EMPLOYMENT TRIBUNALS

Claimant: **Mr A John**

Respondents: **Cycle Specific Limited (in creditors voluntary liquidation) (first respondent)**

Mr D Morris t/a Tri-Specific (a sole trader) (Second respondent)

Heard at **Carmarthen** **On: 11 March and 24 May 2019 (in chambers)**

Before: **Employment Judge R McDonald**
Mr P H Bradney
Mrs M Humphries

Appearances

For the Claimant: in person
For the Respondents: Mr G Lomas (Counsel)

JUDGMENT

The Judgment of the tribunal is as follows:

1. Cycle Specific Limited (in Creditors Voluntary Liquidation) is substituted as the first respondent in place of Tri-Specific Ltd.
2. For the avoidance of doubt, all the claimant's complaints against Tri-Specific Ltd are dismissed.
3. A copy of this judgment shall be sent to the liquidator of Cycle Specific Limited, Annette Reeve at 1st Floor, Spire Walk, Chesterfield, Derbyshire, S40 2WG.
4. Any party which wishes to apply under rule 29 of the ET Rules to vary or set aside the order under paragraph 1 shall do so within 14 days of the date this judgment is sent to the parties.

5. The claimant's complaint relating to the alleged failure by the first respondent to enrol him onto a pension scheme in breach of the Pensions Act 2008 from April 2017 fails.
6. The claimant's complaint that the sum of £103.71 was unlawfully deducted from his wages succeeds.
7. The claimant's claim for a remedy for the second respondent's breach of Regulation 15 of the Working Time Regulations 1998 fails.
8. The claimant's complaint that the first respondent failed to comply with the requirement to provide information under reg.13(2) of Transfer of Undertaking (Protection of Employment) Regulations 2006 succeeds.

9. By way of remedy:
   a. The second respondent shall pay the claimant sum of £103.71 unlawfully deducted from his wages, payable net of deductions.
   b. The first and second respondents are jointly and severally liable to pay the claimant the sum of £1488.90 as compensation for the first respondent's failure to comply with reg.13(2) of the TUPE Regs.

REASONS

1. The claimant worked as a Triathlon coach from 21 November 2016 until he was made redundant on 29 June 2018. The claimant was employed for less than 2 years and so cannot bring a claim of unfair dismissal. There is no dispute that he was initially employed by Cycle Specific Limited. There is also no dispute that on 3 May 2018 there was a transfer of undertaking ("the TUPE transfer") by which the business was transferred to a new owner. Because it was a TUPE transfer, that new owner became the claimant's employer from 3 May 2018. There is a dispute about who that new owner was. We deal with that issue in the section of the judgment headed "The respondent issue".

2. The claimant brings a number of complaints. They relate to pension, holiday and a failure to comply with the obligation to inform and consult relating to the TUPE transfer.

3. At the hearing the claimant represented himself. All the respondents were represented by Mr Lomas of counsel. The second respondent, Mr Dylan Morris ("Mr Morris"), was also a director and co-founder of Cycle Specific Ltd.

4. There was an agreed bundle of documents consisting of 119 pages. During the hearing two further documents were added. These were a screenshot of a "TrainingPeaks" cycle undertaken by the claimant (p.120) and an extract from the holiday diary relating to the respondents' business (p.121). There was no objection raised to the inclusion of those

documents in the bundle. References in this judgement to page numbers are to pages in that bundle. As is usual, the tribunal only read those documents to which the parties referred in evidence or in their submissions.

5. At the hearing we heard evidence from the claimant. For the respondents we heard evidence from Mr Morris and from Mrs Helen Morris, company secretary and co-founder of Cycle Specific Limited. All three witnesses provided a written statement as their evidence in chief and gave oral evidence in cross examination and in answer to questions from the tribunal. It is fair to say that not all of the evidence we heard was relevant to the issues the tribunal had to decide. In particular, the claimant clearly felt strongly that his dismissal would have been found to have been an unfair dismissal had he had sufficient length of service to bring such a complaint. In this judgment we have recorded only the findings of fact relevant to the issues we had to decide.

6. Because of the need to deal with a preliminary hearing on another case on the same day it was not possible to hear evidence and submissions on 11 March 2019. Instead we directed that the parties provided written submissions. Mr Lomas provided his submissions first (by 18 March 2019) to help the claimant understand the format of what was required. The claimant then provided his by 25 March 2019 and Mr Lomas provided submissions in response by 1 April 2019.

7. Unfortunately, the other commitments tribunal panel members had meant it was not possible for us to meet until 24 May 2019 to deliberate and make our decision. Although the delay was unavoidable we apologise to the parties for the length of time between the hearing and promulgation of this judgment.

The issues in the case

8. There was no agreed list of issues. The issues the tribunal had to decide were identified through discussions with the claimant and Mr Lomas at the hearing and further clarified by the written submissions provided by the parties after the hearing.

9. At the start of the hearing the issues the tribunal had to decide were:

    a. The correct respondent(s) in the case (“the respondent issue”).
    b. Whether the respondent(s) had failed to auto-enrol the claimant into a pension scheme from April 2017 and, if so, what remedy the tribunal could award. (“the pension enrolment claim”).
    c. Whether the respondent(s) had in breach of sections 13 and 14 of the Employment Rights Act 1996 made unlawful deductions from

the claimant's wages for pension contributions for the period October 2017 to April 2018 ("the pension deduction claim").

d. Whether the respondent(s) had required the claimant to take holiday without giving him the notice required by Regulation 15 of the Working Time Regulations 1998 ("the WTR 1998") and, if so, what remedy (if any) the tribunal could award ("the holiday notice claim").
e. Whether the respondent(s) had failed to comply with the obligation in regulation 13 and 13A of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE Regs") to inform and consult with the claimant in relation to a relevant TUPE transfer and, if so, what remedy (if any) the tribunal should award ("the TUPE information and consultation claim").

10. As regard the pension deduction claim, during the hearing the respondents accepted that there had been an unlawful deduction of £103.71 from the claimant's wages for the period October 2017 to April 2018. That concession is repeated in their written submissions. The claimant at the hearing and in his written submissions confirmed that he agreed the total unlawful deduction was £103.71.

11. As Employment Judge Powell ("EJ Powell") noted in his Case Management Order ("the CMO") relating to the Preliminary Hearing on 17 October 2018, the claimant had also brought a complaint for "injury to feelings" relating to his dismissal. The legal basis for such a complaint was not clear and by para 1.4 of the CMO EJ Powell ordered the claimant to provide the statutory basis for it by 2 November 2018. By a document attached to his email of 1 November 2018 (p.42) the claimant confirmed he was no longer pursuing that complaint.

Introduction and background facts

12. Given the number of discrete complaints raised by the claimant the tribunal decided the clearest way to structure its judgment was to deal with each complaint in turn rather than deal with all the law and all the facts for all the claims together. For each complaint we have set out the dispute; the relevant law; the evidence and our findings; a discussion and our conclusion on that complaint. For convenience we have summarised our conclusions at the end of our judgement

13. As we have noted, there is a dispute about the correct respondent(s) to the claimant's complaints. However, there is no dispute that the business in which the claimant was employed was a Wattbike Cycling Studio and that it was run by Mr and Mrs Morris. Both the claimant and his partner worked for the business.

