EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lorraine Cooper & Ors**

Respondents: **(1) Vanners Silk (1740) Limited**
(2) Victor 1003 Limited (Company No. 13112449) formerly called Penrose Ties (London) Limited
(3) Victor 1001 Limited (Company No. 13114470) formerly called Vanners (Administration) Limited
(4) Victor 1002 Limited (Company No. 13114627) formerly called Vanners (Silk Weaving) Limited

Heard at: **East London Hearing Centre**

On: **6, 7, 8, 11 and 12 April 2022**

Before: **Employment Judge Barrett**

Representation
Claimants: Mr Richard Wayman, Counsel

Mrs Laura Gore and Mr Justin Dudden represented themselves in respect of their claims for unfair dismissal

Respondent: Mr Roger Gawn, Director

JUDGMENT

The judgment of the Tribunal is that: -

1. **There was a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 on the 5 January 2021, by virtue of which:**

   a. **Mrs Lorraine Cooper's employment transferred from the First Respondent to the Fourth Respondent;**

   b. **Mrs Lorraine Golding's employment transferred from the First Respondent to the Third Respondent;**

c. Mr Sam Humphreys' employment transferred from the First Respondent to the Second Respondent;

d. Mrs Deborah Jordan's employment transferred from the First Respondent to the Second Respondent;

e. Mrs Aneta Tyszkiewicz's employment transferred from the First Respondent to the Second Respondent;

f. Mrs Caroline Wright's employment transferred from the First Respondent to the Second Respondent;

g. Mr Justin Dudden's employment transferred from the First Respondent to the Third Respondent;

h. Mrs Laura Gore's employment transferred from the First Respondent to the Third Respondent;

i. Mrs Caroline Humphreys' employment transferred from the First Respondent to the Second Respondent;

j. Mr David Sheppard's employment transferred from the First Respondent to the Fourth Respondent;

k. Mr Darren Underwood's employment transferred from the First Respondent to the Third Respondent.

2. The Respondents failed to inform and consult on the transfer in breached of regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

a. The First Respondent and the Fourth Respondent are jointly and severally liable to pay Mrs Lorraine Cooper 4 weeks' gross pay, namely £1,724.80.

b. The First Respondent and the Third Respondent are jointly and severally liable to pay Mrs Lorraine Golding 4 weeks' gross pay, namely £305.06.

c. The First Respondent and the Second Respondent are jointly and severally liable to pay Mr Sam Humphreys 4 weeks' gross pay, namely £1,401.60.

d. The First Respondent and the Second Respondent are jointly and severally liable to pay Mrs Deborah Jordan 4 weeks' gross pay, namely £1,395.20.

e. The First Respondent and the Second Respondent are jointly and severally liable to pay Mrs Aneta Tyszkiewicz 4 weeks' gross pay, namely £1,559.52.

f. The First Respondent and the Second Respondent are jointly and severally liable to pay Mrs Caroline Wright 4 weeks' gross pay, namely £1,440.00.

g. The First Respondent and the Third Respondent are jointly and severally liable to pay Mr Justin Dudden 4 weeks' gross pay, namely £4,653.85.

h. The First Respondent and the Third Respondent are jointly and severally liable to pay Mrs Laura Gore 4 weeks' gross pay, namely £6,538.46.

i. The First Respondent and the Second Respondent are jointly and severally liable to pay Mrs Caroline Humphreys 4 weeks' gross pay, namely £3,076.92.

j. The First Respondent and the Fourth Respondent are jointly and severally liable to pay Mr David Sheppard 4 weeks' gross pay, namely £2,692.31.

k. The First Respondent and the Third Respondent are jointly and severally liable to pay Mr Darren Underwood 4 weeks' gross pay, namely £2,788.00.

3. The Respondents made unauthorised deductions from the Claimants' wages and are ordered to pay the net sums unlawfully deducted:

a. The Fourth Respondent to pay Mrs Lorraine Cooper £2,857.80.

b. The Third Respondent to pay Mrs Lorraine Golding £621.55.

c. The Second Respondent to pay Mr Sam Humphreys £2,517.33.

d. The Second Respondent to pay Mrs Deborah Jordan £1,360.42.

e. The Second Respondent to pay Mrs Aneta Tyszkiewicz £1,793.07.

f. The Second Respondent to pay Mrs Caroline Wright £1,718.10.

g. The Third Respondent to pay Mr Justin Dudden £6,370.94.

h. The Third Respondent to pay Mrs Laura Gore £8,082.48.

i. The Second Respondent to pay Mrs Caroline Humphreys £4,547.85.

j. The Fourth Respondent to pay Mr David Sheppard £9,186.98.

k. The Third Respondent to pay Mr Darren Underwood £11,471.82.

4. The Third Respondent unfairly dismissed Mr Justin Dudden. His unfair dismissal claim is well-founded and succeeds.

a. **A reduction of 30% to be applied to his compensatory award under the *Polkey* principle.**

b. **An uplift of 25% to be applied to his compensatory award to reflect an unreasonably failure to comply with the ACAS code.**

5. The Third Respondent unfairly dismissed Mrs Laura Gore. Her unfair dismissal claim is well founded and succeeds.

a. **A reduction of 40% to be applied to her compensatory award under the *Polkey* principle.**

b. **An uplift of 25% to be applied to her compensatory award to reflect an unreasonably failure to comply with the ACAS code.**

6. The Second Respondent unfairly dismissed Mrs Caroline Humphreys. Her unfair dismissal claim is well founded and succeeds.

a. **A reduction of 35% to be applied to her compensatory award under the *Polkey* principle.**

7. The Fourth Respondent unfairly dismissed Mr David Sheppard. His unfair dismissal claim is well-founded and succeeds.

a. **A reduction of 20% to be applied to his compensatory award under the *Polkey* principle.**

8. The Third Respondent unfairly dismissed Mr Darren Underwood. His unfair dismissal claim is well-founded and succeeds.

a. **A reduction of 30% to be applied to his compensatory award under the *Polkey* principle.**

9. Claims for redundancy payments by Mrs Humphreys, Mr Dudden, Mr Sheppard and Mr Underwood are not well-founded and are dismissed.

10. Mrs Gore, Mrs Humphreys, Mr Dudden, Mr Sheppard, Mr Underwood, Mrs Jordan, Mrs Tyskiewicz and Mrs Wright were dismissed in breach of contract in respect of notice pay. The Respondents are ordered to pay damages, calculated on a net basis.

a. The Second Respondent to pay Mrs Deborah Jordan £298.12.

b. The Second Respondent to pay Mrs Aneta Tyszkiewicz £1,871.54.

c. The Second Respondent to pay Mrs Caroline Wright £305.17.

d. The Third Respondent to pay Mr Justin Dudden £6,061.86.

e. The Third Respondent to pay Mrs Laura Gore £8,082.48.

f. The Second Respondent to pay Mrs Caroline Humphreys £6,821.78.

g. The Fourth Respondent to pay Mr David Sheppard £9,671.84.

h. The Third Respondent to pay Mr Darren Underwood £4,593.49.

11. Mrs Gore, Mrs Humphreys, Mr Dudden, Mr Sheppard, Mr Underwood, Mrs Jordan and Mrs Tyskiewicz were owed holiday pay on the termination of employment. The Respondents are ordered to pay damages, calculated on a net basis.

a. The Second Respondent to pay Mrs Deborah Jordan £536.61.

b. The Second Respondent to pay Mrs Aneta Tyszkiewicz £449.17.

c. The Third Respondent to pay Mr Justin Dudden £1,692.57.

d. The Third Respondent to pay Mrs Laura Gore £3,536.09.

e. The Second Respondent to pay Mrs Caroline Humphreys £4,206.76.

f. The Fourth Respondent to pay Mr David Sheppard £9,671.84.

g. The Third Respondent to pay Mr Darren Underwood £1,735.32.

12. The Respondents failed to provide the Claimants with a written statement of change to their particulars of employment. Each Claimant is to be paid two weeks' gross pay.

a. The Fourth Respondent to pay Mrs Lorraine Cooper £862.40.

b. The Third Respondent to pay Mrs Lorraine Golding £152.53.

c. The Second Respondent to pay Mr Sam Humphreys £700.80.

d. The Second Respondent to pay Mrs Deborah Jordan £697.60.

e. The Second Respondent to pay Mrs Aneta Tyszkiewicz £779.76.

f. The Second Respondent to pay Mrs Caroline Wright £720.00.

g. The Third Respondent to pay Mr Justin Dudden £2,326.92.

h. The Third Respondent to pay Mrs Laura Gore £3,269.23.

i. The Second Respondent to pay Mrs Caroline Humphreys £1,538.46.

j. The Fourth Respondent to pay Mr David Sheppard £1,346.16.

k. The Third Respondent to pay Mr Darren Underwood £1,394.00.

REASONS

Introduction

1. The eleven Claimants were employed in various roles by Silk Industries Ltd, a silk-weaving company which operated out of a factory in Sudbury.

2. Silk Industries Ltd went into administration on 9 November 2020. On 24 December 2020, the First Respondent, Vanners Silk 1740 Ltd, purchased the business. It is agreed that the Claimants' contracts of employment transferred to the First Respondent on that date under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

3. The Respondents argue that the Claimants' contracts of employment were subsequently transferred for a second time to other companies, namely the Second, Third and Fourth Respondents. The Claimants dispute that there was a second transfer.

4. The working relationship between the Claimants and Mr Roger Gawn, owner and director of the Respondents, became strained. Concerns arose regarding late payment and non-payment of wages.

5. The Claimants notified ACAS on dates between 3 February and 10 March 2021, and early conciliation certificates were issued on 9 and 11 March 2021. On 11 March 2021, the Claimants submitted ET1 claim forms to the Tribunal, raising the following complaints:

    5.1. Failure to inform and consult on a TUPE transfer, in breach of reg.13 TUPE;

    5.2. Unauthorised deductions from wages, in breach of s.13 Employment Rights Act 1996 ('ERA');

    5.3. Failure to provide written particulars of employment.

6. One of the Claimants, Mrs Caroline Humphreys, in her ET1 also brought claims for unfair dismissal, notice pay, holiday pay and a redundancy payment. She was dismissed on 28 February 2021.

7. Three other Claimants, Mrs Aneta Tyszkiewicz, Mrs Deborah Jordan and Mrs Caroline Wright, ticked the box on the ET1 form to claim notice pay and holiday pay, without making claims for unfair dismissal.

8. Four more Claimants subsequently presented second ET1 claim forms bringing claims arising from the termination of employment:

    8.1. Mrs Laura Gore was dismissed on 28 February 2021. On 7 April 2021, she presented a second claim for unfair dismissal, notice pay and holiday pay.

    8.2. Mr Justin Dudden says he was dismissed on 31 March 2021. This is disputed by the Respondents, who say he resigned. On 4 May 2021, he presented a second claim for unfair dismissal, notice pay, holiday pay and a redundancy payment. (Mr Dudden submitted two ET1 claim forms on

that date containing the same complaints; nothing turns on the duplication.)

8.3. Mr David Sheppard resigned on 4 May 2021. On 1 July 2021, he presented a second claim for constructive unfair dismissal, notice pay, holiday pay, arrears of pay and a redundancy payment.

8.4. Mr Darren Underwood resigned on 23 June 2021. On 27 July 2021, he presented a second claim for constructive unfair dismissal, notice pay, holiday pay, arrears of pay and a redundancy payment.

9. The five Claimants pursuing claims for unfair dismissal are referred to as the 'Group 2 Claimants', and the remaining six Claimants are referred to as the 'Group 1 Claimants'.

10. At the time when the claims were presented, Silk Industries Ltd was also a respondent. The Claimants' claims against Silk Industries Ltd have since been settled, and Silk Industries Ltd removed as a respondent.

11. Case management was conducted by Regional Employment Judge Taylor at preliminary hearings on 2 September and 23 November 2021.

12. At the 2 September 2021 preliminary hearing, the Respondents were given an extension of time to serve a substantive response to the claims, have served only holding responses prior to that date. The Respondents subsequently filed a statement from Mr Gawn dated 12 October 2021 to stand as Grounds of Resistance to all the claims.

13. On 21 October 2021, the Claimants made an application to strike out the Respondents' response. That application was refused on 23 November 2021 by Regional Employment Judge Taylor because a fair hearing of the issues remained possible. It was directed that the Claimants' TUPE and wages claims would be heard before the Group 2 Claimants' unfair dismissal claims. The Respondents were ordered to provide further information, which was served by Mr Gawn on 7 December 2021.

The issues

14. The issues for determination are as follow.

TUPE transfer – all Claimants

15. Was there a relevant transfer for the purposes of the TUPE Regulations between the First Respondent and the Second to Fourth Respondents?

16. Were the Respondents required to inform and consult with the affected employees?

17. If so, did the Respondents comply with their obligations?

18. If not, are the Claimants entitled to a declaration that their rights under reg.13 TUPE have been breached?

19. Should compensation be awarded, and if so, what compensation would be appropriate?

Unauthorised deductions from wages – all Claimants

20. Who is the correct Respondent in respect of each Claimant's wages claim?

21. Did the Respondent with potential liability make deductions from wages and if so in what amount?

22. Did each Claimant consent to be furloughed?

23. Were the deductions unauthorised?

24. If the claim succeeds:

    24.1. Does the Claimant's claim for unauthorised deductions concern a matter to which the ACAS code of practice on disciplinary and grievance procedures relates?

    24.2. Did the applicable Respondent fail to comply with that Code in relation to that matter?

    24.3. Was that failure unreasonable?

    24.4. If so, would it be just and equitable in all the circumstances to increase the Claimant's award? By what amount, up to 25%?

