EMPLOYMENT TRIBUNALS

Claimant: Mrs P Haynes
Mrs E Woodford
Miss L Smith
Mrs S Goldenbaum
Mrs N Virdee
Ms D Elsworthy
Mrs E Cooper (Timms)
Mrs C Warren
Mrs J Scarfe
Mrs P Shaw
Ms M Astill
Ms D Jones

Respondent: Leicestershire County Care Limited

AT A FINAL HEARING

Heard: At Leicester and partly by CVP **On:** 28 March – 31 March 2022
(And in Chambers: 1 & 25 April 2022)

Before: Employment Judge Clark (sitting alone)

Appearances

Mrs Shaw, Mrs Astill & Mrs Jones:	Mrs Shaw in person / lay representative
The remaining claimants:	Mr Lee Bronze of Counsel
The respondent:	Mr M Stephens of Counsel

JUDGMENT

1. The claims of unlawful deduction from wages **fail and are dismissed**.

2. The claims of unfair dismissal **fail and are dismissed.**

REASONS

1. Introduction

1.1 These twelve claims all relate to the validity of the respondent employer's decision to seek to change certain terms in the contract of employment. They each present a single claim of either unauthorised deduction from wages or unfair dismissal, depending on whether they accepted under protest, or refused and were dismissed. Resolving each type of claim engages with the like provisions of regulation 4 or, in the case of dismissal, regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

1.2 The dismissal claims are also advanced on an "ordinary" basis under s.98(4) of the Employment Rights Act 1996 ("the 1996 Act").

1.3 To the extent that the claim forms may appear to advance claims of breach of contract or to argue that any apparent agreement was vitiated at common law, it is common ground that that is not part of the case.

2. The Claimants

2.1 There are now 12 claimants remaining in the case. The complexity in the case means they divide, Venn-like, into different groups depending on the context. It may be helpful at the outset to summarise, and hopefully simplify, the membership of the various groups, issue by issue.

By their representation

2.2 Mrs Shaw, Mrs Astill and Mrs Jones are no longer supported in their claims by their trade union, Unison. They bring their claims in person albeit Mrs Shaw has helpfully stepped up to also act as a lay representative for her two colleagues. (the "Shaw group")

2.3 The remaining claimants are supported by their trade union, GMB. They are represented by Simpsons Solicitors and Counsel. (the "Simpsons group")

By their claim

2.4 Of the Simpsons group, Mrs Haynes, Mrs Woodford, Mrs Smith and Mrs Goldbaum did not agree to the variation and were dismissed. They bring claims of unfair dismissal only. (the "dismissal group").

2.5 The remaining five claimants in the Simpsons group agreed to the variation. The Shaw group also all agreed to the variation in the terms of their employment. Those eight claimants bring claims of unauthorised deduction from wages only. (the "deductions group").

By their transfer date

2.6 The contracts of employment of all claimants transferred to the respondent by operation of TUPE.

2.7 The minority of claimants transferred from Leicester City Council in 2015. (The "2015 group"). They are Mrs Woodford, Mrs Virdee and Mrs Cooper (previously Timms).

2.8 The remaining nine claimants transferred from Leicestershire County Council in or around September 2012 (the "2012 group").

By their participation in this hearing

2.9 The format of this hearing was settled at a preliminary hearing held as long ago as December 2020. It directed that all four of the dismissal group would give evidence, as would all three of the Shaw group. Of the remaining five members of the Simpsons group, it was agreed that they stand behind one lead claimant. Ms Elsworthy has filled that role. I have called her the lead claimant although she is only the lead claimant in respect of this sub-group of 5 within the Simpsons group (the piggy-back claimants).

2.10 Accordingly, Mrs Virdee, Mrs Cooper, Mrs Warren and Ms Scarfe have not attended or participated this week, which takes me to other preliminary matters.

3. Other Preliminary matters

3.1 There was no order permitting the piggy-back claimants not to attend the hearing although, in view of the circumstances and their passive role, that may be forgiven. However, other claimants also failed to attend on the first day. I expressed my concern at this state of affairs, especially as one of those absent claimants had been subject of an application by her solicitors the previous week seeking a variation to the format for her to participate remotely due to Covid. That application had been granted. She did not attend as she said she had not been told to. When she did attend, she had not been provided with a copy of the bundle. A professional representative must action the obvious consequences of their application being granted in order to ensure the hearing is effective and conducted fairly for all concerned. Other absent claimants attended from the second day, again apparently not being aware that they had to attend. In the event I was satisfied it was possible to conduct the hearing fairly for all.

3.2 There were orders for all claimants to serve schedules of loss. For the deductions group, this was an essential part of individualising the essential basis of each claimant's claim, including issues of jurisdiction. The TUPE dispute is not an academic question and does not call to be answered in the abstract. The claim before me means resolving a claim for of unauthorised deductions. Without a claim to engage jurisdiction, strictly I have no power to deliver a judgment on the TUPE point.

3.3 This hearing was originally listed to determine all issues. Some of the piggy-back claimants have not filed schedules of loss as ordered. Of those that have, one does not appear to show a deduction occurred within the three months before the claim was presented. Had the claims succeeded, I would have had to engage with the powers to

amend, extend and/or grant relief for the failure to comply with the case management orders. Of the other schedules, they show the term which give rise to the claim of unauthorised deduction from wages is limited to the enhancements for working weekends and bank holidays.

4. Evidence

4.1 There are aspects of each side's evidence that needlessly raises additional questions for me in my fact finding. At times it seemed insufficient attention had been given to the tissues arising in the wo types of claims being presented when preparing the case. Late disclosure is often a sign of such deficiencies and there has been late disclosure in this case. None of the parties appears to have engaged fully with the disclosure obligations as ordered. That has left gaps and, in the case of the respondent's deficiencies, has understandably served to fuel the claimants' grievance, particularly in respect of its finances and occupancy levels. This is a professionally represented respondent and it is no answer to say the tribunal could order further disclosure. These are adversarial not inquisitorial proceedings.

4.2 Equally, there are a number of aspects of the witness evidence from the Simpsons group which has meant they have attracted little to no weight in my fact finding. It emerged that there had been wholesale preparation of the content of witness statements by unknown third parties. The statements contained evidence about which the witness often had no real understanding of. There were whole paragraphs which had clearly been cut and pasted and the opinion of an unknown third party inserted. Some statements contained evidence that simply did not apply to the witness concerned. The statement of one in the dismissal group stated how she had agreed to the variations under protest. These are professionally represented claimants.