14. It is also not disputed that by the middle of 2018 the business was struggling financially and that on 29 June 2018 the claimant was made redundant.

The respondent issue

The dispute

15. There was no dispute that the claimant was initially employed by Cycle Specific Limited ("the transferor"). There was also no dispute that Cycle Specific Limited went into liquidation on 3 May 2018 and that on that date there was a TUPE transfer under which the claimant's employment transferred to the new owner of the business. There was a dispute as to the identity of that new employer ("the transferee").

16. The claimant said that transferee was Tri-Specific Ltd, i.e. a limited company. Mr Lomas said the transferee was Dylan Morris trading as Tri-Specific, i.e. a sole trader.

17. There is a second issue which emerged after the hearing and in the process of deliberating on and writing up this judgment. At the preliminary hearing, it was agreed that Cycle Specific Limited was not the claimant's employer when he was dismissed. In the CMO, Cycle Specific Limited was removed from the proceedings. It appears to us, however, that Cycle Specific Limited as the transferor in the TUPE transfer was the correct respondent to the TUPE information and consultation claim. We therefore considered whether it was appropriate to use the tribunal's power under rule 34 of the Employment Tribunal Rules 2013 to add or substitute Cycle Specific Limited as a party to these proceedings.

The law

18. Regulation 4(1) of the TUPE 2006 say that when there is a TUPE transfer, the contract of employment of any person employed in the undertaking transferred has effect after the transfer as though originally made between the employee and the transferee of the undertaking.

19. Rule 34 of the Employment Tribunal Rules allows the tribunal of its own initiative to add any person as a party to proceedings (by way of substitution or otherwise) if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the tribunal which it is in the interests of justice to have determined in the proceedings.

20. The Employment Appeal Tribunal ("EAT") in **Linbourne v Constable [1993] I.C.R. 698** confirmed that the power to add or substitute a party can be exercised even after the final judgment in a case.

21. In deciding whether to exercise the power, the tribunal should be satisfied that a genuine mistake had been made and that the mistake was not misleading, and should consider all the circumstances, particularly the injustice or hardship which might result to the parties from the decision (**Cocking v Sandhurst (Stationers) Ltd [1974] I.C.R. 650, [1974] 7 WLUK 124**).

22. When it comes to the correct respondent for a complaint of failure by the transferor in a TUPE transfer to comply with the information and consultation requirements in reg.13 of the TUPE Regs, the EAT in **Allen v Morrisons Facilities Services Ltd [2014] I.R.L.R. 514** held that an employee's standing to bring a complaint for breach of reg.13 was determined at the date of the breach, not at the date of the claim. If a transferor failed to give its affected employees the information required by reg.13, they could pursue a complaint against the transferor notwithstanding that when lodging the complaint the employees might have transferred to the transferee. A transferor's employee could not obtain standing to claim against a transferee on the ground that he had become an employee of the transferee on the transfer.

23. In this case, there is no dispute that the transferor was Cycle Specific Ltd. The claimant's complaint is that there was a failure by his employer prior to the TUPE transfer to comply with its obligations under reg.13 and 13A. In light of **Allen**, it seems to us that the correct respondent to such a complaint would be Cycle Specific Ltd. Reg.15(9) does make clear that the transferee under the TUPE transfer is jointly and severally liable for payment of any compensation awarded for failure to comply with those obligations but reg.15(8) seems to us to make it clear that the declaration and order is made against the transferor.

Evidence and findings

24. In his ET1 the claimant had brought his claim against Cycle Specific Limited, Cycle Specific Ltd and Tri-Specific Ltd. In the CMO, EJ Powell recorded that the parties agreed that Cycle Specific Limited and Cycle Specific Ltd should be removed as respondents. EJ Powell added Mr Morris as sole trader as a respondent.

25. At the time of the hearing, therefore, the respondents to the claim were Tri-Specific Ltd as the first respondent and Mr D Morris trading as Tri-Specific as the second respondent.

26. EJ Powell also recorded that "in his role as director of Tri Specific and in his own capacity, Mr Morris accepts that, if the claimant were to prove a breach of Regulations 13 and 13A of the [TUPE Regs] or the other alleged matters then either Tri Specific Limited or he, in his personal capacity, would in principle, be liable".

27. It was not disputed that Mr and Mrs Morris were the co-owners and officers of Cycle Specific Limited.

28. Both Mr and Mrs Morris gave evidence that on 3 May 2018 the business was transferred to Mr Morris as a sole trader but using the trading name "Tri- Specific" (para 16 of Mrs Morris's witness statement and paras 1 and 19 of Mr Morris's witness statement). They both also gave evidence that Tri-Specific Ltd was a dormant company which at no point traded or employed anyone (para 2 of Mrs Morris's witness statement and para 1 of Mr Morris's witness statement).

29. The CMO records that Mr Lomas and Mr Morris agreed to disclose "any documentation which would dispel the ambiguity which remains as to the correct respondent" (p.36 para 6). Unfortunately there was no such documentation in the bundle. In terms of corroboration of Mr and Mrs Morris's evidence, however, there was in the bundle a WhatsApp message from Mrs Morris to the claimant's partner dated 30 July 2018 (p.85). It says "As you know from 4th May Cycle Specific Ltd ceased to exist and therefore I am no longer anything formally to do with your employment from that date. Please contact your employer Dylan."

30. The claimant pointed to two pieces of evidence which he said supported his argument that he was employed by Tri-Specific Ltd from 3 May 2018.

31. The first was that his bank statement (at p.31a and repeated at p.93) showed payments of wages from "Tri Specific" on 1 and 4 June 2018. That is correct although, as the respondents' written submissions point out, it does not refer to "Tri Specific Ltd" whereas a payment from 28 February 2018 on that same page refers to "Cycle Specific Ltd".

32. The second piece of evidence is a document sent by Mr Morris to the claimant's partner (p.44). It is dated 25 May 2018, i.e. after the TUPE transfer. It sets out the details of a "proposed sale of Cycle Specific as Tri Specific Limited with rights to use the Cycle Specific logo". It refers to the shares of "Tri Specific Limited" being "handed over by the current owners and distributed by the new owners as they see fit".

33. On balance we accept the evidence from Mr and Mrs Morris and find that the claimant's employer after the TUPE transfer was Mr Morris t/a Tri-Specific. Mrs Morris' WhatsApp message (p.85) provides corroboration

for that evidence from some 10 weeks after the transfer. We agree with the respondents that the "Tri Specific" on the claimant's bank statement could refer to a payment from Mr Morris trading under that name as well as to Tri Specific Ltd. Indeed the omission of "Ltd" in that bank statement reference seems to us to point to it being more likely made by Mr Morris as a sole trader. We do not think that the rather garbled reference in the sale proposal document (p.44) to the proposed sale of "Cycle Specific as Tri-Specific Ltd" is enough to overturn the weight of the other evidence referred to.

