Case No: 3300231/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms F Stewart

Respondent: Vertas Group Limited

Heard at: **Watford Employment Tribunal (by CVP)** **On: 24 October and 18 November 2022**

Before: **Employment Judge N Walker**

Representation
Claimant: In person
Respondent: Mr D Chapman, solicitor

RESERVED JUDGMENT

1 The Claimant's claim for Automatic unfair dismissal under section 104 of the Employment Rights Act 1996 is dismissed upon withdrawal by the Claimant.

2 The Claimant's claims for constructive ordinary unfair dismissal and for automatically unfair dismissal under regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 both fail.

3 The Claimant's claim for unfair dismissal, pursuant to regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 succeeds.

3 The Respondent is ordered to pay the Claimant the sum of £4,859.25 being made up of a Basic Award of £2,919.51 and a Compensatory Award of £1,939.74 (subject to recoupment).

REASONS

The Claim

1 The Claimant claimed constructive unfair dismissal and automatically unfair dismissal pursuant the Transfer of Undertakings (Protection of Employment) Regulations 2006. The Claimant also claimed wrongful dismissal.

2 The issues had not been formulated prior to the hearing and I therefore discussed the issues with the parties at the outset of the hearing. The list of issues I agreed with them is set out below.

3 The hearing was originally listed for two days but due to pressure on judicial resources, it was eventually listed before me for only one day and I reserved the decision. I then took time to consider my decision.

4 The Claimant was unrepresented at this hearing but had representation in at various times and her submissions had been prepared by her advisers.

5 The hearing took place by CVP. I was satisfied that it was appropriate for the case to be heard in this manner. Everyone could see and be seen, and the evidence was given in circumstances where the witnesses had clean unmarked copies of the documents with them and could not be influenced by anyone.

Evidence

6 I had a bundle of documents. I heard evidence from the Claimant and from Aaron Hughes, Head of People for the Respondent, Martin Kenworthy, the former Head of Passenger Services and Fleet for the Respondent (who now holds another role with them), and Katie Robinette, a Peoples Team Manager for the Respondent.

The Issues

7 <u>Constructive unfair dismissal</u>

7.1 Was there a dismissal? As this is alleged to be a constructive dismissal, it is necessary to determine the following questions:

7.1.1 Did the Respondent commit a breach of contract which amounted to a repudiatory breach, such that the Claimant was entitled to resign?

NOTE: The Claimant says the breach was a breach of trust and confidence which arose out of:
(a) the Respondent changing the pay cycle so as effectively to withhold 2 weeks' pay from her until the end of her employment and
(b) the Respondent's failure effectively to consult with the Claimant over the proposed change.

7.1.2 The Claimant did resign

7.1.3 Did the Claimant resign in response to the breach question

NOTE: The Claimant argued that each breach played a part in her decision to resign

7.1.5 There was originally an issue over waiver, but the Respondent confirmed during submissions that they were not pursuing it.

7.2 If there was a constructive ordinary unfair dismissal, the Tribunal has to consider the provisions of section 98(4) of the Employment Rights Act 1996 and the question of whether the dismissal was fair

8 Automatic unfair dismissal under section 104 of the Employment Rights Act 1996

8.1 This claim had been withdrawn by the Claimant in writing prior to the hearing commencing.

9 Automatically unfair dismissal pursuant to Regulation 7 of TUPE and/or under Regulation 4(9) of TUPE

9.1 The Claimant argued in the alternative that if she was not ordinarily unfairly dismissed, she was dismissed in breach of regulation 7(1)(b) of TUPE which was a reference to the old version of TUPE, which had been amended by the 2014 regulations. However, it was clear that what the Claimant was arguing was related to the general provisions in regulation 7 of TUPE.

9.2 The questions which arise in relation to the constructive dismissal claim are as follows:

9.2.1 Was the Claimant constructively dismissed by the Respondent?

9.2.2 Was that because of the TUPE transfer?

9.2.3 If it was, the Claimant was automatically unfairly dismissed unless the Respondent can show that there was there an economic technical or organisational reason entailing changes in the workforce of either the transferee or the transferor before or after the transfer.

NOTE: It appeared the Respondent had argued that point in the ET3 but at this hearing the Respondent's representative confirmed they did not argue there was an ETO reason and thus if there was a constructive dismissal because of the transfer, there was no defence.

9.3 In relation to the claim under regulation 4(9), there is a further alternative option which is that the Claimant may have been entitled to resign even if she was not constrictively dismissed. The questions that arise are:

9.3.1 Did the transfer involve a substantial change in the working conditions of the Claimant

9.3.2 Did the Claimant consider that change a detriment?

9.3.3 Was that a reasonable position for the Claimant to adopt – note this arises out of the fact that there must be a material detriment

9.3.4 If yes, the Claimant was entitled to resign, and the Respondent is treated as having dismissed her under regulation 4(9) of TUPE.

10 Wrongful Dismissal

10.1 If the Claimant was dismissed (i.e. by way of a constructive dismissal) did the Respondent failed to pay her notice pay?

NOTE: Regulation 4(10) of TUPE refers to Regulation 4(9) and states that no damages are payable for any period for which the Claimant failed to work and thus if the Claimant succeeds on that basis, there is no wrongful dismissal entitlement for any period when the Claimant did not work

Facts

11 These facts include various quotes from the documents and emails. I have quoted them as they appear, even where they are not grammatically correct.

12 The Claimant is a coach driver. She is also a single parent. She began work for the previous employer, Norse, on 1 September 2014. It was accepted by the parties that her employment transferred from Norse to the Respondent pursuant to a TUPE transfer on 1 September 2021 and that was a service provision change. Her role involved transporting children from school which allowed her to work in the term time only and was convenient for her childcare responsibilities.