4.3 There will always need to be support for witnesses in how their witness evidence is prepared but it should always be the evidence that that person could give orally from the witness box. But even the Shaw group, who I otherwise do not include in these concerns, based their statements on a "template" provided to them by their union representative. To their credit, they brought to my attention those aspects that they wished to modify or distance themselves from.

4.4 As to what I do and do not have, I have witness statements from all 4 of the dismissed claimants. I have a witness statement from Mrs Elsworthy as the lead case in respect of the Simpsons / deductions group. I have witness statements from each of the Shaw group. For the respondent I have a witness statement from both Dr Davie Vive-Kananda and Mr Stuart Vive-Kananda. I have a bundle running to around 450 pages plus the additional documents disclosed during the hearing. Both Counsel addressed me in closing, Mr Bronze speaking to a written submission which Mrs Shaw endorsed as her own on behalf of the claims by the Shaw group.

5. Facts

5.1 It is not the tribunal's function to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to determine the issues before it and to put the case in its proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2 The respondent is one of two subsidiary companies of the Johnson Group Limited which provides residential care home services. The other company operates in the Essex area where the group head office is based. The Essex subsidiary, ECCL, was the first company to be incorporated in what is now the group structure and the first to enter the market of buying and running ex-local authority care homes. It took on six such homes. I find by inference that the local authority staff transferred to it under TUPE with their local authority terms. There is little direct evidence before me of the circumstances of ECCL but I can also infer that had there been any erosion of those local authority terms, the prospects of any success of the group's subsequent bids with Leicestershire County and Leicester City would likely to have been jeopardised. I return to my conclusion on the business model of this type of venture but for present purposes, I accept Dr Vive-Kananda's evidence that it has always been his intention to honour the terms and conditions that these staff brought with them under TUPE. I find the relative success of the venture in Essex must have been a factor in the success of its bid for Leicestershire County Council's care homes in 2012, for which this respondent was incorporated. That bid was repeated in 2015 with the successful takeover of certain Leicester City Council's care homes. From what I have seen of Leicester City Council's view of this respondent, again I find that if there had been any hint of a planned erosion of local authority terms that bid was unlikely to have succeeded. It follows that I find for a business whose entire model is inheriting staff from local authorities, an aggressive approach to reducing the terms those staff transfer with would not be in its long-term interests.

5.3 The evidence of Dr Vive-Kananda is that the homes were not financially viable whilst under the Council's control. His evidence was not challenged, indeed, one of the claimant's positively agreed with the proposition. Dr Vive-Kananda's evidence was directed at the two Leicestershire Councils but I take it to be a proposition that is likely to lie behind each local authority decision to divest itself of its directly managed care home stock. It is also a foundation proposition against which I find the later highly emotive and potentially naïve criticisms made about the respondent by one of the Councils do not carry any weight.

5.4 One might question how, if the local authority could not make these care homes financially viable, anyone else could? The same buildings transfer with the same value and maintenance needs. On the other hand, there is arguably a different management overhead. There are different ways of working which might generate efficiencies, especially if the homes can be run at an optimum occupancy level to generate the maximum fixed cost recovery. However, it is reasonably clear that the largest cost is that of the workforce.

5.5 So far as I can detect from the circumstances, the respondent's business model and route to profit seems to be based on three main strategies. First, there are certain systems and management improvements that can be made immediately, hopefully to save costs and generate efficiencies. One example before me was the operation of staffing ratios. I accept the evidence of one such example of using those ratios to both improve efficiency and quality of care by restructuring the night shifts away from the inherited shift pattern of two waking and one sleep-in shift, to three waking shifts. Secondly, there is an incentive to maximise the scope for privately paying residents, the fees from whom are substantially greater than those paid by the local authority for its funded residents. The private residents' charges are set not so much by the cost of the services, as what the organisation needs to recover to make up the shortfall on caring for other residents. I have no evidence as to whether the local authorities themselves took in privately paying residents before the transfers, nor do I have evidence of any ongoing service contract for the provision of local authority funded beds which may or may not set restrictions on any minimum number of local authority places. The ratio may be contractual or it may simply be a question of market forces. Whatever it is, having as many privately paying residents as possible is not just desirable, but seems to be essential to the model. On this issue, I do find that immediately before the issues material to these claims arose, about 30% of residents across the respondent's homes were privately paying. The third aspect is its payroll costs. In this aspect of the business model, I find two factors are at play. The first is a move towards locally determined terms and conditions for its staff. Such terms are inevitably less generous, or less costly to the employer, than the local authority terms. That is certainly so in this case. Immediately following any such transfer, I find the proportion of the respondent's employees working under their previous local authority terms was close to 100%. Over time, that percentage falls as a result of natural wastage or internal promotion, itself meaning the employee agreed to relinquish old contractual terms. I find the number of staff needed has remained broadly the same although I have no doubt there may also be savings to the overall establishment in some places. Even where the numbers remain the same, the overall payroll costs reduce over time as the proportion of employees on local terms increases. In this case, charting that gradual change over the years will show a consistent shift towards the local terms, with a slight uptick in 2015 when the transfer exercise was repeated with the Leicester City Council homes. Thereafter, I find the trend has continued downwards. By the time I am concerned with in 2020, the proportion of staff on local authority terms of employment had reduced to around 15%. That is, 97 of the 640 or so total employees. The second factor under payroll costs is that the local authority terms remain as they were at the point of transfer. It seems, as would not be unusual, that those terms do not contain any contractual right to a pay increase or other dynamic terms referencing back to local authority terms.

5.6 An associated employment cost is that of pensions. The local authority superannuation scheme did not, and could not, transfer with TUPE. However, in what I understand to be some sort of collateral contract to the transfer, the respondent and transferring local authorities reached a separate agreement concerning the new employer's contributions. In broad terms, the difference is substantial. The cost to the employer is 55% of pay for those employees retaining local authority terms and 6% for those on local terms.

To be clear, this fell outside the events that unfolded in 2020 albeit the respondent did make attempts to alter its immediate commitment within the overall aim of balancing its books.

5.7 The main differences between the local terms and the local authority terms were:-

a) Local terms hourly rates were lower, at least to start with. It would be wrong to say the respondent simply paid at the national minimum wage rate. I find wage rates were set above the national minimum wage as was necessary to reflect the local labour market. In some cases, it may not have been much more but in other areas it paid a higher rate to recognise local housing or transport costs.

b) The local terms did not come with additional enhancements for working nights, weekends, or bank holidays. Similarly, overtime was paid at flat rate.

c) There was no “disturbance allowance” for being required to work at a different home or location.

d) The annual leave entitlement was limited to the statutory entitlement in the working time regulations 1998.

e) The sickness entitlement was limited to the statutory sick pay.

f) Entitlements to maternity and other similar family leave was limited to the statutory scheme.

5.8 It is not disputed that the respondent has not taken any steps to remove the local authority terms in the 7 years or so from the County transfer or the 5 years or so since the City transfer. I further find that this fact is supportive of Dr Vive-Kananda’s evidence of his general statement of principle that he has never had an intention to remove the local authority terms or the staff that retained them.

5.9 That is not to say that those staff were not the focus of attention at times, or “under attack” as some of the claimant’s strongly put it. However, I find it was not Dr Vive-Kananda or for that matter Mr Stuart Vive-Kananda who was behind that. It was not the employer’s position. After examination in the witness box, the claimants’ written evidence was significantly diluted from its initial accusations aimed at the directors. What the evidence boils down to is this. I accept that there was tension between the local authority staff and the locally recruited staff as a result of the commonly known differences in their terms and conditions. I also accept that staff may have learned of some expressions of frustration from local home managers in organising work and meeting local budgets. Those, however, are not indicative of a view held by the employer of the TUPE staff or the continuation of their terms.

5.10 Although inflation in the economy was consistently low over this recent period, the national minimum wage has outstripped RPI. As a result, the local terms which are influenced heavily by the changes in the national minimum wage have increased in value whilst the local authority terms have remained static at their 2012 or 2015 levels. The result

is that the differential between the basic hourly rates have narrowed substantially and, by 2020, was close to a convergence.

5.11 It follows that I find the 7 years or so following the county transfers were unremarkable, at least from the point of view of the individual employment contractual relationship.

5.12 The effect of the enhanced rates of pay and additional holiday and sickness entitlements came at a cost. I find in 2020 that was an additional cost of c.£235,000 to the respondent compared to what it would cost to employ those staff on the local terms. The respondent had honoured this to this point and there is no suggestion those entitled to those retained TUPE terms have not been able to exercise them. I am satisfied that on the model of state funding that operates in this sector, it is necessary for a provider to move towards its own terms where it can and as soon as it can but I do not accept that that is an example of profiteering, as it has been portrayed in the media reports shown to me about this dispute. It is a question of long-term survival of the service. If the care homes do not survive economically, the provision of essential social services to elderly residents is, at best, disrupted and potentially lost altogether.

5.13 The financial information put before me has not been extensive. I have only the accounts for the respondent ending 2019. On the face of it that shows a profit. I accept it is part of the group. I also accept there is some historic accounting between the two arms of the group and, in effect, the respondent's management costs and overheads fall to ECCL, largely because the overhead costs were established when it was the only entity and they have remained with it when respondent was subsequently incorporated. It is not for me to comment on whether this method of accounting for the individual entities satisfies the principles of true and fair accounting. I am reluctant to go behind accounts prepared for statutory purposes and signed off by a director with statutory duties, however, the financial state of affairs was alluded to in the extract of the Council meeting put before me on day three. It accords with Dr Vive-Kananda's explanation. I accept as a fact that the business as a whole was in a delicate financial position and the Johnson Group's profitability overall was in the balance.

5.14 Then, in 2020 the implications of Covid hit. Through March 2020, Dr Vive-Kananda wrote a number of communications to staff about the challenges ahead that Covid presented. I accept that this was having an effect of increasing the pressure on the financial situation to the point of being a real threat to the continued existence of the business. This hit on both sides of the profit and loss account.

5.15 So far as the costs are concerned, there was a dramatic increase in a number of areas. A major cost pressure was obviously the staffing implications of Covid. Sickness and other Covid related absences had their cost in the ways absences always did, and more. For some time, Dr Vive-Kananda wanted to honour full pay for staff absences related to Covid and, of course, the old local authority staff were entitled to periods of full pay in any event when off sick. Backfilling absent staff faced new and significant challenges as agency staff could not simply move from home to home from one day to the next due to the restrictions on them to curb the spread of Covid, despite the respondent's initial attempts not to restrict

working across sites. The favourable rates the respondent had previously enjoyed with a few agencies amounted to nothing if they could not supply workers. The agency staff themselves were as susceptible to illness and the requirement to self-isolate as were the permanent staff. Permanent staff could not undertake agency or cross covering work in addition to their permanent roles for the same contamination risk. The supply of labour was drastically depleted. The respondent had to go to the market at a time when every other care home was doing exactly the same. Not only did that substantially increase the rates being charged, but in many cases demand simply outstripped supply and could not be satisfied.

5.16 I also find other costs increased. A significant cost was PPE. I don't accept the claimants' challenge that this was always provided and came with no extra costs. I accept the nature of PPE and the use of it increased substantially. There was also additional churn in that fresh PPE had to be used between residents in circumstances that it had not previously been required. There was an enormous demand to the extent that supplies were exhausted. This had an obvious effect on prices. I have not been shown exact figures. I have been told in some circumstances the costs increased by 70%. I accept also that there was some access to government support which may mean some of the challenges in certain respects may have some validity but, overall, the picture is sufficient for me to find that there was an unprecedented increase in these costs.

5.17 I find other operating costs increased. Unfortunately, part of the respondent's core financing was based on a commercial risk assessment which the bank downgraded around this time meaning its interest charges increased. The respondent's then current financing was due for renewal in January 2020 and, ultimately, its £6.5m financing had to increase by nearly 50%.

5.18 For completeness I must deal with a point raised by the claimants on this topic relating to other savings that might arise. I find there were some savings to be made on pre-covid activities resident activities and trips being cancelled, but this was largely balanced by the added requirement to provide some alternative enrichment to residents who were otherwise now forced to isolate and remain in the care home. Similarly, there were modest savings on food due to the reduced number of residents as occupancy dropped. I find none of these savings were substantial, especially when viewed against the bigger financial picture.