Discussion and conclusion on the respondent issue – the correct transferee

34. The claimant did not address this issue in his written submissions. In fact, they refer to his being employed "by Cycle Specific Ltd…until my unfair dismissal on 29 June 2018".

35. The submissions for the respondents reiterated that the correct post-TUPE employer was Mr Morris t/a Tri-Specific (a sole trader). The submissions suggest that the claimant "was of the mistaken belief that he was employed by Tri-Specific Ltd because his payments were made by Tri-Specific".

36. In light of our findings that the business was transferred to Mr Morris as a sole trader the tribunal concludes that Tri-Specific Ltd should be removed as a party to these proceedings.

Discussion and conclusion on the respondent issue – addition/substitution of Cycle Specific Limited (in creditors voluntary liquidation) as a party

37. As we have said, we believe that the correct respondent to the TUPE information and consultation complaint is the transferor. In this case that would be Cycle Specific Limited (in creditors voluntary liquidation). We are satisfied that the criteria for the exercise of the discretionary power in ET rule 34 to add or substitute party apply. There are clearly issues between Cycle Specific Limited (in creditors voluntary liquidation) and the claimant falling within the jurisdiction of the tribunal and which it would be in the interests of justice to have determined as part of these proceedings. In fact, a key part of the hearing was evidence about whether Cycle Specific Limited (in creditors voluntary liquidation) had complied with its reg.13 and 13A obligations as transferor.

38. Turning to the factors set out in **Cocking** which a tribunal should take into account in exercising its discretion. First, it seems to us that in this case a genuine mistake was made in that Cycle Specific Limited (in creditors voluntary liquidation) should have remained a party to these proceedings

as the transferor. This is not a case where proceedings were brought against the wrong party. Instead, the claimant had initially brought proceedings against the transferor and it was only at the preliminary hearing that it was removed as a party to these proceedings. That was, it seems to us, due to a mistaken belief by all parties that it was not necessary for the transferor to be a party because in reality it was to the second respondent that the claimant would look for payment of any compensation awarded because Cycle Specific Limited is in liquidation.

39. Turning to the injustice or hardship which might result to the parties if we were to substitute Cycle Specific Limited (in creditors voluntary liquidation) as a party, it seems to us that balance is very much in favour of us doing so. Firstly, the second respondent had, as we've noted, accepted that he would be liable for any breach of reg.13. Secondly, it seems to us that we did in practice hear from Cycle Specific Limited (in creditors voluntary liquidation) at the hearing of the case. Mr and Mrs Morris were its co-owners and officers and they gave evidence as to how they said the transferor complied with its reg.13 obligations. We are satisfied that there is no injustice to Cycle Specific Limited (in creditors voluntary liquidation) or to the second respondent in making the addition or substitution. On the other hand, it seems to us that would be a significant injustice to the claimant in not doing so. If we are correct that unless we join Cycle Specific Limited (in creditors voluntary liquidation) as a respondent the second respondent's joint and several liability under reg.15(9) would not arise then not adding it is a party would remove the remedy for any breach of reg.13 we found. That would, it seems to us, be completely contrary to the understanding of all parties who always proceeded on the basis that a finding of a breach of reg.13 would lead to a remedy for which the second respondent would be liable.

40. The tribunal therefore order that Cycle Specific Limited (in creditors voluntary liquidation) be substituted as the first respondent to these proceedings in place of Tri-Specific Ltd. We also order that a copy of this judgement be sent to the liquidator of Cycle Specific Limited.

41. In hindsight it would clearly have been preferable if this issue had been raised and discussed with the parties at the hearing. They have not had a chance to comment on this issue. As in **Linbourne** however, it seems to us the most efficient way of dealing with this matter is to make our decision and for any party which wishes to seek to vary or set aside that order under rule 29 of the ET Rules to apply to do so. In order to provide certainty for all the parties we order that any such application should be made within 14 days of the date this judgment is sent to the parties.

The pension enrolment claim

The dispute

42. As EJ Powell recorded in the CMO (p.36 para 9), the claimant complains that the first respondent failed to enrol him into a pension scheme between April and October 2017.

43. Mr Lomas says that the tribunal does not have jurisdiction to deal with this issue. In any event, he says that the obligation to auto-enrol the claimant did not arise until October 2017 so there was no default on the part of the First Respondent.

The law

44. Section 3(2) of the Pensions Act 2008 requires an employer to take steps to auto-enrol a "jobholder" who meets certain conditions as to age and earnings into an automatic enrolment pension scheme "with effect from the automatic enrolment date".

45. The date when the obligation to auto-enrol applies to an employer is set out in regulation 4 of the Employers Duties (Implementation) Regulations 2010. The relevant date depends on factors such as the number of employees in the employer's PAYE scheme; the last 2 characters of their PAYE reference; and when PAYE income first became payable.

46. EJ Powell was not clear what jurisdiction the tribunal had to provide a remedy if there was a failure to comply with the obligation to auto-enrol. In the CMO he ordered the claimant to provide the statutory basis for such a claim (p.38, para 1.4).

47. In the document he emailed to the tribunal on 1 November 2018 (at p.42) the claimant suggested that the relevant statutory provision was s.45 of the "Pensions Regulations 2008". He quotes that provision which is headed "Offences of failing to comply". The reference is to s.45 of the Pension Act 2008. Chapter 2 of that Act is headed "Compliance". It sets out a compliance regime whereby the Pension Regulator can serve a compliance notice (under s.35) on an employer who fails to comply with their duties. It also (in s.40) gives the Regulator power to issue a fixed penalty notice where an employer has failed to comply with a compliance notice. S.34 of the 2008 Act says that "contravention of an employer's duty does not give rise to a right of action for breach of a statutory duty".

Evidence and findings

48. The claimant did not provide evidence in support of his contention that the obligation to auto-enrol him in a pension scheme applied from 1 April 2017.

49. In the bundle there was an exchange of email correspondence between the first respondent's payroll providers (Ashmole) and Mrs Morris (pp.47-52). On 7 September 2017, they advised Mrs Morris that the auto-enrolment staging date for Cycle Specific Ltd is 1 October 2017. They then discuss arrangements to set up auto-enrolment for the claimant and his partner. This results in an "Auto Enrolment – General Notice" (pp.53-55) and an "Auto Enrolment – Jobholder" letter being sent to the claimant's partner (pp.56-59) on 31 October 2017 confirming her enrolment into a pension scheme with effect from 1 October 2017.

50. There was no equivalent notice or letter addressed to the claimant in the bundle but he did not dispute that he had also been auto-enrolled into the pension scheme with effect from 1 October 2017. He confirmed that he had not raised a query about his auto-enrolment date at the time.

