Case number: 2602342/2018 Reserved

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
Mr P Kibble	And	Arcadia Group Limited

AT A FINAL HEARING

Held at: Nottingham **On**: 16 & 17 December 2019
and in chambers on 13 January 2020

Before: Employment Judge R Clark

REPRESENTATION
For the Claimant: Mr B Henry of Counsel
For the Respondent: Mr S Wyeth of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that: -

1. The claim of breach of contract **fails and is dismissed**.

REASONS

1. Introduction

1.1 This is a claim for damages alleging breach of contract. With effect from 9 June 2018, the claimant's long period of employment with the respondent came to an end by reason of redundancy. He received the statutory redundancy entitlement and notice to which he was entitled under the Employment Rights Act 1996.

1.2 The claimant's claim is that those payments did not reflect the enhanced contractual entitlement he enjoyed as a result of two collective agreements made between his employer and his union, the Union of Shop, Distributive and Allied Workers ("USDAW"). The first agreement dates back to 1976 ("the 1976 agreement"). This was subject to a more recent variation in the second agreement signed off in 1996 ("the 1996 agreement").

1.3 There is no dispute that those agreements applied to the claimant when his employment commenced in 1981 as they still did when the 1996 agreement was reached. There is no dispute that they provide for enhanced severance terms in case of redundancy and, to that extent, quantum is agreed. The only issue in this claim is whether the claimant remained entitled to the relevant parts of the agreements by the time his employment came to an end, about 22 years later.

2. Jurisdiction

2.1 The claimant's claims amount to £33,629. The Claimant understood that litigating the claim in this jurisdiction meant it was subject to the statutory cap of £25,000 as an aggregate of both alleged breaches. (i.e. in respect of the enhanced notice provision and the enhanced severance provision).

3. Evidence

3.1 For the claimant I heard from Mr Kibble himself. He also called Mr Graham Malin and Mr David Darby, both ex-employees of the respondent who were able to speak in brief terms to their own experiences of the application of the agreements. He submitted a statement from Ms Jane Elfleet in similar terms but who did not attend and, whilst I considered her statement, it consequently carried little weight.

3.2 For the respondent I heard from Mr Philip Edwards who was employed by the respondent as head of employee relations. His employment commenced around the time that the claimant's employment ended and the nature of his evidence was to produce documentation and to convey what he described as the "team memory" of the circumstances behind the collective agreements. I also heard from Mrs Kate Rixon who is employed by the respondent as Head of South Region for the Dorothy Perkins and womenswear brands. She has a longer employment history with the respondent of some 28 years. Her evidence was, firstly, in respect of her role dealing with Mr Kibble's internal grievance appeal and, secondly, to provide something of the history of the organisation's evolution.

3.3 All witnesses in attendance adopted their written statements on oath or affirmation and were questioned.

3.4 I received a small bundle running to 148 pages and considered those documents I was taken to. Both Counsel made closing submissions.

4. Facts

4.1 In this case, much of the background is not in dispute and the case will largely be determined by the interpretation of the contemporaneous documentation. Nevertheless, my

function is to make such findings of fact as are necessary to determine the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact in three parts. The evolution of the respondent's business; the collective agreements and the claimant's career.

Evolution of the Respondent's Business

4.2 The respondent is a well-known commercial enterprise trading through a number of high street fashion brands. Its origin can be traced to the beginning of the 20th century when Burtons Menswear started out as a manufacturer, tailor and retailer of men's clothing. In 1929, the company was listed as a public limited company under the name Burton Group Plc. Whilst the origin of the business is in menswear, the business expanded into womenswear in the 1940's acquiring Peter Robinson women's clothing and by the end of the 1970's a women's clothing range had evolved including Topshop, Evans and, in 1979, Dorothy Perkins. The group had also, by then, acquired other menswear brands. Jackson the tailor being one such brand in operation during the mid-1970s as well as Top Man.

4.3 For decades, the business model was such that each brand was sold out of its own store and whilst each brand formed part of the group, each operated as its own business. Indeed, I find that within the management of the group as a whole, each brand was run as if it was a separate autonomous entity, at least until one reached the more senior management levels or group-wide, corporate functions. It was described to me how each brand even had its own floor at the respondent's head office in Berners Street, London.

4.4 The retail employees, however, were all employed by one legal entity, that is Burton Group Plc, a predecessor name of the respondent. The one exception to that was Top Man/Topshop which, due to changes in its ownership, would become its own legal entity employing its own staff sometime in the late 1990's. Aside from that exception, at the time that the claimant joined the respondent's business in May 1981 and throughout his employment he was, like all customer facing retail staff across the group, employed by the respondent. For the purposes of this case and the sake of clarity, there is no change in employing entity, only its name and legal status. The respondent was originally known as the Burton Group Plc. That entity changed its name to Arcadia Group Plc in 1998. In 2002, it delisted and became a private limited company with the legal identity it has today.

4.5 Thus, there was a very particular, if not unusual, state of affairs in the corporate and legal structures. The brands and shops were in one sense distinct from each other, yet the staff in all brands were employed by the same legal entity. In practice, I find there was a clear sense to anyone within the business as to which part of the business they belonged. That was particularly the case at the shop level. I doubt, if asked in a social setting, an employee would describe where they worked as Burton Group PLC in preference to "Burtons", or "Dorothy Perkins" etc. I find it was a common understanding that the employer, in a non-legal sense, was regarded as the particular brand to which that employee was deployed or assigned. Whilst I have no doubt that the assignment to this "employer" could change either through choice or imposition, it remained the case that individuals would regard their employment in their particular brand to be reasonably stable.

4.6 I find that this very long-standing view of the way people were employed and where they were employed to work influenced not only the view of the individual employment relationships, but also how the employer and staff collectively managed their affairs. I return to the trade union's involvement below.

4.7 During the early 1990s, the trading conditions for the respondent across all of its brands deteriorated and there began a significant contraction of the number of individual outlets occupied by the various brands with nearly 400 stores closing. Around 350 stores transferred between brands as the group refocused its position in the market.

4.8 Other changes occurred in the business. Additional brands were acquired or developed over time including Wallis and Miss Selfridge. Again, the employees assigned to work in each of these brands remained legally employed by Burton Group Plc. Even if, as I suspect, there were other legal entities connected to these brands, such legal entities did not employ the staff working within them.

4.9 By 2000, the strategic direction of the respondent's business was recast under a strategy known as "BrandMAX". This introduced shared retail space across the brands operated by the respondent to a new level. Some employees moved from one brand to another. The move towards multiple brands trading out of the same premises increased. This provided a strain on what, for decades, had been the traditional model of employment within a single brand and marked the end of the model which had seen individual brands run as quasi autonomous businesses.

