pull, a contract between Lancer and IMS – referred to as "the consultant" - in February 2011 refers to services having been provided from December 2004. Byron Pull, or in his absence some other person acceptable to Lancer, was to assist in client relations and financial management for an annual fee of £140,000, and a discretionary bonus fee, and termination without notice if Mr Pull left or died or became incapacitated, otherwise 12 months. In turn Mr Pull had a contract of service with IMS dated 2 November 2011, with earlier service recorded from July 1994. There was salary of £6,745 p.a., 12 months' notice, and 28 days holiday. By 2014 Mr. Pull was said to receive "salary" (presumably the fee paid to IMS) of £350,000 per annum. No update of his service contract with IMS was available, but presumably his contracted salary from IMS had increased to the current level of personal allowance for employed income

33. For Andrew Lax there was a contract between Lancer and Abbotstone of February 2011, recognising service from August 2010. There was an annual fee of £50,000, a discretionary bonus fee and the same notice term as with IMS. Mr Lax was to assist in client relations and general business development. In turn Mr Lax's contract of service with Abbotstone provided a salary of £5,700 per annum, 12 months notice and 30 days holiday. By 2014 a Lancer table shows Mr Lax receiving "salary" of £500,000, again presumably the fee paid by Lancer to Abbotstone.

34. Besides the four claimants Lancer had 7 other staff, all employed. During the period after 2014 when directors' salary stayed level because of the shareholder dispute, these staff received salary increases of 3% per annum.

End of the Asset Management Agreement

35. Early in September 2016 John Kevill had a meeting with Jassim al-Seddiqi, not previously known to him, about sale of an Estate property. In discussion he gave him a lot of information of Lancer's business. As John Kevil subsequently emailed his co-directors, "it seems Jassim has been requested by (the signatory) to assist with the family's A.D. and London Holdings …and was clearly on a fact-finding mission today". He understood he was: "now charged with or likely to be charged with overseeing what we knew et cetera …or maybe more, who knows?.. There will be likely changes ahead".

36. He then sent a long email to Mr al- Siddiqui about relations with the owner, and details of individual staff. Of Andrew Lax and Byron Pull he said: "our chairman (67 years) who has been part-time for a few years now and wishes to retire imminently, as does our FD (69 years old). I mentioned these two to (the previous signatory)", and referred to "when we replace the FD, which is in in hand". He also explained that because the management contract lacked security of tenure, they kept employee numbers to a minimum by contracting out day-to-day property management to a team at GVA, which had been part of Lancer's surveying practice, but was sold to GVA in 2003.

37. As the directors later learned, Mr al-Seddiqi was in fact forming a subsidiary company to take on the asset management contract for the estate.

38. Mr al-Seddiqi arranged another meeting with John Kevill soon after, when all the directors were present. They hoped this was the start of negotiation leading to a buyout, but the meeting did not go well. Mr al-Seddiqi had understood the directors had already been served by the owner with 12 months' notice of termination of the asset management contract, when they had not. It was not served until a week or so later, on 20 September 2016. By reason of this misunderstanding perhaps, they found his attitude disdainful.

39. The directors had been served with notice of termination on four previous occasions, and had each time been able to negotiate an extension on revised terms. However, this time, John Kevill said, "it feels more terminal".

40. Led by John Kevill, the Lancer directors hoped to persuade the owner to extend the agreement, and if not, to purchase the business. Part of this campaign was a lack of cooperation with requests for business information. Mr al-Seddiqi asked Mr Kevill to complete a due diligence questionnaire about the assets of the business. Mr Kevill referred this to

the owner. On 3 October 2016 the owner's signatory authorised Lancer to supply information by answering Mr al-Seddiqi's due diligence questionnaire. On 30 November 2016, Qazi Bhatti, on behalf of the owner, asked Lancer to answer. The campaign also involved veiled threats that vital staff would be leaving. On 15 December 2016 Mr Kevill told Qazi Bhatti that "as the client has not engaged in a discussion with the directors of the overall company, you may need to make your superiors aware of the following", and said he would shortly be announcing to staff the termination of the contract, and it would have a submit a note on termination in the public accounts, due for filing soon; staff would be likely to leave, and "TUPE arrangements will not apply". There was also a veiled threat about publicity. Qazi Bhatti asked for clarification, and John Kevill told him staff were on contracts of up to 9 months, and he was not obliged to give further details. They would ensure the smooth running of the estate until handover in September 2017.

41. The owner was undeterred. On 19 December 2016 came a letter direct from the signatory in Abu Dhabi asking for documents held under the terms of the management agreement, information about the estate properties, additional information on subcontractors and employees, and detail of tasks delegated to sub-contractors, all by19 January 2017. Lancer provided a tenancy schedule in January; the directors' evidence otherwise was that the owner got a quarterly report, and that should be enough.

42. Then fees were paid late, and goodwill ran short. This is reflected in an angry email from John Kevill to Qazi Bhatti on 30 March 2017, after a request for detail of the rents, insurance arrangements and so on, which now indicated to Lancer's staff, who had not till then known of the notice of termination, that a takeover was impending. This clumsiness, he said, "has now changed the rules of engagement our end". He was instructing "our relevant team to progress with the legal process of staff redundancy… and this may hopefully enable them find good jobs elsewhere in a timely manner whilst enabling us to comply with our obligations." (A threat that an exit of knowledgable staff would impede transfer). He complained: "I simply do not believe or morally accept that after all the huge financial success that we have presented the President (the Emir of Abu Dhabi) with in London we should now be dealt with so despicably and dishonourably". Lancer's directors were not contractors to be changed "as if were WC cleaners or whatever".

43. He wrote to the UK ambassador to the UAE to see if an intervention at higher level would persuade a change of heart.

44. Astrea, the company which was to take over management of the Berkeley Estate from 29 September 2017, was formed for that purpose late in 2016. It was then called Squadron, and changed name shortly before the transfer; for simplicity it will be called Astrea throughout in these reasons. It was owned by Abu Dhabi Financial Group (ADFG). The Tribunal was told that ADFG is not in turn owned by the Berkleley Estate's owner. Astrea's sole director was Mustafa Kheriba, a resident of Abu

Dhabi, who in turn reports to Jassim al-Seddiqi, of ADFG.

45. Astrea appointed Giles Easter, the fifth respondent, resident in London, as its CEO in April 2017.

46. It was at this point that "market chatter" alerted Lancer to Astrea's formation. John Kevill flew to Abu Dhabi in May to meet the signatory, presumably seeking to dissuade him from termination, but when Dr. al Masrouei came to London soon after he did not return his call.

47. Giles Easter meanwhile hired a PA, and set about recruiting an analyst and a chief operating officer. Early in May he met the GVA team and found out more about Lancer. In reporting back to ADFG, he commented: "we know John (Kevill) and Andrew (Lax) are not joining...it's a safe assumption that Byron Pull will retire" (noting he had just turned 70). He wanted to recruit a new Finance Director, and try and keep Lancer's two financial controllers. He added "John and Andrew will remove a significant chunk of payroll", and enable staff recruitment and restructure. He remained concerned about the salaries of the transferring staff. He did not yet have enough business information to analyse the portfolio.

48. After a period of negotiation, on 6 July 2017 Astrea signed an asset management agreement for the estate with the owner. It contained a list of four "transferring employees" from Lancer. They were chosen by the owner, presumably on information from Qazi Bhatti, as those essential to smooth running of the business. Of the claimants, only Duncan Ferguson was on the list. There was an agreement that, subject to a cap, the owner would indemnify Astrea for TUPE related costs of terminating the employment of staff not on the list.

49. At some point before 15 June 2017 the directors decided to get staff contracts updated, because in an email that date John Kevill suggested to Byron Pull they review staff salaries and bonus "as normal" while the solicitors were working on staff contracts. It would help diffuse staff tension about the impending transfer – one had just asked what would happen with their employment contracts on transfer.

50. At the same time they reviewed the directors' contracts. A memorandum on "points agreed re contracts" dated 29 June 2017, sets out many of the terms subsequently included in the new contracts. They were:

> "Salary: 15% increase as from 1 May 2017 (3% compound for 5 years)
> bonus: discretionary with minimum of 50% payable pro rata on1 May 2017 (5/12 full year payable for the period to 28/9)
> location: suggest UK/London only additional agreed we have the ability to work from home required. BHP working on minutes with lawyers now".

The two consultants were to remain on the same contract with parallel amendments and

"severance: one months uncapped pay per year of service".

Confidentiality clauses were to be loosened and restrictive covenants reduced to 6 months.

The New Contracts

51. The final versions of the employed directors' new contracts are dated 26 July 2018. John Kevill's salary was £576,000. The discretionary bonus was retained and in addition there was now a *guaranteed* bonus of 50% salary, of which 5/12 was to be paid in August 2017 and the rest at the end of the financial year. Holiday was increased to 30 days, and could be carried forward year on year. Pension contributions of 10% salary would be paid. There was a termination payment, other than on resignation or summary dismissal, of one month's salary for each year he had been a director, which John Kevill altered to run from 3 October 2001, that being, he said, the date from which he had managed the Estate. Duncan Ferguson's was similar, save that his termination payment was calculated by reference to the years he had been a director; his salary was £402,000 per annum.

52. Andrew Lax's contract with Abbotstone was amended with effect from 1 May 2017 to provide terms similar to those Lancer agreed with its employees: salary of £280,000 per annum, a guaranteed bonus of 50% salary with 5/12 payable in August 2017, and 24 months' notice, and a termination payment of a month's salary for each year he had been a director. He could work from home. Byron Pull's contract with IMS is dated 3 August 2017 with an annual salary of £115,000 and guaranteed bonus and termination payment; it was amended to increase the annual fee to £402,000 by letter 29 August 2017. (A text from 11 August indicates the consultant contracts were still under discussion, and from 25 August that they were still not finalised).

53. In all cases, none of the directors could now be required to travel overseas.

54. Why were the contract terms improved at this stage? All directors said it was because they were out of date and did not reflect reality, as they knew and trusted each other, and had not seen it necessary to update the formal documents. The 15% salary increase was to reflect the corresponding 3% increases that had been paid to staff but not directors, who could instead leave the money in the business. Duncan Ferguson said Lancer had "consistently paid bonuses at around 30% of staff and around 50% to the directors over a long period. As such the bonus payments were a significant part of the remuneration package and were viewed as a contractual entitlement", but this does conflict with the evidence of £250,000 paid in 2011 and again in 2015, and the December 2016 document saying they should be exceptional, and Mr Kevill was perhaps more accurate on this, pointing out that up to transfer they could choose whether to draw the money as employee bonus or retain the money in the company of which they were shareholders. The justification

for guaranteed bonus was not given, but it was probably to make sure remuneration continued to made to them as employees when the ability to make dividend payments to director shareholders was lost. The termination payment was provided because "there was risk of us being distracted when it was critically important we focused on the delivery of services under the AMA". It was also presented as a retention incentive. Of the travel clause, this was because until the transfer each knew the other could not require them to travel, and they would lose this on transfer. In fact, while Andrew Lax had travelled a great deal until 2014, from that date he had made no trips to the Gulf.

55. The directors' contracts were ratified by the Lancer board meetings on 24 August and 9 October 2018, long after the event, and in the run-up to this hearing

56. In July 2017 Lancer's staff were given also given salary increases (of the usual 3-4%); their discretionary bonus was made a guaranteed bonus of 30% of salary.

Communication before the Transfer

57. Having signed the AMA, Giles Easter phoned Duncan Ferguson, the only director he knew personally (they had met on a boat in Lymington some years before) to tell him, and they spoke for an hour. Duncan Ferguson told him of the history of bad blood with Mr al-Seddiqi, and that 11 staff would transfer from Lancer. He concluded with: "welcome to the viper's nest", and reported to his co-directors he had been "blunt". Mr Easter recalls being pressed to say whether ADFG owned Astrea, because "the staff wouldn't want to learn they were working for ISIS".

58. Giles Easter met the Lancer directors on 19 July, and asked for employee information, which he was told would be sent, though he did not get it until 31 August. They explained that they thought the "honourable" position of the owner should have been to buy the company. The resentment of their treatment is shown by the directors' series of excuses not to meet Mustafa Kheriba.

59. John Kevill and Giles Easter had a long and frank discussion on 21 July. He spoke of the "ignominy of being treated like a WC cleaning contractor in a TUPE process".

60. John Kevill then sent Giles Easter an organogram. It showed the new salaries, but stated Andrew Lax was on £576,000. Giles Easter was surprised by the figures.

61. During August Mr Easter held a series of meetings with Lancer's staff about how the business was run. He became frustrated at his inability to understand the detail of day to day operations, and moved from team meetings to one to ones. He had a further meeting over drinks with John Kevill, who vented his anger and frustration at Lancer's treatment by "the Arabs" – "why not buy the fucking company", and expressed frustration at

their approach to business when: “55 years ago they were sitting on a rock, pointing over some goats and picking their nose.… Now they being the richest guys in the world within two generations”, and “honesty is a tradable commodity and saving face is more important than honesty”, while describing his difficulty engaging their attention in an attractive deal. When Giles Easter said Byron Pull and Andrew Lax were effectively ready to retire, he said they were not replying on this - “they carried on, I couldn’t buy them out”.

62. On 11 August Lancer informed Astrea that all their employees would transfer automatically on 29 September under TUPE and asked for confirmation of this. Giles Easter was frustrated by the lack of detailed business information and so initially did not reply. John Kevill gave a memory stick to Qazi Bhatti, who passed it on, but it contained little of use.

63. On 16 August Lancer wrote to their staff giving information about the transfer and the opportunity to elect employee representatives under TUPE.

64. John Kevill then said on 22 August that Lancer was being constructive, but Astrea was not reciprocating, so he would “pause” handover discussions until the TUPE position was clear. Astrea replied that TUPE would apply to those of Lancer’s team who were “assigned to management of the estate”. He needed more information about staff roles and responsibilities before he could be specific as to who was assigned to the business. John Kevill’s response was to pause the staff meetings for the rest of August. Both sides seem to have seen a trade-off in information on employees and information on the business, Easter telling Bhatti he needed to balance being honest (presumably about directors not transferring) with the risk that Lancer would close down communication; John Kevill also saw it as tactical, as shown when he told his colleagues on 1 September: “now that TUPE matters are “in due process” we should be showing..goodwill by reengaging on those “paused” one to one meetings”. Duncan Ferguson believed the ongoing staff meetings Astrea wanted were so they could decide who to keep, an impression confirmed by Giles Easter telling John Kevill on 5 August he needed to understand staff skills, and he did not know if some had found jobs elsewhere. Lancer had also heard on the grapevine that Astrea was hiring.

65. On 23 August Lancer asked Astrea what measures they would take on TUPE; Astrea told Lancer the place of work would change. Nothing was said about staff.

66. On the Lancer side, they were now considering what would happen if some but not all directors transferred. For Lancer to make employment payments under the contracts was “very tax inefficient” and the largest shareholders were disproportionately penalised. They should have candid conversation about “if, say one or more of Lancer’s directors are stuffed

by the Arabs" (i.e. did not transfer. On 30 August John Kevill emailed his codirectors that the employment contracts were all ready for sending to Astea, save Byron Pull's, and meanwhile they needed to review "what if" scenarios. If no director transferred, "it only seems fair that we fall back on our previous May 2017 contracts", and that all the (new) contracts were terminated on 28 September. If only some transferred, the same should happen for those left behind. This was copied to their solicitor, apparently in the expectation it would thereby acquire privilege from disclosure ("in order to keep this confidential between us").

67. On 30 August Lancer sent Astrea all the employee liability information, and on 1 September, all the directors' contracts.

68. When Giles Easter compared the July organogram he found higher salaries there for the two consultants than appeared in the employment contracts with their service companies he had just been sent. (He learned that the higher figures were the fees newly negotiated with the service companies). Then he also noted the recent dates on all the contracts, and the unusual terms as to guaranteed bonus, the termination payments, and the very long notice (now 24 months for the consultants, whom he had thought on the verge of retirement). He also noted that service as a director, rather than service an an employee was reckoned for the termination payments. Finally, it was odd to exclude travel outside the UK when the single client was in the Gulf. He reported to his superiors on 6 September 2017:

> "Lancer has manipulated the law to their advantage, by rewriting all of their employment contracts in the last month or so. In particular, the directors have abused the process by putting in place long termination notice periods (up to 24 months) as well as incredibly generous termination payments, tied into their length of service. These are all highly unusual terms".

69. Astrea involved Qazi Bhatti, for the owner. Giles Easter discussed options with Mustafa Kheriba on 5 September. He was concerned that delays to handover meant he would not have a team in place by day one. He described three options: first "collectively, we terminate, not pay and pursue legal action saying that, using the excuse that Kevill has amended his agreement, his contract, prior to TUPE taking effect… That way, we dump him, by taking him to, rather than the other way round and we present to the public what he has been doing and how he has been acting maliciously". Another view is that Duncan Ferguson was under pressure from Kevill, otherwise reasonable, and they needed to persuade him to join Astrea on his previous contract terms. The third option was to take on the four named in the transfer agreement, and dismiss everyone else, which would be expensive. The conversation then moved on to discuss Duncan Ferguson's position. Giles Easter thought he was "carrying some baggage from the old days" which he did not want, but recognised he had to come across because of the agreement with the owner.

70. He had not at this stage seen the old contracts, but on 8 September he

was sent an insurance policy showing staff salaries of May 2017, and noted that the directors had had 15% salary increases, rather than the 3% awarded to staff.

71. In his view, the remuneration and benefits went well beyond market standard. While Lancer pressed for confirmation of staff transfer and information about TUPE "measures", Giles Easter for Astrea asked for job descriptions – so he could consider employees' roles and responsibilities, and the old contracts - neither was provided – and why the consultants had higher salaries in the organogram than in the contracts. Astrea also sought legal advice.

72. The involvement of the owner at this stage is shown in a formal letter to Lancer from the signatory on 12 September, reciting the history of non – cooperation with requests for information going back to 19 December 2016 and complaining:

> "this lack of cooperation is totally unacceptable and in breach of your contractual requirements. You should be aware that this is putting the owner's interests at significant financial risk".

It was noted that although earlier Lancer had suggested their staff would be leaving, they now said they would all be transferring:

> "Due to Lancer changing positions, I can only conclude that Lancer appears to be deliberately delaying in providing the information we have been requesting since December 2016 with the aim of furthering your own personal interests".

They had hoped to have an amicable running down of the relationship, and were disappointed by Lancer's confrontational approach in breaching "their contractual obligations at will", by refusing requests for meetings, information, and involving third parties (a reference to the letter to the ambassador). Lancer was threatened with legal action if lack of cooperation damaged the owner's interests.