51. With their written submissions the respondent provided a copy of an email from the automatic enrolment section of the Pensions Regulator to Mrs Morris dated 15 March 2019 confirming that the relevant auto-enrolment date for the first respondent was 1 October 2017.

52. In light of that evidence we find that the applicable automatic enrolment date for the first respondent was 1 October 2017.

Discussion and conclusion on the pension enrolment claim

53. Our finding that the applicable automatic enrolment date for Cycle Specific Limited was 1 October 2017 means that even if the employment tribunal does have jurisdiction to deal with failures to auto-enrol, there was no breach of that obligation in this case. If we had had to decide the issue it seems to us that Chapter 2 of the Pensions Act 2008 makes it clear that enforcement of the obligation to auto-enrol is a matter for the Pensions Regulator rather than the tribunal.

The holiday notice claim

The dispute

54. The claimant complained that Mr Morris required him to take June 5-7 2018 and June 12-16 as annual leave without giving him the notice required by regulation 15 of the WTR 1998.

55. The claimant accepted that he had been paid for those annual leave days. His argument was that had he not been "forced" to take those days he would be entitled to 8 days' pay for untaken holiday when his employment ended.

56. The respondents submitted that even if there was a breach of the notice requirement in reg.15 there is no remedy in reg.30 WTR 1998 for such a breach where the annual leave is taken.

The law

57. Reg.15(2)(a) of the WTR 1998 says that a worker's employer may require the worker to take leave to which the worker is entitled by giving notice to the worker in accordance with reg.15(3).

58. Reg.15(3) says that such a notice:

"(a) may relate to all or part of the leave to which a worker is entitled in a leave year;
(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and
(c) shall be given to the employer or, as the case may be, the worker before the relevant date."

59. Reg.15(4) says that the "relevant date", for the purposes of a paragraph 2(a) notice is the date "twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates".

60. Reg.30 WTR 1998 sets out the remedies for breach of the WTR. It provides that a worker may present a complaint to an employment tribunal that his employer has refused to permit him to exercise any right he has under reg.13 or 13A, i.e. the right to take annual leave. Reg.30 does not refer to a remedy for a failure to comply with the notice requirement in reg.15.

61. In terms of other remedies relating to breaches of the WTR 1998, s.45A(1) of the Employment Rights Act 1996 ("ERA 1996") provides that a worker has the right "not to be subjected to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the WTR 1998".

62. S.101A of ERA 1996 makes it automatically unfair to dismiss an employee for refusing (or proposing to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the WTR 1998.

63. In the CMO, EJ Powell noted that it was not apparent how the claimant argued that the tribunal had jurisdiction in respect of the alleged breach (p.37 para 12). He ordered the claimant to set out in a document the statutory basis on which he made that claim (p.38 para 1.4).

64. The claimant clarified his claims in the document emailed to the tribunal on 1 November 2018 (pp.41-42). In relation to the breach of reg.15 notice requirements, he merely says that he sees that as a "breach of contract". He does not set out a basis for a remedy in the WTR 1998 themselves. In his written submissions he repeats that he is claiming a remedy for breach of the reg.15 notice requirement but doesn't give the basis for that claim (para 12 of his submissions). He did not in his written submissions pursue the argument that the breach of the notice requirement in reg.15 was a breach of contract.

65. It seems to us clear that a worker has a remedy for breach of the notice requirements in reg.15 if they refuse to take leave and suffer a detriment or dismissal as a result of that refusal. That remedy is provided by the provisions of the ERA 1996 mentioned above. It seems to us, however, that there is no remedy the tribunal can award if the worker does decide (however grudgingly) to take the annual leave even in the absence of the required reg.15 notice from the employer.

Evidence and findings

66. There is no dispute that the claimant took annual leave on 5-7 June and 12-16 June 2018 and was paid for it. The tribunal's decision is that where a worker takes annual leave and is paid for it there is no remedy the tribunal can award. However, we have recorded our findings of fact in relation to this issue in case our view of the law is incorrect.

67. In his witness statement (para 19) the claimant said that Mr Morris told him on the weekend prior to the 4th June 2018 that he should "have the week off as [the claimant] needed a break". The claimant's evidence in his statement was that he "never planned to have the week off" because he was involved in a race the following weekend and "would have liked the same structure and routine as always".

68. That seems to us to imply that the claimant was intending to work a normal working week during the week beginning 4 June 2018, i.e. that he had not booked any days off. However, in cross examination evidence the claimant confirmed that he had booked annual leave on 8-11 June 2018. That he had done so is corroborated by the extract from the business's holiday diary (p.121) which has the 8-11 June 2018 marked as "Alex away". The claimant's written submissions also confirms that his

complaint is in relation to the additional days either side of the leave he had booked for the 8-11 June 2018.

69. Mr Morris's evidence was that he did not "force" the claimant to take any holiday. He did not dispute that it was his suggestion that the claimant take the 5-7 June 2018 as leave. He could not realistically dispute that given the WhatsApp message exchange between him and the claimant's partner (p.61). At 10.43 on 3 June Mr Morris sent a message to her which included the following:

    "I would recommend that you and [the claimant] take this week as annual leave whilst everything is contemplated including your offer to the business"

70. When it comes to the leave on the 5-7 June 2018, the claimant in his witness statement (para19) said that when he was told by Mr Morris to take the week of 4 June off the claimant "challenged this" but Mr Morris "insisted". The statement gives no further details of how or when Mr Morris "insisted" other than saying that the claimant was "only informed of this the weekend prior to the 4th".

71. Mr Morris's witness statement did not deal with this issue in detail at all, merely including a denial that he forced the claimant to take holiday (para 36).

72. In cross examination evidence the claimant accepted that he had not himself challenged Mr Morris's insistence that he take the 5-7 June as annual leave. He said that his partner had done so and referred as evidence to her text message to Mr Morris on 3 June 2018 (p.62).

73. The text message from the claimant's partner referred to was sent at 6.27 p.m. on 3 June 2018. It deals with a number from matters relating to the business irrelevant to the annual leave issue but does say:

    "Alex never planned having this week off as I'm away and he'll have nothing to do. It's your call all you would need to do is the extra morning class and the Saturday sessions. It's pretty quiet this week anyway".

74. Mr Morris responded at 8.22 p.m. on that same day saying:

    "Thank you, I will be in all week on my own. With help arranged as and when required. I believe you guys require a break and deserve it especially taking everything that has happened into account."

75. The claimant's partner responded at 8.56 p.m. on that day saying:

"OK, we'll see you next week".

76. Those message were part of a WhatsApp "conversation" from the 29 May 2018 to 20 June 2018 (p.60-64). That conversation covers a number of matters relating to the business and is primarily between Mr Morris and the claimant's partner with the claimant's only involvement being two messages very nearly at the end of the conversation on 19 and 20 June 2018. Neither of those messages refer to the annual leave issue.

