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EMPLOYMENT TRIBUNALS (SCOTLAND)

10 **Case Nos: S/4106584/2017, S/4106585/2017, S/4106586/2017, S/4106587/2017,
S/4106588/2017, S/4106589/2017, S/4106590/2017, S/4106591/2017,
S/4106592/2017,
S/4106593/2017, S/4106594/2017, S/4106595/2017,
S/4106596/2017, S/4106597/2017, 4106598/2017,**

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Held at Glasgow on 2 May 2018

Employment Judge: Rory McPherson

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1. Elaine Sutherland **First Claimant**
Not Present and
Not Represented

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2. Mr Petar Nikolov **Second Claimant**
Not Present and
Not Represented

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3. Mr Gerald Sutherland **Third Claimant**
Not Present and
Not Represented

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4. Mr Keiran Coll **Fourth Claimant**
Not Present and
Not Represented

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5. Mr David Linnen **Fifth Claimant**
Not Present and
Not Represented

E.T. Z4 (WR)

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| 6. | Mr David Baillie | Sixth Claimant
<u>Not Present and
Not Represented</u> |
| 5 | 7. Mr Paul Fleming | Seventh Claimant
<u>Not Present and
Not Represented</u> |
| 10 | 8. Mr Martin Romano | Eighth Claimant
<u>Not Present and
Not Represented</u> |
| 15 | 9. Mr Stuart Ross | Ninth Claimant
<u>Not Present and
Not Represented</u> |
| 20 | 10. Mr Frank Burns | Tenth Claimant
<u>Not Present and
Not Represented</u> |
| 25 | 11. Mr Patrick McGrory | Eleventh Claimant
<u>Not Present and
Not Represented</u> |
| 30 | 12. Mr John Wallace | Twelfth Claimant
<u>Not Present and
Not Represented</u> |
| 35 | 13. Mr Phillip Blair | Thirteenth Claimant
<u>Not Present and
Not Represented</u> |
| 40 | 14. Mr Elizabeth Queen | Fourteenth Claimant
<u>Not Present and
Not Represented</u> |
| | 15. Mr Graham Taggart | Fifteenth Claimant
<u>Not Present and
Not Represented</u> |

1. **Flemings Innovation Plastics Ltd** **First Respondent**
Not Present and
Not Represented
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2. **ICL Tech Limited** **Second Respondent**
Not Present and
Not Represented
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3. **Secretary of State for Business** **Third Respondent**
Energy & Industrial Strategy **Represented by:-**
R Doyle -
Technical Manager
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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that each of the 15 claimants claims for redundancy pay, notice pay, holiday pay and arrears of pay are dismissed.

REASONS

Introduction

30 **Preliminary Procedure**

1. By a claim form lodged by the first claimant on 24 November 2017 (accepted following reconsideration as presented on 9 January 2018), the 15 claimants brought claims for redundancy pay, notice pay, holiday pay and arrears of pay arising from their employment with the first respondent.
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2. The first respondent's ET3 lodged 9 February 2018 identified that the first claimant had been one of their directors, she was their named contact for the

claim, the respondents e-mail address was that of the first claimant and the first respondent was insolvent. The effect of insolvency was that liability for redundancy pay, notice pay, holiday pay and arrears of pay fell to the third respondent.

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3. A previous Preliminary Hearing was held on 4 April 2018 (the 4 April Preliminary Hearing) at which the 2nd and 3rd respondents attended. The first claimant did not attend. At this Preliminary Hearing the Tribunal understood that the first claimant together with the first respondent and second respondent argued that there was no relevant transfer. It was further understood that the third respondent would argue there was a relevant transfer and as such they were not liable to pay arrears of pay to the claimants arising from the first respondent which had become insolvent.

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15 4. The second respondents at the 4th April Preliminary Hearing confirmed that they had subsequently employed the first claimant and considered that she was best placed to give evidence in respect of the circumstances of the first respondent which would be relevant to determine whether a relevant transfer to them had occurred.

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5. Following the 4 April Preliminary Hearing, the claim was listed for a Preliminary Hearing Wednesday 2 May 2018 and Thursday 3 May 2018 at 10.00 a.m. on the question of whether or not there was a relevant transfer from the first to the second respondent.

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6. A copy of the Note of the Preliminary Hearing of 4 April 2018 was issued to the first claimant on her own behalf and as representative of the other 14 claimants and the three respondents by correspondence 10 April 2018.

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7. The Note at para 13 identified that it was considered that the first claimant was “*apparently best placed to give evidence in respect of the circumstances of the first respondent.*” The note recorded that the second respondents confirmed that they now employed the first claimant and they intended to call one of their

own directors as a witness to speak to the circumstances from the point of view of the second respondent.

8. The Note at para 18 directed that it was the first claimant's *"responsibility to advise all of the claimants of the date of the forthcoming Preliminary Hearing, as they are entitled to attend and to be heard if appropriate, albeit that the hearing is restricted to questions of whether there was a relevant transfer"* and stated that *"... it is expected that Mrs Sutherland will attend on those dates, as the claimant, to represent the other fourteen claimants, and to give evidence, as appropriate."*
9. A Notice of the Preliminary Hearing scheduled of Wednesday 2nd May and Thursday 3rd May 2187 was issued to the first claimant on her own behalf and as representative of the other 14 claimants and the respondents on 26th April 2018 stating that the hearing will be conducted in public and the parties are *"responsible for making sure that any witnesses" they "wanted to call can attend and know the place, date and time of the preliminary hearing. Please note you only need to ensure that those witnesses who can give evidence relevant to the preliminary issue ... attend..."*
10. On Thursday 26 April 2018 at 4pm the first claimant issued an e-mail to the Tribunal and the second (though not the third) respondents *"Further to your e-mail and letter in respect of Notice of Preliminary Hearing. I write to confirm I will not be able to attend, and would ask that your proceed based on my original submissions"*
11. On Wednesday 2 May 2018 at 8.17 am the second respondent's agents issued an e-mail to the tribunal copied to the first claimant and the third respondents *"On consideration of the confirmation given by Ms Sutherland, the lead claimant, that she will not be attending the hearing, our client has taken the decision that it does not wish to attend the hearing in person, nor to instruct us to attend on its behalf. We have been instructed to send to the tribunal a signed statement from Mr Nicholas Downie, our client's managing director, and this is*

attached. If the judge assigned to today's hearing is minded to proceed with the hearing we would be obliged if Mr Downie's statement could be considered in determining the preliminary issue with which the hearing is concerned, namely whether there was a relevant transfer under the TUPE Regulations 2006 from Flemings Innovation Plastics Limited (prior to its liquidation) to our client. If we can clarify any matter further in these circumstances we will be pleased to do so."

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12. No claimants attended the Preliminary Hearing scheduled to start 2 May 2018. There were no witnesses in attendance to speak to the position of any claimant or the first or second respondents at this Preliminary Hearing. Nor were there any representatives in attendance for the claimants or the first or second respondents.

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15 **Relevant Law**

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13. The Employment Rights Act 1996 s166 provides that where an employer is insolvent an employee may apply to the third respondent for payment of redundancy pay, notice pay, holiday pay and arrears of pay out of the National Insurance Fund.
14. Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) Reg 4 provides that a relevant transfer operates to transfer employment including any liabilities for holiday pay and arrears of pay in the usual way and employees subject to such transfer would not be redundant and there would be no liability on the part of the third respondent.

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15. Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, (the Tribunal Rules) Rule 47 provides as follows:

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47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information

which is available to it, after any enquiries that may be practicable, about the reasons for the parties' absence.

Discussion and Decision

- 5 16. I considered all of the information which was available to me. I made such enquiries as were practicable including reviewing the first claimant's e-mail of Thursday 26 April 2016 and the second respondents e-mail sent on the morning of the hearing Wednesday 2 May 2016 8.17 am confirming that they would not be attending and providing only statement from their managing
10 director.
17. Given the repeated correspondence from the Tribunal to the parties, informing them and reminding them of the purpose of Hearing listed for Wednesday 2 May 2018 and Thursday 3 May 2018 together with the need for witness
15 attendance, taken together with the 4 April Preliminary Hearing Note identification of the third respondent's expectation that they would be able to cross examine the witnesses, I did not consider that it was appropriate to start seeking out explanations from the first claimant as to why she and indeed all other claimants failed to attend the Tribunal hearing. If there is a valid
20 explanation for non-attendance, it would be open to them to apply within 14 days for reconsideration of this decision.
18. The third respondents who through their representative attended the hearing Wednesday 2 May and had made arrangements to attend on Thursday 3 May
25 2018 gave consideration to seeking a costs order against the first claimant under rule 76 (1) of the Tribunal Rules which provides that a Tribunal may make a costs order "*where it considers that a party has acted vexatiously... or otherwise unreasonably in either the bringing of proceedings... or the way that the proceedings...have been conducted*" however the third respondents did
30 not seek to insist on such a costs order.

19. Each of the Claimants' claims for redundancy pay, notice pay, holiday pay and arrears of pay are hereby dismissed.

5 Employment Judge: Rory McPherson
Date of Judgment: 04 June 2018
Entered in register: 05 June 2018
and copied to parties

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