EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANTS		**RESPONDENT**
MR K APSLEY (1) **MR J GOULD (2)**	**V**	**REVECTOR TECHNOLOGIES LIMITED**

HELD REMOTELY ON: 14 – 15 JANUARY 2021

BEFORE: EMPLOYMENT JUDGE S POVEY
(SITTING ALONE)

REPRESENTATION:
FOR THE CLAIMANTS: IN PERSON
FOR THE RESPONDENT: MR FOSTER (DIRECTOR)

JUDGMENT & REMEDY

1. The First Claimant's claims for a statutory redundancy payment, notice pay and unlawful deductions from wages are made out and allowed.

2. The Second Claimant's claims for a statutory redundancy payment and unlawful deductions from wages are made out and allowed.

3. The Respondent must pay the First Claimant the sum of £16,401.80, calculated as follows:

	£
a. Notice Pay	8500.00
b. Statutory Redundancy Payment	3675.00
c. Wages	2833.33
d. Holiday Pay	1013.47
e. Expenses	380.00
Total	16401.80

4. The Respondent must pay the Second Claimant the sum of £3,407.70, calculated as follows:

	£
a. Wages	2000.00
b. Statutory Redundancy Payment	923.08

c. Holiday Pay	184.62
d. Bank Charges	300.00
Total	3407.70

REASONS

1. These are claims by Kevin Apsley ('the First Claimant') and Joshua Gould ('the Second Claimant') against their former employer, Revector Technologies Limited ('the Respondent'). The First Claimant was employed as an administration co-ordinator. His dates of employment were in dispute. The Second Claimant was employed as an engineer from 14 June 2017. The effective date that his employment terminated was also in dispute.

2. The First Claimant brought claims of unpaid wages, holiday pay, expenses and notice pay. He also claimed to be entitled to a statutory redundancy payment, which remained outstanding. It was his case that he was told by the Respondent at the beginning of November 2019 that his employment was ending but that he would be paid up to the end of the month and that his entitlement to a redundancy payment would be considered and calculated.

3. The First Claimant submits that he has never been paid as promised or at all. In addition, at the time his employment ended, the First Claimant claimed that he was also owed outstanding holiday pay and expenses. Finally, the First Claimant submits that he was contractually entitled to three months' written notice of the termination of his employment, which he did not receive. He claims a sum equivalent to that notice period.

4. The Second Claimant brought claims of unpaid wages and holiday pay. He similarly claimed to be entitled to a statutory redundancy payment and also sought compensation for bank charges and stress. Like the First Claimant, he also submits that he was told at the beginning of November 2019 that his employment was ending, that he would be paid his wages to the end of the month and his entitlement to a redundancy payment would be considered and calculated. He too claimed that he had outstanding holiday entitlement when his employed ceased. Finally, the Second Claimant argued that as a result of the non-payment of sums owed to him by the Respondent, he had incurred bank charges in excess of £1,000.

5. Prior to the hearing, the Respondent purported to resist all claims in full. However, as set out below, a number of concessions were made on behalf of the Respondent in the course of the hearing.

The Hearing

6. The hearing was conducted remotely over two days. The Claimants represented themselves and the Respondent was represented by one of its directors, Michael Foster. The Tribunal heard evidence from each Claimant. For the Respondent, I heard from Mr Foster and Craig Stevens, a consultant formerly employed by the Respondent. I was provided with witness statements for the Respondent's witnesses which they each adopted. I took each witness through their evidence, gave guidance throughout on the Tribunal's procedures, checked the parties' understanding and encouraged them to ask questions of me throughout the hearing if there was anything, whether in law or procedure, that they were unsure of or did not understand.

7. I was also provided with a paginated joint bundle of documents to which I was referred throughout the hearing. Finally, I received oral submissions from each of the Claimants and written submissions from Mr Foster on behalf of the Respondent.

8. The Tribunal delivered its judgment with summary reasons at the conclusion of the hearing. On 25 January 2021, the Respondent requested a written copy of those reasons. These are those reasons.

The Issues

9. The parties agreed at the outset of the hearing that the issues for the Tribunal to determine were as follows:

    9.1. When, how and for what reasons were the Claimants employments terminated by the Respondent?

    9.2. When did the First Claimant's employment begin?

    9.3. What payments were the Claimants entitled to and what payments, if any, had they received to date?

The Relevant Law

10. Section 13 of the Employment Rights Act 1996 ('ERA 1996') affords a worker the right not to suffer unauthorised deductions from his wages. This involves a consideration of what sums the worker is entitled to under his contract of employment and what sums he has been paid.

11. For the purpose of section 13 of the ERA 1996, the definition of "wages" includes "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*" (per section 27(1)(a) of the ERA 1996).

12. An employee who is dismissed by reason of redundancy is entitled to be paid a redundancy payment (per section 135 of the ERA 1996). Section 136 of the ERA 1996 defines what a dismissal by reason of redundancy is. So far as relevant, it includes a dismissal which "*is wholly or mainly*

attributable to…the fact that the requirements of that business…for employees to carry out work of a particular kind…have ceased or diminished or are expected to cease or diminish" (per section 139(1) of the ERA 1996).

13. The amount of a redundancy payment is calculated according to the provisions of section 162 of the ERA 1996. At the relevant time for these claims, the amount of a week's pay for calculating a redundancy payment was capped at £525 per week (per section 227 of the ERA 1996 as in force from 6 April 2019 to 5 April 2020).

15. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('the TUPE Regulations') apply to a 'relevant transfer', which so far as is relevant to these proceedings means "*a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity"* (Regulation 3(1) of TUPE).

16. Guidance on when an economic entity retains its identity for the purposes of Regulation 3 of the TUPE Regulations was provided by the Employment Appeals Tribunal in Cheeseman v R Brewer Contracts Ltd [2001] IRLR 144 ('the Cheeseman guidelines').

17. When there is a relevant transfer, Regulation 4 of the TUPE Regulations sets out the impact upon those who are party to the transfer and those employed by the transferor. In particular, it provides for continuity of employment and the transfer of the employment contracts for those employees who are subject to the said relevant transfer.

14. The burden of proving their claims is on the Claimants. They must prove their respective cases on the balance of probabilities (i.e.it is more likely than not).

Findings of Fact

16. It was not in dispute that, at the relevant time, the First Claimant's salary was £34,000 per annum and the Second Claimant's was £24,000 per annum. Both Claimants worked full-time.

17. It followed that the Claimants were remunerated at the following monthly, weekly and daily rates:

	Monthly	Weekly	Daily
The First Claimant	£2833.33	£653.85	£130.77
The Second Claimant	£2000.00	£461.54	£92.31

When did the Claimants employment end?

18. In the course of the hearing, Mr Foster conceded on behalf of the Respondent that both Claimants employment ended with effect from 30 November 2019. Although neither Claimant ever received any written notice terminating their employment, it was the uncontested evidence of Mr Stevens that at a meeting on 4 November 2019 and at the direction of Mr Foster, he told the Claimants that their employment was ending but that they would be paid up to the end of November 2019. In his oral evidence, Mr Foster did not take issue with Mr Stevens recollection of the meeting or of what he had asked Mr Stevens to impart to the Claimants.

19. Mr Stevens' evidence was also consistent with the Claimants submissions that they were told at the beginning of November 2019 that their employment was ending.

20. I therefore found that each Claimants employment with the Respondent terminated on 30 November 2019.

Why did the Respondent terminate the Claimants employment?

21. All the parties were aware that during 2019 the Respondent was facing financial difficulties. During the summer of 2019, the Respondent was hopeful of securing a significant order, referred to in the proceedings as the Iraq contract. Unfortunately, during late August and early September 2019, it became clear to the Respondent that the Iraq order would not be realised. That left the Respondent in significant financial difficulties and prompted an application in September 2019 to the Welsh Development Bank for funds ('the WDB application').

22. That application was unsuccessful and, the Claimants argued, prompted the decision to terminate their employment with effect from 30 November 2019.

23. It was further averred by Mr Stevens and confirmed by Mr Foster that another director of the Respondent (Andrew Gent) agreed to cover staff wages from September 2019 out of his own pocket.

24. To be fair to Mr Foster, once the definition of what constituted redundancy under the ERA 1996 was explained, he agreed that the reason for terminating the Claimants employment was because of redundancy (arising from the Respondent's inability to secure adequate funds).

25. On the basis of the largely uncontested evidence, I was of the same view. The circumstances facing the Respondent and the decisions taken as a result to end the Claimants employment could be properly be characterised as redundancy situations.

How did the Respondent terminate the Claimants' employment?

26. The Claimants were only ever given verbal notice that their employment was ending. However, there was a dispute as to when that notice had first been given.

27. The Claimants case was that they were first given notice at the meeting with Mr Stevens on 4 November 2019. The Respondent averred that notice had in fact been given at an earlier meeting with the Claimants in August 2019, attended by Mr Stevens and his brother, Mark (who was also a consultant with the Respondent at the time). Specifically, it was claimed that the staff (including the Claimants) were told that the Respondent was facing financially difficulties, that jobs would be secure if the Iraq contract came to fruition but that there was no guarantee that this would happen. As such, the staff were advised to look for alternative work and were given notice.

28. Both Mr Stevens and Mr Foster confirmed in their respective evidence that Mr Stevens was acting on the direction of Mr Foster at the August 2019 meeting.

29. The length of notice purportedly given in August 2019 was unclear. In his witness statement, Mr Steven stated that staff were told they were being given three months' notice (at Paragraph 3). However, in his oral evidence, he thought that in fact he gave everyone one months' notice, although they were all kept on and paid for three months. Mr Stevens also claimed that he only became aware later that the First Claimant was entitled to three months' notice. Mr Foster's oral evidence was, in contrast, that Mr Stevens was aware in August 2019 that the First Claimant was entitled to three months' notice, although he (Mr Foster) was not aware until later. He similarly agreed that all staff were given a months' notice in August 2019.

30. The Claimants both denied that any such meeting in August 2019 took place or that they were given any notice prior to the meeting on 4 November 2019.

31. I found on balance that the Respondent did not give the Claimants oral notice in August 2019 as claimed. I made that finding for the following reasons:

    31.1. The Respondent failed to adequately explain how, if awaiting the outcome of a large contract (the Iraq contract), it would tell staff to find other work in case it wasn't successful. When this was put to him, Mr Stevens claimed that he could have completed the order on his own or could have offered the staff their jobs back but given that the Respondent realised the contract was not going to happen only a few weeks after the purported meeting in August 2019, I did not find this to be a plausible explanation.

31.2. It was also inconsistent with the decision to give the First Claimant the new title and role of Production Manager, which it was accepted by Mr Stevens took place after August 2019.

31.3. It was also inconsistent with the decision by the Respondent to apply for a publicly funded loan ('the WDB application') in the aftermath of not getting the Iraq contract. Again, it was far more plausible that, once the WDB application was refused, the Respondent took the view that, as Mr Steven's put it in his oral evidence, "*the game was up"*. It was less plausible that that decision would have been taken in August 2019 or that staff would be told to find other jobs.

31.4. There were other anomalies which were not adequately explained in the evidence adduced by the Respondent. Why was the Second Claimant purportedly given three months' notice, when he was only entitled to one month? If he was in fact only given one months' notice and if "*the game was up"* after the loss of the Iraq contract, why was the Second Claimant not dismissed at the end of his one months' notice? If the staff had been given notice and told to find other work, why would another director agree to cover their wages from his own pocket from Sept 19 onwards? Again, it was far more likely that the decision to make staff redundant was not made, was not communicated to them and notice was not given until the meeting on 4 Nov 2019.

32. However, for the reasons explained below, my finding on when and how the Claimants were notified that their employment was ending was, in reality, of no material impact upon their claims.

<u>When did the First Claimant's employment with the Respondent begin?</u>

33. So far as relevant to these claims, it was not in dispute that the First Claimant was first employed by a company called Commercial Link Limited ('Commercial Link') in June 2013. The First Claimant claimed that, by reason of the TUPE Regulations, he had undergone relevant transfers of his employment from June 2013 until his employment was terminated by the Respondent in November 2019.

34. For the First Claimant, that had two important effects on his current claims. It meant that he had been continually employed for over six years (which was relevant to the calculation of his redundancy payment). It also meant that he remained subject to his original terms and conditions with Commercial Link, as a result of which he was contractually entitled to three months written notice of termination of his employment.

35. The Respondent accepted that there had been a number relevant transfers of the First Claimant's employment from June 2013 until 30 April

2017. It was not in dispute that the First Claimant's employer changed from 30 April 2017 to 1 May 2017. However, the Respondent submitted that there had been no relevant transfer at that point and the Claimant's continuity of employment was broken. In effect, it was claimed that the First Claimant's employment with the Respondent had not begun until 1 May 2017.

36. Again to his credit, Mr Foster explained to the Tribunal that, as he had not been a director of the Respondent or any of its predecessor companies at that time, he had been limited to making his own enquiries as best he could of what had occurred in April and May 2017. He accepted that he had assumed that there had not been a transfer of the First Claimant's employment on 30 April 2017 because, unlike earlier transfers, he had been unable to locate any paperwork confirming the same.

37. It was not in dispute that the First Claimant underwent a relevant transfer (for the purposes of the TUPE regulations) in July 2013. From the evidence adduced, I found that the transfer in July 2013 was from Commercial Link to Megablue Technologies Limited ('Megablue Technologies'). The focus was on the period 30 April to 1 May 2017, when the First Claimant's employer changed again. The First Claimant claimed it changed from Megablue Technologies to Megablue Technologies Holdings Ltd (which then changed its name to Revector Technologies Ltd on 18 September 2019). The First Claimant denied ever having been employed by another company, Megablue Technologies Property Consultants ('MPTC')

38. In an email to the First Claimant on 13 December 2019, Mr Foster explained that, from his own investigations, the First Claimant's employment had in fact been transferred to both MTPC and to Megablue Technologies in July 2013 – there appeared to be some overlap with which company dealt with the payroll. The First Claimant evidenced a payslip from Megablue Technologies for this period. Mr Foster also claimed in the same email that the First Claimant ceased employment with MTPC on 30 April 2017 and commenced new employment with Megablue Technologies, not Megablue Technologies Holdings Limited. A cursory inspection of Companies House lent some support, in part, to that – Megablue Technology Holdings Limited was not incorporated until 24 August 2018.

39. It seemed from the above that, on the Respondent's case, the First Claimant either moved his employment from MTPC to Megablue Technologies on 1 May 2017 or the involvement of MTPC in his employment fell away and he simply continued being employed by Megablue Technologies. If it was the latter, there was clearly continuity of employment, as the employer did not change (which might also explain the absence of any paperwork which Mr Foster had, in contrast, been able to locate for earlier TUPE transfers).

40. In the alternative, was there a transfer of the First Claimant's employment from MTPC to Megablue Technologies?

41. The First Claimant's evidence was that all staff were transferred, not just him. His job role did not change, his job title did not change, his terms and conditions did not change, his manager did not change and he was not aware of any changes in the business being undertaken or the overall running of the company. It was, in the First Claimant's mind, no different to other TUPE transfers he had been subject to.

42. As noted, there was no gap in time between ceasing employment with MTPC and starting with Megablue Technologies. It was also not suggested that there was any gap in employment when, at some point, the First Claimant transferred from Megablue Technologies to Megablue Technology Holdings Limited (after its incorporation in August 2018), which is now the Respondent (following the name change in September 2019).

43. Mr Foster accepted that he was at a slight disadvantage, having not been appointed a director until after the events of April/May 2017. He was candid in his oral evidence – he had assumed there had been no relevant transfer per the TUPE Regulations in 2017 because there was no paperwork confirming the same.

44. However, on the basis of the First Claimant's largely uncontested evidence, if his employer did change on 1 May 2017, it was as part of a relevant transfer for the purpose of the TUPE Regulations and his continuity of employment was preserved. I reached that finding notwithstanding claims by Mr Foster that aspects of the First Claimant's role changed at or around that time. There was no documentary evidence to support that contention. It was also accepted by Mr Foster that no new terms and conditions were issued to the First Claimant regarding his alleged new employment or role. Rather, the First Claimant's account of what happened was wholly consistent with a TUPE transfer, having regard to the Cheeseman guidelines.

45. In addition, there appeared, as set out above, to be an acknowledgement from both Mr Stevens and Mr Foster that the First Claimant was entitled to three months' notice. Mr Stevens referred to a contract which his brother had drafted, affording the First Claimant that entitlement. The contract in evidence between the First Claimant and Commercial Link includes those exact same notice provisions and is signed on behalf of Commercial Link by Mark Stevens, Mr Steven's brother.

46. Those terms and conditions still being considered effective in 2019 and being accepted as so by members of the Respondent's management team was also consistent with continuity of employment.

47. For all those reasons, I found that there was no break in the First Claimant's employment on 30 April 2017.

48. My findings on the First Claimant's continuity of employment had the following material consequences:

    48.1. He is deemed to have been employed by the Respondent for the period from June 2013 to Nov 2019. For calculating his statutory redundancy payment, he therefore had 6 years completed service.

    48.2. The First Claimant retained the rights afforded to him under the Commercial Link terms and conditions. He was, by reason of Clause 12.1 of the evidenced Commercial Link contract, entitled to three months' notice in writing. Even on the Respondent's own case, the First Claimant was only ever given three months' notice verbally. It follows that he was not given correct notice in accordance with his contractual rights.

    48.3. If the First Claimant had been given the three months' written notice he was entitled to, he would have accrued further holiday entitlement of 5.75 days during his notice period. That was calculated on the basis that the First Claimant had a contractual entitlement to 23 days paid holiday entitlement each year (per Clause 11.1 of the Commercial Link contract), which was calculated pro rata in his final year of employment (per Clause 11.3).

<u>What payments were the Claimants entitled to and what, to date, have they received?</u>

49. As set out above, it was accepted by the Respondent that:

    49.1. Both Claimants employment ended on 30 November 2019.

    49.2. The reason for ending their employment was redundancy.

50. It was not in dispute that both Claimants had been employed continuously for at least two years at the time that their employment ended. It was also accepted by the Respondent that neither Claimant was paid their wages for November 2019.

51. Mr Foster also took no issue with each Claimant's holiday pay claim (two days, as claimed by each Claimant) or with the First Claimant's expenses claim (of £380). Again, it was accepted by the Respondent that those sums had not been paid to the Claimants.

52. It follows that the First Claimant was entitled to his wages for November 2019, a statutory redundancy payment, his outstanding holiday pay and his expenses claim. In addition, and by reasons of my findings above regarding the First Claimant's contractual right to written notice, he was also entitled to payment in lieu of his contractual notice period.

53. The Second Claimant was entitled to his wages for November 2019 and his outstanding holiday pay.

54. The Second Claimant also claimed for alleged bank charges. He claimed that, as a result of not being paid in November 2019, he had incurred regular bank charges because he had continuously exceeded his overdraft limit. He claimed those charges were in excess of £1000 in total but was seeking compensation capped at £1000. Although the Second Claimant's Schedule of Loss referred to stress, he confirmed in his oral evidence that the sum he was seeking was solely in respect of bank charges – bank charges he would not have incurred if he had been paid the wages that he was entitled to at the time he was entitled to them (that is, 30 November 2019).

55. I afforded the Second Appellant the chance to evidence those charges. He preferred to proceed without evidence as he did not want to delay the progress of these proceedings. In his written subs, Mr Foster explained that whilst the charges were disputed, due to lack of evidence, the Respondent would be prepared to meet what was described as "*a modicum"* of the bank charges, to be set at my discretion.

56. As stated, I have not seen the documentary evidence relating to those charges. However, it was not suggested by the Respondent that the Second Claimant was inventing or exaggerating those charges. I am prepared to accept that he has incurred the charges as claimed. However, it is harder to accept without the evidence that those charges were wholly caused by the Respondent's failure to pay the Second Claimant the sums owed. It is incumbent on any claimant to take reasonable steps to mitigate their losses. The absence of documentary evidence does not allow for an examination of what steps were taken by the Second Claimant to minimise those bank charges (for example, by negotiating a larger overdraft or requesting a charges holiday from his bank).

57. As such, whilst on balance I accepted that some of those charges naturally flowed from the Respondent's failures to pay the sums owed to the Second Claimant, I concluded that it was just and equitable to limit the Respondent's liability to £300, equating to just under one third.

Conclusions on Liability & Remedy

58. I bring forward the above findings and apply the relevant law to them.

The First Claimant

59. The failure by the Respondent to pay the First Claimant his wages for November 2019, his accrued holiday pay and pay him a sum equivalent to three months' wages in lieu of notice constituted unlawful deductions from the First Claimant's wages (contrary to section 13 of the ERA 1996).

60. The First Claimant's holiday pay claim equated to 7.75 days (his two days outstanding as of November 2019 plus a further 5.75 days, which would have accrued if he had been given his contractual notice).

61. By virtue of section 24 of the ERA 1996, the Respondent is ordered to pay to the First Claimant sums equivalent to these unlawful deductions. Those sums are calculated as follows:

    61.1. Wages for November 2019 (£35000/12) = £2833.33

    61.2. Unpaid holiday pay (7.75 x £130.77) = £1013.47

    61.3. Unpaid expenses = £380.00

    61.4. Payment in lieu of notice (3 x £2833.33) = £8500.00

62. The First Claimant was entitled to a redundancy payment from the Respondent, as calculated in accordance with section 162 of the ERA 1996. Based upon the First Claimant's age at the time of dismissal and his length of service, that equated to a sum equivalent to seven weeks pay (capped at £525 per week), which is £3675.00.

63. The First Claimant did not receive any redundancy payment from the Respondent and the Respondent is ordered to pay him £3675.00.

<u>The Second Claimant</u>

64. The failure by the Respondent to pay the Second Claimant his wages for November 2019 and his accrued holiday pay constituted unlawful deductions from the Second Claimant's wages (contrary to section 13 of the ERA 1996).

65. By virtue of section 24 of the ERA 1996, the Respondent is ordered to pay to the Second Claimant sums equivalent to these unlawful deductions. Those sums are calculated as follows:

    65.1. Wages for November 2019 (£24000/12) = £2000.00

    65.2. Unpaid holiday pay (2 x £92.31) = £184.62

66. The Second Claimant was entitled to a redundancy payment from the Respondent, as calculated in accordance with section 162 of the ERA 1996. Based upon the Second Claimant's age at the time of dismissal and his length of service, that equated to a sum equivalent to two weeks' pay, which is £923.08 (£461.54 x 2).

67. The Second Claimant did not receive any redundancy payment from the Respondent and the Respondent is ordered to pay him £923.08.

68. In addition, and as detailed above, I found that it was just and equitable for the Respondent to pay the Second Respondent the sum of £300 towards the bank charges incurred as a result of the Respondent's unlawful deductions from the Second Claimant's wages (which also constituted a breach of contract). In my judgment, to a degree, those charges were a reasonably foreseeable consequence of the Respondent's failure to pay the Second Claimant sums which were owed to him by reason of his employment contract.

69. As such, the Respondent is also ordered to pay £300 to the Second Claimant.

Payment & Enforcement of the Judgments

70. As explained to the parties at the conclusion of the hearing, the sums owed by the Respondent to the Claimants become payable immediately upon judgment (i.e. 15 January 2021). If the sums owed are not paid within a reasonable period of time (usually considered to be 28 days, unless a longer period is requested by the Respondent and agreed to by the Claimants), enforcement of these judgments is by application to the County Court, not the Employment Tribunal. The court fees associated with any such application can be added to the judgment debt.

71. I also explained that all sums must be paid as stated. The Respondent does not deduct any sums for tax or national insurance. It is for Claimants to declare any applicable sums to Her Majesty's Revenue and Customs Service.

72. In his written submissions, Mr Foster on behalf of the Respondent referred variously to liabilities of Mr Mark Stevens and outstanding invoices between him and the Respondent. For the avoidance of doubt, those matters in no way affect the Respondent's liability to pay the above sums to the Claimants. Any issues regarding sums owed to the Respondent by Mark Stevens are matters between the Respondent and him. They have no bearing at all on the Respondent's liability to these Claimants arising from these proceedings. The sums set out in these judgments and reasons above must be paid in full by the Respondent to the Claimants.

EMPLOYMENT JUDGE S POVEY

Dated: 4 February 2021

Order posted to the parties on
5 February 2021

For Secretary of the Tribunals