13 The Claimant's statement of terms and conditions of employment with Norse was not in the bundle but there was a generic document which the parties agree was in the same form as the Claimant's statement of terms and conditions. That contained the following provisions:

> *"Your annual salary is £XXX. Payment will be made by credit transfer on the last working day of each month for the current calendar month.*
>
> *Norse reserves the right to change the method or and or timing of wage payments to comply with statutory regulations".*

That clause was not operated by Norse so that the entire salary which had been earned as at the end of the relevant month was paid at the end of each month. Although salary payments were made at the end of the month, overtime would be paid later and there is one email from the Respondent which says Norse spread the Claimant's payments over twelve months when, in fact, the Claimant only worked for 39 weeks each year. That meant the Claimant did not work for 13 weeks outside school term time. While it is not clear that the Respondent's description of payment was entirely correct, and neither party gave evidence about that detail, the payslip for August 2021 shows a full pay for a month when the Claimant would not have been working as it was outside term time. I am therefore satisfied that clause did not refer to payment of the full month's salary at the end of each month.

14 The contract to supply coaches and drivers was won by the Respondent and there was a period of time before the Respondent took over that contract and the staff who were assigned to it. During that time the Respondent and Norse communicated over the Employee Information. I have no specific information about the extent of Norse's consultation with its employees as Transferor. The Employee Information was not in the bundle, and I do not know when it was supplied. There was a considerable amount of union involvement in terms of representing employees both at Norse and at the Respondent, but it is not clear whether either company recognised a union to the extent that such union was the employee representative for the purpose of TUPE consultation.

15 The Claimant's claim arises out of a change to the payment arrangements for wages that the Respondent decided to make and the consultation over that change.

16 On 12 May 2021 the Respondent wrote to Norse confirming that they agreed that TUPE applied and providing details of the envisaged "measures" that they might take in relation to the employees in connection with the transfer. The letter noted that any final decisions on the envisaged measures detailed below will only be made after the consultation process has been completed. The relevant "envisaged measure" was described as follows:

> *"**Change in Pay Date***
>
> *The pay date for Vertas staff will be on the 14th of the month or closest to that date.*
>
> *First salary payment: salary will be paid into designated bank account on or around 14 October 2021. This will cover the period work from 1 September 2021 to 30 September 2021.*
>
> *The transferring staff may need to consider changing the date of direct debit /standing orders to reflect the pay date for Vertas.*
>
> *Depending on the existing pay date, Vertas may offer a pay advance in order to give staff time to make appropriate adjustments to their domestic budgetary arrangements.*
>
> *Vertas will assess whether a pay advance will be required through discussion with the member of staff. The pay advance will need to be repaid to Vertas as agreed with the member of staff and they will sign an agreement to this effect."*

17 The letter addressed holiday payments and said:

> *"The employees will receive their basic pay monthly; their annual salary will be divided by11 months. The 12th month (August) will be their holiday pay."*

18 The letter dealt with a variety of matters which are not relevant for this judgement. It then explained that in line with the requirements of TUPE, it was the responsibility of the outgoing employer as Transferor to consult with affected staff and appropriate representatives about the envisaged measures.

Then there was a reference to the legislative requirements for information to be provided. The letter went on to say:

> *"Vertas would like to hold an onboarding session with the transferring staff to introduce ourselves to them, review the measures and complete new starter paperwork.*
>
> *Vertas will consult with all employees and will follow proper process in respect of any potential redundancies and will discharge all obligations should any employee need to be dismissed for ETO reason."*

The Respondent's proposals were communicated to the staff and on 11 June 2021 the Claimant emailed Norse and copied in her union representative stating with reference to the letter of proposed measures that she rejected the change in pay date. She explained:

> *"due to the fact that I don't want to wait six weeks to get four weeks pay! Can they please give more information on why, if they need to change our pay date, it won't be paid on 14 September? any steps to harmonise the workforce can **only** be done if it **improves** terms and conditions and I feel this does not."*

19 The Claimant's e-mail concluded in a request for her questions and concerns to be forwarded to the Respondent for them to clarify. She hoped to attend the meeting on Teams that day, but she was worried that she wouldn't have the time to voice her concerns.

20 A second e-mail from the Claimant of the same date referred to today's meeting. It was clear the Claimant had been able to attend the meeting. Her email was addressed to both the Norse Group and to the Claimant's union representative. She referred to the pay situation again and stated:

> *"I feel the fact that not only are they intending to pay us on a different date, make us wait six weeks before receiving a payment and withhold completely two weeks wages, is completely unacceptable. cutting pay on transfer to bring us in line with existing employees is against the law, any Harmonisation must improve terms and conditions. Given this I feel that there has been a failure in management and HR to even bring this to the meeting."*

21 The Claimant maintained her rejection of what she later called their illegal proposal for transfer in further emails. There had been an effort to collect verification information for employee's ability to work. The Claimant was unhappy about giving her personal data to a company that she didn't work for at that time and she asked her Trade Union about the position. During their exchange of emails about the situation, she wrote to her Trade Union representative on 23 June saying:

> "*As I have rejected their illegal proposal for transfer and have yet to receive a legal one I am happy with I won't be transferring".*

22 Later in June the Respondent held various meetings with the transferring staff. These were the "welcome meetings" that the Respondent had notified Norse that it wanted to hold. The Claimant was part of a small group which met with Mr Kenworthy on 24 June 2021. There is a presentation in the bundle with the

Tribunal understands was shown to Norse' staff by the Respondent at those meetings and that includes a slide with is headed "Declared Measures" under TUPE. That slide refers to the pay date being on the 14th of the month or the nearest working day and the first pay being on 14 October 2021 covering the working period from 1 September to 30 September 2021. It also says if you have any concerns with these changes and how they impact you personally please speak to myself or our People Team. A final slide included contact information for the Respondent's People Team.

23 The Claimant emailed Mr Kenworthy after that meeting sending him a copy of an extract from a legal workbook she had, and forwarding an e-mail she had sent previously. It is clear that she was explaining that she did not think it was possible for the Respondent to change the pay date.