77. Taking into account that witness and documentary evidence we find that it was the respondent who "recommended" that the claimant take the 5-7 June 2018 as annual leave. That "recommendation" was made in a text message to the claimant's partner on 3 June 2018. Taking that text message as the purported "notice" to take leave under reg.15 we note it directly addresses the claimant's partner not the claimant although it was sent to a WhatsApp group of which the claimant was a member (see para 7 of the claimant's written submissions). The claimant did not suggest that he hadn't seen that message. However, since it related to a period of 3 days' leave beginning on the 5 June 2018 and was given on 3 June 2018 the notice did not meet the "twice as long in advance as the length of the holiday" notice requirement in reg.15(4) WTR 1998.

78. In those circumstances the claimant would have been entitled to refuse to take the 5-7 June 2018 as annual leave because the notice requirements in reg.15 WTR 1998 had not been met. We find that he did not in fact raise any objection with Mr Morris to taking those days as annual leave either directly or through his partner. We do not think that the text message exchange between Mr Morris's and the claimant's partner on 3 June 2018 can realistically be characterised as it is in the claimant's witness statement, i.e. as the claimant "challeng[ing]" Mr Morris telling him to take the time off nor as Mr Morris "insisting" on his doing so.

79. When it comes to the leave on the 12-15 June 2018, the claimant in his witness statement (para 20) said after his annual leave he arrived in to work on the 12 June 2018 to be asked by Mr Morris what he was doing there and told to have another day off. He said that his partner then sent Mr Morris a text message asking if the claimant would be returning to work on the following day and that Mr Morris replied that it was best for the claimant to have the rest of the week off (para 21).

80. Mr Morris's witness statement gives no detail of what happened on 12 June. In cross-examination, he denied that he had told the claimant to go home on the 12th. Instead he said he hadn't expected him in as he was not needed.

81. It was not disputed that the claimant's partner was on leave abroad until the 13 June 2018. She did not send a message to Mr Morris on the 12 June as the claimant's witness statement (para 21) seemed to be suggesting. However, she did send a message at 5.35 p.m. on the 13 June (p.63) relating to the claimant and her coming in to work on the 14 June. It said:

    "Hi Dyl, Hope the week went well. I can see the morning class has been cancelled. Is there anything else booked in for the morning? If not, we'll be in for the afternoon class."

82. Mr Morris responded at 10.06 a.m. on the 13 June to confirm that the following morning's classes had been cancelled and that "there is no need for more one person (sic) there tomorrow so just take the day off, catch up with the jetlag. I will be in touch to make arrangements to discuss the future plans." A few minutes later the claimant's partner responded asking "how long are we having annual leave for?"

83. Mr Morris did not respond until 3.45 p.m. on 15 June when he sent a message saying to the claimant's partner "if we could arrange a time to meet on Tuesday morning that will be good". She responded at 4.12 p.m. by confirming that that is "fine" but asking "Will we be working Tuesday? I'm a little frustrated with not knowing what's going on, there's only so many days I can have off for jetlag."

84. The Tuesday referred to in these messages would be Tuesday, 18 June 2018. Mr Morris did not respond until that day at 9.05 a.m. when he texted the claimant's partner to say "we will sort everything out tomorrow". It was at the meeting on the following day, the 19 June 2018, that the claimant was told he and his partner were being made redundant.

85. We prefer the claimant's evidence that he had intended to return to work on the 12 June 2018 but when he did so he was told by Mr Morris to go home. We also find that Mr Morris did not give the notice required by reg.15, having effectively given him notice to take leave on the same day as he wanted him to take leave rather than in accordance with the notice period required by reg.15(4). The text message exchange on p.63 confirms that he effectively told the claimant to take leave from 12-16 June, albeit mainly by omission, through not actively asking him to come in to work and not responding to messages from the claimant's partner seeking clarification on when she and the claimant would be returning to work.

86. In relation to the period 12-16 June 2018 we find that the claimant would have been entitled to refuse to take the 12-16 June 2018 as annual leave because the notice requirements in reg.15 WTR 1998 had not been met

by Mr Morris. We find that the claimant did not in fact raise any objection to taking that annual leave with Mr Morris either directly or through his partner.

Discussion and conclusion on the holiday notice claim

87. We found that the respondent did breach the notice requirements in reg.15 WTR 1998 in relation to both contested periods of annual leave, i.e. 7-9 June 2018 and 12-16 June 2018. However, given our conclusions about the relevant law, this not a breach for which the tribunal could award a remedy.

The TUPE information and consultation claim

The dispute

88. The claimant complained that the respondents had failed to comply with its obligations under reg.13 and 13Aof the TUPE Regs. The respondents denied that was the case.

The law - The reg.13 and 13A requirements

89. Reg. 13 of the TUPE regs requires an employer to inform and consult with employees affected by a TUPE transfer. There was no dispute that this case involved a "micro business", i.e. one with fewer than 10 employees and that reg.13A applied. It provides that if, as in this case, there are no "appropriate representatives" elected, the employer may comply with regulation 13 by performing any duty which relates to appropriate representatives as if each of the affected employees were an appropriate representative.

90. In this case, therefore, the duties under reg.13(2) were to inform the claimant and any other employees directly of:

"13(2)(a)the fact that the [TUPE] transfer is to take place, the date or proposed date of the transfer and the reasons for it;

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

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

(d)if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any

affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact."

91. That information has to be provided "long enough before a relevant transfer to enable the employer of any affected employees to consult the [employees]".

92. S.13(6) sets out the obligation to consult which arises where "an employer of an affected employee…envisages that he will take measures in relation to an affected employee" (reg.13(6)).

93. "Measures" are not defined in the TUPE Regs. but the word is to be given a wide meaning and incudes "any action, step or arrangement" (**Institution of Professional Civil Servants v Secretary of State for Defence [1987] IRLR 373, para 12**).

94. Even where the compulsory obligation to consult under reg. 13(6) does not arise (because no measures are envisaged) the obligation to inform under reg.13(2) still applies. That is because the "consultations" referred to in the opening words of reg.13(2) are voluntary consultations, which the employee may seek on any topic once they have the requisite information, but which the employer is not compelled to grant if he chooses not to do so (**Cable Realisations Ltd. v GMB Northern [2010] IRLR 42 , at paras. 29-35**).

95. The purpose of the requirement in reg.13(2) to provide information is not only to put at rest the minds of affected employees as far as possible at a time of impending changes. It goes further than that and is "designed to allow [the representatives of] those employees to engage in a consultation process with the employer on an informed basis. Whether the employer is obliged to engage in such a consultation exercise is dependent on Regulation 13(6)."(**Cable** at para 31).

96. Whether information is provided "long enough before the transfer to allow consultation" is a question of fact. The "classic test" of fair consultation approved in **R v British Coal Corporation ex.p Price (1994) IRLR 72 , para 24** requires consultation when the proposals are still at a formative stage; adequate information on which to respond; adequate time in which to respond; and conscientious consideration by an authority of the response to consultation." (**Cable para 37**).

97. In their written submissions (para 37), the respondents submits that there is no specific requirement in the TUPE Regs that the reg.13(2) information be provided in writing, though it accepts that would be good practice. In support of that submission they refer to the employment

tribunal case of **GMB v Eastleigh Borough Council [ET case no 3102915/08]**.

98. We were not provided with a copy of the judgment in that case, it does not appear to be reported and is not referred to in the current online edition of **Harvey on Industrial Relations and Employment Law**. The respondents' submissions say that in that case the tribunal decided that "oral discussions with the employees, forewarning them of the inevitability of the transfer were sufficient to satisfy regulation 13".

99. The current online version of the **IDS Handbook: Transfer of Undertakings** summarises the case (at para 8.96) in the context of discussing the remedy for breach of reg.13 as follows:

"GMB v Eastleigh Borough Council and anor: the transferor had provided all the information to the employees, albeit in instalments and not all of it in writing. The tribunal found that oral discussions with the employees, forewarning them of the inevitability of a transfer, were sufficient to satisfy Reg 13. However, the transferor had not provided information in writing of the measures that the transferee proposed to take; namely, to change the depot from which the employees worked. As that failure was not deliberate, and deemed to be a technical failure only, each employee was awarded £200."

100. It is not clear to us from that summary whether the obligations under reg.13 satisfied by "oral discussions" were those to provide information under reg.13(2) or to consult under reg 13(6). What is clear is that the tribunal did find a failure to comply with reg.13(2) because of a failure to provide information in writing about measures proposed to be taken.

101. We note that in the section dealing with "How should information [under reg.13(2)] be provided" that same IDS Handbook says:

"According to Reg 13(5), the Reg 13(2) information should be delivered to the appropriate representatives or sent by post to an address notified by them to the employer, or, in the case of trade union representatives, sent by post to the trade union at the address of its headquarters or main office. This wording suggests that the information must always be provided in writing." (para 8.67)

102. The BEIS guide to the TUPE Regs: **Employment Rights on the Transfer of an Undertaking** (updated January 2014) is silent on whether the reg.13(2) information has to be provided in writing.

103. As we've said, we are not entirely clear whether the tribunal in the **Eastleigh** case did decide that it is sufficient for an employer to provide the reg.13(2) information partly in writing and partly orally. Even if it did then its interpretation of the law would not be binding on us.

104. We agree with the interpretation of reg.13(2) set out at paragraph 8.67 of the **IDS Handbook**. It does seem to us that the wording of reg.13(5), referring to information being "delivered to them..or sent by post" envisages the information being provided in written form. That also seems to us to be the interpretation which is most consistent with the purpose of reg.13(2) as set out in **Cable**, (quoted above). The aim is to provide clarity for employees at a time of flux and uncertainty about their livelihoods. The provision of the information in writing both reduces the risk of lack of clarity in communicating the information and provides employees (or their representatives) with a better opportunity to take in and formulate their response to the information with a view to consultation with the employer (whether voluntary or under reg.13(6)).

105. We therefore reject the respondents' submission that the reg.13(2) information does not have to be provided in writing. We do accept, however, that **Eastleigh** supports the submission that the compensation to be awarded for a breach of reg.13(2) may be reduced if an employer has effectively conveyed all the information required orally to the employees within the timescale required by reg.13(2).

106. If the obligation to consult in reg.13(6) does apply then the requirement is to consult "with a view to seeking their agreement to the intended measures". That includes an obligation to consider any representations made by the [employees], reply to those representations and, give reasons for an representations the employer rejects (reg.13(7)).

107. Finally in relation to reg.13 we record that the respondents did not in this case seek to rely on reg.13(9) which provides that if in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of reg.13(2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

The law - Remedy for breach

108. Where a tribunal find an employer failed to comply with the reg.13 requirements the tribunal can award such compensation as it considers just and equitable having regard to the seriousness of the employer's default, not exceeding 13 weeks' pay (reg.15(8) and reg.16(3)).

109. In their written submissions, the respondents referred us to the case of **Baxter v Marks and Spencer, Securicor Security Limited [UKEAT/0162/05/RN]** in which the Employment Appeal Tribunal said that it was not an error of law for the tribunal to award no compensation where the breach of reg.13 was a "technical breach". The EAT based its decision at least partly on the award under reg.15 being "compensation....it is not a fine or a penalty" (para 29 of the EAT judgment).

110. The claimant referred us to the employment tribunal case of **Mrs Cheryl Ford vs The Sandwich Box (Southampton) Ltd and others – ET1400141/2018**. We accept the respondents' submissions that there are factual differences between this case and that one, such as the transfer being between two arms' length parties. However, we note and agree with what the tribunal said in that case at para 17 of its judgment, i.e. that under reg.15 the tribunal "is making an award, not compensating the claimant but punishing the wrongdoer, the intention being to encourage employers to engage in meaningful consultation with a view to mitigating the effect of any transfer upon employees affected."

111. That approach seems to us to reflect the view of reg.15 compensation expressed in more recent cases than **Baxter** such as **Cable** and by the EAT in Scotland in **Todd v Strain [2011] I.R.L.R. 11.** That view is that in deciding reg.15 compensation a tribunal should have in mind the same factors set out by the **Court of Appeal in Susie Radin Ltd v GMB [2004] ICR 893** in relation to compensation for a protective award under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992, i.e.

(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations..: it is not to compensate the employees for loss which they have suffered in consequence of the breach.

(2) The ET have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default.

(3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.

(4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations

(5) How the ET assesses the length of the protected period is a matter for the ET, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there

are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate."

112. In relation to that fifth point, in **Todd v Strain** the EAT in Scotland said that that guidance is directed at the case where the employer has done nothing at all, and it should not be applied mechanically in a case where there has been some information given and/or some consultation but without using the statutory procedure.

113. Finally on remedy, reg.15(9) confirms that the transferor and transferee are jointly and severally liable for any award of compensation for a transferor's failure to comply with reg.13.

Evidence and findings

114. When it comes to the TUPE transfer, some facts are not in dispute. The first is that there was a TUPE transfer and that this took place on 3 May 2018 which was also the date when the first respondent went into liquidation. An extract from the Companies House record for the first respondent (p.105) confirms that it entered into a creditors voluntary liquidation on that date.

115. The second fact which is not in dispute is that the claimant was well aware of the first respondent's financial difficulties from at least March 2018. Mr Morris covers the financial difficulties in his witness statement (paras 7-16) and the claimant in his witness statement refers to dealing with regular debt collectors on a week to week basis (para 6). The exchange of WhatsApp messages at pp.66-78 confirms the position as at mid-March 2018. For example, in a message on 18 March 2018, the claimant's partner asked "do we need to worry about the bailiff coming back tomorrow or Friday?". She also asked in that same message "are we going into liquidation to clear off the debts". As elsewhere, the exchange is primarily a conversation between Mister Morris and the claimant's partner. However, at the top of page 66 there is confirmation that there were four members of the What'sApp and that the claimant is one of those members.

