Case Numbers: 3314963/2020 & others

EMPLOYMENT TRIBUNALS

Claimants Mr A Sharma & others

Respondents (1) Travelex UK Limited (in administration) (debarred) ("TUK")
(2) The Secretary of State for Business

Rule 35 participants: (1) Travelex Central Services Limited ("Central Services")
(2) Travelex Foreign Coin Services Ltd ("Foreign Coin")

Heard at: Watford, by Cloud Video Platform ("CVP") **On**: 4-7 and 11 April 2022

Before: Employment Judge Hyams

Appearances:

For the claimants: In person, but with two claimants (Mr Nidhin Thomas and Mr Anurpam Sharma) acting not only on their own behalf but also as representatives of fellow claimants

For the rule 35 participants: Ms Laura Robinson, of counsel

RESERVED JUDGMENT ON TWO PRELIMINARY ISSUES

Introduction; the background to the hearing which started on 4 April 2022 and the issue which was listed to be determined at that hearing

1 The hearing which started on 4 April 2022 was listed by Employment Judge ("EJ") R Lewis after preliminary hearings conducted by him occurred on 12 May 2021 and 25 August 2021. There was then a further preliminary hearing conducted by EJ R Lewis on 15 February 2022 with a view to assisting in the preparation for the hearing starting on 4 April 2022. The hearing commencing on 4 April 2022 was listed at the hearing of 25 August 2021, at which the following orders (recorded in the record of the hearing of which there was a copy at pages 8-18 of the hearing bundle) were made:

"1. Travelex Central Services Limited and Travelex Foreign Coin Services Limited are permitted in accordance with Rule 35 of the Tribunal's Rules to participate in the proceedings on the same terms as if each were a respondent to all claims, including claims for which permission has not yet been given to amend. The terms of participation for avoidance of doubt include that each is subject to disclosure obligations, may call evidence, cross examine, and make submissions to the tribunal.

2. It is confirmed for avoidance of doubt that the above paragraph does not imply any other adjudication against either TCS or TFCS, and that the term 'respondent' in relation to each is used as a matter of convenience only.

...

5. The parties are subject to disclosure obligations. The duty is to supply to each other a list and copies of any document that they may wish to refer to at the April hearing, or which is relevant to the TUPE issue, irrespective of which side's case the document may appear to help. As it is accepted that the great majority if not all these documents are in the hands of the respondents, and the claimants may have few if any, the process is as follows.

6. The respondents are to send the lead claimants a copy of its list and documents by 12 November 2021 and the lead claimants to send the respondents a list of any further relevant documents which they may hold which NB have not already been disclosed to them by the respondents by 3 December 2021."

2 The things which I say in the following five paragraphs below are findings of fact, which I made because the parties were in agreement on those facts, and which I state here because they are important as part of the factual background to the hearing which was listed to start on 4 April 2022.

3 The business of TUK was principally the provision of foreign currency exchange services, mainly at various retail outlets (in airports and supermarkets), but also online. In addition, TUK provided cash collection and vaulting services and VAT refund services.

4 TUK's foreign exchange services were affected by at the latest late 2019 by technological change (to which I refer further in paragraph 42 below). That led to planning on the part of TUK at that time to reduce the number of retail outlets for the services described in the preceding paragraph above. On 31 December 2019 there was a ransomware cyber-attack on the business of TUK (which involved the disabling of TUK's IT systems, and a demand for a ransom to re-enable them). That attack had a major effect on the operation of the business. Computers had to be rebuilt and the profitability of the business was hugely affected. The Covid-19 lockdowns which were

then introduced in 2020 led to a halt on foreign travel from the second half of March 2020 onwards, with only a minor reduction in the restrictions on foreign travel in July 2020.

5 The circumstances described in the preceding paragraph above led to

5.1 determinations on the part of TUK to dismiss a number of its staff on the ground that they were redundant, and

5.2 the appointment of administrators of TUK on 6 August 2020.

6 On the very day of the appointment of the administrators, the administrators

6.1 dismissed with immediate effect all of the claimants in circumstances to which I return below, and

6.2 entered into agreements for

6.2.1 the sale of certain assets of TUK to Foreign Coin on the express basis that the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246, as amended ("TUPE") did not apply to the sale; and

6.2.2 the sale of part of the central services operations of TUK to a company for which later (it appears) Central Services was substituted, on the express basis that TUPE did apply to that sale.

7 Lead claimants within the meaning of rule 36 of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Rules") were agreed at the hearing of 25 August 2021. The issue which was listed for determination at the hearing starting on 4 April 2022 was stated in order number 12 of those made on 25 August 2021, which was in the following terms.

> "There will be a preliminary hearing in public on the nine working days 4 to 14 April 2022 starting at 10am on the first day by CVP to decide the issue: Did the employment of any lead claimant (and therefore of the group for which s/e is rule 36 claimant) transfer from TUK to TCS or TFCS in accordance with the provisions of TUPE 2006 and if so when. The listing is before any employment judge sitting alone."

8 The lead claims were grouped. Group 3 concerned a number of former employees of TUK who worked in the Cash Processing Room at Heathrow Airport. They included Ms Goonetillake, whose name appeared at the head of the records of the preceding hearings. Shortly before 4 April 2022, the group 3 claims were settled. In the light of that, I substituted the name of Mr A Sharma, one of the other lead claimants who was acting as a representative of a number of the claimants, for that of Ms Goonetillake.

The documentary evidence as it stood on 4 April 2022

9 At the start of the hearing on 4 April 2022, I had before me a bundle consisting of 941 pages including the index. Before reading the papers and the witness statements, I discussed the case with the parties and pointed out that since the issue which I had to decide was whether or not there had been a transfer within the meaning of TUPE of the contracts of employment of the claimants, the oral evidence was likely to be less important than the documentary evidence. That was in turn because (as Ms Robinson agreed) the question whether or not there has been a TUPE transfer is usually determined by reference to contracts between (1) the claimed transferor and the claimed transferee, or (2) either the claimed transferor or the claimed transferee and a third party.

10 The hearing bundle contained only 7 extracted pages of a contract dated 6 August 2020 between (1) TUK, (2) TUK's administrators, and (3) Foreign Coin, and some of those pages were heavily redacted. The bundle contained also 11 extracted pages of a contract between (1) TUK (2) TUK's administrators, (3) Travelex Limited (in administration), (4) Travelex Group Investments Limited (in administration), (5) Travelex Acquisitionco Limited, and (6) Travelex Topco Limited. Those extracts were at pages 289-295 and 278-288 respectively. I refer to those two extracts below as (respectively) (1) "the Foreign Coin Extract" and (2) "the Central Services Extract".

11 The lead claimants had made witness statements, and there were before me 2 witnesses' statements for Central Services and Foreign Coin. The witnesses for Central Services and Foreign Coin were Ms Clare Burns and Ms Bonnie Pal, both of whom were Human Resources managers. Both had made two witness statements, the second of which was in response to those of the claimants.

12 The most that there was in the witness statements of Ms Burns and Ms Pal about the agreed TUPE transfer to Central Services was this passage (it is the whole of paragraph 70) in Ms Burns' first witness statement:

> "I understand that the business transfer agreement that applies to the Group 4 Claimants, relevant parts of which are at pages 278 to 288, provides for certain employees to TUPE transfer. Those employees are listed in Schedule 5 of the agreement, a snapshot of which is provided at page 288. Under that agreement, I can see that the employees who were being retained following Pluto TUPE transferred to Travelex AcquisitionCo Limited but as that is not an employing entity, I understand that they later TUPE transferred to TCS [which, as stated in the heading to this document, I am calling "Central Services"], which became their employer. None of the Claimants are on that list as all their roles had been confirmed as redundant by TUK prior to 6 August 2020 meaning that, at the time of the administration, there was no ongoing need for their roles and they were serving out their notice periods. There was no ongoing role to transfer. In terms of the business transfer agreement, they fall under the definition of "*former*

employees" which acknowledges the redundancies that had taken place and confirms that TUPE would not apply to those employees – see page 285)."

13 The word "Pluto" was defined by Ms Burns in paragraph 17 of her first witness statement as "The collective redundancy exercise" as a result of which the claimants were dismissed for redundancy. I have set out that paragraph in paragraph 46 below.

14 There was in relation to the business transfers that occurred in addition this passage in the witness statement of Ms Burns:

> '23. Certain assets of Old Travelex (including those of TUK) transferred to TFCSL under an "Agreement for the Transfer of Certain of the Assets of Travelex UK Ltd (In Administration)" dated 6th August 2020. This is summarised in the SIP report at page 313. I understand that this was to "preserve the option to review and reshape the UK retail operations" and allow TFCSL [which, as stated in the heading to this document, I am calling "Foreign Coin"] to continue to trade (see the announcement on pages 869 - 881, specifically on page 872).
>
> 24. Relevant parts of the asset transfer agreement are at pages 289 – 295. Clause 7.1 of that agreement (page 295) sets out that: "The parties neither intend nor expect that the sale and purchase of the Assets pursuant to this Agreement will amount to a relevant transfer for the purposes of the Transfer Regulations and therefore no employees or contracts of employment (or collective agreements) will transfer from the Vendor (or other member of the Vendor's Group) to the Purchaser on Completion or otherwise". This was in marked contrast to the transfer of other parts of Old Travelex's business under sale and purchase agreements, where those employees who had been determined as transferring employees were listed in accompanying schedules and the contracting parties acknowledged and accepted that the TUPE Regulations applied to the transaction in respect of those employees. See the agreement at pages 278 to 288, which contains a snapshot of the Schedule listing transferring employees.
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> 25. Despite the transfer of assets to TFCSL, and it continuing to trade, TFCSL did not automatically join New Travelex upon the administration. It remained part of Old Travelex for a time. If it was able to re-negotiate contracts with airports and become more profitable over a period, it was envisaged that it would join New Travelex, but not otherwise. (Page 313 of the SIP summarises that TFCSL "will attempt to renegotiate airport contracts with the relevant operator, and subject to agreeing commercial terms, may continue trading at certain airports over time. However, at the point of transaction, there was no value to TUK in these retail airport contracts as TUK was unable to fulfil its obligations under them.") I.e. as at 6 August 2020, it was by no means a given that TFCSL would become part of New Travelex as it needed to change the way it did business and the contracts it

> operated in order to do so. It is worth noting that a number of other companies in this situation outside the UK, such as our North American operations, did get wound up instead.
>
> ...
>
> 28. In terms of cash solutions airport contracts, immediately after the administration, TFCSL only had a fraction of the customers (such as BA Airlines and WDF): 17 out of a total of 70 that TUK had had. This increased gradually over time up to December 2021 but four of TUK's former customers did not renew any sort of cash solutions contract with TFCSL. In any event, many of those customers had less need for cash solutions services. Many had stopped taking cash at the time (for example WDF did not take cash from the start of the pandemic until approximately May 2021) and even where and when those businesses were taking cash, it was being used less.'

15 The word "confirms" in paragraph 70 of Ms Burns' witness statement (which I have set out in paragraph 12 above) was of course inapt. There was nothing to confirm, since the question whether the contracts of employment (not the "role[s]") of the staff in question, namely the relevant claimants, had transferred under TUPE to the company which was now Central Services was (subject to the possibility of a successful appeal and a determination being made by the appellate court) a matter for this tribunal, and not Central Services, or anyone else. If and to the extent that the words "and confirms that TUPE would not apply to those employees" were an assertion, they were an assertion as to the ultimate issue, which was, in the circumstances, a matter for my determination.

16 The Central Services Extract at pages 278-288 (which included the front page) was heavily redacted. It did not, as redacted, contain a comprehensible definition of the business transferred, but it did have this definition on page 281 (it was the only definition left unredacted on that page):

> '"**Central and Shared Services Employees**" means the Employees listed at Schedule 5 (Employees) under the heading "Central and Shared Services Employees" who are employed by TUK and are assigned (other than on a temporary basis) to the Central and Shared Services Business at or immediately before Day 1 Completion'.

17 Most of the content of the 7 pages of the Foreign Coin Extract at pages 289-295 (which included the front page) was redacted. The Foreign Coin Extract did not include a definition of the business or part of a business which was the subject of the agreement of which the extract was part. Page 2 of the Foreign Coin Extract had only one entry which was not redacted, and it was this (it was the first entry on the page):

> '"**Assets**" means all the assets agreed to be purchased under this Agreement, as listed in Clause 2 (Purchase of Assets)'.

18 On Tuesday 5 April 2022, I raised with Ms Robinson the fact that there were in the hearing bundle only extracts of the two agreements under which what appeared to be the whole of the business of TUK was transferred on 6 August 2020. I pointed out to her that there was nothing in the applicable data protection legislation which either justified or required the redaction of names either in the course of the disclosure and inspection of documents in litigation or in relation to the inclusion of names in documents in a hearing bundle. In doing so, I referred to the case of *Dunn v Durham County Council* [2013] 1 WLR 2305. I then pointed out that even though there was scope for redactions of documents in a hearing bundle, that scope was subject to the requirement to do justice in public, and that that requirement could not be avoided by any agreement between the parties. In saying that, I referred to the case of *Frewer v Google Limited* [2022] EAT 34, and at 10:30 I sent to the parties a copy of the judgment in that case. I also sent the parties various extracts from legal textbooks concerning the question whether or not there has been a TUPE transfer and on the issue of who is properly to be regarded as being assigned to the undertaking or business or part of an undertaking or business which is transferred.

19 At 11:34 on Tuesday 5 April 2022, the solicitor acting for Foreign Coin and Central Services sent to the parties and me a complete and unredacted copy of the agreement relating to the transfer from TUK to Foreign Coin. It (the full document, to which I refer from now on as "the Foreign Coin Contract") consisted of 82 pages, a number of which were material. For example, at pages 67-70 there was as part of Schedule 1, a list of "Transferring contracts". On pages 71-72 there was a list, which was Schedule 2, of "Retained contracts", which, it was clear from clause 10 on pages 12-13, were intended to be operated by the purchaser.

20 Page 2 of the Foreign Coin Contract, unredacted, contained a number of material entries, including this one (albeit that there was no provision in that contract for the transfer of a business as such):

> '"**Business**" means all the business as conducted by the Vendor in connection with the Assets as at the Completion Date including (i) retail consumer foreign exchange and related travel services at airport and downtown retail locations and through direct channels (online/ call centre); (ii) the provision of GBP and FX ATM machines; and (iii) the provision of foreign exchange and cash handling services to retail concessionaires in airports, *provided that* such definition shall exclude the Excluded Business;'.

21 The definition of "the Excluded Business" was also redacted in the Foreign Coin Extract. It was on page 4 of the complete document, i.e. the Foreign Coin Contract, and was in these terms:

> '"**Excluded Business**" means the ATM Business, the Central and Shared Services Business and the Travellers Cheques Business'.

22 The "ATM Business" was defined on page 2 of the Foreign Coin Contract (it having, as I indicate in paragraph 17 above, been redacted in the Foreign Coin Extract) as having 'the meaning given to the term "Business" in the ATM Asset Transfer Agreement'. I was not given a copy of the ATM Asset Transfer Agreement, but it was part of the witness statement and oral evidence of Foreign Coin and Central Services (to which I refer below as "the rule 35 participants") that the role of the retail staff based at airports included restocking and otherwise looking after ATMs.

23 On Wednesday 6 April 2022, I commented that I had not been sent a complete copy of the agreement from which I had only a redacted extract in the form of the Central Services Extract. Ms Robinson said that she thought that the claimants and I had been sent it, but then she agreed with me that we (the claimants and I) had not been sent it.

24 At 6.32pm on that day, 6 April 2022, a full, unredacted, copy of the document of which the Central Services Extract formed a part was sent to the claimants and me by the solicitors acting for Central Services and Foreign Coin. I refer to that complete, unredacted, document as "the Central Services Contract". It was 129 pages long. Many of those pages were pages of Schedule 5: there were 51 such pages, and they contained a list of all of the employees of TUK who were agreed by TUK and the other parties to that agreement as having transferred under TUPE to the purchaser (to which, for convenience, I shall refer simply as "Central Services", although that company was not, as I say above, in fact a party to the agreement). Schedule 5 contained a lot of names of staff who were employed in TUK retail outlets located in Asda and Tesco stores. In addition, the names of some of the members of the teams which were plainly part of the overall management and related central staff of TUK, were in Schedule 5. The teams of which the transferring employees were part were stated in relation to each employee.

25 The business which was stated to be transferred from TUK under the Central Services Contract was defined on pages 2-3 of the Central Services Contract. The first part of the relevant section was not redacted in the Central Services Extract, and was in these terms:

> '"**Business**" means:
>
> (a) all the business as conducted by each of TL [i.e. Travelex Limited (In Administration)] and TGIL [i.e. Travelex Group Investments Limited (In Administration)] as at the Day 1 Completion Date; and

(b) the Central and Shared Services Business, but excluding the Excluded Business'.

26 The definition of "the Excluded Business" was in the Central Services Extract, and was this:

> '"**Excluded Business**" means the Travellers Cheques Business, the Retail Business and the ATM Business'.

27 The definition in the Central Services Contract of "the Central and Shared Services Business" (which, as I indicate above, was redacted in the Central Services Extract) was this:

> '"**Central and Shared Services Business**" means the business of TUK of providing centralised finance, human resources, IT, compliance, legal, and administrative services for the operation of the other businesses of any member of TUK's Group;'.

28 When I asked Ms Robinson what was the rule 35 participants' explanation for the disclosure and giving to the claimants only of the Central Services Extract rather than the Central Services Contract, she said that it was that the rule 35 participants had accepted that there had been a transfer under TUPE of the contracts of employment of some employees. That was, I now record, not an explanation that could have applied to the failure to supply to the claimants or put in the bundle the Foreign Coin Contract. The only justification that Ms Robinson was able to advance on behalf of Central Services and Foreign Coin for the failure to supply unredacted and full versions of the Foreign Coin Contract and the Central Services Contract was the fact that the documents contained confidential commercial information. I note here, however, that at pages 296-320 of the hearing bundle there was a complete, unredacted, version of the administrators' report dated 13 August 2020 in which there was much information which had been redacted in or excluded from the Foreign Coin Extract and the Central Services Extract.

The oral evidence which I heard

29 On behalf of Foreign Coin and Central Services, I heard oral evidence from Ms Burns and Ms Pal. In paragraph 1 of her first witness statement (which was undated but which was sent to the claimants on 24 January 2022), Ms Burns described her role thus:

> "I started my current role as Head of HR for Travelex, covering the whole of our UK business and our support teams, in June 2021. Prior to this, I was Head of HR UK Trading, covering Retail, our supermarkets business and Vaults."

30 Ms Pal's description of her role was in the following opening paragraphs of her first witness statement (which was also undated but which was also sent to the claimants on 24 January 2022).

> "1. I started my current role as HR Manager for Support and Enabling functions (covering IT, Legal, Finance, COO, Internal Audit, Compliance and Risk and ATMs HR) for Travelex in April 2021.
>
> 2. I first started working for Travelex in April 2015 as HR Business Partner for UK Retail. I then became the Senior HR Business Partner for all Support and Enabling functions in September 2019, before moving into my current role. (I was originally employed by Travelex UK Ltd (TUK), but I TUPE transferred to Travelex Central Services Limited (TCS) in August 2020. TCS was not previously an employing entity, so it did not have a HR function.) I have worked in HR since 2008."

31 I heard oral evidence from the following claimants, in the following order.

31.1 Mr Nidhin Thomas,

31.2 Mr Welton Pinto,

31.3 Ms Jacqueline Martin,

31.4 Mr Jeremy Webb,

31.5 Mr Anupam Sharma, and

31.6 Ms Jacquelyn McInally.

The parties' cases on the issue(s) that I had to decide

32 It was the claimants' case that they were all assigned to the business, or a relevant part of the business, of TUK that transferred to either Foreign Coin or Central Services, and that that transfer of that business or part of a business was a transfer within the meaning of regulation 3 of TUPE.

33 I initially had some difficulty in understanding the responses of the rule 35 participants to the claims. Eventually, it became apparent that the responses focused on the individual circumstances of each claimant's work and argued that the fact that the relevant rule 35 participant no longer required the claimant to do that work meant that there was no TUPE transfer of the business or part of the business in which the claimant worked and/or that the claimant was not assigned to that business or part of the business, and/or in the case of a claimant who argued that his or her contract was transferred to Central Services, that the claimant was not assigned to the business which was transferred to Central Services. However, the particular way in which each

response was advanced differed. I refer further to the arguments of the relevant rule 35 participant in relation to individual lead claimants below, when stating my conclusions in relation to the claimant in question.

34 However, there was a general position taken in regard to the issue of whether or not the contract of employment of any employee at all transferred to Foreign Coin. In paragraph 29 of her witness statement, Ms Burns said this:

> "I explain below my involvement in the redundancy process as well as the lead up to TUK's administration, including the selection of what I will refer to as the 'Top 55' – the 55 full-time equivalent roles that were the highest scoring in the Pluto redundancy exercise and which were then offered new employment with TFCSL after the administration. Note that, for the reasons given below, even those whose roles were part of the Top 55 did not TUPE transfer to TFCSL: like all employees of TUK, they were dismissed upon TUK going into administration, and then this small sub-set of individuals were offered employment with TFCSL. TFCSL could not have continued to keep everyone and bring them all over to the new entity and survived."

35 However, in her helpful (and helpfully extensive) written closing submissions (she called them a skeleton argument, but they were 49 pages long and were more in the nature of lengthy written submissions), Ms Robinson raised a new point. She did so in the following paragraphs of those submissions.

> 'Immediately before the transfer
>
> 37. In addition to being assigned to the undertaking or business transferred the employee must have been so employed immediately before the transfer.
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> 38. In **Litster v Forth Dry Dock & Engineering Co Ltd** [1989] IRLR 161 the receivers dismissed the workforce at 3.30pm and at 4.30 pm, transferred the business in which they had been employed. The House of Lords' decision was:
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> > "The provision in reg 8(1) [now reg 7(1) of the 2006 Regulations] that a dismissal by reason of a transfer is to be treated as unfair dismissal, is merely a different way of saying that the transfer is not to 'constitute a ground for dismissal' as contemplated by art 4 of the Directive, and there is no good reason for denying to it the same effect as that attributed to the Article. In effect, this involves reading reg 5(3) [of the 1981 Regulations] as if there were inserted after the words "immediately before the transfer" the words "or would have been so employed if he had not been unfairly dismissed in the circumstances described in reg 8(1) [of the 1981 Regulations]"

> 39. **Litster** is therefore the origin of the wording in regulation 7(1) of TUPE 2006. It is clear from Litster that employees whose contracts are terminated for a reason which is not by reason of the transfer (for example, as a consequence of misconduct) do not fall within reg 4(1) of TUPE 2006. The transferor will, accordingly, not inherit any liability in respect of them.'

36 I pointed out at the hearing on 11 April 2022 that

36.1 that point had not been foreshadowed anywhere in the responses to the claims advanced by the rule 35 participants,

36.2 no evidence from the administrators had been adduced about the precise timing of the administration and the communications made by the administrators to the claimants that they were being dismissed for redundancy with immediate effect, and

36.3 it was in any event a novel point as far as the law relating to contractual liabilities (rather than liability to meet a claim of unfair dismissal, which was dealt with by the House of Lords in *Wilson v St Helens Metropolitan Borough Council* [1998] ICR 1141, [1999] 2 AC 52) was concerned.

37 Ms Robinson accepted those propositions and said that the issue was not being relied on by the rule 35 participants at this point after all. When writing these reasons, it occurred to me that

37.1 the administrators could not have had authority to dismiss the claimants unless and until the administration had started,

37.2 the complex and highly detailed relevant documents, such as the Central Services Contract, were not drafted in an hour or so, with the result that for example the Central Services Contract document must have been in preparation for some time by the start of the administration,

37.3 it appeared that the administration was not going to occur unless and until agreement had been reached in regard to for example the contents of the Central Services Contract, and

37.4 the argument on which Ms Robinson now sought to rely would be subject to the possible objection that if it were correct then it might negate the purpose of TUPE, which is (see for example paragraph 43 of the ECJ's judgment in *Klarenberg*, which I have set out in paragraph 92 below) the protection of the rights of employees in the event of a transfer of the economic entity in which they are employed.

38 In addition, *Litster* was decided with a view to protecting the rights of employees in the event of a TUPE transfer, and the House of Lords did that by reading words into the

then-applicable United Kingdom regulations (SI 1982/1794). That was clear from the "holding" part of the headnote to the report at [1990] 1 AC 546, which was this:

> 'Held, allowing the appeal, that the Regulations of 1981 were expressly enacted for the purpose of complying with Council Directive (77/187/E.E.C.) which provides for the safeguarding of employees' rights on the transfer of a business; that the courts of the United Kingdom were under a duty to give a purposive construction to the Regulations in a manner which would accord with the decisions of the European Court of Justice on the Directive and where necessary implying words which would achieve that effect; that there had to be implied into regulation 5(3) after the words "immediately before the transfer" the words "or would have been so employed if he had not been unfairly dismissed in the circumstances described by regulation 8(1);" that regulation 5 operated to transfer the applicants' contracts of employment, with their attendant obligations, from the transferor to the transferee; and that, accordingly, the applicants had been dismissed for a reason connected with the transfer, their dismissals were unfair and the transferee was liable to them for compensation'.

39 A further problem with the point being raised by the rule 35 participants at this stage was that the point was only raised for the first time in closing submissions without any evidence having been adduced on the point, when the point was directly relevant to the issue that I had to decide, namely whether the claimants' employment transferred under TUPE: see paragraph 7 above.

40 Having said those things, if the point were a good one, then it would be regrettable if it were not open to the rule 35 participants to raise it in defence of the claims merely because it had only been thought of at the last minute. I have therefore allowed in my judgment below for the possibility of the point being raised when the rule 35 participants comply (as respondents) with order number 3 or (as the case may be) 5 below. I add a note of caution to the rule 35 participants, however: the decision of the Employment Appeal Tribunal ("EAT") in *Kerry Foods v Creber* [2000] ICR 556 may be inconsistent with the proposed reliance on *Litster* in this context. I add too that this is said in paragraph F[164.05] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*"):

> "It is a primary rule that an economic, technical or organisational (ETO) reason entailing changes in the business must relate to the conduct of the business going forward. Thus held the EAT in *Wheeler v Patel* [1987] IRLR 211, [1987] ICR 631 (see also *Gateway Hotels Limited v Stewart* [1988] IRLR 287, EAT). If the reason for the dismissal is, in effect, motivated by the desire to obtain an enhanced price for the business, or to achieve a sale, this will not amount to a reason related to the conduct of the business."

Relevant factual findings concerning the general situation

41 It is convenient now to state the relevant evidence and, in so far as it is necessary to do so, my findings of fact in regard to what happened generally, as opposed to the individual circumstances of each claimant.

42 It was Mr Sharma's evidence that during the final quarter of 2019, TUK had identified that it needed to slim down its global retail operations, and in particular its retail operations in airports, because of a reduction in demand for foreign currency exchange in airports. I accepted that evidence, which was consistent with that of Ms McInally and was in fact not disputed. I understood that reduction to result from technological changes, including (1) the possibility of paying for goods abroad using a credit or current account card, rather than by using cash, and (2) the buying of foreign currency online. Ms McInally started working for TUK only on 10 October 2019, and it was her oral evidence (which was not seriously challenged, as I understood it, but in any event I accepted it) that she was employed as Head of Programme Management, which was part of the first respondent's team which it called its PPCC team. Those letters were short for "Payments Products Customer Channel".

43 Ms McInally made two witness statements (the second of which was put before me and the rule 35 participants only on Wednesday 6 April 2022). The overall factual situation as seen and experienced by Ms McInally was stated succinctly in her first witness statement in the following way.

> "2. **Oreo/GFX**: I was employed in the capacity of Head of Programme Management for a programme of work called Oreo, which was later renamed Global Foreign Exchange (GFX).
>
> 3. **PPCC – New Remit**: On 14th November I attended my first PPCC Leadership Team meeting where my new remit was explained to the team.
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> 4. **New Portfolio of Projects**: When I first started working for Travelex, I reported to Sushant Sahani, Global Head of Channels by 11th November, Gareth Williams (Chief Product and Transformation Officer) asked me to report directly to him and I was asked to take responsibility for a number of other projects as part of that change in reporting line. I was asked to work closely with Colin Swain (Global Transformation Director) to draft a team structure that would support this newly expanded portfolio.
>
> 5. **Global Store and Headcount reduction programme (November 2019)**: The new portfolio of projects that I was responsible for included a project to significantly reduce the number of Travelex Stores in order to reduce costs and improve profitability. A number of the stores in Heathrow Airport and Gatwick airport were part of this programme and it was the intention of the leadership team to execute the delivery of this headcount reduction as soon as possible.

6. **Cyber-Attack**: On New Years' Eve hackers launched a ransomware based cyber-attack on Travelex which propagated quickly through the network of systems required for Travelex to provide service to customers.

7. **Cyber-Attack task force**: By January 8th, a task force had been formed to reinstate all of the systems that had been encrypted and taken offline by the cyber-attack. I was asked by Gareth Williams to do what I could to help.

8. **Business Readiness**: At the end of January, there were issues with business readiness in relation to the reinstatement of systems and although, there were planned go-lives, the business teams had failed to get the operational pieces in place to support all necessary processes. It was at this point I was asked by Jaap Remijn the Group Chief Operating Officer to explain the issues and recommend ways of working to resolve the issues. Jaap agreed with my explanation and asked me to brief Tony D'Souza on the same. Shortly after my meeting with Tony, Gareth had said the feedback from both Tony and Jaap had been very positive.

9. **Ongoing Cyber-Attack resolution**: I worked from January until mid-February on the cyber attack resolution, on most days I was working from 7am until midnight including on weekends., before taking 5 days off, this was agreed with Gareth to be time in lieu based on the overtime that I had worked in the 6 weeks after the cyber attack."

44 Apart from the fact that TUK did not have any stores at Gatwick (which Ms McInally accepted, when it was put to her in cross-examination; she said that what she had said in that regard was the result of an erroneous memory on her part), that passage of Ms McInally's evidence was not seriously challenged but in any event I accepted it, subject to that correction.

45 In paragraph 16 of her first witness statement, which I accepted, Ms Burns said this:

> 'As a reminder of the Covid situation at the time, in early March 2020, government advice was to stop non-essential contact and travel and legal lockdown measures came into force later that month. By 5 August 2020, although we were out of lockdown, stringent restrictions were still in place about meeting others. For example, it was not permitted to meet indoors in groups of more than two households, meet outdoors in a group of more than six people if they were from more than 2 households or to stay overnight away from your home with members of more than one other household. This severely affected people's ability and appetite to travel. As the Statement of Insolvency Practice (SIP) report sets out (on page 303): "*global travel restrictions, lockdown measures and airport and border closures have resulted in a significant drop in the number of people travelling internationally. As a result, demand for foreign currency in the Group's retail business largely disappeared*." And it highlights that "*The retail business is the main source of the Group's revenue*".'

46 That (said Ms Burns in the preceding paragraph of her witness statement, and I accepted) "all led to the appointment of PricewaterhouseCoopers LLP (PWC) in an advisory capacity in around March 2020, followed by redundancy proposals in Spring 2020 which were an effort to try to turn the business around." That which occurred up to and on 6 and 7 August 2020 was described by Ms Burns in the following passage of her witness statement, which I accepted.

> '17. The collective redundancy exercise was given an internal name: "Pluto". So that the Tribunal can understand the scale of the redundancy processes that I am going to describe, 563 employees were originally employed to provide services on the Heathrow Airport contract, the Group 1-3 Lead Claimants among them. The collective redundancy process resulted in 333 of these employees being made redundant, all of whom were placed on garden leave once their redundancy was confirmed. This means we retained 230 employees in London Heathrow. (The numbers on page 334, from Pete Marsh's presentation of 11 June 2020, are slightly different because they refer to Full-Time Equivalent (FTE) roles rather than actual numbers of employees, and compare them to budgeted costs and FTE for 2020).
>
> 18. Employees who were retained in the Pluto process generally signed up to amended terms and conditions of employment (which were also consulted on as part of Pluto). These new terms removed, for example, unsustainable elements of pay (for example enhanced overtime rates, shift allowances and enhanced sick pay) in the hope this would also help the business survive. It was a fine balance between retaining as many colleagues as we thought we could, while making cuts that we thought would be sufficient to turn around the profitability of the business.
>
> 19. From about mid-June 2020, I (along with senior managers in the business) knew that it was possible that TUK would go into administration. With the help of PwC, that is an outcome we were trying to avoid. There were efforts to secure new funding, as well as (ultimately unsuccessful) attempts to sell the group. Further detail of this is provided on pages 303 – 304 and 308 – 310 of the SIP. In the background, contingency plans were being made in case that new funding / sale did not materialise.
>
> 20. The redundancies that took place were an effort to try to turn the business around before it was decided that administration would occur. While the collective redundancy process was a large one, it seems – in hindsight – that it simply did not go far enough. It became clear that TUK along with some other group companies would need to go into administration as it "wasn't possible to rescue them as a going concern" (page 296, from the SIP report). The administration occurred on 6 August 2020. This was the culmination of a complex financial restructuring process which resulted in a "New Travelex" and an "Old Travelex". TUK was put into administration and

stayed in Old Travelex. Whilst TFCSL was not put into administration, it did remain in Old Travelex (until it moved over to New Travelex in June 2021) – see paragraph 25 below for more detail on why this was. TCS was part of New Travelex.

21. The SIP report of 13 August 2020 (at pages 296 - 320) explains the reasons for the administration as well as the alternatives that had been tried, including the sale of the business. As page 301 makes clear "ahead of the transaction, the businesses have been appropriately market tested for purchasers" and that "despite the considerable efforts to find a going concern solution", this was not possible. Page 296 confirms that the purpose of the administration was about "achieving a better result for the company's creditors as a whole than would be likely if the company were wound up." So the administration was preferable to the company simply going under because the administration allowed a restructure of the company that saved at least part of the business – and many jobs with it.

22. As outlined in the Responses, and the SIP report at page 297, the administration avoided a larger collapse of the group and safeguarded 1,802 jobs in the UK out of a total UK workforce of 3,111 (and a further 3,635 jobs internationally) and allowed many suppliers to continue working with the New Travelex Group helping to safeguard those businesses and the jobs of their employees. I appreciate that this does not help the particular claimants in this case, but we clearly had some very difficult choices as a company at the time."

47 The claimants were all dismissed with immediate effect by the administrators on 6 August 2020, in the manner described by Ms Burns in paragraph 47 of her witness statement, where she referred to the particular position of one of the lead claimants, Ms Anita Thakkar, but said that it was the same for the other claimants:

> "Following a collective consultation process which started in early June 2020 (which is documented at pages 129 – 229), and an individual consultation, her role was confirmed as redundant on 23 July 2020 (see pages 403 – 405). She did not appeal the decision to make her role redundant. She was due to spend her 12-week notice period plus accrued holiday (until 15th October 2020) on garden leave. However, the administration on 6 August meant that the end of her employment was brought forward to that date (see letter on page 406 to 412 and there are equivalent letters for the other Lead Claimants). Ms Thakkar had not been at work for just over 4 months in advance of the administration."

48 The letter to Ms Thakkar at pages 406-412 was dated 7 August 2020. The first part of its text was this:

"As you will be aware from recent employee communications that, together with Toby Banfield and Edward Macnamara of PwC, I was appointed as one of the Joint Administrators of Travelex UK Limited on 6 August 2020.

You may have seen announcements in the media in July that Travelex had reached an agreement with at least 66.7% of its Senior Secured Noteholders and all of its Revolving Credit Facility lenders on the terms of a comprehensive debt restructuring. The transaction made £84m available to the Company to acquire certain assets, undertakings and operations of the Travelex Group and to provide the liquidity that they require to trade. However, as part of this transaction, it has been necessary for the business to restructure the way it operates. Unfortunately, this means that it is not commercially viable for the UK to continue trading in its current form, particularly given the recent impact of Covid-19 and the cyber security breach in late December 2019. Although the directors of the Company have explored options to enable the Company to continue trading in its current form, this has unfortunately not been possible in the current financial climate.

As a result of the Company's financial circumstances, it has not been possible to retain all roles and your role has regrettably been identified as no longer required. I therefore regret to advise you that your employment with the Company is terminated with effect from 6 August 2020 because of redundancy.

As you may expect in these circumstances, unfortunately no right of appeal against the redundancy is being offered.

We appreciate that you may be wondering why you have been made redundant and have not been allowed to remain furloughed under the government's Job Retention Scheme. Notwithstanding the Covid-19 situation, the business and administrators are required to assess whether there has been an underlying reduction in the requirement for work to be performed. This was the responsible course of action for the administrators, and therefore regrettably this means a number of roles were identified as no longer required by the Company in administration."

49 No evidence was given on behalf of the rule 35 participants about the precise sequence of events on 6 August 2020, namely precisely when notice was given orally to the staff who were told on that day that they were being dismissed for redundancy.

50 In the following passage of her witness statement, Ms Burns gave the following evidence and advanced the following assertions as to the effect of the application of TUPE:

"36. For London Heathrow, Pete Marsh, Matt Heavens (who was then Head of Heathrow and is now Head of Retail – Branded Retail) and I came to the view that 55 FTE roles were in fact needed to achieve the hybrid objective that had been identified. I note that Pete Marsh's presentation in January

2021 (re scaling up again) on page 361 says *"FTE baseline from **Pluto** – 55 FTE*" (my emphasis). I think that as he is referring to a situation a few months before, he was possibly using 'Pluto' as shorthand for where the company was at around July / August 2020. But when I refer to Pluto in this statement, I mean purely the redundancy processes that we were carrying out, up to and including those individuals who were given notice on 23 July 2020. The 'Top 55' was a separate piece of planning for the hybrid option which may ordinarily have led to a further redundancy consultation but, as explained below, TUK going into administration intervened. (The Top 55 list was then used, instead, by TFCSL as a basis for deciding who to offer to re-employ. I explain below how we decided which individuals would fill the Top 55 roles – essentially by using the redundancy scoring that had already been undertaken for Pluto).

37. Once we had the numbers, we considered the roles that we needed and in order to decide which employees in those roles would be retained, we went through the scoring matrices that we had from the Pluto redundancy processes that had already been conducted. For this, clearly, we only considered employees who had not already been made redundant and were not already on notice / on garden leave (as they were by definition not top scoring individuals). We used the top scoring people in each job role to fill the necessary number of roles in the 'Top-55', and we considered that all other roles would no longer be required. By 30 July 2020, Matt Heavens had put together a list of the specific names and structure for the Top 55 (which was 55 full-time equivalent roles, but 84 actual employees, 28 of whom were on zero-hours contracts) and this is at pages 350 – 355. While we had planned to include all of the zero hours staff on that list, in the end they were all exited under the administration and only re-employed if and when needed.

38. I understand that the names (but not the roles) of those individuals have been blanked out, except Agnela Ciana Mascarenhas, as she has been referred to by the Claimants in Groups 1-3 as – I assume – 'proof' in their view that they all (should have) TUPE transferred to TFCSL. I can see why, without necessarily knowing the background to the administration and the restructure of the Travelex business as I do, it might seem to the Claimants that because certain individuals in similar jobs to them 'transferred' to TFCSL, that they should have done so too. However, that is not the case. As I have explained: (a) TFCSL was running a significantly scaled down operation and the people who were offered employment with TFCSL were those on the 'Top 55' list who were chosen as explained above and (b) their employment with TUK had come to an end due to the administration and they started new employment with TFCSL on standard Travelex employment terms. <u>This was not a TUPE transfer. The relevant "Top 55" individuals did, however, retain their continuity of service because – I</u>

believe – that was considered to be the correct legal analysis, and it also seemed like the fair thing to do.

39. We did not get to the point of consulting on the plans for further reductions and store closures because the administration intervened, and all employees of TUK were dismissed by virtue of the administration. But, having identified that we needed to scale down further, to around 55 FTE roles in Heathrow, and having chosen who the individuals were based on the top scoring people from the previous redundancy exercise (the 'Top 55'), it was those individuals who were offered employment on new (standard Travelex) contracts with TFCSL after the administration.

40. When we were considering the Top 55, we were still in the throes of Covid. We didn't know how long we were planning for but given the aim of the hybrid model, that we could trade approximately 6 stores though at a minimum, it was a relatively sustainable number that we were aiming for. In Heathrow, the headcount is still not significantly different to that: as of December 2021, there were 61.56 FTE roles at Heathrow, which translates into 76 individuals.

41. This means that almost 18 months later we have only phased up by less than seven full-time equivalent roles and that has been to cover sickness, maternity etc, as well as different products being sold such as the London travel pass. If anything, we kept 55 FTE roles thinking we might have to reduce this further. And in fact, those on zero hours contracts were not immediately offered new roles with TFCSL as we did not need them at the time. But as can be seen, the further reductions in staff has not been a short-term change and it is still unclear what the new landscape for foreign travel and for the remaining Travelex business will look like going forward.

42. On this point, I want to acknowledge that the Reverse Pluto / Upscaling Heathrow presentation from January 2021 on page 358 predicted 148 FTE roles by end of 2021. This was just a forecast, based on certain assumptions (also outlined in the presentation) which did not turn out quite the way we thought. We did not predict, for example, the Delta variant of Covid-19 and the effect that would have on foreign travel, nor the quarantining arrangements for those coming from high-risk countries, which came about shortly after this, in February 2021. So the forecast was just too optimistic, and that scaling up did not happen.

43. In light of all I have said above, the purpose and scale of the activities that TFCSL has been carrying out are fundamentally different to what TUK had been doing, even after the large redundancy exercise, and my understanding is that this is a key reason why TUPE was considered not to apply to any former employees of TUK."

51 While all of that passage was material, I have emphasised by underlining one particularly important part (at the end of paragraph 38). During oral submissions, Ms Robinson asserted that the continuity of employment which was conferred by those responsible for determining what by way of assets transferred to Foreign Coin, was conferred only as a matter of the law of contract. As I pointed out at that time, however, continuity of employment within the meaning of (now) the Employment Rights Act 1996 ("ERA 1996") is a statutory concept and, by reason of the decision of the House of Lords in *Secretary of State for Employment v Globe Elastic Thread Ltd* [1979] IRLR 327, [1979] ICR 706, such continuity cannot be conferred by contract. Mr Thomas then referred me to the contract of Ms Mascarenhas at pages 594-607, and pointed out (correctly) that it conferred continuity of service in these terms (on page 594):

> "1. Your Continuous Service Date
>
> For the purposes of the Employment Rights Act 1996 your continuous employment is effective from 12/07/2017. No period of employment with any other employer counts as part of your continuous service. However, your employment with Travelex Foreign Coin Services Limited, which commenced on 07/08/2020, counts towards your period of continuous service with us."

52 Ms Mascarenhas signed a witness statement on 12 February 2022. Mr Thomas appended it to his witness statement. Ms Mascarenhas did not give evidence, but the rule 35 participants did not adduce any evidence in reply to her witness statement despite adducing other evidence in response to the witness statements of the claimants. Ms Mascarenhas' witness statement contained, in paragraph 3, this passage:

> 'On 5 August 2020 I received an email from TUK asking to attend a phone call later on that day. The email said, "please be mindful that this information is confidential and is not for onwards sharing as it relates to specific information for a specific audience". And later that afternoon at 12 noon received a call from Pete Marsh and Matt Heavens speaking about the company going into administration and the staff would we [sic; that was probably meant to be "be"] made redundant. But the collective few in this call had no job risk and he explained about the new contract and the changes in it. According to the call we had a choice to secure our job and sign the new contract in a short period of time. The company was to be renamed and would be a whole new entity effective from 11 August 2020. I was told that as a Travel service Partner my job role would be the same with no change. We were asked to keep the details in the call highly confidential and not to share any information. And we told that we should attend the call on 6th August 2020 as well, but a few hours after that we had to sign the new contract with the new company (TFCSL) and it would be a continuous service with no break in our employment.'

53 When Ms Burns gave oral evidence, she was cross-examined by Mr Thomas on this evidence of Ms Mascarenhas. In response, she said this (as recorded by me in the following exchange; the following note is a tidied up version of my notes):

> "Q: Pete Marsh and Matt Heavens made a call to a set number of employees saying that their employment would be safe and that they would move to a new company. That call took place on 5 August 2020.
>
> A: Yes; I am aware of the call. I understand that it was made to the colleagues that would be re-employed to put their minds at ease on the following day."

54 Ms Burns gave the following oral evidence (which I accepted) in answer to supplementary questions when giving evidence in chief about what happened in July and August 2020 at London Heathrow Airport ("Heathrow").

54.1 After 24 March 2020 until the week commencing 12 July 2020, there were no staff of TUK present at Heathrow.

54.2 By 7 August 2020, there were around 8 staff physically present at what were previously TUK's various premises at Heathrow.

55 By October 2020, I noted Ms Burns said, there "would have been no more than perhaps 16 or 20" members of staff working at Heathrow, after which in November 2020 there was a further lockdown, with "not a lot of flights" so there were "not many staff there". Ms Burns was not sure how long that situation lasted, but staff numbers at Heathrow had, she said (and I accepted) increased since early 2021.

