Case Number: 1600471/2019

EMPLOYMENT TRIBUNALS

Claimant:	**Dr Nicholas**	
Respondent:	**Three Nations Dispense Limited**	
Heard at:	**Cardiff**	**On: 6, 7, 8, 9 & 10 September 2021**
Before:	**Employment Judge R Harfield**	

Representation:
Claimant: Dr Nicholas (with the assistance of Mr Eckley)
Respondent: Mr Walters (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that:

(a) The claimant was wrongfully dismissed;

(b) The claimant was unfairly dismissed;

(c) There was a failure to inform and consult the claimant and he is entitled to a protective award;

(d) The holiday pay claim is not well founded and is dismissed;

(e) The claimant is awarded:
   i. £14,750.06 protective award;
   ii. £2,286.00 basic award;
   iii. a compensatory award made up of:
      £4,114.55 net loss of earnings;
      £3,459.90 gross notice pay.

(f) The claimant is responsible for payment of any tax and employee national insurance contributions due on the notice pay element;

(g) The recoupment provisions do not apply.

REASONS

Introduction

1. The claimant, as a litigant in person, presented his claim form on 13 April 2019 bringing claims for unfair dismissal, a redundancy payment, notice pay, holiday pay, a failure to consult under TUPE and a claim for unauthorised deduction from wages in respect of pension contributions. The respondent filed a response form denying the claims and asserting there was no TUPE transfer of the claimant's employment from his original employer, Three Nations Limited. The response also asserted that the claimant was in fundamental breach of his contract of employment by being actively involved in two companies unconnected with Three Nations (Toucan Recruitment Limited and Storm Chepstow Limited).

2. The case came before Employment Judge Sharp on 25 October 2019 ostensibly for a final hearing. The claimant by then had legal representation (although his representatives subsequently came off the record and the claimant has for much of the litigation, including the final hearing, represented himself). The originally listed final hearing was not effective because the issues in the case were not sufficiently clear. Employment Judge Sharp permitted the claimant to amend his claim to bring a complaint of automatic unfair dismissal connected to a TUPE transfer. By agreement, the available Tribunal time was then ultilised to decide the preliminary issue of whether there had been a TUPE transfer and its operative date. Employment Judge Sharp decided that there was a TUPE transfer of the entire business of Three Nations Limited to the respondent on 8 January 2019, meaning that the claimant's employment had automatically transferred on that date. EJ Sharp then made case management orders to get the case ready for this final hearing. This included an order that the claimant provide a statement of case and the respondent an amended response.

3. A further case management hearing took place before Employment Judge Brace on 30 July 2020. The parties were directed to prepare a draft list of issues.

4. I had before me a bundle of documents, a draft list of issues, the respondent's draft chronology, cast list and company structure, the respondent's representative's correspondence with Mr Darrell, the transcript of the interview with Mr Darrell taken by the respondent's solicitor, an email from Mr Darrell to Mr Eckley of 2 September 2021, a text message sent by Mr Darrell to Mr Moss on 24 June 2019, and the claimant's updated

schedule of loss of 12 August 2020. The claimant and Mr Eckley attended the hearing before me in person. The respondent's counsel and the respondent's witnesses all attended by video.

5. In terms of witnesses for the claimant I had four witness statements from Mr Eckley (24 June 2019, 30 July 2019, 9 January 2020 and 6 September 2021) and two witness statements for the claimant 24 June 2019 and 9 January 2020). I heard oral evidence from both those witnesses. Turning to the respondent, I had three witness statements from Mr Daryl Moss (25 June 2019, 31 January 2020, and 20 August 2021) and two witness statements from Mr Watts (25 June 2019 and 22 August 2021). I heard oral evidence from both those witnesses and also oral evidence from Mr Darrell. Mr Moss and Mr Watts were also recalled to give evidence on day 5 so that they could address some matters raised in Mr Eckley's answers in cross examination.

6. Day 1 was taken up by reading and case management. The parties consented to me sitting alone without a full panel in relation to the protective award part of the claim. On day 2 Mr Moss and Mr Watts gave their evidence. During the evidence of Mr Watts the claimant made an application for disclosure of documents, that had already been disclosed in another set of proceedings where he represents the claimants. The claimant said the documents would show Mr Watts working as HR manager for another limited company. I declined the application and gave oral reasons at the time. I told the claimant it did not prohibit him from continuing to argue that he had permission from Mr Eckley to do work for other companies. Other documents were admitted to the proceedings throughout their course (as summarised above) with the consent of the parties.

7. On day 3 the hearing did not start until 2pm. Prior to the hearing I had granted the respondent a witness order for Mr Darrell. Mr Darrell is known both to Mr Eckley (who was a witness for the claimant and assisted the claimant with running his case) and Mr Moss (the key witness for the respondent). It transpired that Mr Darrell was in Columbia. Arrangements were ultimately made, with the appropriate consents in place, for Mr Darrell to give evidence by video but with a later start time because of the time difference. The respondent did not wish (to which I agreed) to start the claimant's or Mr Eckley's evidence without Mr Darrell's evidence first being heard.

8. Part way through Mr Darrell's evidence the respondent's counsel indicated he wished to raise a matter that needed to be discussed in Mr Darrell's absence. Arrangements were made to move Mr Darrell to an empty CVP room as a waiting room so that the connection with him was not lost. Mr Walters raised concerns on behalf of the respondent as to whether there had been inappropriate contact between Mr Eckley and Mr Darrell. I spoke

with Mr Eckley and he allowed me to examine his phone. I then spoke with Mr Darrell. I was satisfied that there had not been any inappropriate contact and that Mr Darrell had not been influenced or indeed intimidated by Mr Eckley. I also spoke with Mr Eckley about the need to try to moderate his reactions to the evidence that was being given. Whilst the issues in the case were clearly emotive and of importance to him, and whilst his reactions had no impact upon me, I told him he needed to reflect on whether his personal mannerisms were contributing to the whole concern arising and whether these distractions were not to the benefit of the claimant who he was there to support. At one point Mr Eckley talked about leaving the hearing. I explained it was a matter for him and the claimant to reflect upon but that I did not recommend a decision be made rashly as Mr Eckley was there to support the claimant and was assisting with tasks such as note taking. Mr Eckley did ultimately stay.

9. As the afternoon went on unfortunately the video connection with Mr Darrell deteriorated. Arrangements were therefore made for him to attend again by video the following day at the same time. By agreement, given the questions for Mr Darrell were largely complete, Mr Eckley gave his evidence in the morning of day 4 before Mr Darrell's evidence was completed. Unfortunately, again the video connection was poor and Mr Darrell's evidence was ultimately completed by telephone. The respondent was initially opposed to such a step but I was satisfied that it was within the rules (as amended) and it was in the best interests of the administration of justice to do so. Ultimately the respondent did not oppose the step. We were then able complete Mr Darrell's evidence before starting the evidence of the claimant.

10. I was able to arrange to sit on the case for an additional day on what became day 5, as considerable time had been lost in the case due to various disruptions. The claimant finished his evidence. Mr Eckley conducted the re-examination of the claimant. Mr Moss and Mr Watts were then briefly recalled to address some matters that had arisen through Mr Eckley's answers to questions in cross examination. I then heard oral closing submissions. I have not set out the parties closing submissions here, but I did take them fully into account. There was insufficient time to deliver an oral judgment.

The issues to be decided

11. As directed by EJ Brace, the respondent's representatives prepared a draft list of issues that was sent to the claimant on 18 August 2021. The claimant did not respond. He said to me at the hearing, however, that whilst he was not legally qualified, it did appear to identify the key legal questions. I therefore adopt it as a broad structure to follow in my discussion and conclusion section below. It reads:

Unfair Dismissal

- *Was the reason, or principal reason for the dismissal an automatically unfair reason i.e. contrary to regulation 7(1) of the TUPE Regulations 2006?*

- *The respondent contends that Regulation 7(1) is not engaged because the sole or principal reason for dismissal was an economic, technical or organisational reason entailing changes in the workforce.*

- *Was the main or principal reason redundancy under s98(2)(c) ERA 1996 or some other substantial reason under s98(1)(b) ERA 1996?*

- *If the dismissal was not for the automatically unfair reason was the claimant's dismissal fair or unfair in the circumstances, having regard to s98(4) ERA 1996? In particular: whether in the circumstances including the size and administrative resources of the Respondent the Respondent acted reasonably or unreasonably in treating it as sufficient reason to dismiss. In considering the same the Tribunal is required to determine the case in accordance with equity and the substantial merits of the case and the Tribunal will be asked to consider inter alia the lack of any dismissal procedure, the advice the Respondent received at the material time, its knowledge of whether or not a transfer of undertaking had occurred and whether following a dismissal procedure was a futile exercise.*

Wrongful Dismissal

- *Did the Respondent breach the Claimant's contract of employment by failing to give and pay him contractual notice in respect of the dismissal? The Respondent accepts it did not give the Claimant the required contractual notice and that it has not paid him notice pay.*

- *Notwithstanding the above, can the Respondent establish that in fact the Claimant was in breach of his contract of employment to such an extent that dismissal without notice would have been justified?*

Protective Award

- *Is the Claimant entitled to claim a protective award for a failure by the Respondent to consult with him about the TUPE transfer?*

Holiday Pay

- *What leave had accrued to the Claimant but which he had not taken at the time of his dismissal?*

- *The Claimant asserts he was entitled to 8.7 days untaken leave. The Respondent asserts that he was entitled to 0 days untaken leave.*

Remedy

Unfair dismissal

- *If the dismissal was unfair what is the extent of the loss suffered by the Claimant?*

- *What is the level of basic award?*

- *Should the basic award be reduced to reflect pre-dismissal conduct?*

- *If so, to what extent?*

- *What is the extent of the financial loss suffered by the Claimant?*

- *Has the Claimant taken any reasonable steps to mitigate such loss?*

- *Should the compensatory award be reduced to any extent under the Polkey principle on the basis that the Respondent contends that the Claimant would have been dismissed at some time between February and May 2019 in any event? The Respondent asserts that dismissal would have been for redundancy but if not effected by about May 2019 it would have been for gross misconduct.*

- *If so, to what extent should the compensation be reduced?*

- *Did the ACAS Code of Practice apply to the dismissal?*

- *If so, did the Respondent unreasonably fail to comply with the relevant Code of Practice and, if so, should his compensation be increased and to what extent pursuant to s207A TULCRA 1992*

Wrongful Dismissal

- *What is the extent of the loss suffered? The Respondent avers it is limited to the relevant notice period i.e. three weeks.*

Holiday Pay

- *What is the true extent of the claim? See above*

Protective Award

- *What is the appropriate level of award having regard to all the circumstances of the case the maximum award being 13 weeks' pay? "*

Findings of fact

The parties' backgrounds

12. Mr Eckley and Mr Daryl Moss are both seasoned businessmen. They were both equal co-owners and directors of Three Nations Limited. They had worked together since 2014 when Mr Eckley merged his company with Mr Moss'. It ultimately turned out to be an unhappy union. In this Judgment I refer to Mr Daryl Moss as "Mr Moss." Mr Moss has a son, James Moss. James Moss is referred to in this Judgment by his full name.