116. The third fact which does not seem to us to be in dispute if that in practice the day-to-day business in which the claimant was employed carried on in the same way after the TUPE transfer as it did before. The claimant neither in his written submissions nor his evidence suggested that there was a change in the business other than in terms of its ownership. If we are wrong and there is any dispute about this then we confirm that our finding is that it was "business as usual" after the 3 may 2018 except that Mr Morris was now the owner of the business as a sole trader rather than via a limited company. As the respondents note in their

written submissions (para 31), the claimant in cross examination confirmed that nothing changed from 3 May 2018 onwards.

117. The fourth fact which is not in dispute is that neither the first respondent nor the second respondent provided the information required by reg.13(2) to the claimant in writing. Given our decision above that the TUPE Regs do require that information to be provided in writing, that finding means that the first respondent was in breach of reg.13(2).

118. However, we have gone on to make further findings of fact about what happened for two reasons. The first is in case we are wrong about the requirement to provide the information in writing. The second is that it does seem to us that any steps taken by the first respondent to provide the information orally are relevant to our conclusion on the seriousness of the employer's default and, therefore, to our decision on the amount of compensation to award.

119. The main dispute of fact was about what happened on 2 May 2018. In brief, the respondents say that on that date Mrs Morris met with the claimant and his partner and orally provided the information required by reg.13(2). The claimant says that he was not at that meeting.

120. Before turning to the evidence about 2 May 2018 it is necessary to make one further finding about what happened before that date. At paragraph 23 of their written submissions the respondents say that "the claimant was fully aware of the poor financial state of [the first respondent] and that the liquidation process started on 2 April 2018". The submission cross refers to box 8.2 of the claimant's ET1 (p.8) in which he says "on 2 April 2018 Cycle Specific Limited started the liquidation process". In cross-examination the claimant said that either Mr or Mrs Morris had told him about potentially starting the liquidation process then.

121. Neither Mr or Mrs Morris suggested in their evidence that they had provided the information required by reg.13(2) before 2 May 2018. Mrs Morris in her witness statement (para 17) suggests that during the meeting on 2 May with the claimant and her partner she said that the first respondent would be liquidated the following day "as the date had been moved from 26th April, which they were also aware of". Her witness statement gives no evidence about when it is alleged the claimant and his partner were told that the liquidation would be on 26 April 2018.

122. There is some evidence to support the submission that the claimant and his partner were aware that liquidation of the first respondent was a possibility. In her WhatsApp message on 18 March 2018 (p.73) the claimant's partner referred to a meeting or conversation with Mr and Mrs Morris when they were both "ready to wipe your hands of the business.

[Mrs Morris] said she hadn't worked for [the first respondent] since December and [Mr Morris] you were resigning as director as of Friday 10 a.m. Your words not mine. . Liquidation was the only way forward". However, earlier in that same WhatsApp conversation (p.69) Mr Morris said "the business is not bust. There are enough assits (sic) to pay the [debts]."

123. We find that prior to 2 May 2018 the claimant and his partner were aware of the financial difficulties of the first respondent to the extent of knowing that liquidation might be a possibility. However, we also find that prior to 2 May 2018 the claimant had not been given any clear information about what was happening to the business. Certainly, we find he had not been given clear information about a proposed transfer of the business to the second respondent, nor the date or proposed date of any such transfer.

124. Moving on to events on 2 May 2018. The claimant's case is that he did not attend the meeting with Mrs Morris on that date. Mrs Morris's evidence was that the meeting happened at the studio at the end of the afternoon but before the 5 p.m. classes started. The claimant's evidence was that he could not have attended that meeting because he was out cycling on that afternoon. In support of that he produced the screenshot of his cycle ride (p.120). That showed that at 2.51 p.m. The claimant started a ride which lasted 1:09:01 hours. We accept his evidence that he therefore finished his ride at more or less 4 p.m.

125. In answer to the tribunal's question the claimant said that after the ride he probably returned to the studio. On that version of events he would have been in the studio from around 4 p.m. However, in his written submissions the claimant said that "taking into consideration, I would have to drop my kit home, showered changed and returned to work for the 5 p.m. class. It leaves very little time to have had any supposed meeting of such high importance" (para 20).

126. There was no suggestion that Mr Morris attended the meeting. He cannot therefore give evidence about it. In her witness statement, Mrs Morris says that she arranged to meet with the claimant and his partner to update them on the current state of affairs. She refers to a WhatsApp message (p.79). That message is dated 1May 2018 at 8.35 p.m. It is from Mrs Morris to the claimant's partner. It apologises for messaging her but says that "[the claimant] never responds to my messages so I presume he doesn't open them". After dealing with some matters not relevant to these proceedings she says "I'm popping in tomorrow afternoon sometime speak to you in person about it to and pick up any mail". The claimant's partner confirms that she and the claimant are in all day the following day and that she'll "get some cake in". At 2.42 p.m. on 2 May

Mrs Morris sends a message to the claimant's partner saying "I'll be popping in at about 3.30 if that's okay sort some finance admin stuff out. And eat that cake of course if any left" (p.80). The claimant's partner responds at 2.49 p.m. saying "yeah that's fine. We can share the custard slid (sic) Alex bought me".

127. We note at this point that Mrs Morris at no point in that exchange neither stressed that she needed to meet with the claimant and his partner to pass on important information nor made any attempt to ensure that both the claimant and his partner understood the importance of the meeting.

128. As to what happened at the meeting, Mrs Morris in her witness statement (para 17) does not set out what time it took place. She simply says that "I confirmed that Cycle Specific Ltd would be liquidated the following day as the date moved from 26th of April, which they were also aware of. I also confirmed that I had arranged the purchase of assets that day for Mr Morris t/a Tri-Specific". She claims that the claimant's partner's exact words were "why are you so supportive Helen? Thank you so much but why do you keep doing it?".

129. Mrs Morris did not in her witness statement say that the claimant had said anything at the meeting. She simply says that "the claimant was at this meeting".

130. Mrs Morris did not suggest that she confirmed what she had said at that meeting in writing. The next WhatsApp message after the meeting (p.80) is at 8.25 and relates to new targets which the claimant and his partner were to meet.

131. Mrs Morris gave further evidence about the meeting in cross-examination and in response to questions from the tribunal. In cross-examination she confirmed that she could not be certain of the time when the meeting took place. Although she mentioned 3.30 p.m. in her message to the claimant's partner, she said she was by 2 May working full-time and would have had to drive from either Newport or Cardiff to the studio for the meeting.

132. The claimant in his submissions said that in cross-examination Mrs Morris said that clients for the 5 p.m. class could arrive from 4:15 p.m. The claimant submitted that it would therefore be impossible to "lock yourself away from clients and have a meeting, leaving clients and attended". In fact what Mrs Morris said was that clients for the class will start arriving about 4.45 pm. so the meeting would have been over by then.

133. In answer to the tribunal's question, Mrs Morris confirmed that the meeting took place on the comfy chairs in the ground floor studio space. She repeated the evidence in her witness statement that she had told the claimant and his partner that the assets were been transferred to Mr Morris as a sole trader. She said that they also discussed targets for the claimant and his partner. She confirmed again that the claimant was present during the meeting although she did confirm that he was "up and down a couple of times". She also said that she did not recall claimant saying anything during the meeting.