56 Ms Burns' oral evidence was that the work done at Heathrow by the staff of Foreign Coin was different from that which was done by the most comparable staff of TUK, because (1) there is no longer a contract for the cleaning of the premises, so staff are expected to do the cleaning as well as their other jobs, (2) the VAT refund work no longer exists because VAT refunds are no longer given by HMRC, (3) Foreign Coin now sells the London Travel Pass, which was not sold by TUK, and (4) the opening hours of the premises are now fewer than before 24 March 2020 since the premises are no longer open from the first to the last flights in a day (which they were up to 24 March 2020). Mr Thomas's position, put in cross-examination, was that TUK had sold travel passes which were comparable to those which Foreign Coin now sold. Mr Thomas was a team leader at Terminal 3 at Heathrow but, he told me and I accepted, as a team leader he worked on the tills in TUK's retail premises at Heathrow. He was in fact offered, and initially accepted, new employment with Foreign Coin, to work at the latter's Selfridges branch.

57 There was in the evidence before me no job description for the roles of the staff who worked in the TUK premises at Heathrow before 24 March 2020, or (except as stated in the following paragraph below) for the roles of the staff of Foreign Coin who worked in those premises after 6 August 2020. The parties agreed that Mr Thomas was initially

offered new employment on new terms and conditions, but because his scores in the Pluto redundancy exercise were not among the top 55, he was after all orally informed on 6 August 2020 by the administrators that he was being dismissed for redundancy. Mr Thomas' oral evidence included this passage (as noted by me and tidied up for present purposes):

> "The ones who returned were among the top 55. Some were former colleagues. Sam Evans, for example, returned and went on to work for the business which was Foreign Coin. He did so using the same equipment in the same place and using the same skills. The job description [for the new role] was the same for me as compared with before."

58 Mr Thomas' job description for the post-Pluto job that he was going to do (but which he did not in fact do because he was dismissed on 6 August 2020) was at pages 456-457. The job description for his role at Selfridges was at pages 458-459. The job descriptions were almost identical. The "role purpose" for the post that Mr Thomas was initially offered as a survivor of Pluto, before he was dismissed on 6 August 2020, was this:

> "To support the Location manager and lead the daily operation of your team to complete daily processing of foreign currency, sterling, VAT and ATM's, to ensure that the targets set are met and exceeded whilst quality standards are maintained. In so doing, to provide motivation and direction to your team by encouraging and supporting the achievement of goals through regular coaching, feedback and performance management".

59 The "role purpose" for the Selfridges role was the same except that there were in it the additional underlined words in the following sequence:

> "To support the Location manager and lead<u>, motivate</u> the daily operation of your team to complete daily processing of foreign currency, sterling, VAT and ATM's, to ensure that the targets set are met and exceeded whilst quality standards are maintained. In so doing, to provide motivation and direction to your team by encouraging and supporting the achievement of goals through regular coaching, feedback and performance management.
> <u>ensure that all operational, risk & compliance standards are upheld; and ensure our people are happy, motivated whilst being managed in a fair and compliant way</u>".

60 The "key accountabilities" for both roles were the same, except that for the role at Selfridges there was an additional one: "Ensuring the bureau delivers a satisfactory rating for all audits including OCR's (Operational Control Review)".

61 There was at pages 933-934 an undated job description for the role of VAT Admin Team Leader. Otherwise, there was in the bundle no job description for any member of the TUK staff before 6 August 2020 or of the staff of Foreign Coin.

62 In those circumstances, having seen and heard Mr Thomas give evidence, and bearing it in mind that his evidence was first-hand, or direct, whereas that of Ms Burns was not direct, I accepted Mr Thomas' evidence that there was no substantial difference in the work done by the staff of Foreign Coin when they did return to work at Heathrow as compared with the work which they did for TUK. That was because they were still providing principally foreign currency exchange services, although (1) the VAT refund work ceased by the end of 2020 because the United Kingdom at that time stopped giving VAT refunds, and (2) the staff did some work cleaning the premises where they worked, when previously they had not done so.

The factual circumstances of each lead claimant whose case remained "live" on 4 April 2022

63 The claimants were put by agreement into four groups. As I say in paragraph 8 above, the group 3 claims were settled before the start of the hearing on 4 April 2022. The circumstances of the members of the other group lead claimants, taking them in turn, were as follows.

Ms Anita Thakkar; group 1 lead claimant

64 Ms Thakkar's circumstances were described as follows in her witness statement. She did not give evidence, but there was no challenge to the following evidence.

> "1. **VAT Administration Team**: I worked for Travelex UK Ltd (TUK) in London Heathrow; Retail as part of the VAT Administration team in Terminal 2. I have also performed this role in Terminal 3 alongside Mrs Gurinder Sidhu, she performed the same role as myself, and to my knowledge is performing a similar role to the one we were both in before the restructuring took place.
>
> 2. **Furlough (March 2020)**: Travelex placed me on furlough from 24th March 2020.
>
> 3. **Consultation Period (June-July 2020)**: There was a consultation period between June & July 2020 regarding proposed changes to our existing contracts as Travelex was restructuring. On 23rd July, I was informed that I was being made redundant, and I did not appeal this decision. I was placed on Garden Leave and given a 3-month notice period for termination of employment due to end on 15th October 2020."

Mr Nidhin Thomas; group 2 lead claimant

65 Mr Thomas' witness statement contained the following passage, to which, as far as the facts were concerned (the assertions of law were not factual and were in any event wrongly included in the witness statement, so I simply ignored them) there was no major challenge, and which in any event I accepted. For the avoidance of doubt, while

the precise circumstances in which Mr Thomas was told that he was coming back to work in July 2020 and then that he was not after all required to do so were challenged, the rule 35 participants did not advance any direct evidence about those circumstances and in any event I found Mr Thomas to be a measured witness, doing his best to tell me the truth, and therefore I accepted his account of what happened in full.

"**Background**

1. **Sales Consultant**: I started my career at Travelex in March 2017 as a Sales consultant in Heathrow terminal 3 , working in that capacity until January 2018

2. **Team Manager**: I then moved to a management role in January 2018 as a Team Manager in Heathrow terminal 3 and was made a permanent Team Manager in June 2018. Later this Job Position was renamed to Sales and Service Manager.

3. **Redundancy (August 2020)**: On 6th August 2020 TUK unfairly dismissed me on the basis of redundancy due to administration

4. **Re-hiring as a Team Leader (December 2020)**: I was re-hired as a Team Leader by TFCSL in December 2020 and started in May 2021 in a Team Leader role in Selfridges. This job was very similar if not the same, in essence I was doing the same job in Selfridges with TFCSL as I was in my job within TUK in Heathrow Terminal 3.

Details of Redundancy and TUPE Transfer

5. **Furlough (March 2020)**: On 24th March 2020 I was placed on Furlough.

6. **No longer at risk of redundancy (July 2020)**: On 7th July 2020, after a consultation process in which the company was planning to change terms and conditions to employment contracts and reduce number of staff. I was informed by Matt Heavens (who was then Head of Heathrow and is now Head of Retail – Branded Retail) that I had "scored one of the highest in the group and no longer at risk of redundancy" and that I will retain my role.

7. **Return to Work (July 2020)**: On 13th July 2020 I received a call from Sasan Jahanbazy, a Location manager in Heathrow informing me that I will return to work in the following week and that I will be placed in Terminal Two. He asked me to get in touch with three sales consultants Farhat, Patrycja and Robert and get their ID details and send to him along with my ID details to activate the Ids.

8. **Cancellation of return (July 2020)**: On 16th July 2020 I received a message from Sasan Jahanbazy stating the opening list has been updated

and that my name is not there anymore. And that I don't need to return to Heathrow next week.

9. **Signing of New Contract (July 2020)**: On 28th July 2020 I signed a new contract with Travelex UK Limited, effective from 1st August 2020 which had a new job title as Team Leader (previously known as Team Manager), and they also change some of the terms and conditions of employment.

10. **Group Phone call (August 5th 2020)**: On the 5th August 2020, my team member informed me that they had a group phone call from Pete Marsh (Operations Director) and Matt Heavens (who was then Head of Heathrow) and on which they were told that their jobs were safe, and that everyone who was not on that call will be made redundant. As such I was made aware by my team member that they will be employed by Travelex Foreign Coin Services Limited. Whilst my employment remained within the now insolvent Travelex UK Ltd.

11. **Redundancy (August 6th 2020)**: On the 6th August 2020 I was informed via group phone call that Travelex UK limited had gone into administration and that price water cooper was the administrator. I was also informed that my employment was terminated with immediate effect."

Mr Welton Pinto: group 2 lead claimant

66 Mr Welton Pinto was the other lead claimant in group 2. So far as relevant, his witness statement was in these terms.

"1. **Furlough (March 2020)**: On 24th March 2020 I was placed on Furlough.

2. **2nd Individual Consultation**: On 7th July 2020, after my 2nd Individual consultation meeting with Balwinder Matharu (Deputy Terminal Manager), I was informed about the changes of terms and conditions and reduction in headcounts. I was later informed by Balwinder Matharu that I have scored highly enough and will no longer be at risk of redundancy

3. **New Contract**: On 28th July 2020 I signed a new contract with Travelex which was effective from 1st August 2020.

4. **Group Phone call (August 5th 2020)**: On the 5th August 2020, my team member informed me that they had a group phone call from Pete Marsh (Operations Director) and Matt Heavens (who was then Head of Heathrow) and on which they were told that their jobs were safe, and that everyone who was not on that call will be made redundant. As such I was made aware by my team member that they will be employed by Travelex Foreign Coin Services Limited. Whilst my employment remained within the now insolvent Travelex UK Ltd.

5. **Redundancy**: On the 6th August 2020 I was informed via group phone call that Travelex UK limited had gone into administration and that Price Waterhouse Cooper was the administrator. I was also informed that my employment was terminated with immediate effect."

67 I had some difficulty understanding why there was a need to differentiate between the circumstances of Mr Thomas and Mr Pinto, but in any event that evidence of Mr Pinto was not challenged, and I accepted it. Such challenge as there was to Mr Pinto's evidence was to paragraph 7 of his witness statement, which was in these terms:

> "**Travel Service Partner – same job role, duties and responsibilities**: I note the new contract I signed with TUK on 28th July 2020 for the Job role of (Travel Service Partner) from which I was dismissed on the 6th of August 2020. This was the same Job which was offered by TFSCL to my colleagues. The same job title (Travel Service Partner) the same job description and in the same place of work with the same duties and responsibility. For these reasons I believe that my employment had in fact transfer to TFSCL when TUK transferred said assets to TFSCL."

68 When it was put to Mr Pinto that the new role was different in that it was "multi-skilled", he said that the role was "pretty much the same". He said that it was just the job title that had changed and that the job had had some extra responsibilities added to it. Apart from that, he said, it was pretty much the same. I agreed with his analysis.

<u>Ms Marieanne Lloyd; lead claimant for a sub-group of group 2</u>

69 The circumstances of Ms Lloyd were stated by her in the witness statement at pages 73 of the witness statement bundle, of which there was a signed copy at page 74. Her circumstances were stated by her in this way:

> "1. **Initial Consultation & New Contract**: After going through an initial consultation and selection process, in June 2020, I was offered a new position and signed a new contact for Vat Manager. I returned to work on site at the Heathrow Terminal 5 in July 2020, assisting the Team with the Vat admin operations. At which Travelex were still operating a Vat business.
>
> 2. **Redundancy**: On the lead up to the 6th August, whilst on site working at Heathrow, I was made aware of a number of team members who were sworn to secrecy and called on to attend calls from the heads of the business. Pete Marsh and Matthew Heavens.
> The nature of the call was to let the individuals know that the business would be transitioning to another name, and that they were the lucky ones as had kept their jobs and were asked if they wish to continue on new contract terms with a limited time to agree. I was not part of this transition even thou I had just signed a new contract.

I was also made aware by two team members that were selected on the calls, that they were sworn to secrecy and if anyone found out they were threatened with disciplinary.
The said two individuals on the call made me fully aware that individuals, who had not been selected on the call were not part of the said group and transition and would be losing their jobs on an announcement that would be taking place on the 6th August.
I was fully aware of the evening before the 6th August after all the teams on duty were sent home, that I was not part of the select few that retained their jobs, and not from my line Manager, which was exceptionally disappointing.
I waited for the announcement to attend a call with 1300 other staff to be advised that the company had gone into administration."

70 Ms Burns' second witness statement responded to that witness statement of Ms Lloyd in the following manner.

"7. Pre-Pluto, Ms Lloyd was employed as a Customer Relationship Manager. This involved going to central London hotels and asking them to remind guests, when checking in, to use Travelex for claiming back VAT on their purchases. She would also work with VAT refund partners (such as Global Blue and Planet who work on behalf of retailers such as Selfridges and Harrods) to make for a smoother customer VAT transaction.

8. As this was a unique role, she was not subject to pooling or scoring, either in the Pluto exercise or in the selection of the Top55. As part of Pluto, her job title changed to VAT Manager. After this, her role did not make it into the Top55 as it was not a priority role in the further scaled down operation that TFCSL would run.

9. Ms Lloyd was not on furlough as of 26 May 2020 until her employment ended on 6 August 2020 as she was helping prepare for the Pluto changes for example by supporting with structures and job descriptions as well as conducting the actual redundancy consultation meetings on the management side. Helping with the redundancy consultation process was the purpose of bringing her (and some other managers) back from furlough since there were not enough HR staff to conduct the meetings given the number of people affected. She appears to be the only Claimant in this position. (Other Claimants acted as employee representatives, but these duties were not inconsistent with them remaining on furlough and our pay records show that there was no change in their pay for June and July 2020 compared to previous months, indicating that they remained on furlough).

10. To the extent that Ms Lloyd is saying that she did any other work, such as her normal role, note that the circumstances at the time would have made it very difficult for Ms Lloyd to carry out her substantive role. I note that shops (at which VAT reclaimable purchases could be made) were all shut until at

least 15 June 2020 due to lockdown and travel that could lead to VAT reclaimable purchases was minimal throughout the summer.

11. In respect of paragraph 2 of Ms Lloyd's statement, we do have a practice of asking people to keep certain discussions confidential – at least initially – because the messages are different for different groups and the calls cannot all take place at the same time. We wanted to ensure people hear relevant communications first-hand from their managers. (Indeed, Ms Lloyd herself mentions here that she did not hear the news from her manager which she found very disappointing and that is what we were trying to avoid). It would not be normal practice to threaten disciplinary proceedings for a breach of confidentiality in these circumstances. We tried to be sensitive about messaging, but knew that in due course people would find out about what was happening with others and we were not trying to stop that."

71 I accepted the evidence of Ms Lloyd and that of Ms Burns in response to that of Ms Lloyd. That was because the evidence of Ms Burns did not materially contradict that of Ms Lloyd, and was not in fact challenged.

Mr Anupam Sharma; group 4.1 lead claimant

72 Mr Sharma's witness statement started in this way.

"1. **Freelance Contractor**: I started my career at Travelex in April 2014 as a freelance contractor, working in that capacity until Dec 2015.

2. **Workforce Strategy & Optimisation Manager**: I returned to Travelex in a permanent role as Workforce Strategy & Optimisation Manager in July 2017. This role sat within HR alongside Bonnie Pal and Clare Burns.

3. **Strategy Business Partner**: I then moved to the Strategy team in July 2019 in the role of Strategy Business Partner, before being made redundant in August 2020.

4. **Central Strategy Team changes of reporting lines**: The Strategy team moved around frequently between departments between 2017-2020. At times the Strategy team has reported directly into the CEO (Tony D'Souza), and at other times into the Chief Product Officer / Chief People Officer (Gareth Williams).

5. **Notice of redundancy**: I was issued with my notice of redundancy on 28th May 2020. My assigned leave date (as reflected in the letter from Kathy Harding dated 28 May 2020) was 9th September 2020. Therefore as a result of the August 6th early redundancy, my notice period was cut short by 5 weeks.

6. **TUPE Transfers**: On the 6th August, my strategy colleagues' (Geoffrey Brandy and Rob Cranston) employment transferred to Travelex Central Services Ltd. Whilst my employment remained within the now insolvent Travelex UK Ltd."

73 Mr Sharma explained his personal circumstances in some detail in the rest of his witness statement, and in a supplementary witness statement which I permitted him to rely on, albeit that it was put before me only on 7 April 2022. I accepted all of the rest of Mr Sharma's evidence. During the hearing, as I said, I found it hard to see why it was thought by the rule 35 participants that the issue of precisely what part of the operations of TUK which transferred to Central Services Mr Sharma worked in was relevant to the question whether or not his contract of employment was transferred under TUPE, except in relation to the question of assignment. In any event, I see no need to set out the rest of Mr Sharma's evidence. As I say, I accepted it. So far as material, Central Services accepted that the contracts of employment of Mr Sharma's immediate colleagues (Mr Brandy and Mr Cranston) transferred under TUPE to Central Services.

Ms Jacquelyn McInally; group 4.2 lead claimant

74 When writing these reasons and reconsidering the issue of the relevance of the precise circumstances of the lead claimants, despite Ms Robinson's strong assertion that the fact that EJ R Lewis had accepted its relevance in principle (before the hearing of evidence) meant that I should do so too, I could not see why the precise circumstances of Ms McInally's employment before the accepted TUPE transfer to Central Services were of particular importance, given that she was plainly employed as part of the central management team of TUK. That in turn was not least because of the definition of the business that was transferred to Central Services, as set out in paragraph 27 above. In fact, that which was transferred to Central Services was also the business of TUK done in Asda and Tesco supermarkets, so that definition was by no means exhaustive. In any event, so far as material, Ms McInally's work was as stated by her in paragraphs 2-9 of her witness statement, which I have set out in paragraph 43 above, and accepted, as I have said in paragraph 44 above. I accepted also (despite the points put by Ms Robinson in cross-examination) Ms McInally's evidence in paragraphs 18-22 of her first witness statement, which was in these terms.

"18. **PPCC Division**: PPCC as a department (Product, Payments, Customer Channels) first came into existence on 28th February 2019, a year before the onset of the global pandemic.

19. **2020 Transformation Plan (November 2019)**: I was being line managed by Gareth Williams in his remit of Chief Product and Transformation Officer and my remit had expanded from PPCC related projects to a Transformation agenda. This new programme had a total of 8 projects of which I was Change Lead for four (these were Transformation, Oreo, Zeus and Jagger) and would have been likely to have picked up the 5th (Ancillary Products)

which was enabled by Project Jagger. However the Transformation project was the driver of the Agenda for this team. This was confirmed via WhatsApp from Gareth as well as a Presentation Deck circulated by Colin Swain on behalf of Gareth Williams named 2020 Transformation Agenda.

The function of this portfolio of Transformation Projects at this time was far broader than to simply serve the needs of the PPCC division. The transformation portfolio was aimed towards, delivering changes affecting the whole organisation including:

19.1. **Sponsor, manage and lead the Transformation Agenda across Travelex** – tracking the scorecard, ensuring GEO and central engagement and managing the investment prioritisation.

2020 KPIs

- Manage the overall Transformation investment and Business Case across Travelex to an agreed budget and schedule
- Support in delivering a positive cashflow for Travelex Group
- Ensure all Geos, through Transformation leads, are connected, leading and delivering on the Transformation agenda
- Ensure the transformation agenda and governance structure is transparent and well managed
- Build global and local communications plan and strategy to support the Transformation agenda

19.2. **A global transformation of the retail store estate**: proactively assessing store and location profitability across our network and working with local GEOs to significantly reduce our operating and trading costs through (a) airport renegotiations, (b) automated technology (ATMs), (c) FTE reductions, (d) stock reductions, (e) location closures or sales.

2020 KPIs

- Transformation cash generation (Opex or stock release): £18m
- Global locations checklist and decision tree

19.3. **To deliver a SALT replacement for global partners during 2020, delivering through the Oreo three-tier platform**: Allowing both partner retention and the ultimate decommissioning of the SALT system. 2020 focus is for Core FX product only, web and API.

2020 KPIs

- Number of the top 20 partners moved to Oreo: 3

- Partners committed to move off SALT by 06.21: 100%
- Full partner analysis and recommendations completed

19.4. **Diversification – looking at adjacent product and services which could be offered by Travelex within the Travel sector.**

2020 KPIs

- Jagger proposition and/or ancillary products BC submitted
- Travelex support provided to Finablr-Group [the ultimate parent company of TUK] programmes

19.5. **Offer our Retail Core FX customers new products and services related to travel**: Allowing Travelex to drive further cross-sell and increasing the value per customer.

2020 KPIs

- Jagger proposition and/or ancillary products BC submitted

20. **Transformation priority**: Additionally after the cyber attack, it was determined that these projects were higher priority:

As such I refute Bonnie Pal's statement within paragraph #12 of her witness statement, claiming that "*Much of the PPCC work stack is comprised of these currently non-profitable future-focussed product lines and projects and unfortunately there is no longer funding or a requirement for them in the critical position that Travelex finds itself in"*. Whilst I accept that this statement applies to the majority of PPCC functions – my role, as can be seen from the list of projects above, was certainly not involved extensively or solely in these "*future-focussed product lines and projects"*.

21. **Redundancy Assessment**: At the time of my redundancy I was not given the opportunity to be assessed against either or [I assumed that that should that have been "of"] the two individuals who ended up taking over responsibility for the work I was doing. I was told at the time that this was because the role I had been hired to do as per my contract was specific to the supposedly disbanded Oreo project and the PPCC team. This was despite the fact it had been established that my role had changed significantly since my start date.

22. **Ongoing Transformation Programme**: The projects listed above have been are [sic] still ongoing in one way or another, and over the past 18 months Travelex have repeatedly advertised vacancies for similar programme management roles to the one I was doing when I was made redundant."

75 Ms McInally's second witness statement contained additional detail, which was consistent with the above passage, and which I accepted. The most important part (assuming that any part of it was of any greater materiality than the evidence which I have set out in the preceding paragraph above) was this passage:

> "**What was I working on between November and the commencement of Gardening leave**:
>
> 19. In November with the collapse of Finablr it was put to the PPCC Leadership Team by Gareth that our team were responsible for the transformation and the future survival of Travelex.
>
> 20. My role was to be independent and accountable for delivery of Channel and Transformation Projects, transformation projects that would help the company diversify and compete.
>
> 21. Transformation and diversification workshop took place on 30th and 31st January 2020 in response to the cyber attack and in the knowledge that the pandemic. [Sic]
>
> 22. Oreo / GFX Workshop on 11th March.
>
> 23. April - continuing to work on GfX /
>
> 24. I spent much of March working with Mike Batley and Elvin on a project relating to stores including reducing the store numbers. My role in that respect was to help Michael with the project plan and prioritisation and shaping the project and designing how it would be tracked, managed and reported on. Additionally, we were scoping future initiatives and trying to understand the future technology needs for a changing business.
>
> 25. GFX Leadership Team Meetings - last one attended on May 6th."

76 The final lead claimants were Ms Jacqueline Martin, Mr Jeremy Webb, and Mr Mohamed Rameez. I now turn to their circumstances.

<u>Ms Jacqueline Martin; group 4.4 lead claimant</u>

77 Ms Martin initially asserted that she was not employed by TUK before 6 August 2020, but, rather, that she was employed by another company within the group of which TUK formed part. However, after some discussion during the hearing, Ms Martin accepted (as Ms Robinson on behalf of the rule 35 participants asserted) that she was in fact employed by TUK at the start of 6 August 2020. As Ms Martin put it in paragraph 3 of her witness statement (and this was agreed by the rule 35 participants): "My last role was Inventory Manager for the Asda Travel Money stores". In oral evidence, Ms Martin

expanded on that role. It was, she said (and I accepted) to look after stock control for each foreign currency exchange store (they were in booths) in Asda stores. She ordered foreign exchange and returned what was not required: that was of vital importance to the profitability of each booth. At that time there were 148 Travelex booths in Asda stores.

78 After Ms Martin stopped working for TUK, the work that she had done was distributed among the area managers whose employment transferred to Central Services in the manner stated in paragraph 24 above. That was after 6 August 2020.

Mr Jeremy Webb; group 4.5 lead claimant

79 TUK had an office at Peterborough as well as one in London. Mr Webb was based at the Peterborough office, as he described in the following passage of his witness statement, which (except to the extent that it was a submission, or an assertion about the result of the application of the law to the facts) I accepted. I record here that one point that was repeatedly pressed on Mr Webb and put to me by Ms Robinson was that Mr Webb had asked to be permitted to continue to work during the period of lockdown starting on 24 March 2020. His evidence was to the contrary, and in part because no direct evidence to the contrary was adduced, but also because I found him to be an honest witness, doing his best to tell the truth, I accepted Mr Webb's evidence on this point as well as otherwise.

> "3. **Peterborough Office & Managerial role**: I was based in the Peterborough office along with 2 EUC [end user computing] Engineers Robert Turp and Michael Casson. Even though my role was a managerial role I was still hands on with supporting the Peterborough office along with Michael and Robert.
>
> **Details of Redundancy and TUPE Transfer**
>
> 4. **Cyber-Attack (December 2019)**: On 31st Dec 2019 Travelex were hit by a devastating cyber-attack. The 3 of us in Peterborough and the wider EUC team worked many long hours rebuilding machines to try and get the business up and running again.
>
> 5. **COVID Pandemic**: With the onset of the Covid pandemic my manager Gagan Sethi placed Michael and Robert on furlough at the start of April 2020 leaving me as the sole onsite IT Support person for the Peterborough office. Even though I was the EUC manager for the West which included the UK and therefore Michael and Robert I was not involved in the decision to furlough them, I was just expected to be the onsite IT support person. Numerous finance staff and the Call Centre were all still working from the office and therefore needed onsite assistance with IT issues. Although my title was EUC Manager because of the 2 engineers being furloughed I was effectively mostly doing their role instead.

6. **Notice of Redundancy**: On the 30th June 2020 I was advised that I was being made redundant, as I had 3 months' notice period my official last day with Travelex would have been the 5th October. I did not appeal against this as I was on Thomas Cook terms and conditions which meant my redundancy package was very good and also because I felt the company had been poorly managed over the last 5 years and decided that the time was right to leave.

7. **Cancellation of Garden Leave**: Around the same time as I was advised that I was being made redundant, Danielle Dumont who was the Project Manager for the Windows 10 project resigned leaving the project with no PM. Because of this Gagan Sethi my manager asked me if I would take over the role instead of going on garden leave. With both Michael and Robert still on furlough he asked if I would also continue to provide EUC support for the Peterborough office. Out of loyalty to the company and to my team I agreed to this on the understanding that I would do it for the first 2 months of my notice period and then have the last month as garden leave. Under no circumstances did I ever ask to work my notice period, the resignation of the Project Manager and the fact that they had no EUC support staff onsite meant that they needed someone to perform both roles while they looked to make different arrangements.

8. **August 6th 2020 redundancy**: On the 6th August 2020 at the exact time that colleagues were being TUPE Transferred to Travelex Central Services (TCS) I was a on different call being told that Travelex UK had gone into administration and that I was therefore now redundant. A number of my EUC colleagues and my Line Manager were all TUPE transferred across.

9. **Grouping of employees that was transferred to TCS**: I believe that the above proves that the EUC team that I was member of was part of a grouping of employees that was transferred to TCS and that I was part of this grouping immediately prior to the transfer.

10. **Project Management of Windows 10 project**: Post my redundancy in August 2020, I am told, the Project management of the Windows 10 project was moved to India however some of the coordination for it was still done by Amber Larkinson.

11. **EUC Team ongoing structure**: Amber was an EUC analyst that was based in the London office, Kings Place. As Kings Place was closed, she was moved to the Peterborough office to carry out Onsite support with Robert Turp who was brought back from furlough in September. Michael Casson was made redundant at the same time that I was as part of the downsizing of the team, his role in Peterborough is now being done by Amber.

12. **EUC Team ongoing function**: Both Amber and Robert continue to this day in the EUC team doing onsite support in Peterborough as well as for wider support for Travelex. They are doing exactly the same role as before as are the rest of the EUC team."

80 In answer to my questions, Mr Webb clarified that the contract of employment of Mr Robert Turp, an "EUC Analyst" on the same level as Mr Casson, transferred under TUPE to Central Services. That was borne out by page 109 of the Central Services Contract. In addition, said Mr Webb, the employment of his line manager, Mr Gagan Sethi, transferred, and that was borne out by page 108 of the Central Services Contract. That page also showed that, as Mr Webb said, the employment of Mr James Chilton, who was employed as "EUC Team Manager – UK", based at "GBR – Heathrow – Processing Centre", transferred to Central Services, as did the employment of Amber Larkinson, who was stated at page 108 of the Central Services Contract to be an "EUC Analyst".

Mr Mohamed Rameez; group 4.6 lead claimant.

81 Mr Rameez was employed (and these things were not disputed)

81.1 as "an Area Manager covering the ASDA Supermarket bureaus in the London area", and

81.2 was based at the London office of TUK in Kings Place.

82 Mr Rameez was selected to be dismissed for redundancy and given notice of his dismissal by reason of redundancy on 24 July 2020. He appealed against that notice of dismissal on 30 July 2020, but the appeal had not been determined before 6 August 2020, when he was informed by the administrators that he was being dismissed with immediate effect.

83 I now turn to the relevant legal principles.

The relevant law

The question whether there has been a TUPE transfer

84 The question whether there has been a transfer within the meaning of TUPE is determined by reference to regulation 3 of TUPE and the (considerable) body of case law which concerns the concept of a transfer to which that regulation must be taken to apply. That case law concerns both the predecessor regulations to the 2006 version of TUPE (i.e. the Transfer of Undertakings (Protection of Employment) Regulations 1981), and the European Directive which gave rise to those regulations. That directive is usually called the Acquired Rights Directive ("ARD"). Regulation 3 of TUPE provides, so far as relevant:

‘(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

(b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”);

(ii) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client’s use.

...

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.'

85 The question whether there has been a transfer within the meaning of regulation 3(1)(a) of TUPE was the subject of helpful guidance given by Lindsay P in the decision of the EAT in *Cheesman v R Brewer Contracts Ltd* [2001] IRLR 144. That guidance is in large part set out in paragraphs F[34] and F[35] of *Harvey* (although in paragraph (i) set out in paragraph [F35] the word "criterion" is wrongly changed to "criteria"). I took that guidance fully into account, and I set some of it out below. The guidance is referred to in paragraphs F[35] and F[36] of *Harvey* in the following terms respectively:

85.1 "This considered approach was approved by the Court of Appeal in *McCarrick v Hunter* [2012] EWCA Civ 1399, [2013] ICR 235 and applied by the EAT *in Beynon v Crash Accident Repairs Services Ltd* (Debarred) UKEAT/0255/12 (14 March 2013, unreported)."

85.2 "*Cheesman* continues to be the starting point for UK employment tribunals considering reg 3(1)(a) 'business transfer' cases. Its continuing relevance is illustrated by *ALNO (UK) Ltd v Turner* UKEAT/0349/15 (11 October 2016, unreported)."

86 The principal reason for the assertion advanced by Ms Robinson on behalf of the rule 35 participants for TUPE not applying to the transfer of the part of the operations of TUK in which the claimants worked or to which they were assigned on 6 August 2020, was that that part had not, after 6 August 2020, retained its identity. In that regard, the key part of the guidance in *Cheesman* was the first part of paragraph 11 of the judgment of the EAT. However, the whole of paragraph 11 is relevant in one way or another, so for convenience I now set it out.

"As for whether there has been a transfer:

(i) As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed – *Vidal* [1999] IRLR 132 paragraph 22 and the case there cited; *Spijkers v Gebroeders Benedik Abattoir CV* [1986] ECR 1119 ECJ; *Schmidt v Spar-und Leihkasse* [1994] IRLR 302 ECJ paragraph 17; *Sánchez Hidalgo* [1999] IRLR 136 paragraph 21; *Allen* [2000] IRLR 119 paragraph 23.

(ii) In a labour-intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially

assigned by his predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity – *Sánchez Hidalgo* [1999] IRLR 136 paragraph 32.

(iii) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation – *Vidal* [1999] IRLR 132 paragraph 29; *Sánchez Hidalgo* [1999] IRLR 136 paragraph 29; *Allen* [2000] IRLR 119 paragraph 26. However, whilst no authority so holds, it may, presumably, not be an error of law to consider 'the decisive criterion' in (i) above in isolation; that, surely, is an aspect of its being 'decisive', although, as one sees from the 'inter alia' in (i) above, 'the decisive criterion' is not itself said to depend on a single factor.

(iv) Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended – *Sánchez Hidalgo* [1999] IRLR 136 paragraph 29; *Allen* [2000] IRLR 119 paragraph 26.

(v) In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on – *Vidal* [1999] IRLR 132 paragraph 31; *Sánchez Hidalgo* [1999] IRLR 136 paragraph 31; *Allen* [2000] IRLR 119 paragraph 28.

(vi) Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets – *Vidal* [1999] IRLR 132 paragraph 31; *Sánchez Hidalgo* [1999] IRLR 136 paragraph 31; *Allen* [2000] IRLR 119 paragraph 28.

(vii) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer – *Allen* [2000] IRLR 119 paragraph 30.

(viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer – *Vidal* [1999] IRLR 132 paragraph 35.

(ix) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor – *Sánchez Hidalgo* [1999] IRLR 136 paragraph 30.

(x) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not

conclusive as there is no need for any such direct contractual relationship: *Sánchez Hidalgo* [1999] IRLR 136 paragraphs 22 and 23.

(xi) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer – *ECM* [1999] IRLR 559 p.561.

(xii) The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one subcontractor and the start by the successor – *Allen* [2000] IRLR 119 paragraphs 32-33."

87 Before referring to paragraph 12(iii) of the EAT's judgment in *Cheesman*, I record that as stated in paragraph 11(i) of that judgment, the issue in deciding whether or not a business (i.e. an "economic entity") retains its identity after a putative transfer is not whether or not the employees in the business do the same or similar jobs, but whether the entity's "operation" is continued or resumed.

88 Paragraph 12(iii) of that judgment is this:

> "More generally, the cases also show: ...
>
> (iii) The aim of the Directive is to ensure continuity of employment relationships within the economic entity irrespective of any change of ownership – *Allen* [2000] IRLR 119 paragraph 23 – and our domestic law illustrates how readily the courts will adopt a purposive construction to counter avoidance – see Lord Oliver's speech in *Litster v Forth Dry Dock Co Ltd* [1989] IRLR 161 at 167."

89 The need to "adopt a purposive construction to counter avoidance" is illustrated particularly well by the cases referred to in paragraphs F[21] and F[22] of *Harvey*, concerning situations where there has been a change in the control of a business resulting from what was initially a transfer of shares in the company which at that time owned the business.

90 The law relating to TUPE transfers was to an extent changed in 2006 by the introduction of protection in the event of a service provision change within the meaning of regulation 3(1)(b) of TUPE. The claimants do not here rely on there having been such a change: it is their case that there were two TUPE transfers, one from TUK to Foreign Coin and one from TUK to Central Services, and that they were assigned to one or other of the economic entities which were the subject of those transfers. In that regard, the following passage of *Harvey* (it is paragraph F[63]) is of assistance.

> "In the UK, the position reached prior to the advent of TUPE 2006, at least domestically, was that *Oy Liikenne* was not treated as laying down any strict rule to the effect that, where assets are the essential part of the business, the absence of a transfer of most or all of these would preclude there being a transfer of an

undertaking for the purposes of the 1981 Regulations. This can be seen from decisions such as that in *P&O Trans European Ltd v Initial Transport Services Ltd* [2003] IRLR 128, EAT, and *RCO Support Services v UNISON* [2002] EWCA Civ 464, [2002] IRLR 401. In the latter case, Mummery LJ, addressing the problem posed by *Süzen v Zehnacker Gebäuderenigung GmbH Krankenhausservice*: C-13/95, [1997] IRLR 255, [1997] ICR 662, concluded that the case, as a matter of Community Law, did not mean that there can never be a transfer of an undertaking in an outsourcing situation where neither assets nor workforce have transferred. He said: 'I do not read *Süzen* as singling out, to the exclusion of all other circumstances, the particular circumstances of none of the workforce being taken on as being determinative of the transfer issue in every case.' Arguably, if there is one important decisive factor, it is that the transferred undertaking retains its identity and the *Spijkers'* list of factors is not to be narrowed down to the one factor concentrated on in *Süzen*. In deciding whether there was a transfer of an undertaking in accordance with the decision in *ECM*, the EAT was, the Court of Appeal held, entitled to have regard, as a relevant circumstance, to the reason why the employees were not taken on by the new employer. The fact that none of the workforce was taken on, whilst relevant, was not necessarily conclusive of the issue of retention of identity. The context in which the decision was made should be considered. This involves an objective consideration and assessment of all the facts, including the circumstances of the decision not to engage the workforce rather than the subjective motive of the putative transferee to avoid the application of the directive and the 1981 Regulations. In this instance, the Court of Appeal considered that the EAT was entitled to have regard to the evidence, pointing to, rather than away from, the retention of the identity of the cleaning and catering undertakings. The willingness of the putative transferee to take on the workforce, if they resigned and accepted re-employment on its terms and conditions of employment, was also significant. Applying *RCO Support Services*, the EAT in *Dolphin Drilling Services v Gordon* UKEAT/0101/03 (24 August 2004, unreported) stated: '…we consider that the recent review of the relevant cases in *RCO Support Services*, is comprehensive and restores, if not reinforces, the original position of *Spikers* [sic] to the effect that the transfer of employees is not necessary and not conclusive, in the context of whether or not a transfer has taken place by the relevant undertaking'."

91 I record here that the principle stated in paragraph 11(xii) of the judgment in *Cheesman* which I have set out in paragraph 86 above was applied by the European Court of Justice ("ECJ") in *Sigüenza v Ayuntamiento de Valladolid In-Pulso Musical Sociedad Cooperativa*: C-472/16, [2018] IRLR 1056. There, a contract for the provision of services at a Spanish Music School was terminated and services were not resumed by a new contractor until after a gap of five months. The ECJ decided that that did not preclude there being a transfer within the meaning of the ARD. That decision was for the following reasons.

"41 Furthermore, it is clear from the case-law of the Court that a temporary suspension, of only a few months, of the undertaking's activities cannot preclude

> the possibility that the economic entity at issue in the main proceedings retained its identity and that there was therefore a transfer of undertaking within the meaning of that directive (see, to that effect, judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 31).
>
> 42 In that regard, the Court has held, in particular, that the fact that the undertaking was, at the time of the transfer, temporarily closed and had no employees in its service is admittedly one factor to be taken into account when assessing whether an existing economic entity was transferred. However, the temporary closure of an undertaking and the resulting absence of staff at the time of the transfer do not of themselves preclude the possibility that there has been a transfer of an undertaking within the meaning of Article 1(1) of Directive 2001/23 (judgment of 15 June 1988, *Bork International and Others*, 101/87, EU:C:1988:308, paragraph 16 and the case-law cited).
>
> 43 That conclusion applies in particular in a situation such as that at issue in the main proceedings, where, although the undertaking's activities ceased for five months, that period included three months of school holidays."

92 I add that it has been also held by the ECJ that all that is required for the identity of an economic entity to be retained after a putative transfer is that the alleged transferee pursues "an identical or analogous economic activity": see paragraph 53 of the judgment of the ECJ in *Klarenberg v Ferrotron Technologies GmbH*: C-466/07, [2009] IRLR 301. In fact, the whole of the passage which led up to that statement is material and helpful here. It starts in paragraph 40. That passage is as follows.

> "40 It should at the outset be recalled that, as is clear from recital 8 in the preamble to Directive 2001/23, the above provision was adopted to clarify the concept of transfer in the light of the case-law of the Court (see, inter alia, Case 186/83 *Botzen and Others* [1985] ECR 519, paragraph 6, and Case 24*/85 Spijkers* [1986] ECR 1119, paragraph 11). According to that case-law, Directive 2001/23 is intended to ensure the continuity of employment relationships existing within an economic entity, irrespective of any change of ownership and, thus, to protect employees in the event that such a change occurs.
>
> 41 It is clear from the provisions of Article 1(1)(a) of Directive 2001/23, read in conjunction with those of Article 1(1)(b) thereof, that, in the event that the economic entity transferred does not retain its identity, the application of point (b) of Article 1(1) forestalls the operation of point (a) of that provision. It follows that Article 1(1)(b) of Directive 2001/23 is capable of restricting the scope of Article 1(1)(a) of that directive, hence the scope of the protection afforded by that directive. Such a provision must therefore be construed narrowly.
>
> 42 Ferrotron contends that the 'economic entity', defined in Article 1(1)(b) of Directive 2001/23, retains its identity only if the organisational link which connects all of the staff and/or all of the elements is preserved. By contrast, the economic

entity transferred does not retain its identity in a situation where, following the transfer, it loses its organisational autonomy, the acquired resources having been integrated by the transferee into an entirely new structure.

43 However, regard being had, in particular, to the objective pursued by Directive 2001/23, which seeks – as is clear from paragraph 40 of this judgment – to ensure effective protection of employees' rights in the event of a transfer, such an understanding of the identity of the economic entity, according to which that identity depends entirely on the single factor relating to organisational autonomy, as contended by Ferrotron, cannot be accepted. It would imply that, on account of the sole fact that the transferee decides to break down the part of the undertaking or business which it has acquired and to integrate it into its own structure, Directive 2001/23 could not be applied to that part of the undertaking or business, thus depriving the employees concerned of the protection afforded by that directive.

44 As regards, specifically, the factor relating to organisation, although the Court has previously held that that factor contributes to defining an economic entity (see, to that effect, Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 15; Case C-234/98 *Allen and Others* [1999] ECR I-8643, paragraph 27; Case C-175/99 *Mayeur* [2000] ECR I-7755, paragraph 53; and Case C-172/99 *Liikenne* [2001] ECR I-745, paragraph 34), it has also held that an alteration in the organisational structure of the entity transferred is not such as to prevent the application of Directive 2001/23 (see, to that effect, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraphs 20 and 21; *Mayeur*, paragraph 54; and Case C-458/05 *Jouini and Others* [2007] ECR I-7301, paragraph 36).

45 Moreover, of itself, Article 1(1)(b) of Directive 2001/23 defines the identity of an economic entity by referring to an 'organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary', thus emphasising not only the organisational element of the entity transferred but also the element of pursuing an economic activity.

46 Having regard to the foregoing, in order to interpret the condition relating to the preservation of the identity of an economic entity, within the meaning of Directive 2001/23, account should be taken of the two elements – as laid down in Article 1(1)(b) of Directive 2001/23 – which, taken together, constitute that identity, and of the objective pursued by that directive, namely the protection of employees.

47 In accordance with those considerations and, in order not to frustrate in part the effectiveness of Directive 2001/23, that condition should be interpreted, not as requiring the retention of the specific organisation imposed by the undertaking on the various elements of production which are transferred, but – as the Advocate General stated in points 42 and 44 of his Opinion – as requiring the

retention of a functional link of interdependence, and complementarity, between those elements.

48 The retention of such a functional link between the various elements transferred allows the transferee to use them, even if they are integrated, after the transfer, in a new and different organisational structure, to pursue an identical or analogous economic activity (see, to that effect, Case C-392/92 *Schmidt* [1994] ECR I-1311, paragraph 17).

49 It is for the referring court to ascertain, in the light of the foregoing elements, in the context of a global assessment of all the facts characterising the transaction in question in the main proceedings (see, to that effect, *Spijkers,* paragraph 13; Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, paragraph 24; *Süzen*, paragraph 14; and *Allen and Others*, paragraph 26) whether the identity of the economic entity transferred was preserved.

50 As was pointed out both by the referring court in its order for reference, and by the German Government and the Commission of the European Communities in their observations to the Court, the wording of the first and fourth subparagraphs of Article 6(1) of Directive 2001/23 confirm that, in the mind of the Community legislature, that directive is intended to apply to any transfer satisfying the conditions laid down in Article 1(1) of that directive, whether or not the economic entity transferred retains its autonomy in the transferee's organisational structure.

51 It is, lastly, necessary to reply to Ferrotron's argument that, in the event of the transferred economic entity losing its organisational autonomy, the continuity of the employment relations that Directive 2001/23 seeks to guarantee cannot, in any event, be assured because the employment position of head of unit, previously occupied by Mr Klarenberg, cannot be linked to any equivalent employment position in the new work structure established by the transferee.

52 In that regard, it should be recalled that the Court has already held that an obligation to terminate contracts of employment governed by private law in the case of the transfer of an economic activity to a legal person governed by public law constitutes, in accordance with Article 4(2) of Directive 2001/23, a substantial change in working conditions to the detriment of the employee and resulting directly from the transfer, with the result that termination of such contracts of employment must, in such circumstances, be regarded as resulting from the action of the employer (*Mayeur*, paragraph 56). Likewise, it must be held that the impossibility, which may arise in the event of a transfer, of assigning to an employee, in the organisational structure put in place by the transferee, a position of employment which is equivalent to that which that employee occupied under the previous owner could, if it leads to a substantial change in working conditions to the detriment of that employee, be assimilated with termination of the

> employment contract resulting from the action of the employer, for the purposes of that provision.
>
> 53 The reply to the question referred by the Landesarbeitsgericht Düsseldorf is therefore that Article 1(1)(a) and (b) of Directive 2001/23 must be interpreted as meaning that that directive may also apply in a situation where the part of the undertaking or business transferred does not retain its organisational autonomy, provided that the functional link between the various elements of production transferred is preserved, and that that link enables the transferee to use those elements to pursue an identical or analogous economic activity, a matter which it is for the national court to determine."

The question whether or not an employee was "assigned" to an economic entity which transferred under TUPE

93 The reason why it is important to know whether a claimant was assigned to an economic entity which was transferred under regulation 3(1)(a) of TUPE is that regulation 4(1) of TUPE provides:

> "Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."

94 The word "assigned" first appeared in the context of a transfer within the meaning of the ARD when the ECJ decided in *Botzen v Rotterdamsche Droogdok Maatschappij BV* [1985] ECR 591, [1986] 2 CMLR 50, that the test for determining whether an employee's contract of employment is transferred under the ARD is whether the employee was "assigned" to the business, undertaking, or part of a business or undertaking which has transferred, an "employment relationship [being] essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties" (see paragraph 15 of the ECJ's judgment in that case). Thus (as it is said in paragraph 14 of that judgment):

> "the only decisive criterion regarding the transfer of employees' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organisational framework within which their employment relationship took effect".

95 However, as a result of paragraph 16 of that judgment:

95.1 the mere fact that an employee who was not employed in the transferred part of an undertaking performed "certain duties which involved the use of assets

assigned to the part transferred" will not mean that the employee was assigned to the part which was transferred, and

95.2 an employee "who, whilst being employed in an administrative department of the undertaking which has not itself been transferred, carried out certain duties for the benefit of the part transferred", will not be regarded as having been assigned to the transferred part.

96 The following passage in section F of *Harvey* was relevant, and I took it into account as well as the above statements of principle in *Botzen*.

> '**(v) Employees who are absent on leave**
> **[88.21]**
>
> This leads us to consider the position of employees who are absent on leave, but who would, but for that leave, be working in the part transferred. Employees temporarily absent, eg through sick leave, maternity leave, extended holiday leave, military service, career break or otherwise may be part of the personnel of the undertaking or service and may assert a right to return to work under the same circumstances as they might have been able to assert against the transferor had the transfer not taken place. Thus, in *TC Cleaning Contractors Ltd v Joy* EAT/134/96 (7 June 1996, unreported) an employee on sick leave after suffering a stroke was excluded from a list of transferring employees on a transfer of an undertaking that took place on the changeover of contractors cleaning premises for a customer. Nonetheless, despite the fact that the transferee's managing director said to the employee intending to return to work after sick leave 'I understand that you are thinking of coming back to work: you haven't got a job – your job has been given to someone else', she rightly succeeded in her claim under the TUPE Regulations as she remained part of the human stock of the undertaking concerned.
>
> **[88.22]**
>
> In *Fairhurst Ward Abbotts Ltd v Botes Building Ltd* [2004] EWCA Civ 83, [2004] IRLR 304 the Court of Appeal also considered the situation where an employee was absent from the undertaking (or part) in question on the ground of sickness. An employment tribunal had held that such an employee, if absent, would not be assigned: he had, it said, 'become detached'. This was overruled by the EAT and the Court of Appeal. According to Mummery LJ in the CA at [40]:
>
> > "If the [employee] was in fact employed in that part of the undertaking for the purposes of TUPE, the fact that he was away from work because he was sick would not of itself prevent the transfer from including him. A person on sick leave, like a person on holiday, on study leave or on maternity leave, remains a person employed in the undertaking, even though he is not

> actually at his place of work. The question is whether he was employed in the part transferred. That is a factual matter."

[88.23]–[88.25]

In *BT Managed Services Ltd v Edwards* [2015] IRLR 994 the EAT considered that an employee who was *permanently* off sick, and connected with the part of the service being transferred purely for administrative reasons, was not assigned to the organised grouping of employees concerned. According to the view of HHJ Serota QC:

> "The question of whether or not an individual is "assigned" to the organised grouping of resources or employees that is subject to the relevant transfer, will generally require some level of participation or, in the case of temporary absence, an expectation of future participation, in carrying-out the relevant activities on behalf of the client, which was the principal purpose of the organised grouping."

In this particular case it could not be said that the claimant was assigned 'in any meaningful sense understood by employment lawyers'.

The matter reached the Court of Appeal ([2016] EWCA Civ 679) by way of an application to appeal the EAT decision to the Court of Appeal. Lord Justice Longmore granted the application. BT Managed Services Limited's position was that there is nothing in *Botzen* to suggest that the question of assignment has anything to do with a person contributing economic activity to the undertaking or part concerned. It is enough, said BT Managed Services Limited, that the transfer takes place of the department to which the employee was assigned and which formed the organisational framework within which the employment relationship took effect (see *Botzen*). Also, it was submitted, there is nothing in *Fairhurst Ward Abbotts* to suggest that there is any requirement of substantial economic activity on the part of the person alleging assignment. However, the case settled and, for the moment, the EAT decision is the final view.'

97 I was told by Ms Robinson that there is no authority concerning the question whether the fact that an employee has been given notice of dismissal by reason of redundancy means that that employee is not to be regarded as being assigned to the business or part of a business which is transferred under TUPE.

The submissions advanced on behalf of the rule 35 participants

98 Under the heading "General factual circumstances", Ms Robinson's written closing submissions contained these paragraphs.

> '40. From 24th March 2020 to week commencing 12th July 2020 London Heathrow Airport was closed. No services were being provided.

41. On 6th August 2020 the administrators sold some of the assets of Travelex UK Limited to Travelex Foreign Coin Services Limited (p.289) These assets are set out at p.293. They did not include the assets set out at p.292. This transaction is summarised in the Insolvency Practitioners' report at p.313. Paragraph 24 to 28 of Clare Burns' statement is relied upon.

42. Travelex Foreign Coin Services Limited did not become part of the new Travelex companies until mid-2021. As set out at p.313 (the Insolvency Practitioners' report), Travelex Foreign Coin Services Limited would attempt to negotiate contracts and subject to being able to agree terms may continue trading at airports over time. Therefore, as at the 6th August 2020 Travelex Foreign Coin Services Limited had agreed to buy some of the assets of Travelex UK Limited – at the point of transaction there was no value to TUK in the retail airport contracts as TUK was unable to fulfil its obligations under them. (p313)

43. Travelex Foreign Coin Services Limited had bought assets which might or might not, at some future point, allow it to trade at airports.

44. There were no staff transferred under the contract. At 7.1 of the agreement, it was made clear that the parties neither intended nor expected that the sale or purchase of the assets would amount to a relevant transfer (p.295). That is because what had been sold/bought were assets and not a business. The running of a business was subject to further contracts being entered into by Travelex Foreign Coin Services Ltd with third parties – they may or may not have been achieved.

45. Those employees who were in the Top 55 in the redundancy selection process were offered new contracts of employment with Travelex Foreign Coin Services Ltd. They were not returned from furlough immediately. There was a gradual re-introduction of employees over a period of time. Ms Mascarenhas did not return until 19th August 2020. In August 2020 there were 8-10 people over 2 stores. By October 2020 there were approximately 16-20 people. In November 2020 there was a further lockdown. In January 2021 – September 2021 there was only 7% of the "walk-ups" when compared with 2019 (evidence of Clare Burns).

46. On 6th August 2020 the administrators sold business and assets to Travelex AcquisitionCo Limited and Travelex TopCo Limited. This included the Central and Shared Services Business (page 280). The Central and Shared Services Employees (listed at Schedule 5) were TUPE transferred on the basis that they were assigned to the Central and Shared Services Business immediately before the transfer.

47. The Concession Agreement (p.77) between TUK and London Heathrow (dated in 2019) provides only that Heathrow had granted TUK the right to access retail space at Heathrow in order to sell its Services from that space. Heathrow is therefore not a client under this agreement and there is no contracting out, in or changing of service provider in relation to this agreement. Service provision change is therefore not discussed in detail in this skeleton."

99 Ms Robinson's submissions relating to the individual lead claimants were all to the same effect, albeit that they were tailored to the circumstances of each lead claimant. It is therefore convenient to set out below first the set of submissions relating to Ms Thakker. That is because her employment will, if it transferred, have transferred to Foreign Coin. It is convenient then to set out the submissions of Ms Robinson relating to Mr Webb's employment. That is because (1) if his employment transferred then it was to Central Services, and (2) the submissions relating to the other claimants whose employment may have transferred to Central Services (not including Ms Martin and Mr Rameez) were comparable. Finally, I refer to Ms Robinson's submissions relating to Ms Martin, which were to the same effect as those relating to Mr Rameez.

100 Ms Robinson's submissions relating to Ms Thakkar were as follows.

'Factual circumstances (Thakkar)

48. Ms Thakkar worked at London Heathrow in the VAT administration team. She was placed on furlough on 24th March 2020 (p.378 -380).

49. In June and July 2020 there was a collective consultation process to reduce the staff working at London Heathrow from 519 to 201 employees (p.129, 173, 223, 381, 384, 389, 394, 399). The redundancies were not connected to the transfer. They were intended to reduce staff to ameliorate the effects of the cyber-attack, reduction of liquidity due to issues with Finablr, and the pandemic. The redundancies were aimed at keeping the business trading to allow time for further funds to be secured (p.296-320).

50. On 23rd July 2020 the Claimant was given notice of redundancy and placed on garden leave (p.403)

51. On 6th August 2020 the Claimant was dismissed by reason of redundancy by the administrators.

52. Ms Thakkar avers that her employment should have transferred to Travelex Foreign Coin Services Limited.

Questions to be answered (Thakkar)

53. Was there a **transfer of an undertaking, business or part** of an undertaking or business to another person?

    There was no transfer of an undertaking (on the scale in which it had existed prior to March 2020). There was simply a transfer of assets. However, part of the original undertaking in the form of foreign exchange and VAT administration function (in a smaller form) continued after 6th August 2020.

54. Was there an **organised grouping of resources** which had the objective of pursuing an economic activity?

    Prior to the transfer there was an organised grouping of resources which had the objective of undertaking foreign exchange and VAT administration functions.

55. Following the transfer, did the organised grouping of resources **retain its identity**?

    Applying the **Spijkers** and **Cheesman** factors: the type of business before transfer was the provision of foreign exchange and VAT administration services to customers, some assets transferred, no employees were taken over and no customers transferred (the customers of that part of the business being the public). Following the transfer there were 8-10 employees providing a minimal foreign exchange service across 2 stores in London Heathrow. The VAT administration was minimal to non-existent as tourists could not travel. The VAT scheme had been cancelled and therefore there was to be a diminishing of the use of that scheme to zero in any event. Prior to the transfer there had been 519 staff providing foreign exchange and VAT services across 55 stores. After the transfer staff were required to be multi-skilled (formerly they had been assigned to either VAT or foreign exchange as per the evidence of Mr Pinto) and to provide VAT administration, foreign exchange, ATM replenishment, the sale of other services, be more proactive with obtaining customers. The staff had new shifts, hours, terms and conditions of employment.

    Therefore, the organised grouping of employees did not retain its identity. (**Department for Education v Huke and Evolution Resource Ltd (in liq**) "A substantial change in the amount of the particular activity that the client requires could, we consider, show that the post transfer activity is not the same as it was pre-transfer')

56. Was the Claimant in question **assigned to the organised grouping of resources** which is the subject of the relevant transfer?

    The Claimant had been furloughed from 24th March 2020. In a redundancy exercise unrelated to the transfer, she had been selected for redundancy.

She had not returned to work. She had been on garden leave from 23rd July 2020. At the time of the administration, she had not carried out any economic activity for four and a half months. As per **BT Managed Services Ltd v Edwards** [2015] IRLR 994 "The question of whether or not an individual is "assigned" to the organised grouping of resources or employees that is subject to the relevant transfer, will generally require some level of participation or, in the case of temporary absence, an expectation of future participation, in carrying-out the relevant activities on behalf of the client, which was the principal purpose of the organised grouping." There was no participation and no expectation of future participation by the Claimant – she had ceased to undertake any activity for TUK and was not to resume any such activity.

57. Were they so **assigned immediately before the transfer**?

The Claimant was not so assigned immediately before the transfer – **Litster**.'

101 Ms Robinson's submissions relating to Mr Webb were as follows.

'Factual Circumstances (Webb)

128. The Claimant was employed as End User Computing (EUC) Support Manager. He avers that his employment transferred from TUK to Travelex Central Services Ltd.

129. Following the cyber-attack on 31st December 2019 Mr Webb spent long days carrying out the role of EUC Support, the hands-on role two levels below his own (p.237) in order to mitigate the effects of the attack (his own evidence).

130. On 24th March 2020 the EUC Support staff at Peterborough were furloughed (one had health issues that meant that they could not attend the office) and Mr Webb therefore was the only one on site dealing with EUC issues. He therefore continued to carry out the EUC Support role rather than his own managerial position (which sat between the Head of EUC and the EUC Team Manager in the structure) (p.237).

131. On 26th May 2020 he was informed that his role was at risk of redundancy (p.807). The redundancies were not connected to the transfer. They were intended to reduce staff to ameliorate the effects of the cyber-attack, reduction of liquidity due to issues with Finablr, and the pandemic. The redundancies were aimed at keeping the business trading to allow time for further funds to be secured (p.296-320).

132. A Collective Consultation was carried out at Peterborough in May and June 2020 (p. 230, 809, 812, 249, 268).

133. The Claimant was informed that his role was redundant on 30th June 2020 (p.815). The Claimant was asked to work his notice until 18th September 2020 following which the remainder of his notice period would be on garden leave. The reason for the request was in order that he could continue the EUC Support work he had been carrying out and could assist with the Project Management of a Windows 10 migration project.

134. On 6th August 2020 the Claimant was dismissed by reason of redundancy by the administrators.

135. Following the administration, the Windows 10 project management was carried out from India.

Questions to be answered (Webb)

136. Was there a **transfer of an undertaking, business or part** of an undertaking or business to another person?

    There was a transfer of some of the business of Central and Shared Services to Travelex Central Services.

137. Was there an **organised grouping of resources** which had the objective of pursuing an economic activity?

    There was an organised grouping of employees who were pursuing the economic activities of Travelex UK Limited by administratively supporting their business prior to the transfer.

138. Following the transfer, did the organised grouping of resources **retain its identity**?

    Following the transfer, some of the organised grouping of resources retained their identity. The EUC Support retained its identity.

139. Was the Claimant in question **assigned to the organised grouping of resources** which is the subject of the relevant transfer?

    The Claimant was not assigned to an organised grouping of resources which was the subject of the relevant transfer. In a redundancy exercise unrelated to the transfer, he had been selected for redundancy on 30th June 2020.

    The Claimant had ceased to undertake his role as EUC Support Manager following the cyber-attack in December 2019. That role ceased to exist entirely from 30th June 2020. The Claimant was temporarily assigned to

EUC Support and then the Windows 10 project. That assignment was due to end on 18th September 2020. As per **Bademosi v Securiplan** EAT/1128/02 on temporary assignment (and regulation 2 (1) which states that "assigned" means assigned other than on a temporary basis) the Claimant was not therefore assigned to the organised grouping of resources which was the subject of the relevant transfer.

As per **BT Managed Services Ltd v Edwards** [2015] IRLR 994 "The question of whether or not an individual is "assigned" to the organised grouping of resources or employees that is subject to the relevant transfer, will generally require some level of participation or, in the case of temporary absence, an expectation of future participation, in carrying-out the relevant activities on behalf of the client, which was the principal purpose of the organised grouping." There was no participation and no expectation of future participation by the Claimant – he had ceased to undertake his managerial role and was not intended to resume it.

140. Were they so **assigned immediately before the transfer**?

The Claimant was not so assigned as his managerial role had ceased to exist and he was not carrying it out and the temporary nature of the alternative roles in EUC Support and the Windows 10 project means that he was not so assigned immediately before the transfer.'

102 The reasons why Ms Robinson asserted that Ms Martin's employment did not transfer to Central Services were these.

102.1 "The Claimant had been furloughed from 24th March 2020".

102.2 She "had been selected for redundancy."

102.3 "She had not returned to work. She had been on garden leave from 27th July 2020. At the time of the administration, she had not carried out any economic activity for four and a half months."

102.4 Ms Martin was not assigned to the part of TUK's undertaking that transferred to Central Services because

> "There was no participation and no expectation of future participation by the Claimant – she had ceased to undertake any activity for TUK and was not to resume any such activity."

102.5 And finally, "The Claimant was not so assigned immediately before the transfer – **Litster**."

A discussion and some general conclusions in regard to the way in which TUPE must be interpreted to apply

103 In her submissions concerning the case of Ms Thakkar, Ms Robinson in effect in paragraph 53 asked the question whether there was a transfer of "an organised grouping of resources which has the objective of pursuing an economic activity". That, after all, is the question that arises from the application of regulation 3(1)(a) of TUPE, read with (as it must be) regulation 3(2) of TUPE. Paragraph 54 of the submissions was therefore in one sense superfluous, but it was helpful to ask the question what was it that might have been the subject of a regulation 3(1)(a) transfer.

104 In fact, I did not agree that the relevant organised grouping of resources had only the objective of undertaking foreign exchange and VAT administration functions, since in my view the relevant grouping was done by TUK and therefore the issue of what was the purpose of the organised grouping of resources of TUK had to be asked by reference to what TUK did before the claimed TUPE transfer. That plainly included the sale of some travel tickets, together with cash collection and vaulting services.

105 In addition, the focus in deciding whether or not an economic entity within the meaning of regulation 3(1)(a) of TUPE retained its identity after a putative TUPE transfer must be on the "economic activity" of the entity, which in my view cannot be determined solely or even mainly by reference to the manner in which employees are required to work before and after the claimed TUPE transfer, unless the economic activity has to be identified solely or mainly from that manner.

106 Here, there was in my view no possibility lawfully of determining the economic activity of TUK by reference only or even mainly to the way in which TUK's employees were employed before and after 6 August 2020. If that were legally possible then it would be open to a putative transferee to reorganise the jobs of the workforce after the putative transfer and by doing so cause there to be no TUPE transfer. That would be contrary to the purpose and intended effect of TUPE and the Acquired Rights Directive stated in paragraph 43 of the ECJ's judgment in *Klarenberg*, which I have set out in paragraph 92 above. It would also negate the protection conferred by regulation 7(1) of TUPE on an affected employee in the circumstance that there is in place in regulation 7(2)-(3A) of TUPE considerable protection of the interests of a transferee.

107 As for the fact that the Covid-19 lockdown of 24 March 2020 onwards caused TUK to close down most of its operations, and certainly those at Heathrow, in the period from March to July 2020, that was in my view incapable of precluding the application of TUPE to the contracts of employment of staff who were furloughed. That was because that lockdown period both could and in my view should be regarded as a temporary closure within the meaning of the ECJ case law including that to which I refer in paragraph 91 above.

108 The case of *Huke* (which was relied on by Ms Robinson in paragraph 55 of her written closing submissions, which I have set out in paragraph 100 above) concerned a service

provision change within the meaning of regulation 3(1)(b) of TUPE, and was therefore not directly applicable. In any event, I could not see how a diminution in the size of an economic entity after a claimed TUPE transfer could preclude there being such a transfer if the economic activity of the entity was resumed (albeit on a smaller scale) after the transfer.

109 Turning to the issue of assignment, it appeared to me that it would negate the protection provided by regulation 4 of TUPE if it were possible lawfully to conclude that because an employee is under notice of redundancy, he or she is not assigned to an undertaking or part of an undertaking which is transferred. The only case which provided any kind of support for the proposition that because an employee is under notice of redundancy, he or she is not assigned to an undertaking or part of an undertaking which is transferred, was that of *BT Managed Services Ltd v Edwards* [2015] IRLR 994, [2016] ICR 733. That case concerned a member of staff who was absent from work permanently on account of sickness. Permission to appeal to the Court of Appeal was (as recorded at the end of the passage from *Harvey* set out in paragraph 96 above) given, but the case settled. In assessing the applicability of the ruling in *Edwards*, I therefore considered the situation from the point of view of what one might call basic principles.

110 The first such principle was that it cannot (or at least in my view cannot rightly) be said that the mere fact that an employee has been given notice of dismissal (for whatever reason) means that the employee's employment relationship no longer exists within the economic entity in which he or she is employed. In addition, as a second basic principle, the "decisive criterion" is (see the passage set out at the end of paragraph 94 above)

> "whether or not a transfer takes place of the department to which [the employee in question was] assigned and which formed the organisational framework within which [the employee's] employment relationship took effect".

111 In any event, the statements made by the EAT in *Edwards* can and in my view should be confined to the situation in which an employee is permanently absent from work because of sickness. That is not least because the only sensible or practical purpose that would be served by an employee being regarded as being permanently absent from work because of sickness would be to ensure that permanent ill health insurance payments continue to be made to the employee. That is a very different situation from that of an employee who, until he or she was given notice of dismissal (including because of redundancy), was actively engaged in the economic entity in question, or would have been so engaged if there had not been for example a lockdown of the sort that was imposed with effect from 24 March 2020 onwards by reason of Covid-19.

My conclusion on the issue stated in paragraph 7 above

112 The claims of the following claimants related to the part of the business of TUK which transferred to Central Services:

112.1 Mr Sharma,

112.2 Ms McInally,

112.3 Ms Martin,

112.4 Mr Webb, and

112.5 Mr Rameez.

113 The rule 35 participants accepted, in my view plainly correctly, that there was a TUPE transfer of part of the operations of TUK to Central Services on 6 August 2020. As far as I could see, the only issue concerning the five claimants to whom I refer in the preceding paragraph above which arose therefore was whether or not they were assigned to the part of TUK's business which transferred to Central Services.

114 In my view, applying the case law which I have set out or referred to in paragraphs 85-96 above and what I say so far as relevant in paragraphs 105-111 above, there was no room for any conclusion other than that those claimants were so assigned and that their contracts of employment therefore transferred to Central Services on 6 August 2020. If and in so far as there was room for a different conclusion, I concluded on the evidence before me that in all cases the claimants to whom I refer in paragraph 112 above were assigned to work in a part of the operations of TUK which constituted an economic entity which retained its identity immediately after 6 August 2020 and was transferred to Central Services on 6 August 2020. For the avoidance of doubt, I concluded that

114.1 Mr Sharma, Ms McInally and Mr Webb were assigned to the business defined as set out in paragraph 27 above; and

114.2 the fact that they had been given notice of redundancy before 6 August 2020 did not in my view mean, either as a matter of law or as a matter of fact, that their assignment to that business had ceased by 6 August 2020.

115 Also for the avoidance of doubt, Ms Martin and Mr Rameez were assigned to the part of TUK's business which was based in outlets in Asda supermarkets. The fact that they were under notice of redundancy did not, either as a matter of law, or alternatively as a matter of fact, alter that. That business also plainly transferred to Central Services on 6 August 2020.

116 The claims of the following claimants related to the part of the business of TUK which is now operated by Foreign Coin:

116.1 Ms Thakkar,

116.2 Mr Thomas,

116.3 Mr Pinto, and

116.4 Ms Lloyd.

117 Those claimants were all plainly assigned to the part of the business of TUK which was done in or in relation to Heathrow. The fact that that they were placed on furlough because of the first Covid-19 lockdown neither required nor justified a different conclusion. That lockdown caused a temporary cessation in the business which was transferred, which was the business to which the so-called Top 55 employees were assigned. In my view there was no alternative to a conclusion that that business was the subject of a TUPE transfer, but even if there were such an alternative, I concluded that that business was indeed the subject of a TUPE transfer. That was because

117.1 the assets which were used for that business were transferred under the agreement to which I refer in paragraphs 18-22 above, and

117.2 the 55 employees whose employment with Foreign Coin started on 6 August 2020 were

117.2.1 told that they were going to do so the day before, so that they were plainly identified as being necessary for that business, and

117.2.2 (see paragraph 51 above) given continuity of service under the ERA 1996, as (see paragraph 38 of Ms Burns' first witness statement, which I have set out in paragraph 50 above) "that was considered [presumably by the management of TUK and Foreign Coin, or at least that of Foreign Coin] to be the correct legal analysis, and it also seemed like the fair thing to do."

118 For the avoidance of doubt, I regarded the recognition that the top 55 staff of the Heathrow and Heathrow-related operations of TUK should be regarded as having continuity of service for the purposes of the ERA 1996 as being plainly correct, in that their contracts of employment were transferred under TUPE to Foreign Coin.

119 I could in those circumstances see no alternative to the conclusion that the four claimants referred to in paragraph 115 above were assigned to the part of the business of TUK which transferred to Foreign Coin. However, if there were such an alternative, then in any event it was my clear conclusion that the contracts of employment of those claimants transferred under TUPE to Foreign Coin on 6 August 2020. For the avoidance of doubt, the factors to which Ms Burns referred in paragraph 25 of her witness statement, which I have set out in paragraph 14 above, did not mean that there was no transfer of the business of TUK which was the subject of the agreement referred to in paragraphs 18-22 above. Rather, the factors to which Ms Burns referred to in paragraph 25 of her witness statement were relevant to the fact that there was on

6 August 2020 a temporary cessation of the part of the business of TUK to which the assets referred to in the agreement referred to in paragraphs 18-22 above related. That part of the business was an economic entity which retained its identity on and immediately after 6 August 2020 despite the fact that its size was, by reason of that temporary cessation, much reduced.

The way forward in the light of my above conclusions

120 At the end of the hearing, on 11 April 2022, I had a discussion with Ms Robinson about the way forward if I found in favour of the claimants on the preliminary issue stated in paragraph 7 above. Ms Robinson pointed out what was said by EJ R Lewis in paragraph 21 of his case management summary on page 11 of the hearing bundle. That was this:

> "The first question was how TCS and TFCS should be party to the hearing on transfer while reserving their rights to resist applications to amend if need be at a later stage. I had first proposed joining them under Rule 34. Ms Robinson resisted this vigorously, no doubt for fear that joinder would prejudice her clients' rights in future when resisting amendment, by appearing to constitute an adjudication that the new respondents might be liable to a claimant."

121 As I pointed out on 11 April 2022, given the decision of the Court of Appeal in *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209 and that of the EAT in *Vaughan v Modality Partnership* [2021] IRLR 97, it was difficult to see in the event that I found in favour of the claimants on the issue set out in paragraph 7 above, how I could lawfully decline to (1) permit the claimants to amend their claims so that they were made against Central Services and Foreign Coin and (2) join Central Services and Foreign Coin. At the time, on 11 April 2022, however, I said that I would not at this time give permission to the claimants to amend their claims and join Central Services and Foreign Coin as respondents.

122 Nevertheless, on reflection, I believe that I should both (1) give the claimants permission to amend their claims so that they are made against Central Services and Foreign Coin and (2) join the latter two parties as respondents. I therefore have made orders 1 and 2 below. If Central Services and Foreign Coin object to either or both orders then they must do so in accordance with order number 3 below. If the claimants wish to respond to that objection then should do so in accordance with order number 4 below. I will then make a decision on the papers unless Central Services and/or Foreign Coin asks for an oral hearing at which to make oral representations against the making of orders 1 and 2 below. Order 5 is consequential on orders 1 and 2.

In conclusion

123 In conclusion, I find in favour of all of the lead claimants on the issue stated in paragraph 7 above. However, that finding is subject to the possibility of the argument based on *Litster* to which I refer in paragraphs 35-40 above being (1) raised by the rule 35 participants, as respondents, when complying with order number 3 (or as the case may be 5) below, and (2) subsequently found to be correct.

Other matters

124 The parties are reminded of the Presidential Guidance on 'General Case Management', which can be found at:
https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/

125 The parties are also reminded of their obligation under rule 2 to assist the tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the tribunal.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

Permission to amend the claim forms by the addition of Central Services or (as applicable) Foreign Coin

1 The claimants have permission to amend their claims to add as a respondent either Travelex Central Services Limited or (as applicable to the claimant in question) Travelex Foreign Coin Services Ltd, on the basis that the liability to meet the relevant claim has transferred to the relevant one of those two companies.

2 Those two companies, namely Travelex Foreign Coin Services Ltd and Travelex Central Services Limited, are joined as respondents. Service on them of the claim forms is dispensed with.

3 If either Travelex Foreign Coin Services Ltd or Travelex Central Services Limited objects to the above orders, then that respondent must, by 28 days from the date when this document was sent to the parties, state that objection and the reasons for it. If no such objection is so stated then the relevant respondent must, by 28 days from the date when this document is sent to the parties, respond to the claims as stated by the claimants, amended as stated in order 1 above.

4 If any claimant wishes to respond to any objection stated under order 3 above, then that claimant must do so by 56 days from the date when this document was sent to the parties.

5 In the event that an objection is stated under order 3 above, then, unless the party stating the objection seeks an oral hearing at which to make representations in support of the objection, I will, without a hearing and on the papers only, consider (1) the objection, (2) the stated reasons for it, and (3) any response to the objection, and decide whether to revoke or vary the order to which objection was stated. If I do not decide to revoke the order then I will at that time state a new date for compliance with the order.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 54 or 57 or hold a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative

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Employment Judge Hyams

Date: 29 April 2022

Sent to the parties on:

4 May 2022

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For Secretary of the Tribunals

List of Claimants

Case Ref No	Case
3314963/2020	Mr A Sharma
2206597/2020	Ms C Feraouche
3311691/2020	Mrs F Byrne
3311707/2020	Mrs M Lloyd
3312252/2020	Ms A Thakkar
3313248/2020	Miss R Shalloe
3314154/2020	Mrs J Martin
3314691/2020	Ms E Ardito
3300097/2021	Mr J Webb
3300412/2021	Mrs S Butt
3313284/2020	Mr N Thomas
3313285/2020	Mrs M Carvalho
3313286/2020	Mr W Pinto
3313287/2020	Mr A Fernandes
3313288/2020	Miss S Fernandes
3313289/2020	Mr Z Akbarali
3313290/2020	Mr N Lopes
3313291/2020	Ms J Fernandes
3313292/2020	Mrs B Ghuman
3313293/2020	Ms P Mahay
3313294/2020	Ms A Brzozowska
3313295/2020	Ms M Gonsalves
3313296/2020	Mr S Dhillon
3313297/2020	Mr J Camelo
3313298/2020	Ms V Da Costa
3313299/2020	Ms N Rego
3313300/2020	Ms R Fernandes
3313301/2020	Mr J Dcunha
3313302/2020	Mr A Cardoso
3313303/2020	Ms F Rodrigues
3313304/2020	Mr A Abranches
2204083/2020	Mr D Phelps
2207010/2020	Mrs A Park
2207047/2020	Mr MR Mohamed Rameez
2207716/2020	Miss J McInally
3313358/2020	Mrs M Marsh