13. The claimant and Mr Eckley had known each other for some time. The claimant held various research roles at Cardiff University. Some time in or around 2008 or 2009 the claimant and Mr Eckley started working together on some collaborative projects. Mr Eckley had a chlorine oxide based product he wanted to commercialise, which had started out as a means of cleansing water and ventilation hygiene systems, but which was found to also be an effective teeth whitener. Mr Eckley decided to commercialise the latter and the claimant left the University to work for Mr Eckley in about 2010 or 2011. After a couple of years the company was successfully sold and the claimant and Mr Eckley went their separate ways, with the claimant working for various companies in London.

The claimant starting employment with Three Nations Limited

14. On 1 April 2015 the claimant started employment with Three Nations Limited as Associate Director of Development. He was paid a salary of £50,000 a year. His contract of employment stated:

    "6.1 Your normal working hours will be 40 hours per week…

    7.2 During your normal working hours and at all such other times as may be reasonably required of you, you shall devote the whole of your time, attention, skills and abilities to the business of any Group Company for which you are working and to the performance of your duties under this Contract."

15. The notice period provision says:

"One week during probation period. For the first two years of service following the successful probation period one weeks notice of termination of employment will be provided. Thereafter, one week's additional notice for each subsequently completed year of service will be provided up to a maximum of twelve weeks notice."

16. From 1 July 2015 onwards the claimant was also paid a car allowance of £8000 a year.

17. At the time the claimant joined, Three Nations Limited had a diverse portfolio of interests. There was a facilities management services arm where the work included reactive maintenance, construction, mechanical and electrical, commercial cleaning and grounds maintenance. There was a drinks dispensing arm whose services included beverage brand installations, drinks equipment and supply, refrigeration, event bars, cellar management training and line cleaning. It had some notable clients in the brewing trade.

Vipzy

18. The main initial reason for the claimant's recruitment was to manage a project called Vipzy. Vipzy is intended to be an online platform where singers and entertainers can be booked to perform at hospitality and entertainment venues. The project was the brainchild of Mr Eckley who clearly is a fervent supporter of its concept and scope for commercialisation. Mr Eckley sought and obtained Mr Moss' agreement to the claimant's appointment. Both Mr Eckley and Mr Moss at the time were co-owners of Vipzy.

19. The claimant initially managed a team of developers, graphic designers and marketers for Vipzy albeit that team was largely disbanded by the middle of 2017. The claimant and Mr Eckley said, and I accept, that the design and build work had been largely completed by that time. The Vipzy work efforts, led by Mr Eckley, then concentrated on trying to secure investment or a buyer for the business to allow it to be actively marketed. Not all other activity had completely ceased as a developer, Marcello, continued working 16 hours a month for Vipzy and another company, Toucan and in March 2018 the documents show that Vipzy was recruiting a marketing and events manager to get more users on to the platform. That said it would also appear that employee had left by May 2018 because there is documentation in the bundle relating to Acas early conciliation between that employee and Vipzy.

20. On 2 February 2018 the claimant sent himself some draft heads of terms in relation to Vipzy relating to potential investment of £330,000 to fund development of Apps for the platform, advertising on India TV and to organise talent competitions in Shropshire and Portsmouth. The potential

investor would become a director and receive a 10% shareholding. On 12 March 2018 the claimant emailed this potential investor saying *"Please find attached an independent valuation for Vipzy Ltd by Churchill Guilford. The valuation is £3,467,380."* The email also referred to the recruitment of the marketing manager (above) and the launch of a Vipzy Talent competition. The attachment is on headed paper for "Churchill Guilford" dated 6 June 2017 and purports to be in the name of "David Daryl, Partner." The attachment says *"I have been instructed to provide a fair market value of Vipzy Limited for the purpose of offering the business for sale. I have determined the business valuation by discounting the future business income using a discount rate which captures the business risk. Based on the information in the enclosures, and allowing for discounted rates, it is my estimate that the fair market value of Vipzy Limited is… £3,467,380."*

21. The respondent says that this Churchill Guilford letter is a fraudulent instrument and that in sending the email with the attachment the claimant was a knowing party to a deliberate attempt to obtain an investment from a third party by a fraudulent instrument.

22. Mr David Darrell (which is the correct spelling of his name) is a former insolvency practitioner. He runs a business called Phoenix Business Solutions, which does what its name suggests. He advises businesses in financial difficulties about how to restructure to survive, and places them with insolvency practitioners if needed. Churchill Guilford is a different arm of his enterprise which he uses for non-insolvency, non-litigious matters.

23. The Churchill Guilford letter of 6 June 2017 was not drafted by Mr Darrell (for one, he would no doubt spell his own name correctly). Mr Eckley says he drafted it, which I accept.

24. Mr Eckley says that he put together a business proposal for Vipzy with a view to raising funds and that he discussed a valuation with Mr Moss. He says a similar software system called "App Nation" had a valuation of £528 million. Mr Eckley says that he and Mr Moss came to the conclusion that Vipzy was worth £3.46 million. He says that he contacted Mr Darrell as he knew Churchill Guilford dealt with raising money. He says that Mr Darrell did not seem that interested but told Mr Eckley he could use the company letterhead and use Mr Darrell's name to draft a business valuation. Mr Eckley says he wrote the letter and gave it to the claimant to send on to the prospective client. Mr Eckley says the claimant was working to his instruction and just did what Mr Eckley asked him to do. Mr Moss says that Mr Eckley would always tell him that Vipzy was worth a lot of money but that he was not personally involved in this valuation or any specific proposed investment. The claimant says he did not know that the letter was not genuine and he simply followed Mr Eckley's instructions.

25. Mr Darrell and Mr Eckley at the time were old friends. Mr Darrell had helped Mr Eckley with the acquisition of another business, Storm Chepstow, and had also helped Mr Eckley with a matter for a cousin. Mr Darrell said that the paperwork for Storm Chepstow was on a Churchill Guilford letterhead, that he would generally try to help Mr Eckley, but he would not have given him carte blanche to just use his letterhead. He said he could not remember giving Mr Eckley a blank letterhead on a dongle but may well have done so. Mr Darrell said if he learned Mr Eckley had written something in his name, and he was happy with what had been said, he would probably say "ok Marc." Mr Darrell also said in evidence he personally believed Vipzy was not going anywhere and he did not believe in it. He said he had limited knowledge of Vipzy but he accept he had seen a prospectus or a hybrid business plan prospectus with some financial forecast for Vipzy.

26. I have to evaluate these factual disputes applying the balance of probabilities. In my judgement, and on the evidence before me, I consider it likely that Mr Eckley genuinely believed that Vipzy could have a substantial value, and that at least for the purposes of opening negotiations with a buyer or investor he could put forward a valuation at £3.46 million. As I have said, he gave every impression to me of being a fervent supporter of its potential and value and at the time that was also the impression he gave Mr Moss and Mr Darrell, even if they were not themselves such enthusiastic believers in it and even if it could be said Mr Eckley's beliefs were unrealistic. Mr Moss said himself in evidence that Mr Eckley could be a convincing person. Mr Eckley must have prepared some kind of prospectus or a hybrid business plan prospectus with financial forecasts because Mr Darrell accepted that he had seen it. I do not find it likely that Mr Darrell gave Mr Eckley his express advance consent to write the letter that Mr Eckley did. But I do also accept they probably had the kind of relationship at the time where Mr Eckley probably thought Mr Darrell would not have a big problem with his actions.

27. The claimant and Mr Darrell had met and knew each other but they had limited interactions. They were not friends in the same way that Mr Darrell and Mr Eckley were.

28. I consider it likely that the claimant looked up to Mr Eckley. He saw him as a successful entrepreneur. In my judgement, if Mr Eckley genuinely thought Vipzy was worth what he was saying, then it is likely the claimant believed Mr Eckley. On the balance of probabilities, I do not consider it likely that in sending the email of 12 March 2018 the claimant knew it had not been produced by Mr Darrell or that it was some kind of false, unsupportable valuation. I consider it likely that the claimant did simply do what he was instructed to do by Mr Eckley. The claimant's role was about getting Vipzy to commercialisation and as I have said, I am satisfied the claimant genuinely believed it was a project of value. The development and

commercialisation of Vipzy was something he was dedicated to and believed in having worked on previous projects with Mr Eckley and having left a good job in London to take up his job with Three Nations Limited, a key element of which was Vipzy.

Other work the claimant did

29. As stated above, I think it is likely that a substantial reason for the claimant's recruitment was Vipzy. I think it is likely, as Mr Moss said in evidence, that Mr Eckley told Mr Moss that the claimant was the man for the job. However, I accept that the claimant did also work on other projects. At the end of the day, the claimant was an employee of Three Nations Limited with the job title of Associate Director of Development. He was not an employee of Vipzy working solely on Vipzy.

30. Three Nation Limited's portfolio was, initially at least, wide and seemed to extend to matters that the directors thought it was a good idea to diversify into. Early on in his employment the claimant worked on projects such as Call Bernard and the Party On Music Festival. There is no dispute that this was legitimate business activity on behalf of Three Nations Limited.

31. His role also included from around December 2015 helping set up and manage a startup business, Toucan Recruitment Limited; a recruitment business. The claimant later became a Director of Toucan. Mr Moss says that Toucan was an entirely separate company and that the claimant as an employee of Three Nations Limited should not have spent working hours working for Toucan. Mr Eckley said that Mr Moss was originally a silent shareholder in the business and that it was set up because Three Nations Limited wanted to recruit 60 to 70 engineers and to set up their own recruitment business would save costs. Mr Eckley says that Toucan were set up in the Three Nations offices rent free for a period, with the provision of other matters such as IT. Mr Eckley says then the business started failing and Mr Moss did not want to be a part of it and wanted to start charging the business rent as they were not getting anything back from it. Mr Eckley says that the rent level was such that the directors of Toucan decided to move out to separate premises. Mr Moss owns the premises in question.

32. Irrespective of who the directors or owners or beneficial owners of Toucan were, I consider it likely that how Toucan functioned was an example of flexibility that existed at the time in the business lives of the directors of Three Nations Limited and other senior managers or family members. I consider it likely that Mr Moss and Mr Eckley granted each other considerable latitude to pursue projects of their choosing and it was probably fairly common for senior individuals to spend some of their working time on other projects or businesses, some of which may be beneficial to or complementary to Three Nations Limited, and some less so. I accept it is

likely that when it started out, Toucan Recruitment Limited was seen as a complementary business that could assist with recruitment for Three Nations Limited at a lower cost than using completely external agencies, and also potentially turn a profit in the recruitment world in general. It is not in dispute that Toucan originally had office space within Three Nations Limited and they also had some help with other facilities, such as IT. Toucan was then later forced to stand more on its own two feet. I consider it likely that Mr Moss grew disaffected with its perceived lack of success more quickly than Mr Eckley (who was more personally invested in it as a shareholder and subsequently a director).

33. I consider it likely that at the outset of his involvement with Toucan, the work did fall naturally within the claimant's remit as Associate Director of Development, as it was a complementary business to Three Nations Limited. As time went on Toucan then became more independent. However, I do not consider that the claimant continuing to work on Toucan was outside usual practice of the directors of Three Nations Limited or their senior managers and family members. As I have said I think it likely that there was an understanding, expectation and toleration of such individuals spending part of their time on other business interests. I consider it likely the reality became that the claimant was seen as Mr Eckley's "right hand man" and that Mr Eckley was largely left to direct the claimant as he saw fit, within the considerable flexibility that Mr Eckley and Mr Moss as the directors and owners of Three Nations Limited had. At the end of the day Mr Moss left Mr Eckley (and in turn the claimant) to function in this way. I consider it highly unlikely that Mr Moss existed in total ignorance (even when Mr Eckley and the claimant started to work from Mr Eckley's home) as to what Mr Eckley, and in turn the claimant's business interests were, or that they were spending time on other businesses was a key concern for him at the time. As I have said, I think it likely that was the common expectation. In truth, in my judgement, it only really became a big issue for Mr Moss after everything fell apart and the claimant brought this litigation. Furthermore, Mr Eckley was the claimant's line manager, and in my judgement, the set up of Three Nations Limited at the time was such that this was the kind of managerial direction that Mr Eckley was able to give to the claimant.

34. At some point Toucan ceased trading. I am not certain as to when that was as there are documents in the bundle that suggest it was still active in December 2018.

35. The claimant also did some work for Mr Eckley on other businesses of his such as Storm Chepstow Limited (of which the claimant was a Director) and Flight Simulator Parts Ltd. My same observations apply to such business activities.

36. In the latter couple of years of the claimant's employment I find it is likely that he worked in part on Vipzy, in part on other projects of Mr Eckley's such as Toucan and Storm Chepstow and other work Mr Eckley gave him to do on behalf of Three Nations Limited. I consider it likely that Mr Eckley saw the claimant as his second in command, a good project manager and someone he could pass, what Mr Eckley saw as problem areas, to manage. In the last year or so of his employment the claimant was largely working on dealing with disputed dilapidations and handing back commercial properties to landlords, responsibility for property leases, dealing with arbitration and adjudications, chasing bad debts, ensuring compliance with road haulage licenses, and other business activities he was directed to undertake by Mr Eckley.

37. By way of more detail that can be gathered from the documents in the bundle and other evidence before me, Mr Eckley took on responsibility for dilapidation disputes and the claimant assisted with this work and pursuing dilapidations claims in 2017 and October 2018. The claimant also managed adjudication proceedings. He dealt with such a dispute about electrical works between October and December 2017. From April 2018 the claimant also took the lead in managing various difficulties that had arisen with Three Nations Limited's national goods vehicle Operator's License and action taken against the company by the Traffic Commissioner. At the time the License was needed for the nationwide transport of beer equipment between the company's depots and other locations. The claimant (with others) dealt with a preliminary hearing on 24 May 2018, a public enquiry in August 2018 and a further public enquiry on 29 November 2018. In November 2018 the claimant and Mr Eckley both attended Operator License awareness training that the Traffic Commissioner had directed senior personnel in the company needed to attend. In September 2018 Mr Eckley instructed that the claimant would take over responsibility for managing Three Nation Limited's leases. In September 2018 the claimant was handling issues about payment on a construction project that Mr Moss had passed to Mr Eckley and in November 2018 the claimant was tasked with managing legal proceedings against a company in relation to a dispute about electrical works. In January 2019 the claimant was tasked to issue a notice to quit in relation to the East Kilbride depot. The plan was to vacate the depot by June 2019.

38. The respondent's position is that this type of work for Three Nations Limited amounted to little. I do not agree. The claimant was a career focused individual and a hard worker. Mr Watts spoke about how (before the claimant moved to work from Chepstow) it would often be him and the claimant working in the office late at night. I think it likely the claimant was largely busy with the tasks and projects given to him by Mr Eckley and much of this did relate to or was complementary to Three Nations Limited and was not just, for example, Storm Chepstow Limited. The emails that have been

disclosed that are in the bundle will only be a small snapshot of the claimant's email account during this period and the email account is not something that the claimant has access to. The limited emails available do show the claimant undertaking the type of work summarised above, and I consider it likely that access to the full email account would be likely to show a lot more. Moreover, after the claimant's dismissal, there is no evidence of the claimant continuing to substantially work for Mr Eckley. I consider it likely that if the claimant truly had been spending all his time working for other businesses such as Storm Chepstow Limited, or furthering the other private business interests of Mr Eckley, then there would have been a job for him with Mr Eckley after he was dismissed.

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The claimant's disputed annual leave

39. The respondent asserts that the claimant took more annual leave in his employment than was recorded on his holiday form for the holiday leave year January 2018 to December 2018. On 17 December 2018 the claimant provided HR an annual leave form showing he had taken 9 days of his 20 days allocation (excluding bank holidays). The claimant said he anticipated carrying forward 5 days into the next leave year and Mr Watts accepted in evidence it was usual practice for staff to carry up to 5 days forward if they had been unable to take it. Mr Watts now asserts that it is likely the claimant in fact took 34 days annual leave in the year (leaving aside, he says, New York in January or the boat trip in August 2018).

40. The alleged discrepancies came to light after the event and once these proceedings had commenced because Mr Moss and Mr Watts decided to trawl through the claimant and Mr Eckley's emails. It is therefore necessary for me to make some findings about the disputed occasions. I do so again mindful of the fact that only the respondent has access to the claimant's and Mr Eckley's email accounts and that the bundle only contains a handful of emails that the respondent has decided they consider to be of relevance as to what they understand the claimant's activities to be.

41. In January 2018 the claimant took a trip to New York for a few days. The claimant did some presentations for a University and also had a couple of meetings about Vipzy. I consider it likely that this was a trip authorised by Mr Eckley as the claimant's manager, and the claimant was not considered to be on annual leave.

42. On 7 August 2018 the claimant sent an email to a new member of staff at Toucan saying he was on route to the airport. Mr Eckley said in evidence this was a one day trip to the Isle of Mann to look at a boat. The claimant in oral evidence agreed with this and said he understood it to be business networking that was not annual leave. However, Mr Eckley did not say that

in his own oral evidence. Given he was the claimant's manager, I do not find that it was an authorised business trip.

43. On 24 September 2018 the claimant sent an email to say he was on annual leave until 8 October 2018 [226] in response to an email about attending a coffee morning on Friday 28 September. It was put to the claimant in cross examination that avoiding a coffee morning did not require him saying he was away until 8 October. The claimant then said he would give this kind of response so that individuals would not bother him with requests about trivial matters and that he was busy with the public enquiry. I do not find the claimant's explanation to be plausible. I find it more likely that he was on annual leave during this period. He would not need to give the end date in question to get out of coffee on 28 September 2018. Moreover, the claimant's assertion that he was preparing for a Traffic Commissioner hearing at that time does not match with the dates for those hearings and was not an explanation proffered by Mr Eckley in evidence (who said he was unable to account for the claimant's email). I consider it is therefore likely the claimant was absent on annual leave for 10 working days between 24 September 2018 and 8 October 2018.

44. On 26 October 2018 the claimant sent himself an out of office message saying he was on annual leave until 5 November 2018. Mr Eckley said in evidence that it was an out of office message to say the claimant did not want to be disturbed as they were studying documents for a big court case to recover monies for 3 Nations Limited but he could not explain why the claimant put annual leave on the message. The claimant agreed he had set it up for this purpose, but said that it was a draft message that he only ever sent to himself. I do accept that an individual may well email themselves as a test to check that their out of office message is working properly. However, the explanation remains a confusing one because, as put to the claimant in cross examination, if someone involved in the case had emailed the claimant with the out of office message in operation they would have been troubled to get a reply to say the claimant was on holiday. However, the bundle also contains an email sent by the claimant dated 29 October 2018 about a dilapidations dispute [246] and the claimant sending a further one on 30 October 2018 [159]. On 6 November the claimant then sent letter and spreadsheet about it which it seems likely he had been working on [157]. There is also no evidence of the claimant's out of office message having been sent to anyone other than himself. In the circumstances I therefore accept that the claimant was probably working during this period and not on leave and that the out of office notification was not ultimately used by him in the end.

45. There were also 4 days compulsory annual leave on 24, 27, 28 and 31 December 2018 that do not feature on the claimant's leave sheet, albeit there was nothing before me to say that he had been required to record

those on that sheet as opposed to HR. Mr Watts also alleges that the claimant had been off work between 17 December and 7 January as it is said the claimant only used email a few times. Access has not been given to the claimant's full email account and as such it is just a comment made by Mr Watts. I am unable to accept there is sufficient evidence to show that the claimant was not working during this period (other than the compulsory leave period and public holidays). It follows that I have found there were 15 days not included on the claimant's holiday sheet (one day on 7 August 2018, 10 days in September/October 2018, and 4 days compulsory Christmas shutdown).

Changes in Three Nations Limited

46. At some time in or around 2017 Three Nations Limited took the decision to significantly reduce its facilities management services by closing down its construction/facilities management and cleaning services whilst continuing with mechanical and electrical services and grounds maintenance as well as the dispense side of the business. At some point around that time the claimant and Mr Eckley also stopped attending the Three Nations premises and worked from offices in the grounds of Mr Eckley's home.

47. It strikes me as likely that all was not well within Three Nations Limited and its deterioration was matched by a deterioration in the relationship between Mr Moss and Mr Eckley. Both blame the other for what happened, but it not necessary for me to adjudicate upon that in these proceedings.

48. I consider it likely that during this period and onwards there were financial difficulties or concerns within Three Nations Limited, maybe off and on, but overall increasing over time. It is extremely difficult to piece together with any exactitude what happened and when because there has been very little provision of documents in this case by the respondent. Mr Moss and Mr Watts were able to access and trawl through the claimant and Mr Eckley's email accounts so it seems likely to me that Mr Moss maintained access to various records. However, much of the disclosure of documents in this case appears to relate to allegations of wrongdoing the respondent wants to level against the claimant rather than disclosure of financial documents and records, or emails or messages exchanged for example between Mr Moss and Mr Woolley (the financial director) or between such individuals and Mr Darrell who was advising them. The documents there are in the bundle do however show, for example, in September 2018 issues about payment on a construction project. Moreover, I was told in evidence, particularly by Mr Watts, that the company was closing some depots and that there were already some redundancy processes in train in January and February 2019.

49. I also consider it likely that there was a sense of vulnerability, at least in Mr Moss' mind, that if one part of the business failed it could bring down the

rest. Some time in 2017 Three Nations (Mechanical & Electrical) Limited was set up and I accept Mr Moss' evidence that was with the intention of moving that line of work over to that limited company and leaving the dispense business with Three Nations Limited. It did not, however, prove to be possible because collateral warranties rested with Three Nations Limited that could not be moved.

50. Whilst Mr Eckley denied that any such meeting had happened, I do find that some time in or around September 2018 there probably was an unhappy discussion between Mr Moss and Mr Eckley that related in part at least to financial worries. I also find it likely, and accept, that during the course of the meeting Mr Moss probably did comment words to the effect that he did not see Vipzy going anywhere, that they had spent £420,000 on it and that the claimant should be let go (as Vipzy should come to an end). I also accept it is likely, and therefore make a finding of fact, that Mr Moss told Mr Eckley that he was going to separate out the dispense side of the business and that Mr Eckley was unhappy and said he was going to take legal advice about it. It is also likely Mr Eckley said that Vipzy remained of value, would be developed, there were meetings coming up with potential buyers and that the claimant was the right person to do that job. I do not think this exchange between Mr Moss and Mr Eckley meant that Mr Eckley had in any way consented to Mr Moss' course of action or that he understood what Mr Moss was going to then go on and do. For one, Mr Moss subsequently told Mr Darrell not to tell Mr Eckley what he was up to. I accept Mr Eckley was unaware.

51. By 1 November 2018 Mr Moss had his plans in place because on that date Mr Moss (on the official records but not in reality) ceased to be a person with significant control of what had until then been a dormant company called City Vent Services Limited. He also ceased to be a registered director of that company. Instead his son, Mr James Moss, on paper, became a person with significant control. On that same date City Vent Services Limited changed its name to become the respondent in these proceedings; Three Nations Dispense Limited.

52. On 19 December 2018 Mr Couzens the customer services director for Three Nations Limited wrote to various dispense customers saying Three Nations brand name changes would take effect from 1 January 2019 such that the "Drinks Dispense Division" would trade under the name of the respondent. New bank details were provided for the payment of invoices. The contracts were then novated to the respondent on 1 January 2019.

<u>The Sale Agreement</u>

53. Mr Darrell said he started advising Mr Moss in or around November or December 2018 time and Mr Moss sought his help in how to separate the

business. I find that Mr Moss had mixed motivations in doing so. The dispense side of the business was Mr Moss' original company that had merged with Mr Eckley's company. I consider it likely that Mr Moss wanted to protect the dispense business from an anticipated impending downfall of the rest of the business and he also wanted to reclaim that business to himself and keep Mr Eckley out of it.

54. Mr Darrell said he was told Three Nations Limited was under pressure from HMRC and suppliers and that the financial forecasts in the short to medium term did not look good. Mr Darrell says he was told that HMRC had not been paid for a number of months, and that the construction sector was hemorrhaging money. He said it appeared to him the company was insolvent. This is not the evidence that Mr Moss gave me, but I accept Mr Darrell's account in this regard. In particular, it accords with what subsequently came to light in respect of monies allegedly owed to HMRC.

55. I do not consider it was sudden, or a great surprise to Mr Moss, but in December 2018 the financial troubles worsened further with a shortfall in payment on a construction contract of nearly £1 million. The financial distress of Three Nations Limited was also contributed to by the fact that payment of invoices on the dispense side from January 2019 were being paid into the respondent's bank account whilst Three Nations Limited continued to bear all the overheads, including staff salaries. Again its financial distress can therefore have been of no surprise to and must have been anticipated by Mr Moss as he was siphoning off Three Nations Limited's funds to the respondent.

56. Mr Darrell's advice was to do a sale agreement between Three Nations Limited and the respondent. He said the original plan was, which I accept, to isolate and transfer the dispense side of the business. Mr Darrell told me, and I accept, that he understood the plan for Three Nations Limited was to then run down the construction contracts and it would be likely to result in employees being made redundant. Mr Darrell's evidence was clear that he had always thought that Three Nations Limited was insolvent and that he thought administrators were likely to be appointed. Paragraph 11(i) of the respondent's *Further Response to the Claimant's Revised Statement of Case states that "By 8th January 2019, an Administration Order was in the process of being applied for by creditors, the nominated firm for this purpose being Alexander Lawson Jacobs*" ("ALJ"). Given what happened next "creditors" here must refer to Bibby Financial Services and demonstrates that the anticipated path for Three Nations Limited at an early stage was insolvency.

57. Mr Darrell said, and I accept, that the financial information for Three Nations Limited did not allow the dispense figures to be easily isolated. Instead of taking time, or doing the work to carve it out, Mr Darrell drafted a sale

agreement which transferred, in effect, all of the assets of Three Nations Limited (including all the employees) to the respondent, not just the dispense side. Mr Moss and Mr Woolley must have known that was how Mr Darrell had drafted the sale agreement because Mr Darrell said that he discussed it with them, and they signed the ensuing agreement.

58. On 8 January 2019 a sale of the assets and goodwill therefore took place between Three Nations Limited and the respondent with a purchase price of £944,916.67 plus VAT together with 5% of the net proceeds of any debt secured by the purchaser. There were to be instalments of £265,000 on 31 January 2019, £500,000 at the end of February, £143,900 by the 7 March 2019, and the remaining £225,000 over 12 months starting in April 2019. The completion date was defined as the date of the agreement of 8 January 2019. The contract gave a right of recission. All employees and liability for payments to them passed to the respondent. The sale agreement talks about TUPE applying. Mr Moss signed on behalf of Three Nations Limited and his son on behalf of the respondent. Mr Eckley was not involved and was unaware. As found by EJ Sharp at the preliminary hearing, all employees, including the claimant, transferred to the respondent on 8 January 2019.

59. Finance was put in place for the respondent. Three Nations Limited had a book debt factoring arrangement with Bibby Financial Services, backed by a registered charge against the assets of Three Nations Limited. The debt book factoring arrangement involved the company selling a proportion of their debts to Bibby to recover in return for an upfront cash injection. Bibby were prepared to grant a new debt factoring arrangement to the respondent. I was told this was because the dispense side customers were blue chip companies who Bibby knew to be good and timely payers and because of their pre-existing relationship with Mr Moss.

60. At some point (again there are no documents disclosed such as text messages or emails) Mr Darrell introduced Mr Moss to ALJ, who he knew were on Bibby's approved panel. ALJ were appointed by Bibby to pursue administration. Mr Darrell, said however, that Mr Alexander from ALJ had spoken to Mr Moss before Bibby got involved and he understood that Mr Moss had made a payment to ALJ for their services prior to ALJ's appointment by Bibby. According to paragraph 11(i) of the Further Response to Claimant's Revised Statement of Case, set out above, that must have all happened by 8 January 2019.

61. Bibby took a debenture over the assets of the respondent on 31 January 2019, which was the same day the first instalment was due to Three Nations Limited, of £265,000 which Mr Moss told me was paid. There is an invoice recording the payment from the respondent to Three Nations Limited in the bundle albeit I have no way of actually verifying what was paid and when.

62. Mr Moss' position is that he did not realise at the time that all the employees transferred to the respondent as of 8 January 2019. He said the original plan was to separate out which employees were going to stay with Three Nations Limited and which would move to the respondent at the end of the financial year (i.e. end of March/early April 2019). Mr Darrell, despite drafting the agreement, said he also did not realise the employees would all transfer on 8 January 2019 and that if that is what happened it was his drafting mistake. He also said that the sale agreement would also be subject to ratification by the anticipated administrators for Three Nations Limited.

63. Mr Moss at that time did not seek any legal advice. He also did not seek any HR advice, for example, from Mr Watts his HR manager. Only Mr Moss and Mr Woolley were dealing with the situation, in conjunction with Mr James Moss as the putative director and owner of the respondent. Mr Moss accepted, however, that in reality he was the guiding hand behind it all and not Mr James Moss. Mr Watts told me that Mr James Moss later said he had not even read the sale agreement before signing it. I did not hear from Mr James Moss but that assertion has the ring of truth to me.

64. Reflecting on the evidence overall, I think it likely that Mr Moss and Mr Darrell were seeking to hedge their bets at the time and have a range of options open. I think it likely that the sale agreement was there to be relied upon if needed to try to protect assets. But I consider it also likely that the plan was to negotiate a deal with Three Nation Limited's intended insolvency practitioner to ratify a transfer of the dispense side of the business by presenting the transfer as being in place, functioning and the only aspect capable of surviving as a going concern. It would be presented as being the best solution for the creditors of Three Nations Limited. Support and funding would be in place from Bibby who would be pursuing the administration of the remainder of Three Nations Limited as controlling debenture holders. In the meantime, trading could continue on the dispense side. I consider it likely that it was thought there would be flexibility in avoiding the full effects of the original sale agreement (if needed) by not paying over the full purchase price or due to the fact that an insolvency practitioner could refuse to ratify or challenge the sale agreement or agree different terms. They thought there would be options to negotiate different terms or use the sale agreement not as a sale agreement for all the assets but for dispense assets/ employees. In turn it was thought there would be scope at a later date to carve out which employees were moving to the respondent and which were not. That said, I do not think Mr Darrell or Mr Moss were ignorant as to what on the face of it the sale agreement said, including about employees. They just thought there were ways out of it or to change it, if needed, or indeed they could potentially discard it.

65. It followed that the employees, including the claimant, knew nothing about the transfer and there was no consultation with them or any arrangements made, for example, to appoint workplace representatives. There was no recognised trade union to consult with. It does not strike me as likely that Mr Moss would have wanted to inform or consult the employees in any event as, if done properly, it would have involved the employees becoming aware not just of the intention to separate out the dispense side of the business but also the parlous state of the remaining part of the business with the potential for employees to lose their jobs.

66. A further £500,000 was due to be paid in February 2019. The documents in the bundle suggest that only £25,000 was paid with £21,000 being paid on 18 February 2019 and a further £4000 on 21 February 2019. On the face of it there were therefore significant underpayments.

Meetings with ALJ

67. Mr Moss, Mr Woolley and Mr Darrell had two meetings (at least) with ALJ. No contemporaneous documents relating to those meetings have been disclosed. I did not receive any evidence from ALJ. I also was not given ALJ's full reports.

68. Mr Darrell and Mr Moss both said that ALJ were aware of the sale agreement. As I observed at the hearing, this point troubles me. Mr Darrell told me that ALJ were laissez faire about the sale agreement. He said the attitude was that is what the agreement is, we will inherit it and deal with the employees in the insolvency and review whether it was a fair value. I have not heard any evidence from ALJ. They are regulated insolvency practitioners. It is a curiosity to me, if they had access to the sale agreement:

    a. Why they would not have appreciated that all of the assets of Three Nations Limited had on the face of it been sold to the respondent;
    b. why they would not have appreciated what the total sale price in the sale agreement was (with large sums outstanding) and which contrasts to the lesser deal with the respondent they later recommend be accepted;
    c. why they would not have appreciated that the employees ALJ later ended up administering in the then administration had on the face of it all already transferred to the respondent, and therefore were not in fact Three Nation Limited's or ALJ's or the redundancy payment office's responsibility;
    d. why they would advise Mr Moss and Mr Woolley to make the Three Nations Limited's employees redundant other than those they wanted to move across to the respondent if all the employees were in fact already employees of the respondent.

e. Mr Eckley also told me that the subsequent alternative insolvency practitioners, Duff & Phelps, who became the liquidators for Three Nations Limited were subsequently surprised when they learned of the terms of the sale agreement. They are different insolvency practitioners but would have had a hand over from ALJ and again tends to me to suggest that ALJ did not have the full picture.

69. All of this leads me to conclude, on the balance of probabilities that it is more likely that whilst ALJ where told about the fact of the sale agreement in some guise, that they did not see, for reasons unknown to me, its full terms. It is in my judgement more likely that they thought the sale was of the dispense side of the business and that currently all the employees still rested with Three Nations Limited.

70. On 25 January 2019 solicitors for CRT Property Investments Limited, a creditor, said they had presented a winding up petition against Three Nations Limited for arrears of rent and other sums owed under a lease for £8780.00. It was sealed by the court and served on Three Nations Limited on 6 February 2019.

71. In January and February 2019 there were redundancy processes running in parts of the business of Three Nations Limited.

72. On 8 February 2019 solicitors for Mr Eckley wrote to Mr Moss threatening litigation. At that point in time Mr Eckley did not know about the sale agreement. The solicitors letter related to the alleged transfer of the dispense customer contracts to the respondent. Mr Moss' solicitors responded on 20 February 2019 asserting that at a meeting in September 2019 Mr Moss had explained that the M&E side of the business was not performing as hoped and was in risk of bringing the downfall of the dispense side. The solicitors letter asserted that Mr Moss had stated at the time he intended to move the dispense side of the business to a new company and that Mr Eckley had not objected.

73. On 27 February 2019 a meeting took place with ALJ. Mr Moss says Mr Alexander stated that as a result of the winding up petition presented, Bibby were applying for an administration order with ALJ to be appointed as administrators. Although, as I have said, the respondent's own pleading says that the plan for an administration order was already in place by 8 January 2019. Mr Moss says Mr Alexander said that upon appointment the administrators would not continue trading in the loss making areas of the business/ the non dispense side of the business. He says they instructed him and Mr Woolley to cease trading in all non-brewery related activities and make redundant all staff not directly engaged in that side. Mr Moss said in oral evidence that he only had about 24 hours at the most to decide who would move to the respondent and who would be made redundant. He

said he followed an instruction from ALJ to transfer staff on the dispense side other than those he did not deem it necessary to move. He said he took technical or planning staff from dispense and key staff in other departments such as HR and accounts. He said those outside the dispense side of the business such as those that fell on the M&E side and facilities were those who were let go. He said he made the decisions on behalf of Three Nations Limited because at the time in question it was not understood that all the staff had in fact already transferred under TUPE to the respondent because the sale had not completed. There are no contemporaneous records of the meeting.

74. After the event, in June 2019, Mr Darrell prepared a letter to Mr Moss summarising his recollection of the meeting. It appears to have been requested for the purposes of this litigation. It says:

> "I *confirm that Mr Alexander informed you that, as a result of the existence of a winding-up petition presented against the Company by an unsecured (landlord) creditor, the Company's factors and debenture holders, Bibby Factors Plc, were in the process of making an application to the court for the appointment of ALJ as Administrators of the Company, and that as soon as the formalities of formal demand on the Company, notice to the solicitors acting on behalf of the petitioning creditor etc, had been completed, the application to the court for an Administration Order to be granted, and the appointment of ALJ as Administrators, would be made forthwith.*
>
> *In anticipation of the appointment of ALJ as Administrators, and the existence of the winding-up petition, I further confirm that Mr Alexander advised you that, upon appointment, they would not continue any of the loss-making trading activities of the Company not related to the brewing industry, and (particularly due to the existence of the winding-up petition) to therefore immediately cease all non-brewery related trading activities of the Company, and as a direct consequence, to immediately make redundant all staff that were not directly engaged in the brewery trading activities (including office, clerical and support staff)."*

75. Mr Darrell said in oral evidence that there was a general discussion about redundancies in the loss making activities or roles not productive in the administration. He said there were three or four different sectors and one was the construction sector and Mr Alexander was clear the construction sector would not continue. Mr Darrell said that he did not form the impression that the situation was so awful that it needed to be shut immediately that night. He disagreed with the impression given by Mr Moss and Mr Watts (albeit Mr Watts in evidence was repeating what he said Mr

Woolley told him) that the meeting created such a sense of urgency that Mr Woolley was run ragged putting the instructions into place.

Redundancy decisions

76. After the meeting with ALJ Mr Moss went away and compiled a list of who to keep on with the respondent and who was to be made redundant. 148 members of staff were, I am told, (I have not seen the correspondence they were sent) offered employment with the respondent on their existing terms and conditions. (Of course in fact their employment had already transferred without their knowledge in the January). I was told that they were offered their old terms and conditions/ allowed to keep their continuity of service as a matter of goodwill and comfort and that it was not understood by those involved at the time that TUPE applied.

77. Mr Moss gave his list to Mr Woolley and on 28 February 2019 Mr Woolley took a letter, drafted by Mr Darrell, together with the list of names, to Mr Watts at about 3:20pm. Mr Woolley told Mr Watts Three Nations Limited was in a critical condition and the letter needed to out to staff (including staff already under consultation for redundancy as part of an earlier process). Mr Watts said he had quite a heated discussion with Mr Woolley about it at the time, but Mr Woolley was insistent that Mr Watts had to do it and they where instructed to do so by ALJ. Mr Watts said Mr Woolley stated he had been trying to look at other ways to save the business but it had gone too far and there were contracts not paid and huge sums of money in shortfall. Mr Watts said after about 15 minutes Mr Woolley said there was no more time and Mr Watts just needed to get on with the letters. Mr Watts said he could see the names on the list were not to do with the dispensing side of the business. He said he did start talking about some of the names on the list but Mr Woolley was insistent that Mr Watts just had to get on with it. Mr Watts did not have a specific conversation with Mr Woolley about the claimant. Mr Watts asked Mr Woolley about whether there would be individual meetings and was told that he would not have to do any of them, arrangements were in place, and to just get on with the paperwork so that it was ready for the morning. Mr Watts said he tried to express concerns to Mr Woolley about TUPE but Mr Woolley told him that it was an insolvency situation and special rules applied. Mr Watts therefore spent some time working on the letters, correcting typos and calculating figures for the letters, such as likely redundancy payments.

78. 57 staff, including the claimant, were made redundant. Those that were in the building were called to meetings, which were held in groups. Those not there were sent a letter. Mr Darrell conducted the meetings. The claimant received a letter dated 1 March 2019 from Mr Moss at Three Nations Limited. The letter said that following an independent review of the company's financial affairs the directors had received advice that the

company was insolvent and should cease trading forthwith. The letter said that as Three Nations had ceased trading with effect from that date his contract of employment was summarily terminated with no notice period. It confirmed that salary, due the day before, had been paid. The letter stated that there were no funds to pay any other sums due but as the company was being placed into formal insolvency a claim could be made to the redundancy payments office.

79. Mr Moss says, and I accept, that as of 1 March 2019 the non dispense side of the business conducted by Three Nations Limited was stopped.

80. Returning to Mr Moss' decision making process, ALJ could not have "instructed" Mr Moss to make redundancies, as they were not the appointed administrators at that point in time. They did not have the power to do so. Mr Darrell accepted that it was more of a recommendation. I have found already, contrary to Mr Darrell and Mr Moss' assertions, that at the meeting on 27 February 2019 ALJ did not know about full terms of the sale agreement to the respondent but instead they had been told of an agreement to sell the dispense side of the business.

81. I do accept it is likely that ALJ expressed the view that the non dispense side of the business appeared to be insolvent. I accept it is likely they told Mr Moss and Mr Woolley that the best steps would be to cease trading, and make redundant the employees in the parts of the business that were not going to survive (not knowing they had already transferred to the respondent). Based on what Mr Darrell told me, I consider it likely that Bibby were keen to press ahead with formalising the administration, that had been planned for some time, rather than the liquidation initiated by the landlords going ahead, so that they could maintain control and ride out their existing debt book factoring with Three Nations Limited, Bibby could then move forward with a new arrangement with the respondent. I consider it likely that ALJ also stated that the eventual outcome of the administration would probably in due course be the liquidation of the remaining elements of Three Nations Limited. I think it likely ALJ's understanding was that employees needed for the dispense side of the business either had or would transfer over to the respondent, and that they would review and value the transfer of the dispense side for the benefit of the creditors of Three Nations Limited.

82. I consider it likely that Mr Moss then rushed through the transfer/redundancy process, albeit a process that would have happened in any event. I consider it likely that by that point Mr Moss and Mr Darrell appreciated that the best way forward was to present the dispense split as having happened and a fait accompli. At that point in time it was not in Mr Moss' interests to seek to transfer all of the assets of Three Nations Limited to the respondent, as set out in the original sale agreement. The respondent, amongst other things, would otherwise have inherited all the costs associated with all the

employees from across the Three Nations Limited empire. I consider it likely those involved wanted to carry through the completion of the move of the dispense side before control vested in the administrator.

83. I find that when Mr Moss was preparing his list of who he would make redundant and who he wanted to move to the respondent, he was focussing on those individuals he saw as needed for the dispense side of the business, which included those working directly on it and those working on other services central to keep that side of the business running (such as finance and HR). I consider it likely that in some of his decisions, he was also considering whether he needed all of the employees working in a particular role or section or whether it could be streamlined.

The claimant's selection

84. Mr Moss had not seen the claimant very much in recent times. In my judgement, Mr Moss did not see the claimant as having expertise and focus that were relevant to the dispense side of the business and did not see there was a viable role for the claimant with the respondent. The claimant was a well paid individual within Three Nations Limited. Mr Moss did not see that he needed an associate director of development as his aim at that time was in effect to hunker down and refocus on the core dispense business. Mr Moss did not see Vipzy as being a key component of the dispense side of the business, and Vipzy was also something he was not interested in continuing. Mr Moss did not have a granular understanding of the minutiae of the claimant's day to day working. He was aware the claimant worked on what Mr Eckley gave the claimant to do and included tasks such as, transport regulation, leases, debt collecting and dilapidations. Mr Moss did not see that he had a viable role for the claimant across the type of work he understood the claimant to be doing within the reduced functioning of the respondent. I do also accept that given Mr Moss saw the claimant as allied to Mr Eckley, and in effect Mr Eckley's second in command, he would have had no particular drive to want to keep the claimant on, or to find a role for him. That said all said I should also add that Mr Moss was working through a long list of staff in a night so it is also likely he did not spend a significant period of time mulling over all the nuances of the claimant's particular situation.

After the claimant's redundancy

85. On 10 March 2019 the claimant sent Mr Watts a whats app message with advance notification he would be writing about what he considered to have been a wrongful process in terminating his employment and that of his colleagues. Mr Watts also sent the claimant a whats app confirming that he believed the claimant had an entitlement to 8.7 days holiday.

86. On 12 March ALJ were appointed joint administrators of Three Nations Limited.

87. On 17 March 2019 the claimant wrote to Mr Watts asserting that his employment should have transferred to the respondent and they were liable for his unfair dismissal and any other arrears due. The claimant advanced claims of unfair dismissal, automatic unfair dismissal, a failure to inform/consult under TUPE, notice pay, redundancy pay, unpaid holiday pay, and unpaid pension contributions. He sought confirmation as to whether his claim was accepted or rejected in whole or in part. There was no formal response.

88. Acas early conciliation took place between 23 March 2019 and 10 April 2019. The claimant presented his claim form on 13 April 2019.

89. In around April 2019, after the threat of legal action, Mr Moss and Mr Watts decided to go through the work email accounts of the claimant and Mr Eckley. Mr Moss said that it was only then that he thought that the claimant had devoted so much of his time to Mr Eckley's other businesses.

90. On 29 April 2019 the joint administrators issued their proposals. The extracts I have refer to agents being instructed to value Three Nations and that the respondents were approached to make an offer in respect of the business, goodwill and assets that were transferred prior to the administrators' appointment. An offer of £300,000 was made which the agents recommended acceptance of with the addition of a 3% allocation of profits for a three year period. The administrators said solicitors had been instructed to complete a settlement agreement with the respondent on the basis of a series of deferred payments and a personal guarantee from Mr Moss.

91. The administrators' proposals were not approved by the creditors. Instead the creditors (by now led by HMRC who had claimed an outstanding sum of over £8million out of total liabilities of around £16 million) decided that the administration should end by 30 May 2019 and steps be taken to place the company into creditors' voluntary liquidation with the appointment of Duff and Phelps as Joint Liquidators.

92. On 24 June 2019 Mr Darrell emailed Mr Moss saying

"*I've had Marc on the phone about Doc etc… apparently I'm being subpoenaed to appear about my letter and Doc is going to use details about my conviction to assassinate me… I told Marc if I'm in the stand, I'll tell the truth about Vizor, and the relationship with Marc…*

I told Marc I would swear Doc is still working for Vipzy… he said Vipzy is "mothballed"…"

93. The reference to "Marc" is to Mr Eckley and the reference to "Doc" is the claimant. The relationship between Mr Darrell and Mr Eckley at the time was acrimonious because of the assistance Mr Darrell had given Mr Moss without Mr Eckley knowing.

94. On 5 December 2019 solicitors for the liquidators wrote to the respondent regarding the sale agreement of 8 January 2019 asserting that the assets remained vested with Three Nations Limited. Mr Moss told me that the liquidation remains outstanding and it is not known what action, if any, may ultimately be taken by the liquidator or their representatives.

The legal principles

Unfair Dismissal

95. The relevant parts of section 98 of the Employment Rights Act ("ERA") state:

" (*1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show— a. the reason (or, if more than one, the principal reason) for the dismissal, and b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it— (c) is that the employee was redundant…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)— a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and b. shall be determined in accordance with equity and the substantial merits of the case.

Redundancy and statutory redundancy payment

96. Section 135 of ERA states:

"*An employer shall pay a redundancy payment to any employee of his if the employee— (a) is dismissed by the employer by reason of redundancy"*

97. Section 139(1)(b)(i) of ERA states:

"*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

(a) The fact that his employer has ceased or intends to cease –
(i) To carry on the business for the purposes of which the employee was employed by him, or
(ii) To carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business—
(i*) for employees to carry out work of a particular kind, or*
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

The Transfer of Undertakings (Protection of Employment) Regulations ("TUPE")

98. Regulation 7 of TUPE states:

"(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 (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—
(a) paragraph (1) does not apply;
(b) without prejudice to the application of section 98(4)4 of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—
(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
(ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held."

99. Regulation 13 of TUPE provides, so far as relevant, as follows –

"(*1) 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...who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.*

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of –

(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….

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d)…

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall
(a) consider any representations made by the appropriate representatives; and

(b)reply to those representations and, if he rejects any of those representations, state his reasons…

(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 any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances…

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2)…"

The appropriate representatives are defined as a recognised trade union or appointed employee representatives.

100. Regulation 15 of TUPE provides, so far as relevant: –

"(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal –

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

(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 his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises 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….

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor In respect of compensation payable under sub-paragraph (8)(a) or paragraph (11)."

101. Under regulation 16(3) "Appropriate compensation" in regulation 15 means such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

102. Under regulation 16(4) sections 220 to 228 of the 1996 Act apply for calculating the amount of a week's pay for any employee for the purposes of paragraph (3).

Wrongful Dismissal

103. A dismissal without giving contractual notice will prima facie be in breach of contract unless the dismissal was in itself a response to the claimant's own repudiation of the contract.

104. The necessary conduct entitling the employer to dismiss summarily is usually restricted to conduct said to amount to gross misconduct. It was said in Neary v Dean of Westminster [1999] IRLR 288 that the conduct "*must so undermine the trust and confidence that is inherent in the particular contract of employment that the master should not be required to retain the servant in his employment."*

105. In a wrongful dismissal claim it does not matter that the employer only found out about the gross misconduct after the dismissal provided that in fact the employee was in repudiatory breach at the material time: Boston Deep Sea Fishing and Ice Co v Ansell [1886-90] All ER Rep 65.

Holiday Pay

Unauthorised deduction from wages

106. Section 13 of the Employment Rights Act 1996 states: -

"(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 make 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 contact (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"

107. Case law has established that for a sum to be "properly payable" to the claimant, the claimant had to have a legal (albeit not necessarily contractual) entitlement to the sum.

108. Section 27(1) defines "wages" and says, "*In this Part "wages", in relation to a worker, means any sum payable to the worker in connection with his employment, including – (a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise."*

Working Time Regulations 1998

109. Regulation 13 of the Working Time Regulations sets out the entitlement to the statutory minimum amount of four weeks annual leave (supplemented by an additional 1.6 weeks leave in regulation 13A). Regulation 13(9)(b) states that annual leave '*may not be replaced by a payment in lieu expect where the worker's employment is terminated*'. Regulation 16 provides for payment in respect of annual leave at the rate of a week's pay in respect of each week of leave. The relevant enforcement provision is at Regulation 30 which includes that a worker may present a claim where the employer has failed to pay the whole or any part of holiday pay due.

Discussions and Conclusions

Protective Award

Liability

110. I take this claim first, as the transfer/failure to consult occurred first in the timeline of events.

111. The respondent confirmed in closing submissions they accepted there had not been consultation with the claimant and that the claimant has standing to bring his protective award complaint. It was further confirmed that the respondent were not relying upon the exceptional circumstances defence as they acknowledged that the threshold for such a defence is a high one. It was further accepted that a protective award is a punitive award not a compensatory award, and that the starting point for the award was 13 weeks pay but assessed in light of mitigation. The respondent's position is that there is mitigation because it was said that both Mr Moss and Mr Darrell believed there was no transfer at the time. Furthermore, it was said that this was different to the common situation where employees who have not been consulted with have lost their employment immediately or have had their terms and conditions significantly detrimentally altered. The point was made that the claimant's situation was different as he remained employed at the time and on the same terms until his subsequent dismissal.

112. There was no recognised union in the workplace and Three Nations Limited did not take any steps to appoint employee representatives or, in default of that, to undertake individual consultation (which may serve to mitigate to an extent where there is a failure to appoint representatives).

113. The claimant was therefore deprived of the opportunity to be informed about the proposed transfer to the respondent, the reasons for it, the legal, economic and social implications or any measures it was envisaged the respondent would take. I do not agree that these failings had limited impact or consequences for the claimant. I have found, as a matter of fact, that Mr Moss knew by the end of December 2018 that the non dispense side of the Three Nations Limited business was not likely to survive and was going to be run down, and would result in redundancies. The 8 January 2019 sale agreement transfer, which constituted the TUPE transfer, whilst transferring everything including all employees as a back up if needed, did not alter that being the main plan. The plan was ultimately that the respondent would be functioning in the dispense side of the business with the remainder to be liquidated, albeit via administration.

114. Consultation with the employees about the sale agreement transfer would have involved (if done properly) the employees, including the claimant, being told about their employment transferring to the respondent. The respondent rather obviously has the word "Dispense" in its title. In turn the employees would have to be told about the potential employment implications/measures for those involved in the non-dispense aspects of the business. It was not in Mr Moss' personal interests to do that given the

likely impact and fall out releasing that information would have upon staff (and indeed Mr Eckley would have found out about what Mr Moss' plans were when Mr Moss was deliberately trying to keep him out of it.). But the point of the collective consultation obligations is that (unless exceptional circumstances apply) those kinds of consultations, however difficult they may be, actually happen.

115. The respondent says that there was no consultation because Mr Moss and Mr Darrell did not know that the transfer took effect on 8 January 2019. Mr Moss also said in evidence that if things had unfolded in a more orderly fashion that he originally anticipated, there would have been consultation with affected employees in the March/April time.

116. My finding of fact above is that Mr Moss and Mr Darrell considered they had various potential cards in their hands to play, one of them using the sale agreement as and when needed (or indeed using it not as a sale agreement of all the assets but as a sale agreement for dispense assets/employees). They thought there would be alternative options given the likely role of an administrator. As such, in one sense, they did not appreciate the transfer of employees happened once and for all on 8 January 2019 and I accept that Mr Darrell did not tell Mr Moss at the time that was the clear effect.

117. However, on balance, I do not consider that amounts to mitigation such as to reduce the size of the protective award. The sale agreement was there to be read. Its terms clearly state that the operative date is the date of the agreement and that it covered all employees. The agreement is live to the issue of TUPE, referring to the provision of Employee Liability Information being provided by the respondent to Three Nations Limited and expressly acknowledging that employee consultation had not been undertaken. Mr Moss could and should have read it fully. It was also open to him (and indeed his counsel acknowledged in closing submissions with the benefit of hindsight it would have been advisable to) take some advice from a lawyer, or a regulated Insolvency Practitioner, or from a HR professional.

118. Fundamentally, I consider it comes down to the plan to keep the options open, and for the sale agreement to be a card in their hands. As such the potential for the sale agreement to backfire was a risk that Mr Moss adopted. I therefore do not consider that the scenario is one that falls simply into a category of Mr Moss being the victim himself of negligence or misguidedness in the hands of Mr Darrell. It is a more serious breach. It is part of a deliberate decision to keep the sale agreement secret and have it (with the risks that brought) held there as one of a range of potential business options available if needed. In that sense it was a calculated decision to take the risk.

119. Therefore, bearing in mind this was not a technical default but a complete failure to inform and consult, the consequences of the breach, and the state of mind lying behind the breach I consider it is appropriate to award the claimant the full 13 weeks. It is a sum I consider just and equitable having regard to the seriousness of the failure of the employer to comply with their duty (for which the respondent is jointly and severally liable under regulation 15(9) TUPE).

Remedy

120. The claimant seeks his basic pay, car allowance, BUPA healthcare and employer's pension contributions within the rate of gross pay to be applied.

121. The claimant is entitled to a week's pay being the amount of a week's pay payable by the employer under the contract of employment in force on the calculation date if the claimant had worked normal working hours in a week (section 221 ERA). Case law has established that this refers to sums which are payable by the employer as a matter of legal obligation where that obligation arises simply because the employee has worked their normal working hours in a week. In my judgement, that includes the claimant's basic pay, car allowance and employer's pension contributions but does not include the valuation placed by the claimant on BUPA health insurance.

122. There is no evidence that the car allowance [78] was paid to the claimant simply as a reimbursement of expenditure as opposed to being additional remuneration paid to the claimant by reason of him doing his job and therefore constituting his "pay" due to him under his contract of employment. There is also appellate authority that pension contributions paid by the employer fall within the scope of section 221 ERA as again being a reward for work done under the contract of employment/ part of a week's pay (University of Sunderland v Drossou [2017] IRLR 1087.) The provision of benefits (BUPA health insurance) does not, however, fall within that definition.

123. The claimant's gross weekly pay was £961.54, the car allowance was £153.85 a week and employer pension contributions £19.23 totalling £1134.62 x 13 = **£14,750.06**.

Unfair Dismissal

Liability

Reason for dismissal

124. The starting point is to determine what was the reason or principal reason for the claimant's dismissal? The reason for a dismissal is a "*set of facts*

known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee" (Abernethy v Mott, Hay and Anderson [1974[ICR 323).

125. In my judgement, the reason for the claimant's dismissal was because Mr Moss believed that it was open to him to determine as at that point in time which employees he wanted to transfer over to the respondent and he decided he did not want or need the claimant in that business. He thought (albeit incorrectly), notwithstanding the sale agreement, there had remained some flexibility open to him as to what to do with the employees.

126. In turn, Mr Moss decided that he did not want to transfer the claimant over because he did not see the claimant as being central to the dispense side of the business, he did not believe the dispense side of the business at that time needed an associate director of development, he did not believe that Vipzy was part of or importance to the dispense side of the business or that it was something he wanted to take forward, and he not believe he had a job for the claimant doing the kind of spot project work that he had a limited understanding of the claimant doing (leases, debt recovery, overseeing traffic compliance etc). As set out in the finding of fact, Mr Moss also had no particular impetus to keep the claimant on, bearing in mind his perceived allegiance to Mr Eckley. Mr Moss also considered that there was no role for the claimant remaining in Three Nations Limited because he was going to cease trading all other aspects of the business as they were considered to be insolvent and ALJ, as the likely administrators, had advised Mr Moss to cease trading and make redundant those employees who were not going to transfer to the respondent as that side of the business appeared to be insolvent and was likely to be liquidated.

127. I consider it likely that the timing of the claimant's dismissal (and the other employees) was pushed through speedily in advance of the administrators being formally appointed because there was a wish to present the setting up of the respondent as a fait accompli so that the administrators would approve a deal of the transfer of the dispense side. I consider it was also likely to be part of a desire to try to bury the full picture of the sale agreement as that would not accord with Mr Moss' aim at that point in time in limiting the scope of what was transferring to the respondent, including the potential cost consequences if the respondent had to pick up the liabilities for all the employees.

128. Ultimately determining what the principal reason is for dismissal is a factual one. Weighing all the above into the equation I do not find that the sole or principal reason for the claimant's dismissal was the transfer. The transfer played a part in the sense that one contributing factor (particularly in relation to the speed at which things happened) was a wish for the respondent to avoid the potential liabilities for all employees that could be said to have

transferred under the sale agreement of 8 January 2019. A transfer also played a part in the sense that Mr Moss was making redundant those he did not want to transfer as part of a wider plan to help persuade the administrators to approve a transfer of the dispense side of the business to the respondent (albeit a modified transfer as opposed to the original TUPE sale agreement).

129. However, I do not find this means the transfer was the sole or principal reason for the claimant's dismissal. The principal reason, in short form, was that the original Three Nations Limited business portfolio was insolvent and that any future viability lay with focussing on the dispense side of the business with the respondent which only needed a reduced workforce, and the claimant was not seen as part of the required reduced workforce (see for example, Thompson v SCS Consulting Limited EAT/34/00).) I am satisfied that if Mr Moss had not taken the steps in total that he had, the administrators would have in due course have dismissed all the employees, other than potentially those they may have wished to retain to facilitate a sale of the dispense side of the business.

130. If I am incorrect, then I would in any event find that the sole or principal reason for the claimant's dismissal was an economic, technical or organisational reason entailing changes in the workforce such that the claimant's dismissal would not be automatically unfair in any event. The principal reason for the claimant's dismissal was an "economic" one and a "organisational" one that related to the conduct of the business. For economic reasons there was an intention not to operate in the fields of business other than the dispense side and there was therefore an intention to change the workforce and to continue to conduct that reduced business as a viable going concern (see Spaceright Europe Ltd v Baillavoine and others 2012 ICR 520 and SCS Consulting Limited as above). The claimant was not required for the carrying out of those business needs. That reason was also a reason entailing changes in the workforce in that there was a reduction in the functions of and numbers of the workforce of the respondent as transferee.

131. It would also be my judgement that in those circumstances the claimant's dismissal would be deemed to be for the potentially fair reason of redundancy. I would find that the claimant's dismissal was wholly or mainly attributable to the fact that the respondent's requirements for employees to carry out work of a particular kind had ceased or diminished or very shortly was expected to cease or diminish. The respondent was not taking forward Vipzy. The respondent was concentrating on dispense work and was reducing its personnel down to those considered necessary to keep that dispense work functioning. In its reduced enterprise the respondent decided it did not require an associative director of development, and/or an individual carrying out the kind of hybrid management role that the claimant was

carrying out in the sense of project managing problem areas that arose such as leases, debt collecting, licensing etc. The claimant was in a redundancy situation. His dismissal was attributable to that diminution in work. The respondent had a genuine commercial reason to justify making redundancies. Once I am satisfied of that, it is not the Tribunal's role to further look behind the respondent's commercial decision making process.

132. In such circumstances, whether or not the claimant's dismissal was in fact fair or unfair falls to be assessed under section 98(4) ERA. That is exactly the same assessment whether the case is considered on the basis of the respondent having established an ETO defence (with deemed potentially fair reason of redundancy), or whether the case falls outside of TUPE (my primary finding) and falls to be considered purely under sections 94 and 98 ERA. It is to that I therefore turn.

Fairness of the dismissal

133. In assessing fairness under section 98(4) in a redundancy case, the case law suggests a tribunal should consider issues including: the pool for selection; the selection criteria; whether meaningful consultation has taken place and whether alternative jobs have been properly considered. The Tribunal must take care not to substitute their own view for that of the employer and generally the test that is to be applied is whether the employer's decision was within the range of reasonable responses.

134. In Polkey v AE Dayton Services Ltd [1988[1 AC 344 it was said:

> **"***Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by section 57(2)(a), (b) and (c) of the Employment Protection (Consolidation) Act 1978[1]. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural," which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their*

[1] Now section 98 of the Employment Rights Act 1996

representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied."

135. Here the respondent accepts that there was no consultation with the claimant in relation to the termination of his employment. However, the respondent asserts that there are exceptional circumstances in this case, and the procedural steps normally appropriate were reasonably considered futile by the respondent. The respondent argues that the business was failing and the respondent was in a position of panic, needing to urgently deal with stabilising the profitable dispense side, and that the claimant and others not working on that side of the business (and central core functions still also needed) were therefore made redundant.

136. I do not agree that the respondent acted reasonably in deciding to dispense with the appropriate procedural steps in a redundancy situation. On the respondent's own account, the claimant was in the same situation and treated no differently as the other employees who were not given jobs with the respondent. I do not consider it was within the range of reasonable responses for the respondent to conclude it was futile to consult with that group. For one, it deprived the employees of the ability (including the claimant) to put forward any arguments they may have to make, and for those arguments to be listened to and responded to, that there was a role for them going forward in the dispense focussed side of the business. For Mr Moss to say there was never any possible scope for the claimant to convince him there was a role for him in the new organisation, would be in my judgement for Mr Moss to say he had entirely prejudged the situation; which would not in itself accord with acting reasonably.

137. I therefore find that the claimant was unfairly dismissed under section 98(4) ERA. In the circumstances, and in accordance with equity and the substantial merits of the case, the respondent acted unreasonably in treating the redundancy reason as a sufficient reason for dismissing the claimant. In my judgement, when assessing the claimant, Mr Moss

probably considered the claimant as being in a "pool of one" i,e, that he held a unique position in the organisation and was not within a wider pool. Mr Moss did not consider that role was needed for the respondent given the respondent's focus on the dispense side of the business. I accept that would have been a reasonable initial perspective for Mr Moss to take. However, it was also still a reasonable requirement for the respondent to consult with the claimant about that and to fairly consider what the claimant may have to say about why he considered his role should still exist within the new business, or any submissions the claimant may have to make about why he should have been considered for other roles in the new organisation (such as vehicle fleet management for example). That is one of the central purposes of the consultation obligation. The extent to which that would have made a difference, is a question for remedy as identified in the central point identified in the Polkey case. The failure itself renders the dismissal unfair.

Unfair Dismissal – remedy

Basic Award

138. The claimant is ostensibly entitled to a basic award. Both parties value this at £2,286.00. The respondent argues, however, that that the basic award should be reduced under section 122(2) ERA on the basis of the claimant's conduct prior to dismissal. In particular it is said (in the counter-schedule of loss) that the claimant:

(a) Absented himself from the company premises;
(b) As "Associate Director of Development" failed to protect the company from adverse financial risk;
(c) Operated as manager or Director of "Vipzy", "Toucan Recruitment", "Storm Chepstow" and other companies still ongoing at the point of redundancy;
(d) Attempted a deliberate over valuation of the company "Vipzy" while acting as an associate director of the Respondent company (referring here to Three Nations Limited).

139. Section 122(2) of the Employment Rights act says:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

140. There is no requirement for a causative relationship between the conduct and the dismissal. The adjustment has some overlap with, but is not identical to, the provision in Section 123(6) ERA relating to the potential reduction to the compensatory award. In Steen v ASP Packaging Ltd [2014]

ICR 56 the Employment Appeal Tribunal suggested the following should be assessed:

(a) What is the conduct which is said to give rise to possible contributory fault?

