



# EMPLOYMENT TRIBUNALS

**Claimant:** Elle Kim

**Respondents:** Finablr Ltd (1)  
UAE Exchange UK Ltd (2)  
Finablr Plc (3)  
Finablr Venture Holdings Ltd (4)

**Heard at:** London Central (by cvp)      **On:** 22-24 June 2022

**Before:** Employment Judge Housego  
Tribunal Member Brazier  
Tribunal Member Brett

## Representation

**Claimant:** Alice Beech, of Counsel, instructed by Keystone Law Group Plc

**Respondents:** Katya Hosking, of Counsel, instructed by Druces LLP, for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not attend and were not represented.

## JUDGMENT

1. The 1<sup>st</sup> Respondent made unlawful deductions from the wages of the Claimant and is ordered to pay to the Claimant the sum of £248,307.72.
2. The 1<sup>st</sup> Respondent is ordered to pay to the Claimant £6,258.48 in respect of holiday entitlement accrued but not taken at the effective date of termination of employment.
3. The 1<sup>st</sup> Respondent is ordered to pay to the Claimant £25,000 in respect of breach of contract.
4. The claims against the 2<sup>nd</sup> Respondent are dismissed.
5. The claims against the 3<sup>rd</sup> Respondent are stayed.
6. The claims against the 4<sup>th</sup> Respondent are dismissed.

# REASONS

## The hearing

1. The Tribunal heard oral evidence from Elle Kim, from Robert Miller and from Ritesh Lahoti. There was an agreed bundle of documents of 180 pages. A bank statement was added as the hearing started. Case reports were provided by Counsel. Alice Beech provided a helpful written submission setting out the way the claims were pleaded. Katya Hosking followed the organisation of this submission in the way the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' cases were put. This was of much more help than the list of issues in the bundle of documents and the Tribunal used it as a guide.
2. Counsel conferred before the hearing, and the Tribunal records its gratitude to them in the way they narrowed the issues, agreed facts where possible, agreed a timetable for the hearing, cross examined forensically, adhered to their timetable and made clear focussed submissions in conclusion. As the matter is complex, we reserved our decision.

## Facts found

3. The Respondents all formed part of a group of companies, trading around the world in financial services. Perhaps the best known of these is Travelex. These companies were privately owned by an Indian national, until the UK Plc (the 3<sup>rd</sup> Respondent) floated on the London stock exchange in March 2019. There were underlying financial issues, and, in summary, the group imploded, with its share price collapsing by 97% before trading was suspended in March 2020. Travelex was sold off, and the rest of Finablr Plc later sold for 1 US\$. That deal still awaits regulatory approval. The Claimant's claims arose from events during the turmoil that arose, or commenced, at this time. As discussed with Counsel during the hearing, a Wikipedia entry sets out the known history for any reader of this judgment who wishes to know more - <https://en.wikipedia.org/wiki/Finablr> with the usual caveat that Wikipedia entries are not guaranteed to be accurate.
4. Ms Kim was recruited in 2019. She was then resident in the USA<sup>1</sup>. Her contract was dated 14 July 2019. She started work on 01 August 2019. Her remit was to develop an app which would extend the range of services offered by the group of companies. It was called Astryve. It was to be targeted, in the first instance, at Indians, both in India and in the UK. The person who owned the companies is an Indian national resident either in the UAE or perhaps now in India.
5. Elle Kim's basic pay was to be £240,000 a year (with other benefits and potential bonuses). She became resident in London. Her contract provided for her to be based in London (with travel elsewhere). Her salary was expressed in £ sterling. The Courts of England and Wales had exclusive jurisdiction to settle any dispute about the contract<sup>2</sup>. It was a contract in England and Wales.

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<sup>1</sup> Address given in the contract of employment.

<sup>2</sup> Clause 25:15, 107/180.

6. The company which is stated in the contract of employment to be her employer is Finablr Ltd, which is a company incorporated in UAE.

7. Some explanation of a very complex company structure is necessary.

7.1. Finablr Ltd (the 1<sup>st</sup> Respondent) is 100% owned by Finablr Plc. Finablr Ltd is the company which is named in the contract as employing the Claimant. It is registered in the UAE, and is a holding company, owning subsidiaries. It does not trade, and never has. What happened to its various other subsidiaries is not relevant to the claims. All the senior management of the group was employed by it, save Messrs Moorhouse and Miller who were employed by Finablr Plc. There were about 20 employees of Finablr Ltd. They included Mehul Desai, Elle Kim's line report, based in the USA. Many of them were also directors of other companies in the Group. When trading in the shares of Finablr Plc were suspended it appears (from the evidence of Robert Miller) that most of the employees of Finablr Ltd ceased to play any role in the affairs of the group, leaving Elle Kim and her line manager Mehul Desai, who left in September 2020, and possibly one or two others.

7.2. UAE Exchange UK Ltd (the 2<sup>nd</sup> Respondent), is a UK company which did trade, mainly in the UK. It is 100% owned by Finablr Ltd. Ritesh Lahoti is now sole director of UAE Exchange Ltd. He was appointed on 29 March 2021. Previously he was head of finance. He has been with the company about 10 years. He was appointed a director on 29 March 2021, after the previous CEO, Aaditya Rathod, left. Robert Miller was a director of UAE Exchange Ltd from 14 May 2020 until 02 March 2022. Both Robert Miller and Robert Moorhouse were moved from Finablr Plc to UAE Exchange UK Ltd in May 2020. That company is a standalone business with about 7 stores and about 50 employees of whom about 40 are customer facing.

7.3. Finablr Plc (the 3<sup>rd</sup> Respondent) was owned by various investment vehicles of Dr B R Shetty. It floated in May 2019, in London. Trading in shares was suspended in March 2020. Senior management based abroad was, we were told, then conspicuous by its absence. Robert Miller and Robert Moorhouse were two senior managers employed by Finablr Plc (on salaries, we were told, of £300,000 and £240,000) who remained.

7.4. While it would appear that the Plc is at the top of the organisational pyramid, in fact the management of the Group was by people who were involved with Finablr Ltd.

7.5. Travelex was a completely separate company autonomous within the group.

7.6. There was no reason apparent to the Tribunal, and Elle Kim did not know of any, why her contract of employment was with Finablr Ltd and not with Finablr Plc, which would have been more logical. Ms Kim's line manager was Mehul Desai, Chief Technology Officer, based in the US. It is not entirely clear by whom he was employed. Mehul Desai left in September 2020. Robert Miller thought Mehul Desai was employed by Finablr Ltd, which seems likely, and the Tribunal so finds. Mr Desai reported to the CEO of the group, Promoth Manghat, in UAE (he was part of Finablr Ltd).

Promoth Manghat left in March 2020. Bhairav Trivedi replaced him, but he left in January 2021.

- 7.7. Robert Miller and Robert Moorhouse were appointed as directors of Finablr Plc on 14 May 2020. Robert Moorhouse resigned on 31 December 2020. Robert Miller was appointed CEO of Finablr Plc on 01 January 2021. He resigned on 03 March 2022. They were employed by UAE Exchange Ltd from May 2020, because that company could pay them, and Finablr Plc could not.
- 7.8. In 2019 Ms Kim recruited a team of people (between 6 and 10: the evidence varied), all UK based. They were all employed by Travelex. It appears that Ms Kim was not employed by Travelex as Mr Desai wanted her in the company by whom he was employed, and so without interference from Travelex. Those 6 or 7 people were all dismissed as redundant soon after the crisis stated, and the Astryve project abandoned.
8. Robert Miller joined the group in October 2019 as human resources director. He was employed by Finablr Plc. He and Robert Moorhouse did a substantial amount of work at the time seeking to salvage the group. They were moved to UAE Exchange UK Ltd when the crisis leading to the suspension of the shares in Finablr Plc occurred. This was, we were told and accept, to avoid difficulties of trading while insolvent. Messrs Miller and Moorhouse met Ritesh Lahoti and Aaditya Rathod (CEO of UAE Exchange Ltd). Ritesh Lahoti was told they would be joining his payroll. He had no choice in the matter. Later, after Aaditya Rathod had left, Robert Miller said he wanted Elle Kim to move to UAE Exchange Ltd as well. At the time Ritesh Lahoti did not know what she earned but refused. The matter was not raised again. Ritesh Lahoti was told that the money paid to Robert Miller and to Robert Moorhouse would be refunded when Finablr Plc was sold. That has not yet happened, because the deal awaits regulatory approval. As the turnover of UAE Exchange UK Ltd was £4.1m pre pandemic and £2.5m in 2020, Ritesh Lahoti's reluctance to take on someone who was not going to do any work for his company was understandable. The burden of paying over £½m to Robert Miller and Robert Moorhouse was already a very large part of his turnover. His salary costs were a little over £2m a year at the time they joined him (not including their pay).
9. Finablr Ltd had no payroll department, or mechanism for paying people in a conventional way. A table of payments was provided (and it has 2 payments missing, each of US\$ 25,350 made from an account of Finablr Plc on 11 May 2020 and 01 October 2020). Those other payments were all of £20,000. They were:
- |                        |                               |
|------------------------|-------------------------------|
| 9.1. August 2019 -     | UX Holdings Ltd               |
| 9.2. September 2019 -  | Finablr Ventures Holdings Ltd |
| 9.3. October 2019 -    | Finablr Ventures Holdings Ltd |
| 9.4. November 2019 -   | Finablr Ventures Holdings Ltd |
| 9.5. December 2019 -   | Finablr Ventures Holdings Ltd |
| 9.6. January 2020 -    | Finablr Ventures Holdings Ltd |
| 9.7. February 2020 -   | Finablr Ltd                   |
| 9.8. 11 May 2020 -     | Finablr Plc                   |
| 9.9. 01 October 2020 - | Finablr Plc                   |

10. It is apparent that the financial controls in the group were, to use a neutral phrase, unconventional. Money was paid out from wherever it happened to be. Very highly paid people (it seems Elle Kim was not alone) were being paid gross with no provision for the payment of tax on their earnings.
11. The Tribunal was not told that Elle Kim made appropriate arrangements to pay tax or national insurance on these payments.
12. When the crisis hit there was a vacuum at a senior level. An executive committee was formed, including Robert Miller and Robert Moorhouse. Their role was to seek out investors and find purchasers for the business, which had no, or very little, cash. Few if any people were paid during that period.
13. The pandemic's first lockdown happened soon after the crisis arose. Elle Kim was at home. There was nothing for her to do on her project. She was in contact with Robert Miller, and with Mehul Desai. There was one issue about a redundancy issue about which she contacted Robert Miller. He was human resources director, so this is unsurprising. She wrote a business to consumer strategy and plan (different to the app, Astryve) which she had written for Mehul Desai, and turned it into a PowerPoint presentation, at the request of Robert Miller. That is marked as updated on 04 August 2020. Robert Miller and Robert Moorhouse were trying to find, and then to interest, possible investors as well as deal with the financial and organisational mayhem that had blown up. They did not involve Elle Kim in that task, and she did not put herself forward. Ms Kim's role had been to report to the Chief Technology Officer in the development of a new product, moving with the changes in technology. As Robert Miller pointed out to us, he was not dealing with anything to develop for the future, but engaging in a fire sale of anything that might be worth money immediately as an income producing asset.
14. The PowerPoint is doubtless an impressive business plan, but it was not a developed product. The team to build Astryve had all been dismissed. The Tribunal accepted Robert Miller's evidence that while he thought the PowerPoint might be useful to have, in the event no potential purchaser was interested in it.
15. Elle Kim had, by August 2020, done almost nothing within the business, save the B2c business plan, since March 2020: her evidence that she was waiting at home to be called upon.
16. The WhatsApp messages between Elle Kim and Robert Miller, ending in August 2020, show Elle Kim repeatedly asking to be paid, and to be moved to a UK company. It is apparent from them that at that time she continued to regard herself as employed by Finablr Ltd, precisely because she was anxious to be moved from it to a UK company. She did not specify which one. It is not that she was (then) asserting that she was already part of UAE Exchange Ltd. In fact, it could only have been UAE Exchange (UK) Ltd, as the other UK companies were not producing sufficient (or any) income, but had Elle Kim thought, at the time, that she was an employee of UAE Exchange UK Ltd she would undoubtedly have said so. While a transfer of undertaking takes place by operation of law, so that the employee does not have to have knowledge of it, that could not have been the case here. The argument is a later construct.

17. Ultimately, she resigned with immediate effect, on 19 April 2021 by email to Mehul Desai and to Robert Miller, citing non-payment of salary.

18. There is no doubt, and it is not contested, that this was a constructive dismissal.

### Claims made

19. Elle Kim claims:

19.1. Unpaid salary;

19.2. Holiday pay, for both the calendar year 2020 and for that part of 2021 before she resigned;

19.3. A claim for breach of contract for notice pay of six months' pay (dependent on a finding of unfair constructive dismissal, although no claim for unfair dismissal can be made as service was less than two years);

19.4. A further claim for breach of contract for unpaid pension contributions of 3% of salary, from inception to resignation (it being accepted that these two claims for breach of contract - £120,000 for notice pay, and £12177.53 pension contributions - have to be capped at £25,000 but far exceed that amount);

19.5. Expenses of £17,061.04<sup>3</sup>. This is in the Particulars of Claim, but then Elle Kim thought that the October payment was for expenses, and so it did not feature in her Schedule of Loss. She now does not challenge that the payment was salary. It follows that her claim for expenses needs adjudication.

19.6. An uplift of 25% for breach of the Acas grievance and disciplinary codes.

19.7. If the claim that there was a transfer of an undertaking succeeds, compensation for failing to inform and consult about that transfer.

### The 3<sup>rd</sup> Respondent

20. The 3<sup>rd</sup> Respondent, Finablr Plc went into administration on 11 March 2022. The consent of the administrators to continue with the action has not been obtained. Accordingly, the claim against them must be stayed.

### The 4<sup>th</sup> Respondent

21. The 4<sup>th</sup> Respondent ceased to instruct the solicitors retained by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents some time ago. There has been nothing from them since. In these circumstances the Tribunal has various options<sup>4</sup>. The Tribunal decided to proceed with the hearing of the claims against the 4<sup>th</sup> Respondent. No information was available as to why the 4<sup>th</sup> Respondent had taken this decision. If the solicitors previously retained by the 4<sup>th</sup> Respondent, who remain retained

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<sup>3</sup> Claimant's witness statement §40 citing email of 18 August 2020 to Robert Miller, 125/180 of bundle of documents.

<sup>4</sup> Rule 47

by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent know, they would not be able to tell the Tribunal for professional reasons. In practical terms this may make little difference. The only connection – if a substantial one – Elle Kim had with the 4<sup>th</sup> Respondent is that £100,000 of the money paid to her was paid by them. Having considered all the evidence, the claims made against the 4<sup>th</sup> Respondent fail, and are dismissed. She never worked for the 4<sup>th</sup> Respondent, and what happened was that someone in Finablr Ltd arranged for money that reposed in the 4<sup>th</sup> Respondent's bank account to be paid to the Claimant.

The real issue in this case

22. There is no doubt but that Elle Kim is owed a lot of money by one of the Respondents. Because the 1<sup>st</sup> Respondent, Finablr Ltd, is a company incorporated in Abu Dhabi, and because (it appears) those running it have abandoned it, and because the value of its assets (its subsidiaries) is likely either to be negligible or impossibly hard to attack, understandably Elle Kim seeks recompense from the 2<sup>nd</sup> Respondent, UAE Exchange UK Ltd, which is a UK company trading profitably in the UK.

The basis of the claim

23. The routes by which it is asserted that the 2<sup>nd</sup> Respondent, UAE Exchange UK Ltd, is liable to Elle Kim are several:

23.1. The initial contract with Finablr Ltd was always intended to be short term, and temporary. There was no payroll set up for her, they paid her only once (February 2020), she was UK based, as was the team she assembled, and it was always intended that she would be employed by a UK based company. Robert Miller and Robert Moorhouse were employed in UK companies and were moved to UAE Exchange UK Ltd from May 2020. Looking at the reality of the situation, the claim was that in fact she was employed by the same company as were they and (with Robert Miller) doing work for the benefit of the whole group, and it was Robert Miller who arranged for her to be paid, on those occasions when she was paid.

23.2. Alternatively, the same facts amount to the transfer of an undertaking. She was part of a small number of people (three: herself, Robert Miller and Robert Moorhouse) working at a senior level toward the rescue of the group's businesses after the management prior to February 2020 had, for want of a better phrase, jumped ship. This was an economic entity: an organised grouping of workers. It did not matter that it had no assets, for that is not necessary. It was not for single project, and it retained its identity after transfer to UAE Exchange UK Ltd, as everyone worked to try to salvage something from the wreckage. It mattered not that her work was not related to the day-to-day operations of UAE Exchange UK Ltd, for this company was the only vehicle which could support them in their work to try to save the businesses.

23.3. A third route contended for was that Finablr Ltd was only acting as the agent for the true employer, which was UAE Exchange UK Ltd, the only business in the UK (where she was based) which could employ her.

Submissions on behalf of the Respondents

24. The identity of the employer, and TUPE, were the first topics. The starting point was the contract – Clark v Harney Westwood & Reigals & 4 O’rs UKEAT 00018/20/BA UKEAT/0019/20/BA & UKEATPA/0576/19/BA, 21 December 2020. Counsel agreed with me that that had to be read in the light of the Supreme Court in Uber BV & Ors v Aslam & Ors [2021] UKSC 5 – it was not the starting point but part of the factual matrix in deciding what the employment relationship was.
25. The Claimant accepted that at the start of her employment it was with Finabl Ltd – it was her case that it was intended to be temporary. It was not being alleged (apart from the agency argument) that it was in any way a sham. That being so, it had to be shown that there had been a change in some way. Perhaps novation or TUPE, but the Claimant had to show that a particular entity had consistently acted as employer.
26. In August 2019, did the contract reflect the intentions of the parties, and what was the identity of the employer in May 2020? Was there a change to make UAE Exchange UK Ltd her employer, and if so, how did that happen?
27. The Claimant said that she, Robert Miller and Robert Moorhouse together constituted an economic entity which retained its identity after a transfer to UAE Exchange Ltd. The case had not been put that way until recently. The Claimant said that she was part of an economic entity with them, and so as they transferred to UAE Exchange UK Ltd, so did she as a matter of law. That also gave rise to the claim for failure to inform and consult.
28. Cheesman v R Brewer Contracts Ltd EAT/0909/98/EAT/952/98 at §10 set out that there had to be an organised grouping of persons for there to be an economic entity for a specific objective, but not a single task. There need not be assets, but it needed to be autonomous. An activity was not an identity (§6 of *Cheesman*). The most that could be said was that this was an activity.
29. All the witnesses had done their best, and all acknowledged gaps and errors in their evidence. They could all be relied upon, with the limitation that this was a time of chaos, and that there was much that was unknown to them.
30. Of course, the Claimant should have been set up on a proper UK payroll, and this was a significant issue for the Respondents, but however unsatisfactory that was, that did not mean that the contract between the Claimant and Finabl Ltd was other than what it said - §55 of *Clarke*: a breach of Cayman Islands law was just that, and did not make the contract a nullity. I observed that I noted that it was not asserted that the contract was tainted by illegality.
31. From May 2019 to May 2020 the Claimant accepted that Finabl Ltd was her employer. She had discussed with Robert Miller her wish to move to a UK entity. From May 2020 to August 2020 the Claimant repeatedly asked to be moved to a UK company. From August 2020 until 09 April 2021 there was little contact save some solicitors letters.
32. In the written submissions of Counsel for the Claimant it was said that this did not reflect reality for three reasons: no payroll set up, they paid her only once,



and she and her team were based in the UK. That could not be the finding of the Tribunal given the oral evidence of the Claimant that at the commencement of her employment she accepted that Finablr Ltd was her employer. The existence of a payroll was not a factor, as many companies had service companies who paid their employees, and that was precisely what Robert Miller was organising when the problems began, in February 2020.

33. UAE Exchange UK Ltd had never paid the Claimant. There was no connection between them. It was a standalone business trading in the UK, with shops. Her role was to develop a group wide technology related products.

34. There was always the intention to move the Claimant to a UK company with her Travelex employed team, and Robert Miller and Mehul Desai had discussed this with her. But that there was an intention to do so does not mean that it happened. It was never in mind that Elle Kim would be employed by UAE Exchange Services Ltd. While the contract with Finablr Ltd was intended to be temporary, unless someone changed it the contract endured. No one had changed it. That was what the Claimant was wanting, and the Respondents, generically, agreed, but it did not happen. The Claimant had no right to insist on change, and nor was there any duty on the Respondents to do so. Robert Miller's creation of Finablr Services UK Ltd was the intended vehicle to deal with the situation, but the crisis had put a stop to that and so the Claimant remained employed by Finablr Ltd.

35. From May 2020 it was said that UAE Exchange Ltd was the employer for three reasons:

35.1. No payroll – the answer to which had already been given (many companies use other companies to organise payroll);

35.2. That Robert Miller actioned payment for the Claimant's expenses, he then being employed by UAE Exchange UK Ltd. However, Robert Miller's evidence was that these payments were made to a very large number of employees (over 100), funded by the sale of real property owned by the group. This was not Claimant specific. It was a decision of the steering committee for the group, of which he was a part. In fact, the sign off was by a human resources individual as the distribution of emails shows. [Note: the underlying facts in this submission are not disputed.]

35.3. It was said that the Claimant was working with Robert Miller for the benefit of the group – that they formed part of a team. The extent of any cooperation was insufficient in quality and quantity to found such a contention:

35.3.1. It was Mehul Desai who was her line manager at the time. He directed her work, not Robert Miller (for example while Robert Miller asked Elle Kim to produce the 04 August 2020 PowerPoint the work on which it was based was at the direction of Mehul Desai). Mehul Desai was also employed by Finablr Ltd.

35.3.2. In the WhatsApp chats (121/181) the Claimant would approach him before messaging Robert Miller.

- 35.3.3. The discussions about her future were with Mohul Desai as well as Robert Miller. Even well past May 2020 Mohul Desai was clearly much involved.
- 35.3.4. There was very little overlap between anything the Claimant did and what Robert Miller was doing. Before the company crisis Robert Miller had been head of human resources and the Claimant working on the Astryve project. There was no link between them then, other than that they worked in the same office and she would ask him about human resources issues. No link had been created after the crisis arose. Robert Miller was on the executive committee trying to salvage the businesses, and find and negotiate with investors, and the Claimant was not.
- 35.3.5. The group needed the cost of paying Robert Miller and Robert Moorhouse moved out of Finablr Plc to avoid the possibility of trading while insolvent. That did not create any connection between the Claimant and Finablr Ltd.
- 35.3.6. The Claimant was not told about the Prism deal until very late in the day, long after it was agreed, was not involved in any of the discussions with other potential investors (and did not know of them). She was not part of an economic entity with Robert Moorhouse.
- 35.3.7. The only piece of work the Claimant did after February 2020 was the PowerPoint, requested of her by Mohul Desai. One piece of work did not mean she was part of an economic identity.
- 35.3.8. After Mohul Desai left the Claimant did no work for the group (apart from approving one expenses claim) for the group after August 2020.
- 35.3.9. Someone from human resources asked Elle Kim to approve the expense payment and Robert Miller had only been copied in: Mohul Desai had left by then so someone at a senior level had to be involved, and he was doing such things across the group.
- 35.3.10. The Claimant said she was waiting at home for instruction, so had not been involved with anyone, and was not part of a grouping.
- 35.3.11. The Claimant accepted that she had little to do with Ritesh Lahoti. There was no connection between her and UAE Exchange Ltd.
- 35.4. In summary there was no economic entity as claimed, but even if there was the Claimant was not part of it. There were no reporting lines, official or unofficial. Robert Miller was not managing the Claimant and nor were they working together.
- 35.5. There was no evidence about how it was said Robert Moorhouse and the Claimant worked together.
- 35.6. Work she did might benefit the Plc and the group, but that was the case for all senior management.

- 35.7. The Claimant was working on a group project, Astryve. The work of Robert Miller and Robert Moorhouse was for the group also. If the Claimant had anywhere to be moved to it would be Finablr Plc. Miller and Moorhouse had been moved out of the Plc for financial reasons. It did not follow that the Claimant would have been moved as well, because her work had no value to the task of realising value in the group, for her role was about future expansion and product development, which was completely different and not something the Plc could take forward in its situation.
- 35.8. If the Tribunal was minded to find that the Claimant was correct in saying that there was an economic identity which was transferred and retained its identity afterwards, for the reasons given that could only be to Finablr Plc, but the action against that Respondent had to be stayed given the appointment of the administrator.
- 35.9. The Claimant had agreed that she had overlooked the payment of US\$25,500 in May 2020, and accepted in oral evidence that it was salary, and that she could now readily see that the other payment, in October 2022 was also salary as it was of the same amount (in dollars, inevitably a different amount in £s when converted to sterling because of exchange rate differences on the dates of transfer). That was relevant to the issue of the amount of salary unpaid.
36. As to holiday, the figures were not in dispute. There was no contractual right to carry forward, and that foreign travel might not have been possible did not mean that holiday could not be taken. The Claimant was not doing anything else and there was nothing preventing her from taking her holiday in 2020. She said she was “on standby” from August 2020, but there was no work commitment stopping her take holiday, and she had not suggested any other reason.
37. It was accepted that pension contributions had not been made as they should have been, and the sums were not disputed. However, it was clear from case law that the claim was in contract and was not a S13 deduction from wages. It was subject to the overall cap of £25,000.

#### Submissions on behalf of the Claimant

38. Counsel observed that there was no difference between the parties as to the law relevant to the issues.
39. Taking the same order of issues, Counsel started by observing that the Respondents were, in effect, saying this was a sprawling group of companies, and that who was placed where was up to them, and not connected with what they did and with whom. That was not right. The reality of the situation had to be evaluated and assessed.
40. It was conceded that the original employer was Finablr Ltd, but that as matters progressed things were not on all fours with what the contract purported to be the case. There was general confusion, and everything about this employment relationship was based in and connected to England and Wales. There was no payment from Finablr Ltd save one in February 2020.

41. It was said that there was no payroll facility in Finablr Ltd but this was inconsistent with the submission about the company, which had about 20 employees, and there were multiple payments organised before February 2020. The Plc paid her on 3 occasions.
42. Robert Miller accepted in oral evidence that people were almost always employed in the country in which they worked. Elle Kim had recruited a team of 7 people, all of whom were UK employees. This was a change in circumstances. There was no reason for her to be employed by a company registered in the UAE when all her team were in the UK and all her work was UK based.
43. The point about the initial contract was different to that put by Counsel for the Respondents. There had been early discussion about the contract with Finablr Ltd being temporary, and the clear impression given that she would be moved into a UK company: it was set up as a temporary contract. Finablr Ltd was always described as a holding company. She was not involved in anything to do with that: her role was a group wide product development role. On paper the Claimant was left hanging until matters were regularised, in a different employer to what anyone would expect. The reality was just that, and that meant her employer was other than Finablr Ltd.
44. It was inherently objectionable for someone to be in the position of the Claimant, employed by a company which had no activities in the UK. Also, Finablr Ltd had none of the attributes of an employer, in both not processing pay, and not providing work.
45. There was a paucity of documentary information, and a case could be put for the Claimant working in any of the Respondents. The Claimant's evidence was that her line manager Mehul Desai was employed by Finablr Plc. It was in the nature of things that she had no document to prove that, but the Respondents did have access to such documents and could have produced them had they wished. This was a factor to which the Tribunal should give weight: the Claimant's case was that she was in reality part of Finablr Plc, engaged in group work and was in reality part of a team which transferred to UAE Exchange UK Ltd in May 2020.
46. The situation about payments was confusing to say the least. The 4<sup>th</sup> Respondent had made most of the payments, but the Claimant had little to do with that company. It showed how porous the boundaries were within and between the companies in the group. There was no clear demarcation or rigid distinction between the financial activities of group companies. It was easy to see how the employment relationship could traverse companies.
47. Post February 2020 there was minimal documentation. There was no documentation about the move of Robert Miller and Robert Moorhouse from Finablr Plc to UAE Exchange UK Ltd. Their move was undocumented: no documentation should be expected for the Claimant's similar move. Robert Miller and Robert Moorhouse were really employed by UAE Exchange Ltd and it was not just a payroll function, even though Ritesh Lahoti was clear in his oral evidence that he regarded them as directors rather than employees as they played no part in the day to day running of UAE Exchange UK Ltd. As they were employees of UAE Exchange UK Ltd, there was no reason why, without

documentation, the Claimant did not move employers in the same way, and every reason to think that she did. She had no connection with Finablr Ltd, either in terms of the work she did, or what she got paid for doing it, and her whole team was UK based. Work she did after they were dismissed was all UK based.

48. There was no clear evidence of who decided what, about who was employed by which company. This confusion was entirely down to the Respondents, so one had to look at the reality, which was that her employment was solely UK based, and it should be concluded that her employment had moved company as had those of Robert Miller and Robert Moorhouse, to accord with the realities of the situation.
49. A letter from solicitors had said that Finablr (as an umbrella term) could not continue to have Robert Miller and Robert Moorhouse employed by Finablr Plc because the cost of their salaries could not be justified by Finablr Plc when it was insolvent. They needed to be kept working to try to save the businesses. No reason was apparent as to why they could not be paid from another source, as the Claimant had been.
50. Robert Miller and Robert Moorhouse were earning as much or more than the Claimant, so it could not have been a financial reason.
51. It was a red herring to say they were not working on things for UAE Exchange Ltd, for their roles were group wide, as was that of the Claimant.
52. Her role changed too. In February 2020 she stopped work on the Astryve project and worked on the B2c project, to create an opportunity to assist the sale of the businesses.
53. Whether Robert Miller or Robert Moorhouse was able to make use of the B2c idea was not to the point. It was work to the same end, trying to make the businesses saleable.
54. All three remained UK based post February 2020. The Claimant's report line included Robert Miller. Yes, Mehul Desai was involved too, but she was UK based and was reporting to a UK based Robert Miller.
55. In May and October 2020, it was Robert Miller who took charge and ownership of the payment of wages.
56. The Claimant's team was all dismissed by reason of redundancy. That was material to the decision. She was not considered redundant, and she was based in the UK. Her manager Mehul Desai left: with the shrinking of the organisation she was part of a small group of managers in the UK who remained. The reality was that she was not part of Finablr Ltd, whose key people had all departed and which did not trade. In reality she was part of the UK operation, trying to do things globally for the group of companies, just like Robert Miller and Robert Moorhouse.
57. When her manager Mehul Desai left, the only person who could be regarded as her manager was Robert Miller, and so the reality had to be that she was

employed by the same company as he was. It was he who shaped her working conditions, organised her pay, and set her some tasks to do.

58. The lack of any form of documentary evidence was in favour of the appellant, as it was for the Respondents to provide it, particularly the 1<sup>st</sup> Respondent, which said it was her employer.
59. For a transfer of an undertaking no assets were required.
60. As to the May payment – it was accepted that it was salary. The Claimant had just missed that payment when compiling her list of payments received. Her oral evidence was that now she could see how it might be thought to be salary, not that she accepted that it was.
61. HMRC v Stringer [2009] UKHL 31 was clear that non-payment of money due for holiday not taken was a deduction from wages, contrary to S13 Employment Rights Act 1996. Regulation 13(10) of the Working Time Regulations was applicable – the Claimant had not been able to take holiday because of the pandemic and so fell within Regulation 13(10). The figures were 20 days in 2020, of £18,461.59 and 6.78 days in 2021, of £6,258.48.
62. The breach of the Acas Code alleged was that set out in paragraph 58 of the written submission. It was a failure to update solicitors about the investigation that was said to be undertaken about tax and national insurance. The grievance was not dealt with as required by paragraph 40 of the Code. There was a clear set of complaints and they had been ignored.

#### Overall impressions of witnesses

63. The Tribunal agreed that all three witnesses were doing their best to recall accurately what had occurred. They will inevitably have only partial knowledge of what was occurring. There are some areas where they do not agree, but this is more about what conclusions to draw from what happened rather than any dispute of fact.
64. It has to be said that it was remarkable that someone working in the UK was paid £20,000 a month without deductions for tax and national insurance, and also remarkable that someone would wait over a year without pay before resigning. In this saga there is much more than is in the evidence before us about the particular claims made, and their defence.

#### Conclusions

65. Overall, the Tribunal found the submissions of Counsel for the Respondents to be how the Tribunal viewed the case after careful examination of the evidence.

#### The claim that the real employer was UAE Exchange UK Ltd

##### *Short term temporary contract*

66. The submission was that the contract is the starting point. This was discussed in the hearing. It was accepted that the Supreme Court decision in *Uber* made

a difference to the older case law. The Tribunal did not start with the contract, but looked at all the circumstances, of which the contract was part.

67. The contract was between Elle Kim and Finabl Ltd. Elle Kim was not under any illusion that this was not the case, and she knew it was a UAE company. She regarded it as temporary, and plainly that was the intention. When Robert Miller joined as human resources director he fully appreciated that it was inappropriate (to use a neutral word) to have a senior employee working in the UK in a UK contract paid in sterling a very large salary indeed with no accounting for income tax or national insurance, either employee or employer. Plainly he should have done something about it immediately. He did not. He did intend a solution of having a group wide service company to employ everyone in the group working in the UK. This would not have been simple to organise, and he had not been able to conclude this task in the months between him joining the group and the start of the crisis.
68. It is not said (although it might have been) that the contract with Finabl Ltd was a sham and did not reflect the reality of the situation. Elle Kim knew and accepted (and intended) to enter the contract with Finabl Ltd.
69. Nowhere in all the WhatsApp messages did Elle Kim say that she regarded it as short term. She did ask repeatedly to be moved to a UK company, and her line reports were all in Travelex as a convenient place to place them. Robert Miller's Finabl Services Ltd was intended by him to be the employer of them all. Before he joined there is no evidence of how Elle Kim's employment was intended to develop or change.
70. However, it is not, the Tribunal decides, sufficient to say that because it was intended to be (and should have been) a short-term matter until properly structured UK employment was organised that when it was not organised Elle Kim's employment changed to that of another company without anyone doing anything. There is nothing to support the change actually occurred. That it should have occurred is not synonymous with saying that it did occur.

#### *Transfer of an undertaking*

71. This is a cleverly constructed argument, and all the constituent parts of a transfer are identified. The Tribunal did not find it convincing, for the following reasons:
- 71.1. Elle Kim's project work was doubtless potentially very exciting and in future a potentially profitable way of driving the group's business to become integrated across its revenue and business streams, and Astryve a way to embrace and exploit the rapid shift to the use of mobile phone apps for modern banking. However, it was a project not reality. By April 2020 the team to deliver it had all been dismissed. There was then the B2c project, which was an idea in a PowerPoint presentation, not a business project that could be rolled out. The work Robert Miller and Robert Moorhouse were doing was to try to find investors, then try to work out a deal with them to take over the businesses of the group. This is totally different. If Elle Kim had switched to work of that sort, then the Tribunal can see how it is arguable that this was an organised grouping of three people, two from Finabl Plc and one from Finabl Ltd working together in an economic

identity engaged in dealing with the crisis. But she did not do such work. There were only two work related interactions with Robert Miller, and none with Robert Moorhouse. One of these was a human resources issue about consultation over redundancy, and Robert Miller was the human resources director so there is nothing in that point. The other is the PowerPoint, discussed above. So, there was not an economic undertaking of the three of them.

71.2. Linked with this is the fact that Elle Kim was sitting at home waiting for instructions. She was not actually working at all, and so not part of any form of economic undertaking. One wonders why someone on £240,000 a year was not actively seeking ways to be involved, especially given the absence of the UAE based leadership of the group, and if she had done so then the argument might have more force. As it is, the Tribunal finds that Elle Kim was economically inactive for almost all the time after February 2020 until her resignation in April 2021. The communication from her is mostly (and understandably) about getting paid her salary and her huge level of expenses (her evidence was that she personally bought the computer equipment for her team of up to 10 people and paid for their Christmas party and claimed back the cost as expenses). That does not make her part of an economic identity.

71.3. Elle Kim did not know about the deal with Prism for the acquisition of Finablr Plc. At no time was she engaged in the salvage operation. It was not that she was excluded from it. She was never part of it. If there was an economic identity which transferred and retained its identity, she was not attached to it.

72. Therefore, the claims against the 2<sup>nd</sup> Respondent based on the argument that there was a transfer of an undertaking does not succeed.

73. It follows that the claim for failure to inform and consult fails.

#### *Agency*

74. The Tribunal did not find convincing the submission that Finablr Ltd was in some way acting as an agent for a UK based company. First, why would that be as agent for UAE Exchange Ltd? It was accepted that Elle Kim was not doing anything for that company's operations: it was said that like Robert Miller and Robert Moorhouse she was placed there as the only suitable place from which she could work for the benefit of the group after Finablr Plc could not pay their salaries.

75. The fallacy with this argument is that if it was an agency it would have been so from the start, and the company for which there was agency would have to be Finablr Plc. She was employed on a project for the whole group. The natural place to employ her would have been Finablr Plc, which sits at the top of the group. That the group then collapsed cannot be a reason why things changed, retrospectively creating an agency.

76. The Tribunal cannot find that there was an agency of Finablr Plc, because the action against the Plc is stayed by reason of the appointment of an



administrator. It does not find that Finablr Ltd was acting as agent of UAE Exchange Ltd.

77. For these reasons the claims against UAE Exchange UK Ltd fail and are dismissed.

Claims against 1<sup>st</sup> Respondent, Finablr Ltd

*S13 Employment Rights Act 1996 – deduction from wages*

78. The payments made to Elle Kim, from various parts of the group are set out above. She was paid in full, gross, from the start of her employment to the end of February 2020. She resigned on 09 April 2021 with immediate effect. That is 14 months and 9 days. There were two payments from Finablr Plc's US\$ account of what was intended to be £20,000. The figure credited to Elle Kim was after conversion by the banks into sterling and so not precisely £20,000. The Tribunal uses the figure of £20,000 for those two payments. Accordingly, there were 12 months unpaid, plus the 9 days of April 2021. In connection with the claim for holiday pay the daily rate was calculated at £923.08. 12 x £20,000 is £240,000. 9 x 923.08 = £8,307.72. The Tribunal therefore orders the 1<sup>st</sup> Respondent to pay £248,307.72 to the Claimant under S13 of the Employment Rights Act 1996.

79. The Claimant formulated this claim very differently, using a monthly figure calculated as the likely net figure after tax and national insurance, and giving credit for the full £20,000 paid each month. That assumes the tax is not paid by anyone. The correct way to deal with this claim is to calculate it all gross, leaving the Claimant to account to HMRC for the income tax and national insurance due on those earnings.

*Expenses*

80. Elle Kim made a claim for expenses in her Particulars of Claim. It was not included in her Schedule of Loss because she then thought they had been paid by the payment of US\$25,350 in October 2020. The expenses were £17,061.04<sup>5</sup>. Elle Kim's evidence was that she thought the October payment from Finablr Plc was near enough the expenses figure, and so assumed that was what it was for. Having seen the May payment of the same amount from the same account she accepted that it could be a salary payment. As the two payments were for the same amount and were for about £20,000 (the Tribunal was told that Elle Kim had identified one at about £20,350) the Tribunal finds they were both salary.

81. This means that those expenses have never been paid. The Respondent (Robert Miller) did not contest the claim for expenses at the time, in their WhatsApp exchanges. In these circumstances the Tribunal decided that the claim in the Particulars of Claim for expenses (always set out in the sum of £17,061.04) was live, and proved. However, this is a claim in contract, not a deduction from wages, and as the cap of £25,000 applies it makes no difference to the final award.

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<sup>5</sup> Stated in resignation letter 125/180

*Holiday pay*

82. The claim was for 20 days in 2020 and 6.78 days in 2021. The holiday year was the calendar year. It was submitted that the Working Time Regulations meant that although there was no contractual right to carry forward holiday from 2020 into 2021, paragraph 13(10) meant that she could do so. That is the provision which said that anyone prevented from taking holiday by reason of the pandemic could carry it forward. Elle Kim says that Covid restrictions prevented her from travelling so that she could not take holiday.

83. This is not logical. Holiday is a period of rest away from work, with no requirement to spend it away from home. Doubtless there was no possibility of travel to other countries. Lockdown was not for the whole of 2020. The “eat out to help out” 50% discount at restaurants scheme for almost all the whole of August led to mass holidays in the Lake District and the West Country. Or Ms Kim could simply have stayed at home (a “staycation”).

84. The figure for 2021 is agreed to be £6,258.48, and the Tribunal orders the 1<sup>st</sup> Respondent to pay the Claimant that sum.

*Pension contributions – claim in contract*

85. The Respondents accept that the Claimant was not enrolled in a pension scheme. There should have been pension contributions of 3% of salary due. The figure is agreed at £12,177.53, and the Tribunal orders the 1<sup>st</sup> Respondent to pay this sum to the Claimant. The judgment caps the award at the maximum of £25,000.

*Notice pay*

86. The resignation letter of 09 April 2021, written to Robert Miller and Mehul Desai, makes it clear that the resignation was because of non-payment of salary and expenses. That is a fundamental term of the contract. There was no affirmation of the contract of what was a continuing breach and so it cannot be asserted that the Claimant delayed too long. The claim of constructive dismissal was not resisted. The notice period in the contract was 6 months, and so the notice pay should have been £120,000. There is a clause in the contract about pay in lieu of notice<sup>6</sup>, but it is discretionary, and so there was no crystallisation of contractual right at the date of resignation. There is an obligation to mitigate loss. The Claimant did mitigate her loss. The Respondents do not challenge her evidence in this regard. Her earnings in that period were £67,563. The Tribunal orders the 1<sup>st</sup> Respondent to pay to the Claimant the difference, which is £52,437, the award being capped at the maximum of £25,000.

*Acas uplift*

87. An enhancement was sought, of 25%, for failure to follow the Acas code and guidance in respect of grievances of the Claimant about not being transferred to a UK company, and about non-payment of wages. This was an extraordinary time. Thousands of employees were not being paid. Robert Miller, to whom the emails were sent, was one of a small team dealing with an existential crisis for

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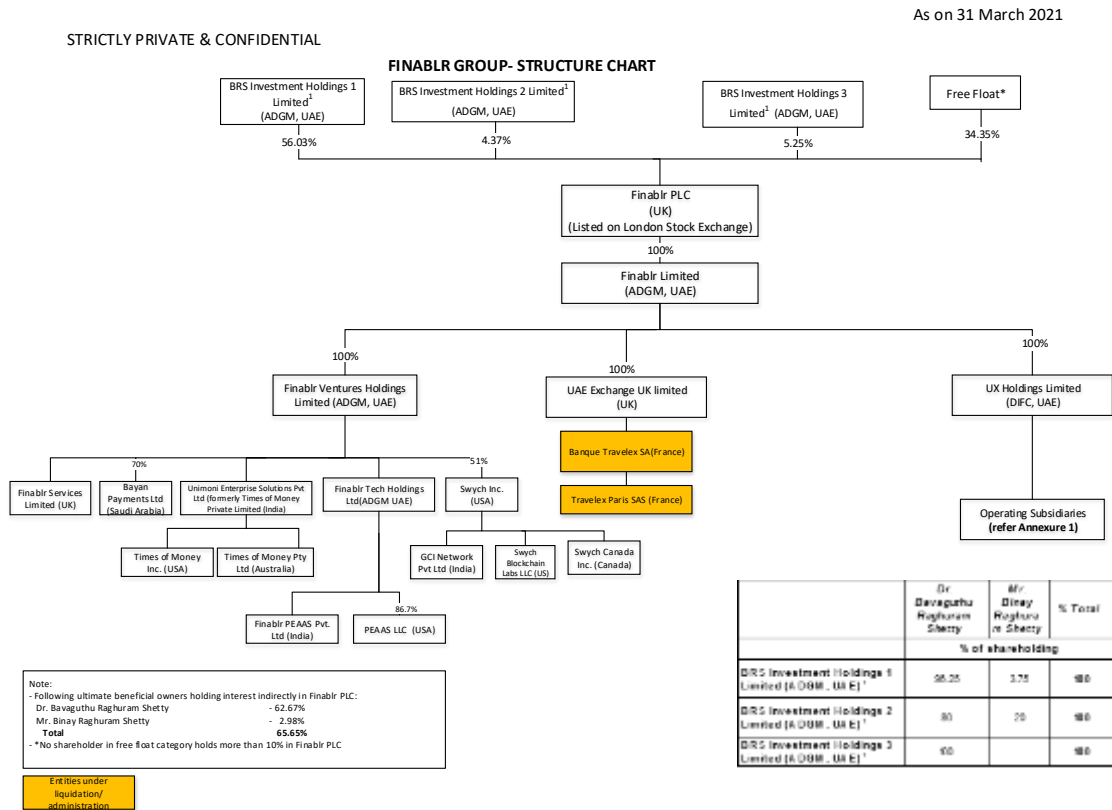
<sup>6</sup> Clause 13.6

the group. It is hardly surprising that he did not deal with the grievance, about a matter affecting a huge number of people. It would not be proportionate to add any uplift.

Annexes

88. Three appendices are attached – an organogram, a chronology and a cast list.

Annex A – company organogram



Annex 2 – Chronology

IN THE LONDON CENTRAL  
EMPLOYMENT TRIBUNAL

CASE NO: 2204168/2021

B E T W E E N : -

ELLE KIM

Claimant

-and-

(1) FINABLR LTD

(2) UAE EXCHANGE UK LTD

(3) FINABLR PLC

(4) FINABLR VENTURES HOLDINGS LTD

Respondents

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CHRONOLOGY

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Date	Event	Page
14/07/19	C contract signed	82
1/8/19	C start date	85
5/9/19	C paid \$20,000 by UX Holdings Ltd	166
23/9/19	C paid £20,000 by R4	167
10/19	Robert Miller joins R3	
23/10/19	C paid £20,000 by R4	168
11/19	C paid £20,000 by R4	
12/19	C paid £20,000 by R4	
23/1/20	C paid £20,000 by R4	169
25/2/20	C paid £20,000 by R1	170
3/20	R3's listing on London Stock Exchange suspended	

## Annex 3 – cast list

**IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL****Case no. 2204168/2021****BETWEEN****ELLE KIM****Claimant****and****(1) FINABLR LIMITED****(2) UAE EXCHANGE UK LIMITED****(3) FINABLR PLC****(4) FINABLR VENTURES HOLDINGS LIMITED****Respondents**

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**CAST LIST**

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***This cast list does not include the identities of the employers since those are in issue***

Jitin Bahl	Director, Corporate Engagement and Communications, based in Abu Dhabi
Mehul Desai	Group Chief Technology Officer; C's line manager (to Sept 2020)
Elle Kim	Claimant; Business Head for FinablR Community
Ritesh Lahoti	UAE Exchange Ltd Head of Finance (April 2012 – Sept 2020) UAE Exchange Ltd Country Head (from Sept 2020) Director of UAE Exchange Ltd (from March 2021)
Promoth Manghat	Group CEO (to March 2020)
Robert Miller	Group HR Director (Oct 2019 – Jan 2021) Director of UAE Exchange Ltd (May 2020 – March 2022) Group CEO and Director of FinablR plc (from Jan 2021)
Robert Moorhouse	Group Company Secretary (to December 2020)
Dan Phelps	Global Head of Architecture and Technology (to April 2020)
Anish Racherla	Head – Strategy, FinablR Technology; based in Abu Dhabi; reported to Chief Technology Officer Mehul Desai
Abdu Salam	HR Administrator, based in Abu Dhabi
Bhairav Trivedi	Group CEO (March 2020 – Jan 2021)
Mohan Shetty	Director, UAE Exchange UK Ltd October 2009 – April 2019, and April 2020 – December 2020)

Employment Judge Housego

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Date 23 June 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON  
04/07/2022.

OLU.  
FOR THE TRIBUNAL OFFICE