73. This letter prompted some action by Lancer to supply information about the properties in the estate, while pointing out to the owner that most of the detailed material was held by GVA, and that Astrea had already been in touch with them. In addition, Lancer had now provided Astrea with their 10 year plan. Astrea then held meetings with GVA, and with Lancer's professional advisers on valuations, rents and rates. Giles Easter met Byron Pull and Andrew Lax to discuss their duties.

74. On the 15 September Lancer wrote to the staff again to provide TUPE information. This included the address of the new office, adding that Astrea had not yet supplied details of further measures it contemplated taking as result of transfer. Meanwhile Astrea did some work on the staff contract terms. Other than the directors it was agreed to take them on their existing terms, though hoping to renegotiate the long notice, and the guaranteed bonus.

75. On 22 September Astrea proposed a meeting to discuss measures, and when that did not happen, sent a letter late on 25 September. John Kevill was told that Henrietta Lees (his PA) was redundant, as Astrea already had a PA, and that following transfer, John Kevill's employment would be terminated immediately, as with that of Byron Pull and Andrew Lax if they also transferred. As to the staff's new contracts of employment, Astrea wanted to understand why this had happened and: "may take steps to address any changes that were made in connection with the transfer and thus ineffective". Other measures included paying for 29 September (which would not be covered in Lancer's September payroll run) but in October payroll, for administrative convenience. Staff were to report for work not on Friday 29 September but on Monday 2 October.

Dismissal of Second Third and Fourth Claimants

76. A separate letter of 25 September terminated John Kevill's employment with immediate effect for gross misconduct. He was informed that the contracts recently signed appeared to have been put in place in anticipation of the transfer to enhance the position of the employees and directors, and were void under regulation 4(4), but in agreeing these terms, the directors had "acted in breach of your fiduciary and contractual duties to Lancer". The directors had general duties to exercise their powers for the proper purposes of the company's business and as employees must act in good faith towards Lancer, but "by agreeing golden parachute and other terms in your personal interests in anticipation of your transfer", the directors were in breach. Their conduct in delaying and failing to hand over portfolio information to enable a smooth transition, was done to "leverage or improve your personal position", rather than promoting Lancer's interests in the orderly conduct of its business or protection of the owner's interests, inconsistent with their duties as directors and employees. He was advised that the owner considered the relationship to have broken down irretrievably because of repeated failure to comply with requests for information and breach of confidentiality. Lancer's rights against its employees transferred to Astrea, and Astrea had now lost trust and confidence in him going forward. As the contract was void, either from TUPE, or because it was entered into ultra vires, or for improper purposes, no payments due under it would be made.

77. Similar letters were sent to Byron Pull and Andrew Lax. They were expressed subject to the proviso that it was not accepted that their employment did transfer, as they were not employed by Lancer, and it did not appear they were allocated to servicing the Estate immediately prior to transfer, but if they did, they too were dismissed for gross misconduct.

78. These prospective dismissals were carried out without the investigation or disciplinary meetings as outlined in the ACAS Code of Practice on Discipline and Grievance as normal process.

Dismissal of First Claimant

79. Duncan Ferguson's position was less clear cut. Giles Easter was reluctant to take him on, considering that he was likely to be as difficult a colleague as the other directors, (and also paid considerably more than him). In an email of 5 September (see paragraph 69 above) he said of him:

> "if he's part and parcel of this action and he's uncooperative to start with, manipulative…. we don't really want him".

He recognised however that he did not have a clean sheet because of the owner's specification that he should transfer:

> "we don't really want him on board, unless you guys insist".

A discussion developed with Mustafa Kheriba, because of the costs involved, and the risk of displeasing the owner. He explained he thought Duncan Ferguson had been involved in sabotaging the handover, and would find the cultural change impossible.

80. On 21 September Duncan Ferguson asked Giles Easter for confirmation about his own position, and whether he should report for work on 29 September.

81. In an email that day Giles Easter set out for Mustafa Kheriba the pros and cons of taking Duncan Ferguson on. On the plus side, he had an enormous and detailed knowledge of the Estate, and would ease the transition. It was also dangerous going against the client preferences. On the negative side, it would weaken the legal case (presumably on gross misconduct in making the new contracts) against the other directors. There was also the risk that he may not adapt to working with Giles Easter, and the impact of his large salary on profitability. If he was kept on, terminating his employment would only be deferred. He concluded that if he was "removed from the current toxic environment", as the other directors were viewed as the ringleaders, he could move on positively. He recommended taking him. Later he repeated that he considered him "complicit" in , or supportive of, the other directors' appalling behavior; he also criticised him for allowing occupation of part of the office by another company, and exposing the portfolio to risk over the impending MEES regulations (energy certificates required for letting from April 2018 – not much had been done). He still recommended taking him.

82. On 22 September, Mustafa Kheriba emailed Jassim al-Siddiqui about it. He presented much of the same material, but recast with a greater steer against taking him:

"he could be a disruptive and divisive influence to the office environment and make much-needed cultural change or difficult".
His knowledge of the estate was important, but this was undermined by the subletting and MEES regulations.

> "We are making you very aware that the client needs to know this will pose a great risk to the portfolio and potentially damaging consequences".

In turn Jassim al-Seddiqui forwarded this to the signatory on 24 September, commenting:

> "this is disturbing news and we take no responsibility for his actions and ramifications",

and

> "it is unclear why the client wants us to keep him despite his failing in informing the client of MEES which will be a big problem soon".

83. On 22 September Qazi Bhatti asked Duncan Ferguson to meet him about the transfer. This was probably to discuss altered remuneration terms. His co-directors objected to direct approaches.

84. Once the measures letter had been sent, Duncan Ferguson was invited to meet Giles Easter at the office on 29 September (when no one else would be working). His wife was now dying of ovarian cancer, and his reply involved explaining he had to rearrange his wife's care to make the meeting, as he had altered because he thought he would not be at work that day. Mustafa Kheriba, seeing this, said he did not like his tone. He explained to the tribunal he meant he thought it not the right way to respond to a supervisor's summons to a meeting, and indicated defiance. In the view of the Tribunal the email about care arrangements is businesslike, appropriate and compliant, nor does it seem Giles Easter read it any other way; Mr Kheriba's reading was a cultural misunderstanding, but not without significance if Mustafa Kheriba was involved in the decision to dismiss.

85. Duncan Ferguson attended as arranged, and found Mustafa Kheriba also present. The meeting was covertly recorded as usual, but not the first part. It is desirable to set out the flow and direction of the conversation to follow the reason he was dismissed.

86. There was an extensive discussion of reporting systems for the client, moving on to the transferring team. Duncan Ferguson said: "they all want to work", and challenged by Mr Kheriba on why he said "they", not "we", he said it was his team coming over. Giles Easter said he was not coming across as quite positive, on Monday he wanted everyone pulling in the same direction and the client coming first. Duncan Ferguson said he would be working as usual, as for the last 15 years, and accepted there may be some changes. The discussion moved on to documentation. Duncan Ferguson explained the paperwork was all in filing cabinets, though he had fallen behind on his electronic filing because "I've just been out of the office so much", at which point Mr Kheiba asked why he had been out of the office so long, and got the reply "because my wife has got terminal cancer, Sorry, weeks to go".

87. They moved back to information transfer, and to Lancer having blocked transfer of email and Outlook calendars. Mr Ferguson indicated he had not agreed with this but "I'm one of four", and the discussion turned to the new contracts. Mr Kheriba asked "who would do that honestly", and got a reply "I think getting on to a subject that I can't, because obviously they…" , and was interrupted by, "you are possibly part of that" and he answered "I am. I am absolutely complicit in it", and expressed anger at how the client had seen his contract. He explained the pay rise as 3% for five years, and said the bonus and termination payment were matters for the directors, and that he could not comment because: "there is a process the other directors are going, I can't comment on because I'm not party to it". He was grilled about his contract, and explained he could no longer access it. They moved back to discussing the transfer. Duncan Ferguson was told, "I view you as absolutely fundamental to that because you are the most senior person transferring", making it seamless. They then discussed individuals and projects for quite some time, before Giles Easter asked him about the "tough decisions" he had made in the last couple of weeks (the dismissal of the other three). Mr Ferguson said that he could not comment because they had their own legal advisers. Mr Kheriba said that now he was part of Astrea, and "I was hoping that you would be little more transparent with us on this". He was concerned that "you are not part of our team. You are still on the other side of the equation". Mr Ferguson explained that he felt some loyalty to the others, because they had worked together so long, and he would not do anything to prejudice them. They moved back to talking about the Estate. Then Mr Kheriba said: "I hope that we will see the same excitement yourself being a senior member turning over. I will never, and neither will Giles, ever ask you what happened there". They went back to the practicalities of working with the client, Mr Easter added ""you are the most senior person transferring. You've got the most knowledge, and I think together, hopefully, we can really try and make this seem, but in order to do that, and I repeat myself, I want to draw a line under what's happened. I want no negativity in the office", and Mr Ferguson replied "I don't think you'll have trouble… The uncertainty has gone, you won't see nothing but positivity"; they then talked about the accounts staff, then what they would on Monday, Duncan Ferguson explained he needed Monday afternoon off to meet medical teams as "we're not 1 million miles away from hospice" – the meeting on Monday was about permanent carers. He would be in first thing however. Mr Easter offered flexibility, reducing his workload in the short term, Mr Ferguson confirmed "it's just going to be weeks, not months if we are realistic", and after a short discussion about his children, Mr Kheriba said "I would excuse myself if you don't mind", and left.

88. Mr Easter and Mr Ferguson continued discussing property and the estate in a way which reads as entirely cordial and professional, including repeated reassurance that they would start on Monday with a clean slate, and Giles Easter saying "you and I being on the same side".

89. In his witness statement, Giles Easter's recollection of meeting is otherwise, stating that in the unrecorded art, he had spoken "in an

aggressive and confrontational manner… disparaging and in a disrespectful way about both ADFG and the client", and he held "deep rooted negativity to the handover process". He had stated he was "complicit" in the actions of the other directors in agreeing the new contracts. He says that following the meeting he had discussions with Mr Kheriba and the lawyers, they decided to dismiss him.

90. That evening he reported to Jasssim al-Siddiqui that his manner, approach and body language were aggressive and confrontational, his language was' them and us' rather than 'we', he was not positive, unlike other transferring employees, and "was not willing to go against the actions of the directors and actually fully admitted that he was complicit with the actions". He was not willing to discuss his employment contract. He had evaded further discussion by talking about other members of the team. It was feared he would have a highly negative influence, and "this is also backed up by various transferring staff, who are now starting to speak more openly about Duncan, as well as the other directors". (Asked in Tribunal what this meant, he said that after the transfer, staff said that Duncan Ferguson and the directors been engaged in meetings constantly over the summer. This is hard to understand, as at that point, the staff had not yet started work). He added that one of the transferring staff had told him he had been asked by John Kevill to spy for financial reward. (This forms no part of the respondent's case, but its insertion at this point in the decision making is interesting). He concluded that the previous week's decision to offer him the transfer was correct, but "as more information comes to light, I have increasingly severe reservations about Duncan transferring". Later that evening he added that he would have "severe trust issues", as if a member of staff is being asked to spy, what would he not been asked to do? He had been constantly astonished by the "bitterness and greed of John Kevill and the directors of Lancer towards the client". On Monday morning, he wanted to draw a line under that, and he believed it was for the greater good of Astrea and the client if Duncan did not transfer.

91. In between, he emailed Mr Kheriba about the staff guaranteed bonus. He recommended they leave it as it was, to stabilise the team in the anticipation of underhand tactics by the Lancer directors "especially if we terminate Duncan".

92. That is what happened. On Monday, 2 October Mr Ferguson came to work at the new office, and attended to a number of practical tasks, until later in the morning he was summoned to Giles Easter's office and told that he and Mustafa Kheriba had decided that it would not work, as he had readily admitted the directors were complicit in their actions. He was terminating his employment on the same grounds and for the reasons as John Kevill's, and it was a summary dismissal. He had not done so earlier in the morning because he been trying to sort out a transfer of health insurance over for his wife's treatment - Mr. Ferguson said she was in fact being treated on the NHS.

93. Astrea did not write to confirm this until 5 October, after Mr Ferguson

had asked for the reasons for dismissal, pointing out that his absence was fueling gossip, and his reputation was at stake. Mr Easter explains the delay as caused by the health insurance transfer – of which there is some email evidence. The dismissal letter states his employment is terminated for gross misconduct in relation to the new contracts, essentially repeating what was said to the other directors, moving on to the lack of cooperation with handover information, and then that at the meeting last Friday: "you admitted you were complicit with the other directors in relation to the matters set out above and you offered no explanation for your actions". Astra had no trust and confidence in him going forward. Even without summary dismissal, Astra would not be bound by the (new) contract terms because it was ultra vires, or made for improper purposes, or in connection with the transfer.

First Respondent's Dismissal – Relevant Law, Discussion and Conclusion

94. In law, the reason for dismissal is a set of facts or beliefs held by the employer that cause him to dismiss– **Abernethy v Mott, Hay and Anderson (1974) ICR 323**. Was the first claimant dismissed by Astrea because of the new contracts, or because he was paid more than expected, or because Giles Easter did not want to work with him, despite the owner's preference? What part was played by his need to take time off work to care of his wife in the terminal stage of her illness (the section 15 Equality Act claim, modified for associative discrimination) or by working part-time?

95. It is clear that he was not dismissed because he was a Part-time worker within the meaning of the Part-Time Work (Prevention of Less Favourable Treatment) Regulations 2000. Part-time work is defined by regulation 2 (2) as: "he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the workers employer under the same type of contract, is not identifiable as a full-time worker". His contract was not for part-time work. Apart from getting behind with the electronic filing, there is no evidence he worked short hours, and getting behind with the filing indicates no more than that he was working flexibly or being given occasional compassionate leave to attend to his wife. Qazi Bhatti, who knew in April that his wife was sick, and knew a great deal about Mr Ferguson's knowledge and activity, held the view he must be one of the four transferring employees.

96. Nor was he dismissed because he was proposing to miss meetings because of his wife's disability. There is some evidence that Mustafa Kheriba regarded this as lack of respect and lack of commitment. There is no evidence that Giles Easter held this view. Giles Easter was independently reluctant to take him on, but had to bow to Mustafa Kheriba and Jassim al-Seddiqi who bore the risk of the owner's displeasure. That was the main restraining factor - his inclusion in the agreement for transferring employees, and the need for the owner's agreement. Mr. Kheriba already held a poor view of the first claimant because of the new

contracts and the directors' lack of cooperation with the impending transfer; it is unlikely the need for time off weighed much or at all in reaching a decision they already wanted to take, if only they could persuade the owner. Lack of engagement was not the reason they advanced to the owner, it was lack of competence they put into the mix along with disloyalty and suspicion of skulduggery. There is no real evidence of lack of competence; in evidence Mr Ferguson said MEES certification was in hand with GVA. The operative reason was the perception that the first claimant's loyalty lay with the dismissed directors. It was not about taking time off.

97. Having made this finding it is not necessary to discuss in detail whether a claim under section 15 can be brought in relation to his wife's disability, but the Tribunal would have held this went with the grain of a statute designed to implement the UK's obligations under European Community law and the Equality Directive 2000/78/EC.

98. In respect of a claim under section 98 of the Employment Rights Act, the respondent (here, Astrea) must show that its reason for dismissing was among potentially fair reasons, namely conduct, capability, breach of statutory requirement, redundancy, or some other substantial reason justifying dismissal. The purported reason was conduct, namely his participation in the new contracts.

99. Once the reason is established it is for the Tribunal to decide "whether dismissal was fair or unfair, having regard to the reason shown by the employer", and that depends on "whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and determined in accordance with equity and the substantial merits of the case." - section 98(4). The cases establish that the employer should hold a genuine belief, founded on reasonable grounds, including such investigation as is reasonable in the circumstances - **British Home Stores v Burchell(1978) ICR 378**. An employee should know what is alleged and have an opportunity to put his side of things; of there are reasons why that has not happened, he should at least have a hearing at an appeal. Tribunals should not substitute their own view for that of a reasonable employer.

100. Reading the conversation, (and setting aside now the breach of duty issues raised by the new contracts), having regard to section 98(4) of the Employment Rights Act 1996, setting out the test of whether a dismissal for a potentially fair reason is fair or unfair, the substance and process of this dismissal was unfair. He did not know he was, in effect, being auditioned for his job, rather than having a discussion on the practical operations on transfer or getting to know the new CEO. It was unfair to expect him to discuss the negotiation of the new contract terms, when as he explained, at least twice, he could not do so because of his fellow directors' legal proceedings, and it was unreasonable to expect him as an employee to do so; he had indicated disapproval of John Kevill's decision

to cut off the email, showing dissociation from John Kevill's scorched earth tactics. Saying he was "complicit" meant saying he was involved in the new contracts. Had he been told he was being considered for dismissal because he had been involved in manipulation of contracts and was suspected of sabotage, spying or even just lack of cooperation going forward, he would have been able to say something, having thought how to do so without compromising the other directors, and being able to distinguish his own approach from giving information about their intentions. He had behaved professionally, never having displayed the active animosity and disdain for Arabs and their business practices displayed by some of his co-directors. He was engaged with the ongoing good running of the Estate, as recognised by the owner, who wanted him to continue, and as demonstrated to Giles Easter in the conversation preceding dismissal. There was no good reason for believing he would sabotage the success of ongoing business. There was no investigation of the perceived incompetence in subletting, or MEES certificates, he was not even asked about it.

101. That leaves the question of whether he, or any other claimant, was dismissed because of the transfer, or was guilty of gross misconduct in relation to the new contracts such that compensation should be reduced for contribution or *Polkey*. Before doing so, the position of the third and fourth claimants must be addressed.

The Third and Fourth Claimants and their Service Companies

102. The effect of a relevant transfer is that it: "shall not operate so as to terminate the contract of employment of any person employed by the transfer or and assigned to the organised grouping of resources or employees that are subject to the relevant transfer" – regulation 4 (1) TUPE Regulations 2006.

103. A question arises as to whether either Andrew Lax or Bryan Pull was assigned to the undertaking transferred.

104. The respondent also argues that they were not in fact employed by their service companies, as it could not be said there was any element of control, rather, the contract was a device for tax advantage, and should be treated as a sham as in **Autoclenz v Belcher** (2011) UKSC 41, and that the reality is that they were subcontractors of the entity transferred.

105. The claimant argues that they were employees of the service companies, and that the service companies were part of the organised grouping or "activities" of the service provision change, and their employees were assigned to the undertaking or activities transferring, relying on dicta in **Duncan Web Offset (Maidstone) Ltd v Cooper (1995) IRLR 633**, that "an employee might be employed by one company but be assigned to the business of another.. Tribunals will keep in mind the purpose of the Directive and the need to avoid complicated corporate structures getting in the way of a result which gives effect to that purpose".

106. In this respect **Albron Catering BV v FNV Bondgenoten, 2010 ECJ** us relevant-a contractual link with the transferring undertaking was not required if assigned to it on a permanent basis; it was for the national court to assess if there was an employment relationship. The Tribunal does not accept that Messrs Lax and Pull were not employees of their service companies. Service contracts such as these are common. Written contracts should generally be respected unless shown to be shams. The control argument might equally well apply to owner directors, as Mr Kevill or Mr Ferguson. The dispute to be resolved is whether they were assigned to the Estate activities.

107. The grouping of resources (or the activities, as this is a service provision change) subject to the relevant transfer were those required to manage the Berkeley Estate for the owner. Work for the Holding company, or to manage the directors' own investments, or for other companies in the group, was not part of this. **Botzen v Rotterdamsche Droogdok Maatschappij BV (1986) 2CMLR 50 ECJ** requires, where [art of a business transfers, an assessment of "to which part of the undertaking or business the employee was assigned". Duncan Webb indicates that where the whole business transfers, it has to be shown that the bulk of the employee's time and responsibilities were devoted to other entities within the group". It is a question of fact, as shown in **Edinburgh Home Link Partnership and others v City of Edinburgh Council and others, UKEAT/0061/11,** which indicated that "if, for instance, and employees role is strategic and is principally directed to the survival and maintenance of the transfer or as an entity, it may then not be established that that employee was so is assigned". Tribunals must also consider the extent to which assignment to (or away from) the transferring entity or activities was temporary, for example **Sunley Turriff Holdings Ltd v Thomson (1995) IRLR 184** and **Marcroft v Heartland (2011) EWCA Civ 438.**

108. Andrew Lax was Lancer's chairman and as already recorded supplied his services through a personal service company. He described his role as setting strategy, and giving overall input on the management of the assets in the Estate. He and John Kevill had built up the Estate from its early years. Following a severe illness in 2013, and a year's sabbatical to sail to Australia, from 2015 he had worked three days a week in Lancer, available on the phone, if required, on Monday and Friday. He estimated he spent 90% his time on Lancer's single client work, the rest of his working time was spent attending to Lancer Holdings' companies and to Abbotstone, and advising on the personal investments of Lancer directors (which may simply mean the other Lancer Holdings companies). He described his role as setting the strategy and direction of travel, and that he was better than Mr Kevill at "doing the client stuff", but he had not travelled to Abu Dhabi since 2012, and the owner rarely came to the UK. There was no more detailed account, nor documentary evidence, to support what he said. In his September meeting with Giles Easter he reminisced a great deal about the original setting up of the business; he said he did client relations; he spoke of the role of various staff members,

but little about the current arrangements or what he did. He said he had been going to "slide out", but was still there. Taking the evidence overall it is hard to see how he was engaged in management of the Estate as an asset at all, save agreeing with decisions made by others.

109. Byron Pull says he was responsible for overseeing financial provision for the Estate, with a two person team. He also looked after IT and HR. He was also involved in the group companies and private interests, and "the 12 month period prior to the transfer date I estimate that I spent up to 25% of my time working on various aspects of the services, and reduced over that time through me working on financial matters for Lancer that resulted from the AMA being terminated". In a September 2017 discussion with Giles Easter, he acknowledged managing a number of his own companies within IMS; Lancer group companies were "low-level asset management", and he looked at them maybe once a quarter. On the Estate, he had not been involved in the 10 year plan Lancer had just sent. There was some discussion of software for management information – much of that seems to have been left to the staff to process from that supplied by Grindleys.

110. After the event, Giles Easter concluded that Byron Pull had little direct input into the financial direction of the Estate's affairs, and that it was the team under him who had dealt with the auditors, for example. This evidence on its own should be treated with caution, being hearsay, but an additional finance director has not been hired since the transfer.

111. The estate had not acquired additional assets since 2014, though Lancer say they had researched and proposed several deals which had not been adopted by the owner.

112. Of the other 7 or 8 Lancer companies dealing in property, the amounts involved are small (£13.6 million turnover, £16 million in property value) compared to the size and value of the Estate. John Kevill's evidence indicated that day to day tasks such as rent collection and management were undertaken by Lancer staff and only by contractors "if it was a bit far away". The work will thus have taken up proportionately more of the directors' time, though it is hard to assess the proportion.

113. It is of interest that neither Andrew Lax nor Byron Pull gave any indication to Giles Easter they expected to remain in the business, nor asked about their own position. In considering the evidence of their conversations with Giles Easter the tribunal takes account of the fact that neither may have considered the purpose of the discussion in comfortable surroundings, and had they done so would have given a better account of themselves, but they have since had the opportunity to flesh out in evidence given to the tribunal what part they played in Estate activities and have not added much or at all.

114. Making an assessment of this evidence in the light of the relevant law, the Tribunal concludes that for some years neither was assigned more than in small part to the activities of the Estate. Neither could speak much

of its recent or current activities. Neither spoke of any deals that had been researched and rejected by the client. The financial management of the Estate activities was part of Byron Pull's role as finance Director, but in practice almost of all of this seems to have been undertaken by staff. Andrew Lax had not been involved with the client for some years, even though that was said to be the prime focus of his role. A significant part of Byron Pull's activity by this time was management of the group and its investments. Of strategic decision making, both spoke only of agreeing with decisions made by others. Both seem in reality to have been working part-time, whether through age or poor health, while drawing salary and dividends that reflected their historic role. In reaching this conclusion the tribunal discounts the activity of the last 4-5 months, in anticipation of transfer, which was temporary, but even putting that to one side, there was little evidence of engagement in the Estate, and they were not assigned to it.

115. It follows that their claims against Astrea for unfair dismissal, breach of contract, unlawful deductions and holiday pay all fail. If there is any claim of unfair dismissal, holiday pay, or notice pay against their respective service companies, those too fail, because it is not shown that they have been dismissed by them.

Dismissal because of the Transfer? First and Fourth Claimants

116. Regulation 7(1) of the TUPE Regulations 2006 states: "where either before or after the relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purpose of art 10 of the 1996 act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer".

117. There is an exception in regulation 7 (2) and (3), where there is an economic, technical or organisational reason and any changes in the workforce, but it is not argued here.

118. Where there is a transfer, tribunals must be careful to distinguish the employer's reason from the factual "but for" scenario. Just because the dismissal followed transfer, or would not have occurred without it, does not mean the transfer was the reason – **Hare Wines Ltd v Kaur and H&W Wholesale Ltd UKEAT 0131/17**, and **Tabberer v Mears Ltd UKEAT 0064/17.**

119. In the case of the fourth claimant, Mr Kevill, the tribunal takes as relevant the fact that neither Astrea nor the owner contemplated his transfer, as shown by his omission from the list of "transferring employees" in their July agreement. In any case, a decision seems to have been made before May when Giles Easter wrote "we know John and Andrew are not coming". In evidence Mr. Easter said he did to expect them to have a long-term role in the business but intended a discussion and an agreed workout provision, until he found out about the contract changes, but if that is right, he kept the cards very close to his chest. In the absence of information about the negotiations between Astea and the

owner on who was to transfer, or any other record of his intentions, that is not accepted. The reason for not telling John Kevill he was not to transfer was to keep his cooperation over the handover period. Well before any revision of the claimants' contracts, it was anticipated that he was not to transfer**.** The remaining reasons (that is, not the revision of the contracts) are therefore are the transfer, and the fact that he was CEO, as was Giles Easter, as recognized by his comment to Giles Easter pre-transfer: "you're sitting in my job"; alternatively, though neither side specifically argues for this, the subsidiary reason in the dismissal letter, that the owner had lost confidence in him because of his campaign of non-cooperation to get the owner to withdraw the notice to terminate the asset management contract. John Kevill's email to Qazi Bhatti of 30 March 2017 about changing the rules of engagement is important; it can well be understood that the owner might not wish to deal with him going forward after that, and it is clear that the owner's views on who should transfer were important, demonstrated by Astrea's cautious approach to dismissing Duncan Ferguson. What is not known is the owner's view by May 2017: was it accepted that John Kevill and Giles Easter could not both be in the same job and so John Kevill must go, or was the owner upset by the uncooperative approach which went back to November 2016? Qazi Bhatti would know that the campaign originated with John Kevill specifically. The letter of dismissal picks up on the letter the owner sent to Lancer on 12 September complaining of lack of cooperation. TUPE transfer, but it is known that on 5 September Qazi Bhatti was saying to Astrea they were "in it together" and there may have been a strategy, informed by legal advice, to set this up as a reason, following the discovery of new contracts.

120. There is evidence from Giles Easter on the reasons for identifying particular transferring employees, as he says, briefly, the negotiations with the owner were all above his head. Mustafa Kheriba said the reason for their selection was that the owner believed their knowledge of the estate would be of particular benefit once Astrea took over. He did not say it was because the owner did not want to deal with John Kevill after he had manifested such hostility. In the absence of evidence which could have been given but was not, the tribunal finds that the reason for John Kevill's dismissal was the transfer. Giles Easter did not want to take him on as he wanted a free hand; in May he was looking to recruit a chief operating officer, so he anticipated a vacancy.

121. The dismissal was therefore unfair. The questions of contributory conduct and Polkey remain.

Failure to Inform and Consult

122. As identified by the parties, the issues here are whether Lancer, Abbotsford or IMSL ("the transferor respondents") were in breach of their obligations under regulation 13 to inform and consult about the transfer, if yes, what that because of failure of Astrea, (the transferee respondent) to comply with its obligations under regulation 13 (4).