Unfair dismissal – Group 2 Claimants

25. In respect of Mr Dudden, was he dismissed, or did he resign?

26. In respect of Mr Underwood and Mr Sheppard, was the Claimant constructively dismissed?

    26.1. Did the applicable Respondent employer breach the contract of employment?

    26.2. Was the breach a fundamental one?

    26.3. Did the Claimant resign in response to the breach?

    26.4. Did the Claimant affirm the contract before resigning?

27. In respect of all the Group 2 Claimants, what was the reason for the Claimant's dismissal?

28. Was it a reason falling within s.98 ERA?

29. Did the applicable Respondent employer act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

30. Was a fair procedure followed in dismissing the Claimant?

31. In relation to Mrs Humphreys, whom the Respondents contend was dismissed on grounds of redundancy; if the reason was redundancy, did the applicable Respondent employer act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will consider whether:

    31.1. the Respondent adequately warned and consulted the Claimant;

31.2. the Respondent adopted a reasonable selection decision, including its approach to a selection pool;

31.3. the Respondent took reasonable steps to find the Claimant suitable alternative employment;

31.4. dismissal was within the range of reasonable responses.

32. In relation to Mrs Gore, whom the Respondents contend was dismissed on grounds of misconduct; if the reason was misconduct, did the applicable Respondent employer act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will consider whether

32.1. there were reasonable grounds for that belief;

32.2. at the time the belief was formed the Respondent had carried out a reasonable investigation;

32.3. the Respondent otherwise acted in a procedurally fair manner;

32.4. dismissal was within the range of reasonable responses.

33. If the Tribunal find the dismissal of the Claimant to be unfair; is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

34. If the Tribunal find the dismissal of the Claimant to be unfair; should any reduction be made to her award to reflect his or her contributory conduct?

35. If the Tribunal finds that the dismissal of the Claimant was the result of a defective process, and unfair for that reason, should there be an increase in the award to reflect a failure to adhere to the ACAS code of practice on disciplinary and grievance procedures?

Redundancy payments – Mrs Humphreys, Mr Dudden, Mr Sheppard and Mr Underwood

36. If the reason for dismissal was redundancy, is the Claimant entitled to a statutory redundancy payment under s.135 ERA?

Notice pay – Group 2 Claimants, Mrs Jordan, Mrs Tyszkiewicz and Mrs Wright

37. Were the Group 2 Claimants, Mrs Jordan, Mrs Tyszkiewicz and Mrs Wright entitled to be paid notice pay? In respect of each:

37.1. Was the Claimant dismissed?

37.2. What was the Claimant's notice period?

37.3. Was the Claimant paid for that notice period?

37.4. If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

Holiday pay – Group 2 Claimants, Mrs Jordan, Mrs Tyszkiewicz and Mrs Wright

38. In respect of the Group 2 Claimants, Mrs Jordan, Mrs Tyszkiewicz and Mrs Wright, did the applicable Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?

Failure to provide written statement of employment particulars (s.38 and sch.5 Employment Act 2002) – all Claimants

39. When these proceedings were begun, was the applicable Respondent employer in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?

40. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

41. Would it be just and equitable to award four weeks' pay?

The hearing

42. During the final hearing, all the Claimants were represented by Mr Richard Wayman of Counsel, instructed by Bates Wells and Braithwaite, in respect of their claims for failure to inform and consult, unauthorised deductions from wages and failure to provide a written statement of terms and conditions. Mr Wayman also represented Mr Sheppard, Mr Underwood and Mrs Humphreys of the Group 2 Claimants in respect of the claims connected with the termination of their employment. Mrs Gore and Mr Dudden represented themselves in respect of their claims for unfair dismissal. Mr Gawn represented the Respondents.

43. The Tribunal was provided with a bundle of documents numbering 1533 pages. Mr Gawn provided a witness statement on behalf of the Respondents. Each of the Claimants provided a witness statement, and Mr Sheppard, Mr Underwood, Mr Dudden and Mrs Gore each provided a second statement focussing on their claims for unfair dismissal.

44. On the first day of the hearing, all parties attended in person save for Mrs Cooper and Mrs Jordan. Mr Gawn said he was feeling unwell on the first day. Arrangements were made for a video link to the hearing room. The remainder of the hearing was conducted as a hybrid hearing, with Mr Gawn and some of the Claimants attending remotely. On the second day of the hearing, Mr Gawn attended remotely in the morning and did not attend after lunch. Having previously discussed with Mr Gawn the need to provide medical evidence if unfit to attend, the hearing proceeded in his absence during the afternoon. He was able to attend the following day and for the rest of the hearing. Mr Wayman was unable to attend on the final day of the hearing (by which time his clients' evidence was complete in respect of the claims in which he acted), and only Mr Gawn, Mrs Gore and Mr Dudden attended on that day.

45. The hearing took place over 5 days.

    45.1. The first day was used to hear a strike out application from the Claimants, to discuss timetabling, and for Tribunal reading time.

45.2. On the second day, I refused the Claimants' strike out application. Mr Gawn, Mrs Gore and Mr Sheppard gave evidence on the TUPE transfer issue. Mr Wayman made submissions on behalf of the Claimants on the TUPE transfer issue.

45.3. On the third day, I gave judgment on the TUPE transfer issue, with reasons reserved. There was then a delay while the Claimants attending remotely were provided with a copy of the bundle. All the Claimants, save for Mrs Cooper, gave evidence regarding their wages claims. Mr Wayman and Mr Gawn made submissions on these claims.

45.4. On the fourth day, Mr Gawn gave evidence on behalf of the Respondents in relation to the Group 2 Claimants' unfair dismissal claims. Mrs Humphreys, Mr Sheppard and Mr Underwood gave evidence regarding these claims. Mrs Gore began her evidence.

45.5. Mrs Gore completed her evidence on the morning of the fifth day, and evidence was also given by Mr Dudden.

46. Mrs Cooper was unable to attend and give evidence. Mr Gawn said that there were no matters in her statement that he disputed or sought to challenge.

47. The parties agreed that closing submissions in respect of the unfair dismissal claims should be made in writing as Mr Wayman was unable to attend on the final day of the hearing. Mrs Gore and Mr Dudden, who represented themselves in respect of these claims, said they would rely on Mr Wayman's written submissions. The parties agreed that a separate remedy hearing would be required in respect of any successful claims of unfair dismissal.

Claimants' application to strike out

48. Rule 37 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Sch 1 ("ET Rules") provides, insofar as is relevant:

> **At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
>
> **…**
>
> **that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
>
> **…**
>
> **A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**

49. For a tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response. In *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA, Sedley LJ held:

‘5. This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.

[…]

23. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist.’

50. In *Bolch v Chipman* UKEAT/1149, Burton P offered guidance as to the questions which must be answered on an application for strike out under the predecessor to rule 37(1)(b):

‘(1) There must be a conclusion by the Tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.

[…]

Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question so far as leading on to an order that the Notice of Appearance must be struck out.

The helpful and influential decision of the Employment Appeal Tribunal, per Lindsay P, in De Keyser Ltd v Wilson [2001] IRLR 324 is directly in point. De Keyser makes it plain that there can be circumstances in which a finding can lead straight to a debarring order. Such an example, and we note paragraph 25 of Lindsay P's judgment, is "wilful, deliberate or contumelious disobedience" of the Order of a court.

But in ordinary circumstances it is plain from Lindsay P's judgment that what is required before there can be a strike out of a Notice of Appearance or indeed an Originating Application is a conclusion as to whether a fair trial is or is not still possible.

[…]

Once there has been a conclusion, if there has been, that the proceedings have been conducted in breach of Rule 15 (2) (d), and that a fair trial is not possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion. It is also possible, of course, that there can be a remedy, even in the absence of a

conclusion that a fair trial is no longer possible, which amounts to some kind of punishment, but which, if it does not drive the defendant from the judgment seat (in the words of Millett J) may still be an appropriate penalty to impose, provided that it does not lead to a debarring from the case in its entirety, but some lesser penalty

But even if the question of a fair trial is found against such a party, the question still arises as to consequence. That is clear because the remedy, under Rule 15 (2) (d), is or can be the striking out of the Notice of Appearance. The effect of a Notice of Appearance being struck out is of course that there is no Notice of Appearance served.'

51. Mr Wayman argued that there had been a material change of circumstances since the Claimants' application to strike out the response had been refused by Regional Employment Judge Taylor, because the Respondents had failed to comply with further case management directions. He submitted that this amounted to unreasonable conduct of the proceedings. Mr Gawn responded that he had complied with the case management directions to the extent that he was able, but he was lacking some information.

52. On 23 November 2021, Regional Employment Judge Taylor ordered the Respondents to provide the following items:

    52.1. A counter-schedule to each of the Claimant's unauthorised deductions from wages claims; and

    52.2. Further information regarding the unfair dismissal claims including why it was said that the Claimants had not been unfairly dismissed and any argument regarding contributory fault.

53. On 7 December 2021, Mr Gawn provided a counter-schedule showing the wages he said had been paid and were owing to the Claimants, and a letter containing the reasons why he said the Group 2 Claimants were not unfairly dismissed. He contended that Mrs Humphreys was made redundant, Mr Underwood, Mr Sheppard and Mr Dudden resigned, and that Mrs Gore was dismissed for gross misconduct. He also said that if Mr Dudden had not resigned, he would have been dismissed for misconduct.

54. The Claimants argued that the information provided was sparse, and it was. Nonetheless there had been compliance with Regional Employment Judge Taylor's order. I took into account that Mr Gawn had throughout the period since the last preliminary hearing been representing himself.

55. The Claimants also took issue with what they said was limited disclosure provided by the Respondents. Mr Gawn was reminded of his ongoing duty of disclosure. He said that he thought he had provided all relevant and available documents but that he would further check with his staff for any further records to disclose.

56. On balance I did not consider that Mr Gawn's conduct of the proceedings had been "*scandalous, unreasonable or vexatious*". If it had been, I would still have declined to strike out the response because a fair trial of the issues remained possible. I noted that where Mr Gawn has failed to flesh out the Respondents' defence, that was a matter more likely to prejudice his case than the Claimants' cases. I further noted that it was open to Mr Wayman to probe in cross-

examination whether any key documents were missing, and if so, to address the point in submissions.

Findings of fact

57. The Claimants commenced employment with Silk Industries Limited on the following dates:

    57.1. Mrs Cooper on 10 October 1994.

    57.2. Mr Dudden in July 1998.

    57.3. Mr Underwood on 15 August 2005.

    57.4. Mrs Humphreys on 21 November 2005.

    57.5. Mr Sheppard on 26 March 2012.

    57.6. Mr Humphreys on 16 September 2013.

    57.7. Mrs Gore on 18 December 2013.

    57.8. Mrs Tyszkiewicz on 6 August 2015.

    57.9. Mrs Wright on 25 February 2019.

    57.10. Mrs Jordan on 29 July 2019.

    57.11. Mrs Golding on 2 December 2020.

58. As noted above, Silk Industries Ltd went into administration on 9 November 2020. Administrators from KPMG were appointed. The company continued to trade while the administrators sought a buyer. Mrs Gore, Mrs Humphreys and Mr Underwood offered a management buyout, but their offer was not accepted by KPMG.

59. Mr Gawn entered into negotiations with KPMG regarding a potential purchase of the company from 18 November 2020. On 24 November 2020, he visited the factory and met Mrs Gore, the Managing Director. He was reassured by the information provided by her and by KPMG. He believed that he could restore the company to profit. He had previous experience in luxury goods manufacturing, although not specifically in silk-weaving. He incorporated the First Respondent to take on the business.

60. On 22 December 2020, Mr Gawn had a conference call with Mrs Gore and Mr Underwood, the company's Accountant. They discussed the difficulties which the company had faced. Mr Gawn described his plans for the future, including creating a number of smaller companies, with one owning the fixed assets and machinery, and others employing the staff, in order to reduce liability for business rates. Mr Underwood took notes of the meeting, which refer to additional companies being created: *"Vanners Weaving, Vanners Warping etc… says he can avoid paying business rates by doing this…"* [907].

61. On 24 December 2020, the First Respondent purchased the business and the employees of Silk Industries Ltd, who numbered 31, transferred to the First Respondent. It is accepted that there was a failure to inform and consult

employees regarding that transfer. The Claimants have settled claims against Silk Industries Limited in respect of that failure.

62. At the point when their contracts of employment transferred to the First Respondent on 24 December 2020, the Claimants held the following roles:

Group 1

62.1. Mrs Cooper was a Textile Operative.

62.2. Mrs Golding was a Cleaner.

62.3. Mr Humphreys was Assistant Manager of Tie Production and Distribution.

62.4. Mrs Jordan was a Sewing Machinist.

62.5. Mrs Tyszkiewicz was a Factory Operative.

62.6. Mrs Wright was a Sewing Machinist.

Group 2

62.7. Mrs Gore was the Managing Director.

62.8. Mr Dudden was Head of Sales.

62.9. Mr Sheppard was the Operations Manager.

62.10. Mrs Humphreys was the Tie Production and Distribution Manager.

62.11. Mr Underwood was the Accountant.

63. It was an express term of each of the Claimants' employment contracts prior to the transfer to the First Respondent that they would be paid on the 15th day of each month [e.g. 596].

64. Mr Gawn was assisted in administrative matters by Mrs Maria Walker, who was an employee of a different company he also owned. He was on occasions accompanied by his personal assistant, Ms Sarah LeMercier, also employed through a different company.

65. On 28 December 2020, Mr Gawn telephoned Mrs Gore to ask about sales figures and cash flow. Mrs Gore then sent Mr Gawn a three-month cash flow forecast prepared by Mr Underwood [908].

66. On 4 January 2021, Mr Gawn held a Zoom meeting with Mrs Gore, Mr Sheppard and Mrs Humphreys. He told them that he intended to place all staff other than the five senior managerial staff (the Group 2 Claimants) on furlough.

67. Either later on 4 January or on 5 January 2021, Mr Gawn held a Zoom meeting with all staff telling they would be placed on "flexi-furlough" and that he would claim money for their wages under the furlough scheme. He also explained that he intended to split the business up into separate companies to reduce business rates liability, compartmentalising the existing departments in the building.

68. The Group 1 Claimants say they entered into written "flexi-furlough" agreements with the First Respondent. These agreements have not been provided to the Tribunal, although they are referred to in some of the contemporaneous documentation [e.g. 739]. However, there is no record that the Claimants agreed to vary their pay during furlough and their evidence is that they did not. I accept that evidence.

69. On 5 January 2021, the Second, Third and Fourth Respondents were incorporated. Also incorporated were Vanners (Dye House) Ltd and Vanners (Silk Warping) Ltd. Mr Gawn intended that each company would operate as a business running various aspects of the factory's activities, including silk warping, weaving, dying, tie production, marketing and sales. The First Respondent would retain all the equipment and rent it to the relevant operational company.

70. In order to understand the different elements which made up the factory's activities, Mr Gawn asked Mr Sheppard to colour code a floorplan of the factory. This plan showed:

    70.1. A large building called the 'rapier shed' containing the weaving machines.

    70.2. A small dye house, where some of the woven silk was dyed.

    70.3. A silk warping room.

    70.4. An administrative section.

    70.5. An area where ties were cut, folded, hand-finished and packed.

71. The overall factory site was over 50,000 square feet in area. The area used by each of the operational companies once incorporated would be much smaller. Mr Gawn understood that a company operating in an area with a rateable value no greater than £12,000 per year could claim small business relief and a limitation of rating liability. He believed that using smaller companies to run the component elements of the factory's activities was a legitimate strategy to reduce overheads. (The parties did not address the Tribunal on whether that was a correct understanding and it was not an issue the Tribunal needed to determine.)

72. Mr Gawn intended that the employees would be allocated to the part of the business in which they worked; so, weavers would go into the weaving company, people who made ties would go to the tie-making company, and most managers would go into the administration company. He discussed with Mrs Gore what each staff member did, in order to allocate them to the appropriate company. Mr Sheppard, who was the Operations Manager, spent most of his time dealing with weaving, and so Mr Gawn thought he should go to the weaving not the administration company. Similarly, he thought that Mrs Humphreys, who as Tie Production and Distribution Manager ran the tie-making section of the factory, should be allocated to the newly formed tie company. He did not intend to make any changes to the substance of their roles or to their job descriptions; as he explained it when giving evidence, he formed the new companies to "*encompass*" the functions that were already being undertaken.

73. Mr Gawn's evidence was that prior to incorporating the new companies, he told Mrs Gore to do everything necessary to inform and consult staff about a second TUPE transfer from the First Respondent to the Second to Fourth Respondents.

However, I find that while Mrs Gore was aware of the new companies being set up, she was not told to take any particular steps regarding TUPE. Later in January, Mrs Gore wrote to Mr Gawn saying she was *"a bit confused regarding the numerous companies (apart from business rates)"* and asking whether this could affect employees' TUPE rights [974]. That email is not consistent with her having previously been instructed to carry out a TUPE transfer process from the First Respondent. There was no one at the company with training in HR who could have advised on the TUPE implications of the new companies being set up, the previous HR manager having left during 2021.

74. On 11 January 2021, Mrs Walker emailed Mrs Gore requesting payroll information [1347]. Mrs Gore forwarded the request to Mr Underwood, who asked the company's former payroll accountants for the information [915]. Mr Gawn, who was copied into these exchanges, reprimanded Mr Underwood for contacting the payroll accountants and issued him with a *"first official verbal warning"* [915]. This was because Mr Gawn did not wish to incur any costs for the payroll function, which would in his view be unnecessary.

75. On the same day, Mrs Gore sent Mr Gawn an updated three-month cash flow forecast prepared by Mr Underwood [914].

76. Also on 11 January 2021, Mrs Gore, Mr Sheppard and Mrs Humphreys agreed with Mr Gawn to defer payment of their salary from 15 January 2021 to the end of the month, to assist in providing cash flow to pay the other staff's wages [1527].

77. On 12 January 2021, Mr Underwood sent Mrs Gore the previous payslips [917] and employee pension scheme contributions information [1347] needed for payroll. This information was sent to Mrs Walker, and Mr Underwood also answered follow-up queries from Mrs Walker.

78. On 13 January 2021, Mr Gawn emailed Mrs Gore, asking her to circulate information to all staff [1348]. Amongst other matters, he wrote:

> **'… I have secured necessary funding that it appears that we will need going forward but this cannot be provided in full until the end of the month.**
>
> **I had already decided that the company could not afford to pay staff mid month any longer and as of 1st February this will need to be end of month for the future.**
>
> **However, I am obviously concerned that the staff will find that change difficult, so I am suggesting that we pay 50% mid month for January with the balance by 31st January. What I would like you to do please is to ask the staff to put forward any specific problems that they may be encountering so that a further view can be taken in the short term.'**

79. Mrs Gore circulated that information to all staff on the following day, 14 January 2021. That day, she, Mr Sheppard and Mrs Humphreys also spoke to Mr Gawn, rescinding their agreement to defer their pay until the end of the month. He replied that it was too late as their wages were not budgeted for.

80. On the first pay date following the transfer to the First Respondent, 15 January 2021:

    80.1. Mrs Cooper was paid £500.77 [515], instead of her normal net pay of £1,455.38 [516].

    80.2. Mrs Golding received £141.10 [593], instead of her normal net pay of £330.48 [583].

    80.3. Mr Humphreys received £426.22 [730A7], instead of his normal net pay of £1,275.54 [730A3].

    80.4. Mrs Jordan received £428.30 [735], instead of her normal net pay of £1,291.85 [733].

    80.5. Mrs Tyszkiewicz received £452.78 [901], instead of her normal net pay of £1,622 [896].

    80.6. Mrs Wright received £418.08 [1108], instead of her normal net pay of £1,322.40 [1106].

    80.7. Mrs Gore received no pay [646]. Her normal net monthly pay was £4,378.01 [607].

    80.8. Mrs Humphreys received no pay. Her normal net pay was £2,463.42 [670].

    80.9. Mr Dudden received £1,688.96 [542], instead of his normal net pay of £3,492.61 [536].

    80.10. Mr Sheppard received no pay. His normal net pay was £2,211.68 [777].

    80.11. Mr Underwood received £1,011.81, instead of his normal net pay of £2,163.83 [906].

81. On 18 January 2021, Mr Gawn attended a Zoom call with all staff. He also requested a twelve-month cashflow forecast to be provided that morning. Mr Underwood responded with a draft forecast as requested [933], noting that more work was required to produce a more accurate forecast. On the same day, Mrs Gore forwarded to Mr Underwood a message from Mr Gawn in which Mr Gawn was critical of Mr Underwood's work [932].

82. On 19 January 2021, Mrs Gore wrote to Mrs Walker asking when staff would be paid. Mrs Walker replied that it would be on the 29th or the 1st [939].

83. On 21 January 2021, Mrs Gore emailed Mr Gawn on behalf of herself and Mr Dudden, setting out the current sales in progress and expected and concerns regarding production to meet those sales [825].

84. On 25 January 2021, Mrs Gore wrote to the other senior managers attaching a copy of a new draft contract which Mr Gawn had proposed for all staff [1159 / 610]. Mrs Humphreys wrote to Mr Gawn on 26 January 2021, explaining that pursuant to the TUPE Regulations, staff were entitled to transfer under their existing contractual terms and raising objections to aspects of the new draft terms which she considered to be less favourable. Mrs Walker wrote to Mrs Gore on 27 January 2021 saying that Mr Gawn accepted that current contractual terms

applied for the time being but that potential new contracts were to be discussed as soon as possible [980].

85. On 29 January 2021, the Claimants received payslips in the name of the Second, Third or Fourth Respondents. They had not otherwise been notified that their employment might be transferred from the First Respondent.

85.1. Mrs Cooper's payslip came from the Fourth Respondent. It detailed furlough pay of £1,181.15 [514]. Her unchallenged evidence is that this was not paid.

85.2. Mrs Golding's payslip came from the Third Respondent, in the amount of £388.80 [584]. Her unchallenged evidence is that this was not paid.

85.3. Mr Humphreys' payslip came from the Second Respondent, in the amount of £1,065.87. His bank records show this was not received [730A7].

85.4. Mrs Jordan's payslip came from the Second Respondent, in the amount of £1,118.33 [734]. Her unchallenged evidence is that this was not paid.

85.5. Mrs Tyszkiewicz's payslip came from the Second Respondent, in the amount of £1,087.56 [897]. Her bank records show that this was not paid [902].

85.6. Mrs Wright's payslip came from the Second Respondent, in the amount of £1,098.30 [1107]. Her unchallenged evidence is that this was not paid.

85.7. Mrs Gore's payslip came from the Third Respondent, in the amount of £4,618.83 [622]. Her bank records show that this was not paid [647].

85.8. Mr Dudden's payslip came from the Third Respondent, in the amount of £3,502.13 [539]. His bank records show this was not paid [547].

85.9. Mrs Humphreys' payslip came from the Second Respondent, in the amount of £2,436.70 [672]. Her bank records show that this was not paid [677].

85.10. Mr Sheppard's payslip came from the Fourth Respondent, in the amount of £2,191.07 [778]. His unchallenged evidence is that this was not paid.

85.11. Mr Underwood's payslip came from the Third Respondent, in the amount of £2,115.69 [989]. His unchallenged evidence is that this was not paid.

86. On the same day, Mr Gawn wrote to Mrs Gore [880]:

> **'You asked me to write to you in respect of the wages and salaries due on 31st January 2021… Furlough monies will be arriving next week and all furloughed staff will be paid immediately. If you and the rest of the management team collect the outstanding sums due to the company, which have been advised to me, then management salaries should be met from that income.'**

87. During January 2021, the Group 2 Claimants became concerned at the lack of cash flow and authorisation to continue various aspects of the factory's functioning [e.g., 812]. These included the telephony and internet contract, industrial waste bin and sanitary bin collection and servicing of equipment, as

well as the purchasing of yarn needed to make silk. The telephone lines and internet were cut off at the end of January. The licence for the accounting software also expired. These matters caused tension with Mr Gawn, who objected to paying for services chosen prior to his involvement [e.g., 624]. Meanwhile, Mr Gawn was disappointed that the business, which he had bought as a trading concern, made very little income in January. He felt that he had not been given full information prior to making the purchase and that the managerial staff were being obstructive.

88. On 1 February 2021, Mr Gawn visited the factory with Ms LeMercier. Due to the Covid-19 lockdown, this was the first time he had visited the factory since December. He met with Mrs Gore, Mrs Humphreys, Mr Dudden, Mr Sheppard and Mr Underwood. Mrs Gore covertly recorded the meeting and has provided a transcript, with some narrative description added [884]. Mr Gawn does not dispute the accuracy of the transcript.

89. During the meeting:

89.1. Mrs Gore emphasised that the company had been in administration and needed cashflow. Mr Dudden stated they needed to buy yarn to fulfil new orders coming in.

89.2. Mr Gawn said that he had trusted all of them to manage the business, and they had not come up with a business plan. He also said that during January, the business had not produced or functioned specifically *"or provided what I need".*

89.3. Mrs Humphreys said that the company was obliged to pay wages. Mr Gawn replied it was the company's responsibility, not his, and there was no money coming in. Mrs Gore said this was *"unacceptable and immoral".* Mr Gawn compared her to Arthur Scargill.

89.4. Mr Gawn and Mrs Humphreys had an altercation, the transcript of which reads as follows:

'LG we've just been in administration Roger, month one! You have to give us a chance

RG what do you think I'm doing sitting here? We're going backwards now

CH the only thing we're going backwards on is talking about our pay

RG get off that hobby horse of yours Caroline, I'll tell you what can you leave the room so we can talk about other stuff

CH no because I'd like to know ....

RG don't say another word about wages

CH I will say what I want to say

RG you won't!

CH what are you going to do about it

RG you leave the room and tell me independently

CH [*asks again about contractual obligations*]

RG [*bangs hand on table*] put it in writing – you're fired!

CH on what grounds am I fired -

RG because I don't like the way you treat me

CH tough, I have all these witnesses and you've just fired me

RG no I'll furlough you actually

CH no you just fired me

RG I've changed my mind

CH Nono you just fired me

RG do you want to be fired

CH no but you just fired me

RG but do you want to be fired?

CH I won't answer that

RG can we get back to something constructive, you're so negative'

89.5. Mr Gawn asked to meet with each of the managers individually, but they refused and said they would only speak to him as a group.

89.6. Mr Gawn announced that Mrs Gore, Mr Underwood and Mrs Humphreys would be furloughed, although he wanted Mrs Gore to produce a business plan first.

89.7. Mrs Gore handed Mr Gawn a letter, which she also subsequently emailed to him, saying "*Please note that all staff are now working under protest due to non payment of wages as determined by your TUPE obligations*" [1387].

90. From that time, the factory ceased production. Mr Gawn announced all employees would be furloughed during February, except for Mr Sheppard, Mr Dudden and a third member of staff, Mr Ciaran Roche. Mr Sheppard, Mr Dudden and Mr Roche continued to work on sales, marketing, sending out samples of products already in stock, and maintenance of the factory.

91. On 4 February 2021, Mrs Walker forwarded to the Group 2 Claimants a message from Mr Gawn criticising them for failing to produce an action plan or sufficient income [789]. He added:

'Our own in-house accounts department is working hard to get the formal authority and clearance from HMRC to get the furlough payments cleared so that these can be paid to existing furloughed staff. I am pushing hard to get the new funds cleared through the necessary channels. It is impossible to give definitive dates at this time

92. On 5 February 2021, Mr Gawn wrote to Mrs Gore [865]:

> **'I want to start by saying that I am extremely disappointed. I told you prior to my purchase and subsequently on several occasions that I would not have made the commitment to purchase Vanners unless I had your commitment at the helm. I relied heavily on your representations about the business. You have clearly turned against me, demonstrated by the adverse comments that you have quoted to me on more than one occasion...**
>
> **Your attitude about me was also particularly demonstrable at the impromptu meeting that I had with you and your management team on this Monday morning. Sarah Le Mercier was both an observer at her prior meeting with you to the attitude existing amongst you and a number of the team, but also the meeting on Monday of course. It staggers me that you have not yet had a reality check on the severity of the problems that I now know the business has. I did not create these and only recently have been made fully aware of them! There are many examples of crazy thinking - not least the one where Darren told me that I had to pay £14,000 to get the phones / Broadband re-assigned to the new company. Having spoken to Ocean Telecom yesterday morning they want £400+ for time to date and about £200 per month going forward. Had Darren gone mad? You never contradicted that statement so I can only believe you had accepted it also? My previous statement to you stands as to your employment status. You were the Managing Director of Silk Industries Ltd and I wanted a business plan from you for the business going forward. If you were unable to deliver it then I said that you should be treated as furloughed. I have had nothing from you, so that position began on Tuesday of this week as far as I am concerned. The company simply cannot afford to pay you £80,000+ per annum at this time as you will appreciate. Furlough is designed to assist companies and maintain employment generally. It is not just personal to you. You are not being made redundant, nor being given notice for any reason at this time, however I should point out that your position based upon your actions so far is under review. As sole director I am currently taking on a short term role of dealing with production and logistical matters with David & Ciaran, and customers myself along with Justin. I have had perfectly satisfactory discussions with Burberry and Charvet so far. I need any other customer information that you possess in order that I may fulfil my duties...'**

93. Mrs Gore replied on the same day:

> **'While it might suit your narrative to blame everyone else at Vanners for the current situation, the truth is all these issues have been caused by yourself. On the phones and broadband, find attached numerous emails chasing you for payment of these advising the damage this would cause if they were to be cut off. The quote of £14,000 was a quote for a complete new set up including hardware from DPS which you asked us to obtain. This hardware was not required and in various conversations we explained to you that the**

> **Ocean Telecom existing option was reasonable and would have ensured continuity. We have regularly as a team provided you with all requested information including reports, cashflow, sales budget, client info, competitor info, marketing info etc. The first and only request for a full business plan was on Monday 1st February which was after the server was disconnected. Therefore no-one is able to access any of the data because you let the Broadband contract lapse ergo we cannot provide you with the information you have requested…**
>
> **Due to you not paying staff, people have been contacting the local council as they are in severe financial hardship and need help with rent, food and utilities, so it's very public knowledge in the local area of the situation you have created.**
>
> **Finally, I have always been professional in my dealings with you, I think your suggestion of my adverse comments is actually me just not agreeing with some of your points. As you have raised adverse comments, never in my 25 year career have I (or Caroline) been called "f*^ing bitches" (by Sarah), or witnessed someone being fired (by you) only for it to then be immediately retracted, very unprofessional!**
>
> **Please confirm when staff will be paid as this is the most critical concern for me at this time.'**

94. Also on 5 February 2021, Mr Gawn emailed Mr Sheppard, Mr Dudden and Mr Roche saying:

> **'It is with regret that it has so far this week been impossible to find your wages from any income into the business. The total income to date remains at £3,884 since 24th December 2020.**
>
> **…**
>
> **I am left with two choices. Either continue activities with the acquiescence of staff members that have not been furloughed agreeing to accept delays to the payment of their wages or to close the business completely and immediately until the funding arrangements have been completed. If sales can generate income that will relieve the pressure of course if you are willing to support the former proposition. Needless to say the latter proposition is likely to be detrimental.'**

95. On 8 February 2021, Mr Sheppard replied:

> **'I'm afraid Justin, Ciaran and I do not agree with either of your propositions, being that we believe both are possibly illegal.'**

96. On the same day, Mrs Humphreys emailed Mr Gawn to raise a grievance against [687]. Her grounds were:

> **'I object to non payment of wages, myself, Laura Gore and David Sheppard all agreed to receive our January wages at the end of January on the proviso that all other staff received their wages in full,**

the rest of the staff received approximately 50% on the 15th January and were due to receive their balance as per the issued payslip dated 31/01/21, to date they are yet to receive their balance and I am yet to receive my entire January wages in full, this is due to me at my 100% contractual pay scale.

I draw your attention to the situation that took place on Monday 1st February in the Main showroom at Vanners where after an exchange around TUPE and non payment of wages you 'Fired' me in front of Laura Gore, Justin Dudden, David Sheppard, Darren Underwood and your PA Sarah Le Mercier, the reason for my 'sacking' was and I quote 'because I make you angry', I went on to point out that you cannot sack an employee based on this so you said 'okay you're Furloughed then'.

Please refer to the email I sent you 03/02/21 @ 11 :06 detailing that I protest about being Furloughed on the grounds that there is work to be done within the department (this was also pointed out to you at the point of my 'sacking' too), and the fact that the Furlough is not being used for it's intended use but is being used as a punishment because you did not have the grounds to formally 'fire' me.

You sent me an email on 03/02/21 @07:35 via your assistant Maria informing me of my Furlough, to date there has been no discussion or agreement from me regarding my Furlough. With this in mind I object to my wages being at 80% of my contractual amount as I do not agree to the Furlough or how it is being used, I repeat that I have never consented to the deduction and this is unlawful under statute…'

97. Mr Gawn replied on the same day, rejecting her grounds of grievance in the following terms [686]:

'1. It is an unfortunate reality that as part of the management team during January you failed to bring in sufficient funds to meet your own salary payments. Without having an investment plan from the management team I was unable to invest funds into Vanners on an ad hoc basis, as was frequently demanded. I would ask you to represent your own position to me and not that of others. They can represent their own views.

2. Referring to the impromptu meeting at the factory on Monday 1st February I came to meet you all individually to discuss your personal circumstances and what you had contributed to date, but you all decided to gang up and insist that I spoke to you all simultaneously. For the sake of clarity that included yourself, Laura, Justin, Darren and David. Because of the negativity that you displayed in particular and your aggression to me I found it impossible to deal with you talking over everybody at once. I respectfully requested that you spoke one at a time to give me the opportunity to answer you clearly and factually. You refused to behave in that manner and continued to talk over me and other people. I suggested it was best that you stopped doing this and you responded by saying that you will say

whatever you like. I then suggested that you left the meeting so that I could speak to you on an individual basis afterwards. You refused to leave the meeting. I pointed out that you and your team were acting as though you all owned the business and that I must do whatever you say and demand. I said that if you didn't leave the meeting so that we could continue constructively then I would have to fire you. As the director of your employer I have that right even if you subsequently dispute it. In response you then agreed to behave normally and respectfully and therefore I withdrew that decision. I subsequently suggested that you should be furloughed as there was no work for you to do and no money to pay you.

3. If you are deciding to refuse the furlough arrangements then I have no choice but to lay you off until further notice. There is no work for you. Please acknowledge this new status in writing...'

98. Mrs Humphreys replied the following day, saying that she did not agree to be laid off [686].

99. On 9 February 2021, Mr Gawn visited the factory with Ms LeMercier. He spoke with Mr Sheppard, Mr Dudden and Mr Roche. He suggested that their outstanding wages would be paid when he had completed the sale of a separate property.

100. On 10 February 2021:

100.1. Mr Sheppard emailed Mr Gawn on behalf of himself, Mr Dudden and Mr Roche, stating that they continued to work under protest while their wages were outstanding [801].

100.2. Mr Underwood emailed Mr Gawn to raise a grievance [1048] for underpayment of wages, bullying and harassment. The bullying and harassment allegations related to correspondence from Mr Gawn about the way the management team had been running the company.

100.3. Mrs Gore emailed Mr Gawn to raise a grievance [640 / 1527]. Her grounds were:

'Unlawful deduction of wages which were never consented to and are unlawful under the statute. Payslip email by Maria Walker 29.01.21 no funds received to date - my contracted date of wages is the 15th of each month. Myself, Caroline and Dave agreed to the delay payment of our wages from the 15th January to the 31st January if it meant all other staff would receive 100%, however, all staff only received 30-50% in some cases and myself Dave and Caroline received 0%. I have now not received any salary since the 15 December 2020.

Bullying, unprofessional emails, meetings and phone calls by yourself and Sarah.

Attempting to damage the reputation of the management team by way of emailing factually incorrect information to all other staff on 4th February which I was not included on I.e - advising staff that you

requested to have a business plan which we had not provided and this has been detrimental to the business. Your visit on 1st February was the first time a request was made for a business plan (all other request for information had been provided on request) and as you know from 1 st February no one could access the Vanners network which is where the data is saved as the bills had not been paid.

You have advised you are 'Reviewing' my role, yet you have taken all tools away from me to be able to undertake my role such as internet, telephone and server access. I am forced to communicate with you via my personal email.

Not obtaining my agreement to furlough.'

101. On 12 February 2021:

101.1. Mr Gawn announced his intention to cease operations for 3 months and temporarily furlough all staff [690 / 793].

101.2. Mrs Jordan and Mrs Tyszkiewicz resigned because they had not been paid. Mrs Tyszkiewicz's evidence is that she also sent a grievance to Mrs Walker, although a copy has not been provided to the Tribunal.

101.3. Mr Dudden emailed Mr Gawn to raise a grievance regarding underpayment of wages [1228]. He wrote that he had received less than 50% of his monthly salary on 15 January 2021 and, despite Mr Gawn's assurances that he would receive the balance on the 29 January 2021, he still had not been paid.

101.4. Mr Sheppard emailed Mr Gawn to raise a grievance regarding non-payment of wages, *"attempting to damage the reputation of the management team"* and failure to rectify health and safety issues on site [797].

101.5. Mrs Wright emailed Mr Gawn to raise a grievance regarding underpayment of wages [1111].

102. On 15 February 2021, Mr Dudden emailed Mr Gawn again to ask when staff would be paid [644].

103. On 16 February 2021:

103.1. Mr Gawn replied to Mrs Gore [638]:

'I contracted, via a new company, the purchase of an existing business (Vanners) on Xmas Eve 2020 from the Administrators KPMG.

I had no knowledge of the detailed operations of this business other than representations given to me by KPMG and yourself as Managing Director (which I relied upon), and I have never before been involved in the textile manufacturing sector.

I had presumed from these representations that the business continued to operate relatively normally (albeit at a reduced turnover level) and I expected that overall trading would generate income.

I established a new structure with various companies taking on various activities and passing TUPE responsibility to each new trading company.

In your case Vanners (Administration) Ltd.

The reality is that the only income across the board for the last 7 weeks amounted to £3,884, of which £2,936 must be refunded because the order was not satisfied.

You represented that you, Justin, Caroline, Darren and David were all working normally and were busy at all times. The facts however do not bear this out. What were you all doing during this time?

I will need a detailed daily report from each of you as to your business activities during the period.

I have had no written reports from any of you since I purchased the business. As you were aware I was isolating, due to Covid, and I only ventured out after having my vaccine injection on 23rd January, hence I totally relied upon you all to run the business, as in any event I had intended from the start.

It is an absolute absurdity that a business can operate on no income. However you continued to suggest and demand that I should maintain your highly paid team from external sources to do a job that they clearly were failing to do, irrespective of the lack of income.

You were asked time and time again for proposals of how the business should be run and a business plan. Nothing was forthcoming.

At the meeting on 1st February you all acted as though you owned the business and I was just a pot of money to dig into, and nothing else. You showed no respect.

As for your salary, KPMG paid you up to 31st December 2020. You, Caroline and David agreed to be paid at the end of January instead of mid-month as you had been previously, because you were clearly aware of how dire trading circumstances were. There was no unlawful deduction of wages, as you and your team produced no income into the companies for that to occur. I injected my own money so that shop floor staff could be paid 50% of their estimated net wages, mid month. Maria has also kept everybody informed of the furlough situation, of course.

For your information I am in the process of concluding funding (via my solicitors) which was originally arranged in November and due on 24th December to coincide with the purchase of the Vanners business, to assist then in short term revenue requirements. This

was delayed due to unforeseen circumstances. Monies, when realised, will help deal with any outstanding wage issues. My investment funding, which I advised you of confidentially (but you spread that information amongst your colleagues without my authority) will be used eventually to restructure the whole business and deal with the problem of where the business will be located for its future. The current short term lease on the Weaver's Way factory until December 2021 is simply untenable.

It is ludicrous that you should suggest that I have been unprofessional and bullying. Sarah Le Mercier was witness to the bullying that you, Caroline, Darren and Justin inflicted upon me when I attended the factory unannounced on 1st February. None of you would speak to me individually, only as a group, when you sought to constantly pressurise me for money, refusing to focus on your own inadequacies as managers. Darren went as far as to say that without him the business would fail. No comment!

I never had any intentions of managing the business of Vanners. I am an investor - you, Caroline, Justin and Darren were the key management team, and you all failed to deliver, yet you blame me. It really is pathetic that you blame me, when all of you had been directly involved in running the business historically and should have known what you were doing.

You suggest that you have not agreed to being furloughed. If that is the case then you should consider yourself as being laid off, whilst I review a new plan for the future.'

103.2. Mr Gawn replied to Mr Underwood [1055], refuting the allegations of bullying and harassment and reproducing his response to Mrs Gore, as above.

103.3. Mr Gawn replied to Mr Dudden [544]:

'On my visit to Vanners I said that subject to receiving the funds I was expecting, then I would apply these to meet salary payments where appropriate. I had been told it would be Friday by my solicitors but that proved not to be correct. Legal matters can be tortuous and very uncontrollable sometimes. Again outside of my control.'

103.4. Mrs Cooper emailed Mr Gawn to raise a grievance regarding the non-payment of her wages [518].

104. On 17 February 2021:

104.1. Mr Gawn replied to Mrs Cooper [517] saying that:

'the activation codes never arrived from HMRC so I re applied for them on Monday. As soon as the new ones are received they will be activated and furlough applied for.'

104.2. Mrs Jordan submitted a (post-employment) grievance regarding non-payment of wages [736].

104.3. Mrs Wright gave notice of resignation, to take effect on 19 February 2021, because she had not been paid [1111].

105. On 20 February 2021, Mrs Walker sent a message from Mr Gawn to Mrs Gore, detailing the changes he had made by incorporating companies to undertake various functions [698][1230]. He wrote, insofar as is relevant:

> **'Vanners Silk (1740) Ltd is an Investment Company that acquired the business of Vanners from Silk Industries Ltd on 24th December 2020. Vanners Silk (1740) Ltd is not a trading company, but had accepted certain employees from Silk Industries Ltd under TUPE arrangements. Immediately thereafter (post Christmas) on 5th January 2021 trading companies were established to directly employ all staff and the TUPE obligations were passed to them as follows:**
>
> **…**
>
> **Vanners (Silk Weaving) Ltd**
>
> **…**
>
> **Lorraine Cooper**
>
> **David Sheppard**
>
> **Vanners Administration Ltd**
>
> **…**
>
> **Justin Dudden**
>
> **Lorraine Golding**
>
> **Laura Gore**
>
> **…**
>
> **Darren Underwood**
>
> **Penroses** [sic] **Ties (London) Ltd**
>
> **…**
>
> **Caroline Humphreys**
>
> **Sam Humphreys**
>
> **Debbie Jordan**
>
> **…**
>
> **Aneta Tyszkiewicz**
>
> **Caroline Wright**
>
> **…**

As part of these changes I also changed the wage payment date from mid month to the end of the month. However following representations that were made to me from various parties I agreed to pay an advance sum approximately equal to 50% of the projected net wages for the month, the information for which was supplied by Darren Underwood. The funds for this were not available in any Vanners company and therefore I agreed to subsidise these payments from the resources of Swaine Adeney Brigg who in order to assist purchased an equal sum by value, of stock from Vanners. HMRC registrations were applied for by the relevant trading companies in anticipation of month end. At this stage a PAYE reference was created and received enabling us to create our computer based payrolls. We awaited the authorisation HMRC registrations were applied for by the relevant trading companies in anticipation of month end. At this stage a PAYE reference was created and received enabling us to create our computer based payrolls. We awaited the authorisation codes to enable the registrations to be activated for the purposes of RIT and then be able to process furlough claims. These codes had to be sent to the registered offices of the companies but they never arrived. A week long boycott by the Postal Delivery Service in our area of Norfolk due to very bad snow and ice conditions meant that we could not determine whether they were arriving or not. Once that period had concluded and no post from HMRC had been received then we applied for a second time. Fortunately under HMRC guidelines any furlough payment for January can still be claimed if there has been a delay and that we had a "reasonable excuse", which of course we did - i.e. letters not being received are classed as that reasonable excuse. As far as detailed employment contractual information for each individual employee is concerned this was not received by us at the point of legal transfer of the business as the purchase agreement dictated, and we have subsequently sought to obtain such detailed information from either the management team or the individual employee where possible since early January, in order to accurately create HMRC submissions. We believe and hope that we do now have all of that information. We did not have all of the required information accurately represented until we received pension information during the week ending 12th February. If we had in fact been able to submit information to HMRC for end of month January 2021 it would in fact have been incorrect as a result. We continue to await the Activation Codes from HMRC. I am please [*sic*] to confirm that I have received a communication from the offices of James Cartlidge MP who has kindly offered his help to resolve this frustrating matter with HMRC. I attach details of the sender of this e-mail below so that you have an adequate reference going forward. Until such time as this matter is fully resolved and rectified there cannot be any payments of wages or furlough monies.

This leaves me to explain my current plans for the future of Vanners. At the earliest opportunity we will get a limited number of production floor employees back to work to produce canopy material for our company Brigg Umbrellas and currently a small contract for silk

> **cloth that I have been able to negotiate. I hope to build upon this in the coming weeks and months and if all goes well then more production staff can be brought back off furlough. My intention has always been to give Vanners a new future but I had not prepared myself for the wholly inadequate income and sales situation since my purchase. Covid of course continues to wreak havoc in the overall marketplace and I have been saddened personally by the representations about the status of the business and its immediate trading future that I received, but proved to be incorrect**
>
> **However I will do my best to overcome all of this and trust you will support my efforts where you can.'**

106. Following this, Mrs Gore and Mrs Humphreys informed all staff, including the other Claimants who remained in employment, that a number of companies had been incorporated on 5 January 2021, and their employment had transferred to the company shown on their respective payslips.

107. On 21 February 2021, Mr Gawn responded to Mr Sheppard's grievance [796]. He disputed the allegations regarding attempting to damage the reputation of the management team and health and safety failures. He referred to his message circulated by Mrs Walker the previous day but did not otherwise address Mr Sheppard's complaint about non-payment of wages. Mr Sheppard replied, renewing this complaint [795].

108. Mr Gawn also sent a second response to Mr Underwood's grievance, again refuting his allegations of bullying and harassment [1066]. As in his response to Mr Sheppard, he referred to his message sent by Mrs Walker the previous day but did not otherwise address the complaint about underpayment of wages.

109. Meanwhile, Mrs Humphreys had sent follow-up emails to Mr Gawn on 11, 17 and 18 February 2021 asking for clarification of his email of 8 February 2021 stating that she would be laid off. He replied on 21 February 2021, asking for a copy of her contract and for her to confirm *"why you are refusing to accept Furlough"* [684]. She replied saying, amongst other things, that the people and skill base she had built up were needed to get products made.

110. On 28 February 2021, Mr Gawn emailed Mrs Humphreys to give *"Notice of Redundancy"* [681]. He wrote:

> **'Having had a thorough review of the current practical and financial circumstances surrounding Vanners & Penrose Ties (including further implications of the Covid Pandemic), I have been forced to abandon any further attempts to continue with the Penrose Tie production at Weavers Lane. Other alternatives, like subcontracting are being considered.**
>
> **Under the Vanners purchase agreement the Administrators restricted the use of the factory until December 2021 when the current lease expires.**
>
> **In the short term therefore the only activity that will continue at Weavers Lane will relate to weaving & warping in the Rapier Shed,**

> **and the Dye House, in order that the rest of the premises may be progressively vacated.**
>
> **As a consequence I hereby give you Notice of Redundancy forthwith.**
>
> **Please liaise with Maria Walker at my office in order that an agreed financial arrangement is concluded.'**

111. Mrs Humphreys later received a P45 giving her leaving date as 28 February 2021 [705].

112. Also on 28 February 2021, Mr Gawn emailed Mrs Gore [681 / 1460]:

> **'Please take this as your Notice of Immediate Dismissal.**
>
> **A detailed statement in this regard is being prepared and will be sent to you and to Bates Wells & Braithwaite.'**

113. However, no further statement explaining the reasons for Mrs Gore's dismissal was sent.

114. The Claimants who remained in employment received further payslips in February and March 2021, but no payments were made into their bank accounts.

115. Mr Humphreys resigned on 15 March 2021.

116. On 16 March 2022, an article was published in Drapers magazine saying that the Vanners factory was planning to restart production. This caused some of the Claimants, including Mrs Cooper, to enquire whether they could return to work.

117. On 22 March 2021, Mr Gawn wrote to Mrs Cooper that he planned to restart production with a small team, and rebuild slowly depending on orders. In the meantime, she remained on furlough [521]. He also emailed Mr Sheppard saying that he was shortly to commence limited weaving production with a small team of shop floor workers, but that *"No other management is required at this time and all other staff will remain on furlough until further notice"* [799].

118. On 23 March 2021, Mr Dudden emailed Mr Gawn chasing a response to his grievance [1246]. Mr Gawn replied:

> **'I understand that you have accepted a position working for Tro Manoukian [*a former director of Silk Industries Ltd*]. When will you be terminating your employment with Vanners (Administration) Ltd?'**

119. Mr Dudden replied:

> **'I have been exploring alternative employment as I cannot carry on with my life without being paid, however I have not accepted any offers of employment and should that change I would give you my contractual notice.'**

120. At around this time, Mr Gawn reopened the factory with a skeleton staff of 16 shop-floor workers. His evidence was that the business had done well from this time onwards. Mr Roche was promoted to General Manager.

121. On 27 March 2021, Mrs Cooper wrote to ask for her pay for January, February and March [524]. Mr Gawn replied, apologising for the delay and saying that £1,761.72 had been remitted to her account that day for the balance of her January and February wages, and that her March furlough pay would be paid when received from HMRC [523]. (Mrs Cooper's statement did not address whether this payment was made, and she did not attend to give evidence.)

122. From April 2022, those Claimants who remained in employment began to receive weekly payslips [526]. However, it continued to be the case that no wages were paid to them.

123. On 1 April 2021, Mr Gawn emailed Mr Dudden about *"a very serious matter involving your behaviour involving a member of staff"* [1252][1255]. He wrote that an unnamed employee had reported that Mr Dudden had attempted to persuade Mr Roche to sabotage equipment at the factory. Mr Gawn said he had reported the matter to the police.

124. Mr Gawn's evidence is that he also spoke to Mr Roche, who confirmed the allegation. I do not accept that evidence. Had Mr Roche made such an allegation, it is likely that Mr Gawn would have asked him to make a statement, or at least made a note of their conversation. No such documentary evidence has been produced. The police did speak to Mr Roche, and afterwards closed their investigation, suggesting that whatever Mr Roche told them did not amount to evidence of a crime being committed. Mr Dudden says that Mr Roche has spoken to him and his wife to deny any involvement (although there is no note of this conversation either).

125. Mr Dudden replied, disputing the allegation and saying that he was more than happy to cooperate with the police. He asked whether he had been dismissed [1254].

126. Mrs Cooper was sent a P45 with a leaving date of 30 April 2021 [532].

127. Mr Sheppard resigned on 4 May 2021 [807]. He wrote to Mr Gawn:

> **'Please be advised that I am resigning with immediate effect from today 4th of May 2021. The trust and confidence has broken down between us as you have not addressed any of my grievances and I am still owed a full 4 months wages up to the end or April (£11,666.68) plus 3 weeks accrued holidays. Despite the fact that you have not paid me at all, you provided me with payslips that show pension contributions, yet no pension contributions have actually been made.**
>
> **I have attempted to contact and talk to you many times, all without success, and this has caused me significant stress, financial hardship and health worries for my family and I, which leaves me with no other option other than to resign.'**

128. On 17 May 2022, Mr Gawn wrote to Mr Dudden:

> **'I have yet to have any formal decisions made by the police in respect to your threats to the Vanners business and your incitement to criminal damage.**

> **I am going to make the decision that your employment has ended, whether by your actions, that give us the right to dismiss you, or the fact that you have sought and gained employment elsewhere.**
>
> **We will treat the last date of your employment as 30th April 2021.'**

129. Mr Dudden commenced new employment on 1 June 2022.

130. After periodically emailing to chase the payment of his wages and whether he should return to work, Mr Underwood resigned on 23 June 2021 [1079]. He wrote:

> **'As all my emails in regards to my status with the Company remain unanswered and my government gateway not showing me as furloughed, as claimed by you, and nonpayment of my wages (the most recent one being the last straw), I have no option but to resign. My resignation is on grounds of redundancy and as an effect of the trust and confidence between us breaking down. I cannot continue my life without a job to go to and wages.'**

131. On 12 October 2021, Mr Gawn received an email from the police saying their investigation into his complaint about Mr Dudden had been closed, the investigation having found no corroborating evidence [1504].

ISSUE ONE: Was there a TUPE transfer? Was there a failure to inform and consult?

Submissions

132. For the Claimant, it was submitted that the question was whether there was an economic entity which retained its identity following the transfer. There had been an "*intragroup reorganisation"* following the transfer to the First Respondent. However, this resulted in fragmentation and no second transfer. In the alternative, it was submitted that had there been a second transfer, there was a failure to inform and consult.

133. Mr Gawn's position was that each Claimant moved to the company formed on 5 January 2021 which "*encompassed*" their existing role and function.

The law

134. Regulation 3 TUPE provides, insofar as is relevant:

> **3.— A relevant transfer**
>
> **(1) These Regulations apply to—**
>
> **(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;**
>
> **…**
>
> **(2) In this regulation *"economic entity"* means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.**

…

(6) A relevant transfer—

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

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

135. Tribunals will determine first whether there is relevant and sufficiently identifiable economic entity within the meaning of TUPE and secondly whether or not there is a relevant transfer: *Whitewater Leisure Management Ltd v Barnes* [2000] ICR 1049.

136. Determining whether there is an economic entity for the purposes of TUPE requires a multi-factorial approach. In *Cheesman v Brewer Contracts Ltd* [2001] IRLR 144, the EAT set down a set of five principles to assist tribunals in answering the question. These were summarised in the head note as follows:

'There needs to be a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective.

In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible.

In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower.

An organised grouping of wage-earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity.

An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.'

137. The transferring undertaking, business or part of an undertaking or business must be sufficiently structured and autonomous to be a discrete and identifiable economic entity: *Whitewater Leisure Management Ltd v Barnes* [2000] ICR 1049. However, where the transfer involves part of a business or undertaking, it is not necessary that the particular part which transferred existed as a discrete and identifiable economic entity before the date of the transfer: *Fairhurst Ward Abbotts Ltd v Botes Building Ltd* [2004] ICR 919. In that case, a local authority's building maintenance operations were spilt into two geographical areas at the point of (and not before) the transfer occurred. See [34] per Mummery LJ:

'… the attainment of the aim of the Acquired Rights Directive and of the 1981 Regulations , in preserving the continuity of employment relationships within an undertaking, does not require a distinction to be drawn between (a) the case where the part of the entity transferred was

identifiable as a discrete part before the transfer and (b) the case where the part of the entity transferred became identifiable as a separate entity, in this case geographically, on the actual making of the transfer…

… the case where an existing stable economic entity, in which there are employment relationships, is partitioned into separate identifiable parts for the first time on the making of the transfer… in which it is evidentially possible to trace the organisation of the work carried on after partition back into a part of the larger pre-partition stable economic entity.'

138. In *Landsorganisationen i Danmark Ny Mølle Kro* [1989] ICR 330, the CJEU emphasised that the purpose of the Acquired Rights Directive 77/187 (and hence, TUPE) is to safeguard, as far as possible, the rights of workers in the event of a change of employer, by allowing them to remain in employment on the same conditions as those agreed with the transferor. The Court held that the Directive should apply whenever there is a change in the natural or legal person responsible for the running of the undertaking. This is so regardless of whether ownership of the undertaking has been transferred, as is confirmed by reg.3(6)(b).

139. Further, the Acquired Rights Directive (and hence, TUPE) can apply to a business transfer between two companies within a group. In *Allen v Amalgamated Construction Co Ltd (C-234/98)* [2000] ICR 436, it was held that whenever there was any legal change in the person of the employer, irrespective of whether ownership of the undertaking was transferred, the Directive could apply to a transfer between two subsidiary companies in the same group, even if the companies had the same ownership, management and premises and were engaged in the same work [17]. Relevant factors, set out at [26], are as follow:

'…it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business; whether or not its tangible assets, such as buildings and movable property, are transferred; the value of its intangible assets at the time of the transfer; whether or not essential staff are taken over by the new employer; whether or not its customers are transferred; the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities are suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.'

140. The date of the transfer will be where there is a change in the legal or natural person who is responsible for carrying on the business, regardless of whether or not ownership of the business is transferred: *Celtec Ltd v Astley (C-478/03)* [2005] ICR 1409.

141. Regulation 4(1) TUPE provides that (unless the employee objects) the effect of a relevant transfer will be that 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*", shall have effect after the transfer as if originally made between the person so employed and the transferee.

142. Assignment is a question of fact to be determined by a tribunal considering all the relevant circumstances of the particular case. In *Botzen and ors v Rotterdamsche Droogdok Maatschappij BV* [1986] 2 CMLR 50, the CJEU held that:

'An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive 77/187 by reason of a transfer within the meaning of Article 1(1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned.'

143. Regulation 13(2) TUPE imposes an obligation on the employer to inform and consult employee representatives, as follows:

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

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

144. Regulation 14 TUPE sets out the mechanism for electing employee representatives in a non-unionised workforce.

145. Regulation 15(1) TUPE provides affected employees, employee representatives and trade unions with a right to complain to the Tribunal regarding a failure to comply with a requirement of reg.13 or 14 TUPE. Regulation 15 TUPE goes on:

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

…

(6) In relation to any complaint under paragraph (1), a failure on the part of a person controlling (directly or indirectly) the employer to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

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

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

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

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

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

146. Regulation 16(3) TUPE states:

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

147. In *Ferguson and others v Astrea Asset Management Limited* [2020] ICR 1517, the EAT noted that the purpose of the monetary award is in fact punitive rather than compensatory. Tribunals have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's breach, including the level of culpability and consequences of the breach [51].

Conclusions

148. Was there an economic entity, fulfilling the definition of an organised grouping of resources which has the objective of pursuing an economic activity? Certainly the First Respondent was such an entity when it took over the business of Silk Industries Limited. Like in the *Fairhurst* case, the First Respondent was an existing stable economic entity, in which there were employment relationships. It was partitioned into separate identifiable parts for the first time on the incorporation of the subsidiary companies including the Second, Third and Fourth Respondents. Looking at the functions and operation of the Second, Third and Fourth Respondents, it is evidentially possible to trace the organisation of the work carried on after partition back into a part of the larger pre-partition stable

economic entity. Applying *Fairhurst,* I conclude that the requirement under reg.3(1) TUPE for an economic entity which retains its identity is satisfied.

149. Was there a relevant transfer? There was a change in the natural or legal person responsible for the running of each constituent part of the original undertaking which transferred into a new subsidiary company. Responsibility for running the tie-making part of the First Respondent business transferred to the Second Respondent. Responsibility for the administrative functions transferred to the Third Respondent. Responsibility for silk weaving activities transferred to the Fourth Respondent. Applying *Allen v Amalgamated Construction Co Ltd,* the fact that the companies were part of the same group, had the same ownership, management and premises and were engaged in the same work, does not preclude a relevant transfer. I conclude that there was a relevant transfer, or rather three relevant transfers, between the First Respondent and the Second, Third and Fourth Respondents.

150. When did the transfer occur? I accept Mr Gawn's evidence that the Second, Third and Fourth Respondents were incorporated to run the relevant constituent parts of the First Respondent and were responsible for the running of the transferred parts of the business from their inception on 5 January 2021. Unusually, in this case, the discussion as to which employees were allocated to which transferee occurred after the transfer. However, that process was one of ascertaining retrospectively what had happened, by considering the employees' roles before and after the transfer. Applying the principles in *Celtec Ltd v Astley,* the relevant transfers occurred on 5 January 2021. (I note it has not been suggested that there was a single transfer effected by a series of transactions from Silk Industries Limited to the Second, Third and Fourth Respondents.)

151. Was each Claimant assigned to the organised grouping of resources or employees that was subject to the relevant transfer for the purposes of reg.4(1) TUPE? As a result of the relevant transfers:

151.1. Mrs Lorraine Cooper was a Textile Operative, assigned to the weaving operation in the Rapier Shed. Mrs Lorraine Cooper's employment transferred from the First Respondent to the Fourth Respondent.

151.2. Mrs Lorraine Golding was a Cleaner who worked in more than one area of the factory site. When the Third Respondent was incorporated, her role fell within its administrative and support functions. Mrs Lorraine Golding's employment transferred from the First Respondent to the Third Respondent;

151.3. Mr Sam Humphreys was Assistant Manager of Tie Production and Distribution. Mr Sam Humphrey's employment transferred from the First Respondent to the Second Respondent.

151.4. Mrs Deborah Jordan was a Sewing Machinist in the tie-making part of the business. Mrs Deborah Jordan's employment transferred from the First Respondent to the Second Respondent.

151.5. Mrs Aneta Tyszkiewicz was a Factory Operative in the tie-making part of the business. Mrs Aneta Tyszkiewicz's employment transferred from the First Respondent to the Second Respondent.

151.6. Mrs Caroline Wright was a Sewing Machinist in the tie-making part of the business. Mrs Caroline Wright's employment transferred from the First Respondent to the Second Respondent.

151.7. Mr Justin Dudden was Head of Sales and he had a managerial role. Mr Justin Dudden's employment transferred from the First Respondent to the Third Respondent.

151.8. Mrs Laura Gore was the Managing Director and hence had overall responsibility for all parts of the First Respondent's operation. However, her role was concerned with the managerial and administrative functions of the operation. Mrs Laura Gore's employment transferred from the First Respondent to the Third Respondent.

151.9. Mrs Caroline Humphrey was the Tie Production and Distribution Manager. Mrs Caroline Humphreys' employment transferred from the First Respondent to the Second Respondent.

151.10. Mr David Sheppard was the Operations Manager and his responsibilities included the warping and dying parts of the business as well as weaving. However, the weaving operation was the most significant part of his responsibilities. Mr David Sheppard's employment transferred from the First Respondent to the Fourth Respondent;

151.11. Mr Darren Underwood was the First Respondent's Accountant and therefore assigned to the administrative and managerial part of the business. Mr Darren Underwood's employment transferred from the First Respondent to the Third Respondent.

152. It is accepted that the affected employees were not informed or consulted prior to the transfer. Mr Gawn says in his defence that he instructed Mrs Gore to undertake all necessary regulatory steps. This part of his evidence has not been accepted. Even if he had told Mrs Gore to deal with the transfer, the potential liability for failure to inform and consult would still lie with the Respondents.

153. Mr Gawn did not argue that there were special circumstances that rendered it not reasonably practicable to inform and consult, for the purposes of reg.15(2) TUPE. Even had that been the case, it could not be argued that all reasonable steps were taken, given that staff were not even informed that their employment had transferred until 20 February 2021. The First Respondent did not comply with the obligation to inform and consult under reg.13 TUPE. The First Respondent, as transferor, and the Second to Fourth Respondents, as applicable as the transferee in each case, are jointly and severally liable for that failure.

154. When assessing what compensation (up to 13 weeks' pay) would be just and equitable having regard to the seriousness of the failure, the following factors are relevant.

154.1. There was an accepted failure to inform and consult in relation to the earlier TUPE transfer of the Claimants from Silk Industries Limited to the First Respondent on 24 December 2020, which has been compromised in the amount of 8 weeks' pay per Claimant.

154.2. Having transferred to the First Respondent on 24 December 2020, the onward transfer to the Second, Third and Fourth Respondents happened soon afterwards on 5 January 2021. Only a very limited consultation process could have been practicable, especially taking the holiday period into account.

154.3. However, there was a wholesale failure to give any advance information at all to the workforce about the transfer.

155. I conclude that it would be appropriate to award each Claimant 4 weeks' gross pay in compensation for the breach of their rights under reg.13 TUPE.

ISSUE TWO: Did the applicable Respondent make deductions from wages? Were the deductions authorised?

Submissions

156. For the Claimants, it was submitted that there was no meaningful defence to their wages claims. Mr Wayman submitted there was no contractual entitlement to withhold pay on the basis of any performance concerns that Mr Gawn had. He asked me to find that none of the Claimants had consented to reduce their pay during furlough, and that this would be inconsistent with the grievances various Claimants had brought asking for their (full) pay. He invited me to award a 25% uplift on compensation on the basis that the grievances had not been dealt with according to the applicable ACAS Code.

157. For the Respondents, Mr Gawn conceded that wages were owing to Mrs Golding, Mr Humphreys, Mrs Jordan, Mrs Tyskiewicz, Mrs Wright, Mr Underwood and Mr Sheppard, although he believed the sums owed were less than the Claimants were claiming. He disputed that any wages were owing to the remaining Claimants and said that Mrs Cooper had been overpaid. He contended that Mrs Gore, Mrs Humphreys and Mr Dudden were not owed wages because they had not undertaken the work he expected of them.

The law

158. Part 2, ss.13 to 27B ERA set out the statutory basis for a claim of unauthorised deduction from wages.

159. An employer shall not make a deduction from wages of a worker employed by him, which are properly payable to the worker, unless the deduction is required or authorised to be made: by virtue of a statutory provision; a relevant provision of the worker's contract; or the worker has previously signified in writing his agreement or consent to the making of the deduction. Any agreement or consent authorising the deduction from wages to be made must be entered into before the event giving rise to the deduction.

160. 'Wages' for the purposes of Part II ERA is widely defined. It includes any fee, bonus, commission, holiday pay or other emolument referable to employment, and to statutory sick pay.

161. However, pension contributions paid by the employer to a pension provider on the worker's behalf do not fall within the definition of wages; *Somerset CC v Chambers* UKEAT/0417/12/KN.

162. A non-payment of wages is a 'deduction from wages' for the purposes of s.13; *Delaney v Staples* [1991] IRLR 112.

Conclusions

163. The correct Respondent in respect of each Claimant's wages claim is the transferee employer as set out at paragraph 151 above.

164. Did the Respondent with potential liability make deductions from wages? It was not disputed by Mr Gawn that the Claimants had each been paid part or none of their wages in respect of the month of January 2021, and no wages thereafter.

165. Were the deductions unauthorised? It has not been argued that there was any contractual or statutory provision entitling the Respondents to make deductions. It was raised as a relevant issue at the preliminary hearing stage whether each Claimant consented to be furloughed. I have found that the Group 1 Claimants did agree to be furloughed. The Group 2 Claimants were not asked to agree but rather were told they would be furloughed, although only Mrs Humphreys explicitly refused. However, none of the Claimants provided written agreement in advance to vary their contractual pay to reduce it to the level of 80%, which was recoupable from the Government under the furlough scheme. Therefore, the furlough situation has no bearing on their claims for unauthorised deductions.

166. Mr Gawn's argument that he was entitled to withhold some of the Claimants' pay because he was unhappy with their performance, cannot succeed. There was no contractual mechanism to withhold pay on that basis.

167. If the claim succeeds, does the Claimant's claim for unauthorised deductions concern a matter to which the ACAS code of practice on disciplinary and grievance procedures relates? The following Claimants brought grievances relating to unpaid wages: Mrs Humphreys, Mr Underwood, Mrs Gore, Mr Dudden, Mr Sheppard, Mrs Wright, Mrs Cooper, Mrs Jordan and Mrs Tyszkiewicz.

168. Did the applicable Respondent fail to comply with that Code in relation to that matter? The ACAS code of practice for disciplinary and grievance procedures provides that the employer should hold a meeting with the employee to discuss the grievance, at which the employee must be allowed to be accompanied, then decide on appropriate action, with an option for the employee to take the grievance further if not resolved. None of these steps were taken.

169. Was that failure unreasonable? In the circumstances, I conclude that it was not an unreasonable failure. Mr Gawn did respond to the grievances, although the Claimants did not find his responses satisfactory. He did not dispute that there had been a failure to pay staff their wages. His position was that there were insufficient funds to meet payroll obligations. In the circumstances, there was little to be gained by holding formal grievance meetings to discuss what was an acknowledged failure.

170. Given that conclusion, I have not gone on to consider whether it would be just and equitable in all the circumstances to increase each Claimant's award.

171. What sums are to be awarded in compensation? I have reviewed the payslip documents in the bundle to calculate these sums, as the Claimants' schedules of loss feature various numerical errors which Mr Wayman highlighted in his closing

submissions. They also include periods beyond the presentation of the ET1, include sums which are not legally claimable such as pension contributions and interest, and are based on gross rather than net sums (which is not wrong but makes paying the judgment sum more complicated). The Group 1 Claimants presented their claims for unauthorised deductions on 11 March 2021, representing (for those who remained in employment by that time) a period of loss of 10 weeks. Mr Sheppard and Mr Underwood included further claims for arrears of pay in their second ET1 claim forms presented on 1 July 2021 and 27 July 2021 respectively; I would accept these claims related to a 'series of deductions' for the purposes of s.23(3) ERA. The deductions were in the following amounts:

171.1. Mrs Cooper's net monthly pay was £1,455.38, so her net weekly pay was £335.86 (£1,455.38 x 12 / 52). Over the 10-week period of the claim, she was entitled to receive net pay of £3,358.60. In fact, she received £500.77 in January, giving a balance owing at the date of the claim of £2,857.80. No credit has been given for the £1,761.72 referred to in Mr Gawn's email of 27 March 2021; it is open to the Respondent to apply for reconsideration of the amount ordered to be paid if this sum has already been paid to Mrs Cooper.

171.2. Mrs Golding's net monthly pay was £330.48 so her net weekly pay was £76.26. Over the 10-week period of the claim, she was entitled to receive net pay of £762.60. She received £141.10, leaving a balance owing of £621.55.

171.3. Mr Humphreys' net monthly pay was £1,275.54 and his net weekly pay was £294.36. Over the 10-week period of the claim, he was entitled to receive net pay of £2,943.55. He received £426.22, leaving a balance owing of £2,517.33.

171.4. Mrs Jordan's net monthly pay was £1,291.85 so her net weekly pay was £298.12. She resigned on 12 February 2021. Over the 6-week period of her employment in 2021, she was entitled to receive net pay of £1,788.72. She received £428.30, leaving a balance owing of £1,360.42.

171.5. Mrs Tyszkiewicz's net monthly pay was £1,622.00 so her net weekly pay was £374.31. She resigned on 12 February 2021. Over the 6-week period of her employment in 2021, she was entitled to receive net pay of £2,245.85. She received £452.78, leaving a balance owing of £1,793.07.

171.6. Mrs Wright's net monthly pay was £1,322.40 so her net weekly pay was £305.17. She resigned on 12 February 2021. Over the 7-week period of her employment in 2021, she was entitled to receive net pay of £2,136.18. She received £418.08, leaving a balance owing of £1,718.10.

171.7. Mrs Gore's net monthly pay was £4,378.01 and her net weekly pay was £1,010.31. She was dismissed on 28 February 2021. Over the 8-week period of her employment in 2021, she was entitled to but did not receive net pay of £8,082.48.

171.8. Mrs Humphreys' net monthly pay was £2,463.42 and her net weekly pay was £568.48. She was dismissed on 28 February 2021. Over the 8-week

period of her employment in 2021, she was entitled to but did not receive net pay of £4,547.85.

171.9. Mr Dudden's net monthly pay was £3,492.61 and his net weekly pay was £805.99. Over the 10-week period of the claim, he was entitled to receive net pay of £8,059.90. He received £1,688.96, leaving a balance owing of £6,370.94.

171.10. Mr Sheppard's net monthly pay was £2,211.68 and his net weekly pay was £510.39. He resigned on 4 May 2021. Over the 18-week period of his claim, he was entitled to but did not receive net pay of £9,186.98.

171.11. Mr Underwood's net monthly pay was £2,163.83 and his net weekly pay was £499.35. He resigned on 23 June 2021. Over the 25-week period of his claim, he was entitled to receive net pay of £12,483.63. He received £1,011.81, leaving a balance owing of £11,471.82.

ISSUE THREE: Were the Group 2 Claimants unfairly dismissed?

Submissions

172. For the Claimants, Mr Wayman submitted:

172.1. Mrs Gore was dismissed by a single email giving no reason for the dismissal. The allegations of misconduct made by Mr Gawn in evidence had not been put to Mrs Gore during her employment. There was no investigation, disciplinary letter, disciplinary hearing or appeal. The dismissal was procedurally and substantively unfair.

172.2. Mr Dudden was dismissed on the basis of a hearsay statement from an unnamed member of staff, alleging that Mr Dudden had tried to induce Mr Roche to sabotage equipment, or a mistaken belief that Mr Dudden had secured employment elsewhere. No investigation was undertaken, no statement was taken from Mr Roche, there was no disciplinary hearing or right of appeal. The dismissal was procedurally and substantively unfair.

172.3. Mrs Humphreys' dismissal arose out of the meeting on 1 February 2021 and the altercation in which Mr Gawn told her he was fired, then that she was furloughed. In subsequent correspondence he told her that she was laid off, before dismissing her by email of 28 February 2021. She was not warned about redundancy, no pooling or selection process took place, and no consideration was given to suitable alternative employment. The Second Respondent did not act reasonably in treating any redundancy situation as sufficient reason for dismissing Mrs Humphrey. The dismissal was procedurally and substantively unfair.

172.4. The Fourth Respondent had failed to pay Mr Sheppard his wages from January 2021 onwards and was in repudiatory breach of contract until the time of Mr Sheppard's resignation on 4 May 2020. Mr Sheppard worked under protest from 1 February 2020, raised a grievance and did not affirm the contract. He resigned in response to the non-payment of wages. It is submitted that he was constructively dismissed because of redundancy and his dismissal was unfair.

172.5. The same submissions are made in relation to Mr Underwood, who after part-payment of his wages in January 2021 received no further salary until he resigned in June 2021.

172.6. There was no evidential basis for making a reduction in respect of *Polkey* or contributory fault.

172.7. An uplift of 25% should be awarded in respect of failure to follow the applicable ACAS code of practice.

173. For the Respondents, Mr Gawn reiterated that he had bought the business in reliance on information provided by KPM and Mrs Gore, on the understanding that the Group 2 Claimants could manage it profitably. He blamed Mrs Gore for not dealing with the TUPE process, for failing to make a business plan or to manage the rest of the Group 2 Claimants to operate effectively, and for not furloughing the Group 2 Claimants at the same time as the shop floor staff. She was dismissed because she *"totally failed in her duties".* The other Group 2 Claimants *"all failed to fulfil their job descriptions and were consequently the creators of their own job destruction."*

The law

Constructive dismissal

174. Section 94 ERA provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. Section 95(1) ERA provides that s/he is dismissed if s/he terminates the contract under which s/he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').

175. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard herself or himself as discharged from his obligations under the contract.

176. The employer's obligation to pay the employee's wages is a fundamental term of the contract. A breach of this term is likely to be a repudiatory breach, unless there was a mere inadvertent delay: as the Court of Appeal explained in *Cantor Fitzgerald International v Callaghan* [1999] ICR 639, 649:

'… the question whether non payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events... If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were indeed repudiatory.

Where, however, an employer unilaterally reduces his employee's pay, or diminishes the value of his salary package, the entire foundation of the contract of employment is undermined. Therefore an emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory.'

177. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

178. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at 828-829).

Reason for dismissal

179. If there is a dismissal (whether constructive or express), s.98(1) ERA provides that it is for the employer to show that it was for one of the permissible reasons in s.98(2) ERA, or some other substantial reason. If it was, s.98(4) ERA requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. See s.98 ERA, insofar as is relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(b) relates to the conduct of the employee ...

(c) is that the employee is redundant …

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

180. The 'reason' for a dismissal is "*a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*": *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330B-C, NIRC.

181. In the case of a constructive dismissal, the reason for dismissal is the reason for which the employer breached the contract of employment; *Berriman v Delabole Slate Ltd* [1985] ICR 546, CA.

Redundancy dismissals

182. A redundancy situation is defined by s.139 ERA.

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—**
>
> **(a) the fact that his employer has ceased or intends to cease—**
>
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
>
> **(ii) to carry on that business in the place where the employee was so employed, or**
>
> **(b) the fact that the requirements of that business—**
>
> **(i) for employees to carry out work of a particular kind, or**
>
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**
>
> **have ceased or diminished or are expected to cease or diminish.**

183. An employee may argue that a dismissal for redundancy was unfair either because redundancy was not the real reason; or because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason) the dismissal was nevertheless unreasonable under S.98(4) ERA.

184. In *Murray v Foyle Meats Ltd* [1999] ICR 827, Lord Irvine held that s.139 ERA asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

185. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the question is whether the dismissal was fair or unfair, in accordance with the test at s.98(4) ERA. The starting-point will be the familiar guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at para 18 onwards).

> **'18. For the purposes of the present case there are only two relevant principles of law arising from that subsection. First, that it is not the function of the Industrial Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable**

employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing the employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.

19. In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

> **1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.**
>
> **2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**

> **3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
>
> **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.**
>
> **5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.**
>
> **The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'**

Conduct dismissals

186. The starting-point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

> **'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.**

187. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

> **'… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.'**

188. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable

responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

Procedural fairness

189. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair (*Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16).

190. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in *Taylor v OCS Group Ltd* [2006] IRLR 613.

191. The denial of a right of appeal is capable of rendering a dismissal unfair and equally a failure to apply the appeal process fairly and fully may have the same result. If dismissal would be likely to have occurred in any event, then that will affect compensation, but not the finding of unfairness itself: *Tarbuck v Sainsbury's Supermarkets Limited* [2006] IRLR 664 at [80].

Adjustments to compensation

192. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

193. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

194. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

> **'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'**

195. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) provides:

> **'If, in the case of proceedings to which this section applies, it appears to the employment tribunal that (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'**

196. This provision applies to claims brought under any the jurisdictions listed in Schedule A2 TULR(C)A, which includes a claim for unfair dismissal and a claim for unauthorised deduction from wages.

Conclusions

197. In respect of Mr Dudden, was he dismissed, or did he resign? Although this was an issue raised on the pleadings, in evidence Mr Gawn accepted that he had dismissed Mr Dudden by his email of 17 May 2022. Mr Dudden was therefore dismissed by the Third Respondent on that date.

198. In respect of Mr Underwood and Mr Sheppard, was the Claimant constructively dismissed?

    198.1. Did the applicable Respondent employer breach the contract of employment? In each case, the employer was in breach of contract by not paying the Claimant his wages.

    198.2. Was the breach a fundamental one? Applying *Cantor Fitzgerald International v Callaghan,* this was a repudiatory breach of the fundamental payment term.

    198.3. Did the Claimant resign in response to the breach? I find that both Mr Underwood and Mr Sheppard resigned because they could not continue in employment without pay.

    198.4. Did the Claimant affirm the contract before resigning? Neither Mr Underwood nor Mr Sheppard affirmed their contracts. They were each pursuing a grievance regarding non-payment of wages, and they were not attending work.

199. I therefore conclude that both of these Claimants were constructively dismissed. Mr Sheppard was constructively dismissed by the Fourth Respondent on 4 May 2021. Mr Underwood was constructively dismissed by the Third Respondent on 23 June 2021.

200. In respect of all the Group 2 Claimants, what was the reason for the Claimant's dismissal?

    200.1. I find the reason for Mrs Gore's dismissal was Mr Gawn's belief that she had committed misconduct and a breakdown in the working relationship between her and Mr Gawn. The working relationship had fundamentally broken down by the meeting of 1 February 2021, as shown by her

decision to covertly record that meeting. The transcript of the meeting shows that both Mrs Gore and Mr Gawn each blamed the other for the difficulties the Respondents were facing. Following that meeting, Mr Gawn wrote to Mrs Gore on 5 February 2021, *"You have clearly turned against me…"*, and she responded by calling him *"very unprofessional!"* Their subsequent correspondence, and Mr Gawn's evidence during the hearing, showed that he believed she was obstructive and did not perform the essential duties of her role.

200.2. Although the reason given at the time of dismissal was redundancy, I find the reason for Mrs Humphrey's dismissal was a breakdown in the working relationship between her and Mr Gawn. The relationship broke down during the meeting of 1 February 2021, when Mr Gawn sought to fire Mrs Humphrey because she repeatedly raised the issue of staff wages. Although he rescinded the dismissal, which had been a heat of the moment mistake, their correspondence thereafter showed frustration on both sides. Mrs Humphreys' grievance email alleged that furlough was being used as a punishment instead of its intended purpose. Mr Gawn responded by purporting to lay her off instead. Mrs Humphreys challenged that as well. On the balance of probabilities, I consider it likely that Mr Gawn dismissed her on 28 February 2021 because of his frustration with what he perceived to be her refusal to cooperate. This would fit with his evidence – when asked if he had anything to add on the issue of redundancy, Mr Gawn's first reply was that Mrs Humphreys was *"aggressive and unpleasant"* rather than noting any particular reason why her role was redundant. Although there was a downturn in work at the factory, no one else was made redundant at this time when there was the option of furloughing instead. Mrs Humphreys' own evidence was *"I believe there was no real redundancy situation".*

200.3. I find the principal reason for Mr Dudden's dismissal was Mr Gawn's belief that he had committed misconduct, as set out in the email of 17 May 2021, and confirmed by Mr Gawn when he gave evidence about that decision. A less weighty reason was that Mr Gawn (mistakenly) believed that he had already found another job.

200.4. I find the reason for Mr Sheppard's constructive dismissal, namely the reason why his employer breached its contractual obligation to pay his wages (*Berriman v Delabole Slate Ltd*), was a lack and mismanagement of cashflow. I have considered whether, as submitted on Mr Sheppard's behalf, the reason was redundancy. The background context was that the needs of the business for employees to carry out work of a particular kind had diminished. The managerial staff including Mr Sheppard were left on furlough, while the operations of the factory were initially shut down altogether and then restarted on a smaller scale with a skeleton team of shopfloor staff. However, that was not the reason why Mr Sheppard was not paid. It was open to his employer to dismiss him for redundancy, or to pay him Government furlough pay (if he agreed, with a variation to 80% pay). Neither of those things were done and instead he was left without pay on an indefinite basis until he resigned. This was in keeping with the mismanagement of the initial payroll run in January 2021, and a

lack of priority accorded to paying staff wages in comparison with other demands in a struggling business.

200.5. For the same reasons, I find that the reason for Mr Underwood's constructive dismissal was a lack and mismanagement of cashflow.

201. In each case, was it a reason falling within s.98 ERA? Conduct is a potentially fair reason for dismissal, in the case of Mrs Gore and Mr Dudden. A breakdown in a working relationship may amount to 'some other substantial reason' for the purposes of s.98 ERA, with regard to Mrs Gore and Mrs Humphreys. However, a lack and mismanagement of cashflow cannot, in my judgement, constitute a potentially fair 'substantial reason'. It follows that both Mr Sheppard and Mr Underwood were unfairly dismissed.

202. In the cases of Mrs Gore, Mr Dudden and Mrs Humphreys, did the applicable Respondent employer act reasonably in all the circumstances in treating said reason as a sufficient reason to dismiss the Claimant?

203. In relation to Mrs Gore, insofar as the reason for dismissal related to her conduct, the *Burchell* test applies.

203.1. I accept that Mr Gawn genuinely believed that Mrs Gore had committed misconduct by failing to provide him with a business plan he deemed acceptable and by failing to manage the staff team so as to achieve a higher turnover in January 2021.

203.2. However, Mr Gawn lacked reasonable grounds on which to found his belief. Any manager would have struggled to achieve turnover in circumstances where there was no cashflow to order basic supplies, including yarn, or maintain essential services that were required to keep the business running. It is difficult to see what Mrs Gore could have done differently in January 2021 that would have resulted in a better performance for the business. While she disagreed with Mr Gawn's approach, on the evidence available it appears that she carried out each instruction he gave her.

203.3. Mr Gawn did not carry out any investigation to ascertain whether Mrs Gore had committed misconduct, but instead relied on his own observations over the short period they worked together.

204. In relation to the breakdown of the working relationship between Mr Gawn and Mrs Gore, no steps were taken to investigate and resolve the problem. Mrs Gore's grievance was rejected by Mr Gawn without an investigation or hearing. No consideration was given to alternatives to dismissal, such as a mediation process to improve the working relationship.

205. As for procedural fairness, no disciplinary or equivalent procedure was followed before Mrs Gore was summarily dismissed on 28 February 2021. She was not warned that she was at risk of dismissal or informed of the allegations against her. She had no opportunity to put her side of the story, because there was no investigation or disciplinary hearing. She was not informed of the reason for dismissal or afforded the opportunity to appeal.

206. In all the circumstances, the Third Respondent acted outwith the range of reasonable responses in both the procedure adopted and the decision taken to dismiss Mrs Gore.

207. On application of the *Burchell* test to Mr Dudden:

207.1. I accept that Mr Gawn did have a genuine belief that Mr Dudden had committed misconduct, based on the allegation from the unnamed staff member. I have considered whether the belief was in fact genuine, given that I have rejected Mr Gawn's evidence that Mr Roch corroborated the allegation. I conclude on the balance of probabilities that Mr Gawn was predisposed to believe Mr Dudden could commit misconduct, because of the backdrop of tension with the Group 2 Claimants, and therefore did believe it despite a lack of corroborative evidence.

207.2. This leads on to the question of whether Mr Gawn based his belief on reasonable grounds. I find he did not. A hearsay allegation, uncorroborated by Mr Roche, was an insufficient basis for accepting a serious allegation of wrongdoing against Mr Dudden.

207.3. There was no investigation carried out into the allegation by Mr Gawn or the Third Respondent. Mr Dudden was not interviewed or given any opportunity to respond. There is no documentary evidence that any investigative steps were taken, and Mr Gawn did not describe any when asked about this in cross-examination.

208. There was a lack of procedural fairness. Mr Dudden was told of the allegation against him in Mr Gawn's email of 1 April 2021 but was given no formal opportunity to respond or for his response to be taken into consideration. There was no disciplinary hearing and no appeal.

209. The Third Respondent acted unreasonably in all the circumstances in the procedure followed and the decision taken to dismiss Mr Dudden.

210. In relation to Mrs Humphreys, while breakdown in a working relationship is a potentially fair reason for dismissal, no steps were taken to investigate and resolve the problem. Like Mrs Gore, Mrs Humphreys' grievance was rejected by Mr Gawn without an investigation or hearing. While any relationship breakdown is caused to an extent by both parties, Mrs Humphreys had been entitled to raise the issue of non-payment of wages, and later seek clarity regarded furlough and lay-off decisions. No consideration was given to alternatives to dismissal, such as a mediation process to improve the working relationship.

211. There was also an absence of procedural fairness. Mrs Humphreys was not warned that she was at risk of dismissal. Because the situation was not investigated, and there was no disciplinary or equivalent hearing, she never had the opportunity to put forward matters in her own defence. She was told she had been given notice of redundancy, whereas I have found that was not the real reason for dismissal. There was no offer of an appeal.

212. If the Tribunal find the dismissal of the Claimant to be unfair; is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? In all cases, the backdrop was that that the needs of the business for employees to carry out work of a particular kind

had diminished. There was a downturn in orders and production. The factory was closed in February and March 2021 and thereafter operated by a smaller staffing team with less senior management input. There was an underlying risk of redundancy. Further, there was a clash between the Group 2 Claimants and Mr Gawn; a greater clash in the cases of Mrs Gore and Mrs Humphreys, lesser in the case of Mr Sheppard. Mr Gawn was the owner and director of all the Respondents. In the longer term, the dysfunctional working relationship between him and the senior management team may well have proven to be unsustainable. Mrs Gore, when asked what she thought would have happened to her employment if she had not been sacked for misconduct, replied realistically that:

> **'It's difficult to say. It's not unusual for a new owner to buy a business and sweep out the management team. It wouldn't have been the end of the world. I would have expected a proper procedure, not to have a breach of contract, to have been paid my wages, given notice and had it done in a professional manner.'**

213. Weighing up the chances of a fair dismissal for redundancy and / or relationship breakdown amounting to 'some other substantial reason', I consider it would be appropriate to reduce the Claimants' compensatory awards by the following proportions under the *Polkey* principle:

    213.1. Mrs Gore, 40%, to reflect the fraught nature of her working relationship with Mr Gawn and the difficulty of continuing as Managing Director in such circumstances, as well as the underlying risk of redundancy.

    213.2. Mrs Humphries, 35%, to reflect her poor working relationship with Mr Gawn and the underlying risk of redundancy.

    213.3. Mr Dudden, 30%, to reflect the general tensions and redundancy risk.

    213.4. Mr Underwood, 30%, to reflect the general tensions and redundancy risk.

    213.5. Mr Sheppard, 20%, to reflect the underlying risk of redundancy. On a personal level, Mr Sheppard and Mr Gawn had a better working relationship.

214. I do not consider it appropriate to make any further deduction in respect of contributory fault. I have not seen sufficient evidence on which to base a conclusion that any of the Claimants acted in a culpable or blameworthy manner.

215. If the Tribunal finds that the dismissal of the Claimant was the result of a defective process, and unfair for that reason, should there be an increase in the award to reflect an unreasonable failure to adhere to the ACAS code of practice on disciplinary and grievance procedures? I have found above that the failure to deal with the grievances in accordance with the ACAS code was not unreasonable in the circumstances. The ACAS code on disciplinary procedures applies to disciplinary situations including allegations of misconduct or poor performance. It ought to have been followed in the case of Mrs Gore and Mr Dudden. Mrs Humphreys' dismissal was purportedly for redundancy, to which the ACAS code does not apply. I have concluded that the reason for her dismissal was a breakdown in the working relationship with Mr Gawn. The ACAS code has been found to apply to a relationship breakdown dismissal, where the trigger for the relationship breakdown was misconduct or poor performance; *Rentplus UK Ltd v*

Coulson [2022] IRLR 664. However, Mrs Humphreys' relationship with Mr Gawn broke down because she challenged him on non-payment of wages, furlough and lay-off arrangements. I conclude that the ACAS code was no applicable in her case.

216. Where applicable, the ACAS code provides that an investigation should be carried out to establish the facts of the case, the employee should be informed of the problem, a meeting should be convened and the employee allowed to be accompanied, the outcome confirmed, and an appeal provided. None of those steps were taken in the cases of Mrs Gore and Mr Dudden. The failure to comply with the code was unreasonable and there was no justification for it. In the circumstances, it would be just and equitable to increase the awards made to Mrs Gore and Mr Dudden by 25%.

ISSUE FOUR: Were Mrs Humphreys, Mr Dudden, Mr Sheppard and Mr Underwood entitled to redundancy payments?

Submissions

217. For the Claimants, it was submitted that Mrs Humphreys was expressly dismissed by reason of redundancy, and that Mr Sheppard and Mr Underwood were constructively dismissed by reason of redundancy. It appears to have been accepted that Mr Dudden was dismissed for the reasons set out in Mr Gawn's letter of 17 May 2021.

218. For the Respondents, Mr Gawn agrees that Mrs Humphreys was dismissed because of redundancy. He says that Mr Sheppard and Mr Underwood were not dismissed, but resigned. Although the Respondents' pleadings say that Mr Dudden also resigned, Mr Gawn stated in evidence that he dismissed him due predominantly to the allegation about sabotage, and as a secondary reason, the belief that he had found another job.

The law

219. Section 135 ERA provides that an employer shall pay a redundancy payment to any employee dismissed by reason of redundancy. Such payment is calculated according to the statutory formula at s. 162 ERA.

Conclusions

220. I have concluded above that none of these Claimants were dismissed by reason of redundancy, so these claims do not succeed.

ISSUE FIVE: Were the Group 2 Claimants, Mrs Jordan, Mrs Tyszkiewicz and Mrs Wright entitled to be paid notice pay?

Submissions

221. For the Claimants, it was submitted that there was no challenge to the notice pay claims.

222. Mr Gawn did not focus on these claims, but I understand the Respondents' position to be that Claimants who resigned were not entitled to notice and neither were Mrs Gore and Mr Dudden, who were said to be dismissed for gross misconduct.

The law

223. To succeed in a claim for notice pay, an employee must have been dismissed by the employer, in circumstances where the employer was not entitled to dismiss without notice. For the law on constructive dismissals, see paragraphs 174 to 178 above.

224. For an employer to be entitled to summarily dismiss an employee, that is dismiss him without notice, the employee's conduct must amount to gross misconduct. A definition of gross misconduct is found in [22] of *Neary v Dean of Westminster* [1999] IRLR 288:

> **'…conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.'**

225. Unlike in a claim for unfair dismissal, where the Tribunal will not substitute its own view for the employer's, the question for the Tribunal here is whether the Claimant is guilty on the facts of the gross misconduct alleged.

Conclusions

226. Were the Group 2 Claimants, Mrs Jordan, Mrs Tyszkiewicz and Mrs Wright entitled to be paid notice pay? In respect of each:

226.1. Was the Claimant dismissed?

226.2. What was the Claimant's notice period?

226.3. Was the Claimant paid for that notice period?

226.4. If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

227. For the same reasons as Mr Underwood and Mr Sheppard, I accept that Mrs Jordan, Mrs Tyskiewicz and Mrs Wright were constructively dismissed. The Respondents were in repudiatory breach of contract by failure to pay wages. The Claimants resigned in response to the breach. They protested the non-payment and did not affirm their contracts before they resigned.

228. None of the Claimants had committed gross misconduct such as to justify summary dismissal. They were therefore entitled to their notice period.

229. The Claimants have not contended for any notice entitlement beyond statutory notice pay. The sums owing are as follow:

Claimant	Weeks' notice	Multiplied by net week's pay
Mrs Jordan	1	£298.12
Mrs Tyszkiewicz	5	£1,871.54

Mrs Wright	1	£305.17
Mrs Gore	6	£6,061.86
Mrs Humphreys	12	£6,821.78
Mr Dudden	12	£9,671.84
Mr Sheppard	9	£4,593.49

ISSUE SIX: Were the Group 2 Claimants, Mrs Jordan, Mrs Tyszkiewicz and Mrs Wright entitled to be paid holiday pay?

Submissions

230. For the Claimants, it was submitted again that the Respondents had not disputed the sums claimed by way of holiday pay. It was the case that Mr Gawn had not made any specific challenge, either during cross-examination or closing submissions, although neither were they conceded.

The law

231. The Working Time Regulations 1998 ('WTR') give workers the entitlement to 5.6 weeks' leave each leave year (including any bank holidays the worker is entitled to take). 4 weeks of this was to implement European law (reg. 13) and the further 1.6 weeks' leave is a matter of domestic law only (reg. 13A).

232. A claim for unpaid holiday can be made under s.13 ERA, for unauthorised deductions from wages, or under reg.30 WTR.

233. Employees are entitled to be paid in lieu of holiday accrued but untaken during their final leave year on termination of employment (reg. 16 WTR). If there is no express contractual right to payment in lieu of accrued leave, the claim would be under the WTR, for leave calculated in accordance with the statutory formula (reg. 14).

Conclusions

234. In respect of the Group 2 Claimants, Mrs Jordan and Mrs Tyszkiewicz did the applicable Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended? Mrs Wright ticked the 'holiday pay' box on her ET1, but confirmed in evidence she was not pursuing this claim.

235. I was taken to no documentary evidence such as annual leave records to support the sums claimed by way of holiday pay. However, given that there was a period where no wages were paid, and a period of furlough during which it seems unlikely the Respondents allocated and paid holiday dates, I accept it is likely that

there was holiday pay outstanding at the point when each of these Claimants' employment terminated.

236. In the absence of specific challenge, I have accepted the number of days owing claimed by each Claimant. Where the sum claimed is expressed in money or hours, I have made a pro rata conversion to net days' pay. I have used the net daily pay rate calculated according to the payslips in the bundle. The sums owing are:

Claimant	Days' holiday	Multiplied by net day's pay
Mrs Jordan	9	£ 536.61
Mrs Tyszkiewicz	6	£ 449.17
Mrs Gore	17.5	£ 3,536.09
Mrs Humphreys	37	£ 4,206.76
Mr Dudden	10.5	£ 1,692.57
Mr Sheppard	17	£ 1,735.32

ISSUE SEVEN: Was there a failure to provide the Claimants with written particulars of employment?

Submissions

237. For the Claimants, it was submitted that there had been a unilateral change to the Claimants' contracts as their payment date was changed from the 15th to the end of the month. This was a significant contractual term and a new statement setting out the change was required by s.4(1) ERA. As no new statement had been provided, an award should be made under s.38(2) Employment Act 2002.

238. Mr Gawn did not specifically address this point on behalf of the Respondents, but the claim was contested.

The law

239. A worker is entitled to be provided with a written statement of particulars of employment in accordance with s. 1 ERA. Such as statement must specify the names of the employer and the worker, the date when the employment began, the rate and dates of pay, and other details including working hours, annual leave, sick pay, pension, job title and notice provision.

240. Further, s.4 ERA provides that if there are any changes to the stated particulars, a statement of changes must be given at the earliest opportunity and not later than one month after the change in question.

241. There is an exception at s.4(6)-(7) ERA: no statement of changes is required for an employee where "*the identity of the employer is changed in circumstances in which the continuity of the employee's period of employment is not broken*".

242. Under s.38 of the Employment Act 2002, if when relevant proceedings were brought the employer was in breach of the duty to give written particulars or a statement of changes, the Tribunal will make an award of 2 weeks' gross pay unless it would be unjust and inequitable to do so, and may if it considers it just and equitable in all the circumstances make an award of 4 weeks' gross pay.

243. The jurisdictions to which s.38 applies includes claims for unfair dismissal and for unauthorised deductions from wages (sch.5 Employment Act 2002).

Conclusions

244. When these proceedings were begun, was the applicable Respondent employer in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars? I accept the Claimants' submission that the change of the pay date from the 15th to the end of the month was a change requiring a statement to be provided pursuant to s.4 ERA.

245. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? There are no such exceptional circumstances, so the Tribunal must award two weeks' pay and may award four weeks' pay.

246. Would it be just and equitable to award four weeks' pay? There is no reason for the higher award to be made. The Claimants were informed of the change to the pay term and there was no wholesale failure to provide a statement of employment particulars.

Employment Judge Barrett
Date: 15 August 2022