EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Martynuik & Others (See attached Schedule)**

Respondent: **1. Lunar Caravans Ltd (In Creditors' Voluntary Liquidation)**
2. Lunar Automotive Ltd

Heard at: Manchester Employment Tribunal **On:** 1, 2 3 September 2021

21 September 2021 and
8 October 2021 (in chambers)

Before: Employment Judge Dunlop (sitting alone)

Representation

Claimant: Mr D Jones (Counsel)
First Respondent: Not represented
Second Respondent: Mr D Bloom (Representative)

RESERVED JUDGMENT

1. There was a relevant transfer within Regulation 3 Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") of the first respondent's business to the second respondent on 14 August 2019.

2. The transfer was not the sole or principal reason for the dismissal of the individual claimants. Liability for those dismissals did not transfer to the second respondent.

3. The individual claimants were unfairly dismissed by the first respondent. Their claims under s.94 Employment rights Act 1996 ("ERA") are well-founded.

4. The individual claimants were wrongfully dismissed by the first respondent.

5. Compensation due to the individual claimants will be assessed at a later date.

6. Unite the Union's claim under Regulation 15(1) TUPE that the first respondent failed to comply with its obligations to provide information to Unite the Union under Regulation 13(2) TUPE is well-founded.

7. The terms of the award to be made under Regulation 15(8)(a) will be determined at a later date in accordance with the findings made in the reasons set out below. The first and second respondent will be jointly and severally liable for the award made.

8. Unite the Union's claim under s.189(1) Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) that the first respondent failed to comply with its obligations to consult with Unite the Union under s.188 TULR(C)A is well-founded.

9. The terms of the protective award to be made under s.189(2) will be determined at a later date in accordance with the findings made in the reasons set out below. The first respondent will be solely liable for the award made. (This means that the second respondent is not liable for this award, it does not affect the ability of employees to claim the award (subject to a statutory cap) from the government's Insolvency Service).

REASONS

Introduction

1. This claim concerns the unfortunate demise of a caravan manufacturer based in Preston. The first respondent's business was bought ought of administration by the second respondent, the bulk of the workforce (approximately 120) having been made redundant shortly prior to the sale. The remaining employees (approximately 60) transferred to the second respondent (although it is not conceded by the second respondent that this transfer was by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2016 ("TUPE")).

2. A number of the dismissed employees brought claims against both respondents in respect of unfair dismissal, wrongful dismissal, failure to inform and consult as required by the Transfer of Undertakings (Protection of Employment) Regulations 2016 and for protective awards arising from failure in collective redundancy consultation under s189 Trade Union and Labour Relations (Consolidation) Act 1992. In circumstances discussed more fully below, the claim was later amended to add Unite the Union as a claimant in all cases in order for it to adopt the collective claims, on the basis that it (and not the individuals claimants) had the standing to bring them under the relevant legislation.

3. The first respondent, now in the process of liquidation, has played no part in the proceedings and was not represented at the hearing. The first respondent's Administrators have, however, given consent for the proceedings against the first respondent to continue. This is contained in an

email dated 31 March 2020 from David Acland, one of the Joint Administrators.

The Hearing

4. The hearing was conducted over three days on 1, 2 and 3 September 2021. It was conducted by CVP and there were no technical issues, save that there was a delay in the electronic version of the bundle, which was contained in a very large electronic file, being made available to the Tribunal (despite the considerable efforts of the claimants' solicitors to resolve this issue).

5. In view of some of the matters which follow, I observe here that the claimants' representative at the hearing, Mr Jones, is an experienced barrister, specialising in employment law. The second respondent's representative, Mr Bloom, does not hold himself out as a qualified barrister or solicitor in this jurisdiction. He explained that he holds the office of 'General Counsel' with the corporate group which the second respondent belongs to. It was evident to me that he had a depth of legal experience and a broad familiarity with legal principles and procedure, albeit that employment law was not his specialism.

6. The following preliminary matters arose:

Tribunal Composition

7. Some of the claims presented by the claimants are normally required to be heard by an Employment Judge sitting as part of a Tribunal panel, including Non-Legal Members. It transpired at the outset of this hearing that the matter had erroneously been listed before me on a sit-alone basis. I raised this with the parties and they both indicated that there was little disputed evidence and that the case would turn almost entirely on legal submissions. The claimants, in particular, were keen for the case to go ahead without further delay. Whilst it might have been possible to identify members able to take the case on the second and third day of the listing, this would have given rise to a likelihood of the matter being adjourned part-heard, particularly as there was a large bundle (700+ pages) which newly-identified members would then need to read in to.

8. Section 4(3)(e) Employment Tribunals Act 1996 has the effect that a case which would normally be heard by a full panel may be heard by an employment Judge sitting alone where "*the parties have given their written consent*". Following discussion, Mr Jones and Mr Bloom both indicated that they wished to give such consent on behalf their clients.

9. The position of the first respondent was that it was in administration at the time the proceedings were commenced. By email dated 31 March 2020 the Administrators consented to the continuation of the proceedings and indicated that they would not participate. No ET3 has been filed on behalf of the first respondent. On 30 June 2021 the first respondent entered creditors voluntary liquidation.

10. Section 4(3)(g) of the 1996 Act provides that a case which would normally be heard by a full panel may be heard by an employment Judge sitting alone where the proceedings are "*proceedings in which the person (or, where more than one, each of the persons) against whom the proceedings are brought does not, or has ceased to, contest the case."* I consider that, in the absence of an ET3, the first respondent is not contesting the case.

11. A very literal interpretation of s.4(3) (and particularly the wording in brackets in subsection (g)) might suggest that I was unable to proceed in these circumstances as different exclusions applied to the different respondents. However, considering the "and" connecting the subsections, and taking a broadly pragmatic view of the section as whole, I consider that the better view is that it is within the contemplation of the section for me to proceed alone where the active parties have provided consent and the inactive party is not contesting the case. In view of the fact that this was a remote hearing, the representatives of the active parties provided their written consent by email to be placed on the file.

Postponement application

12. After we had dealt with the panel composition issue, I discussed the issues in the case with the representatives. Mr Bloom and Mr Jones had had the opportunity to discuss matters with each other during two significant adjournments to deal with the technical difficulties with the bundle and to enable the representatives to take instructions on the composition of the panel. The subject of this discussion arose, in part, from a lack of clarity about the extent to which the collective claims (now brought by Unite) would lie against the second respondent directly and/or the extent to which the first respondent's liability for such claims (if proven) might be transferred to or shared by the second respondent and/or the extent to which the claims could be advanced in respect of the 60 employees who had remained in employment (none of whom were claimants). These topics were returned to at numerous points over the course of the hearing, and are discussed further below. However, Mr Bloom raised a concern that if the second respondent's own actions were in issue then it would be appropriate to allow it to introduce additional evidence from its main witness, Mr Marks, as to its actions in the period following the purchase of the business. He therefore applied to postpone the hearing with directions for that evidence to be produced.

13. I rejected that application and gave oral reasons for doing so. In brief, I recognised that Mr Bloom did not appreciate until relatively recently that the amendment of the claim to add Unite as a claimant arguably opened the door to a broader liability than may previously have been assumed to be the case. However, at the time that that application was made the second respondent was professionally represented. It chose not to attend and instead presented written representations prepared by counsel. Following the amendment application being granted, it did not to request written reasons for that Order and did not to appeal it.

