EMPLOYMENT TRIBUNALS

First Claimant:	**Mr R Williamson**
Second Claimant:	**Mr S Hewitt**

v

First Respondent:	**Airedale Catering Group Limited**
Second Respondent:	**Airedale Catering Equipment Limited**
Third Respondent:	**The Catering Design House Limited (in Liquidation)**

Representatives:

First Claimant:	**Mr T Brown (Counsel)**
Second Claimant:	**Mr R Fitzpatrick (Counsel)**
Second Respondent:	**Mr L A Armatey (Counsel)**

Hearing dates:	**8 & 9 April 2021 and 11 May 2021 (Reserved)**
Heard at:	**Birmingham**
Before:	**Employment Judge Hindmarch**

RESERVED JUDGMENT

1. The claims against the First Respondent are dismissed on withdrawal.

2. The Second Claimant's claim for unlawful deduction from wages is dismissed on withdrawal.

3. The First Claimant's claim of unfair dismissal is well founded and is upheld.

4. The First Claimant's claim for notice pay is well founded and is upheld.

5. The Second Claimant's claim of unfair dismissal is well founded and is upheld.

6. The Second Claimant's claim for notice pay is well founded and is upheld.

7. The First Claimant's claim under Regulation 13 TUPE (failure to inform and consult) is well founded and is upheld.

8. The Second Claimant's claim under Regulation 13 TUPE (failure to inform and consult) is well founded and is upheld.

9. The First Claimant's claim for unpaid expenses is well founded and is upheld and the sum of £1216.71 is awarded.

REASONS

1. This matter came before me for a two day hearing by Cloud Video Platform on 8 and 9 April 2021. We concluded the evidence in the allocated two days but there was insufficient time to hear submissions. I therefore ordered Counsel for the parties to exchange submissions by 25 April 2021 and to exchange any replies by 10 May 2021, and proposed that I would sit on 11 May 2021 to reach a reserved decision with no requirement for attendance by the parties.

2. I had an agreed bundle running to 421 pages, witness statements for each of the Claimants and from Mr Bywell, Group CEO of the Airedale Group for the Second Respondent. I heard evidence from all three. There was a list of issues which Counsel had discussed in advance of the hearing. I would like to thank Counsel for their helpful submissions.

3. After the hearing I received written submissions from all Counsel and replies from Counsel for the Second Respondent and Counsel for the First Claimant.

4. The First Claimant (hereinafter referred to as Mr Williamson) filed his ET1 on 8 October 2020 and the Response was filed on 3 November 2020. The Second Claimant (hereinafter referred to as Mr Hewitt) filed his ET1 on 2 November 2020 and the Response was filed on 10 December 2020.

5. The Claimants withdrew their claims against the First Respondent which I dismiss on withdrawal. Mr Hewitt withdrew his claim for unlawful deduction from wages and I also dismiss that claim.

6. There was no dispute between the parties that the Claimants were dismissed from their employment with the Third Respondent (hereinafter referred to as CDH) on 1 July 2020.

7. One of the issues concerned the insolvency of CDH. The relevant question for the Tribunal was whether, on 1 July 2020, the CDH was subject to bankruptcy proceedings or any analogous insolvency proceedings which had been instituted with a view to the liquidation of its assets, namely a Creditors Voluntary Liquation (referred to herein as an CVL) and/or whether on 1 July 2020 CDH was under the supervision of an insolvency practitioner.

8. Ms Armatey made an application at the outset of proceedings to have this issue dealt with as a preliminary issue. She told me there had been a previous application made by her client to have this issue dealt with as a preliminary issue. That application had been refused and a review had been granted with a direction that the application would be dealt with on the first day of the hearing before me. Mr Brown opposed this application on the basis dealing with the insolvency issue as a preliminary issue would be unlikely to save time and reduce complexity, and that it would carve off a matter and risk disruption to the proceedings. Mr Fitzpatrick agreed with Mr Brown adding that it would be unfortunate to go part heard.

9. I agreed with Counsel for the Claimants. The hearing was listed for two days to consider all the issues. Dealing with the insolvency point in isolation, and having to hear evidence and submissions on that point alone, would be unlikely to meet the Overriding Objective as, if the Second Respondent was unsuccessful on that point, we would be unlikely to complete the evidence and submissions on the remaining issues in the time allowed.

10. There had been no Case Management Preliminary Hearing in this matter. We therefore then needed to discuss the order of witnesses. Ms Armatey wished for the Claimants to go first, so that she could better understand their case, particularly on the part of Mr Williamson who was contending he was either part of an organised grouping of resources (including Mr Hewitt) which transferred from CDH to the Second Respondent <u>or</u> that he alone was an organised grouping, and as regards his claim for unlawful deduction from wages (expenses). I agreed with her that the Claimants should go first. During the reading in time Mr Brown disclosed some additional evidence in support of his client’s claim for expenses.

11. The issues I had to decide were as follows:

<u>Regulation 3(I)(b) TUPE 2006</u>

a. What are/is the relevant activities or activities undertaken by CDH?

b. Were the activities undertaken by CDH fundamentally the same as those undertaken by the Second Respondent post transfer?
c. Were the activities undertaken pre and post transfer for the same client(s)?
d. Was there, immediately before 1 July 2020, an organised grouping of employees situated in Great Britain which had as its principal purpose the carrying out of the activities concerned on behalf of the clients (Regulation 3(a)(ii)?
e. Immediately before the transfer, did the client intend that the activities will, following the service provision change, be carried out by the transferor other than in connection with a single specific event or task of short-term duration?
f. Was there a service provision change?

<u>Regulation 8(7) Insolvency</u>

g. On 1 July 2020 was CDH subject to bankruptcy proceedings or any analogous insolvency proceedings which had been instituted with a view to the liquidation of its assets, namely a CVL?

h. On 1 July 2020 was CDH under the supervision of an insolvency practitioner?

<u>Regulation 13 and 13A Failure to Inform and Consult</u>

i. Did CDH, long enough before any relevant transfer to enable it to consult with any affected employees, inform the affected employees of the matters within Regulation 13(2)(a)-(d)?

<u>Regulation 7 Unfair Dismissal</u>

j. Was the reason for the Claimant's dismissal redundancy (as defined by s139(I) ERA 1996) and therefore permissible under s98(2) ERA?

k. Alternatively, was the sole or principal reason for the dismissal the transfer?

l. If not, did CDH act reasonably in treating redundancy as a sufficient reason for dismissing the Claimants applying s98(4) ERA and in particular <u>Polkey v AE Dayton Services</u>?

m. Did CDH's decision to dismiss fall with the band of reasonable responses?

Unlawful deduction from wages

n. Are any unpaid expenses owed to Mr Williamson?

Notice Pay

Were the Claimants entitled to notice pay?

The Facts

12. The Second Respondent (Airedale) is in business as a commercial catering design and project delivery provider. It works across many sectors in particular staff catering, education, care homes, hotels and restaurants. Prior to the Pandemic it had approximately 360 employees, turn over of £30 million and profit of £1-2 million.

13. Airedale has a number of group companies.

14. In 2014 Airedale entered into discussions with the Claimants and, and as result of these, CDH was established. Prior to this the Claimants had been running a Company, Design Catering Limited, which specialised in school kitchens and was in competition with the Second Respondent. CDH was established to take advantage of the experience and reputation gained by the Claimants in this previous venture. CDH was established as a wholly owned subsidiary of the Second Respondent.

15. The only two employees of CDH were the Claimants. A Shareholder's Agreement was drawn up (pages 73-106 of the bundle). The Second Respondent was a 85% shareholder in CDH, and held the remaining 15% of shares on trust for the Claimants at 7.5% each. Neither of the Claimants were Statutory Directors of CDH. The Statutory Directors were Mr Bywell and Mr Bristow.

16. Both Claimants entered into Service Agreements with CDH. Mr Williamson's is at pages 107-130 of the bundle, and his job title is given as Head of Projects. His duties are at page 128. In short, his main focus was sales, brand and business development.

17. Mr Hewitt's Service Agreement is at pages 132-156. His job title was Head of Sales and Design. In short, his focus was a design and design implementation.

18. Both Claimants were entitled to notice periods of six months under their respective Service Agreements.

19. In practice both of the Claimants would assist each other with all aspects of the two roles. They would design, bid for and, if won, implement contracts. After a kitchen was installed there would be further work in retention and maintenance. Often projects would be running simultaneously.

20. Both Claimants employment with CDH began on 16 April 2014.

21. A business plan was drawn up (pages 157-161). A loss was predicted in the first year of CDH trading, in year two a small profit and by year five profit of some £400,00 was predicted.

22. The Claimants were not required to make any initial financial investment into CDH. The Second Respondent was responsible for this and effectively provided initial set up costs and broader support from the Airedale Group including procurement administration, IT, finance and the like. I have already noted that prior to the inception of CDH, the Claimants previous enterprise, Design Catering Limited, was essentially in competition with the Second Respondent. It is clear that even after CDH was established, some of that competition remained. The parties agreed that on occasions CDH and the Second Respondent bid for the same work, and that the Claimants were instructed by the Second Respondent to ensure they were not more competitive, effectively giving the Second Respondent ‘the edge’.

23. As a newly formed Company, CDH had little positive credit history. This meant that where a client required it, the Second Respondent on occasion, had to offer a parent Company guarantee and sometimes clients of CDH contracted directly with the Second Respondent, with CDH however largely doing the work in relation to the contract. Sometimes the clients contracted with the Second Respondent as CDH did not hold certain accreditations required by the client. From 2018 it was agreed that all invoicing and purchasing of stock would be done through the Second Respondent.

24. Mr Hewitt’s main focus at CDH was on design. Mr Bywell contended however that a number of clients required the use of BIM (Business Information Modelling) and that Mr Hewitt did not have experience of this. Consequently any BIM work fell to others within the Airdale Group rather than CDH.

25. Mr Bywell told me that towards the end of 2017 it was clear CDH was under-performing and had incurred a loss. Mr Williamson produced a financial plan for CDH (pages 165-168 of the bundle) in which he and Mr Hewitt proposed reducing overheads by reducing their salary and

relinquishing their offices and moving to home working. This plan was accepted and put in place. The Claimants took salary cuts of £20,000 each. Salaries were increased in December 2018 although not to the previous level.

26. The Claimants, before joining CDH, had prior business relationships with a number of customers including Balfour Beatty Plc and Kier Construction.

27. In January 2018 the Claimant secured a contract with Kier Construction to provide catering facilities at two schools – Wootton Park and Putteridge High. The contract for the Wootton Park project was entered into between Kier Construction and the Second Respondent rather than CDH and a copy is at pages 173-177 of the bundle.

28. In April 2018 the Claimant's secured a contract with Balfour Beatty for a building project at the Manchester University. Again Balfour Beatty contracted with the Second Respondent, rather than CDH. A copy of the contract is at pages 170-172 of the bundle.

29. Due to the COVID-19 Pandemic, from March 2020 construction work slowed down or halted altogether. This had a significant impact on the Airedale Group.

30. On 25 March 2020 Mr Hewitt was contacted by Mr Woodford (the Second Respondent's Project Sales and Commercial Director) to discuss the possibility of Mr Hewitt being placed on furlough leave. Mr Woodford asked that Mr Hewitt email him the current workload for CDH so that he (Mr Woodford) could make the final decision. On receipt of the email, Mr Woodford told Mr Hewitt effectively to 'carry-on as usual' but that he would seek an update the following week.

31. On 8 April 2020 Mr Woodford informed Mr Hewitt he would be placed on furlough leave form 9 April 2020. Mr Woodford asked Mr Hewitt to send him his ongoing pipeline so that a sales person employed by the Second Respondent could manage this until Mr Hewitt was permitted to return.

32. On 8 April 2020 Mr Woodford emailed Mr Hewitt a letter of the same date confirming the furlough leave position. A copy of the letter is at pages 177j-k of the bundle. Mr Hewitt agreed to be placed on furlough leave by email to Mr Woodford on 9 April 2020 (page 221a). Mr Hewitt remained on furlough leave until he was dismissed on 1 July 2020.

33. Mr Williamson was not placed on furlough leave and continued to work for CDH.

34. On 23 June 2020 Mr Bywell called a company-wide meeting for Airedale Group employees to discuss the impact the Pandemic was having. Mr Hewitt was able to attend this, but Mr Williamson was not. Mr Hewitt understood the message from Mr Bywell to be that the Airedale Group was downscaling all of its companies and that the Pandemic had hit all departments. In evidence Mr Bywell told me that between 1 April and 31 July 2020 the Group had to make some 30 redundancies and at one point in May 2020 over 300 employees were on furlough leave. Turnover of the Group dropped some 50-60%.

35. Mr Bywell was looking at the need to make significant cost savings. He formed the view that CDH was loss making and that the Group could no longer afford to support it financially or with Group resources. He took legal advice and in late May 2020 he approached Philip Booth, an insolvency practitioner at Booth & Co, for advice on placing CDH into liquidation. He arranged a first meeting with Mr Booth on 3 June 2020.

36. After several discussions with Mr Booth, Mr Bywell determined that CDH was insolvent and not viable. On 1 July 2020 Mr Bywell and Mr Bristow, as Directors of CDH, held a Board Meeting of CDH. The Minutes are at pages 198-199 of the bundle and record '*The financial position of the Company was discussed and it was confirmed to the satisfaction of the Board that the Company was insolvent'.* It was agreed to convene a general meeting of the Members of CDH on 22 July 2020 to consider the following Special Resolution '*that the Company be wound up voluntarily'* and the following Ordinary Resolution *'that Philip Booth of Booth & Co be appointed as Liquidator of the Company'.*

37. It was further resolved that Booth & Co be instructed and authorised '*to assist the Directors in convening the meeting of the Members of the Company, and to issue notices of the meeting…'*

38. A letter dated 1 July 2020 from Booth & Co to the Directors of CDH is at pages 187-195 of the Bundle. It is essentially an engagement letter setting out the role Booth & Co were expected to play in the proposed CVL of CDH. Curiously (page 195) it was signed by Mr Bywell on 30 June 2020, apparently one day before the date of the letter. Mr Bywell in evidence could not explain this discrepancy.

39. On 29 June 2020 Mr Bywell had emailed the Claimants asking them to attend a meeting with him by Microsoft Teams at 9am on 1 July 2020. He gave no warning that dismissal was on the cards although he acknowledged in evidence that this was 'a real risk'. In readiness for this the Claimants practised using Teams at 8am however at 9am the

Claimants experienced difficulty logging in and so the meeting was conducted by telephone. Mr Williamson was unable however to attend as his mobile telephone was being repaired. Mr Bywell spoke with Mr Hewitt and informed him that CDH was not finically viable, was being placed into either liquidation or administration (accounts differ but are irrelevant for the matters I have to decide) and that the employment of both the Claimants was to be terminated with immediate effect. After the call Mr Hewitt was able to contact Mr Williamson to relay this news to him.

40. Later that day (1 July 2020) at 13:39 Mr Hewitt emailed Mr Bywell, copying in Mr Williamson, and explained he had passed on the news to Mr Williamson. My Bywell replied at 13:58 giving the details of Philip Booth at Booth & Co and confirming he had been '*appointed to undertake the liquidation'* and would '*progress (the Claimants) claim for redundancy payment'.* The email exchange is at pages 205-206 of the bundle.

41. On 6 July 2020 Booth & Co emailed the Claimants attaching a letter and a factsheet regarding the claiming of redundancy payments. Copies appear at pages 209-217 of the bundle. The letters state '*the directors of (CDH) have decided to convene meetings of shareholders and creditors to put the Company into CVL. The Company has ceased trading and I understand that your contract of employment was terminated on 1 July 2020 and you are therefore redundant with effect from that date'.* The correspondence advised the Claimants to claim their redundancy payments from the Redundancy Payments Service.

42. On 15 July 2020 Mr Williamson emailed Booth & Co asking for a list of CDH's creditors. Booth & Co replied to explain a '*Statement of Affairs'*, which would include a list of creditors, was in preparation. The email exchange is at page 227.

43. On 17 July 2020 Booth & Co emailed the Claimants attaching the '*Statement of Affairs'* described as '*Explanatory Information for the Creditors of CDH'.* – a copy of this document is at pages 230-236 of the bundle. In the document, under heading '*Trading History'* (page 232) it records '*Trading results for the first period of trading to 31 December 2015 were disappointing, with (CDH) reporting a loss after taxation of £90,059. The second year of trading proved more encouraging, with losses being reduced to £19,000, and for the year ending 31 December 2016 a profit in the sum of £21,000 was achieved. However more recently (CDH) has found trading conditions more challenging … and has struggled to achieve levels of turnover sufficient to sustain the cost base. This resulted in the Company becoming dependant on loans from*

within the Airedale Group to subsidise cash flow'. The only creditors appeared to be the Claimants and HMRC.

44. An Extraordinary General Meeting of CDH took place on 22 July 2020. The Minutes are at pages 237-238. They record the resolutions were passed '*that (CDH) be wound up voluntarily'* and '*that Philip Booth … be and is hereby appointed as liquidator for CDH for the purpose of the voluntary winding up'.*

45. The Claimants claimed statutory redundancy and notice payments from the Redundancy Payments Service.

46. On 4 September 2020 Mr Williamson emailed Mr Bywell querying the decision to place CDH into CVL and asserting that all work that had been undertaken by CDH had now been 'transferred' to the Second Respondent. Mr Bywell responded on the same day suggesting that Mr Williamson direct any enquiries to Booth & Co. The exchange is at pages 261-264.

47. Mr Williamson emailed Booth & Co on 4 September 2020. Booth & Co replied on 9 September 2020 to explain that they were still collating the financial records of CDH. The exchange is at pages 266-268.

48. The Claimants formed the view that the Second Respondent was essentially standing in the shoes of CDH and continuing with its work and projects, and that the CVL was a sham. At the date of dismissal, the Claimants through CDH were working on projects for Kier Construction, Balfour Beatty and Interserve. At the 1 July 2020 Mr Hewitt was on furlough leave. Mr Williamson had mainly been engaged for CDH on the Manchester University contract with Balfour Beatty. In evidence he explained this contract was taking up all (100%) of his time. He was on site when Mr Hewitt contacted him, following the telephone call with Mr Bywell, to inform him they had both been dismissed. Later that day, or shortly afterwards, Mr Williamson received a call from a subcontractor on that site to inform him that an employee of the Airedale Group (MG) had temporarily taken on his (Mr Williamson's) project management role at the site. Mr Bywell accepted that MG had taken over the Project Management at the site but said it took the Second Respondent '*2 weeks to mobilise'* so MG was permanently on site by mid July 2020). Mr Bywell explained that MG '*built the plan*', being an experienced and Senior Project Manager, then handed over to a colleague, Charlie. Both MG and Charlie remain employed by the Second Respondent and have not been made redundant.

49. CDH had work in the pipeline in relation to Hyhatt Hotels and Tri-Markets. On 18 June 2020 CD, Sales Manager of the Second Respondent, emailed a consultant working with CDH explaining that Mr Hewitt was on furlough leave and offering assistance. On 3 July 2020 CD sent a further email saying '*Please note, I will be your contact moving forward for this site'.* On 6 July 2020 My Bywell became involved in the exchange and sent an email stating '*CDH is part of the Airedale Group … we have taken the decision to place CDH into administration … in this case we would propose that the (Second Respondent) undertakes this project if successful in our bid. As it is part of the same Group as CDH, we have the same qualifications and experience'.*

50. Mr Hewitt in evidence explained that he had been contacted by a client of CDH informing him that they had called the CDH telephone number asking for him, to be told that he was not available and to be put through to an employee at the Second Respondent.

51. Mr Hewitt further explained that employees of the Second Respondent including Mr Bywell made contact with clients of CDH between 1 and 22 July 2020, with the aim of diverting business from CDH to the Second Respondent.

52. Mr Bywell gave evidence that the Claimants were employed at a relatively senior (and, by implication expensive) level and the roles of Head of Projects and Head of Sales and Design were not something the Group would have had a requirement for going forward. He referred to Mr Hewitt's lack of BIM experience and the fact that the projects that CDH were working on as on at the 1 July 2020 were small and/or almost complete, and/or not yet awarded. In the case of the Balfour Beatty/Manchester University contract he contended it was 70% complete. He told us the Project was 'handed over' in April 2021. Mr Bywell in evidence agreed that the Second Respondent continued the Wootton Park work employing one of it's Project Managers (CH) there.

53. It was put to the Claimants in cross-examination that, even if their employment had transferred to the Second Respondent, given the Group was making redundancies due to the Pandemic, they would have been made redundant in any event. Mr Williamson explained at the time of dismissal he was fully engaged on the Manchester University Project which had the potential to keep him occupied until 2021, that it was only about half way complete, and that there was other work in the pipeline. Mr Hewitt explained that, prior to being placed on furlough leave, he was spending 50% of his time on the Manchester University project and on pipeline work that he was 80% confident would result in the award of work. Mr Hewitt accepted that Putteridge High (the Kier Construction

Contract) had commenced in December 2020 but said he was still working on the design when he was placed on furlough leave in April 2020. He accepted Wootton School was 90% completed by May 2020.

54. In the bundle were invoices relating to the Manchester University project. Mr Bywell agreed the Project was valued at £1.5 million. At page 339 of the bundle was the June 2020 invoice showing invoicing to date at £646,000. Mr Bywell accepted in cross-examination that was not 70% complete, as he had said in his witness statement, but said it was 65% complete. In fact little over a third had been invoiced at this time.

55. In cross-examination Mr Bywell was challenged as to why he had produced no information to support the contention that, had they transferred to the Second Respondent, the Claimants would have been dismissed. He was asked why he had not disclosed information regarding salaries, headcount, job roles. He replied that 'we looked at redundancies at all levels, including senior levels'. He said two Project Managers were made redundant and that designers were also made redundant.

56. Mr Hewitt gave evidence that he was one of only three people in the Group who was skilled in both sales and design. He accepts he was not trained in BIM, but explained he was currently putting himself through such training.

Submissions

57. I had detailed written submissions from Counsel for all parties. It is not my intention to repat these in detail here, however I summarise them below and will refer to any relevant law later in this Judgment.

58. The First and Second Claimants contended that there was a relevant transfer of the activities of CDH, by way of insourcing to the Second Respondent, on 1 July 2020. They argued this amounted to a service provision change under Regulation 3(l)(b)(ii) of TUPE. They argued that there was no relevant insolvency proceedings concerning CDH until 22 July 2020. The Claimants position was that their employment should have transferred to the Second Respondent and they were therefore unfairly dismissed without proper notice. Further they argued there had been a failure to inform and consult with them about the transfer. The First Claimant argued that his activities alone could amount to an 'organised grouping of employees'.

59. The Second Respondent's position was that the activities undertaken by it after 1 July 2020 were fundamentally different to those undertaken by

CDH, such that there could be no service provision change. It also contended that the Claimants were not an organised grouping of employees.

60. As to insolvency, the Second Respondent argued that Regulation 6(7) TUPE was satisfied. It's position was that the Claimants were dismissed by reason of redundancy which amounted to an 'ETO' reason.

61. The Second Respondent argued that the First Claimant had not discharged the burden of proof in estimating that expenses were payable to him.

The Law

62. A number of provisions within the Transfer of Undertakings (Protection of Employment) Regulations 2006 and the Insolvency Act 1986 are in play here as follows:

- Regulation 2 TUPE which contains the following definitions:

  - *'insolvency practitioner' has the meaning given to the expression by Part XIII of the Insolvency Act 1986.*

    NB s388 – 'meaning of "act as insolvency practitioner"

    (1) A person acts as an insolvency practitioner in relation to a company by acting -
    (a) As its liquidator, provisional liquidator, administrator, administrative receiver or monitor.

    Under s135 Insolvency Act 1986 a 'provisional liquidator' may be apported by a court 'at any time after the presentation of a winding up petition'.

  - References to *'organised grouping of employees'* shall include a single employee.

  - *'Relevant transfer'* means a transfer or service provision change *'transferor'* and *'transferee'* and shall be construed accordingly and in the case of a service provision change falling within Regulation 3(l)(b), *'the transferor'* means the person who carried out the activities prior to the service provision change and *'the transferee'* means the person who carries out the activities sa a result of the service provision change.

  - Regulation (3)(l)(b) provides:

'[A] service provision change, […] is a situation in which [among other things:]

(iii)activities cease to be carried out by a contractor […] on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, […] and in which [..:]

(3)[…]
(a) immediately before the service provision change –
(i) there is an organised grouping of employees situated in Great Britain which has its principal purpose the carrying out of the activities concerned on behalf of the client;'

- TUPE, reg 4 provides:

'(1) […] a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or 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.
[…]
(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1) [..]

- TUPE, reg 7 provides:

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purpose of Part 10 of the 1996 [Employment Rights] Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

- TUPE, reg 8(7) provides:

Regulations 4 and 7 do not apply to any relevant transfer where[:]
the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.

Conclusion

63. Dealing firstly with the 'insolvency' point. Regulation 8(7) TUPE, as set out above, means there is no protection for the Claimants in relation to either the transfer of their employment to the Second Respondent or against unfair dismissal, if insolvency proceedings had been instituted. CDH was indeed placed into a CVL. The question is when did that winding up process begin. The Second Respondent contends that Booth & Co were appointed liquidator for CDH on 1 July 2020. This is not so. There is an engagement letter from Booth & Co bearing the date of 1 July 2020 and on that date the Directors of CVL conducted a Board Meeting. However the resolutions made were to convene a General Meeting of the Members of CDH on 22 July 2020. It was only at that meeting on 22 July 2020 that resolutions were passed to wind up CDH voluntarily and appoint Booth & Co as liquidators. The Second Respondent sought to argue that Booth & Co were appointed 'Provisional Liquidator' on 1 July 2020. The appointment of a Provisional Liquidator requires a Court Order after the presentation of a winding up petition in circumstances of a compulsory winding up (s135 Insolvency Act 1986), which had not occurred here. The resolutions made on 1 July 2020 were effectively to consider placing CDH in liquidation, not the commencement of the liquidation. That did not occur until 22 July 2020.

64. I was referred by the parties to the case of <u>Secretary of State for Trade and Industry v Slater</u> (2008) ICR 54(EAT) where it was found that in order for Reg 8(7) TUPE to be engaged, the insolvency proceedings had to have actually been instituted by the day of any relevant transfer. Under s86 Insolvency Act 1986 '*a voluntary winding up is deemed to commence at the time of the passing of the resolution of voluntary winding up'.* In the case of a CVL this will be the time of the passing of the Shareholders resolution.

65. CVL proceedings in this case were instituted on 22 July 2020 by the making of the members resolution on that date. On 1 July 2020 It is clear the solvency of CDH was in question, and Booth & Co were engaged, however the insolvency proceedings did not commence until 22 July 2020. It is clear that the work being done by CDH on 1 July 2020 was being diverted to the Second Respondent from that date.

66. Turning next to the question of whether there was a service provision charge. This is a question of fact and I must start by deciding the '*activities'* being performed by CDH. The only two employees were the Claimants. They designed and bid for kitchen installation work and if won, they would manage the installations. As at 1 July 2020 Mr Williamson was managing the work at Manchester University and the Second Claimant was on furlough leave, but prior to this he was assisting with the Manchester University matter and working on other bids. They were also involved in projects at Putteridge High School and Wootton Park School. After the Claimants were made redundant on 1 July 2020, these contracts continued to run and were carried out by staff members employed by the Second Respondent. The three contracts in question were never made with CDH itself, but rather with the Second Respondent who effectively '*sub-contracted'* the work to CDH. The designing of the work, the winning of the work and the project management of the work continued with the Second Respondent in CDH's place. This amounted, in essence, to the Second Respondent insourcing the work of CDH. The activities of CDH continued with the Manchester University project running until April 2021 and the two Schools projects continuing until finished.

67. Whilst same of these projects that continued were underway, such that installation was in progress and initial design complete, it was not disputed that both Claimants roles often over-lapped and that the Mr Hewitt would need to update designs throughout a project. Thus, the role he would have done, but for his dismissal, was carried out by the Second Respondent's staff and Mr Bywell accepted this in evidence.

68. The Claimants contended their employment should have transferred to the Second Respondent so that they could continue with these activities. If there was a service provision change then their employment should have automatically transferred. Looking at the work they did with CDH historically, (designing, and installing kitchens) that work 'transferred' to the Second Respondent.

69. I reject the Second Respondents argument that the activities it carried out after 1 July 2020 were fundamentally different to those carried out by CDH. I accept there is no direct evidence the Second Respondent won work from CDH's pipeline (work it was helping to win) but the Second respondent continued with CDH's existing workload, and, as noted at paragraph 49 above, there was some attempt by the Second Respondent to ingratiate itself with contacts made by CDH. I reject the Second Respondent's contention that because the 'pipeline' did not necessarily transfer, then the activities were fundamentally different. I

also reject the argument that the activities became fragmented. The three main pieces of wok being conducted by the Claimants prior to dismissal were 'taken over' by the Second Respondent and conducted by its staff members. I reject the Second Respondent's contention that the *'client intended that the activities carried out were in connection with a single specific event or task of short-term duration'*. The Second Respondent contended that the Wootton Park and Putterridge High School installations were of '*short-time duration'* and that the Manchester University project was a little over half complete. One of the School projects was well advanced however the other project ran into 2021.

70. There was no attempt to inform or consult with the Claimants about the transfer.

71. The Claimants were plainly dismissed. There was no procedure followed in terms of consultation and the like. The Second Respondent asserts the reason for dismissal was redundancy and that this is an ETO (economic, technical or organisational) reason under TUPE. The burden is on the Second Respondent to show an ETO reason entailing a change in the workforce existed – Litster and others v Forth Dry Dock and Engineering Co Ltd (in receivership) (1989) ICR 341, HL. There was no evidence that the Second Respondent had considered pooling the Claimants with its existing staff members to conduct an exercise of selecting between them for redundancy. Mr Bywell gave evidence that the Claimants would have been dismissed *'in any event'* had their employment transferred to the Second Respondent. He asserted that the Claimants were *'relatively senior'* (and presumably therefore expensive) and that other persons employed by the Second Respondent had been made redundant as a result of the effects of the Pandemic on the business. I detail at paragraph 55 that Mr Bywell gave evidence that two project managers and *'designers'* had been made redundant. However he also agreed that the two Project Managers assigned to cover the CDH works had not lost their jobs.

72. The Second Respondent wishes the Tribunal to have regard to a 'Polkey' argument, that the Claimants would have been *'dismissed in any event'*, it is for the Second Respondent to discharge the burden of proof in that regard – Compass Group PLC v Ayodele (2011) IRLR 802, EAT. Here the evidence given does not discharge the burden. A broad assertion as to similar roles being made redundant is not enough.

73. The Claimants were both entitled to notice pay under their contracts of employment. Both received sums towards this from the Redundancy Payment Service, Both Claimants received the sum of £2326.80 each.

74. Mr Williamson also had a claim for unpaid expenses in the sum of £1216.71 for May and June 2020. Mr Bywell accepted these monies were due in evidence. They would have been paid by CDH had the First Claimant not been dismissed. Given my finding that there was a service provision change meaning the Claimants employment transferred to the Second Respondent, liability for those expenses also transferred.

75. For the reasons above I uphold the Claimants complaints and the matter will be listed for a Remedy Hearing.

Employment Judge Hindmarch

4 June 2021