4.10 By 2002, the traditional demarcation of brands between menswear and womenswear had become even less relevant to the respondent and was replaced by its definition of the market position the various brands were aimed at. Whilst there remained both men's and women's clothing brands, the organisation within the Burton Group became defined by a focus towards either "young fashion" or "mainstream" fashion. Each of these new divisions had within them both men's and women's clothing. For example, young fashion included Topshop and Top Man. Mainstream included Dorothy Perkins and Burton Menswear. Individuals who previously may have identified as being assigned to Dorothy Perkins could then be assigned to a shop selling Dorothy Perkins/Burton Menswear and vice versa. Within these new organisational structures and market strategies, I find the available physical estate was also being used differently, phasing out the single brand/store model. There was now a clear move towards multiple brands in single premises along the same division of "young fashion" and "mainstream". However, whilst that was not universally adopted overnight, it still meant that through the first decade of this century most front line retail employees of Burton Group Plc who may have started their careers in either Burton Menswear or Dorothy Perkins exclusively, now worked in premises that sold both brands. In some cases, there remained some staff who continued to work exclusively in their original brand and, equally, there were other staff who had changed brands altogether and exclusively worked in a different brand to that in which they started.

4.11 As new stores came online, I find they were now being deliberately designed as multiple brand outlets. Even to the point of "young fashion" brands and "mainstream" brands

all being sold from the same premises albeit perhaps one group of brands being on one floor and the other on another floor.

The Collective Agreements.

4.12 The evolution of the respondent's business over more than a century has some relevance also to the evolution of the industrial relations landscape over that time. Indeed, there are aspects of this case which require me to be alert to not only the changing industrial relations landscape over a number of decades, but potentially also some of the changing attitudes in society towards male and female employment.

4.13 Nowadays, there are no trade unions recognised by the respondent for the purposes of collective bargaining. In the past there was, albeit only in certain parts of the business. That, it seems, was only the parts selling menswear and where it can reasonably be inferred there was likely to have been a predominance of male employees.

4.14 With effect from 1 September 1976, a national recognition and procedural agreement came into being agreed between the respondent and USDAW. It is clear it is not intended to cover all employees employed by the respondent in all areas of its business. It is clear it is not intended to cover all brands traded by the respondent but instead only certain staff working in what at the time was the menswear brands of Burton Menswear and Jackson the Tailor. Whether or not there was any form of separate legal entity behind these two brands at the time seems irrelevant because, as I have found, the retail staff working within those brands were legally employed by Burton Group Plc. Nevertheless, this 1976 agreement needed to define the scope of its reach. It did so by applying it only to those employed by "Burton Menswear and Jackson the Tailor", as was explicitly defined in the agreement as "the company". It is a definition which exists solely for the purpose of this recognition agreement. The agreement further limits the trade union's representative role to "retail employees of the company as defined in appendix A". Appendix A contains an exhaustive list under the heading of "definition of retail employees" and containing eight roles or "capacities" in which employees might be engaged within retail branches of the company. The company, in this context, must carry the definition given to it by clause 1A of the agreement, namely, employed by either Burton Menswear or Jackson the Tailor. "Retail branches" must mean, in simple terms, the shops that the two brands operated from. It is certainly the case that the roles covered by the agreement were those one would expect to be employed in shops, as opposed to, say, middle management or corporate functions. They are limited to branch managers, assistant managers, under managers, sales assistants, cashiers, display supervisors and display staff (Burton) display managers and display staff (Jackson) and porters. It is clear that it does not cover any other roles that may have existed in the management of those shops. For example, the equivalent of what would nowadays be styled area manager or the senior management within the company, support services such as "personnel" (as today's "HR" would more likely have been known at the time). I have no direct evidence of the organisational staffing structure in the 1970s but do not regard it as contentious to infer a fact that there must have been others employed in one capacity or another in roles which related solely to the Burton Menswear brand but which do not feature in the list of employees covered by the 1976 recognition agreement. The very fact that there

is such a definitive list supports such a conclusion. Similarly, it is not disputed that there were other brands' shops with employee's working within them, employed by Burton Group Plc but not covered by this agreement.

4.15 One part of the industrial bargain reached by the two sides to the 1976 agreement was to make it a precondition of employment within Burton Menswear or Jackson the Tailor that any relevant employee had to be a member of USDAW. It was a closed shop, as was then permitted by law. Outside the scope of this bargaining unit, it followed there was no such precondition and no such closed shop for employees wishing to work for Burton Group Plc based in any of the other brands. A shop assistant in Dorothy Perkins may have chosen to become a member of USDAW but did not have to.

4.16 It is clear, therefore, that the scope of the 1976 agreement was limited to employees engaged in one of those specified occupations in either a Burton Menswear retail branch or a Jackson the Tailor retail branch. As I have found, the organisational culture and structure was such that I find, on the balance of probabilities, that such a definition would have felt completely natural to those involved in the 1970's and into the 1980's. Everyone at shop level understood the brand they worked for. Everyone understood the quasi autonomous nature of each brand. Indeed, the 1976 agreement carries two signatures for the employer's side of "the company", one on behalf of Burton Menswear and the other on behalf of Jackson the Tailor.

4.17 Beyond the shop level, the 1976 agreement had no reach, even if an employee would otherwise regard themselves as working in that "brand". That is the definition of the bargaining unit. Whilst the agreement does not use the phrase "bargaining unit", its effect is to create one and, for the purpose of this judgment, I will use the phrase to describe the criteria that must necessarily be met for an employee to benefit from the terms of the 1976 agreement.

4.18 Those terms were valuable. Whilst the recognition agreement itself sets out the procedures and basis on which the two sides of industry agreed to formally engage with each other for the purpose of negotiation etc, the appendices to the agreement give tangible benefits to those covered by the agreement. Those benefits found legal force by clause 15 which provides: -

> ***This agreement and the procedures therein are a constituent part of the individual employee's Contract of Employment which will be amended from time to time by any amendments negotiated to this Agreement or the procedures.***

4.19 The procedures and agreements created by this agreement included matters relating to becoming accredited as a representative of the union; to grievance procedures; to disciplinary procedures and to health and safety representation. Central to the issues in this case, at appendix E, is an agreement entitled the "manpower planning and the treatment of displaced staff procedure". Clauses 9 and 10 of appendix E set out enhancements to the payment that would otherwise be paid to displaced employees under the Redundancy Payments Act, as was in force at that time, and replaced that with a substantially enhanced formula for compensating loss of employment in the circumstances of what it described as

"displacement". Broadly, redundancy situations. There was also a slight enhancement to notice periods for long serving employees.

4.20 Whilst it does not seem to me to have been necessary to do so in the context of the agreement as a whole, clause 16 of appendix E nevertheless repeated the definition of the retail staff affected as was already defined in the agreement itself. It is thereby clear that only those described in that bargaining unit could benefit from the enhanced displacement compensation scheme which, by clause 15, was incorporated into their contracts of employment so long as they met the criteria.