14. The amendment application had included draft additional paragraphs to be added to the grounds of claim. This amounted to no more than around half

a page of text. Mr Bloom said that he was disadvantaged because he has not seen that proposed amendment. However, it was served as part of the application, albeit that it had not made its way into the bundle for this hearing due to an oversight. Mr Bloom has explained that he is hampered to some extent by a lien that now exists over the second respondent's papers held by its former representatives. Whilst that may be the case, that is a matter for the second respondent and not the claimant. Further, the amended particulars are referred to in REJ Franey's Order, which itself appears in the bundle There is no reason why Mr Bloom could not have pursued the point with the claimants' representatives (or indeed the Tribunal) in good time before the hearing.

15. When the additional particulars of claim are considered, it is clear that the allegations they make are of defaults in the conduct of the first respondent. Although the claimant's witnesses give some evidence about the conduct of the second respondent after the sale, it is not directly relevant to the claims they have made. Mr Jones described it as "contextual". A less charitable description might be that the claimant's witnesses have indulged in a degree of mud-slinging. In any event that evidence is of very limited relevance to this case and I considered that any prejudice that the second respondent has suffered could be adequately addressed by allowing Mr Bloom leeway to ask some supplemental questions to enable Mr Marks to respond to matters raised by the claimant's witnesses. Any prejudice to the respondent caused by declining to postpone the hearing is therefore, in my view, minor and remediable (at least in part). This must be set against the very significant prejudice to the claimants of having a long-standing hearing delayed at the point where it is about to begin, in circumstances where a new hearing date at this Tribunal would be very late in 2023 or possibly 2024. In all those circumstances, I did not consider it appropriate to postpone the hearing and rejected Mr Bloom's application. I did ensure that a copy of the amended particulars was made available to him.

16. After I had dealt with these preliminary matters, and discussed the list of issues and other housekeeping matters, I took time to read the witness statements, the documents referred to in the witness statements and the documents identified in an agreed reading list submitted to the Tribunal. I made the parties aware that they should not assume that I had read documents not referred to within that material. We therefore commenced hearing evidence on the second day of the hearing. On behalf of the claimants I heard from Mr David Kennedy, a retired full-time Regional Officer of Unite, and Ian Roe, the workplace representative for Unite (who was one of the employees who stayed with the business following the sale). On behalf of the second respondent I heard from Mr Nicholas Marks, the second respondent's owner and Stephen Reynolds, who is an employee of the second respondent but was previously employed by DF Capital.

17. The evidence concluded during day 2, and both Mr Jones and Mr Bloom prepared detailed written submissions, which they supplemented with oral argument on the morning of day 3. I am grateful to them both for the thoroughness of the submissions they have put forward. Following the written submissions, I indicated that I would reserve my decision, and they would therefore receive a written judgment with reasons.

The Issues

18. The issues were originally set out in Employment Judge Leach's Case Management Order dated 21 August 2020. The Order also carefully set out which claims would proceed to a final hearing on remedy and liability and which claims would proceed to a final hearing on liability only (on the basis that individual claimants would not need to attend a hearing at which all the issues were common to all of their cases). That Order pre-dated the addition of Unite as a claimant to the claim and the list of issues had not been updated to reflect the consequences of that Order (giving rise to some of the lack of clarity around the claims and the effect of any judgment in favour of Unite, as mentioned above). I invited the parties to produce an amended List of Issues overnight on day 1. We discussed the resulting document, which was not entirely agreed, on the morning of day 2, and I subsequently circulated a final version which is annexed to this Judgment.

Findings of Fact

19. The relevant facts are as follows:

20. As noted above, the first respondent was a manufacturer of caravans. The first respondent was a unionised workplace. Unite was the recognised trade union in respect of hourly-paid workers pursuant to a Memorandum of Agreement dated 3 September 2002.

21. The factory produced around 3,500 caravans annually. It relied on funding from an organisation called DF Capital.

22. On 20 May 2019, the first respondent appointed FRP Advisory LLP to assist with sourcing equity investment. With effect from 28 June 2019, the scope of their role evolved to assisting in the sale of the first respondent.

23. I find that the business was in genuine and serious financial difficulty in the period spring-summer 2019. Detailed evidence of this put forward as to this in the statement of Mr Marks, much of it drawing on material arising out of High Court litigation in which a key issue (for reasons I need not elaborate on) is whether the first respondent was actually insolvent as at October 2018. Mr Marks was not challenged on this evidence.

24. There was no attempt by the first respondent to inform the union of these financial difficulties or to consult with them about potential up-coming job losses or other implications prior to the business appointing administrators.

25. I find, as described in the Joint Administrator's Proposals document dated 4 September 2019, that HMRC issued the first respondent with a 7-day notice of intention to present a winding up petition on or around 27 June 2019.

26. Mr Reynolds gave evidence that he believed a winding-up petition was subsequently issued in July. There is no direct evidence of this petition, and

it is therefore unclear whether it was ever issued. I will return to this point later.

27. the first respondent served a lay-off notice on 25 June 2019. The original period of lay-off was expected to be 27 June 2019 to 5 July 2019 inclusive. Those individuals that were laid off on 27 June 2019 never returned to work for the first respondent. To all intents and purposes the company stopped making caravans from that date and that work, as matters transpired, did not resume. There was a minor dispute between the witnesses as to whether the second respondent had produced any caravans "from scratch" in its two years operating the business, or whether it had merely finished part-finished stock and carried out repair work. Taking it at its highest, the business has produced no more than 10 vehicles in that period.

28. On 16 July 2019, the following things happened:

    28.1 the first respondent appointed Administrators from FRP Advisory LLP.

    28.2 An HR1 form was submitted by the first respondent, proposing to make 196 employees (i.e. all the employees) redundant between 19 and 31 July 2019.

    28.3 By letter to Mr Kennedy, Unite was notified that the first respondent was being placed into administration and was therefore proposing to make redundancies. It was envisaged that the entire workforce of 196 employees would be made redundant with most employees "released from the business" within 7 to 14 days and a small number required to remain to assist with the administration. The letter did state that it was hoped that a buyer would be found for the business.

29. On 17 July a meeting took place between Les Roberts of the first respondent, David Acland of the Administrators and and representatives from Unite, including Mr Roe and Mr Kennedy. From notes taken by Mr Kennedy, it appears that the discussion centered around access to the statutory payments scheme for employees who were to be dismissed. There is no suggestion of consultation around ways of avoiding dismissals or reducing the number. Nor does there appear to have been any consultation around the selection of who would remain in the business pending any winding up/sale and who would be made redundant immediately.

30. On the same day, Mr Marks, who is an equity investor, was notified of the first respondent as a potential investment opportunity. Shortly afterwards, he was sent an Information Memorandum concerning the opportunity.

31. Mr Marks gave evidence that his team were considering data related to the first respondent with a view to making an offer between 20 July and 1 August. They were not aware of any other parties in the running to buy the business and did not believe there were any. They were placed under time

pressure by the Administrators, and understood that the business would close imminently if a sale agreement was not reached. The key issue, as far as he was concerned, was an extension of funding from DF Capital. Without securing that it would not be viable for him to buy the business. However, that was not the only matter being explored. Mr Marks stated that at that time he was in discussions with the administrators on various matters including the number of employees within the business and the number that would transfer across if the sale proceeded. He stated those discussions took place "*very early*" in the negotiations as he wanted to understand the obligations he was taking on, and in particular the "*wage roll*" that the business would need to support. He complained that the Administrators were reluctant to give full information about the employees that would remain with the business. He gave, as an example, the fact that he wanted to run production lines but had ended up with a lot of admin staff.

32. Mr Marks was clear in his evidence that he had no knowledge of or interest in the individual identities of the first respondent's employees. He had no personal stake in whether a particular employee remained with the business or not. To the contrary, he considered them to be "*chattels*" which would be bought and sold along with the other property of the business (a description he did acknowledge as unfortunate). However, he accepted that the overall number of employees was of interest to him. In particular, he said that he could not have considered purchasing the business with 200 employees on the books. At that time, he was envisioning producing 1,000 caravans in the first year. These would be produced under the "Lunar" brand. He considered he needed a payroll of "*sub-100*" employees for that business to be viable, although he might hope to take more on in the future. He said that he was never having discussions with the administrators on the basis of there being 200 employees, and had that been the case, he would simply have walked away.

33. Largely, I accept Mr Marks' evidence as outlined above. In particular, I accept that he had no knowledge of, and no particular interest in, the identity of any of the individual employees. However, I find it more difficult to accept that there were no direct discussions on the need to reduce the headcount to secure the sale given the totality of Mr Marks' evidence as well as the surrounding circumstances. I find it more likely than not that at some point between 20 and 26 July Mr Marks informed the administrators of a 'ceiling' on the number of employees that he would be prepared to take across if he purchased the business, on the understanding that other employees would be dismissed in advance of the sale. It is likely this ceiling figure was between 60 and 100 employees.

34. On 23 July Unite wrote to the first respondent setting out complaints that there had been failures to inform and consult regarding the collective redundancy situation.

35. On 26 July 2019 123 employees were dismissed without notice, that left 64 on the payroll. The dismissed employees were informed via a letter from the Administrators, which set out details of payments which may be available from the Redundancy Payments Service. The redundancies coincided with the start of a customary two-week factory shutdown. Those employees who

were not made redundant were also absent from work as part of the shut-down. Had the redundancies not occurred, the shut-down would have triggered liability for payment of holiday pay to most of the workforce, totaling around £200,000. There were insufficient funds in the business to make that payment.

36. On the same day, an email from Katy Flynn of FRP Advisory to Carol Tallentire of Unite explained that notices of redundancy had been issued as the company shut down was due to commence and the company was not in a postion to make payments to laid-off employees. The email references "*numerous telephone conversations over the last few days*". Much was made of this reference by Mr Bloom, particularly in view of the fact that Ms Tallentire (who was providing cover for Mr Kennedy who was away in this period) was not called to give evidence. Whilst I appreciate that Mr Bloom feels at a disadvantage as he does not have access to the first respondent's information and witnesses, I do not find that this reference to "*conversations*" advances matters in terms of compliance with the TUPE and TULRCA consultation requirements. A statutory consultation process envisages information being provided in writing with sufficient time for union representatives to discuss matters with their members before presenting their arguments to the employer. The text of the (few) letters between the parties indicate that both were familiar with the requirements of that sort of process. Mr Jones invites me to find, given the chronology, that any such discussion must only have related to the impeding redundancies and not to any proposed sale. I find, on the basis of the witness evidence and documentary evidence as a whole, that the Administrators repeatedly told the employees that they "hoped" to find a buyer for the business but that nothing more specific said about the possibility of the sale to Mr Marks until it was announced as agreed.

37. Although the Administrators were not called by either party to give evidence, I received some assistance from an email dated 17 August 2021 from one of the Administrators to the Tribunal which set out some information in relation to the process. Regarding the telephone calls between Ms Flynn and Ms Tallentiere, the email stated that in those discussions "*it was acknowledged that it is difficult to consult when the company is both in administration and involved in a discreet sales process*."

38. Mr Marks stated, and I accept, that he did not follow the formal sale process outlined in the Memorandum, but made an offer for the business by email, outlining the terms on which he would be prepared to buy it. The second respondent was incorporated on 1 August 2019 as a vehicle for Mr Marks' purchase of the first respondent. I find the email offer was most likely made on that day, or possibly the previous or following day. The key issue for Mr Marks remained the involvement of DF Capital, and the offer was conditional on their participation. However, Mr Marks accepted that his email would have included details of his plans regarding the number of employees who would stay with the business as part of the purchase. This email has never been disclosed. No reason for its non-disclosure has been given and Mr Jones, on behalf of the claimant, invites me to draw an adverse inference that it must be relevant to claims and contain information adverse to the second respondent's case. The absence of the email is one

factor (although not the only factor) leading me to the finding set out in paragraph 32 above that Mr Marks had placed a ceiling on the number of employees he was prepared to accept.

39. By an email dated 5 August 2019, the remaining employees of the first respondent were notified that a buyer for the business had been found and the offer accepted subject to contract. The administrators confirmed that the employees would continue to be employed on the basis of their existing contracts and the company would pay wages until the sale was concluded (or, failing that, the business was wound up). There was no mention of any consultation process in relation to the sale.

40. The remaining 62 employees of the first respondent subsequently transferred to the second respondent on 14 August 2019 following the completion of a Sale and Purchase Agreement between the first respondent, the second respondent and the Administrators. This timescale reflected the business's planned summer shut down. The employees were informed of the identity of their new employer for the first time by email on the evening of the 14th and were requested to return to work on the 19th.

41. Mr Mark's evidence in response to the question of what he considered he had bought was "*the business of Lunar caravans, the assets, they stock that they had, although that actually belonged to DF Capital but we had the new DF Capital facility, the staff employed at the point the business was introduced to me. Good or bad, that was what we were getting."* In response to a further question, he confirmed that he also had the right to use the brand name "Lunar" and his intention was "*business as usual, make caravans*". I accept this evidence as an accurate summary of the key items that made up the sale.

42. There was some limited evidence about events subsequent to the acquisition. It is broadly agreed that Mr Marks' ambition to produce 1,000 caravans did not materialise, and that very few vehicles have been produced. Some repair and warranty work has continued. The parties are at odds in what is to blame for that situation. There has been litigation with the owner of the first respondent, who is also the landlord of the premises the business operates on. Mr Marks considers that the work done in the run-up to sale was substandard, the business has been saddled with a high commitment to remedial work and the workforce continues to cause problems. Unite contends that the failure of the business to resume productivity is due to managerial failures and on-going problems with the timely payment of wages. Obviously, the covid-19 pandemic will have resulted in further unanticipated disruption (although one of Unite's witnesses pointed out that there could have been a golden opportunity to capitalise on the demand for UK-based leisure and self-catering holidays from late spring 2020 onwards). There is no suggestion that the second respondent has sought to recruit additional employees, either at the point of transfer or more recently.

43. By an ET1 presented on 23 December 2019, Julie Martynuik, one of the employees dismissed on the 26 July, presented claims of unfair dismissal, failure to pay a redundancy payment, failure to pay notice pay and failure to

inform and consult under TUPE Regulation 13 and failure to inform and consult under Trade Union Labour Relations (Consolidation) Act 1992 (TULRCA). The claim was presented on behalf of Ms Martynuik and a number of additional claimants represented by Slater and Gordon whose circumstances were all said to be the same as hers.

44. By a second ET1 presented on the same date, Zoe Allan, another of the employees dismissed on 26 July, presented the same claim on behalf of herself and a further group of employees represented by Unite. Some claimants' names appeared on both claims, due to an issue with Early Conciliaiton certificate numbers.

45. A case management hearing was held on 20 August 2020 during which EJ Leach identified that the individual claimants appeared to lack standing to present the collective claims (failure to inform and consult under Reg 13 TUPE and under s.188 TULRCA). On 7 September 2020, as referred to above, Unite applied to be joined as a party in order to adopt those claims. Following a public preliminary hearing on 26 May 2021 Regional Employment Judge Franey made an order substituting Unite the Union for the individual claimants in respect of the collective claims and permitting it to amend the claim by adding five additional paragraphs of particulars.

46. I pause to repeat that there was no direct evidence from the Administrators called by either party. The bundle did contain a letter from a firm acting on behalf of the Administrators dated 17 August 2020 which stated "*the dismissals referred to in these proceedings were not in contemplation of aforesaid transfer, there being no transfer discussions at that time*". The bundle also contained email of the same date from Mr Acland (one of the Administrators) to the tribunal copying the representatives of both sides. That email, which I have already referred to above set out some information as to the first respondent's financial position in the period leading up to the redundancies. I have drawn on it in making my findings of fact.

Discussion and conclusions

47. I consider it helpful in this case to deal with each of the agreed issues in turn, incorporating a summary of the legal principles involved and the competing submissions of the parties into that discussion.

Relevant transfer?

48. The first issue I have to consider is whether a 'relevant transfer' of the first respondent's business to the second respondent within the meaning of Regulation (3)(1)(a) TUPE 2006 occurred on 14 August 2019.

49. Notwithstanding the fact that Mr Marks appeared to accept throughout his evidence that those employees who did come across on the sale of the business would be subject to the TUPE Regulations, Mr Bloom maintained the second respondent's position that there had been no transfer at all, and, therefore, that none of the claims could proceed against the second respondent.

50. I have reminded myself of the relevant statutory provisions:

> ***A relevant transfer***
> ***3(1) These Regulations apply to—***
> ***(a) 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;***
> **(b) [omitted]**
>
> ***(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."***

51. In considering this argument, Mr Bloom asked me to take account of the following matters (I have also summarised his arguments in respect of each point):

    51.1 Did the business retain its identity? Mr Bloom said it did not, it did not continue to make caravans (at least not on any scale). Employees found it a very different environment to work in and Mr Roe said as much in his evidence.
    51.2 What was the nature of the undertaking concerned? The manufacture of caravans. As noted above, Mr Bloom contended this has fundamentally changed.
    51.3 Were the majority of employees taken over by the new owner? No, only a small rump of employees were taken on.
    51.4 Were customers transferred? No, as the business failed to produce caravans to sell.
    51.5 What is the degree of similarity between the activities carried on before and after? Mr Bloom says it is not similar, as above.
    51.6 Were those activities suspended for any time. They remain suspended, on Mr Bloom's analysis.

52. Mr Jones submits that at the time of acquisition the second respondent intended to carry on the business of making caravans, under the brand name of "Lunar" from the premises of the first respondent and using staff that had come across from the first respondent. The business was a going concern and all employees who were still employed at the time of the transfer went across, all customers were also transferred under the terms of the Sale and Purchase Agreement which lists the customer database as one of the assets subject to sale. He notes that all the documentation proceeds on the basis that the TUPE Regulations apply (and there is an express provision to that effect in the Sale and Purchase Agreement at clause 12.1) and that Mr Marks gave evidence on this basis.

53. I accept Mr Jones' submissions. The question of whether there was a relevant transfer must be assessed at the point of transfer. At that point, I can do no better than to summarise it in the words of Mr Marks, it was "*business as usual*". I consider that this business was without question an economic entity which retained its identity and have no difficulty in finding that a relevant transfer within regulation 3 did take place on 14 August 2019.

Does regulation 8(7) apply?

54. The next issue I have to determine is whether TUPE Regulation 8(7) applies. This operates in certain insolvency situations to exclude Regulation 4 (which transfers the contracts of employment of 'in scope' employees from the transferor to transferee) and regulation 7 (which provides that dismissals due to a transfer will be unfair, subject to certain exclusions) and so would also provide the second respondent with a complete answer to some of these claims.

55. Regulation 8(7) provides:

> ***8(7) 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.***

56. As noted above, the first respondent was in administration at the point of purchase. Following some uncertainty on this point, the cases of **OTG Limited v Barke [2011] IRLR 272** and **Key2Law (Surrey) LLP v De'antiuis [2012] ICR 881** now provide binding authority for the proposition that it is not for me to investigate the purposes of *this* Administration to determine whether it can properly be considered to be analogous to bankruptcy. Rather, the courts recognise that administration as a concept is designed to preserve the subject business as a going concern (even if that may be a forlorn hope in any particular instance) and is therefore not analogous to bankruptcy, with the effect that regulation 8(7) will not be engaged in administration cases.

57. However, Mr Bloom explained that he does not rely on the Administration for the purposes of his argument that regulation 8(7) applies. He asks me to find as a fact that a winding-up petition was presented by HMRC in early July, prior to the appointment of the Administrators. As noted at paragraphs 24-25 above, there is indirect documentary evidence that HMRC did serve a 7-day notice of intention to present such a petition on or around 27 June. The only evidence that I have that the petition itself was presented is Mr Reynolds' belief that it was. It will be recalled that Mr Reynolds was working for DF Capital at the time and I accept he would have been involved in discussions with the business about its viability and DF Capital's potential exposure.

58. There is no record of this petition having been presented within the extensive documentation, including the various Administrators' reports. There also appears to be no record in on either the Companies House website or the Gazette website relating to any petition being presented. My understanding is that it may not be so recorded if it was withdrawn within a period of time, and that avoiding such a record is one incentive to encourage struggling businesses to reach agreement with the petitioner. In all the circumstances, I am not satisfied that I can make a finding that a petition was actually presented, merely on the evidence of Mr Reynolds and I decline to do so.

59. Had I found that a petition had been presented, Mr Bloom invites me to find that that would mean that winding-up proceedings had been instituted on the date of presentation of the petition and that regulation 8(7) was then engaged by that route. For completeness, I also reject that submission. Regulation 8(7) requires not only that proceedings are "instituted" but also that they are "under the supervision of an insolvency practitioner". In the context of a winding-up petition, I am satisfied that Regulation 8(7) would not be engaged until a court had made a winding-up Order, which would include the appointment of the official receiver or another liquidator to wind up the company and liquidate its assets for the benefit of creditors. Evidently, no such order was made in this case. the second respondent's witnesses directed much of the evidence in their statements to demonstrating that the first respondent was technically insolvent from as early as October 2018. However compelling that evidence might be, I do not accept that it has any relevance to the question of whether regulation 8(7) was engaged. For the reasons set out above, I am satisfied that it was not engaged.

'Automatic' unfair dismissal?

60. I now to turn to consider the first of the actual claims, namely the unfair dismissal claims. As discussed at the case management hearing conducted by EJ Leach the circumstances of all of the employees dismissed on 26 July 2019 are materially identical. The parties agree that those dismissals are all equally fair, or unfair, as the case may be. It was therefore decided at the case management stage that this hearing would determine liability for the unfair dismissal claims. If successful, the question of remedy will be considered at a later date as the individual circumstances of the employees will then become relevant.

61. The claimants' primary case is that they were 'automatically' unfairly dismissed by virtue of TUPE regulation 7(1). The list of issues identified the question in relation to this claim as follows:

> **Were the dismissals automatically unfair under Rgulation 7(1)? i.e. was the sole or principal reason for the dismissal the transfer? [Parties to make submissions as to whether it is sufficient for the purposes of Regulation 7(1) that the reason was a reason connected to the transfer].**

62. That drafting reflected the fact that Mr Jones' proposed list of issues made reference to the dismissals being unfair if they were for a reason connected to the transfer. Mr Bloom submitted that that was inaccurate, and that it reflected earlier statutory wording which had been replaced in 2014. Rather than hear detailed submissions on the formulation of the test during our preliminary discussion, I amended the List of Issues to indicate that this would be a matter for submissions at the end of the hearing. In the event, Mr Bloom proved to be correct and is to be commended for spotting the point. Ultimately, Mr Jones did not seek to submit that I should apply a broader test than that indicated on the face of the statutory wording.

63. Regulation 7(1) in full provides:

7(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 purposes of Part 10 of the 1996 Act(a) (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

64. Mr Jones invites me to find that the transfer was the sole or principal reason for the pre-transfer dismissals. Mr Kennedy gave evidence that he considered it an "extraordinary coincidence" that dismissals took place on 26 July and the second respondent was incorporated one week later on 1 August. He said "*I cannot believe that the dismissals that took place on 26 July were not in contemplation of the TUPE transfer that was to take place*". Although Mr Kennedy cannot know the mind of the first respondent or the Administrators, Mr Jones submits that this evidence is sufficient to shift the burden of proof onto the first respondent (and the second respondent) to establish that the dismissal was not automatically unfair. In support of this, he relied on the case of **Marshall v Game Retail Ltd UKEAT/0276/13/DA**.

65. Mr Jones also relied on the case of **Hare Wines v Kaur [2019] EWCA 216**, which he submitted was analogous to the present case. **Kaur** concerned one employee who was dismissed shortly before a transfer. It was found that the motive for the dismissal had been to avoid a situation arising following the transfer where Ms Kaur would be supervised by someone she had a difficult relationship with. The EAT and CA in **Kaur** were satisfied that the transfer was the sole or principal reason for dismissal in those circumstances. Mr Jones relied on an emphasis in the CA decision on the proximity of the dismissal and the transfer (although accepted that it was not a conclusive factor).

66. I do not consider that **Kaur**, which involved personal factors relevant to one employee, is of much assistance in determining a case such as this involving the very impersonal dismissal of two-thirds of the workforce. Nor do I consider that this is a case that falls to be determined on the application of the burden of proof as discussed in **Marshall**. In my view, a fairly clear picture emerges from a combination of the Administrators' reports, Mr Acland's email of 17 August 2021 and Mr Marks' evidence. the first respondent was a company which was in dire financial straits. It could not afford to pay its workforce in the run-up to the shutdown, hence why a large proportion of the workforce had already been placed on lay-off, and it could not afford to meet the holiday pay obligations that would be triggered by the shutdown. I am satisfied that it faced no alternative, as at 26 July, than to make the redundancies. If the purchase of the business out of administration by the second respondent had any effect, it was to continue the employment of the 'rump' of employees so that the business could transfer as a going concern. Without the prospect of that sale, it may well have been the case that all, or at least more employees, would have been made redundant before the start of the annual shutdown, as had been envisaged on the HR1 form.

67. I have also had regard to the case of **Spaceright Europe Ltd v Baillavoine [2012] ICR 520** which was referred to in the original particulars of claim, although not emphasised by Mr Jones in his submissions. I recognise that a dismissal may be by reason of a transfer even where the transfer (or particular transfer) is not a certainty at the time the dismissal takes place. A

dismissal effected to make a business more attractive for future sale may be properly considered to be by reason of the future transfer.

68. Although I have found about that Mr Marks probably did have discussions with the Administrators between 20-26 July about the size of the payroll he felt could be sustained going forward, in my view, that is not, of itself, sufficient to displace the immediate reason for the redundancies (the impeding demise of the business) and replace it with the transfer so that regulation 7(1) is engaged. I consider that conclusion to be consistent with **Spaceright** where the immediate reason for the claimant's dismissal was to make the business a more attractive proposition for sale.

69. In the circumstances, the claim under Regulation 7(1) fails. This means that liability for the dismissals remains with the first respondent, and does not pass to the second respondent (as it would under Regulation 4(3) if the dismissals had fallen within regulation 7(1)).

Unfair dismissal case against the first respondent

70. On a bald reading on the post-2014 drafting of Regulation 7, it appears that regulation 7(3) will apply in <u>all</u> cases where the transferor has dismissed for an economic, technical or organisational reason before or after a relevant transfer, whether or not those dismissals have any connection to the transfer itself. I cannot imagine that it is intended that the regulations would concern themselves with ETO dismissals that are entirely unconnected, taking place perhaps months in advance of the transfer. However, leaving aside the question of connection to the transfer for the moment, I accept that the dismissals on the 26 July were for an ETO reason entailing changes to the workforce. This conclusion is based on the findings set out above – the dismissals took place because the business had run out of money, not to make the sale more attractive to a purchaser. An urgent economic need to reduce the workforce is an ETO reason.

71. The effect of that finding under Regulation 7(3) is that the dismissals are deemed to be for a potentially fair reason. Here, I consider that the reason is redundancy (see s.98(2)(c) ERA and Reg 7(3)(b)(1) TUPE) and the test of fairness under s.98(4) must be applied.

72. Given my conclusions above, that liability for dismissal under Reg 7(3) would not pass to the second respondent in any event, that analysis leaves the claimants in exactly the same position in their Reg 7 claim as in their 'fall back' claim of ordinary unfair dismissal (which was always pursued against the first respondent only).

73. Regardless of the correct route, I am satisfied that the dismissals were for a potentially fair reason (namely redundancy) but that they were nevertheless unfair in the circumstances of the case including:

    73.1 The lack of any warning prior to 16 July that redundancies, or any form of costs-saving would be required.

73.2 The lack of any meaningful consultation as to ways to avoid or mitigate the redundancies.
73.3 The lack of any individual consultation with those selected.
73.4 The lack of any transparency around selection for redundancy in circumstances where a considerable minority of the employees were retained in the business.

74. This judgment provides the claimants with a finding that their dismissals were unfair. Given the circumstances of the first respondent, they may or may not wish to proceed to a further hearing to determine the appropriate basic and compensatory awards for each dismissed employee. I will invite the claimants' views on the next steps to be taken in respect of this claim in separate correspondence.

75. This part of the judgment has dealt with points 12-14 of the List of Issues, as well as point 4.

Failure to inform and consult (TUPE)

76. This claim concerns alleged failures by the first respondent to comply with its obligations under Regulation 13 TUPE. The mechanism for bringing a claim and for assessing compensation is set out in Regulation 15. The statutory provisions are lengthy and, although I have considered them closely, I do not reproduce them in full here.

77. In view of the earlier findings in this judgment I considered it useful to first consider the question of who are the "affected employees" for the purposes of this claim. Regulation 13(1) provides as follows:

> **In this regulation and regulations 13A, 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organized grouping of resources or employees that is that subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with the transfer; and references to the employer shall be construed accordingly.**

78. The second respondent was incorporated for the purposes of acquiring the first respondent's business. It had no pre-existing employees. The two groups of employees I am being asked to consider are therefore (1) the first respondent's employees who were made redundant on 26 July 2019 and (2) the first respondent's employees who transferred on 14 August 2019.

79. At paragraph 60-61 above, I have found that the dismissals which pre-dated the transfer were not connected to the transfer. On the basis of that finding, I do not consider that the dismissed employees were affected by the transfer – they would have been dismissed at that point regardless of whether the transfer took place or not. I am therefore satisfied that they are not entitled to any award in respect of any failures under regulation 13.

80. The position in respect of the second group of employees is more difficult. They, undoubtedly, were affected by the transfer as their employment transferred by operation of the regulations. That led to various consequences for their employment, as outlined in Mr Roe's statement, in

particular. However, none of those employees were in the original group of individual claimants who presented claims. Is it possible for Unite, having stepped into the shoes of those claimants for the purposes of this claim, to expand the ambit of the claim to include the second group when the claims of the first group have fallen away?

81. This does not appear to have been what was contemplated when the amendment application was made. The terms of the proposed amendment to the claim were that:

"Unite the Union as an independent trade union recognised by the Respondent in respect of the Claimants seek a protective award as per paragraph 10 of the particulars of claim above." (emphasis added).

82. The reference to paragraph 10 is a reference to the original particulars of claim in which it is averred that:

"Even though the Claimants were dismissed before the TUPE transfer, as "affected employees" the obligation to inform and consult applied under TUPE regulation 13."

83. Mr Bloom submits that the terms of the claim, as amended, are predicated on it being a claim on behalf of those employees who were dismissed, and not those who transferred. He says I must decide the case that is before me on the pleadings and it is not open to Mr Jones, or me, to bring into the scope of the claim the second group of employees when no claim by them or on their behalf was made or contemplated up to, and including, the amendment application. (On that last point Mr Jones says that, in view of his duty to the Tribunal, he expressly raised what he described as the "floodgates" issue, noting that if the application was successful it would lead to more individuals being entitled to compensation than the number that had been named on the original claims. Whilst that may have been the case, the "floodgates" point could apply equally to dismissed employees who had not been named as individual claimants, and the wording of the proposed amended claims does not suggest that the transferred employees were in Unite's contemplation when it made the application.)

84. I have some sympathy with Mr Bloom's position but, ultimately, I consider that there is a claim before me in respect of the second group of employees. When Unite were added as a claimant to the claim the claim became one in respect of any employee affected by this transfer who was "of a description in respect of which an independent trade union (i.e. Unite) is recognised by their employer" (see regulation 13(3)(a)). There is no provision in the regulations for the Tribunal to investigate which groups of employees the claim has been brought on behalf of, nor for a union to purport to act on behalf of some affected employees within regulation 13(3)(a) but not others.

85. I therefore turn back to the other issues.

Did the first respondent long enough prior to 14 August 2019, inform employees who may have been affected by the relevant transfer, via their recognised trade union (Unite), within the meaning of Regulation 13(2) TUPE 2006?

86. The matters that Regulation 13(2) requires employee representatives to be informed of are:

> ***(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;***
>
> ***(b) the legal, economic and social implications of the transfer for any affected employees;***
>
> ***(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and***
>
> ***(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.***

87. As Mr Jones points out, a formal offer of acquisition was received around 12 days prior to the transfer ultimately taking place. During that time the first respondent and the Administrators could, but did not, provide the information set out at (a)-(c) above. The remaining employees were only told the identity of their new employer on the evening of the 14 August, after completion. Pursuant to regulation 13(12) the obligations on the first respondent remain, despite it being under the control of the Administrators.

88. Mr Bloom's reliance on telephone calls between Ms Flynn and Ms Tallentire does not take him very far as Regulation 13(5) makes clear that information must be "delivered" or sent by post, with the clear implication that it will be written information.

89. In respect of point (d), although the focus of the claimant's evidence was on the dismissed employees, there has been no suggestion from any party that the transferring employees (via Unite) were notified of measures envisioned by the second respondent. Given the circumstances of the case and the findings of fact I have already made about the acquisition of the business, I am content that Unite was not notified of the matters required by 13(2)(d). As the first respondent has been absent from these proceedings it has not sought to contend (as permitted by regulation 15(5)) that any failure in respect of 13(2)(d) is the fault of the second respondent.

90. Summing up both these points, I agree with Mr Jones that the first respondent has failed in its obligations under Regulation 13(2). The failure was not minor or technical, it was a wholesale failure to comply with the obligations imposed by that section.

91. The next issue, as drafted in the List of Issues, is:

> **Was the process of consultation engaged in by the first respondent with Unite undertaken long enough prior to 14 August 2019 to allow them to consult with employees who may have been affected by the relevant transfer within the meaning of Regulations 13(5)-(7) TUPE 2006?**

92. This wording draws from Regulation 13(2), which provides that information must be provided long enough before the transfer to allow consultation to

take place, whilst also referring to the obligation to consult itself which is set out in 13(6) and 13(7). (As noted above, 13(5) refers to the form in which information must be given).

93. However, 13(6) and (7) only oblige an employer to consult in respect of measures it will take in relation to an affected employee. In this case, I have already decided that the employees who were dismissed were not "affected employees". In respect of the transferring employees, it was not the first respondent, but the second respondent who would be taking measures. The first respondent had an obligation to inform about those measures under 13(2)(d), but not to consult, as it was not taking them.

94. The transferring employees became the second respondent's employees at the moment of transfer, although measures may still be 'envisioned' at this point, rather than taken, there is no obligation to consult following the transfer (see **UCATT v Amicus and others [2009] ICR 852, EAT**). Further, the claims made by Unite in this case concern only alleged failures by the first respondent (for which the second respondent may be fixed with liability – see below). There is no pleaded allegation of failure to consult by the second respondent itself. That is why I considered it was not necessary to postpone the hearing to allow the second respondent to introduce evidence of its own actions post-transfer.

95. For those reasons I consider that there is no scope in this case for any finding of failure to consult, over and above the finding of failure to inform.

96. The next issue is:

Were there any special circumstances rendering it not reasonably practicable for the first respondent to comply with its obligations under Regulations 13(2)-(7) TUPE 2006, did the first respondent take all such steps towards performing that duty as are reasonably practicable in the circumstances? (Regulation 13(9) TUPE 2006)

97. For the reasons set out above, I am actually considering only the first respondent's failures under Regulation 13(2) in respect of the employees that would ultimately transfer. As I have said, there was a wholesale failure to provide any of the specified information in a timely manner.