123. If yes, should Astrea be ordered to pay compensation, in addition to a declaration, and for how many weeks.

124. Regulation 13 of the TUPE Regulations 2006 provides: "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 the fact that the transfer is to take place, the date or proposed date and the reasons for it, the legal, economic and social implications of the transfer for any affected employee, 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 if the employer is the transfer all, 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 for or, if he envisages that no measures will be so taken, that fact".

125. Where representatives have not been elected, the information must be given to the employees direct - regulation 13 (11).

126. Regulation 13(4) states: "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)".

127. Regulation 13 (1) makes clear that an affected employee to be informed or consulted under the regulation includes any employee who may be affected by the transfer, whether or not assigned to the transferring undertaking or group of employees.

128. Regulation 15 provides where an employer has failed to comply with regulation 13, an employee may present a complaint, and if the tribunal finds it is well-founded, shall make a declaration, and in addition may order compensation to be paid by the transferee, or if shown that it was because the transferor did not inform of measures, the transferor to "any affected employee". (There are provisions for the transferor to notify the transferee of its intention to claim that their default was the reason for any failure; Astrea was notified of the intention of Lancer and the service companies to do so).

129. Regulation 11 lays down employee information to be provided by the transferor. With respect to those "assigned to the organised grouping of resources or employees that is the subject of a relevant transfer", it must state the name and age of the employee, and the particulars of employment required by section 1 of the 1996 Act (which include, as relevant here, the scale and rate of remuneration, holiday and notice entitlement, and terms about requirement to work outside the United Kingdom). It must not be more than fourteen days old when given. It must be given: "not less than 28 days before the relevant transfer, or, if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter".

130. On timing, in **Institution of Professional Civil Servants and others v Secretary of State for Defence (1987) IRLR 373** it was said that where "for reasons beyond its control, particular measures are not envisaged until shortly before the transfer, when there is insufficient time for effective consultations to take place", no criticism can be made of the company. The relevant regulation was to be read as meaning "as soon as measures are envisaged and if possible long enough before the transfer".

131. The claimants and transferor respondents argue that Astrea did not provide its measures letter until 3 days before the transfer. This affected all four claimants, who did not know if they were transferrimg.

132. The transferee respondent, Astrea, argues that it was highly artificial for the claimants to seek an award based on the failure of transferor respondents to consult with them. In addition, "Astrea cannot reasonably be criticised for the somewhat late provision of the measures letter and circumstances where the late provision was due to circumstances beyond its control, i.e. the generally obstructive behaviour of the claimants during the handover process and, in particular, the agreement of the new contracts which were, for transparently 'tactical' reasons, only provided on 1 September 2017. It was not reasonably possible for Astrea to take a concrete decision on the measures proposed to take concerning the future employment of (the claimants) before it had seen and had a proper amount of time to consider the new contracts". Further, "there was nothing that could reasonably have been the subject of consultation, let alone with a view to agreement", as the claimants were unlikely to agree to dismissal for gross misconduct. It is argued that in fact the claimants knew or well suspected that they were not to transfer, and that they devised the new contracts "in case we went across… but were then terminated shortly afterwards".

133. To summarise the relevant facts, Giles Easter told John Kevill on 19 July that TUPE applied, but he needed more information to understand which employees were assigned to the business. It also needed to know more about the terms and conditions of staff employed. On 28 July it received the basic organogram. He continued discussions with individual staff, though "paused" on 22 August. The request for employee information was repeated on 10 and 22 August; on the latter date Astrea said that it needed to know more on the roles and responsibilities of staff and full details of the terms on which they were engaged. Lancer informed its employees of the fact of transfer (but not measures) on 16 August. On 25 August, Astrea stated one of its measures, the change of workplace. On 31 August Lancer gave the outstanding employee liability information, and on 1 September the contracts. Information about pensions and payroll was given in reply to requests over the next few days. Further information on the new contracts or salary of the claimants was refused on 11 September. Not until 25 September were claimants Pull, Lax and Kevill told they were not to transfer and were dismissed. In practice, these three did not know if they were being treated as assigned and were therefore to transfer until dismissal, though they may had a

shrewd guess. Duncan Ferguson did not know either, but he had some notice that he was to transfer, even if subsequently dismissed. It looks as of both sides were using information as a trade-off. Astrea did not want to identify its intention not to take on the three not on the "transferring employees" list for fear of non-cooperation. Lancer did not want to show the new contracts while in the dark as to Astrea's intentions with regard to the directors (or possibly because of delay finalizing the agreements for the service company employees).

134. The transferor provided employee liability information at the very limit of the 28 day time limit of regulation 11, but in time. Whatever the frustrations of Giles Easter trying to find out who did what, despite his ongoing collective and individual meetings with staff during August, he did get the information in time to announce what measures he would and would not take. It is also the case that in respect of some measures it is hard to see why he needed the information. It was already envisaged that Kevill and Lax would not transfer, and anticipated that Pull would retire, and it must have been clear that Henrietta Lax was redundant. He had decided by 5 September he did not want these three directors to transfer because of the new contracts. He may not have been aware of the service companies until 1 September, but it took until 13 and 14 September to meet Mr. Lax and Mr. Pull, and whatever their status, he could have made an outline decision in August, assuming they were Lancer employees, on whether they were assigned. He did not need legal advice to decide whether they were assigned to the business.

135. As for the argument that the directors did not need to be consulted, either because not employees, or because it was artificial. They were employees, and there is no doubt that the legislation, and more particularly the EU Acquired Rights Directive to which it gives effect, requires consultation for its own sake, not just when it makes a difference. The three who were dismissed may have suspected they were not to transfer, but, like any other employee, they should not have been kept guessing and should have been told before they were. Clearly they were unlikely to agree to dismissal, but that did not mean they should not be informed or consulted. As for Duncan Ferguson, he had to ask on 21 September if he was to be reporting for work on 29 September. Had a measures letter which stated the transferee respondent's intentions been provided earlier, this would not have been necessary.

136. A declaration is made that the first respondent, Astrea, failed to discharge its duty under regulation 13(4). Should it also pay "appropriate compensation"? Regulation 16 defines appropriate compensation as "such sum as the tribunal considers just and equitable having regard the seriousness of the failure of the employer to comply with his duty".

137. In **Susie Radin Ltd v GMB (2004) IRLR 400**, the focus was to be the seriousness of the employer's default, starting at 13 weeks for the worst, and counting back. That was a case where the employer did nothing. In **Todd v Strain (2011) IRLR 11**, there was some information, no consultation, but no evidence of measures of any significance, and a

seven week award was made. In **Cable Realisations v GMB Northern (2010) IRLR 42,** the award was three weeks' pay again, where there had been some information.

138. The Respondent argues the timing had no real impact on the ability of the transferor respondents consulting the relevant claimants, ad no award should be made at all.

139. The claimant argues that the respondents were culpable, unlike those in **Todd v Strain**, and should pay more than the seven weeks there awarded.

140. The Tribunal holds that the appropriate award is three weeks' pay. The reasons for this are that while no measures information was given about their continued employment, and this is serious, far more so than knowing about alterations in the terms of employment, for example, the information could have been given by Lancer earlier than at the statutory limit, and as (1) the reason for doing that was because the contracts, or not all of them, were not yet ready, as they were being revised in contemplation of, and perhaps also in some respects conditional on the transfer of the contracted individuals, and (2) there was some tactical play (by both sides) in trading access to business information against provision of employee information, it would not be just and equitable, in the very particular circumstances of this case, where the claimants were those making decisions about providing employee information, to make a higher award.

141. The amount of a week's pay awaits a remedy hearing if it is not agreed by the parties.

The New Contracts and Money Claims

142. The issues raised by the respondent as to why the new contracts are not valid are set out in paragraph 10 above.

143. The issues identified as common law abuse and sham contracts were not originally pleaded in the ET3 response, but had been notified some time earlier, and the respondent applied at this hearing formally for leave to amend. Having regard to the overriding objective and to the principles set out in **Selkent Bus Company v Moore**, permission is given. The document on which this additional ground of response is based came to the first respondent's notice only on disclosure in these proceedings. The validity of the new contracts was already in issue, this was but one more argument. The claimants had had adequate notice and had been able to prepare on the point. Weighing these factors, the balance of prejudice favours the respondent.

Are they void under TUPE Reg 4(4), EU abuse or common law abuse, or shams?

144. Regulation 4 (4) states:

> "subject to regulation 9, any purported variation of the contract of employment that is, or will be, transferred by paragraph (1) is void if the sole or principal reason for the variation is the transfer."

Paragraph 9 concerns insolvency proceedings and is not relevant here.

145. The case law on this concerns factual scenarios where it is the transferee who purports to alter the contract. It seems to be entirely novel that a contract is varied to the employees' advantage by transferor employee directors, as here.

146. In general terms the Tribunal must examine the reason for the terms being varied, and be careful to avoid "but for" causation – **Smith v Brooklands College 2011**. A reason is the "factor or factors operating on the mind of the decision maker" - **Croydon Health Services NHS Trust v Beatt (2017) ICR 1240, CA.** As this concerns an EU Directive, its purpose – "safeguarding of employees' rights" - is relevant.

Submissions

147. The claimants argues that case law supports the view that while an employee may not waive his rights, he can choose between existing rights and improved rights, term by term, and that the regulation operates only to avoid varied terms that are less favourable, especially when presented as part of a mixed package, relying on the reasoning of the court of appeal in **Power v Regent Security Services Ltd 2007**, where retirement age was increased from 60-65 after a transfer, by reference to **Daddys Dance Hall Case 324/86 (1988) ECR 739**, and **Credit Suisse First Boston (Europe) Ltd v Lister (1999) ICR 794.** The respondents relied on **Alemo-Herron**, on balancing rights of employer and employee, but that did not operate because it was about changes going forward, not those already made. In any case TUPE did not effect changes, it recognized those already agreed in contract. There were good reasons for improving the contract terms: they were out of date and did not reflect current salaries and bonus provisions, salary had not increased for some years, the employees had been able to grant bonus as directors, and the contractual change ensured that this continued as employees. The termination payment created a retention incentive, and gave comfort during a difficult time of transition. Increasing liability insurance for directors and officers from 6 to 10 years was believed to be within market rate. The clause preventing compulsory work overseas existing conditions where Lancer would not compel someone to work overseas. As for the abuse principle relied on the respondents, the improvement was achieved by a contractual negotiation, not by relying on TUPE.

148. The first respondent argues that Regent concerned only the 1981 regulations, and preceded the ECJ decision in **Alemo-Herron v Parkwood Leisure Ltd (2013) ICR 1116**, a case concerning a collective agreement with the transferor company with dynamic effect, and held that

the Directive did not aim solely to safeguard the interests of employees in the event of transfer, but sought to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, the other. The transferee must be in a position to make adjustments and changes necessary to carry on its operations. Respondent argues that this principle is not limited to collective agreements. The natural and ordinary reading of the regulation is to safeguard employees rights, not enhance them. The claimants argued there might be reasons for enhancing rights (e.g., to ensure staff did not leave ahead of the transfer) but those were commercial reasons, and the transfer was not the reason. The respondent argued that the EU abuse principle is relevant to his decision. In **Kratzer v R+V Allgemeine Versicherung AG (2016) ICR 967,** the CJEU said "according to settled case law of the court, EU law cannot be relied on for abusive or fraudulent ends". In that case, the claim was of age discrimination relating to jobs applications where he had no intention of taking the job if offered. To make such a finding, there must be an objective element, "it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved", and secondly, "the subjective element, namely that it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain an undue advantage. The prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of an advantage". That this applies in England is shown by **In re Easynet Global Services Ltd (2018) EWCA Civ 820**, where it was held that the treaty and directive on freedom of movement did not contain any criterion of what would constitute an improper attempt to make use of the rights concerned, and that "such rights could be exercised wherever it suited the purposes of the rights holders, whatever those purposes might be, save for fraud". **In HMRC v Prendragon plc (2015) UKSC 37**, where the Directive's purpose was to avoid double taxation, the critical question was the identification of the essential aim of the transaction, which would have shown that each of which produced the tax advantage had no other rationale but to avoid paying VAT. Lord Sumption explained abuse of law as: "it confines the exercise of legal rights to the purpose for which they exist, and precludes their use for a collateral purpose". Where there were concurrent purposes, "They are usually directed to a commercial purpose… The potential for abuse consists in the method chosen to achieve the commercial purpose".

149. Applying these principles, it is argued that the purpose of TUPE is not to allow owner directors to agree new terms that will fix the transferee with substantial additional liabilities in the event of a transfer, but not otherwise. The purpose of TUPE is to preserve rights, not to enhance them. That the aim was to fix the transferee with substantial additional liabilities is shown by the recognition that if some did and others did not transfer, it would be against the interests of others, and there should be a conditional revocation agreement. That was artificially shown by the fourth claimant trying to conceal the revocation agreement, which would have no point if it was introduced for commercial reasons.

150. The respondent also argued that manipulation of TUPE also involved common law abuse, this being "a cynical manipulation of TUPE", citing **Carisway Cleaning Consultants v Richards (1998) UKEAT 629/97,** where a troublesome employee was moved to a part of the business due to transfer shortly, at a higher salary. The employee, it was held, had been gulled by fraud in to moving; it was also a fraud on the transferee as it made the contract unprofitable. The respondents argue that the common law has parallel principles to achieve the same effect as the EU abuse principle, as articulated in **Prest v Petrodel Resources (2013) 1AC 415**, that the law operates on the assumption that dealings are honest, and benefits obtained by dishonesty will not be upheld.

151. To this the claimants reply that **Prest** was about piercing the corporate veil in limited circumstances where owner directors controlled a company. It is argued that these limited circumstances not apply here. They were that fraud vitiates a contract, or a right derived from legal status such as marriage, or a statutory time bar. As for **Carisway**, the reason why he did not transfer was because he was not in fact assigned the undertaking transferred, and it was a fraudulent representation to say he was assigned.

152. Next the respondents argue that the new contracts were a sham, In **London and West Riding Investments Ltd (1967) 2 QB 786**, "acts done or documents executed by the parties to the sham which are intended by them to give to third parties or to the court the appearance of creating the party's legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create". The parties "must have a common intention that the acts or documents are not to create the rights and obligations which they give the appearance of creating". The respondent argues that the new contracts were "a one-way bet". This was to be concealed from first respondent at the point of transfer. The fact that they were still being agreed right up to the weeks before the transfer took effect indicates that the parties did not intend them to alter their relationships but only to apply if the transfer went ahead.

153. The claimants respond to this that, at the time, it was not known if TUPE would apply, as the respondent did not confirm this until 23 August. The revocation agreement (to terminate on 28 September) was to fall back (on to the pre-May 2017 contracts) if there was no transfer, or only some transferred, as that would not be beneficial. In any case, they say, a national rule could not strip an employee of EU rights.

154. Finally, the first respondent argues that when agreeing the new contracts the directors did not exercise their powers only for the purpose for which they were conferred. Section 172 of the Companies Act 2006 requires a director to act "in a way in which he considers, in good faith, would be likely to promote the success of the company as a whole for the benefit of its members as a whole". In **re Duomatic (1969) 2 Ch 365**, a decision taken by all the shareholders entitled to vote was valid without

formalities required by the companies act. In AN **Capital Partners Ltd V Marino (18) EWH C1768**, this did not permit shareholders to do informally what they could not have done formally, they must have acted in good faith and honestly in assenting course of action, there must be unqualified agreement objectively established, and it could not be used to authorise an act or omission would be unlawful, for an improper purpose, in fraud of the company or dishonest. The directors' state of mind cannot be attributed to the company as a defence – **Bilta (UK) Limited v Nazir (2015) UKSC 23**. The new contract terms did not benefit the company but the employee directors; there was no commercial justification for the contract improvements. The purpose was to compensate the directors for Astrea not buying the company. **Taupo Totara Timber (1978) AC537** permitted the addition of a termination payment in the event of takeover as an incentive for staff not to resign and go elsewhere, and had a business purpose. **Re W&M Roith Ltd (1967) 1WLR 432** did not permit a director to enter a service agreement for a pension for his widow in the event of his decease because it was not entered into to promote the company or ensure its prosperity. Astrea had avoided the contracts on transfer, and it is argued the right to avoid went with the contract.

155. For the claimants, it is argued that the contracts were not void, because they were intra vires the directors' powers, and at best they are voidable if it shown the directors breached their duty is to act in the best interests of the company. It is argued that the contracts are not invalid because: (1) there was no breach of any fiduciary duty, alternatively they were ratified by the shareholders under Duomatic. (2) Lancer, as transferor, knew of the breaches, and did not seek to avoid the contracts. They had affirmed them. (3) the right to rescind did not transfer and (4) even if it did, Astrea has lost that right by terminating the contract. In relation to (1) it concerns the directors' state of mind, and whether they held an honest belief. They believed they were restructuring the remuneration they received in tax efficient way; the directors' interests were all aligned, as at that time they expected all four directors to transfer. **Bilta** is not relevant because there was no fraud on the company or any liquidator. On (4) the right to rescission did not transfer because what transferred were the contracts at the time of transfer. If the right to avoid the contracts transferred that would remove the certainty as to contracts that was the purpose of TUPE. Further the right to rescission does not transfer because it concerns directors, not employees, and it falls within the directors' rights and powers. Regulation 4(2)(a) provided for transfer of "all the transferor's rights, powers, duties and liabilities under or in connection with any such contract.." The right to avoid the contract is an equitable right arising from the relationship of directors to the company, not the relationship of the company and its employees, and "in connection with" the contract was not broad enough to include that equitable right. The Directive spoke of a "contract of employment or an employment relationship", not a director relationship. Cases where a duty of care (liability in tort) transferred, were because the duty arose from the fact of the employment relationship. Astrea did not avoid the contracts – that is not mentioned in the dismissal letters.

Discussion and Conclusion

156. A starting point is the reasons for the contract changes. This is done term by term, given the **Regent Power** decision where some terms were altered and others not.

157. It appears the salaries of non-director staff were reviewed annually; this is common, even if the review is no change. If the directors were to be employees going forward it is not difficult to see this as putting the director-employees in the same position, where in earlier years they have preferred to take the remuneration as tax efficient dividends, and fulfills the legitimate commercial purpose of seeing that employee salaries keep pace with inflation and the market.