(b) Is that conduct blameworthy? The tribunal has to assess as a matter of fact what the employee actually did or failed to do (not what the employer believed).

(c) Did any such blameworthy conduct cause or contribute to the dismissal to any extent (this is only relevant to the compensatory award)?

(d) If so, to what extent should the award be reduced and to what extent is it just and equitable to reduce it? Here the EAT noted that

"*A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."*

141. In Nelson v BBC No 2 [1980] ICR 110 it was said:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But is also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

142. I do not find as a matter of fact that the claimant engaged in blameworthy conduct. I have found as a matter of fact the claimant had line management authority to work away from the company premises, he had appropriate authority to do the work that he did for other businesses and did not attempt a deliberate overvaluation of Vipzy. As Associate Director of Development there is no evidence that the claimant failed to protect Three Nations Limited from adverse financial risk. The demise of that company lay in the domain of Mr Moss and Eckley and it is not a matter for me to adjudicate between them their private battle as to where the relative blame lies.

143. I therefore award the claimant his basic award of £2,286.00. I would add he would in any event be entitled to that sum as a statutory redundancy payment (it is not possible to award both).

Compensatory Award

144. The compensatory award is governed by sections 123 and 124 ERA. In particular section 123 says, where relevant:

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable and in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include –

(a) Any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) Subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal. …

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…

(6) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

145. It has been established since Polkey v AE Dayton Services Ltd that where an employee has been unfairly dismissed due to procedural failings, the tribunal may reduce the compensatory award to reflect the likelihood that the employee would have lost their job in any event even if a fair procedure had been followed. Although this inherently involves a degree of speculation, tribunals should not shy away from the exercise. I have to consider not what a hypothetical employer would do but what the respondent would do, on the assumption the employer would this time have acted fairly. Could this employer have fairly dismissed and, if so, what were the chances that it would have done so?

146. Having heard the evidence in the case, I do consider that even if the respondent had followed a fair procedure it would have inevitably led to the claimant being made redundant. It was within the range of reasonable responses for the respondent not to wish to continue with Vipzy as a project

and a decision that Mr Moss would inevitably have made. The plan was to focus on the dispense side of the business in a streamlined manner. It would reasonably not have included sustaining the ongoing cost of Vipzy (including the claimant as an employee working on Vipzy) when it was only tangentially complementary to the dispense side of the business, had already absorbed a lot of funds and did not appear to Mr Moss to be close to being successfully commercialised. The plans to focus on and streamline the dispense side of the business with reduced overheads also did not require an associate director of development at the time. It was also within the reasonable range, and a decision that Mr Moss would inevitably have made that he did not need an individual such as the claimant to step in as a trouble shooter to project manage problem areas as they arose. Mr Moss was going to be managing a much smaller operation.

147. The claimant also identified some other, more individual roles he said he should have been considered for. He identified being manager of the vehicle fleet. Mr Moss said in evidence that initially this job had been undertaken by its existing incumbent, Mr Davies and then when he let Mr Moss took it on personally as the fleet had reduced to light vehicles only. It would have been within the range of reasonable responses for Mr Moss to decide to keep Mr Davies in that role and to not consider bumping him out to make way for the claimant. Whatever the claimant may say about Mr Davies' competencies, the job was Mr Davies' day to day role. The claimant's position was very different, becoming involved in ad hoc projects that included responsibilities for licensing compliance and traffic commissioner enquiries when they happened. It was within the reasonable range to consider these as distinct and different. If a fair process had been followed Mr Moss would have rejected such a proposal from the claimant and it would have been within the reasonable range to do so.

148. The claimant says that he could have been kept on to deal with money disputes and property litigation. Mr Moss said that he had no individual to deal with it, that there were less disputes once the operations were focussed on the dispense side, and if there were any they were sent externally to handle. If a fair process had been followed Mr Moss would have rejected the idea of keeping the claimant on and creating a post for him to deal with money disputes and property litigation. It would have been within the reasonable range to reach such a decision. It would be in the reasonable range for an organisation to decide to outsource what was anticipated to be a low level of such disputes and it would not be reasonable to require the respondent to create such a post for the claimant.

149. The claimant also suggested he could have had a role looking after property leases. Mr Moss said in evidence again that he did not need a member of staff in the respondent looking after this. He has the main building he owns

himself and limited and reducing other premises. If a fair process had been followed Mr Moss would have rejected the idea of keeping the claimant on and creating a post for him to look after property leases. It would have been within the reasonable range to do so. It is a business decision the respondent would be entitled to take whereby Mr Moss would look after the reducing property portfolio and it would not be reasonable to require the respondent to create a post for the claimant to do such work.

150. In my judgement the loss that is therefore attributable to the action taken by the employer and the amount that is just and equitable to award the claimant should therefore reflect the period of time in which it would have taken the respondent to follow a redundancy procedure and properly consult with the claimant. The evidence of Mr Watts was that Mr Moss's companies would usually do so, as he talked about redundancy processes already being in train in January and February 2019 and that individuals ended up being made redundant at the same time as the claimant who were already in a separate consultation process. Bearing in mind those kinds of timescales, and the fact that consultation would have been happening with a fairly large number of employees at the same time, I consider it likely that this redundancy consultation process would have taken around 5 weeks, with the claimant then being given his notice period. This respondent (who was not Three Nations Limited) was not facing financial difficulties that could have potentially foreshortened the timescales. The claimant did not and would not reasonably be able to mitigate his losses during that period

151. I also do not accept the respondent's argument that the Vipzy valuation would have emerged in that period and would have inevitably resulted in the claimant's earlier dismissal. That presumes the outcome of a disciplinary process that never happened (and its outcome cannot be guaranteed bearing in mind the claimant would have had a defence to put forward). Moreover, I do not see how it would have come to light. It is the fall out of the actual dismissal process and this litigation that led to Mr Moss and Mr Watts trawling the claimant's and Mr Eckley's emails. I cannot see how or why they would otherwise have taken on such an extensive endeavour.

152. The claimant is therefore entitled to his net losses for that 5 week period. His notice pay is payable on a gross basis as it is deemed taxable by HMRC and cannot fall within the potential £30,000 tax free threshold. The claimant says his notice period was 4 weeks. The respondent says it was 3 weeks. The claimant had 3 complete years of service. Under his contract he was therefore entitled to 3 weeks notice.

153. The respondent says that there is no evidence of the claimant having BUPA healthcare. However, it is in the claimant's schedule of loss and the respondent in their own counter-schedule does not dispute the claimant

received the benefit and I therefore allow it. The cost of replacing insurance products is also generally recoverable without there having to be a claim on the policy (see Fox (Father of G Fox Deceased) v BA [2013] IRLR 812.

154. The claimant's pay and benefits were:

- Basic salary £50,000.00;
- Car allowance £8,000;
- BUPA healthcare £957.36
- Employer pension contributions £999.96
- Totalling £59,957.32

155. These are gross figures and the net value of such a package applying the appropriate tax rates at the time would be a weekly net figure of £822.91. 5 x £822.91 = £4114.55.

156. The claimant's notice pay entitlement is recoverable at the gross rate for which the weekly figure for the whole remuneration package is £1153.03. 3 x £1153.03 = £3459.09.

157. I do not award anything in respect of the claim for loss of statutory rights as my conclusion is that the claimant would have been made redundant after the period in question and have lost his statutory rights in any event.

158. The claimant is not entitled to an uplift in respect of the alleged failure to follow the Acas Code of Practice on disciplinary and grievance hearings. An uplift can potentially be claimed under section 207A of the Trade Unions and Labour Relations (Consolidation) Act 1992 where it appears to the Tribunal that the claim to which the proceedings relate concerns a mater to which a relevant Code of Practice applies. The Acas Code of Practice on disciplinary and grievance hearings, does not apply to redundancy dismissals. The Code expressly states this.

Wrongful Dismissal

159. I do not find that the claimant was himself in repudiatory breach of contract entitling the respondent to terminate the contract without giving notice. It is often the case in the context of an employment contract that the reality of the contractual relationship (particularly as time goes on) does not always reflect the strict wording of the written contract. Given my findings of fact I accept that it was common practice for directors and senior managers to work for other companies and also that the claimant's activities were known and authorised/ instructed by Mr Eckley and he had the authority to do so. I have not made a finding of fact that the claimant was knowingly involved in a false valuation of Vipzy in an attempt to secure investment through

fraud. The claimant was therefore wrongfully dismissed. I do not, however, make a separate financial award as the notice pay has already been compensated in the unfair dismissal compensatory award calculation above.

Holiday Pay

160. The holiday year is the calendar year. There is no evidence before me that the claimant took any leave in the 2019 calendar year in the run up to his dismissal, other than there would have inevitably been a public holiday at the start of January. He will therefore have accrued untaken annual leave for the period 1 January 2019 to 1 March 2019. Mr Watts initially told the claimant he was entitled to 8.7 days holiday pay on termination. 5 of those at the time would have been days Mr Watts thought the claimant had carried over from the previous year, giving the claimant 3.7 days in the current year. That appears to me to be accurate as 28 days in the whole calendar year would equate to 4.7 days for two months, and subtracting the New Year's Day public holiday from that would take it to the 3.7.

161. In relation to the carrying forward from the previous year, the claimant had 9 days on his leave form. I have found that the claimant's form omitted 15 days. He has therefore overtaken his annual leave in previous year by 4 days. The claimant's contract of employment at clause 13.2 empowers the respondent to require the claimant to repay pay received for holidays taken in excess of the basic holiday entitlement and that any sums could be deducted from any money owing to the claimant from the company.

162. The claimant's excess for the 2018 calendar year therefore offsets the days that were owed to the claimant for the first part of the 2019 calendar year. I therefore do not find that the respondent failed to pay the claimant holiday pay that was due on the termination of his employment and that complaint is dismissed.

Interest

163. This is not a discrimination claim and I therefore do not have any power to award pre-judgment interest.

Recoupment

164. The unfair dismissal award and protective award potentially fall within the remit of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996. However under Regulation 8 the requirements do not apply where the Tribunal is satisfied each day for which the prescribed elements relate the employee has not received or claimed any of the benefits in question. The claimant did not claim social security benefits until April 2020 which was long after the period covered by the

protective award or the period covered by the unfair dismissal compensatory award. The recoupment regulations therefore do not apply.

Conclusion

165. In conclusion I award the claimant:

- £14,750.06 protective award;
- £2,286.00 basic award;
- a compensatory award made up of:
    - £4,114.55 net loss of earnings;
    - £3,459.90 gross notice pay.

166. The claimant is responsible for payment of any tax and national insurance contributions due on the notice pay element.

167. The respondent has an outstanding costs application. They should write in within 14 days confirming whether they are still pursuing that application. If so, I will issue some directions.

Employment Judge R Harfield

Dated: 15 December 2021

JUDGMENT SENT TO THE PARTIES ON 16 December 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche