Case Nos. 2416773/2018
2417244/2018
2417916/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr D Bates

Respondents:
1. Fractional Administration Limited (in liquidation)
2. Langley Corporate Services Limited

HELD AT: Liverpool **ON:** 6, 7, 8 and 9 January 2020

BEFORE: Employment Judge Horne

MEMBERS: Mrs J L Pennie
Mr J Murdie

REPRESENTATION:

Claimant: Ms K Barry, counsel
Respondents:
1. Did not appear and was not represented
2. Mr A Hodge, counsel

JUDGMENT having been sent to the parties on 27 January 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Complaints and issues

1. By claim forms presented on 7 November 2018 and 4 December 2018, the claimant raised the following complaints:

   1.1. Unfair dismissal, contrary to section 94 of the Employment Rights Act 1996 ("ERA") and regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE");

   1.2. Failure to inform and consult in relation to a relevant transfer, contrary to regulation 13 of TUPE;

1.3. Unlawful deduction from wages, contrary to section 13 of ERA; and

1.4. A claim for damages for breach of contract by failing to give notice of termination.

2. In advance of the hearing the claimant helpfully prepared a list of the issues to be determined by the tribunal. That list was not expressly agreed, although the respondents' counsel indicated that nothing "leapt out" as controversial. The issues in the list were substantially modified as the hearing progressed. In particular:

2.1. The claimant's counsel indicated at the outset that there was no complaint of unfair dismissal against Fractional Administration Limited ("FAL"). The only respondent alleged to have unfairly dismissed the claimant was Langley Corporate Services Limited ("Langley").

2.2. Neither respondent sought to argue that it had complied with regulation 13 of TUPE. Neither respondent contended that there had been special circumstances preventing compliance. Langley's counsel confirmed Langley's position at the start of the hearing. Langley's case was simply that there was no relevant transfer and so no duties under regulation 13 arose.

2.3. During the hearing, the claimant's counsel clarified the claimant's case in relation to his employment status between 2013 and January 2018. The claimant's case was that he had been employed by FAL since 2013 under an implied contract of employment. He was not arguing that he had ever been an employee of his own business, SMD & Co. During the parties' closing arguments, they agreed on the legal test that we would have to apply. The test was whether or not it would be necessary to imply a contract of employment between the claimant and FAL.

2.4. During the hearing, the claimant changed his case as to who had been the "client" for the purposes of regulation 3(1)(b) of TUPE. His initial position had been that the client was Fractional Ownership Consultancy Limited (registered in the British Virgin Islands). During closing submissions, without objection from Langley, the claimant's counsel indicated that the real client was The Resort Group and other property developers.

2.5. The claimant's case, as stated in the Grounds of Claim, had been that the date of the transfer was 4 May 2018. That part of the claimant's case was revisited in the parties' closing arguments. The employment judge put the following question to counsel: If the tribunal were to find that no transfer took place on 4 May 2018, is the tribunal constrained to find that no transfer occurred at all, or is it open to the tribunal to find that a relevant transfer took place on a later date? In answer to that question, counsel for Langley indicated that there was no procedural obstacle to the tribunal finding that there had been a transfer after 4 May 2018. To avoid doubt, Langley resisted any such finding on its merits.

2.6. Langley's response to the claim denied that Langley had carried out activities for the client. Though this issue was not identified in the list of issues, it was plainly a ground on which Langley sought to defend the claim. David Hannah

was cross-examined extensively on this point and we saw no difficulty in adding it to the issues that we would have to decide.

2.7. The list of issues included a question about which of FAL's employees had been carrying out activities on the client's behalf. Though it did not use the language of regulation 4 of TUPE, we took this question to be addressing an important test contained within that regulation. The test was this: if there was a relevant transfer from FAL to Langley, was the claimant assigned to the organised grouping that transferred? Our understanding that this was a live issue was reinforced by the parties' cross-examination and closing arguments.

2.8. At the start of the hearing, counsel for Langley made a concession in relation to the complaint of unfair dismissal. It was this: if there was a relevant transfer, the claimant was dismissed prior to the date of the transfer, and transfer was the sole or principal reason for the dismissal, the claimant's employment would be treated as having transferred to Langley. We treated this concession as simply being an acknowledgement of the effects of regulation 4(3) of TUPE. We did not interpret the concession as meaning that the tribunal's hands would be tied on the question of whether the claimant was assigned to the organised grouping that transferred.

2.9. According to the tribunal's records, FAL appeared to be in administration. At an early stage of the hearing, the employment judge raised the issue of whether or not the administrator had given consent to the bringing of the failure to consult complaint against that company. We were informed that FAL had gone into voluntary liquidation and (in case it were necessary) the liquidator had given consent.

2.10. Counsel for Langley confirmed that the company maintained its stance that the claimant's contract of employment with FAL was unenforceable by him. He clarified the basis of his argument. The contract was, he said, unenforceable because the claimant had entered into it in breach of his duties as a director to act in FAL's best interests.

2.11. The claimant indicated that he had received various payments from the Secretary of State in respect of alleged liabilities of FAL to pay wages. It was clear from the claimant's witness statement that he was not pursuing any complaint against FAL for unlawful deduction from wages or for damages for breach of contract. He was solely concerned with the liability of Langley.

2.12. The claimant had initially named Fractional Property Solutions Limited as a respondent, but did not pursue his claim against that company.

3. Mapping these significant modifications onto the original list, we considered that the issues we had to determine were as follows:

<u>Unfair dismissal</u>

(1) Was it necessary to imply a contract of employment between the claimant and FAL between 2013 and January 2018? If not, the claimant would not have had sufficient continuous employment to acquire the right not to be unfairly dismissed.

(2) Was the claimant employed by FAL from January 2018? If not, his employment could not have transferred to Langley and the complaint of unfair dismissal would fail. It was common ground that the claimant had an express contract of employment with FAL. The issue was whether or not that contract was unenforceable by him on the ground that he had entered into it in breach of his duties as a director to act in FAL's best interests.

(3) If the claimant was employed by FAL, we had to decide whether or not there was a relevant transfer from FAL to Langley within the meaning of regulation 3(1)(b)(ii) of TUPE. The questions here were:

(a) Who was the client?

(b) What activities did FAL carry out for the client?

(c) Did Langley carry out activities for the same client after FAL had ceased to carry them out?

(d) Were those activities fundamentally the same as those which FAL had carried out?

(e) Immediately prior to the service provision change, was there an organised grouping of employees which had as its principal purpose the carrying out of those activities?

(f) Did the client intend that the activities would, following the service provision change, be carried out by Langley otherwise than in connection with a single specific event or task of short-term duration?

(g) If there was a relevant transfer, when did it occur?

(4) If there was a relevant transfer, we had to decide whether or not the claimant was assigned to the organised grouping that transferred.

Further questions would have arisen had these questions been answered in the claimant's favour. There was no dispute about whether the claimant had been dismissed, but we would have needed to make a finding about the sole or principal reason for dismissal. We would also have had to establish the effective date of termination, as this would have enabled us to know whether or not the claim had been presented within the statutory time limit. As it was, we did not find it necessary to address these matters.

<u>Failure to inform and consult</u>

(5) To determine whether a duty arose under regulation 13, we had to ask ourselves, first, whether or not there had been a relevant transfer from FAL to Langley.

(6) We then had to determine issues relating to the tribunal's jurisdiction. The starting point was to identify, as above, the date on which the relevant transfer had occurred. Having regard to that date, we then had to ask ourselves:

(a) Was the complaint presented within the statutory time limit, allowing for early conciliation?

(b) If not, was it reasonably practicable for the complaint to have been presented within the statutory time limit?

(c) If not, was the complaint presented within such period as the tribunal considers reasonable?

(7) The final question was whether or not the claimant was an "affected employee" within the meaning of regulation 13.

Unlawful deduction from wages

(8) The claimant was not paid by FAL or any other employer from 30 April 2018 onwards. He claimed that his wages remained properly payable from that date until 19 June 2018 and that there was an unauthorised deduction from his wages on every pay date when he was not paid. In the first instance we had to decide whether or not the claimant had any enforceable contract of employment with FAL. Then we had to determine whether the claimant's employment had transferred from FAL to Langley. That issue would be determined by addressing issues (3) and (4) above.

(9) If those issues were determined in the claimant's favour, we would have had to determine the date of the last deduction in the series and whether the claim was presented within the statutory time limit which ran from that date.

Breach of contract (wrongful dismissal)

(10) Likewise, the claim for damages for breach of contract was solely against Langley. We had to determine the same issues as under the heading of unlawful deduction from wages. There was no dispute as to whether or not the claimant was dismissed or as to the length of the claimant's notice period.

Evidence

4. The tribunal heard oral evidence from the claimant, Mr Nick Hannah and Mr David Hannah. All three witnesses confirmed the truth of their written witness statement and answered questions. Additionally, the claimant relied on the contents of his written reconsideration application dated 10 December 2018 as his explanation as to why it was not reasonably practicable to have presented his claim against Langley within the statutory time limit.

5. We also considered documents in an agreed bundle which ran to two volumes. Additionally we considered minutes of a "meeting of the director" held on 30 January 2018.

6. This is a convenient opportunity for us to record our general impressions of the evidence. All witnesses presented as intelligent and articulate. They all had considerable self-interest in presenting their narrative to suit their case, or that of their company. When assessing the reliability of the claimant's evidence, we could not ignore the artificiality of the agreements that he had reached, effectively, with himself. The credibility of the respondents' account was

undermined by the fact that David Hannah had not searched for a document which he had in his control and which was obviously highly relevant. Overall, where there were disputes of fact, we did not find the self-serving oral evidence particularly helpful in resolving them. Rather, we tended to rely on the documents and on admissions of fact made by witnesses contrary to their own interests.

Facts

7. The claimant is one of a group of businessmen, who all happen to be men. Others in the group include Mr Nick Hannah and Mr Jerry Cobb. The claimant lives on Wirral, UK; Mr Nick Hannah and Mr Cobb live in Guernsey.

8. For a number of years these men worked together in the same business. Their venture operated within a property investment scheme. Essentially the scheme existed to allow investors to own portions of overseas holiday property. Developers sold fractional interests in a resort in Cap Verde. The developer at the centre of this business was The Resort Group ("TRG"). Each fractional interest in the property was held by a separate UK registered company limited by guarantee ("LBG"). Each LBG was required to have an individual director resident in the UK. The business supplied a personal director for each LBG and provided administration services such as filing of returns with dormant accounts. The package was paid for by the developer, TRG. Approximately 1,400 LBGs were serviced in this way.

9. The business operated through an elaborate corporate structure. It is not necessary to set it out in full, but here are some of the essentials:

   9.1. The parent company of the group was known as "FISH". Mr Cobb was the largest shareholder. Minority shareholders of FISH included the claimant, who had a 15% share.

   9.2. FISH wholly owned a company registered in the British Virgin Islands. The company was called Fractional Ownership Consultancy Limited ("FOCL"). Directors of FOCL included Mr Nick Hannah.

   9.3. Another subsidiary of FISH was Fractional Secretaries Limited. The company stood as company secretary to the companies in the FISH group and also to the LBGs.

   9.4. FOCL also owned Fractional Trustees Limited which owned FAL (this respondent). Its purpose was to be a nominal party to a service agreement for administration services to the LBGs. From the date of incorporation until January 2018, FAL was dormant.

   9.5. The claimant had his own business, trading under the name, "SMD & Co". From 17 May 2013, the claimant was the director of FAL. He was also the individual director of the LBGs.

10. In about May 2013, Mr Cobb informed the claimant of the proposed business arrangement. He told the claimant that the group needed a presence in the UK for the activity of administering the LBGs, and he wanted the claimant to set it up. Mr Cobb told the claimant that a "sub-contract arrangement would be the best way to structure it." They agreed on a mechanism. FAL, though dormant, would

be a nominal party to a three-way service agreement. The other parties to the agreement would be FOCL and the claimant (as principal of SMD & Co). Mr Cobb wanted the claimant, through SMD & Co, to "step into the shoes of FAL" in providing the administration services to the LBGs.

11. Accordingly, on 17 May 2013 the claimant was appointed as director of FAL. On 20 May 2013 the claimant, FAL and FOCL entered into the service agreement.

12. By the terms of the agreement, the claimant agreed to provide the following services:

> "The incorporation of UK companies (limited by guarantee and/or limited by shares)
>
> The issuing of a Power of Attorney for each company to acquire real estate
>
> The provision of UK resident shareholders and directors to such companies
>
> The provision of a UK resident company secretary
>
> The maintenance of a UK registered office for all companies
>
> The provision of UK company secretarial and administration services
>
> Such additional administration services as may be agreed between the parties in writing from time to time"

13. There is a dispute about whether at any stage there was a concluded agreement between FAL and FOCL that supplanted the 17 May 2013 agreement. We have seen a copy that appears to have been signed by all parties, but there is a dispute about when the signatures were added on behalf of FOCL. We do not think it is necessary to resolve that dispute. FAL remained dormant until 2018. Up to January 2018, the services to FOCL for the LBGs were actually provided by SMD & Co on FAL's behalf.

14. The claimant occupied an office in his home in Heswall. Through SMD & Co and he employed a small team of support staff. We will call them EH, LW and Ms C. (It is possible that there may have been one or two others, but, if they existed, we did not think it important to identify them.) EH's work was administrative and devoted almost entirely to supporting the formation and administration of LBGs. LW's role was Office Manager. She exercised supervision over the other support staff. She had some budgetary responsibility but the main purpose of her role was to participate in and maintain the support team for the LBGs.

15. Between them, the claimant and his support staff carried out the following activities:

    15.1. The formation of LBGs;

    15.2. The creation of companies' memoranda and articles of association;

    15.3. Processing new fractional membership applications and membership transfers;

    15.4. Carrying out anti-money-laundering checks and due diligence checks on new investors to comply with money laundering regulations and to protect FOCL's developers and members;

15.5. Issuing membership certificates; and

15.6. General company administration for the companies to ensure compliance with UK company law, tax legislation and regulatory requirements, including the provision of personal directors and a company secretary on their behalf.

16. The claimant, as personal director, had statutory personal responsibility for ensuring that he LBG companies were properly administered, which would include taking responsibility for filing returns, submitting dormant accounts and generally keeping the company in good order with Companies House. The actual work of doing these things was done by the support staff.

17. To help them carry out these activities, SMD & Co's staff used bespoke software developed by Nick Hannah for use by the group as a whole.

18. In about 2016 the group explored the possibility of developing a new venture, known as "Oyster". The claimant was heavily involved in planning a new corporate structure to enable the Oyster business to be separated from the business of FOCL. Under the proposed new structure, SMD & Co would provide administrative support not just to LBGs run by FOCL, but also to different LBGs established through the Oyster business. The claimant's work on this venture, and the proposed new structure to accommodate it, carried on until about April 2018. The work was strategic and had little to do with administering the LBGs for TRG.

19. At the time with which this claim is concerned, the business had started to decline. Few, if any, new investors were joining the scheme. This meant that there was little work to be done in checking new investors, processing new applications, forming new LBGs and creating the documents necessary for their incorporation. In a separate development, companies were no longer legally required to have a company secretary. There remained, however, a substantial body of work to be done in continuing to administer the existing LBG portfolio. In particular, the LBGs were required to submit returns and dormant accounts to Companies House. Where investments changed hands, SMD & Co would be involved in carrying out checks on the new owners.

20. On 25 October 2017 the claimant met with a claims handler (or "ambulance-chaser" as he was described by Mr Hannah), by the name of SV. This was an unwelcome development. SV specialised in what might conveniently, if not accurately, be called "mis-selling" claims. He was trying to obtain a client list from FOCL, with a view to recruiting investors to bring mis-selling claims against TRG. The conversation led the claimant to fear that the claims might attract the attention of the Financial Conduct Authority and that, as director of the LBGs, he might be exposed to personal liability. At some point he asked for an indemnity from FOCL in respect of his activities as personal director. There is a dispute about when he first asked, but we do not think it is necessary to determine that dispute. By March 2018 at the latest, the claimant made it clear that a suitable indemnity was a key condition of the claimant's continued participation in the business.

21. In mid-December 2017 Barclays Bank withdrew banking facilities to FOCL. On legal advice, Mr Cobb started using his personal joint bank account to deposit money paid by TRG to FOCL. The claimant was unhappy with this practice and voiced his concern orally to Mr Cobb.

22. During November 2017 and in early 2018, Nick Hannah discussed the business with his brother, David. Unlike Nick Hannah, who lived in Guernsey, David Hannah lived on the UK mainland and was eligible to be a UK-based director. David Hannah had a large tax consultancy business. He also provided services as a personal officer at various companies. He was the director of Langley, which employed a team of support staff. His usual business model was to provide his personal director services through Langley.

23. Nick Hannah told David Hannah that he was having trouble with the claimant (who he may have mentioned by name or simply referred to anonymously as "a director"). By this time, Nick Hannah had realised that the claimant might suddenly cease to be personal director of the LBGs. That would leave FOCL having to find a replacement UK resident individual at short notice to stand in his place. That person would have to be personally responsible for the administration of the companies. Nick Hannah asked his brother if he would be prepared to take over.

24. On 4 January 2018 the claimant met with staff of SMD & Co. Extensive minutes of the meeting give us an insight into the work done by the claimant and his staff respectively. The claimant reported on the prospect of new business with a client, ARG (Abcock Resort Group), his liaison with pension providers and due diligence exercises. There was a further discussion of the status of the Oyster business. There was comparatively little discussion of the administration work for the guarantee companies, or any of the activities done by SMD & Co for FOCL.

25. In January 2018 the claimant sent two emails to Mr Cobb proposing that FAL be made ready for a potential acquisition. He proposed that there should be a TUPE transfer into FAL from SMD & Co. The proposal would potentially make FAL a more attractive proposition to a prospective buyer of the business. In the hearing before us, the parties disagreed about who they envisaged the buyer to be. Was it TRG, as part of an insourcing exercise, or was it another potential purchaser, who might take on TRG as a going concern? We do not find it necessary to resolve this dispute. Whoever the buyer was going to be, two things are plain. The first is that it shows the claimant's focus at this time was on strategic matters rather than delivery of SMD & Co's activities for FOCL to support the LBGs. What is also clear is that Mr Cobb knew from January 2018 that FAL might acquire employees. He did not raise any objection to the proposal.

26. On 29 January 2018 a Business Purchase Agreement was executed between the FAL and SMD & Co. The claimant signed the agreement on behalf of both parties: that is to say, he signed as principal of SMD & Co and as director of FAL. By the terms of the agreement, FAL acquired all the goodwill in SMD & Co in exchange for £1.00. FAL agreed to take on the responsibility as transferee of all liability of employees of SMD & Co.

27. Under the heading, "Employees", the Business Purchase Agreement provided:

"

26. The Transfer of Undertakings (Protection of Employment) Regulations will apply to this Agreement so that the contracts of employment for all employees will have effect as from the Closing Date as if the Seller's contracts of employment with the employees had been made between the Purchaser and the employees.

27. For the avoidance of doubt, it is expressly acknowledged by the Purchaser that the commencement date of the employment of David Leslie Bates with the Purchaser was 17 May 2013. In addition, the Purchaser acknowledges and accepts that the Transfer of Undertakings (Protection of Employment) Regulations apply to David Leslie Bates in respect of his role with the Seller from the date of the contract with [FOCL] on 20 May 2013."

28. On 30 January 2018, at a "meeting of the director" (singular) of FAL, the claimant, as sole director, resolved to enter into a contract of employment with himself. He also resolved on the company's behalf to enter into contracts with the support staff.

29. On the same day, the claimant signed a contract of employment on behalf of FAL, as employer. He then signed it again, this time on his own behalf, as employee. He adapted the contract from a template that he had found. Relevantly, the contract provided:

"

1.1 Your employer is Fractional Administration Limited ("FAL")… Your employment with the Company commenced on 17th May 2013, the date of your appointment as a director. For the record, the Company acknowledges that your previous involvement with the contractual work now transferred to the Company is recognised by us as a TUPE transfer. This means that the consultancy with SMD & Co counts towards your period of continuous employment with the Company with effect from 20th May 2013, the date of the contract between SMD & Co, FAL and The Fractional Ownership Consultancy Limited."

…

2.1 You are employed as a Director and report to the Board of Directors.

2.2 Your duties are to control the affairs of the Company and undertake all activities reasonably required to achieve that.

…"

30. Other contracts were issued to the support staff. They were given written job descriptions setting out various responsibilities for the purpose of supplying administration services to FOCL. The claimant did not give himself a job description.

31. We pause here to reflect on the significance of these contractual documents, not in terms of their legal meaning, but what they tell us about the claimant's state of mind at the time of signing them:

31.1. First, we find that, at the time of signing the documents, the claimant did not really believe that he had been an employee of FAL since 2013. FAL had been dormant between 2013 and 2018. If the claimant thought that FAL had been his employer since his appointment as director, he would not have drafted express clauses purporting to recognise that his employment had transferred to FAL under TUPE. The claimant attempted to explain these clauses in his oral evidence. He told us that he was "not an employment lawyer" and that he had inserted these clauses "for the avoidance of doubt". But that does not explain why, with the assistance of employment lawyers, he made a witness statement which stated, "my employment was TUPE transferred to [FAL] from SMD & Co." The more likely explanation is that the claimant was trying to use an artificial device to create a retrospective employment relationship where none had existed.

31.2. Second, the exercise gives us a further insight into the nature of the claimant's work as a director of FAL. It would undoubtedly have taken a good deal of time and thought for the claimant to buy his business on FAL's behalf, to draft new employment contracts for himself and his support staff, then to devise a means of ratifying them. This effort was part of a strategic attempt to move assets and liabilities to FAL. It is debatable whether that strategy worked in FAL's best interests (by tying in staff) or to its detriment (by giving it employment obligations to the claimant). Either way, the claimant's work in this regard did not have the purpose of delivering the activities that SMD & Co had been carrying out for FOCL or TRG.

32. On 13 March 2019, Nick Hannah sent an email to David Hannah referring to an earlier conversation. He gave details of the number of LBGs and asked for information to enable FOCL to undertake due diligence on Langley. We find that at this time, it was envisaged by Nick Hannah and David Hannah that Langley would be the corporate vehicle by which David Hannah would provide services to the LBGs if required to do so.

33. On 27 March 2019, at an informal FISH shareholder meeting, the claimant made known his wishes for the future business relationship going forward. They included Mr Cobb's ceasing to use his personal bank account and provision of an indemnity for the claimant. He set out his proposal in an e-mail two days later. The respondents characterised these wishes as "demands". The claimant's version is that these were not demands, and that there had been some measure of informal agreement to the claimant's proposals amongst the shareholders. To our minds, the label is not important. The claimant made clear that his future participation would be conditional on his proposals being accepted. Nor do we need to determine whether there was an initial informal agreement. There was no resolution to adopt his proposals at the meeting. Everyone is agreed that the proposals were rejected soon afterwards.

34. On 5 April 2019 Nick Hannah emailed David Hannah. It is clear from that email that Nick Hannah wanted David Hannah not just to be a name on Companies House records but actively to "look after" the LBGs. The e-mail did not make clear what corporate vehicle David Hannah would be expected to use for this purpose. The precise legal entity was less important to them than ensuring that the services would actually be provided.

35. By 10 April 2019, Nick Hannah suspected that the claimant would assert that FAL had employees. He made an enquiry of Mr Piercy about a previous member of support staff.

36. Having taken legal advice, Nick Hannah rejected the claimant's proposals. He informed the claimant of his decision by email on 12 April 2019. Within nine hours, the claimant emailed his resignation from all 1,400 (or so) LBGs. A few minutes later, Nick Hannah sent an e-mail to Mr Piercy. His e-mail stated, "I suppose we should be quaking in our boots?" The rhetorical question demonstrated Mr Hannah's lack of concern at that time. He would not have been quite so glib if he had thought that there would be nobody to provide administration services to the LBGs. But he knew David Hannah was waiting in in the wings. David Hannah would not just appear as a name on Companies House, but would, through whatever corporate vehicle, take on the responsibility for administering the LBGs. That is why, later on 12 April 2019, Nick Hannah e-mailed David Hannah to say, "Ok, you're in play".

37. On 13 April 2018 Nick Hannah forwarded to David Hannah a draft agreement between FOCL and Langley. Although the agreement was never signed, it shows what activities Nick Hannah expected Langley to do. The services were listed in Schedule 1 to the draft agreement. We quote selectively from the Schedule, omitting services in connection with the setting up of new LBGs. This is because it was not expected that there would be any significant number of new investors. Likewise we have omitted references to the provision of company secretaries, which had become obsolete. With those activities deleted, the Schedule read as follows:

> "
>
> (1) Take over the administration of the existing portfolio of the Fractional Group's Clients' UK companies … and provide services as detailed below to them.
>
> (2) Take over the administration of all other UK "group" companies connected to The Fractional Group and the Obligated Parties.
>
> …
>
> (5) The Operation of the Fractional Group's bespoke software package which contains all the statutory records of the Administered Companies [LBGs and companies within the Group] and produces automated documents …and provides automated workflows for certain administrative functions.
>
> (6) Identifying and dealing with the ultimate beneficial owners of Administered Companies…
>
> (7) The provision of UK resident corporate shareholders (where necessary), to act as nominees on behalf of the [ultimate beneficial owners] …
>
> (8) Provision of UK resident corporate directors to Administered Companies.

(9) To provide an individual to act as the personal director for Administered Companies (as required under UK Company Law).

…

(11) The maintenance of a UK registered office for Administered Companies.

(12) The provision of UK company secretarial and administration services, including, inter alia, dealing with HMRC, Companies House, the Members of Administered Companies, and the clients of the Fractional Group, as necessary or appropriate.

(13) Where requested and deemed appropriate, the issuing of a Power of Attorney for Administered Companies.

(14) Providing accounting services for the Fractional Group in connection with Administered Companies including the collection of cash payments.

…

(16) Such additional administration as may be agreed between the parties from time to time.

38. Shortly after 12 April 2018 Nick Hannah and the claimant had a conversation. During that conversation the claimant informed Nick Hannah for the first time that he considered himself to be an employee of FAL. Nick Hannah was surprised.

39. On 24 April 2018 an exchange of emails show that Nick Hannah and Mr Piercy realised that FOCL would have to pay David Hannah, or his company, for staff costs. Nick Hannah envisaged that his brother might simply become director of FAL and the day-to-day work be done by "the girls". This rather outdated term was a reference to EH and LW, who, at that time, were employed by FAL.

40. On 1 May 2018, FOCL was struck off the Register of Companies in the British Virgin Islands. Nick Hannah did not become aware of FOCL's dissolution until October 2018. He continued to press ahead with the recruitment of his brother.

41. On 4 May 2018 David Hannah was appointed by FAL's corporate shareholders as a director of FAL. He was also appointed as director of the LBGs. He set about trying to notify Companies House of his appointment.

42. The same day, FOCL's lawyers in Guernsey wrote to the claimant with an ultimatum. He must either resign as a director of FAL or circulate a written members' resolution removing him and replacing him with David Hannah. The claimant took legal advice on that request. Having done so, he replied, stating that he considered the request to be contrary to company legislation.

43. The idea of continuing to provide the service through FAL was ultimately rejected by FISH. Nick Hannah was informed by TRG that it wanted to sever any ties with FAL. The sticking point was that the claimant was still director of FAL, despite having resigned from all the LBGs. By this time, TRG had lost trust in the claimant and wanted the administration of the LBGs to be done by a company with which the claimant had no connection. (It is not necessary to dwell on the

reasons why TRG no longer trusted the claimant. At the risk of oversimplifying the position, TRG's suspicions had been aroused by a direct approach that the claimant had made to TRG.)

44. By 8 May 2018, the claimant had closed FAL's office. In practice, what that meant was that the claimant no longer used the office room in his home for FAL purposes. The laptops remained in the room. EH and LW did not have access to them. They stopped doing administrative work on the LBGs.

45. On 10 May 2018, the claimant warned Mr Hannah that he might face personal liability as a director. By this time, the claimant was in receipt of legal advice. He did not ask his solicitors to research David Hannah's directorships. Had he done so, he would have discovered that David Hannah was the director of numerous companies. That information was available on the Companies House website. What was not clear, however, was which of those companies might have been involved in the provision of services previously provided by FAL.

46. On 19 June 2018 the claimant placed FAL into administration. On instructions from the administrator, all FAL employees were dismissed, including the claimant himself.

47. In the meantime, David Hannah was having difficulty in notifying Companies House of his appointment and in filing statutory returns for the LBGs. The problem was that he did not have the access codes for Companies House for the LBGs. The codes were kept on the laptops inside the claimant's house. Companies House would not accept paper notifications because FAL had opted for the online service. It was therefore impossible for David Hannah to submit the notifications in the correct form. As a result, many of the LBGs were struck off the Register of Companies.

48. For those LBGs that were not struck off, David Hannah, and his administrative staff, were able to start administrative activities from about June 2018. Broadly speaking, he and his team provided the service that was listed in the Schedule to the draft agreement. The day-to-day work that was required, and the day-to-day work that was actually done, was the ongoing administration of the existing LBGs. Returns and dormant accounts had to be filed with Companies House. He and his support staff used the same software that the claimant's administrative team had used. There was also the occasional power of attorney to complete, but this was relatively rare.

49. By June 2018, there was still no concluded service agreement between FOCL (or any other FISH company) and Langley. Neither was there any service agreement with David Hannah personally.

50. The claimant made a claim to the Secretary of State's Redundancy Payments Service for payment of his wages from 30 April 2018 to 19 June 2018. The basis of his claim was that he had been employed by FAL during that period. The Redundancy Payments Office accepted that the claimant had been employed by FAL and made a payment to the claimant in respect of his unpaid wages. The payment was subject to the statutory cap on a week's pay.

51. On 7 September 2018, the claimant commenced early conciliation with Mr David Hannah. On 10 September 2018, the claimant commenced early conciliation

with FAL. He obtained certificates from ACAS respectively on 7 and 10 October 2018. By this time the claimant had not been copied in to any of the e-mails and messages passing between Nick Hannah and David Hannah. He was unaware of Langley's involvement in continuing to administer the LBGs

52. The attempts by FISH group to rectify matters with Companies House continued into the autumn of 2018. On 10 October 2018, Mr Piercy wrote to Companies House. Relevantly, the letter read,

> "In May 2018 [Langley] were appointed to perform the administration services for Fractional Secretaries Limited following the resignation of a director who left the company on bad terms. This involved the administration of over 1500 companies… These services were previously provided by [the claimant].
>
> On 31st July 2018 [Langley] wrote to [Companies House] advising that [Langley] had recently been appointed to perform the administration services for Fractional Secretaries Limited and that Mr David Warren Hannah is the new Director of Fractional Secretaries Limited"

53. Langley did not call Mr Piercy as a witness to explain this letter to us. Doing our best to interpret it in his absence, we think that the reference to "Fractional Secretaries Limited" is likely to have been a mistake. It was David and Nick Hannah's evidence that, by this time, Fractional Secretaries Limited had virtually nothing to do. There was no requirement for any of the group companies to have a company secretary. All administration work for the group companies was done by the directors. We think it likely that Mr Piercy was in fact referring to FAL, or at least to the corporate entity responsible for administering the LBGs. We also find it significant that Langley has never attempted to disclose its letter 31 July 2018. That letter would have been highly relevant. It would have told us when the controlling mind of Langley considered that Langley had first started out carrying out the activities previously done by FAL.

54. We are now in a position to record our finding about the capacity in which David Hannah was acting whilst he and his staff administered the LBGs. In our view, David Hannah provided this service as director of Langley. He did not do it as a sole practitioner. Langley was the usual corporate vehicle by which David Hannah provided his services as a company director. It was envisaged in the e-mail of 13 March 2018 that Langley would be the company providing the service previously provided by the claimant through FAL. The position was confirmed by Mr Piercy on 10 October 2018 and, in all likelihood, by Langley itself on 31 July 2018.

55. Companies House replied to Mr Piercy's letter. By mistake, the letter was sent to the claimant's home address. We did not record the date of the letter, but the claimant received it in the first week of November 2018. On reading the letter, the claimant discovered for the first time that Langley was the company providing the administration service previously supplied by FAL.

56. The claimant presented his first claim to the tribunal on 7 November 2018. It included a complaint of failure to inform or consult. He named Langley as a respondent to the claim, but did not include any early conciliation certificate number in respect of Langley. Indeed, he could not have provided a certificate

number because he had not notified ACAS of any prospective claim against that company at that time. The claim against Langley was initially rejected for lack of a certificate number. Following a reconsideration application dated 10 December 2018, Regional Employment Judge Parkin directed on 10 January 2019 that the claim against Langley should be accepted.

Relevant law

Implied contract of employment

57. A contract of employment may be express or implied: see section 230(2) of ERA.

58. Where there are express agreements governing the relationship between the parties that are inconsistent with a relationship of employment between two of them (such as typically occurs where an agency worker is supplied by an agency to an end-user), the tribunal may nevertheless conclude that there was an implied contract of employment between those two parties. Such a contract will only be implied if it is necessary to explain the business reality: *James v. London Borough of Greenwich* [2008] EWCA Civ 35.

Validity of contracts

59. At common law a director owes a fiduciary duty to the company's members. The duty includes an obligation to act in good faith in the best interests of the company.

60. Additionally, section 172 of the Companies Act requires a director to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. By section 178, "the consequences of breach of [section 172] are the same as would apply if the corresponding common law rule or equitable principle applied."

61. Section 188 applies to a provision under which the guaranteed term of a director's employment with the company of which he is a director is, or may be, longer than two years. A company must not agree to such a provision unless it has been approved by a resolution of the members of the company. Where section 188 is contravened, the provision is void to the extent of the contravention and the contract is deemed to contain a term entitling the company to terminate it at any time by the giving of reasonable notice.

62. We have had regard to law relating to invalidity of contracts. We searched for cases that might tend to show that an otherwise valid contract would be void or unenforceable because the director entering into the contract was not acting in the best interests of the company. We cannot find any such case. During the course of the hearing we asked counsel if they were aware of any authority to establish the same proposition. They could not point to any authority.

63. In our view, it is likely that, had Parliament intended that a director's contract of employment should be void or unenforceable if entered into in breach of the duty to act in the best interests of the company, there would have been a statutory provision expressly providing for that to happen.

Unlawful deduction from wages

64. Section 13 of ERA provides (subject to exceptions) that an employer must not make a deduction from the wages of a worker employed by him.

Breach of contract

65. In certain circumstances an employee may bring a claim for damages against the employer for breach of contract. The tribunal does not have jurisdiction to consider breach of contract claims otherwise than against the employer.

Right not to be unfairly dismissed

66. Section 94 of ERA creates the right not to be unfairly dismissed. That right is subject to section 108 of ERA, which provides:

> "(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."

Relevant transfer

67. Regulation 2 of TUPE relevantly defines a "relevant transfer" as "a transfer…to which these Regulations apply in accordance with regulation 3".

68. Regulation 3(1) of TUPE provides, so far as is relevant:

> (1) These Regulations apply to-
>
> ...
>
> (b) a service provision change, that is a situation in which-
>
> …
>
> (ii) activities cease to be carried out by a contractor on a client's behalf…and are carried out instead by another person ("a subsequent contractor") on the client's behalf;…
>
> and in which the conditions set out in paragraph (3) are satisfied.
>
> …
>
> (2A) References in paragraph (1)(b) to activities being carried out instead by another person … are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.
>
> (3) The conditions referred to in paragraph (1)(b) are that…
>
> (a) immediately before the service provision change-
>
> (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client; [and]
>
> (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration…

Effect of a relevant transfer

69. Regulation 4 makes provision for the effect of a relevant transfer on contracts of employment. Relevantly it reads:

> (1) …a relevant transfer shall not operate so as to terminate the contract of employment employed by the transferor and assigned to the organised grouping of … employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
>
> (2) Without prejudice to paragraph (1)… on the completion of a relevant transfer-
>
> (a) All the transferor's … liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
>
> (b) Any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contact or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

Client

70. For there to be a transfer within regulation 3(1)(b), the client must remain the same before and after the service provision change.

71. There may be more than one client, provided that the grouping of clients are able to form a common intention: *Duncan v. Ottimo Property Services Ltd* [2005] IRLR 806.

72. The tribunal is entitled to look behind corporate structures and ask itself, "Who is the real client?" See *Horizon Security Services Ltd v. Ndeze* [2014] IRLR 854 and *Jinks v. London Borough of Havering* UKEAT/0157/14.

Organised grouping

73. In *Rynda (UK) Ltd v. Rhijnsburger* [2015] EWCA Civ 75, [2015] IRLR 394, Lord Justice Jackson, giving the principal judgment in the Court of Appeal, laid down a four-stage test for determining whether there was an organised grouping of employees:

> "If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within regulation 3 of TUPE. The first stage of this exercise is to identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a "grouping" for the principal purpose of carrying out the listed activities."

74. In *Amaryllis Ltd v McLeod* UKEAT/0273/15*,* the EAT emphasised that the principal purpose of any organised grouping of workers must be assessed at the point immediately before the change of provider, and not historically.

75. The tribunal should not confuse the issue of whether there is an organised grouping with the question of who is assigned to that grouping. A paradigm example of an organised grouping is an identified client "team". The fact that certain individuals happen to do most of their work for a particular client does not mean that there was an organised grouping of employees: *Eddie Stobart Ltd v Moreman* [2012] IRLR 356*.* There needs to be an element of conscious organisation: *Ceva Freight (UK) Ltd v. Seawell Ltd* [2013] IRLR 726.

76. In *Argyll Coastal Services Ltd v Stirling* UKEATS/0012/11 Lady Smith observed that "the phrase, 'organised grouping of employees' connotes a number of employees which is less than the whole of the transferor's entire workforce, deliberately organised for the purpose of carrying out the activities required by the particular client and who work together as a team".

<u>"Assigned"</u>

77. The word, "assigned" in regulation 4 is derived from the decision of the European Court of Justice (as it was then called) in *Botzen v Rotterdamsche Droogdok Maatschappij BV* 186/83 [1985] ECR 519*,* [1986] 2 CMLR 50:

> "the … decisive criterion regarding the transfer of employees' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organizational framework within which their employment relationship took effect… An employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred…by reason of a transfer … it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned."

78. Employment tribunals should bear in mind the protective purpose of the directive and the need to avoid complicated corporate structures getting in the way of the result which gives effect to that purpose: *Duncan Webb Offset (Maidstone) Ltd v. Cooper* [1995] IRLR 633.

79. In *Edinburgh Home-Link Partnership v The City of Edinburgh Council* UKEATS/0061/11, Lady Smith commented:

> "Regarding the Reg 4 issue of assignment, the question has to be asked in respect of each individual employee. It is not to be assumed that every employee carrying out work for the relevant client is assigned to the organised grouping….if, for instance, an employee's role is strategic, and is principally directed to the survival and maintenance of the transferor as an entity, it may then not be established that the employee was so assigned."

80. An employee, such as a senior manager, may spend a large proportion of their time working on the activities which are done by the organised grouping that transfers. But that does not mean that the employee is necessarily assigned. If the manager's purpose is to be responsible for running a branch, or for overall project management (including projects that do not transfer), it is open to a tribunal to find that the manager is not assigned to the grouping that transfers: *Williams v. Advanced Cleaning Services & others* UKEAT 838/04.

Duty to inform and consult

81. Regulation 13(1) of TUPE defines "affected employees" for the purposes of the duty to inform and consult in relation to a relevant transfer. It provides, so far as is relevant:

> (1) In this regulation … references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

82. Regulation 13(2) lists the various obligations of the employer to provide information to appropriate representatives. Where the employer has fewer than 10 employees, the employer may treat the affected employees as if they were appropriate representatives. There is no need to set out what the duties are. This is because neither respondent contended that it had complied with those duties and neither respondent argued that there had been special circumstances preventing compliance.

Time limit

83. Regulation 15 of TUPE provides, so far as is relevant:

> (1) Where an employer has failed to comply with a requirement of regulation 13…a complaint may be presented to an employment tribunal on that ground …(d) …by any of his employees who are affected employees.
>
> …
>
> (12) An employment tribunal shall not consider a complaint under paragraph (1) … unless it is presented to the tribunal before the end of the period of three months beginning with—
>
> (a)in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed…
>
> or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

84. "Reasonably practicable" means "reasonably feasible". It is not sufficient for a claimant to show that they acted reasonably. The claimant does not, however, have to show that presenting the claim on time was not practically possible.

85. The escape clause in regulation 15(12) and in cognate statutory provisions, contains the phrase, "reasonably practicable for the complaint to be presented". The legislator has chosen the words "the complaint" instead of "a complaint". In our view, that choice of words is significant. It tends to suggest that a claimant may have the benefit of the escape clause if he could not reasonably have presented that particular complaint of breach of regulation 13, even if it would have been reasonably practicable to have presented a complaint of breach of regulation 13 on a different basis. This means that if, after the time limit has expired, an employee discovers a fact of which he was previously unaware, that is of fundamental importance to the complaint that he wishes to bring, the tribunal may be able to extend the time limit.

86. In *Machine Tool Industry Research Association v Simpson* [1988] IRLR 212, the Court of Appeal set out the principles that apply in such a situation. Purchas LJ, giving judgment, said that the determination of the issue of reasonable practicability in such a situation involves a study of the claimant's subjective state of mind. In order to obtain the benefit of the escape clause, a claimant must, according to Purchas LJ, establish three things:

    86.1. that it was reasonable for them not to have been aware of the factual basis upon which they could bring a claim during the three-month limitation period (it being accepted that it cannot be reasonably practicable to bring a case based on facts of which a claimant is ignorant);

    86.2. that the knowledge gained has, in the circumstances, been reasonably gained by the claimant, and that that knowledge is either crucial, fundamental or at least important to his change of belief from one in which he does not believe that he has grounds for an application, to a belief which he reasonably and genuinely holds, that he has a ground for making an application; and

    86.3. that the acquisition of the knowledge is crucial to the decision to bring the claim in any event.

87. For the purpose of determining whether or not to apply the escape clause in such circumstances, the relevant date for assessing the reasonableness of the claimant's belief is the date when he was considering making the complaint, and not the date of the hearing: *Marley (UK) Ltd v Anderson* [1994] IRLR 152, [1994] ICR 295.

88. If the claimant satisfies the first stage of the test, the tribunal must decide whether the complaint was presented within such further period as the tribunal considers reasonable. This is a matter for the tribunal's discretion. In exercising its discretion, the tribunal must have regard to the strong public interest in timely presentation of claims.

Conclusions

89. We now apply these legal principles to our findings of fact, using the same headings as in our formulation of the issues.

Issue (1) - Was there an implied contract between the claimant and FAL?

90. In our view it is not necessary to imply any contract of employment between the claimant and FAL. There was no implied contract between 2013 and January 2018 or at any other time. The business reality was perfectly capable of being explained by the express written agreement. The three parties to the agreement were the claimant, FAL and FOCL. At that time, FAL was dormant. All three parties agreed with each other that services would be provided to FOCL by the claimant's business, SMD & Co. In our experience it is not uncommon for company directors to provide their services through their own consultancy businesses. This explanation is consistent with what the claimant himself believed. He did not really think that he was an employee of FAL prior to January 2018 – see paragraph 31.1 above.

91. This means that the claimant was not employed by FAL prior to 30 January 2018. Assuming, for a moment, that the claimant was subsequently employed and dismissed, his effective date of termination cannot have been later than 19 June 2018. By that date he had not been employed for the qualifying period of two continuous years. He therefore had no right not to be unfairly dismissed and his complaint of unfair dismissal must fail.

Issue (2) – Enforceability of the express contract of employment with FAL dated 30 April 2018

92. It is still important, however, to determine the claimant's employment status from 30 April 2018 onwards. Such status affects the remainder of his claim. There was an express contract of employment between FAL and the claimant. In our view, that agreement was not rendered void or unenforceable by any breach of duty by the claimant.

93. The respondent contends that the claimant, as director, had failed to promote the success of FAL in the interests of its members. The matter was not clear-cut. It is true, as the respondent points out, that the award of a contract of employment exposed FAL to considerable employment liabilities where none had previously existed. On the other hand, FAL might have been more attractive to a purchaser, and more valuable to FAL's shareholders, if its employees, including its director, were tied in to the company and required to give notice of termination. This is possibly why Mr Cobb did not object when the claimant proposed that FAL might acquired employees.

94. In the end, we did not reach a firm conclusion as to whether or not the claimant had breached his duty to FAL. This was because we did not consider, as a matter of law, that such a breach would invalidate the claimant's contract.

Issues (3) and (5) – relevant transfer

95. We took issues (3) and (5) together. They pose the same question, albeit in the context of two different complaints.

Issue (3)(a) – Who was FAL's client?

96. It is unlikely in our view that FAL's real client was FOCL. Nothing particularly changed as a result of FOCL being struck off, and Nick Hannah did not even realise that it had happened.

97. In our view, FAL's real client was TRG. There does not need to be a direct contractual relationship between the client and the person carrying on the activities. TRG was the main developer whose fractional interests were held by the LBGs that FAL serviced. It is possible that there may have been other developers, who were also clients, but they were relatively insignificant. If we are wrong in our identification of TRG as the client, we would say that the client was FISH: the parent company for whose benefit the business of servicing the LBGs was conducted.

Issue (3)(b) – What activities did FAL carry out for the client?

98. Immediately prior to May 2018, the activities that FAL was carrying out for the client were:

    98.1. The provision of a personal director for the existing LBGs; and

    98.2. The ongoing administration of LBGs using the FISH group's software, including the maintenance of records and filing of returns and dormant accounts.

99. FAL had previously carried out other activities associated with the processing of new investors and LBGs. By May 2018 those activities were negligible, as new business had dried up.

Issue (3)(c) – Did Langley carry out activities for the same client after FAL had ceased to carry them out?

100. On 12 April 2018 FAL ceased doing the activity of providing a personal director to the LBGs. Shortly afterwards, and by 8 May 2018 at the latest, FAL's administrative staff ceased to do the activity of doing any LBG administration work.

101. From 4 May 2018, David Hannah, in his capacity as director of Langley, was appointed as a personal director to the LBGs. From 8 May 2018 until June 2018 there was a short lull, during which, effectively, little activity was carried out for the client except for the provision of a personal director. No returns could be filed at Companies House because Langley did not have the online codes. But from June 2018, Langley (through David Hannah) was carrying out substantial ongoing administrative work for the LBGs.

Issue (3)(d) – Were the activities fundamentally the same?

102. Our view is that the activities done by Langley for TRG were fundamentally the same as the activities that FAL was carrying out for the same client. There were minor differences. For example, David Hannah arranged the occasional power of attorney and there is no evidence that the claimant arranged any powers of attorney. Essentially, though, what both companies were doing was providing a personal director for existing LBGs and filing returns and accounts for those LBGs. They both used the same software for that purpose.

Issue (3)(e) – Organised grouping

103. FAL had an organised grouping of employees that had as its principal purpose the carrying out of the activities described above. The grouping included EH and LW. We were not sure whether or not Ms C was still an employee at this

time. LW managed the office. The office existed to enable EH and LW (and possibly Ms C) to administer the LBGs.

Issue (3)(f) - Single specific event/Task of short-term duration

104. We are required to decide whether or not the client, TRG, intended that Langley should carry out the activities. Although we did not hear from any witness from TRG, it is clear that, in May 2018, TRG wanted a new company to carry out the activities. TRG wanted the activities to be done by a new organisation with no connection to the claimant.

105. We did not understand Langley to be arguing that TRG only intended that Langley carry out the activities in connection with a single specific event or task of short-term duration. No such contention appears in Langley's written submissions. In any case, we did not find any evidence to suggest that this was TRG's intention. Langley's involvement was, we find, intended to be open-ended.

Issue (3)(g) – When did the transfer occur?

106. In our view, the service provision change happened in May 2018. We found it difficult to establish a precise date. If pushed, we would conclude that it was completed on 8 May 2018. By that time, the claimant had closed FAL's office. FAL had ceased to carry out the activities. David Hannah had taken on the personal responsibility for ensuring that the LBGs were properly administered. Initially, he, and Langley's staff, could not do very much because they did not have the online codes. But they were carrying out the activities as much as they were able to do.

107. If we are wrong in our conclusion that the transfer occurred on 8 May 2018, we would fall back on a conclusion that, whatever the date, it had been completed by 31 May 2018 at the latest. By June 2018, Langley was substantially carrying out the activities previously carried out by FAL.

108. Having resolved these issues, we find that there was a service provision change from FAL to Langley in May 2018 within the meaning of regulation 3(1)(b)(ii). In other words, there was a relevant transfer.

Issue (4) – Was the claimant assigned to the organised grouping?

109. The next question we have to decide is whether the claimant was assigned to the organised grouping of employees that transferred from FAL to Langley. Our conclusion is that he was not so assigned. We acknowledge that the claimant, as personal director of the LBGs, had individual responsibility for administering them. Without him the whole business model could not function. In our view, however, that is not enough to establish that the claimant was assigned. Being the personal director of the LBGs was only a small part of what the claimant did as director of FAL. He did not get involved in the day-to-day work of administering the LBGs. This was done by administrative staff such as EH and LW. By contrast, the claimant's work was strategic. This was the case during the years and months leading up to the transfer and immediately before it. We have given the examples of the Oyster project, the matters canvassed in the SMD & Co staff meeting, the business purchase of SMD & Co by FAL, and the claimant's

interactions with the FISH shareholders. The claimant's work was directed at furthering his own business interests. It may be a matter of debate whether or not those interests were fully aligned with the interests of FAL and the group as a whole. But whichever side of that debate prevails, what is clear is that the claimant was not assigned to the team that did the administration work for the LBGs.

Issue (6) – Jurisdiction to consider failure to inform and consult complaint

110. We now turn to the complaint of failure to inform and consult and address the time limit issue in turn.

Issue 6(a) – Was the complaint presented within the statutory time limit?

111. We found that the transfer was completed on 8 May 2018, alternatively, some later time in May 2018. This means that the last day for presenting the claim was 7 August 2018, but may have been as late as 30 August 2018. The claimant did not commence early conciliation in respect of any prospective respondent until 10 September 2018. He did not present any complaint under regulation 15 of TUPE until 7 November 2018. The complaint was therefore presented after the expiry of the statutory time limit.

Issue 6(b) – Was it reasonably practicable to present the claim in time?

112. In our view it was not reasonably practicable to present the regulation 15 complaint either by 7 August 2018 or by any other date in August 2018. Throughout the period from May to August 2018 the claimant was unaware of the facts that were fundamental to his claim. He could reasonably have guessed that some form of service provision change had taken place. The business was not going to close overnight. It was highly likely that TRG and the FISH group would find someone to carry on administering the LBGs. What the claimant did not know was the identity of the transferee. That information did not come to him until the Companies House letter was accidentally sent to his address.

113. Langley argues that it was reasonably practicable for the claimant to have discovered at a much earlier stage that Langley was a potential transferee. The claimant knew of David Hannah's involvement from 4 May 2018 and actively approached him on 10 May 2018. He had professional legal advisers at that time. We do not accept Langley's argument. Even with solicitors to help him, all the claimant could reasonably have discovered in May 2018 was that David Hannah was the director of numerous companies of which Langley was just one. In a business that involved elaborate corporate structures, the claimant could not have known which of Mr Hannah's companies was involved. Theoretically he could have named all these companies as respondents, but that would not have been a reasonably practicable step. Tribunals do not encourage a scattergun approach to litigation. It is not reasonably feasible to bring a claim until the respondent can be identified, or at least narrowed down to a small and focused group of candidates. It was not until the claimant saw the letter from Companies House to Mr Piercy that the claimant could have feasibly identified Langley as the transferee.

114. In our view, the identity of the transferee was a fact of fundamental importance to the complaint of failure to inform and consult. Although in theory

the claimant could have brought a claim solely against FAL without knowing who the transferee was, it would have been difficult for him in those circumstances to establish that there was a relevant transfer. He would not have the benefit of alleged transferee's response to the claim or any other documents disclosed by the alleged transferee. It would have been difficult for him to acquire evidence of what activities the transferee did following the service provision change, or when the transferee started doing them. It is significant in our view that the claimant presented his claim – albeit defectively – within a few days of discovering that the transferee was Langley.

Issue 6(c) – further reasonable period

115. We therefore have to consider whether the claimant presented his claim within a reasonable period after the expiry of the statutory time limit in August 2018. We find that he did. Although there is a strong public interest in claims of this kind being brought within three months (plus time for early conciliation, we do not think that it is reasonable to expect the claimant to have presented his claim until he knew the identity of the transferee. Once he discovered this important piece of information, he acted quickly. Within a few days he tried to present a claim against Langley. When it was rejected, he promptly entered into early conciliation and immediately applied for the rejection to be reconsidered. Overall, we think that the additional period from August 2018 to 10 January 2019 was reasonable.

116. The Tribunal therefore has jurisdiction to consider the complaint of failure to inform and consult.

Issue (7) – Was the claimant an affected employee?

117. In our view, the claimant was an affected employee within the meaning of regulation 13 of TUPE. For the purposes of the statutory definition, it does not matter whether or not the claimant was assigned to the organised grouping that transferred. The transfer clearly affected him. The effect of the transfer was that the company of which he was a director was little more than a shell. The claimant was excluded from FAL's former activities. Following the transfer, FAL lost all but one of its employees and its main source of income-generating work, and was no longer in a position to pay the claimant's salary.

Breach of regulation 13

118. FAL was therefore under a duty to comply with regulation 13. Because of FAL's small number of employees, and the lack of any appropriate representatives, FAL's duty was to inform and consult directly with the affected employees. Neither FAL nor Langley sought to argue that there had been compliance with regulation 13. Neither respondent contended that there were special circumstances preventing compliance. We must therefore find that the regulation 13 duty was breached and the complaint is well founded.

119. Before leaving this topic we would make one further observation. The duty to inform and consult rested with FAL, who was the claimant's employer throughout. The controlling mind of FAL was the claimant. He could not have consulted with himself about the identity of the transferee, because he did not know that the transferee was Langley until long after the transfer had taken place. Moreover,

there is only limited value in a company director providing information to himself or consulting with himself. As Langley's counsel pointed out, these observations are relevant to the claimant's remedy.

Issues (8) – unlawful deduction from wages

120. This complaint cannot stand in the light of our finding on the issue of assignment. It means that, whilst there was a relevant transfer from FAL to Langley, it did not operate to transfer the claimant's employment. The claimant was never employed by Langley. He remained employed by FAL until he was dismissed on the instructions of the administrator. Not being the claimant's employer, Langley never owed the claimant any duty under section 13 of ERA.

Issue (9) – jurisdiction to consider unlawful deduction from wages

121. The question of the tribunal's jurisdiction is somewhat academic, bearing in mind that the complaint of unlawful deduction from wages fails on its merits.

122. We considered the possibility that our conclusion on assignment might be held to be wrong and that Langley might be held to have been the claimant's employer. In that case, we would be required to rule on the tribunal's jurisdiction to consider a complaint of unlawful deduction from wages. The time limit would run from the last deduction in the series. We would have to decide when that final deduction was made. This would involve constructing a hypothetical scenario in which the claimant's employment transferred to Langley, contrary to our conclusion above, determining when when his final pay date would have been. In turn, the final pay date would have depended on the date on which the claimant's employment with Langley terminated. Fixing the date of termination would not be a straightforward exercise. It is possible that, on 4 May 2018, FOCL's lawyers acted as agents for Langley in requiring the claimant to resign as director of FAL and, in doing so, impliedly dismissed him from his employment. Another possibility is that Langley dismissed the claimant by conduct in taking over the activities in May 2018 without paying the claimant or attempting to make contact with him. Neither of these scenarios sits very comfortably with the claimant having asserted to the Redundancy Payments Office that he was employed by FAL until 19 June 2018. In the end, we decided not to determine precisely how or when the claimant's employment with Langley terminated had his employment transferred to them. We left the question of jurisdiction unanswered.

Issue (10) – Breach of contract

123. There is no jurisdiction to consider the claim for damages for breach of contract against Langley. For the reasons we have given, the claimant was never Langley's employee.

Employment Judge Horne

20 March 2020

REASONS SENT TO THE PARTIES ON

26 March 2020

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