134. There is therefore a direct conflict of evidence between the claimant and Mrs Morris as to whether he attended a meeting on the 2 May 2018.

135. In assessing the evidence the tribunal did find that the claimant's credibility as a witness was damaged by inconsistencies in his evidence. The first example of this was his assertion during his evidence that his partner had won her TUPE claim against the respondents. As he accepted in his written submissions (para 16) he did "get that wrong". His partner's TUPE claim was not successful. The claimant's explanation was that he got confused with her successful unfair dismissal claim. The second example was his elaboration in his written submissions of his evidence about what he did after his bike ride on the afternoon of 2 May. In his oral evidence he said he had returned to the studio after the ride. In his written submissions (para 20) he said that he would have had to drop his kit home, shower, change and then return to work. As we've recorded above, it seems to us that the claimant also had a tendency to overstate matters, e.g. saying that he had "challenged" Mr Morris telling him to take leave on 5-7 June 2018 when the documentary evidence did not support that.

136. On balance, therefore, we prefer Mrs Morris's evidence that the claimant was present in the studio on 2 May 2018 when she was there. On her own evidence, however, we also find that during the "meeting" the claimant was not always sitting and that he did not actively participate in the meeting.

137. In summary, we find that what happened was that Mrs Morris did "pop in" to the studio sometime after 4 p.m. and that the claimant was present. We find that Mrs Morris had an informal meeting primarily with the claimant's partner, with the claimant being present through some of that meeting but not actively participating in it - he was by Mrs Morris's own evidence "up and down" during it and did not say anything.

138. We find that Mrs Morris failed to effectively communicate the information required by reg.13(2) to the claimant. It seems to the tribunal that the onus is on the employer to ensure that (in the words of reg.13(4))

the information required by reg.13(2) is "delivered" to the employee. We had no evidence, for example, to suggest that Mrs Morris said to the claimant something like "sit down Alex I have some important information" nor that she had flagged up the importance of meeting prior to happening. Neither did she provide the information as a follow up to the meeting, making no reference to the meeting in the WhatsApp message sent later that evening.

139. Our finding is bolstered to a small degree by the fact that the claimant still wasn't certain about the identity of his post 3 May 2018 employer in these proceedings. That seems to us to reflect the failure to communicate the reg.13(2) information effectively.

140. If we do decide to award compensation, that can be up to 13 weeks' pay. A week's pay is calculated in accordance with ss.220-228 of the Employment Rights Act 1996. In this case, the claimant was paid £1293.83 per month (as evidenced by his payslips (pp.107-112) and confirmed by his ET1 (p.5)). The respondent did not dispute that figure in its ET3 on its submissions.

141. Converting that into weekly pay:
£1293.83 x 12 months = £15525.96 per annum
£15525.96 divided by 365 = £42.54 per day
£42.54 x 7 days = £297.78 per week.

Discussion and conclusion on the TUPE information and consultation claim

142. In terms of the obligations under reg.13 of the TUPE Regs which applied in this case, the tribunal finds that neither the first nor the second respondent were proposing to take "measures" in relation to the claimant relating to the TUPE transfer. Other than the change of employer it was, as the respondents submitted "business as usual". The obligation to consult under reg.13(6) did not apply to either respondent.

143. The obligation which had to be complied with was for the first respondent to provide the information required by reg.13(2). The tribunal has decided that compliance with that obligation requires provision of the information in writing. The first respondent failed to do so and is in breach of reg.13(2).

144. If we are wrong that the requirement is to provide information in writing we would still have found the first respondent to be in breach. We found that the first respondent, in the person of Mrs Morris, failed to discharge the onus on the employer to ensure that information was effectively delivered to the claimant.

145. In terms of remedy, we note that the compensation should reflect the seriousness of the employer's default. We have considered the parties' submissions and, in particular the respondents' submission that the breach in this case was a "technical" one. As our findings show we do not agree. We think that there was a substantive failure this case – it was not simply a case where an employer provides all the information required and ensures it is delivered to the employee but fails to put it in writing.

146. Even had we decided that the required information had been provided by the first respondent we would have concluded that it was not provided "long enough before" the transfer to enable the voluntary consultation envisaged by reg.13(2). The information was provided at the end of the afternoon on the day prior to the TUPE transfer. It gave no realistic opportunity for the claimant to process the information, consider and raise any questions you might have not to mention raise the possibility of voluntary consultation with the employer.

147. We appreciate that the first respondent in this case was a very small business. It had no HR Department or in-house legal team which could rely for guidance on the formal steps it was required to take. We also accept that this was not a case of deliberate default in compliance. We accept that Mrs Morris did make some attempt to convey information to the claimant and his partner. To the tribunal's mind, however, the first respondent did not take sufficient steps to discharge the onus on it to ensure delivery of the relevant information. It also did not take steps to deliver the information until the day before the transfer.

148. Taking those factors into account, the tribunal has decided that the appropriate award of compensation in this case is of five weeks' pay. At £297.78 that makes an award of £1488.90.

Summary of conclusions

149. Returning to the issues in the case identified above. In summary, our conclusions (which we have set out in full in relation to each issue above) are:

The correct respondent(s) in the case ("the respondent issue").

150. Cycle Specific Limited (in creditors voluntary liquidation) was the transferor and is substituted as first respondent in place of Tri-Specific Ltd. The transferee was the second respondent, Mr D Morris t/a/ Tri-Specific.

Whether the first respondent had failed to auto-enrol the claimant into a pension scheme from April 2017 ("the pension enrolment claim").

151. The first respondent did not in fact fail to auto-enrol the claimant but even if it had, the tribunal has no jurisdiction to award a remedy for that failure.

Whether the respondent had made unlawful deductions from the claimant wages for pension contributions from October 2017 ("the pension deduction claim").

152. It was conceded at the hearing that it had done so.

Whether the Second respondent had required the claimant to take holiday without giving him the notice required by Regulation 15 of the Working Time Regulations 1998 and, if so, what remedy (if any) the tribunal could award ("the holiday notice claim").

153. The second respondent did fail to give the claimant the notice required by reg.15 both in relation to the annual leave on 5-7 June 2018 and the annual leave on 12-16 June 2018 but the tribunal has no power to award a remedy for that failure.

Whether the respondent(s) had failed to comply with the obligation in regulation 13 and 13A of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE Regs") to inform and consult with the claimant in relation to a relevant TUPE transfer and, if so, what remedy (if any) the tribunal should award ("the TUPE information and consultation claim")

154. The first respondent failed to comply with its obligations to provide information under reg.13(2) of the TUPE Regs. The tribunal awards the claimant compensation of £1488.90.

_____
Employment Judge McDonald
Dated: 17 June 2019

JUDGMENT SENT TO THE PARTIES ON

……18 June 2019……

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS