EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**and**	**Respondent**
(1) Mr M Rajput **(2) Mr T Akmeemana**		**Sky Retail Stores Limited**

HELD AT: **Croydon (by CVP)** **ON:** **1-4 November 2021 and (in Chambers) 5 November 2021**

BEFORE: **Employment Judge K Bryant QC**
Ms P Barratt
Ms A Boyce

Appearances:

For the Claimants: **Mr P Lockley of Counsel**
For the Respondent: **Ms C Davis QC**

RESERVED JUDGMENT

The Claimants' claims for unauthorised deduction from wages, failure to comply with the statutory requirements of collective consultation, and detriment on grounds related to union activities fail and are dismissed.

REASONS

Introduction

1. The two Claimants whose claims have been heard and determined by the tribunal are Lead Claimants within the meaning of Rule 36 of the Employment Tribunal Rules. As the tribunal understands it there are another 25 Claimants whose claims are awaiting the outcome of the Lead Claimants' claims, 24 of whom have the same legal representation as Mr Rajput and Mr Akmeemana, and one of whom (Mr Charman) is representing himself. A number of other claims arising from the same events have previously been withdrawn or struck out.

Claims and issues

2. These claims arise from a restructure of the Respondent's business which took place with effect from 26 October 2018, at which time the Claimants' job title was unilaterally changed from Store Manager to Sales Adviser and their pay package was changed in a number of ways. One change was to a commission scheme; the Claimants claimed that this change led to an unauthorised deduction from their wages, but that aspect of their cases was struck out following a Preliminary Hearing in March 2021. The other changes to pay were that basic salary was increased but a payment known as Store Manager Allowance ('**SMA**') was discontinued.

3. As clarified with the parties at the start of the hearing, there remain three live claims, namely:

    3.1 Unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 ('**ERA**'); this concerns the discontinuance of SMA;
    3.2 Failure to comply with the requirements of collective consultation contrary to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('**TULRCA**'), specifically a failure to comply with the requirements of section 188(2);
    3.3 Detriment on grounds related to union activities contrary to section 146 of TULRCA, specifically responding to collective and individual grievances by saying that matters should be dealt with as part of the consultation process rather than under the grievance procedure, which is said to have had the sole or main purpose of preventing the Claimants from making use of trade union service, ie having union representation, and/or penalising them for being union members.

4. It was agreed by both sides that the claims under ERA, s13 and TULRCA, s188 were alternatives, ie only one or the other could succeed on the facts of this case. Which claim fell to be considered further would depend on whether or not the unilateral changes in October 2018 had the effect of terminating the Claimants' contracts of employment or merely purporting to vary them; if they amounted to termination then the unauthorised deduction claim would fall away, and if they did not then the failure to consult claim could not succeed.

5. In response to the unauthorised deduction claim, the Respondent raised a number of points, including that the increase in basic pay more than offset the loss of SMA and so there was no deduction from wages within the meaning of ERA, s13(3) at all, and also that the Claimants had affirmed their contracts so that SMA was no longer properly payable.

6. With regard to the TULRCA, s188 claim the Claimants accepted that employee representatives had been elected in accordance with the statutory requirements, and that there had been collective consultation with those representatives. However, the Claimants said that the content of the consultation did not comply with TULRCA, s188(2).

7. In response, the Respondent said that the Claimants did not have standing to bring such a claim at all, because of the provisions of TULRCA, s189(1), and, in any event, that there had been collective consultation that complied with TULRCA, s188(2).

8. One final matter to note at this stage is that the Claimants applied to amend their unauthorised deduction claim to bring it up to date, ie to claim monthly losses continuing after the presentation of their ET1s and right up to the date of this hearing. However, the parties agreed that there was no need to decide that application before the tribunal reached its judgment on the existing claims; if appropriate the amendment could be considered at or before a remedy hearing.

<u>Evidence and findings of fact</u>

9. The tribunal was provided with a bundle of documents running to nearly 2,000 pages, a bundle of witness statements, a skeleton argument from each side, and a bundle of authorities which was supplemented during the course of the hearing.

10. The tribunal heard from three witnesses on the Claimants' side, namely the two Lead Claimants and Mr Asim Jan who is one of the other Claimants. Each of them is a former Store Manager. The Respondent called three witnesses, namely John Johnstone, former Head of Regional Sales, Julia McVicar, Regional Manager and former Area Manager, and Amy Deas, HR Business Partner. Each witness gave evidence by reference to a written witness statement.

11. In light of all the evidence seen and heard by the tribunal, it makes the following unanimous findings of fact.

    11.1 Sky is a well-known brand with a number of different businesses in the UK, including the Respondent which is its retail arm.

    11.2 The Respondent operates a number of what it calls 'stores' or 'stands' in shopping centres throughout the country, divided into North, Central and South regions. These are small retail units but not in the traditional sense of a shop in a shopping centre with walls, a glass front and so on. Rather, they take the form of a stand, typically located in the main concourse of the shopping centre.

11.3 Each store or stand is operated by a small number of employees, typically between 1 and around 4. As at 2018 there were just under 200 stores with over 700 staff in total. The majority of these staff had the job title of Sales Adviser or Retail Adviser, but around 175 of them, including the Claimants, had the title Store Manager.

11.4 The role of the stores was to sell Sky products to the public, which by 2018 included TV, mobile and broadband packages.

11.5 Most of the stores had an employee with the job title Store Manager. They reported to an Area Manager who was responsible for a number of stores. The tribunal heard from Ms McVicar, who had been an Area Manager in the Central area, who said that she was responsible for 7 stores and around 20-25 staff. It is not entirely clear whether that is typical but the Claimants have not suggested otherwise, and in any event this aspect of the evidence is not central to the matters the tribunal needs to decide.

11.6 The tribunal has seen and heard much evidence concerning the work undertaken by Store Managers, including the Claimants. There is no dispute that Store Managers at one time performed duties over and above their, and the Sales Advisers', sales roles. There is, however, dispute as to whether they continued to undertaken such duties, and if so to what extent, by 2018; the Claimants say they did and that they were a substantial part of their work, whereas the Respondent says they did not, or at least that there was no consistency across regions / areas and the Store Manager role was, in effect, no longer different from that of a Sales Adviser.

11.7 The tribunal notes that in terms of witness evidence, it has heard from three witnesses who were Store Managers up to and including 2018. On the Respondent's side, the only first hand evidence as to what Store Managers were doing on a day to day basis was from Ms McVicar, who at that time was an Area Manager, and who gave evidence that she aimed to visit each of the stores for which she was responsible for an hour a week on average. The stores are open 7 days a week. Therefore, her ability to observe her staff in situ was clearly limited, although the tribunal accepts that she would have had regular contact with them by other means.

11.8 Both Claimants, supported by Mr Jan, gave evidence as to the work they say they did as Store Managers. They describe having started as Sales Advisers but then being promoted to Store Manager. They describe leading the team at their respective stores and set out a number of specific duties that they undertook.

11.9 Their evidence, the tribunal finds, is consistent with a number of contemporaneous documents to which the tribunal has been referred.

11.10 It is not clear when the Store Manager role first came into being, but the tribunal has seen documentation going back at least as far as 2008 relating to the title and role of Store Manager. A statement of particulars of employment dated 25 February 2008 shows that an individual (not one of the Claimants) was externally recruited into the role of Store Manager at that time.

11.11 By 2013, if not before, the role of Store Manager attracted payment of SMA. The tribunal has seen a letter dated 22 July 2013 notifying contractual changes when an individual's job title changed from Sales Adviser to Store Manager. The tribunal finds that similar letters would have been provided to others in that situation, including the Claimants. The letter says that the 'new contractual terms' were:

> *'Your new Job Title will be Store Manager.*
> *You will be entitled to a Store Manager allowance of £2,860 per annum.*
> *All other terms and conditions will remain unchanged.'*

11.12 Once appointed, a Store Manager remained on the same basic pay scale as a Sales Adviser and participated in the same commission scheme, but was also paid SMA on a monthly basis.

11.13 The tribunal has seen a number of versions of a Store Manager job description, each of which sets out the key responsibilities of the role. For example, one job description (undated) sets out detailed objectives under a number of headings: people, customer journey, performance, trade marketing, asset management, compliance, commercial and behaviour. The 'people' objectives include motivating staff on an individual and team basis, providing on-site support and feedback to staff, ensuring that staff are working the correct hours and reporting to the Area Manager when they are not. Under 'compliance' the objectives include ensuring that all staff adhere to quality standards, reinforcing company key messages as required, and encouraging completion of e-learning and 'knowledge checker' by all advisers.

11.14 Another (also undated) job description gives the first key responsibility of the Store Manager as *'[t]o manage the team working on the Store to deliver to* (sic) *sales target, whilst in turn delivering own personal target.'*

11.15 The tribunal has also seen evidence of Store Managers being invited to 'Store Managers Meetings' to discuss such things as how to develop their teams, and a copy of a Store Manager brief for advisers which appears to be a script for Store Managers when speaking with new, and possibly with existing, Sales Advisers. It includes such phrases as *'It's my responsibility to provide you the support, information, skills and knowledge to carry out your role …'* and refers to onsite coaching / training, operational performance reviews and feedback sessions. It also provides that all holiday requests should be made to the Store Manager.

11.16 It is also clear from a number of documents that Store Managers were given store targets for sales as well as individual targets and that their performance was measured against both. There is no suggestion that this was the case for Sales Advisers, who only had individual targets.

11.17 The tribunal also notes that when a redundancy exercise took place in or around early 2017 staff were told: *'If you are successful in securing a role that is the same as your current role, ie adviser to adviser, store manager to store manager, you will not be eligible for a trial period. … If your new role is not the same as your current role, ie store manager to adviser, you will be eligible for a trial period …'* That, the tribunal finds, strongly suggests that, at least up to 2017, the Respondent saw Store Manager and Sales Adviser as distinct roles rather than one merely being a variation of the other or as the same role with a few additional ad hoc tasks added.

11.18 It is the Respondent's case that, although the Store Manager was a substantive role at one time, by 2018 they were effectively just acting as Sales Advisers, perhaps with minor ad hoc additional duties, and that responsibility for most if not all managerial matters rested with the Area Managers. However, in the tribunal's judgment that position is not borne out by the evidence.

11.19 The tribunal has seen an internal advert dating from March 2018 for a Store Manager vacancy. It refers to it being a *'great opportunity for someone to progress in their Sky career'* and sets out responsibilities including leading from the front, leading the team, developing the team, inducting new employees and working with other Store Managers on area projects.

11.20 In May 2018 Mr Akmeemana was still being given a store target as well as an individual target against which his performance would be measured.

11.21 As late as July 2018 Mr Rajput's Area Manager wrote to her Store Managers referring to *'your teams'* and asking them to lead by example and to 'call out' members of their teams who were not performing satisfactorily. She also said that store results were not just owned by her, but also by *'you guys as the Store Managers'*.

11.22 The tribunal also notes the content of the consultation meetings which took place between August and October 2018, and which will be referred to again below. The Claimants and other Store Managers were asked about their roles and gave examples of things they were doing which, the tribunal finds, are consistent with the type of tasks identified in the job descriptions and other documents referred to above.

11.23 During the consultation process in 2018, the Respondent compiled a spreadsheet setting out the tasks that individual Store Managers had said during their individual consultation meetings they continued to undertake. It was noted in the spreadsheet which Store Manager had mentioned which type of task. However, the tribunal finds that this gave a far from full, or even representative, picture. The information only related to those who had attended individual consultation meetings, which was a minority. Also, the information was the result of the Store Managers giving examples of the sort of tasks they continued to do. They were not asked, and therefore did not give, a complete definitive list of every task.

11.24 The tribunal also notes the document produced subsequently by the Respondent which sets out the type of Store Manager task and where responsibility for that task should sit, based on the information in the spreadsheet. In some cases it was said that responsibility rested with the Area Managers, but that of itself was not inconsistent with tasks being delegated to the Store Managers, which the tribunal has heard did take place, or with formal responsibility resting with an Area Manager but informal day-to-day responsibility falling on the Store Managers.

11.25 The tribunal has no doubt, and the Respondent accepts, that historically the Store Managers held a distinct and identifiable role which was seen by all concerned as a managerial role of a higher status than that of Sales Advisers. The majority of their time would have been spent selling, but they also undertook additional substantive duties and, even when selling, they were, to use the phrase used in various of the contemporaneous documents, leading their team by example.

11.26 The tribunal also finds that although the Store Manager role evolved over the years, eg at some stage all team members were given keys to open and close the stands, it remained a distinct substantive role right up to October 2018 and for which individuals were being paid not insignificant additional pay.

11.27 The Respondent has relied on the fact that many Store Managers had high sales figures, and suggests that this implies they were doing nothing but selling. However, that could be explained by their experience and expertise resulting in better sales figures from less time selling than was the case with Sales Advisers.

11.28 The Respondent also says that there was no consistency across its various regions and areas in terms of the amount and type of additional work done by the Store Managers. However, even if it is right that some Store Managers were not fulfilling their Store Manager duties in the way or to the extent that they should have been, that of itself does not mean that the Store Manager role had effectively ceased to be.

11.29 Based on the totality of the evidence presented to it, the tribunal has concluded that the role of Store Manager was not a 'legacy' role as at October 2018, but was still very much an ongoing substantive role, perceived by all as a managerial role of higher status than the Sales Advisers. The tribunal also accepts the Claimants' evidence that they were, in effect, acting as Store Managers all the time when working, in that even when undertaking selling activity they were still required to lead by example.

11.30 Turning now to the process leading up to October 2018, the Respondent developed what it called the Retail Growth Plan 2020 ('**RGP**'). There were a number of reasons for this, including a desire to broaden its appeal beyond the increasingly competitive markets for TV and broadband services, a concern that the span of control of Area Managers was too broad and prevented them from providing sufficient support to their teams, and a further concern that the pay package was out of line with other employers and may also be encouraging an approach by Sales Advisers that was not in the best interests of customers or the Respondent's business.

11.31 The RGP involved a proposal to restructure the Respondent's operations and the pay and reward package available to its staff. In broad terms, the proposal was to remove the role of Area Manager and create 8 Regional Manager roles at a higher level, and 60 Team Leader roles at a lower level. In addition, the Store Manager role would be removed, and with it payment of SMA, basic pay would be increased for all those working in the stores, and the commission scheme would be changed.

11.32 Part of the proposed restructure was trialled in certain areas for a three month period from April 2018. The trial included the new pay structure in terms of higher basic pay and the proposed new commission scheme. However, there was no change to the Store Manager role or to payment of SMA during the trial. Those taking part in the trial were also given a guarantee that they would not lose out financially during the trial period.

11.33 Then, on 1 August 2018 the proposed restructure was announced to all staff.

11.34 As noted above, the proposed restructure would involve the Area Manager and Store Manager roles disappearing. In the case of Area Managers, the Respondent accepted that the restructure would result in a redundancy situation and that collective consultation was appropriate. The Respondent did not accept that removing the Store Manager role would result in any redundancy situation or that the existing or new commission schemes were contractual; however, even though it did not believe it was obliged to do so, the Respondent also embarked on a collective consultation process with the Store Managers.

11.35 The Respondent does not recognise any trade union, although a number of its employees, including the Claimants, are members of the Communication Workers Union. Employee representatives were therefore elected to represent Area Managers and, separately, Store Managers. As noted above, there is no issue concerning the election process.

11.36 A number of collective consultation meetings then took place. Meetings took place with the Store Manager employee representatives on 17 August 2018, 22 August 2018, 29 August 2018 and 5 September 2018. It had been intended that there would be two further collective consultation meetings, as there were with the Area Manager employee representatives, but the Store Manager employee representatives brought the collective consultation to an early end on 6 September 2018 saying that most of their concerns and proposals had not been accepted and their feedback largely ignored.

11.37 There then followed a process of individual consultation with those Store Managers who indicated that they wanted it. That included Mr Akmeemana, whose only meeting took place on 24 September 2018, and Mr Rajput, who attended meetings on 28 September 2018 and 23 October 2018.

11.38 It is not necessary to discuss here the content of the collective or individual consultation in detail, but a running theme throughout was that the Store Managers wanted either for the change to their role not to take place at all, or if it was to take place they considered that it gave rise to a redundancy situation and they wanted the option of a redundancy package. They were also concerned that the increase in their basic pay would be the same as for Sales Advisers, and so with the withdrawal of SMA there would no longer be any differential between their pay and that of the Sales Advisers who they had previously managed.

11.39 Following the conclusion of the consultation process, the Respondent confirmed that the proposed restructure would be implemented with effect from 26 October 2018. By letters sent to each Store Manager at or around the time the restructure was implemented, the Respondent confirmed changes to their contractual terms. The letter to Mr Akmeemana is dated 16 November 2018 and included the following:

> *'… with effect from 26 October 2018, your contractual details will change/have changed.*
>
> *…*
>
> *Your new contractual terms are as follows*
>
> - *Your new job title will be Sales Advisor.*
> - *Your salary will be £25,500.00 per annum.*

- *Your store manager allowance will end on 26th October 2018.*

…

All your other main Terms and Conditions of Employment remain the same.

By receipt of this letter you confirm that you understand and accept the above changes.'

11.40 Notwithstanding the last sentence of the letter quoted above, the Respondent has (sensibly) not sought to argue that mere receipt of the letter amounted to valid acceptance of any change to terms and conditions of employment.

11.41 Following the implementation of the restructure the Claimants (with the single exception of Mr Charman) continued to work for the Respondent in the role of Sales Adviser and to accept remuneration on the basis of the higher basic salary and withdrawal of SMA as implemented on 26 October 2018. They say that they did so under protest and that they made this clear to the Respondent. However, for reasons discussed below, it is not necessary for the tribunal to make further findings on that matter.

11.42 The final area to cover in these findings of fact concerns various grievances raised with the Respondent by Mr Rajput and Mr Akmeemana both individually and collectively.

11.43 Mr Akmeemana raised individual grievances on 7 September 2018 and 11 September 2018. He was also part of a collective grievance raised on 13 September 2018 which was then followed up (again collectively) on 18 September 2018 and 19 October 2018. Mr Akmeemana then raised a number of further grievances on 7 October 2018. Mr Rajput was also part of the same collective grievance and follow-up emails as Mr Akmeemana. Both Claimants then raised a number of further individual grievances on 26 October 2018, the day on which the restructure was implemented.

11.44 The content of the various grievances varied to some extent, but as with the collective and individual consultation meetings the running theme was that the Claimants did not want the restructure to go ahead, at least in so far as it affected their roles, and/or if it did go ahead they wanted to be offered a redundancy package.

11.45 The response from the Respondent to each of the Claimants' grievances was to say that the matters raised concerned the subject matter of the ongoing consultation process and so should be raised as part of that process. In so far as some of the grievances were raised after the Claimants had already attended individual consultation meetings, they were told that a further individual consultation meeting could be arranged if they wanted one.

11.46 The tribunal notes that in his final grievances submitted on the evening of 26 October 2018 Mr Akmeemana said in terms that he wanted his grievance to be considered at a formal grievance meeting at which he intended to exercise his right to be accompanied by a union representative. In reply, the Respondent acknowledged that Mr Akmeemana wanted his concerns to be treated as a grievance, but said again that the issues raised concerned the consultation process in which he had already participated and that if there were any new points he wished to make then a further individual consultation meeting could be arranged.

11.47 As already noted above, the restructure had in fact been implemented with effect from 26 October 2018. Mr Akmeemana did not request a further individual consultation meeting on or after 26 October 2018 and nor did Mr Rajput.

Relevant statutory provisions

12. The most relevant sections of the ERA for present purposes are as follows:

*‘**13. Right not to suffer unauthorised deductions.***

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision” , in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

…

25. Determinations: supplementary.

(1) Where, in the case of any complaint under section 23(1)(a), a tribunal finds that, although neither of the conditions set out in section 13(1)(a) and (b) was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction shall for the purposes of section 24(a) be treated as reduced by the amount with respect to which that condition was satisfied.

…’

13. The following sections are relevant to the TULRCA, s146 claim:

*‘**146. Detriment on grounds related to union membership or activities.***

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him from doing so,

…

(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, …

…

(2) In subsection (1) "an appropriate time" means —

(a) a time outside the worker's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose "working hours" , in relation to a worker , means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

…

148. Consideration of complaint.

(1) On a complaint under section 146 it shall *be for the employer to show what was the sole or main purpose for which he acted or failed to act.*

…'

14. The most relevant sections for the TULRCA, s188 claim are as follows:

*'**188. Duty of employer to consult representatives.***

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

(1A) The consultation shall begin in good time and in any event—

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1) , at least 45 days , and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

(1B) For the purposes of this section the appropriate representatives of any affected employees are–

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or

(b) in any other case, whichever of the following employee representatives the employer chooses:–

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).

(2) The consultation shall include consultation about ways of—

(a) avoiding the dismissals,

(b) reducing the numbers of employees to be dismissed, and

(c) mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

…

(4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—

(a) the reasons for his proposals,

(b) the numbers and description of employees whom it is proposed to dismiss as redundant,

(c) the total number of employees of any such description employed by the employer at the establishment in question,

(d) the proposed method of selecting the employees who may be dismissed,

(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed,

(g) the number of agency workers working temporarily for and under the supervision and direction of the employer,

(h) the parts of the employer's undertaking in which those agency workers are working, and

(i) the type of work those agency workers are carrying out.

…

189. Complaint and protective award.

(1) Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground–

(a) in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,

(c) in the case of failure relating to representatives of a trade union, by the trade union, and

(d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

…

195. Construction of references to dismissal as redundant etc.

(1) In this Chapter references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related.

(2) For the purposes of any proceedings under this Chapter, where an employee is or is proposed to be dismissed it shall be presumed, unless the contrary is proved, that he is or is proposed to be dismissed as redundant.

196. Construction of references to representatives.

(1) For the purposes of this Chapter persons are employee representatives if—

(a) they have been elected by employees for the specific purpose of being consulted by their employer about dismissals proposed by him, or

(b) having been elected or appointed by employees (whether before or after dismissals have been proposed by their employer) otherwise than for that specific purpose, it is appropriate (having regard to the purposes for which they were elected) for the employer to consult them about dismissals proposed by him,

and (in either case) they are employed by the employer at the time when they are elected or appointed.

(2) References in this Chapter to representatives of a trade union, in relation to an employer, are to officials or other persons authorised by the trade union to carry on collective bargaining with the employer.

(3) References in this Chapter to affected employees are to employees who may be affected by the proposed dismissals or who may be affected by measures taken in connection with such dismissals.'

Submissions and case law

15. Each party provided the tribunal with a written skeleton argument supplemented with oral submissions. The following is a relatively brief summary of the parties' respective positions. It is not necessary to repeat the parties' submissions in their entirety here but the tribunal has taken into account all of the matters put to it by each side.

16. With regard to the claim for unauthorised deduction from wages, the Claimants' position, in short, was that SMA fell within the definition of wages in ERA, s27(1), they had a contractual entitlement to SMA payable each month, they had never agreed to vary their contracts to remove entitlement to SMA, they had not affirmed their contracts following the withdrawal of SMA, and the contractual position therefore remained that they were still entitled to SMA.

17. The Respondent did not dispute that Store Managers, including the Claimants, were entitled to SMA up to 26 October 2018. However, it said that SMA was not properly payable thereafter because it was only payable for so

long as individuals performed the duties of Store Managers, which they did not following the restructure and the abolition of the Store Manager job title. Further, the Respondent argued that if the Claimants were right in saying that the Store Manager remained a substantive role up to the date of the restructure, then its removal was a fundamental change which, in law, amounted to termination of the Claimants' contracts of employment and the imposition of new contracts; on that basis, there was said to be no ongoing entitlement to SMA since the new contractual terms did not include such entitlement. In the alternative, the Respondent said that if the Claimants' contracts of employment were not terminated at the time of the restructure, then by continuing to work and accept increased basic pay they had affirmed their contracts as varied or, in the further alternative, since their new basic pay was higher than the total of their previous basic pay plus SMA, they had in fact been overpaid rather than underpaid.

18. The claim under TULRCA, s188 rested on a finding that the proposed restructure would amount to termination of the Claimants' existing contracts of employment such that the Respondent was proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days, and the duty to consult collectively under s188 was therefore triggered. The tribunal was referred to the wide definition of redundancy for these purposes in TULRCA, s195. The number of Store Managers whose roles were being abolished was clearly more than 20, but the tribunal raised with the parties the question of whether there was an issue as to whether the restructure involved 20 or more employees 'at one establishment'; neither side suggested that this was a live issue in this case and, in any event, for reasons discussed below it was not necessary for the tribunal to resolve it even if it had been.

19. The Claimants submitted that the withdrawal of the Store Manager role and SMA amounted to a forced demotion and was so fundamental that it would amount to termination of their existing contracts and the offer or imposition of a new contract. That, they said, meant that the proposed restructure involved a proposal to dismiss them and the other Store Managers as redundant. They relied on *Hogg v Dover College* ([1990] ICR 39, EAT) and *Alcan Extrusions v Yates* ([1996] IRLR 327, EAT) in support of this.