5.19 It is important to recognise that the financial implications of Covid hit hard not only on the business's outgoings, but on the implications for its income too. Occupancy rates dropped substantially through 2020. I have already referred to the business model seeking to optimise marginal costings. The closer each home got to 100% occupancy, the more efficient it was to run. Prior to lockdown, on 1 March 2020 I find occupancy was at 97.5%. That dropped to 85% by the end of the month. By the end of the year it had reduced to 70%. I find it very quickly became apparent to the business that this reduction was likely to remain for some time. Early on there was an anticipation of restrictions on re-filling empty rooms during the lockdown. Local authorities did not make placements. The opportunity to take in new residents was known to be a problem across the sector in the months going forward. The evidence suggests this may have amounted to something like 86 lost places which, even at

local authority rates of around £600 per week, amounted to a potential loss of revenue of around £2.7m per annum

5.20 That was not the only pressure on occupancy. In one home new admissions were restricted due to the outcome of a CQC inspection. Other restrictions were imposed due to the issue of residents being discharge from hospitals which was 'on and off' during the Covid period as the implications of the spread of Covid came to light and clinical guidance evolved. In short, after a few months the respondent was forecasting that it would already take at least 2 years to recover and it found itself trapped in a financial cycle that it could not use rooms that required updating but did not have the funds to update them.

5.21 After Covid hit, if not for long before, it is well documented that the care sector faced an existential threat in the model of the funding. I accept that the respondent was faced with making significant savings. Some of the senior management took pay cuts. Neither of the Vive-Kananda's evidence could be said to be the clearest or most persuasive, but I accept some reductions were made to Mr Stuart Vive-Kananda's salary and another director took a reduction. I find a zero dividend was declared for shareholders. Investment and redevelopment were paused, although this also potentially had implications for income in the short term. The respondent applied to the local authority to delay a capital repayment. It also sought some adjustment to its obligations in respect of the pension contribution it was required to make.

5.22 Attention then turned to the workforce costs as a means of achieving a financial recovery. The bulk of the workforce were on terms that were at or close to the applicable statutory minimum. Where they were in excess of the statutory minimum, that was largely driven by a view of the local market for care staff such that reductions would risk business continuity. The only other staff cost that could be considered was that associated with the staff retaining their local authority terms.

5.23 I find that in 2018, the respondent had engaged a specialised financial expert in the care setting to review its costs and income and the business model. I accept this became a critical role in early 2020 when the convergence of the general market and Covid meant the senior management focus changed from caring for residents to ensuring the survival of the business. He set about developing a financial plan to maintain the business.

5.24 All of these challenges are consistent with the media reports put before me of care homes across the county battling systemic financial pressures as the implications of Covid hit. The prospect of care homes closing became a reality across the country.

5.25 The ex-local authority employees were sent letters in or around March 2020 regarding proposals to change terms and conditions. An initial consultation period to share concerns and discuss changes commenced.

5.26 On 3 April 2020, Mr Vive-Kananda set out the financial implications of the lockdown. In that letter he wrote, in infelicitous terms,

"We are looking at the undue enhanced staffing costs for certain members of staff".

I agree with the claimants that this depiction of their contractual terms as "undue" was inappropriate. In isolation it suggests a judgmental feel to the protected terms which is at odds with the other evidence before me that Dr Vive-Kananda has been quite content to preserve them for these staff. However, on balance I accept this comment should not be taken as an indication of an ulterior motive for proposing the changes. It should be seen not only in the context of the situation the business then faced, but with regard to the fact that English is not Dr Viv-Kananda's first language and he translates from his native tongue. In such circumstances, the subtleties of English may be lost or misinterpreted.

5.27 On 16 April 2020 the employer wrote again to those staff on the local authority terms. It was headed "meeting on behalf of TUPE staff at Leicestershire County Care Limited to discuss urgent austerity measures". I find it proposed changes to the protected terms. It indicated that the alternative was that the employer would have to consider termination of employment. It offered a £50 inducement for agreeing to the terms. The key paragraph read "

> ***You are all aware that staff who transferred from Leicester City Council and Leicester (sic) County Council, who remain on their previous terms, benefit from enhanced payment terms. To date, we have met the terms of the TUPE staff contracts. However these enhanced payments are jeopardising the organisation and it is essential that we urgently reduce staff costs and to do so we require some of the enhanced benefits to be removed. Doing so will significantly help us financially and ensure that we can continue to care for the most vulnerable members of our society. Our aim is to safeguard as many jobs as possible and to provide and maintain the significantly increased care requirements.***

5.28 I find that fairly summarised the genuine view that the business needed to take urgent action to survive. The proposed changes affected the following terms: -

a) sick pay to be paid at SSP rates.

b) changes to the basic hourly rates of pay which vary depending on the nature of the job performed.

c) remove disturbance allowance.

d) remove of any additional contractual entitlements to maternity paternity and parental and adoption leave which would there have to be paid at statutory rates.

e) removal of enhancements for night shift, weekend and bank and public holiday which would then have to be paid at flat hourly rate.

f) reduction of annual leave where it is in excess of the working time regulations although this was subject to some degree of concession at a later date.

5.29 I then turn to the consultation. Although staff had been communicated with individually to start with, the focus then moved to collective consultation. From the outset, I find the trade unions took the view that the proposed changes were unlawful and would lead to litigation. Dr Vive-Kananda presented these merely as his proposals and invited the staff side to come back with counter proposals. An issue arose in the course of the series of collective

consultation meetings as to whether the respondent was giving fair and reasonable disclosure of its situation for them to do so. I do not accept what the respondent disclosed was deficient or unreasonable. In short, I find the staff side was given the financial information.

5.30 That was partly the reason for some delay in the consultation process although not the only reason. The relationship in the consultation was also soured by press releases in which the staff side shared their view of the situation in the press and a very emotive public position was taken. That is perhaps not surprising as this all took place at a time of high public emotion towards the care sector. These employees were the front line protecting our most vulnerable in society. Whilst that was undoubtedly so, if the homes closed there would be no protection for those users and no jobs for the staff. That level of emotion is again seen in the responses from the Trade Union and especially in the responses from the Local Authority. I have had little regard to the Local Authority minutes that were put before me. Against that background I find it quite understandable why, when consultation recommenced, the respondent wanted to restate the need for confidentiality.

5.31 There were three collective consultation meetings beginning at the end of April and continuing in May and concluding on 9 June 2020. It is an unsatisfactory fact that whilst these collective consultation meetings were progressing and making only very limited progress, the staff were not being kept informed quite as well as they might. The fault for that lies with both sides of the collective process. The respondent did not consistently engage with its staff directly for reason which seem to be based on a misplaced belief the unions would do that in their communication with their members although it had written directly and continued with the existing communications within the workforce. For the staff side, I find their members were not told about the employer's financial predicaments, its other measures, or its rationale for change. The information fed back to the employees was that this was a profitable company and this proposal was all about simply harmonising terms and conditions. Whilst there is criticism, and whilst the respondent may have wanted the staff side to accept the pressures and be more 'on board' that is not their job.

5.32 Outside the period of collective consultation, there was direct communication. Invitations were sent to staff to participate in a remote group consultation to be held on 17 June and the day before, on 16 June 2020, the respondent wrote to affected staff extending the consultation period to 19 June indicating that if the staff agreed by that date they would receive the concessionary terms. I find that the staff clearly knew of the proposals from their individual correspondence earlier in the year and knew of the ongoing collective consultation.

5.33 The trade unions formally gave notice that they would not agree to the changes. The consultation with individual staff continued including individual appointments with Kim Keith, the respondent's HR Manager. The only change of significance at this time was that the proposal was now to implement the package of changes in one step, and not on a phased basis as had been explored earlier in the consultation.

5.34 On 19 June 2020 the respondent sent the remaining staff including the claimants formal notice of termination of their contracts of employment and reengagement on the new

terms. The letter made clear they had until 4 July to agree to the new terms to avoid dismissal taking effect. A one-off payment of £50 was offered for accepting the change. Many staff signed up to the changes on an individual basis. I find as a fact that of the 97 or so affected staff, about 8 retired or left for unrelated reasons. About 85 accepted the new terms. Within that number are the deductions group of claimants. The remaining four who were dismissed are the four claimants in the dismissal group before me who did not agree to the change.

5.35 For present purposes, those four are all in materially identical positions save in respect of one matter requiring a finding of fact. That is that Ms Woodford says in evidence that she later agreed to the change a few days before her notice expired but was told it was too late and her dismissal stood. I have to reject that. First, this is not the pleaded case which states how all four of the dismissal group were dismissed because they refused to accept the new terms. Secondly, it is not supported by any other contemporaneous evidence or further account of the circumstances in which the later agreement was communicated and refused. Thirdly, and significantly, it is at odds with the other evidence of the employer's flexibility. The initial deadline was extended and there remained a need to supply labour to the care homes such that I find on the balance of probabilities that if a vacancy remained, any such later acceptance would not have been refused.

5.36 A number of claimants lodged what was in terms an appeal albeit it was labelled as both a grievance and an appeal against dismissal. It was presented in advance of the deadline for compliance. There was clearly some collective coordination of these challenges as the specific challenges were the same. I do not have documentation for all claimant's but there is no dispute between the parties that the examples in the bundle are materially the same for all that challenged the decision.

5.37 On or around 8 July 2020, the respondent replied. I find there was no hearing. The questions were considered on paper and a letter sent to the claimants rejecting their challenges. It rejected the contention that the changes were a new contract stating the respondent had made it clear in the meetings with the union that the proposals were not replacing the previous contract with a new contract. It repeated how it was not in a financial position to delay this process and so could not put the process on hold. It rejected the challenges that notice of termination was short, referring to the contract and statutory rights which were being honoured. It rejected that the changes amounted to harmonisation and rejected that the employee had been dismissed, at least at that time, and offered further opportunity to address questions arising about the process in the hope that they would remain in employment. It did expressly deal with the decision not to hold an appeal hearing in respect of which the employer had taken the view than as each appellant was positively expressing their rejection of the new terms, it would serve no purpose.

5.38 Of the four dismissed claimants, their employment would terminate on dates between 28 August and 11 September 2020 according to their notice entitlement.

6. Law

Unauthorised deductions from wages.

6.1 The claims of unauthorised deduction from wages fall to be consider by reference to section 13(3) of the Employment Rights Act 1996. By that, a deduction occurs: -

> ***Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.***

6.2 In the circumstances of this case, where there has been an agreement *in fact* to the new terms, the question of what is properly due will be informed by the answer to the question whether that agreement is void *in law* as a result of Regulation 4(4) TUPE.

6.3 There is no dispute between the parties that the payments in fact made to those remaining in employment on the subsequent pay dates reflected the new terms. In short, the only live issue to be determined for this hearing is whether the agreement *in fact* is void in law so that the previous enhanced rates should apply. If it is valid, there has been no deduction and the claims will fail. If void, here has been a deduction (at least in principle) which was not authorised. As already mentioned, I did observe that the claims appeared to have focused on the TUPE concept in the abstract rather than any actual deductions being made. However, for present purposes I have proceeded on the assumption that those claiming deductions can show that they have suffered any form of relevant unlawful deduction from a pay date that falls within three months immediately before the presentation of their claims.

Unfair Dismissal

6.4 The respondent carries the burden of showing the reason for dismissal and that it is a potentially fair reason under s.98 of the 1996 Act. The dismissal group claimants carry only an evidential burden of showing that the reason for dismissal was the transfer or a reason connected to it (**Kuzel v Roche Products Ltd [2008] EWCA Civ 380).** The legal burden of establishing the factual reason, and that that reason was a potentially fair reason for dismissal, remains with the respondent. If the respondent does not prove its stated reason, it does not necessarily follow that the prohibited reason is the reason. It may well be in many cases, but it remains a conclusion for the tribunal to reach.

6.5 The respondent relies in fact on the financial situation the business faced in 2020 and its need to change costs basis. It says that is a reason which falls within the catch all of section 98(1) of Act 1996 Act being another substantial reason. For any factual reason to amount to some other substantial reason in law, the reason must meet certain characteristics or have certain qualities: -

a) It must substantial, meaning it must not be frivolous or trivial; and must not be based on an inadmissible reason such as race or sex — (**Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors 2006 ICR 1552, CA)**.

b) It need only be genuinely held; it need not be sophisticated. A decision to dismiss cannot be substantial if it is whimsical or capricious (**Harper v National Coal Board 1980 IRLR 260, EAT**),

c) To amount to a substantial reason, it must be something that could justify dismissal, it is not necessary to consider at that stage if it does justify it (**Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC**)

d) The employer does not have to show that a reorganisation was essential, merely that there was a 'sound, good business reason' for it. (**Hollister v National Farmers' Union 1979 ICR 542, CA,**) or that the survival of the business was at stake (**Catamaran Cruisers Ltd v Williams and ors [1994] IRLR 386**)

e) Nor is it the tribunal's concern to measure the extent to which the changes might achieve an aim. As long as the advantages are clear, largely to satisfy the tribunal the reason was genuine, the employer does not need to show any particular 'quantum of improvement' achieved (**Kerry Foods Ltd v Lynch 2005 IRLR 680, EAT**).

6.6 If the respondent does satisfy me of the reason, I must then consider the reasonableness of relying on that reason as sufficient to dismiss under section 98(4) of the 1996 Act. In the present context of business interests as a substantial other reason, that may include consideration of the process, the notice given, the genuineness of the pressing business reason and balancing the relative disadvantage to the parties of making or not making the change.

6.7 One factor relevant to fairness and the assessment of the relative reasonableness of the proposed changes is the balance between the number of employees that do accept the proposals and those that reject. In **St John of God (Care Services) Ltd v Brooks and ors EAT 29 July 1992**, 140 out of 170 employees accepted the changes.

TUPE

6.8 Some of the claimants' claims fall to be determined under the 2014 amendments to TUPE, most fall under the unamended original regulations[1]. These are sometimes difficult provisions to apply to the facts of any particular case. I have not been made aware of any appeal cases where the distinctions or similarities between the two versions of the regulations have been considered. I therefore set out my approach from first principles.

6.9 So far as is relevant regulation 4 sets out the basic principle concerning the status of the contract once transferred. It provides in all cases that: -

> ***4.—(1) …. 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.***

[1] As a result of the date of the transfer of their employment in accordance with paragraphs 6(2) 8(2) of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014

6.10 Paragraph 4 of regulation 4 then deals with the circumstances when any variation to a contract of employment will be void. The original version of Regulation 4(4) provides, so far as is relevant: -

> ***…. in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—***
>
> > ***(a)the transfer itself; or***
> >
> > ***(b)a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.***
>
> ***(5) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is—***
>
> > ***(a)a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or***
> >
> > ***(b)a reason unconnected with the transfer.***

6.11 That provision was amended in respect of transfers taking place after 31 January 2014 as follows: -

> ***(4) …. any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.***
>
> ***(5) Paragraph (4) does not prevent a variation of the contract of employment if—***
>
> > ***(a)the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or***
> >
> > ***(b)the terms of that contract permit the employer to make such a variation.***
>
> ***(5A) In paragraph (5), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act(1)). 2014***

6.12 There are then further new provisions made in subparagraphs 5B and 5C which do not engage on the facts of this case.

6.13 Regulation 9 provides a mechanism to render a dismissal unfair in the same circumstances that a variation would be void. Under both the original and the amended regulations the statutory formula is, *mutatis mutandis*, materially the same so I do not set it out again here.

6.14 These regulations seek to implement the Acquired Rights Directive as it is now expressed following Council Directive 2001/23/EC of 12 March 2001. The origins of regulations 4 and 9 flow from Article 4 which provides:-

> ***"1. The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."***

6.15 A number of fundamental propositions relevant to this case arise from EU and domestic law. Those relevant to this case are : -

a) Under both regulations 4 and 7, the focus is placed on the employer's reason for the variation or dismissal as the case may be.

b) The directive does not preclude the possibility of an alteration in the employment relationship agreed with the new proprietor of the undertaking insofar as such an alteration is permitted by the applicable national law. **Foreningen Af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988] IRLR 315, ECJ**

c) The regulations (in either version) do not fix the transferring terms in amber for perpetuity nor do they insulate the employee from dismissal. They do not put the transferring employees in a better position than they would have been in under their previous employer. It is open to an employer to effect productivity or other changes in accordance with the ordinary law, this does not become unlawful when there has been a relevant transfer if the reason is connected to that drive for productivity or other changes (**Enterprise Managed Services Ltd v Dance UKEAT/0200/11/DM**); **Rask and Christensen v ISS p1993] IRLR 133 ECJ)**

d) The emphasis of the protection found in article 4(1) of the directive is expressed in a way which focuses on the transfer "itself". The only prohibited reason in the amended regulations is now "the transfer". In the earlier regulations it was either the transfer or a reason connected with the transfer which is not an ETO reason entailing changes in the workforce.

e) "The transfer" covers the entire concept of the process by which the relevant legal relations of the transferor will move, did move or have moved to the transferee. It is that which the reason has to be connected to, for it to be a reason 'connected with the transfer which is not an ETO reason entailing changes in the workforce'.

f) As to identifying the reason why an employer acts, this is a familiar concept across many areas of employment law including unfair dismissal (**Abernethy v Mott, Hay Anderson [1974] IRLR 213**) and discrimination (**Nagarajan v London Regional Transport [1999] IRLR 572**). The test under TUPE is similar, that is "to find the reason that caused the employer to dismiss/vary the terms". (**Tabberer v Mears Ltd UKEAT/0064/17**). It is not a but for test and particular care must be taken in identifying the reason as opposed to the context. (**Smith v Trustees of Brooklands College [2011] EAT/0128/11**).

g) The regulations contemplate the possibility that two or more reasons may operate on the mind of the employer. In such a case the prohibited reason must be the principal reason. It therefore follows that in any given case the prohibited transfer related reason could be *a* reason for the variation or dismissal, but the dismissal/variation will not be unfair/void if it is not the *principal* reason.

h) The aim of harmonising terms amongst existing and transferring staff will be regarded as a reason connected with the transfer **(Martin v South Bank University [2004] IRLR 74).** To justify a reason connected to a transfer by way of an ETO reason entailing changes in the workforce, there must be a change in the numbers, or possibly the functions, of the employees employed. (**Berriman v Delabole Slate Ltd [1985] ICR 546)**

i) The period of time between the variation or dismissal and the transfer is a relevant evidential factor to weigh in the mix but is not determinative. An act close to the transfer may be for any other reason. An act many years after a transfer may still be done because of it. (**P Bork International A/S v Foreningen af Arbejdsledere i Danmark [1989] IRLR 41 ; Smith v Trustees of Brookland College UKEAT/0128/11; Tabberer v Mears**. See also BIS guide 'Employment Rights on the Transfer of an undertaking' January 2014**)**.

7. Discussion and Conclusions

7.1 The key question for me distils to one of identifying the reason that caused the employer to vary terms or, for four of the claimants, to dismiss employees. I have concluded that the reason was the particular financial situation the respondent found itself in in 2020 compounded by the implications of Covid. I have concluded that is a reason which can neither be said to be the transfer nor a reason connected with it.

7.2 I have reminded myself that care should be taken to identify the reason, and not simply the context in which it all occurs. In a variation of terms case, it will by definition always be possible to see some sort of nexus to the transfer. That is simpy because the terms varied will be the terms transferred as a result of the earlier transfer. That puts the decision in context but does not necessarily identify the reason. Focusing on the fact that the term so varied was a term transferred under TUPE may lead the tribunal into applying an impermissible 'but for' test, rather than identifying the reason for the action. Of course, it may be that the reason is also found to be the transfer (or a reason connected to it) but the fact that the variation affects a term transferred does not in itself answer the question.

7.3 In this case, there has been a significant period of time since any of the transfers during which the employer has demonstrated it has maintained the inherited terms. This is not a case where I can conclude the employer has sought to find a false justification to use as a smokescreen to remove the transferred terms. I have considered the effect some of Dr Vive-Kananda's language in his correspondence might have on the total picture. I have concluded this is explained in his translation from his first language and is not sufficient to show ulterior motivation. There could have been no prediction of the implications of Covid and its effect on this sector and there is no explanation as to why it might have waited up to seven years to bring about such a change. Moreover, I accepted those pressures on the

continued business were genuine, unforeseen and immediately pressing. I am satisfied that the financial pressures of the Covid year were the genuine reasons for it acting as it did and that it genuinely had a belief that these cost savings would make a material difference to its prospect of continuing its provision of care.

7.4 A central argument in the claimants' cases is that this change amounts to harmonisation and that harmonisation is a prohibited reason. As a matter of law, they are correct that it would be prohibited but I do not accept that harmonisation is the reason. First, there is a distinction to be drawn between the consequential result of a variation and the operative reason. A permissible reason for varying terms may create a result which might look like harmonisation, but if that is not the reason for the change being made in the first place, the variation is not in itself unlawful. Secondly, harmonisation is an aim in itself and distinct from costs saving as a reason. Harmonisation may also come with costs saving but it also generates systems benefits and consistency and removes distinctions and inconsistency across the workforce. That is not the situation here although, on a term-by-term basis, there are now more terms which are consistent across the workforce than before. However, thirdly, the result does not in fact amount to harmonisation of contractual terms as there remain differences including the basic hourly rate which remains protected.

7.5 The effluxion of time is not determinative, but it is potentially indicative that the transfer is not an operative reason still less the principal or only reason. The totality of the situation has to be viewed in the round. In this case there is a considerable period of years. The most obvious and significant difference in 2020 compared to any of the preceding 7 years or so was the effect of Covid. The claimants may have arguments around the margin about how the company was being run generally in the run up to, and during, that time. They may have arguments about other business choices the respondent might have had open to it as a means of dealing with the situations it found itself in. The crucial finding for me, however, is that the employer's belief in its current financial predicament and its forecast of the immediate future was genuine and reasonable. It is that which was the motivating force in the need to propose and implement the changes.

7.6 I am satisfied that the reason cannot therefore be said to be "the transfer". That answers the claim negatively for those 2015 transfer group who transferred after 2014 and the first limb of the argument for the 2012 transfer group who transferred before the amendment. For them, there is the second limb of whether the reason was connected with the transfer. Whether a reason is connected with a transfer is a difficult concept to pin down. The authorities such as **Tabberer** and **Trustees of Brookland College** point me to a conclusion that it has to be the employer's reasons which are connected with the transfer, and not simply that the facts can somehow be shown to have some contextual relationship with an earlier transfer. Again, it is a matter of separating context from the operative reason. It seems to me the lengthy period of time that those terms were left in place shows that the transfer, or for that matter anything connected with it, did not operate on the employer's mind motivating these variations or dismissals.

7.7 If I am wrong in my principal conclusions as to the reason and if the context of the terms being changed is sufficient to amount to something which is connected with a transfer. Alongside the pressing financial predicament, it seems to me the outcome would not change. In such a situation I would then be faced with two operative reasons and would have to identify the principal reason. If such circumstances arose, and informed partly by the lengthy period of time since the transfer, I would conclude that the principal reason remained the respondent's genuine need to address its financial circumstances in the face of Covid and its related pressures. It follows that I am satisfied that the reason or principal reason for the variation / dismissal was neither the transfer nor a reason connected the transfer and if I am wrong such that either did play a material part in the reason, it was nonetheless not the principal reason.

7.8 In reaching that conclusion, I have also had regard to the BIS guide to TUPE 2006 following the 2014 amendment. It is not law but at page it deals with reasons unrelated to a transfer which will not render the variation void and suggest as examples "a sudden loss of an expected order by a manufacturing company or a general upturn in demand for a particular service or a change in a key exchange rate". Those are only examples and merely illustrate the practical application of the legal principals set out above. The essence is that TUPE does not prevent the new parties to the contract varying terms in the face of new pressures just as the original parties to the contract could have done.

Unauthorised Deduction from wages

7.9 As I have alluded to already, this case has not been prepared with a focus on the cause of action presented. In some cases, the date and nature of an alleged deduction is capable of identification in a schedule of loss if not actually in the witness evidence. In other cases, it is not. In some there may yet be time limit issues to resolve if my conclusion on the TUPE question had been different.

7.10 However, the answer to that TUPE question answers all such deduction claims. The contracts had been varied by agreement in fact. The agreement to that variation was not void as a matter of law. As a result, the payments due to the claimants remaining in employment on each subsequent pay date was, so far as the issues before me are concerned, the amount that was properly due. If the amount properly due was the amount paid, there can be no deduction. For that simple reason, the claims of unauthorised deductions from wages must fail.

Unfair Dismissal

7.11 Answering the TUPE question does not determine the unfair dismissal claims as it does with the deduction claims. Although the claim of an automatically unfair dismissal has gone, the ordinary basis of unfair dismissal is unaffected. No party has given detailed consideration to this question in the way I am sure they would have had this been the only claim. Nevertheless, it remains the case that the respondent has to prove the reason and the evidence has to persuade me that such a dismissal was fair within the meaning of section 98(4) of the 1996 Act.

7.12 The respondent relies on the financial pressures to its business during Covid and says the need to effect changes in the terms and conditions amount to a substantial reason. I am satisfied that this was the genuine reason operating on its mind as a matter of fact. Applying the characteristics set out above which are necessary for this reason in fact to amount to a potentially fair reason in law, I am satisfied that the test is made out. The reason is not whimsical or capricious; it arises in the face of a genuine business crisis and is an approach that many employers would adopt. It is not necessary that the survival of the business relies on the reason but in this case the need was particularly pressing. For those reasons I am satisfied that it is a reason which could amount to a fair reason. As such, at this first stage that is enough for it to satisfy the test in section 98(1) of the 1996 Act.

7.13 I then turn to the fairness of those four dismissals. Under section 98(4) I must consider the reasonableness of the change and, by extension, the subsequent dismissal. This involves whether, in all the circumstances, including the employer's size and administrative resources, the employer acted reasonably in treating the business reason as a sufficient reason to dismiss. As always that is an objective assessment measured against the hypothetical reasonable employer in materially similar circumstances. It is not for me to substitute my view of whether or not the employer acted reasonably in the circumstances with what steps I might have taken or decisions I might have made.

7.14 Whilst the reasonableness of the employer's need for the change and the reasonableness of the claimants' refusal remain part of the relevant factual considerations, neither determines the question. The question is as always whether the decision to dismiss for that reason was reasonable in the circumstances. Reasonableness of making the change and reasonableness of the employee's rejection may each be made out from each party's perspective yet the situation remains irreconcilable.

7.15 This is not an exemplar of a process of contractual change, but to approach matters from that perspective would take me into the realm of substitution. I must consider what did happen and the reasons for it and whether those decisions and the steps taken to reach them were within the range of reasonable responses of a reasonable employer. Omissions and deficiencies in a process one might expect to see must not be elevated to some sort of statutory provision. They are part of the test of fairness which does not operate in the abstract. The nature of the unfairness that arises from any omission or deficiency has to be identified.

7.16 First, I have accepted that there was a real need to reduce costs in this way. There were limited options for cost saving in a business model which was so heavily locked into provision of local authority funded services. There were obvious substantial savings to the respondent in the change and its intention to seek agreement to vary was, therefore, reasonable but I accept also that those needs have to be balanced by the material financial effect on the individual claimants. If they worked weekends or bank holidays, or had the other contractual benefits engaged, they would see less money in their pay than they had previously. That, however, has to be seen in the context of ongoing employment. There is little advantage to these claimants in preserving their enhanced terms for a such time as it

might take for a business to fold. Looking at the balance between these competing interests, both sides were reasonable in their stance, but I am not satisfied the balance of those interests takes the decision outside the range of reasonable responses.

7.17 I am satisfied that the consultation process adopted was sufficiently detailed and reasonable. The proposals were communicated in writing to the staff from the outset, even if the communication slowed during the period of collective consultation. I am satisfied that much all falls within the range of reasonable responses. The recognised trade unions were then consulted as were employee representatives of other staff groups and I found the information provided to reasonably set out the rationale for the change. It is not necessary for me to reach a conclusion on the staff side position. The collective process did not reach a collective agreement, largely it seems because a position was taken that this was an unlawful variation but it was a process that was not rushed and took place over about 2 months. I say no more about that. It may be that their position was itself a reasonable one to take although I have rejected the central theory as a matter of law. Had they not taken that position it is possible some form of agreement might have been achieved but that is of no value to this question. The reasonableness of the trade union position in the consultation does not determine the question which focuses on the reasonableness of the employer's actions. I have to assess the respondent's decision based on what did in fact happen. It was clear the collective consultation had reached a final conclusion and there was no further scope for it to provide any answer tot eh business needs. That was exhausted before the employer moved to vary with the individual employees. There was then some compromise by the employer to its proposals and the implementation dates put back, albeit that might be characterised as marginal. The individual communications that followed. There was then a mechanism adopted for challenges to the proposals which was exercised.

7.18 I have considered the fact that an appeal was not explicitly referred to in the notice given to employees. That is an omission but it exists in the abstract as individual challenges to the decision were made and were addressed by the employer. Similarly, I have considered the implication of the fact that no hearing was held in reaching that decision. Again, I have concluded that there is no unfairness. The points of challenge were raised and dealt with including the issue of whether to hold a hearing on the point in a way that I am satisfied meets the test in section 98(4) of the 1996 Act. To be clear, I have not concluded that part of the process was fair because holding a hearing would have made no difference, although for the purposes of section 123 of the 1996 Act that would be my conclusion. I have concluded it is fair because it was within the range of reasonable responses of the reasonable hypothetical employer in those circumstances to decide not to hold a hearing, particularly in respect of the timing and the settled position of the appellants rejecting the offer.

7.19 Finally, a significant factor in assessing reasonableness is to have regard to the number accepting the proposals. In this case that was 85 out of 97, with 8 leaving for other reason and the 4 claimants before me not accepting. In other words, about more than 95% accepted, albeit some under protest, whilst nearly 5% rejected. The balance of those figures, even though a number of those accepting will no doubt have done so under protest, adds to the scale in favour of the fairness of the decision.

7.20 For those reasons, the claims of unfair dismissal fail.

7.21 In the alternative, if I am wrong about the fairness question and that there were aspects of the process which rendered the dismissals unfair, I must then consider the "Polkey" question under the general requirement to have regard to what would be just and equitable having regard to the loss sustained in consequence of the dismissal in any potential remedy implications under section 123 of the 1996 Act. Such considerations can bite in different ways. Sometimes it is in respect of failed procedural steps and what the world would have looked like had a reasonable process been followed. Sometimes it is about the wider evidential picture of the way the employment relationship would have continued after the dismissal. The key question is to reflect what would have happened but for the unfairness. In this case, I am satisfied that there is nothing to suggest the employment would not have continued for a reasonable period after the actual dismissals so as to limit compensation. So far as what did happen, had the process included individual appeal hearings I cannot see that the outcome would have been any different at all. The appeals were on the basis that the change should not be made. That was a decision that the employer could not then reach. I have not been able to reach any findings of fact on any specific individual circumstances of the four dismissed employees which might admit of some chance of a different outcome. All plead to a position that they would not accept the new terms. I rejected Ms Woodford's evidence of an attempt to accept out of time. For those reasons, even if the process in respect of not holding hearings to decide the individual challenges was unfair, the outcome would have been the same.

Footnote

I want to add two footnotes referencing the individual aspects of this case and which lie outside the legal issues I have had to deal with in the judgment. The first is that a difficult case was made pleasurable by the opportunity to meet the 8 individuals who attended to give evidence. I pay tribute to the claimants' tenacity in pursuing their genuine sense of grievance. In particular, I want to single out Mrs Shaw who took on the task of representing herself and her two colleagues without the support of their union. Whatever else I might have had to make findings on in this case, I am left with no doubt that all of these claimants demonstrated unfaltering commitment to the care of the residents in their charge.

Secondly, of those claimants who remain in the respondent's employment, they continue to approach their vital work as a vocation and despite the modest material rewards in this sector. Through his Counsel and from the witness box, Dr Vive-Kananda rightly acknowledged that sentiment but those parties now have to move towards rebuilding a working relationship. I hope there may be some scope in the future for the respondent to recognise in some material way the added value its business receives from the experience of its particularly long serving employees.

EMPLOYMENT JUDGE R Clark

DATE 7 July 2022

JUDGMENT SENT TO THE PARTIES ON

……...……

AND ENTERED IN THE REGISTER

……...……
FOR SECRETARY OF THE TRIBUNALS