158. The guaranteed bonus is not on a par. Lancer's stated policy was not to award routine bonus, which was to be exceptional, so making it an annual payment was major change – it would bind the company in good times and bad and amounts to a steep pay rise rather than a reward for performance. It was guaranteed at 30% for staff and 50% for director employees. The staff, rightly, thanked the directors for their generosity. There is no evidence that staff were unhappy and seeking to leave (though one chose not to transfer) but even so it is hard to see how payment of a discretionary bonus, deferred perhaps to a date after transfer, would not have achieved the same result. The sense of it seems to be to increase the income of the director employees on a permanent basis without drawing undue attention to it, using staff guaranteed bonus as a decoy, knowing that after transfer payments to staff would not come at the expense of company profits that would otherwise accrue to the director shareholders as dividends or property investments, and giving the directors a permanent increase in remuneration as employees to compensate for loss of profit as shareholders. That was not a commercial decision to promote the success of the company. It was done because on transfer the directors would only be employees. It was more than a rearrangement for tax efficiency. It was because the owner-shareholders were losing their business's single contract, and so the profit – or risk of loss- from managing the Estate, which before they lost the contract they could allocate as salary or dividend as they found tax efficient. The increase in bonus and termination payment was to compensate the claimants for loss of the business contract, as owners. This was not done a legitimate commercial purpose of the company. The fact that the termination payments related to years as director, not years of employment (as is usual in employment relationships) underlines the intention, that it was to compensate the director-shareholders, and this evidence is intention is not weakened by Mr Kevill making a handwritten amendment to the length of time he had had the Estate contract (which in any case predated his service contract). Some termination payment, or long notice clause, could have had a commercial purpose to avoid disruptive resignations at or soon after transfer, but not this one.

159. The increase in notice to 24 from 12 months for the service companies is similarly hard to justify commercially, when the existing notice terms

would have sufficed to avoid disruption; 24 months is hard to understand when both were understood by Mr Kevill 12 months earlier to be looking to retire. This increase reflects no commercial need but a protection of their share of the profits of the business.

160. The clause providing a 10% pension contribution appears from the limited evidence of remuneration under the old arrangements to reflect the pension payment to Mr Ferguson and Mr Kevill, and not to be an improvement but to state what was already the case.

161. As for holiday, now 38 days, an increase of 5 days from 32 (25 plus 8 statutory holidays), the Tribunal observes that it is not excessively generous, given that the statutory minimum is 28 days and that higher paid employees are frequently or usually rewarded with more generous holiday. This too probably reflects what was already the case, rather than being an improvement out of line with market reality.

162. The insurance point is not clearly unrelated to commercial operations. It was said to be market standard; there was no evidence to support or dispute this assertion.

163. The clause specifying normal working in the UK was new, and unusual for a company whose sole client was based overseas, where they had when necessary travelled to visit the client. It is hard to justify this on commercial grounds, and silence on the point would have reflected the position as it was, and was likely to be.

164. Although unstated, it might be inferred from the tone of communications over 2017, and some of Mr Kevill's specific remarks on this, that some of the purpose was to punish – it had got beyond deterrence by this point - the transferee and Estate owner for using TUPE to acquire the management of the Estate, rather than a purchase of the business.

165. Were these changes made by reason of the transfer? They anticipated the transfer. They came about then because management of the Estate was transferring, and with it, the profit that accrued to shareholders. They operated to effect payment of profit (even if the business made a loss) after transfer to transferring director - employees. It is hard to see any other reason for the changes (other than the salary and insurance increases).

166. Of the EU abuse principle, and with regard to **Kratzer,** the purpose of the Directive was to safeguard employee rights. If there was a legitimate commercial purpose, they would not be invalid just because they were made close in time to the transfer or in knowledge of it. The improved rights would be safeguarded by the fact of transfer. It is however hard not to see this as a case of the essential aim being to obtain an undue advantage. There is no commercial purpose served by the improved contract terms. As for fraud or dishonesty, it is hard to see that it was honest to import a guaranteed 50% rise in salary, when the directors were

in effect awarding it to themselves, knowing it would be paid at the expense of Astrea, and when that knowledge could not be imputed to the employer company (Lancer), relying on **Bilta**, which though about directors' duties is apt when considering the purpose of the changes.

167. Considering regulation 4(4) in the light of the abuse principle, the tribunal finds that the contract terms as to bonus, termination payment, and notice are void because the transfer was the reason for variation.

168. That being the case it is not strictly necessary to consider whether the contracts were a sham. It is not clear that when agreed in June or so (before the documents were signed) it was intended that they were conditional and only for the eyes of third party (Astrea) rather than between the directors of Lancer. It was only in August that Mr Kevill realized the detrimental tax effect on any who did not transfer, which is when he raised it. It is not clear that this was agreed. Some contracts had been signed by then, the service company contracts were slow to catch up. It does not indicate they were a sham at the time, but it does reinforce the view that they were varied by reason of the transfer.

169. In the light of the findings on regulation 4(4) it is unnecessary to address the points on whether the directors acted in breach of fiduciary duty, though the Tribunal would have held on the facts that these variations were akin to the pension in **Roith** (to which the liquidator objected) rather than the termination payment in **Taupo** (to which the purchaser objected) and that a transferee is a similar position to a liquidator or purchaser in objecting that changes to service agreements were made in breach of fiduciary duty and did not serve the company's interests. It is not necessary to address whether the right to avoid the contract transferred under TUPE.

170. Increase of Awards for failing to follow the ACAS Code

171. Where a dismissal is carried out without heed to the ACAS Code, a Tribunal may order an increase in the award of up to 25% to reflect the employer's fault. The respondent purported to dismiss for misconduct, without investigation, notice of charge, hearing or appeal. In Duncan Ferguson's case this was especially unfair. The first respondent was well informed and aware of its duties. It is understood why the respondent wanted to act quickly, but there is no reason why they could not have suspended the claimants and conducted an accelerated process that gave the claimants an opportunity to state their side of the story. For a complete failure to follow any procedure in the statutory Code a 25% increase is appropriate.

Contribution and Polkey

172. Whether the first and fourth claimants are to be reinstated must await a

remedy hearing. In assessing compensation for unfair dismissal as an alternative, section 122(2) provides "where the Tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce… the amount of the basic award to any extent the tribunal shall reduce… that amount accordingly." The compensatory award can be reduced under section 123 (6): "where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

173. The tribunal has not found that either claimant was lawfully dismissed for gross misconduct. The respondent would have argued that there was gross misconduct for varying the contracts to import golden parachutes in anticipation of termination, or for cynical opportunism in purporting to agree them. They had deliberately obstructed the provision of information to the owner. It is argued the implied obligation to act in good faith and not profit at the expense of the company passed on transfer as did liability for breaches- **Marcroft v Heartland (2011) EWCA Civ 438, Tullett Prebon plc v BGC Brokers (2011) EWCA Civ 1131**. These are treated as arguments to reduce the awards for conduct or contribution. The claimants cannot say the transferor employer affirmed the varied contracts just because they happened to be the same people – **Bilta.** The claimants have argued that there was no misconduct.

174. In the case of Mr. Ferguson, the only conduct or action in which he participated was the variation of contract. It is not clear to wat extent he participated actively. Given his wife's health, he had a lot else on his mind at the time. The "complicit" remark must be seen in the context of being asked to discuss the position of his fellow directors who had just been dismissed for gross misconduct, and of declining to be drawn in to discussing their position. There is no evidence either way as to whether he would have insisted on the new terms being carried into effect, but the evidence of how he was viewed by Qazi Bhatti, the practical tenor of the transfer discussion, and remarks he made about (for example) cutting off the email, indicate he was prepared to carry on running the estate as he had before, and that he was cooperative, not much engaged in contract changes, and would probably not have insisted on the enhanced terms, though he would probably through loyalty have avoided giving evidence contrary to his fellow directors and would have been unlikely to give evidence in their support either. Beyond formal agreement in the changes there is no evidence that he participated in an activity led by John Kevill. This was not conduct requiring a reduction in the basic award. As a matter of fact it may have contributed to his dismissal because of the suspicion of the first respondent that he would undermine the company, but had there been discussion, it is likely they would have been reassured. Any complicity by Mr. Ferguson was not blameworthy; it would have been clear he was a follower, not a leader, ether in the contracts, or in the withholding of information to the owner, not did the recorded discussions show him speaking contemptuously of owner of Astrea.

175. There is no evidence to suggest he would have been dismissed in any event had there been proper process.

176. It is a different picture with the fourth claimant, Mr Kevill. He seems to have devised and led the inflation of the contract terms. Quite apart from that, he was for months deliberately obstructive of the owner's requests for information, which had not gone unnoticed. It is hard to see how an employer could have confidence in one who deliberately obstructed his only client in seeking information about his assets to which he was entitled. He was also, behind the owner's back, openly contemptuous of him on racial grounds, and of the transferee's holding company (the various remarks about Arabs, goat herding, and their business methods). His employer, knowing this, cannot have had much confidence in his ability to do a job that required good or at least respectful relations with the sole client, and his own boss.

177. Of these features, the obstruction of business information in the face of clear requests, sometimes not answering at all, when requested was in breach of his duty to serve the interest of the business, was the most insupportable conduct in any employee. For an employee to vary his contract deliberately for his own gain, as he could when wearing two hats, rather than for the interest of the business, was also conduct repudiatory of the contract.

178. Had there been a proper process it is likely he would have been dismissed in any event within three weeks.

179. His conduct as an employee was so substantially bad that a 100% reduction in both awards is appropriate.

_____

Employment Judge Goodman

Date 11 December 2018

JUDGMENT SENT TO THE PARTIES ON

13 December 2018

.....
FOR THE TRIBUNAL OFFICE

.