4.21 It follows from this analysis that when it came into force, on 1st of September 1976, anyone already employed by Burton Group Plc and who fell within the bargaining unit as defined would benefit from the various aspects of the collective procedures for consultation and negotiation as well as the enhanced displacement compensation should they be dismissed on ground of redundancy. Anyone who was employed outside the bargaining unit would not. Similarly, anyone who joined Burton Group Plc whilst the agreement remained in force would also benefit so long as their employment continued to fall within the bargaining unit and, if at any point it did not, they would lose that benefit. Consequently, the limitation on the bargaining unit had implications for other staff employed elsewhere in the group. An employee of Burton Group Plc working within, say, the Dorothy Perkins brand as a sales assistant in the early 1980's was not covered by the agreement but would become covered if he or she changed roles to do exactly the same job in a Burton Menswear shop. Conversely, a sales assistant working within Burton Menswear and covered by the agreement would lose the benefits if they changed roles to work in, say, a Dorothy Perkins store where the agreement did not reach. In addition to these moves, which might be termed horizontal movements, the scope of the bargaining unit was such that the reach of the 1976 agreement could also be lost through what might be termed vertical movements, even where the employee remained squarely within the Burton Brand. For example, a branch manager of a Burton Menswear retail branch who was promoted to a position equivalent to what is now styled as area manager would then fall outside the scope of the bargaining unit as defined, even though they remained working solely in the Burton Menswear brand.

4.22 This agreement remained extant until the early 1990's. By that time, the Top Man brand had been added to the group and had either reached its own recognition agreement or, as seems more likely, adopted the Burton Menswear 1976 agreement for the same roles working in Top Man branches. Equally, by then Jackson the Tailor had disappeared as a discrete brand. I note that the Top Man brand was developed as the younger men's fashion equivalent to what Top Shop was for younger women. The equivalent recognition agreement, however, seemed only to relate to employees of Top Man. It did not extend to employees of Top Shop.

4.23 It is not clear exactly what industrial dispute arose between the respondent and USDAW, but, on 29 January 1993, the parties were involved in litigation in the High Court. With the assistance of ACAS, that led to a revised agreement being reached on 16 June 1993. In short, the effect of that litigation and the revised agreements it spawned was to bring collective bargaining to an end. The contemporaneous evidence I was shown related only to

the staff working in Top Man, but it is not in dispute that the same situation applied to employees working in Burton Menswear. The Top Man letter to staff included the following statements: -

- ***Collective bargaining has ceased. We no longer negotiate pay alternative conditions.***
- ***Specific safeguards for certain individuals (i.e.: employees who joined the company before 16 June 1993 and who were USDAW members on that date) have been agreed.***
- ***These employees have the individual rights to representation in disciplinary grievance and appeals procedures, supported by Burton Lay Union Representatives. There are no Lay Union Representatives within Top Man.***

4.24 The safeguards mentioned in the second bullet point were then set out in two further documents attached to the letter. Those were, firstly, the agreement itself and, secondly, three appendices. The relevant parts of the agreement states that: -

> ***Special provisions (Appendix 1) apply solely to Top Man employees who were employed prior to 16 June 1993.***

4.25 And later it stated: -

> ***These individual rights will be retained by the staff concerned so long as they remain Top Man employees (or transfer to Burton Menswear) while the agreement with USDAW remains in place.***

4.26 To my surprise, it is not suggested in this case that this 1993 agreement with USDAW, or its equivalent in what would become the Burton Menswear 1996 agreement, has ceased or terminated.

4.27 Turning to the appendices themselves, appendix 2 and 3 dealt with discipline and grievances. For present purposes, only Appendix 1 is relevant. It was common ground that the purpose of appendix 1 was to preserve the severance compensation in circumstances of redundancy for those meeting the condition termed the "special provision". The appendix opens with a restatement of that special provision, albeit in very slightly different terms to that contained in the revised agreement. Here it states: -

> ***SPECIAL PROVISION – TOP MAN***
>
> ***The following provisions apply solely to staff employed by Top Man prior to 16 June 1993. They will apply to them as individuals only, so long as they are employed by Top Man or transfer to Burton Menswear.***

4.28 The documentation relating to this 1993 Top Man agreement came before me on day 2 of the hearing. Its disclosure was prompted largely by my questioning as to the significance of the date of 16 June 1993, which also features in the 1996 Burton Menswear agreement. Strictly speaking, this Top Man agreement does not apply to the claimant. At the time, his employment was such that the relevant agreement for him was what would become the equivalent 1996 Burton Menswear agreement signed on 12 July 1996. Nevertheless, the Top Man agreement has been enlightening not only to understand the significance of the date of

16 June 1993, but also to see the background and wider industrial relations context to the 1996 Burton Menswear agreement.

4.29 I have no explanation as to why it took 3 years for the Burton Menswear agreement to be signed off (compared to the 3 weeks it took for the 1993 Top Man agreement) but the agreement itself makes it clear that its terms also commenced with effect from 16 June 1993, the same date as is recorded in the Top Man agreement as being the date on which the agreement was signed at ACAS head office. To the extent it is necessary to explain the delay, it seems more likely than not that it related in some part to further discussions needed to formalise some sort of continuing form of limited recognition for the purposes of joint consultation which applied to the Burton staff but, apparently, not to the Top Man staff.

4.30 I have no doubt the parties to both the Top Man and Burton Menswear agreements had the same intentions when it came to reaching an agreement that preserved the enhanced severance scheme of the 1976 agreement. In the 1996 agreement, the relevant appendix containing the severance compensation is appendix 3. It is right to note that the 1996 Burton Menswear agreement and the 1993 Top Man agreement do not use identical wording in the material parts. I find as a fact that the objective intentions of appendix 3 to the 1996 agreement was, as it was for appendix 1 of the 1993 Top Man agreement, to preserve rights that any relevant employees may have had at that date. Further, I find as a fact that the intention of the parties to be discerned from the state of affairs existing at that time was, therefore, not to enlarge upon those rights, nor was it to increase the pool of employees who might benefit from those rights. It is for that reason that it remains necessary to understand the scope and extent of the rights and bargaining units defined in the 1976 agreement, when interpreting the 1996 agreement.

4.31 The 1996 agreement contains similar definitions to those set out in the 1976 agreement. In both, “the company” is defined as Burton Menswear. As was the case in 1976 agreement, the employing legal entity was actually Burton Group Plc. Burton Menswear is clearly not the name of the employing legal entity (although, as I have already indicated, it seems likely that there is or was other legal entities related to the brand in existence but, even so, no other entity was ever the employer of those working in Burton Menswear shops). I am satisfied that the intention of this 1996 agreement was to replicate the same bargaining unit and not to change those that would previously have been covered by the 1976 agreement. Clearly, by 1996 Jackson the Tailor was no longer a trading brand within the Burton Group and, therefore, does not feature in the 1996 agreement. The agreement does not define the job roles within each branch but does limit the scope of the right of representation in procedural matters to “branch staff who are members”. I find the phrase “branch staff” to be terminology that the parties at the time would have readily understood to have meant staff assigned to a particular branch or shop. This agreement does not directly create any individual legally binding rights. Unlike the 1976 agreement, it does not contain any explicit clause incorporating the effect of any agreements within the individual contracts of those employees to which it applies but the effect of clause 15 of the 1976 agreement was to incorporate the 1976 agreement and *“any amendments negotiated to this agreement or the procedures”.* Clearly, the 1996 agreement was viewed as such a negotiated amendment.