20. As noted above, if the duty to consult under TULRCA, s188 was triggered then there was no dispute between the parties that employee representatives were properly elected in accordance with the statutory requirements or that collective consultation with those representatives had taken place. The remaining areas of dispute were (a) whether the content of the collective consultation complied with TULRCA, s188(2), and (b) whether the Claimants had standing to bring a claim for failure to consult because of the wording of TULRCA, s189(1). Unsurprisingly, the Claimants' position was that the answers to (a) and (b) above should be no and yes respectively, and the Respondent's position was the opposite.

21. Finally, with regard to the claim under TULRCA, s146 the Claimants said that by insisting that their grievances be dealt with under the consultation process rather than its grievance procedure, the Respondent denied them the right to union representation. They said this was a detriment and that the

Respondent had acted in this way for the sole or main purpose of preventing them from making use of trade union services (within the meaning of TULRCA, s146(1)(ba)) and/or to penalise them for being union members (s146(1)(a)). The Claimants invited the tribunal to infer the Respondent's purpose from a number of aspects of the witness and documentary evidence which demonstrated, they said, the Respondent's antipathy towards the union. The Respondent said in response that no such inference should be drawn from the evidence, and that the Respondent dealt with the many grievances raised by the Claimants in the way that it did simply because the subject matter was the same as that being dealt with in the consultation process and the Claimants were able to raise any concerns as part of that process.

22. The tribunal was provided with copies of a number of cases by the parties, all of which have been taken into account when reaching its conclusions.

<u>Discussion and conclusions</u>

23. **Were the Claimants' contracts terminated?**
The first matter to consider is whether the restructure which was implemented on 26 October 2018 amounted, in law, to the termination of the Claimants' contracts of employment and the offer or imposition of new contracts. The Claimants accept that if it did then their claim for unauthorised deduction from wages would fall away, and if it did not then their claim for failure to consult must fail.

24. There was some discussion with the parties during their closing submissions as to what the correct legal test is for what one might call a *Hogg v Dover College* type termination. At one point the Respondent said that a fundamental breach of contract by the Respondent would be enough to terminate the Claimants' contracts of employment. The Claimants did not accept this, saying that what is required is more than a fundamental breach.

25. The tribunal notes the way in which the applicable test has been formulated in previous appellate cases. In *Hogg v Dover College* itself, Garland J (at 42F) referred to Mr Hogg in effect being told that his former contract was from that moment gone, and that he was to be employed on wholly different terms.

26. In *Alcan Extrusions v Yates*, HHJ Smith QC (at ¶25) formulated the question for the tribunal to answer in such cases as whether the old contract was being withdrawn or removed from the employee and noted (at ¶27) that the tribunal in that case had been entitled to conclude that the new terms imposed on Mr Yates were *'so radically different from the old as to pass beyond mere repudiatory variation of the old contract'*; this latter point, the tribunal finds, resolves the question of whether a repudiatory breach without more would be enough to amount to termination.

27. In light of the guidance from the EAT in these and other cases, it seems to the tribunal that the question it has to answer is whether, on an objective consideration, the restructure in so far as it affected those with the job title of Store Manager was so substantial that it amounted to the withdrawal of their

existing contracts of employment and the offer or imposition of new contracts of employment.

28. It was the Claimants' case (albeit in the alternative to their unauthorised deduction claim) that the restructure involved the removal of their substantive Store Manager role and the higher status and additional remuneration associated with it, and that this amounted to a forced demotion. They also relied on the fact that before the restructure the payment of SMA meant there was a substantial differential between their pay and that of the Sales Advisers, whereas after the restructure there was none. They said in closing submissions that these were very substantial changes.

29. The tribunal has already found that the Store Managers, including the Claimants, held a distinct and identifiable role which was seen by all concerned as of higher status than the role of Sales Adviser, that it was a managerial role which involved substantive additional duties, and that this remained the case up until 26 October 2018 when the restructure was implemented. It is also clear from the evidence that the differential pay as between Store Managers and Sales Advisers disappeared after the restructure.

30. The tribunal finds that the unilateral removal of this role and the additional remuneration, in the form of SMA, that went with it was a very substantial change to what were clearly contractual terms of the Claimants' employment.

31. The question is then whether the changes imposed on the Claimants were so substantial as to amount, on an objective assessment, to the withdrawal of their existing contracts as Store Managers and the imposition of new ones as Sales or Retail Advisers. The tribunal has considered the fact that many of the reported cases, including *Hogg*, appear to have involved not only a substantive change in role but also a substantial reduction in pay. In this case, although SMA was removed, the increase in basic pay was greater than the level of SMA payments. However, the absence of a pay reduction cannot, in the tribunal's judgment, be decisive; the question remains whether, objectively, the restructure amounted to the withdrawal of the Claimants' existing contracts of employment.

32. The tribunal has concluded, taking into account all of the evidence presented to it, that in this case the changes imposed by the Respondent were, as the Claimants said at the time, sufficiently significant when assessed objectively to amount to termination of their contracts of employment with effect from 26 October 2018. Thereafter, they continued to work under new contracts of employment.

33. **Unauthorised deduction from wages**

In light of the above conclusion, the claim for unauthorised deduction from wages cannot succeed since the Claimants' contractual entitlement to SMA ended on 26 October 2018 when their existing contracts of employment were terminated. This claim is therefore dismissed.

34. **Failure to consult**
A claim that an employer has failed to comply with a requirement under TULRCA, s188 (or 188A) may be presented to the tribunal only in accordance with TULRCA, s189, which gives defined categories of person the standing to bring such a claim. Pursuant to s189(1)(b), a claim concerning a failure relating to employee representatives (other than one relating to their election) may be brought by any of the employee representatives to whom the failure relates. Neither of the Claimants was an elected employee representative.

35. The Claimants have said that their claims fall within TULRCA, s189(1)(d), ie *'any other case'*, and that they therefore have standing to bring this claim. The Respondent referred the tribunal to the judgment of the Court of Appeal in *Mercy v Northgate HR Ltd* ([2008] ICR 410) in which it was held that a complaint relating to employee representatives could only be brought by one or more of those representatives. In that case the alleged failure concerned the provision of information under TULRCA, s188(4) and the Claimants have argued that this case is distinguishable on the basis that it concerns s188(2).

36. The Claimants argued that TULRCA, s188(4) expressly requires information to be provided to employee representatives, whereas s188(2) sets out the matters about which there must be collective consultation. However, TULRCA, s188(2) also provides that the consultation must be *'with a view to reaching agreement with the appropriate representatives'*, in this case the employee representatives. The tribunal has concluded that no relevant distinction can be drawn between this case and *Mercy*, and that it is therefore bound by the judgment in that case.

37. On that basis, the tribunal finds that neither of the Claimants has standing to bring the claim for failure to consult, and it must therefore be dismissed.

38. **Trade union detriment**
The final claim is for detriment on grounds related to union membership or activity under TULRCA, s146.

39. The Respondent accepts that it responded to the Claimants' various grievances, both individual and collective, by saying that the matters could and should be raised as part of the consultation process. The tribunal accepts that the effect of that response denied the Claimants the opportunity to have union representation, to which they would have been entitled had the grievances been dealt with under a grievance procedure, and that this prevented them from making use of trade union services within the meaning of TULRCA, s146(1)(ba). The tribunal also accepts that that was capable of amounting to a detriment.

40. This claim therefore turns on the Respondent's purpose in responding to the grievances as it did, ie whether its sole or main purpose was to penalise the Claimants for being union members and/or to prevent them from making use of trade union services.

41. The tribunal has considered the matters relied on by the Claimants on the basis of which they invite the tribunal to draw an inference that there was a culture of dislike and mistrust of the union. It seems to the tribunal that many

employers may have allowed the Claimants grievances to be dealt with under a grievance procedure, especially when grievances were reiterated on 26 October 2018, after the individual consultation process had concluded and the restructure had been implemented; at that point it could be said that suggesting that any new points should be raised in a further individual consultation meeting was unrealistic.

42. The tribunal has also reminded itself of the burden of proof in such claims under TULRCA, s148(1).

43. However, looking at the totality of the evidence, the tribunal is satisfied on balance that the sole or main reason that the Respondent responded to the grievances in the way that it did was because the issues raised were being, or latterly had already been, considered as part of the consultation process, and that it was not for any of the purposes set out in TULRCA, s146(1). Therefore this claim also fails and is dismissed.

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Employment Judge K Bryant QC
23 November 2021 – Croydon