98. The "special circumstances" defence is set out in regulations 13(9) and 15(2) as follows:

13(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by way of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

15(2) If… a question arises as to whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show-

- **(a) That there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and**
- **(b) That he took all such steps towards its performance as were reasonably practicable in those circumstances.**

99. Mr Bloom emphasised the dire financial circumstances of the business as providing "special circumstances" to account for any failure I might find. The first difficulty with this argument is that the regulations provide that it is for the employer, in this case the first respondent, to show that the defence is made out. The first respondent in this case has not submitted any defence to the claim, far less any evidence in support of their being special circumstances. In that situation, I do not accept that the second respondent can assume that defence and run it on their behalf. Even if it could, however, authorities show that the defence is narrowly construed, for to do otherwise would undermine the purpose of the protection offered by the regulations. Generally, neither financial difficulties nor a desire to maintain commercial confidence will of themselves amount to special circumstances and, given the paucity of evidence in this case, there is nothing from which I could confidently conclude that the defence is engaged.

100. It is convenient to again take the List of Issues slightly out of order and deal with the issues as to appropriate compensation, and who should receive it, next. These are drafted in the List of Issues as follows:

Who are the "affected employees" for the purposes of TUPE 15(8)(a)?
What is the appropriate compensation for the purposes 15(8)(a)?

101. When a tribunal finds a complaint under regulation 15(1) to be well founded, it must make a declaration to that effect and may order the transferor to pay "appropriate compensation to such descriptions of affected employees as may be specified in the award". (regulation 15(8)).

102. Mr Bloom submitted that "such descriptions of affected employees as may be specified in the award" should not extend to the transferring employees as they were not within the scope of the claim. I have dealt with this argument above but I refer to it again here to confirm that I have considered the specific terms of 15(8)(a) and given consideration as to whether the transferring employees should be excluded from the scope of the award given the points that Mr Bloom has raised. There appears to be little authority on any principles as to which descriptions of affected employees ought to be specified in any award. Repeating the reasons set out above, however, I consider that the reference must be read in the context of Regulation 13(3) and must refer to the various 'constituencies' of employees that may be represented by different unions or elected representatives within a workforce. I not read it as affording me any proper basis to exclude the transferring employees in this case, who were affected employees represented by Unite which has (by virtue of the successful amendment application) brought the claim on their behalf.

103. Turning to the question of the amount of compensation. Mr Jones submitted that the maximum award, of 13 weeks' pay per employee, should be made having regard to the seriousness of the default in this case.

104. Mr Bloom submitted that there was not a wholesale failure. He emphasised in this respect Mr Roberts' letter to Mr Kennedy of 16 July. However, that letter outlines proposals for redundancies, there is nothing said about a transfer beyond an expression of a hope that a buyer may still be found. He also refers to the meetings which took place on 17 and 25

July, but the same point applies to them. The problem for Mr Bloom is that the first respondent and its Administrators (quite possibly for sound reasons) did nothing to give the employees any specific information about the transfer to the second respondent before it happened – the deal was done and then they were told about it. For that reason I accept Mr Jones' characterisation of the failure as "wholesale".

105. However, it does not automatically follow from that that an award of 13 weeks pay should be made. Regulation 16 requires me to take into account the seriousness of the employer's failure, and the authorities show that this is a punitive sanction reflecting the nature and extent of the employer's failure.

106. Although I have rejected the suggestion that there is a special circumstances defence, the matters relied on by Mr Bloom in support of that argument are relevant for the purposes of deciding on the appropriate award. I do accept that this was a fast-moving situation and that the Administrators were under pressure to secure the sale before the obligations triggered by the annual shut down left them no choice but to dismiss the entire workforce and close the business completely. I also acknowledge that there may have been a perceived need for the sale to be conducted "discreetly" although given the lack of specific evidence on this point from the first respondent, the Administrators or the second respondent I do not place a huge amount of reliance on any need for confidentiality in considering the appropriate award. In addition, I accept that there was some engagement between the Administrators and Unite, particularly in the form of phone calls, albeit that I have found that these did not convey the information required by Regulation 13(2). Finally, I consider it is appropriate to take account of the fact that I have found a failure to inform only, and that no consultation obligation actually arose vis-a-vis the first respondent and the affected employees.

107. Overall, taking all those matters into account, I consider the appropriate level of award is five weeks per affected employee.

108. The final issue is:

Is the Second Respondent jointly and severally liable for any failure to inform and consult Unite with regards to the relevant transfer pursuant to Regulation 15(9) TUPE 2006?

109. Although the successful claim arises entirely from the first respondent's default, Regulation 15(9) provides for that liability to be shared on a joint and several basis with the second respondent. The awards will therefore be fully recoverable from the second respondent by the affected employees.

Failure to Inform and consult - Conclusion

110. I have made the declaration required by Regulation 15(8) in this Judgment. I have indicated, above, my decision as to the appropriate level of award. However, I will invite the parties to agree a schedule of employees in respect of whom the award is payable before making an order for the

payment of compensation. Arrangements for the parties to prepare that Schedule will be sent in separate correspondence.

Wrongful dismissal

111. As set out in the list of issues, the wrongful dismissal claims are pursued against the first respondent only. No one asserts that the liability transfers to, or is shared with, the second respondent.

112. The first respondent has not defended the claims. I am satisfied on the evidence I have heard that all of the individual claimants were dismissed without notice and were therefore wrongfully dismissed.

113. The compensation payable to the individual claimants will be calculated at a later date.

Protective Award

114. Following on from the conclusions set out above, the claim for a Protective Award for failure to consult under s188 TULR(C)A is brought by Unite on behalf of the employees who were made redundant. No one asserts that the liability transfers to, or is shared with, the second respondent.

115. The list of issues identified the relevant issues as follows:

Did the first respondent propose to dismiss as redundant 20 or more employees within a 90-day period?

116. It is clear that it did.

Did the first respondent comply with the provisions of s.188 TULRCA 1992?

117. The first respondent did not comply with its obligations under s.188. the HR1 form was submitted on 16 July, which was the same day as the union was informed of potential redundancies. This was 10 days before the redundancies took effect, not the 45 days required by statute. I find that there was no consultation involved the matters set out in s.188(2) i.e. ways to avoid, reduce or mitigate the dismissals. Nor was the union provided with the information required by s.188(4). In particular, no information was given as to the number of employees that would be retained within the business and how those would be selected. That is a matter about which, potentially, useful consultation could have taken place.

118. Although a special circumstances defence is available, it has not been relied on by the first respondent, which has not defended the claim.

119. I am therefore content that Unite is entitled to the declaration of a protective award. That is an order that the first respondent pay remuneration to the dismissed employed for a period of up to 90 days. Employment Judge Leach's case management order identified that the appropriate level of protective award in this case would be decided at this hearing, rather than at a subsequent remedy hearing. However, on reviewing Mr Jones' written

submissions and my notes of the oral submissions, it appears that he omitted to address the point in any detail.

120. On the basis that the employer and Administrators were faced with a dire and deteriorating financial situation, and that there was some effort to keep the union informed of the situation and the proposed course of action (albeit belatedly) I consider that this is a case where it is appropriate to make some reduction to the 90-day starting point, notwithstanding the fact that the first respondent has not been represented and has not put forward any arguments. In line with the evidence that I have heard, I am of the view that the appropriate protected period is 70 days.

121. I recognise that there is a disparity between the amount awarded in the TUPE claim and in this claim, although many of the same factors are relevant. However, the lower award in the TUPE claim reflects in part the fact that I found a default only in the obligation to inform, and cases on the more serious end of the spectrum of such awards would be likely to include failure to inform *and* to consult. The protective award I have made, in contrast, specifically reflects a failure to consult in relation to the redundancies.

122. As was the case in the TUPE claim, this judgment includes a declaration under s189(2) but the protective award itself will be made at a later date, following receipt of further information from Unite as to a Schedule of employees to be included in that award.

Employment Judge Dunlop
Date: 8 October 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

14 October 2021

FOR EMPLOYMENT TRIBUNALS

ANNEX A
LIST OF ISSUES

Relevant Transfer

Regulation (3)(1)(a) Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE')

1. Did a 'relevant transfer' of the first respondent's business to the Second Respondent within the meaning of **Regulation (3)(1)(a) TUPE 2006** occur on 14 August 2019 and in particular, the second respondent will be asking the tribunal to consider the following matters:
    a. Did the business retain its identity?
    b. What was the nature of the undertaking concerned?
    c. Were the majority of employees taken over by the new owner?
    d. Were customers transferred?
    e. What is the degree of similarity between the activities carried on before and after?
    f. Were those activities suspended for any time

Automatic unfair dismissal (*pursued against the second respondent only)*

(Regulation 7(1) TUPE 2006)

2. Insolvency point – does Regulation 8(7) apply so that no claim of automatic unfair dismissal can be pursued? (Was the Respondent the subject of bankruptcy proceedings or analogous insolvency proceedings which had been instituted with a view to its liquidation of its assets and which were under the supervision of an Insolvency Practitioner? If so, from when.)

3. Were the dismissals automatically unfair under Regulation 7(1)? i.e. was the sole or principal reason for the dismissal the transfer? [Parties to make submissions as to whether it is sufficient for the purposes of Regulation 7(1) that the reason was a reason connected to the transfer].

4. If the termination of the Claimant's employment with the first respondent on 26 July 2019 was for an economic, technical or organisational reason entailing changes in the workforce, was it a fair dismissal within the meaning of **s.98 Employment Rights Act 1996** pursuant to **Regulation 7(3) TUPE 2006**?

Failure to inform and consult (*pursued against the first respondent and the second respondent)*

(Regulation 13 TUPE 2006)

5. Did the first respondent long enough prior to 14 August 2019, inform employees who may have been affected by the relevant transfer, via their recognised trade union (Unite), within the meaning of **Regulation 13(2) TUPE 2006**?

6. Was the process of consultation engaged in by the first respondent with Unite undertaken long enough prior to 14 August 2019 to allow them to consult with employees who may have been affected by the relevant transfer within the meaning of **Regulations 13(5)-(7) TUPE 2006**?

7. Were there any special circumstances rendering it not reasonably practicable for the first respondent to comply with its obligations under **Regulations 13(2)-(7) TUPE 2006**, did the first respondent take all such steps towards performing that duty as are reasonably practicable in the circumstances? (**Regulation (9) TUPE 2006**)

8. Is the Second Respondent jointly and severally liable for any failure to inform and consult Unite with regards to the relevant transfer pursuant to **Regulation 15(9)** TUPE 2006?

9. Is the claim against the Second Respondent limited to that set out in paragraph 18 of the Amended Particulars of Claim namely a claim in respect the dismissals by the first respondent or compensation for individual Claimants named in the case?

10. Who are the "affected employees" for the purposes of TUPE 15 (8) (a)?

11. What is the appropriate compensation for the purposes 15(8)(a)?

Unfair dismissal (*pursued against the first respondent only*)

Section 98 Employment Rights Act 1996 ('ERA')

12. What was the principal reason for the Claimants' dismissals on 26 July 2019?

13. Were the dismissals fair within the meaning of s.98(4) ERA 1996?

14. The parties agree that if the unfair dismissal claims succeed on this basis, then liability for the dismissal does not transfer to the second respondent.

Wrongful dismissal (*pursued against the first respondent only)*

15. Did the first respondent terminate the Claimants' contract of employment on 26 July 2019 without serving the requisite period of notice?

16. The parties agree that liability for this claim does not transfer to the second respondent because:

    16.1 The dismissals preceded the transfer and were not by reason of it, meaning that Regulation 4 does not apply to those liabilities (the second respondent's case); OR
    16.2 If the dismissals were by reason of the transfer, then Regulation 8(7) applies so that Regulation 4 is disapplied (insolvency point) (the second respondent's alternative case); OR
    16.3 If the dismissals were by reason of the transfer, and Regulation 8(7) does not apply, then Regulations 8(2)-(6) operate to exclude liability for

the sums payable under relevant statutory schemes from transferring to the second respondent.

Protective Award (pursued against the first respondent only)

Section 189 Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA')

1. Did the first respondent propose to dismiss as redundant 20 or more employees within a 90-day period?

2. Did the first respondent comply with the provisions of **s.188 TULRCA 1992**?

3. The parties agree that liability for this claim does not transfer to the second respondent for the reasons set out at 15 above.

ANNEX B
SCHEDULE OF CLAIMANTS

Case Number	Claimant Name
2408166/2021	Unite the Union
2416812/2019	Ms Zoe Allan
2416813/2019	Miss Zoe Allan
2416814/2019	Mrs K Bamber
2416815/2019	Mr John Eadon
2416816/2019	Mr Michael Horrocks
2416817/2019	Mr Joseph Jones
2416818/2019	Mr Kenneth Mitchell
2416819/2019	Mr Trevor Slater
2416820/2019	Mr John Wilkinson
2416830/2019	Mrs Julie Martyniuk
2416831/2019	Miss Zoie Allan
2416832/2019	Mr David Bamber
2416833/2019	Mr P Blakeley
2416834/2019	Ms Christine Chappell
2416835/2019	Mr Adrian Ditchfield
2416836/2019	Mr R Doran
2416837/2019	Mr R Duignan
2416838/2019	Mr Michael Gregson
2416839/2019	Mr Steven Gregson
2416840/2019	Mr Alexis Hernandez
2416841/2019	Mr T W Iles
2416842/2019	Mr Joseph Jones
2416843/2019	Mr Anatoli Martyniuk
2416844/2019	Mrs Julie Martyniuk
2416845/2019	Mr Keith Miller
2416846/2019	Mr Kenneth Mitchell
2416847/2019	Mr Paul Norris
2416848/2019	Mr Marcin Olejnik
2416849/2019	Mr H Stubbs
2416850/2019	Mr Andrew Turner
2416851/2019	Mr Andrew Whiteley
2416852/2019	Mr Stephen Wilson
2416853/2019	Mr Steven Wright
2416854/2019	Ms Anne Yates