4.32 The essence of Appendix 3 of the 1996 Burton Menswear agreement is that it preserves, for eligible staff, the right to enhanced severance compensation. That eligibility is subject to conditions set out under the heading "special provisions", largely mirroring the Top Man agreement. The special provision states, with the original emphasis: –

> *The following provisions apply solely to staff employed by **Burton Menswear prior to 16 June 1993** and will apply to them as individuals only, as long as they are employed by that company, or transferred to **Top Man.***

4.33 At the time of this agreement, just as it was in 1976, the Burton Group Plc traded through a number of brands. By 1996, of course, that number had increased and, indeed, the balance of trading had shifted in favour of womenswear. It is significant that this agreement does not mention employees transferred to any other brand other than Top Man which was itself a menswear brand. It is understandable why the parties sometimes referred to these agreements in shorthand as the "menswear agreements".

4.34 I find there were no other recognition agreements of any sort applicable to staff working in other brands or, indeed, in any other areas that may have been capable of forming bargaining units within the Burton Group Plc. In summary the only collective agreements were those related to Burton Menswear and Top Man (and Jackson the Tailor that for such time after the 1976 agreement as it had continued to be a trading brand within the group). The only employees entitled to the benefits conveyed by agreements and their associated appendices were those whose employment fell within the bargaining units as defined.

The Claimant's Career History

4.35 The claimant is the 3rd generation of lifelong employees of the respondent. On 18 May 1981 he followed his father into the business who had, himself, followed his father. The claimant has always been employed by the respondent. The records of his very early years are lost but there is no dispute that for many years his employment was within either Burton Menswear or Top Man in various shop-based roles. The significance of that being that upon his appointment he worked within the bargaining unit defined by the 1976 Burton Menswear agreement. All his roles fell within the ambit of those posts defined within the retail branch. The most senior of which was store manager, a role he has performed at various stores for at least the last 20 years or so of his career.

4.36 At the critical point in time of immediately before 16 June 1993, it is common ground that the claimant had at all times been employed in both a post and within a qualifying brand, that is either Burton Menswear or Top Man. He was therefore employed within the bargaining unit and was an employee to whom the 1996 agreement applied. If nothing had changed between then and his redundancy, it is common ground that he would have satisfied the "special provisions" conditions of Appendix 3 of the 1996 agreement and would have been entitled to payments under the preserved enhanced severance scheme. But things did change.

4.37 Between 1993 and 1999, the claimant continued to work within the Burton Menswear brand, or Top Man, exclusively and there is no dispute that he remained within the bargaining unit and therefore the reach of the special provision. From 1999, things were less clear cut.

4.38 As the respondent's business changed and the BrandMAX strategy was implemented through the 1990s and early 2000's, the claimant had avoided the various redundancies and store closures that had taken place. That is not to say the nature of the working world had not changed for him. As part of the brand strategies that lay behind the restructuring, in 1999, the claimant took responsibility for a combined Dorothy Perkins and Burton Menswear store. He was then no longer able to say that he was exclusively employed in Burton Menswear.

4.39 He was appointed formally to the post of store manager of the combined Dorothy Perkins and Burton Menswear store at Fosse Park with effect from 1 March 2002. The offer of employment was set out in writing in a letter dated 11 January 2002 and its acceptance forged a new contractual relationship. That letter included a statement that :-

> ***the company may require you to work within any of its brands and in any reasonable location deemed suitable. As much notice as possible will be given should the company require you to move.***

4.40 Enclosed with the letter was a "summary of employment terms" which, it was stated, "together with your staff handbook and this offer letter" formed the claimant's new contract of employment.

4.41 The accompanying summary of employment terms purports to be a statement of main terms and conditions of employment as required by section 1 of the Employment Rights Act 1996. It does not include reference to any collective agreements. Of course, at that time there was nothing collectively negotiated save for the matters preserved by the 1996 agreement (and the Top Man 1993 agreement).

4.42 If the full effect of the 1996 agreement was continuing for employees such as the claimant, a conflict then arises between the procedures for disciplinary hearings and grievances. They were covered by the agreement for qualifying employees, yet this new contract now explicitly provided for a different disciplinary process and a different grievance procedure. This respondent's name for its grievance process is a "problem-solving" process. Neither the contract nor the accompanying handbook addressed severance payments on termination by reason of redundancy or anything equivalent. For those beyond the scope of the two agreements, the entitlement was limited to statutory notice and statutory redundancy payments.

4.43 It will be recalled that the respondent was repositioning its various brands in the marketplace and grouping them within individual stores. Dorothy Perkins and Burton Menswear were typically grouped together for the purposes of organisational structure and management under the "mainstream" fashion division. Whilst there remained some stores branded solely as Dorothy Perkins, and some branded solely as Burton Menswear, the strategic direction of respondent was for both brands to be sold out of one store. That strategy was itself under pressure as womenswear continued to take over as the overall focus

of the respondent's business. In some areas, this led to a decision that some stores would no longer carry the poorer performing menswear brands.

4.44 One such store was Fosse Park. In 2003, it demerged its Dorothy Perkins and Burton Menswear and the claimant became store manager of a Dorothy Perkins store. Although the internal organisational structure maintained that of the "mainstream" demarcation, for the first time in his career he found himself responsible for a store that did not sell menswear at all and could not be said to be either a Burton Menswear brand store or a Top Man brand store. It seems there was some consideration given to the claimant's seniority and salary and, as the Dorothy Perkins store had a higher turnover, it could better support his higher salary. Whatever the factors behind this change, had it occurred during the 1980's, it is not in dispute that the claimant would have then fallen outside the bargaining unit and no longer been subject to the provisions, or obligations, of it.

4.45 In 2004, the claimant was seconded to a project department.

4.46 From 9 October 2007 the claimant moved to become store manager of another Dorothy Perkins store in Derby.

4.47 During his time managing Fosse Park and Derby, he had also undertaken various other secondments to a number of other stores and, indeed, to cover the more senior management position of area manager. His experience meant he also undertook some work supporting training or mentoring in the wider group. There is no suggestion that a temporary secondment out of the bargaining unit would sever the link with the bargaining unit an employee might have through their "substantive" appointment.

4.48 The Derby store would be the last substantive posting for the claimant before he was made redundant. During those 10 ½ years, the mix of brands sold changed from time to time and, therefore, the brands in which it could be said the claimant was working changed. From November 2010, the store was a Dorothy Perkins store. For approximately 3 years it sold Burton Menswear brands within it but that multi branding ceased on 10th of August 2013 when the store, once again, ceased to sell any menswear. Burton Menswear was reintroduced once again on 20 November 2017 for the last 7 months before the store finally closed for good and the claimant's employment terminated with effect from 9 June 2018.

5. The Claimant's Case

5.1 The claimant's case, briefly summarised, is this. The claimant says firstly that the agreement is governed principally by where he is "employed" and that has a specific legal meaning. He says he has only ever been employed by Arcadia Group Limited (and its predecessors). Moreover, he says how that is the only "company" within the meaning of the Companies Act 2006 (and its predecessor legislation) that was relevant to his employment and who his employer was. Where the agreement refers to him being employed by Burton Menswear, and seeks to define "the company", he says it must be interpreted to mean being employed by the respondent. As he was so employed at 16 June 1993, and because he never ceased to be employed by that "company" until the date his employment was

terminated, he says he continued to meet the conditions set out in the special provision and is entitled to the enhanced provisions of the 1996 agreement.

5.2 Alternatively, he argues that he has never ceased to work within an organisational division of the respondent that was structured by reference to Burton Menswear to one degree or another. In this argument I am invited to interpret "employed by" as meaning something more akin to "assigned to" or "working within" and that it is not to be interpreted exclusively such that where an employee is assigned to or works within two or more brands, they will still satisfy the special provision if at least of the brands being serviced is Burton Menswear. The claimant says that he has at all times either (a) worked only in the Burton Menswear brand (b) worked in a store which sold other brands alongside the Burton Menswear brand or (c) even when he worked in a store selling only womenswear with no link to the Burton Menswear brand (or for that matter Top Man), he nonetheless remained employed within a division of the respondent's business that was structured according to the "Dorothy Perkins/Burton Menswear" brands within what the respondent called its "mainstream fashion". Area managers to whom he reported, even when working as manager of a Dorothy Perkins only store, were themselves employed in the mainstream fashion division and in the role of area managers for both Burton Menswear/Dorothy Perkins. He says he continued to undertake additional duties from time to time either by acting up to cover an area manager role, which did then bring him back into direct responsibility for Burton Menswear, or by supporting corporate initiatives such as training or mentoring that itself had links to the Burton Menswear brand. For that reason, even during the times when he was working in stores without any responsibility for the Burton Menswear brand, he says that was such as to continuously satisfy the special provision in appendix 3 of the 1996 agreement.

5.3 Moreover, I am invited to consider the respondent's moral obligation to the claimant. He relies on the lack of choice on the occasion he was deployed to manage a Dorothy Perkins store (without any responsibility for the Burton Menswear brand) and that he had no contractual right to object.

6. The Respondent's Case

6.1 In an equally brief summary of the submissions, the respondent says the correct construction of the special provision, drawn from the words used, the surrounding circumstances and the context and background, is that it was to recognise the end of the previous recognition agreement with USDAW. Part of that was a common objective intention to preserve the rights of those staff who were subject to the agreement immediately before 16 June 1993. I am invited to conclude that there must have been a mutual intention that that group of eligible individuals would phase out over time and no new employees would become entitled to the enhanced severance payments. The numbers would diminish as employees otherwise entitled left the respondent altogether or ceased to be employed in the area of the respondent's business that was previously within the bargaining unit.

6.2 On that construction of the special provision, the respondent says the claimant's case fails on two bases. The first is that the offer and his acceptance of the new post of store manager with effect from 1st March 2002 meant the claimant ceased to be employed in what

would have been the relevant bargaining unit. He was no longer employed by Burton Menswear, he was now employed by Dorothy Perkins/Burton Menswear. The respondent says that is not the bargaining unit referred to in the agreement and the claimant thereby ceased to be covered by the special provision and lost the right to the preserved rights.

6.3 The second is that, even if his eligibility under the special provision did continue by virtue of the fact that the combined store nonetheless continued to include, as part of it, Burton Menswear, he nonetheless lost that right when he became a manager of an exclusively "Dorothy Perkins" branch in 2003.

7. Law

7.1 This case is entirely concerned with the construction of the "special provision" contained within the Burton Menswear 1996 agreement.

7.2 Construction of a written contractual term is a matter of law. My task is to identify the meaning of the term as it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The approach was laid down by Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society (No. 1) [1998] 1 WLR 896, HL**. It is sufficient to record that the assessment of the objective intention does not include the subjective view of the parties or any pre-contractual negotiations or exchanges. What is required is an understanding of those relevant matters which form part of the background and context to the contractual documentation itself.

7.3 Whilst that test is applicable to all commercial contracts of all types, it is also relevant to have regard to the fact that the term in this case arises in the context of an industrial relations relationship of collective-bargaining over a long period of time and, in particular, the ending of a state of affairs that had existed between the two sides of industry for many years.

7.4 Mr Wyeth relied on a slightly earlier exposition of the test within the industrial relations context as set out in **Adams v British Airways plc [1996] IRLR 574**. This case concerned the construction of the pilots' seniority provision within a collective agreement incorporated into the employees' contracts of employment. Whilst it is given before the opinion of Lord Hoffmann in the *Investors Compensation* case, and was not referred to by the House of Lords, it seems to me to be on all fours with Lord Hoffman's five principles of construction and simply emphasises that one significant part of the context of this particular agreement, is the context of collective bargaining. At paragraphs 21 and 22, Sir Thomas Bingham MR summarised the relevant law as this: -

> ***21. The court is not concerned to investigate the subjective intentions of the parties to an argument (which may not have coincided anyway). Its task is to elicit the parties' objective intentions from the language which they used. The starting point is that the parties meant what they said and said what they meant. But an agreement is not made in a vacuum and should not be construed as if it had been. Just as the true meaning and effect of a mediaeval charter may be heavily dependent on understanding the historical, geographical, social and legal background known to the parties at the time, so must a more modern instrument be construed in its factual setting as known to the parties at the time. Where the meaning of an***

> ***agreement is clear beyond argument, the factual setting will have little or no bearing on construction; but to construe an agreement in its factual setting is a proper, because a common-sense, approach to construction, and it is not necessary to find an agreement ambiguous before following it.***
>
> ***22. On the facts here, it was a collective agreement which was incorporated into the contracts of the individual plaintiffs. A collective agreement has special characteristics, being made between an employer or employers' organisation on one side and a trade union or trade unions representative of employees on the other, usually following a negotiation. Thus, it represents an industrial bargain, and probably represents a compromise between the conflicting aims of the parties, or 'sides' as in this context they are revealingly called. But despite these special characteristics, a collective agreement must be construed like any other, giving a fair meaning to the words used in the factual context (known to the parties) which gave rise to the agreement.***

7.5 It follows that a clause in a collective agreement falls to be construed like any other agreement, giving a fair meaning to the words used in the factual context known to the parties which gave rise to the agreement.

8. Discussion and Conclusions

8.1 I have first considered the individual elements of the special provision to seek to elicit the ordinary natural meaning of the words used. Where that gives rise to an unambiguous interpretation, that will be it.

8.2 The special provision opens with the phrase *"The following provisions apply solely to staff…"* From that wording alone, the parties are correct in my judgement to characterise the intention of the parties when drafting appendix 1 of the 1996 agreement as limiting the application only to some staff, but not all staff. The employees excluded by this construction are not only employees across the wider Burton Group Plc but also those employed by, or working within, Burton Menswear but who otherwise do not meet the other conditions for protection.

8.3 The parties are also correct, in my judgement, to recognise that the intention of the parties drafting Appendix 1 was to preserve the accrued rights of certain staff, as opposed to creating new ones. In my judgment, that is an important part of the context of the agreement which informs other necessary parts to be interpreted. I reach that conclusion for the following reasons: -

a) The background and surrounding circumstances that led up to the 1996 agreement concerns the dispute litigated in the High Court at the beginning of 1993 and leading to the ACAS facilitated agreement signed on 16 June 1993. That date is a significant date with meaning and effect in the subsequent agreement. It is the date which saw the end of collective bargaining within the Burton Group Plc. The benefits under the 1976 agreement to those staff eligible to receive them at that date, would arguably have ceased at that date had parties not made specific provision for their continuation. For the staff working within Top Man, it seems there may not have been any continuing role at all for any collective staff side processes. For the staff working within Burton Menswear, it seems discussions did take place to formalise a role for USDAW and its

members within the context of a joint consultation procedure, albeit a diluted form of collective engagement than they had enjoyed in the past but some recognition, nonetheless. In both bargaining units, the enhanced severance payments to be paid on termination by reason of redundancy came to an end for all new staff. It is clear to me that the compromise forged by both sides, the intention of which is recorded in this agreement, was that those staff who had a contractual right to the enhanced severance payments incorporated into their individual contracts of employment immediately before the end of the recognition agreements on 16 June 1993 would continue to benefit from that term until such a time as they were no longer "employed" within the Burton Menswear brand, that is, the bargaining unit.

b) Whilst the language and grammar used by the parties in drafting the 1996 Burton Menswear agreement is not identical to that used by the parties in drafting the 1993 Top Man agreement, it seems to me beyond doubt that the intention of the parties to each agreement was that the staff working in either of the two bargaining units who qualified to retain the eligibility for the enhanced payment would not lose it if they transferred to work in the other bargaining unit or brand to which the two agreements each made reference. Hence each is structured in the same way to protect continued employment in either of the original bargaining units. This is significant because, just as when the 1976 agreement was first made, there were other brands within the Burton Group Plc operating out of their own retail stores or branches which were outside the reach of the particular bargaining unit, so was it the case in 1996 when the second agreement was reached, save only to the extent that, by then, the numbers and varieties of other brands and stores had increased. It remained the case that none of those other brands, stores or areas of work were identified in the 1996 agreement as areas to which an otherwise eligible employee could be transferred without losing the benefit of the enhanced severance payments.

c) It is clear from the context that the intention behind this agreement being structured in this way was to preserve that which had existed and neither to create any new rights nor to allow other employees not otherwise eligible to become eligible. Top Man is not an exception. It is named only because both Top Man and Burton Menswear had the same enhanced severance package in place under different bargaining units, but their respective collective recognition agreements took divergent paths after 1993. Thus after 1996, an employee with protection would lose that protection if they moved to work in another brand just as they would have lost it had they made such a move in, say, 1985. The difference after 1996 is that if they then returned to what would have been the bargaining unit at a later date, they would now not regain that protection.

8.4 It follows that a mutual objective intention can be readily discerned to limit the continued eligibility to those that work in areas that would previously have formed either of the two bargaining units. Whilst the clause I am tasked with construing is the special provision of appendix 3 to the 1996 agreement, the background and context to that is the 1976 Burton Menswear agreement and its relevant appendices. If I am right that the intention of the 1996

agreement was to preserve rights, it means one must understand the 1976 agreement to properly interpret what it is that is being preserved.

8.5 The corollary of my conclusion that the 1996 agreement sought only to preserve rights, is that it was not the intention of the parties to enlarge upon those rights. There were two criteria in particular that engaged the entitlement under the 1976 agreement. One was the brand of the store in which the employee was employed. The other was the job the employee performed. Whilst the 1996 agreement does not explicitly recreate the list of posts and branches to which the agreement will apply, in my judgement that must be what was intended by the preservation of rights. To conclude otherwise would potentially enlarge the scope of the agreement which I do not accept was the objective intention. In any event, the 1996 agreement does make reference to "branch staff" which in the context of this agreement and this sector, must be a reference to staff employed within the retail branch or individual shop. It follows that the objective intention of the parties was that the same vertical, as well as horizontal, changes would affect the continued eligibility to the enhanced severance payments.

8.6 The special provision then goes on to state *"employed by Burton Menswear…".* It is in this respect that Mr Kibble invites me to interpret "employed by" and the reference elsewhere to the "company" in what he argues is their natural and ordinary meaning in the context of employment and company law. The flaw in Mr Kibble's argument arises from the drafting of both recognition agreements and the fact that each specifically defines the meaning of "company" as something which everyone agrees was not a legal entity and certainly not the employing legal entity. It does so for the purpose of identifying what I have called the bargaining unit to which the relevant agreement relates. Whilst it is right that the choice of language the parties used does not accord with strict legal interpretation in their usual contexts, I am satisfied that that is irrelevant when they have gone to the trouble of providing a definition by which the word in the document must be interpreted. When seeking to interpret words used in a document based on discerning the parties' objective intentions, there is simply no scope to go beyond a meaning which the parties have themselves taken the trouble to define. The intention is clear and present because the parties have stated it. Moreover, in this case such a construction it is entirely consistent with the surrounding context of the agreement.

8.7 I therefore reject the claimant's submission that he qualifies by being an employee, in the legal sense, of Burton Group Plc and its successors to Arcadia Group Limited. That does not reflect the objective intention of the parties and, to turn this analysis on its head, would raise a number of contradictions. Firstly, if the agreement is to apply to employees of Burton Group Limited, no purpose would be served by including the special category of transfers to Top Man. At the time of this agreement employees working in the Top Man brand were also employees of Burton Group Plc and would, if the claimant was correct, already be covered by the provision. Indeed, the whole concept of any form of "transfer" become otiose. Similarly, the phrase "employed by" was objectively intended to be given a non-legal meaning consistent with the industrial practice at the time and the surrounding circumstances demonstrate the parties adopted a meaning closer to the notion of being "assigned to" or

"working within". There would also be no need for two preservation agreements flowing from the 1993 settlement.

8.8 The next part of the special provision is that the staff must have been employed *"…Prior to 16th June 1993*". There is potentially scope for ambiguity in this phrase when it is considered in isolation. For an employee to "have been employed prior to" could mean simply that the commencement of the relevant employment must have been before that date, even if the relevant employment has subsequently changed. That interpretation feels strained in the context of this agreement. If the condition is being employed at a single point in time at any time before 16th June 1993, it leaves open the possibility of an individual falling outside the scope of the bargaining unit at some point between first being so employed, and the critical date of 16 June 1993. That such a person would not have been entitled to the benefits on 15 June but would then acquire them on 16 June is clearly at odds with the concept of preserving benefits. It seems to me that the events of 16 June 1993 provide the context to explain what the parties meant by "prior to", as does the background to preserving the accrued rights. From 16 June 1993, there was no collective bargaining as a result of the dispute resolved with the assistance of ACAS. Anyone who enjoyed the benefits of the 1976 agreement would lose them at midnight on 15 June 1993. Anyone who had accrued the rights at a point in time prior to 16 June 1993 but had subsequently fallen outside the bargaining unit, and thereby lost them, would have nothing to be preserved. The intention of the parties when using the phrase "Prior to" in this context must be construed as meaning to protect those who have the rights immediately prior to that date, i.e. at midnight on 15 June 1993.

8.9 It is common ground between the parties that this special provision contains two limbs in order to maintain eligibility. That is firstly the qualifying employment at 16 June 1993 and, secondly, qualifying employment at a later date. The wording of the 1996 Burton Menswear agreement does this simply by the use of the conjunction, "and". It seems to me that that gives rise to no ambiguity but for the sake of completeness I have reflected on how the same parties have chosen to express what is ostensibly the same special provision in the 1993 Top Man agreement. It states.

> ***The following provisions apply solely to staff employed by top man prior to 16 June 1993. They will apply to them as individuals only, so long as they are employed by top man or transferred to Burton Menswear.***

8.10 It can be seen that there are three points where the words used to express the two provisions have subtle variation. The first is that instead of "and", the Top Man agreement inserts a full stop after "1993" and starts a new sentence with the word "They", referring to those that have satisfied the first condition. The second is that the phrase used is "so long", instead of "as long". The final is instead of "transfer" the word used is "transferred". Do any of these individually or collectively alter the objective intention to be construed when interpreting the words? Taking each subtle difference in turn, I have concluded they do not. I do not detect any change in meaning by the use of transfer or transferred. Either conveys a meaning that between 16 June 1993 and the date of termination when the scheme falls to be considered, the employee is then working in one or other of the original bargaining units. The punctuation still leaves the words forming two limbs to be satisfied and whatever the meaning

of “as long” or “so long”, it is hard to see a difference between the two, either term conveys a further condition to be satisfied. Overall, therefore, whilst the parties have used subtly different language, none of those differences either individually or taken as a whole alters the interpretation of the two special provisions, both having the same meaning. Moreover, the fact that they each have a reciprocal relationship in respect of the possibility of staff transferring between each bargaining unit reinforces this conclusion.

8.11 Turning to the second limb of the test more specifically, there are two questions that then arise. Firstly, on what date is the second condition to be assessed and, secondly, is that a condition to be satisfied on that date only, or must the employee have continuous service in the bargaining unit between 16 June 1993 and the date on which the severance provision is being applied?

8.12 Just as it is strained and unnatural in this context to interpret “prior to” to mean on any date before, as opposed to immediately before, so it is equally strained to interpret the “as long as they are employed” as any date other than the date on which the severance provision potentially falls to be applied, that is their dismissal on grounds of redundancy. I recognise there could be arguments that if “prior to” was interpreted to mean “on any date before..”, then the second date could be a reference to some other earlier date such as 16 June 1993 itself or, in the case of the 1996 agreement, the date that it was signed. I have rejected this. Not only are they strained interpretations, they add nothing. Similarly, the possibility the later date might mean the date the 1996 agreement was signed has no utility to the agreement as even though the 1996 agreement was signed 3 years later, it expressly says it applies from 16 June 1993. Finally, if an employee did not have to meet the qualifying condition at least at the date of termination, it would serve to have improved the rights of the 1976 beyond the way it would have been applied during its currency.

8.13 In the context of this case, the second question is of the greatest significance. Am I right to interpret the second limb as imposing a condition of ***continued*** employment within the bargaining unit? Staying with the alternative construction for the moment, i.e. whether all that is required is employment ***at*** those two points in time, it not being important where the employee had worked in between times, some support for that may be drawn from the use of the word “are” employed as opposed to what the parties might have chosen, such as “remain” employed. If that is the proper construction, it would leave open the possibility of individuals having lost a right since 16 June 1993 but regaining eligibility by virtue of the quirk of where they happen to be employed at the date of termination. One could argue that is how the 1976 agreement would have operated if an employee moved out of, and then returned to, the Burton Menswear brand. However, after 1996, that could not be the case for new staff or staff transferring in from outside the bargaining unit. I have come to the conclusion that satisfying qualifying employment in the bargaining unit merely at two points in time, as opposed to continuously, is not the objective intention of the 1996 agreement for three reasons.

8.14 Firstly, the fact that during the currency of the 1976 agreement an employee returning to the bargaining unit would regain the benefit of the severance terms did not arise because he had previously had the benefit, but because the benefit was open to all those who joined

the bargaining unit and for as long as they remained within in. Such an employee was simply returning to work in an area for which the terms and conditions were informed by that agreement. That is not the case after 1993.

8.15 Secondly, that interpretation requires the phrase “as long” or, indeed, “so long” to be construed as conveying a simple condition to be satisfied at that single point in time and not as a continuing temporal condition to be maintained day to day and which, if at any point it is not maintained, then the eligibility would be lost. Whilst such an interpretation is not grammatically impossible, I find it strained. The latter interpretation is, in my judgment, the more natural meaning.

8.16 Thirdly, whilst prior negotiations cannot be legitimately referred to in order to interpret the written agreement, it is legitimate to have regard to how the same two parties to the agreement expressed themselves on exactly the same point, in exactly the same context, in the 1993 Top Man agreement. In that, the reference to the special provision in the agreement, albeit not the appendix 1 itself, does use the word “remain” to describe the ongoing condition of eligibility between 16 June 1993 and the date of application. It is inconceivable that the objective intentions of the parties to both preservation agreements intended there to be a different construction, particularly in view of the reciprocal arrangements within them.

8.17 The final words of the special provision to consider is in the meaning of the phrase *“applied to them as individuals only*”. Clearly, the benefits that were previously conveyed to them and incorporated into the contracts of employment of eligible employees could only ever apply to them as individuals. It seems to me that once again the surrounding context and background to this provides the answer to the correct construction. These enhanced payments were previously expressly incorporated into a limited category of employee’s contracts of employment and only by virtue of the existence of the recognition agreement which then ceased. New employees in the areas of the respondent business that would previously have formed part of the bargaining unit would not thereafter attract the enhanced payments. From that it can be discerned that the intention of the parties at the time to express this preserved eligibility as applying “to them as individuals only” was, in my judgement, a linguistic device to convey the intention that the right was being preserved to that individual employee because of their past eligibility, as opposed to all employees in the bargaining unit.

8.18 Having considered the constituent parts of the special provisions in the 1996 Burton Menswear agreement I take a step back and reconsider the provision as a whole and in the round. The analysis of the constituent parts points to a conclusion that the parties intended the severance payments to be limited to a defined group of staff who met two conditions. The first was that the enhancements arising under the 1976 agreement by virtue of being imposed immediately before 16 June 1993 and the second that at the time when it came to consider whether they were eligible that they would continue only as long as they remain in employment that is working with either of the two bargaining units. That is a store selling the Burton Menswear brand or the Top Man brand of clothing.

8.19 Had the 1976 agreement continued in its original form, there is no dispute that the claimant would have fallen outside its reach during the times he managed the Dorothy Perkins store selling neither Burton Menswear nor Top Man clothing. There seems to me to be no reason to find any distinction on the same facts when they arise under the 1996 agreement. It cannot be the case that the same set of facts can give rise to two different outcomes merely because of when they are applied between, say, the 1980's and the 2010's. It follows that I have concluded Mr Kibble lost the entitlement to the preserved benefits in 2003 when he became the manager of the Dorothy Perkins only store.

8.20 I have considered the impact of secondments during his career and concluded that they are irrelevant to both side's arguments. I found that at various times whilst managing Fosse Park and Derby the claimant had undertaken secondments and other duties. The circumstances of those secondments would appear to have taken the claimant's employment out of the scope of the bargaining units – either by not working for Burton Menswear or Top Man (the horizontal movement) or by not occupying a defined post within the scope of the retail branch (the vertical movement). I have concluded that such temporary movements fall outside the scope of the agreement and that it is the substantive position they hold that would govern their eligibility. There is an argument that the informal interpretation of employment to mean "deployed" or "assigned" could have been enough to take an employee out of the scope of the agreement, but I have concluded that would have been inconsistent with the purpose of a severance or displacement scheme. An employee on such a temporary secondment would not be made redundant from the secondment, they would be returned to their original, home employment. If it was the home employment that was at risk of closure leading to redundancies, they may be better placed for redeployment, but it seems to me it would be their original or home deployment that would then govern their entitlement. It is common ground between the parties that, in fact, whatever the correct construction of the 1996 Burton Menswear agreement, it has only been applied to the relevant employee's underlying substantive post, not their seconded position. Whilst it is impermissible for me to base my decision on the parties' subjective interpretation of the agreement (and the fact they each share the same subjective interpretation on this point does not alter that), it seems to me that what is being advanced by the parties is, on an objective basis, likely to reflect the intention of the parties to the agreement at the time. It is more likely than not that the true intention of the parties was not to disadvantage those undertaking temporary secondments to positions or branches falling outside of the bargaining unit or to deprive that employee of their rights under the agreement. Conversely, Mr Kibble cannot point to his secondments or his other duties undertaken from time to time in the nature of area manager as, by definition, such work even on a substantive basis would have taken him outside the scope of the 1976 and therefore 1996 agreement.

8.21 There are two further arguments to consider in the alternative. Firstly, I am less attracted to the respondent's alternative submission that the bargaining unit ceased before 2003. It says even the multiple branding (Dorothy Perkins and Burton Menswear) was a state of affairs that meant he fell outside the 1976 bargaining unit. I accept that such a multiple branding was something not objectively in the contemplation of the parties to the 1976 agreement and, had it arisen under that agreement, it would have been largely unworkable as

it would have resulted in staff working alongside each other in the same roles and locations yet with different entitlements. More particularly, the machinery for the collective bargaining that the 1976 agreement provided for could not realistically have operated. Had there been multiple branded stores in 1976, the 1976 agreement would have had to be worded differently. However, the 1996 agreement did not maintain collective bargaining. The agreement preserved a limited collective relationship by way of consultation only and individual benefits to the enhanced severance payments. An obvious consequence of 1996 agreement was that colleagues working alongside each other in the same roles in the same Burton Menswear store would have different contractual entitlements on redundancy and some other matters. Those within the scheme had something that any new employees joining or moving into a Burton Menswear brand did not have or acquire. It seems to me that there is a basis for discerning an objective intention that survives the new developments in organisational structures of the 90's and 00's and era of the new brand definitions. As long as an individual's continued employment meant they were in the necessary branch role and that role meant they sold the Burton Menswear brand of clothing, it is objectively the case that the intention was that they would continue to fall within the scope of the agreement. It would not have mattered that that they may then be working alongside a long serving Dorothy Perkins employee to whom neither the 1976 nor 1996 agreement had ever applied, just as it did not matter if they worked in an exclusively Burton Menswear branch alongside a new employee who did not have the benefits of the preserved scheme. Conversely, the complete severance of any connection to the Burton Menswear brand was, however, something which any objective assessment of the intention of the parties would conclude fell outside its scope. That is the basis on which I have found against the claimant, not any earlier loss of entitlement.

8.22 In reaching that conclusion I have kept out of the reckoning the parties' subjective interpretation on this point based on how various managers have in fact interpreted the 1996 scheme in the last 20 odd years. I do not know what reasoning they each have for their conclusions, but the way I have interpreted the agreement happens to be the way in which it has operated in practice in other cases.

8.23 Finally, Mr Kibble advanced what he termed a moral argument, based on the fact that he had no right to refuse the original transfer to move away from Burton Menswear to manage a Dorothy Perkins brand store. There is no place for such an approach in my analysis. The interpretation of contractual terms does not admit a concept of reasonableness or fairness unless the terms themselves convey it or, as does not apply here, a statute requires it. To do otherwise would amount to rewriting the parties' bargain. Nevertheless, to the extent that there is any moral argument to be considered, the respondent's counter submission has some force to level the moral scales. At the time of what the claimant correctly characterises as a forced move, the contract expressly entitled the employer to redeploy to different brands. If there was any alternative to this move, it seems it may well have been redundancy. Even though, the claimant would then have remained entitled to the benefits of the 1996 scheme had that then happened, on his own evidence the value of that enhanced severance is far outweighed by the value of the 16 years or so of continued employment that then followed.

8.24 In conclusion, Mr Kibble fell outside the scope of the agreement when he ceased to be deployed to a Burton brand at a shop level post up to and including store manager. That happened firstly in 2003. It happened again in 2013 but, by then the entitlement had already been lost. There is no basis for interpreting the 1996 agreement in a way that revives an entitlement once lost. He cannot show that he remained employed in Burton Menswear throughout the period between 1993 and his dismissal on ground of redundancy. He cannot satisfy both limbs of the special provision to the 1996 agreement at the date the provision fell to be applied. In short, the terms of his severance payments do not disclose a breach of contract.

EMPLOYMENT JUDGE R Clark

DATE 7 Februarys 2020

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

……...……..

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FOR SECRETARY OF THE TRIBUNALS