24 Mr Kenworthy forwarded the Claimant's e-mail to Katie Robinette and others at the Respondent asking if they were able to respond. Ms Kate Innes responded to him asking which measure the Claimant was contesting that they could not change. She also said:

> *"with regards to change to pay date and holiday pay this is this a Organisational reason under ETO".*

25 On 10 July 21 the Claimant emailed Katie Robinette who had sent out a new starter pack to the employees who were transferring. The Claimant wrote stating:

> *"As I am not happy that I have had a consultation, as none of my concerns have been addressed. Also, I have not been in a position to discuss my contract in a private meeting. I am very unhappy with the way Vertas is trying to push on as if they have no issues to be resolved on the unlawful measures they are proposing. TUPE protects my terms and conditions and you can't change them without my consent and I do not agree to the changes, as such I will be keeping all my terms and conditions. All the information you have asked for in your form will be given to Vertas in the transfer. I am not filling in your forms. Unless Vertas starts to treat me with some of that integrity that they seem to think they have, and come back to me with new proposals, I will have no choice but to take Vertas to an employment tribunal."*

26 It was clear from the Respondent's management's evidence and various documents in the bundle that the Respondent's management erroneously took the view that if there was an "economic technical or organisational reason" within TUPE, they were at liberty to change the terms and conditions. They seemed unaware that such a reason only applied where it involved changes in the workforce. It was agreed by all sides that there were no workforce changes in this case. One example of the documents which show this is Ms Robinette's reply to the Claimant which she sent on 14 July 2021 which stated:

> *"In regards to the measures, the incoming employer are allowed to make minor changes under TUPE regulations if they are for what is called an "ETO" reason and, with the support from the current employer, consult on these changes with the employee's. We have declared the measures to Norse who we believe have consulted with*

yourselves and we have also held a consultation meeting to declare these changes."

27 Ms Robinette also included a link to an ACAS guide to TUPE transfers. She went on to refer to the pay day loan which was available to minimise any financial impact and offered a phone call to discuss this if the Claimant wished.

28 Page 33 of the TUPE Guide which Ms Robinette relied upon in the email had been included in the Bundle and this described TUPE measures. This was a part of the section dealing with Employee Liability Information and due diligence. Page 33 included changes to staff pay dates as something which would be a measure. It then noted that there are tight restrictions under TUPE on when terms and conditions may be altered and referenced page 37. Page 37 was not in the bundle. It was part of a separate section on changing terms and conditions.

29 The Claimant replied to Ms Robinette's email of 14 July within minutes saying:

"There is never a valid ETO reason for harmonisation and any that doesn't improve terms and conditions are illegal and void. The change of pay date is not just a change of date, you are withholding wages (2 weeks) this is against my current contract."

She went on to describe how she saw this as withholding pay explaining that if she was paid on 14 September for 1 to 14 September and again on 14 October for 15 September to 14 October, that would be a change of pay date, but the Respondent was withholding earnings to which she was entitled and if they did not do that, she would not need a loan.

30 Ms Robinette replied on 14 July to the Claimant stating the Respondent was not withholding any pay. She pointed out that on 14 October she would be paid for the period 1 September to 30 September on 14 November she would be paid for the period 1 October to 31 October and so on. She referred to the Respondent's view saying:

"Vertas do not believe this to be harmonisation and as per ACAS guidelines, this is a measure that is commonly seen within TUPE transfers as many employers have different pay date changes."

31 The email exchanges of 14 July continued as again, the Claimant replied within minutes saying that was exactly her point as on 14 October under her current contract she would be entitled to be paid in full and as the Respondent would only pay to the end of September, they were withholding two weeks' pay.

32 A further exchange of emails continued on from that with Ms Robinette replying the next morning referring to it as a two week delay but once again pointing out the pay day loan.

33 Again, the Claimant replied stating that the Respondent was changing her existing contract to fit in with their current systems/ employees and stating that this was the very definition of harmonisation. She said:

"the fact that worsens my contract (paying me14 days late every month) is illegal."

She continued

> *"Vertas may not see it has harmonisation but you can't hide it in with the Change of pay date. It is 2 separate things. One is changing the date (acceptable if agreed) and the other is paying us 14 days late every month (illegal harmonisation) I'm sure the tribunal, as I have will see past what you're trying to do."*

34 Ms Robinette took a few days to respond, but the correspondence by e-mail continued. Ms Robinette emailed the Claimant on 20 July and referred to having spoken to Unison who, she said, were supportive of the measures in regard to the payday change. She then explained the reason for the change which was because their time and attendance system being processed in this way. She said:

> *"We have to allow time for all employee's to clock in and out for the month and then allow managers time to approve the hours that were worked for each of their employee's falling under a technical reason."*

35 Ms Robinette then stated:

> *"we are still paying you 4 weeks/a months pay each month, in line with what you currently get paid. We appreciate that there is a delay in the first payment, and this is why we offer a payday loan."*

She then maintained that the measure would stay in place and referred to the pay dates for the rest of the year being 14 October, 14 November and 14 December.

36 Again, on 20 July the Claimant replied again very quickly to Ms Robinette stating:

> *"The unions can't legally agree to changes in my contract during TUPE transfer only I can do that. Even with a ETO reason changes must still be agreed and I am not agreeing to being paid 14 days late. ETO reasons cannot be used for harmonisation of a staff group."*

She went on to explain:

> *" I have no problem being paid on the 14th but you will need to pay 6 weeks money on 14th of October and then monthly there after to stay in line with my contract. I believe that you are making excuses to bully and force me to accept a change in contract that is illegal harmonisation. I believe that your system is more than capable of doing this but Vertas is withholding this money to benefit their budget and to harmonise us in with exiting staff."*

37 The communication about the pay date change continued with Mr Pond, the local Trade Union representative for the Norse staff who were transferring, taking up the matter. He emailed a Mr Stannard at the Respondent to whom he had just spoken to confirm the conversation they had in which Mr Pond had suggested that the problem was that money which was due to the staff would be withheld until the 14th of the month and paid on exit from the company so

staff would miss approximately 2 weeks' pay. He said that the loan was too late. He suggested that they were paid on the 14th of each month, starting with the first payment on 14 September and with all pay due at the time. He also explained that overtime could be caught up a month later as was the current position.

38 Ms Robinette replied to that proposal for Mr Stannard stating they were unable to pay this way due to technical reasons with the pay system. The pay system looked back in arrears and allowed the managers time to check the clocking in and out system and amend it to ensure all employees were paid correctly. She repeated her position that the Respondent was not withholding 2 weeks' pay. She included a table with the pay periods for the next six months and pointed out that if someone resigned and left on 12 February 2022, their final payment would be on 14 March covering the hours from 1 February to 12 February. She stated that the change fell under both organisational and technical reasons within the TUPE regulations.

39 The Claimant had been copied in on that correspondence and she replied to Ms Robinette on 21 July stating that if the system cannot be changed the Respondent would need to make separate payments for two weeks prior to the system picking up the hours. She said the change did not fall under an ETO reason as all ETO reasons must entail changes to the workforce, as in workforce numbers, functions, or location. She said the Respondent did not have a valid ETO reason for making the change in her contract and paying her 14 days late every month. She also said she had spoken to ACAS who were willing to step in if they could not resolve the matter, but she hoped the Respondent would read the photo she had provided (which I understand to be another photo of the legal workbook that she had provided in a previous e-mail.

40 Thereafter the Respondent sent out documentation to enable employees to apply for the pay date loan and documentation showing that the loan would have to be repaid over three months. It would be paid out at the end of September and recouped in three instalments on 14 October, 14 November and 14 December so that by 14 January the employees would be receiving their full pay for the month of December with no further repayment of the loan.

41 The Claimant lodged a grievance over the situation. She sent it to Ms Robinette and another person. The complaint was that she didn't feel she had had consultation as she hadn't met with the Respondent to discuss her contract and none of her concerns had been taken seriously.

42 Ms Robinette replied on 30 July that as the Respondent was not her employer yet, it was not able to address her grievance. Mrs Robinette maintained they had looked into each point she had raised but confirmed that the Respondent believed the measures to be in line with TUPE Regulations as stated on the ACAS website. She also referred to the Welcome/onboarding meetings and said they were more than happy to have a one to one with the Claimant regarding her concerns if she wished to do so. This could be face to face or a virtual meeting. She asked the Claimant to tell her a time that would be suitable. This prompted another reply from the Claimant that this was not in line with the ACAS code of practice which was for a change of date only and the Respondent had no valid ETO reason for this. She also said that she thought the Respondent should arrange the meetings.

43 Ms Robinette then went on holiday for a week and Mr Hughes took over the correspondence for the Respondent. Mr. Hughes described in three detailed paragraphs how he thought the change was for each of an economic technical and organisational reason and stated that the change of pay date was a regular measure they had in place in similar circumstances which had always been accepted by Unison for all previous transfers. He referred to the bridging loan of about two weeks' pay to support with the transition of pay dates and believed the offer was reasonable. He said that Mr Kenworthy would be in touch with regard having a one to one session with the Claimant further prior to the transfer but he was also happy to discuss the matter directly with her if she could confirm her availability. There was a further exchange between the Claimant and Mr Hughes in which the Claimant again informed Mr Hughes that a change of date was allowed under ACAS but not withholding pay. Mr Hughes replied with a colour coded calendar he had made to try to show the pay dates for the Claimant and another offer to talk to her directly about the position.

44 The Claimant replied on 6 August saying she might be available that afternoon, and Mr Hughes also indicated he was able to talk then. It is not clear whether that phone call took place. There is a dispute over whether it did or not. There are no notes of any phone call but a later email from Ms Robinette refers to there having been a phone call. What is clear is that despite the communication between the Claimant and the Respondent's various managers, the parties remained entrenched in their positions. However, around that time, the repayment period for the loan was extended to 6 months by the Respondent.

45 In subsequent email exchanges the Claimant was in touch with Mr Dorsett who I understand was a Union representative based near the Respondent's offices. Mr Dorsett emailed the Claimant on 16 August 2021 referring to their telephone call. He had been involved in discussions with the Respondent and had a good understanding of how the revised pay date worked and his email refers to having discussed the financial impact of the change of pay period with the Respondent. He was not the Claimant's local union representative but an official in the same union. The Claimant replied to him about the matter the same day and her email to him stated:

> *"the fact that worsens my conditions by cutting my pay to the point that I can't afford to continue working is a constructive dismissal."*

In her witness statement the Claimant merely states:

> *"Going six weeks without pay and then only getting paid for four of those weeks had the potential to cause significant harm to me and my colleagues."*

46 In her evidence to the Tribunal the Clamant was asked about this and having initially forgotten she had made this point, when reminded about it, she said she thought withholding was equivalent to a pay cut. The Claimant has not identified any specific harm she envisaged she would suffer or repeated the assertion in her email to the Unison representative that she couldn't afford to continue working for the Respondent on this basis. The Claimant's e-mail to Mr Dorsett dated 16 August 2021 reiterates her complaints stating that it was not just a change in pay date but two things were happening. She described the first one as changing the pay date which she said was something that could be done, but only if agreed. The second

point she raised was moving the pay date away from the pay period causing a two week unpaid wait for money. She said:

> *"Thus changing terms and conditions as I would normally be paid all contractual pay covering all days worked*".

It is my conclusion that that statement was simply was not correct. The Claimant was not paid all contractual pay covering all days worked in a month at the end of that month but it is clear the Claimant approached the situation as if that were the case. The Claimant went on to explain to Mr Dorsett that the change was only being done because of the transfer to harmonise them with the current system and:

> *"not because they can't change the systems because they don't want to".*

It was her firm view that the Respondent could have updated or changed the pay system. She then reiterated again that she didn't think Mr Dorsett understood that this was not just changing pay date and she explained:

> *"I will be paid late every month the only reason being the transfer (no change can be made for this reason without a valid ETO). They think they can make this change as they are covered in technical reasons. But the system can pay what they tell it to, so the only reason is not because they can't do it but because they want to harmonise their staff/systems (never a valid ETO for harmonisation). And all ETO reasons must involve changes to the workforce and this does not, also making it invalid."*

47 The Claimant told the Tribunal that she then heard from another driver that the Respondent had decided to pay them 6 weeks' pay on 14 October.

48 On the transfer date the Claimant emailed Ms Robinette in response to a request to send in a starter form that she had omitted to attach to an earlier email and said she would hand it in today and them said:

> *"I am still not happy with the proposed measures that Vertas are now forcing on me, and the fact that I never did get the meeting I asked for."*

Later that day the Claimant emailed Ms Robinette again and asked if the wages were going to be paid as per the measures letter as she had been told by a driver that day that the Respondent would be paying them all 6 weeks on 14th. She was again told by Ms Robinette by email on 3 September that the payment schedule was being changed as the Respondent had always maintained and the September pay would be paid on the 14th of the following month. The Claimant resigned that day. Her resignation letter simply referred to the way she had been treated without further detail.

49 The Claimant explained in her witness statement why she considered that she was entitled to resign as follows:

> *"I considered that I was entitled to resign on two main grounds: firstly, that the transfer was illegally conducted, without proper consultation and by lowering my working conditions; and, secondly, that changing my pay*

date to withhold two weeks' pay was a fundamental breach of my contract, causing me to lose trust and confidence in the Respondent as an employer.".

50 After her resignation the Claimant had a further exchange with Ms Robinette about the pay that she had received for the days worked between 1 and 3 September when she had resigned. Ms Robinette's reply says with Norse you were paid 1/12th of your salary. The email continued referencing the fact that pay from Norse and also from the Respondent was not based in the hours worked in the period. Both Norse and the Respondent spread the pay over a period (presumably to even it out) and employees were not paid for the full time worked each month at the end of that month.

Remedy

51 There was some confusion over the Claimant 's salary with Norse which I had understood to be based on an hourly rate of £10.43 per hour. She was due to work 37 hours per week for 39 weeks per year, so that would have meant she should have earned £385.91 per week for those 39 weeks and a total of £15, 050.49 per annum. As I have noted, in an email exchange between Ms Robinette and the Claimant Ms Robinette says that Norse paid her that amount in 12 monthly instalments (i.e. spreading it out over the full year rather than paying it as it was earned). Ms Robinette divided up the annual salary by 12 months but this outcome results on a monthly salary of £1254.21 per month which does not tally with the salary slips in the bundle which show the Claimant's base monthly gross pay was £1,405.69. Since the figures do not tally with the payslips, I have taken the monthly gross base from the pay slips as the correct figure.

52 If you multiply £1405.69 by 12 and then divide by 52 you get a gross weekly pay of £324.39. I cannot work out how the Claimant calculates £344.39 in her schedule of loss and there is no breakdown to explain that calculation. I have therefore based my calculations on the weekly figure of £324.39.

53 On the payslips the Claimant's net pay is £1216.12 but that includes deductions for NEST and the union. If I only deduct the Tax and NI deductions, which total £144.04 that leaves a monthly net pay of £1261.65. That sum times 12 = £15,139.80 divided by 52 leaves £291.15. as the net average weekly pay. That is the figure I have used.

54 The Claimant put her CV on a website called Indeed. She admits she did this in July 2021 but says she was on the lookout for better paid work, but it was difficult to find work she could fit in with her childcare responsibilities.

55 The Claimant was contacted by another coach company called Navigator within a week of her employment ending. She began work for Navigator. The Claimant's schedule of loss says this role commenced on 16 October but the contract of employment in the bundle shows that it commenced on 16 September. The day is clearly 16 but the month shown on the copy of the contract in the bundle as the start date is not very legible and could be an 8 or a 9, but as the Claimant was still working for the Respondent in August, it cannot be an 8. Moreover, there is a reference to a three month probation period which ended on 16 December 2021. Subsequent correspondence between the Claimant and Navigator in June 2022 also refers to her having

worked for nine months. From that it is clear that the indistinct month date must be a 9 and thus September. The work for Navigator must have commenced on 16 September 2021.

56 The Claimant only worked 20 hours per week for Navigator rather than the larger number of hours per week that she worked for Norse and the Respondent. She earned £11 per hour, so that once she worked a similar number of hours when would have earned a similar amount. The Claimant says in her witness statement that she would have hoped to make up her wages entirely, but it was tricky to work around her needs given that she could not request flexible working when walking into a new employment. The contract with Navigator was competitive for her needs and skill set. I take this to be a reference to the statutory requirement that an employee must have 26 weeks consecutive service with the new employer to be able to request flexible working.

57 As the Claimant acknowledges, there was a prospect that she would have been able to make up her wages entirely. She could have done that by finding additional hours for her new employer or alternative employment working a similar number of hours as she had previously done. Given time I have no doubt she would have done so. However, the Claimant's effort to fully mitigate did not get underway as a result of the Claimant becoming ill.

58 On 1 February 2022 the Claimant went off work due to stress. She remained on sick leave for the rest of her employment with that company. There are no fit notes in the bundle and the Claimant has not supplied any medical documentation about this illness. The only evidence is a brief statement in the Claimant's witness statement and refences in correspondence with Navigator. The Claimant said in her witness statement:

> *"In the New Year, around February time, I became too ill to work, ultimately leading to my employment being terminated in July 2022. I fully believe that the stress caused by Vertas' handling of the transfer was a major contributing factor to my stress and one of the reasons I could not work."*

59 Navigator wrote to the Claimant on a number of occasions asking her to consent to an Occupational Health appointment. The Claimant refused to do this. The correspondence in the bundle shows that the Claimant's new employment ended on 6 June 2022 because she was absent from work from 1 February 2022 due to a stress related problem. She had refused despite repeated requests to consent to a medical report and there was an absence of any medical opinion as to the likelihood of her return to work. She had at that stage, nine months service with Navigator, of which six months had been on sick leave.

60 The Claimant's Schedule of Loss seeks to recover all her losses from the Respondent including those losses attributable to her illness. However, there is no medical documentation for me to review which supports the Claimant's assertion that the stress was contributed to by the Respondent's conduct. Without some evidence, I cannot reach that conclusion.

Submissions

Claimant's Submissions

Constructive Unfair Dismissal

61 The Claimant's submissions had been prepared for her by a lawyer and she read them out to the Tribunal and then I was sent a written copy. I have extracted the relevant points for this judgment.

62 The primary submission is that the Respondent's change of pay terms which required her to work for six weeks to only receive four weeks' worth of pay at the end, effectively withholding two weeks' pay until the end of her employment, was a repudiatory breach of her contract of employment.

63 I am reminded that the test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27. That test is an objective one, rather than subjective: Millbrook Furnishing Industries v McIntosh [1981] IRLR 309.

64 It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, 464 (Lord Nicholls) and 468 (Lord Steyn).

65 Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, 350. Per Lord Nicholls in Malik at p.464, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.'

66 The Respondent offered a loan to cover the two weeks' pay but the Claimant submitted that this would not solve the issue, rather it would move it down the line. The terms of the Claimant's employment had been changed to her disadvantage and the offer to negate some of that impact was to become indebted to her employer.

67 The Claimant submitted that the pay terms were an express condition of her employment, according to the contract of employment. The Respondent changed those terms without giving proper thought to her reservations and simply refusing to see the proposed "change of pay date" as what it truly was: a "change of pay terms".

68 The unilateral change of terms of employment to put her two weeks in arrears was sufficient to destroy the mutual trust and confidence she had in the Respondent as an employer. An employer changing contractual terms without that employee's agreement or against that employee's request, was likely to break mutual trust and confidence.

69 The Respondent's failure effectively to consult with the Claimant regarding the TUPE transfer and its breach of Regulation 7 of TUPE 2006 was sufficient to cause a breach of mutual trust and confidence.

70 The Claimant submitted that Ms Robinette confirmed that the Respondent felt it was engaging in the consultation process. Employers who engage in voluntary consultation must meet the same standards of mandatory consultation, else risk a protective award: Cable Realisations Ltd v GMB Northern [2010] IRLR 42.

71 The Claimant was provided with just one meeting with the Respondent in relation to the TUPE process, as part of a group. Her trust in the employer was likely to be destroyed by that failure to consult.

72 The Respondent then spent the rest of the period leading up to the Claimant's resignation repeatedly stating that the responsibility for consulting lay with her previous employer.

73 Regulation 13(6) TUPE 2006 provides that the Respondent should have consulted with appropriate representatives with a view to seeking their agreement to the intended measures. Per Regulation 15(3) TUPE 2006, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employees. Chris Pond was the Claimant's Trade Union representative at the time. The documents indicate that the Respondent informed Unison of measures but did not consult. Further, the Respondent did not appear to consult with Chris Pond, the Claimant's Union representative.

74 The change of pay terms, rather than simply pay date, was an action deliberately done by the Respondent over and above what necessarily occurs as a result of the transfer itself: Todd v Strain and others UKEATS/0057/10. This was therefore a measure upon which consultation should have taken place.

75 The Respondent did not seek approval from either the Claimant or the Trade Union in relation to the measures it was taking. The Respondent, therefore, did not consult properly in relation to the transfer and the measures it sought to impose.

76 Those breaches of the Respondent's obligations were likely to destroy the implied term of trust and confidence and did so.

77 Each of the breaches played a part in the decision to resign. In Abbycars (West Horndon) Ltd v Ford UKEAT/0472/07 it was held that once a repudiatory breach has been established an employee can claim constructive dismissal, so long as the breach "played a part" in his/her leaving. Thus, it is submitted that if any of the breaches pleaded which played a part in the decision to resign are shown to be repudiatory, the claim for constructive unfair dismissal should succeed.

Automatic Unfair Dismissal

78 Alternatively, the Claimant submitted that her resignation was a dismissal which was automatically unfair, per Regulation 7 TUPE 2006.

79 The change of pay terms was to her material detriment. The Claimant said she had explained how that was the case at paragraph 7 of her witness statement. In that statement she had said that she was no longer to be paid for the hours she had worked but would only get paid for the month of work two weeks after that month ended so she would always be two weeks behind and the only way to get paid for those two weeks would be in final pay when leaving the Respondent. Going 6 weeks without pay and then only getting paid for four of those weeks had the potential to cause significant harm to the Claimant and her colleagues.

80 It was further submitted that the Respondent acknowledged this detriment with the offer of a loan.

81 Pursuant to Regulation 4(9) TUPE 2006, the Claimant was entitled to treat the contract of employment as having been terminated in those circumstances. There did not need to be a breach of contract in order to invoke this right, rather a change in working conditions to her material detriment, which is a wider scope: Tapere v South London and Maudsley NHS Trust [2009] IRLR 972.

82 Even if the Respondent had a contractual right change the pay terms, which is denied, this is irrelevant to the question of whether that change was substantial and to her material detriment: Lewis v Dow Silicones (UKEAT/0155/20/LA).

83 Whether there has been a material detriment must be viewed through the Claimant's perspective as the employee: Abellio London and Centrewest London Buses v Musse [2012] IRLR 360. The Claimant was at a material detriment in going six weeks without pay and only receiving four weeks' worth, where the only way to regain the lost monies was to resign.

84 The Claimant argued that as the working conditions were changed to her material detriment, she was, therefore, entitled to treat her employment as having been terminated, and the sole or principal reason for the dismissal was the transfer. It was the transfer which changed her conditions. Without the transfer, her conditions would not have changed, thus the sole or principal reason was the transfer.

85 Per Underhill LJ in Hazel v Manchester College [2014] EWCA Civ 72, [2014] IRLR 392, the right of employees to preserve their existing terms must prevail over the interest of the employer in achieving harmonisation "however fair or necessary the proposed harmonisation may be". The Respondent's desire to marry up payroll was not sufficient to override the Claimant's right to keep her contractual terms.

86 Given there was no valid ETO reason entailing changes in the workforce function or numbers, the dismissal was automatically unfair and there is no need to consider whether the dismissal was reasonable which, for the avoidance of doubt, it is submitted there would not be, in any event.

Wrongful Dismissal

87 Given that the Respondent committed a repudiatory breach of contract, the Claimant was entitled to resign without notice and to recover the pay in lieu of the notice.

Respondent's Submissions

Constructive Dismissal claim

88 The Respondent took the view that the payment period for the employees including the Claimant would not change. It was simply the date of payment that changed. The Respondent had carried out many transfers and had always taking the position that changing the date of payment could be done as this approach reflected commercial necessity.

89 The Respondent's business involved acquiring contracts which amounted to service provision changes and thus triggered TUPE transfers. They had to change the method and timing of the wage payments. It was important to the Respondent that employees were given plenty of notice. They also provided pragmatic assistance in terms of the loan. The Claimant was the only transferring employee to take the point which she did. The Respondents had not come across someone who took such umbrage at the change.

90 The Respondent argued that the Norse contract of employment was confusing and that it was within the scope of the contract to permit a change of pay date.

91 The Respondent argued that there was no fundamental breach of contract, rather insofar as there was a breach it was a minor breach and not so serious as to entitle the Claimant to consider herself constructively dismissed.

92 The union didn't have any issue with the change and just took the view that this was something the Respondent could do. The Respondent maintained that this was not withholding of pay but merely a delay in payment of two weeks. The effect was for the first tranche of wages the employee would have to wait an additional 2 weeks, but this was offset by the offer of a six month loan (initially 3 months extended to six months).

93 The Respondent's overall submission in relation to constructive dismissal was that they accepted there had been a breach of contract but did not regard it as a fundamental breach sufficiently serious to amount to a repudiatory breach and thus entitled the Claimant to resign.

94 In relation to the claim under regulation 4(9) in essence the Respondent's position was the same. The acknowledged the test was slightly different, the question being whether it was a substantial change. Much of the case law on that matter looked at geographical changes and the Respondent had been unable to find any case law on change of pay dates. However, the Respondent suggested that this was a two week issue and if the Claimant took the pay loan, that was not a substantial change but merely had a short term impact.

95 It was a question for the Tribunal to determine the facts. Even if it was a substantial change, it had to be to the Claimant's material detriment and the Respondent suggested that the Claimant was not acting reasonably in concluding that.

96 The Respondent argued that there are upsides to the change, for example the pay would be correct. The employees would not be at risk of deductions if they had been sick. The Claimant said she didn't do overtime, but it appeared she did do overtime according to some of her payslip's.

97 Overall, the Respondent suggested that detriment was not so material that the Claimant was entitled to resign under regulation 4(9).

98 As regards the suggestion that the Respondent had failed effectively to consult, there was enough in the bundle to show that Norse was the transferor and the obligation lay on them to consult. There was a limit to what the transferee could do. The transferee could not go a lot further than they did until the employees were in their employment. They were only able to do an open line of communication via e-mail and the welcome meeting which they did.

99 The Claimant was able to reach out, which she did, and the Respondent gave their response, and the union were involved. Even if the consultation was deficient, it was not so deficient that it would amount to a fundamental breach.

100 What the Claimant was complaining about was the fact that the Respondent did not change their view of her position as a result of the communication, but it was not so serious as to amount to a repudiatory breach and the Respondent suggested the Claimant was overtly hostile to the whole position.

101 The Respondent did not argue that the Claimant had waived any breach

The Law

102 In *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*, the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve a *repudiatory breach of contract*.

103 In order to claim constructive dismissal, the employee must establish that:

there was a *fundamental breach* of contract on the part of the employer that repudiated the contract of employment

the employer's breach *caused* the employee to resign, and

the employee did not *delay* too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

104 The House of Lords' concluded in *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL*, that there was an implied contractual term that an employer 'will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'. The EAT has held that where an employer breaches the implied

term of trust and confidence, the breach is 'inevitably' fundamental — *Morrow v Safeway Stores plc 2002 IRLR 9, EAT*.

105 Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended.

Regulation 4

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

Regulation 7

7.— (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

106 In Tabberer and others v Meares Ltd, UKEAT/0064/17 Judge Eady QC described the question that the Tribunal have to answer where there is a variation of terms following a transfer as follows:

> *"In determining the Claimants' claims of unauthorised deductions, the ET had to ask whether the reason for the cessation of ETTA - the contractual variation in issue - related back to the transfer, such that the transfer had been the sole or principal reason for the change. It thus had to first find - as a question of fact - what had been the reason for the variation."*

107 And also

> *"It is… common ground that the passage of time will not necessarily mean the causal connection disappears. On the other hand, merely because the variation takes place against the backdrop of a transfer does not mean that it is the reason for that variation; this is not a "but for" test and context alone is not sufficient. The question to be asked is: what is the reason? – What caused the employer to do what it did?*

108 In Tapere v South London and Maudsley NHS Trust [2009] ICR 1563, it was held

> *"52. It will be noticed immediately that "detriment" is not qualified by any adjective. How then are employment tribunals to approach the phrase "material detriment" in regulation 4(9) ? It seems to us probable that Parliament's addition of the adjective "material" was a recognition of Lord Hope's analysis at para 35 of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 (see para 20 above) that the use of the word "detriment", even without adjectival qualification, in article 8(2)(b) of the Sex Discrimination (Northern Ireland) Order 1976 involved the issue of materiality. We recognise, of course, that the context in Shamoon's case was one of discrimination but the applicable field in which that alleged discrimination had to be considered was that of employment and we accept the submission of Mr Medhurst that we should consider the approach in Shamoon's case when interpreting the phrase in regulation 4(9) . Moreover, although "material" is added to the rubric of the Directive, we do not think that the addition is at all at odds with the meaning of the Directive, so long as the purpose of the adjective is regarded as an emphasis that the trivial or fanciful cannot be accepted as "detriment"."*
>
> and
>
> *"54. What has to be considered is the impact of the proposed change from the employee's point of view. Here the change of location meant potential disruption to child care arrangements and a longer journey or an altered journey involving travelling on the M25, which the claimant did not find attractive. The questions that ought to have been asked were whether the claimant regarded those factors as detrimental and, if so, whether that was a reasonable position for the claimant to adopt. In determining the matter by weighing the employee's position against that of the employer and deciding that the employer's position was reasonable, the employment tribunal looked at the matter from the wrong standpoint and thus misdirected itself as to the correct approach to regulation 4(9)."*

109 In the case of Lewis v Dow Silicones a summary was made of the propositions which could be derived from the case of Tappere v South London and Maudsley NHS Trust [2009] IRLR 972. The propositions were held to be as follows

(1) the regulation can apply even where there is no breach of the employee's contract of employment;
(2) whether there is a change in working conditions and whether it is substantial are questions of fact;
(3) the nature as well as the degree of any change needs to be considered in deciding whether it is substantial and the nature (or "character") of the change is likely to be the most important aspect in determining this;
(4) the question whether a change in working conditions is to the material detriment of employee involves two questions:

(a) whether the employee subjectively regarded the change as detrimental and if so
(b) whether that was a reasonable proposition for the employee to adopt.

110 Section 123(1) of the Employment Rights Act 1996 provides:

"Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

Conclusions

Constructive unfair dismissal

111 I have read the cases to which I was referred by the Claimant.

112 In relation to this claim, the key question is whether there was a dismissal. As this is alleged to be a constructive dismissal, it is necessary to determine the following questions:

112.1 Did the Respondent commit a breach of contract which amounted to a repudiatory breach, such that the Claimant was entitled to resign?

112.2 Was there a breach of trust and confidence which arose out of the Respondent changing the pay cycle so as effectively to withhold 2 weeks' pay from the Claimant until the end of her employment and the Respondent's failure effectively to consult with the Claimant over the proposed change.

113 As noted, the two elements which the Claimant relies upon are set out above, although the Claimant argues that if I find either proven, she was entitled to resign and claim constructive dismissal.

114 The first matter is the change of payment date. The wording of the statement of terms and conditions is as follows:

"Your annual salary is £XXX. Payment will be made by credit transfer on the last working day of each month for the current calendar month."

It is necessary for me to determine what that means. While it states that the Claimant had a contractual right to be paid at the end of the month she had worked, the clause is not a statement that the full amount of the Claimant's earnings attributable to her work in the month would be paid at the end of that month. Rather it is a statement that there will be a payment at the end of the month. Overtime was not paid immediately, and the documentary evidence shows that the Claimant's salary was spread over a longer period than her working weeks. The Claimant did not provide her own contract or a section of a handbook. There is no correspondence with Norse. It is unlikely there was no documentation explaining how the monthly payments worked but the Claimant has not disclosed any. The Claimant did say in her

witness statement that before the transfer she was being paid for the hours that she had worked, but this is clearly incorrect. She says she was not paid overtime, but there is a reference to overtime on one payslip dated 31 May 2021.

115 It is my conclusion that the contractual meaning of the statement of terms and conditions is that any monies which were due in accordance with the arrangement between the parties as to what the Claimant would get paid per month were paid at the end of the month. In other words, it is a statement about the timing of payment, but not a promise to pay the entire monies attributable to that month at the end of the month. For the record, in so far as the Respondent pointed out that there is a contractual right to vary the payment date to comply with statutory regulations, there is no right of variation for any pragmatic reason. It applies only where there is a statutory obligation which requires some change. That was not the case in this situation.

116 The Respondent did change the pay date in practice. The major difference between the parties is that the Respondent argues that changing that date was a minor breach because it was in effect a short delay in payment. Thereafter the payments would be made at the same time each month so there would be regularity. The Claimant argues that the proposal was for a two week delay which was to be repeated each single month right up to the end of her employment so that it led to a break in the necessary trust and confidence between the parties. The reality is that the by delaying the payment date the Respondent did not pay the Claimant some money which she would have received at the end of the month, for a further two weeks, but the Claimant would be paid regularly every month. At the end of the Claimant's employment, she would be paid in full. There was no intention that she should permanently lose any money but rather that the timing of payment of her basic monthly earnings would be shifted by two weeks. This had advantages and disadvantages. On the one hand the pay would be correctly calculated and include any overtime and sick pay would be properly accounted for so that there would be unlikely to be any claw back at a later date such as can occur when there has been an inadvertent overpayment. The disadvantage from the Claimant's perspective was that there was a delay. After the initial delay, the Claimant would receive her basic monthly payment at regular monthly intervals.

117 I note that the Claimant in her e-mail dated 20 July 2021 said that she did not object to being paid on the 14th of the month. Her objection was that she was not being paid fully up to that date. As I have noted, she had clearly not been paid in full at the end of each month in the past due to the delay with assessing overtime and the spread of payments across a longer period than the Claimant's 39 week working year.

118 While I note the Claimant's submission that she would be going six weeks without getting paid and then would be paid for only four of those weeks and that had the potential to cause significant financial harm to her and her colleagues, she did not identify the specific harm other than a general delay in getting her pay. Moreover, everyone who is paid at the end of the month, as the Claimant was previously, waits for some pay till the end of the month. The delay was two weeks, not six.

119 The Claimant was asked about her financial position. She did not volunteer any detailed information about her position, nor did she explain any specific difficulties she faced as a result of the change of pay date. She did mention that her rent was equivalent to 2 weeks wages. It is clear that she has limited finances. However, in the contemporaneous documentation as I have noted she said she didn't mind waiting for 6 weeks, but described her objection being to the fact that the Respondent was aiming to harmonise terms where she considered it had no legal right to do. There was no evidence from her that the Respondent's delay in payment would in fact have caused her significant distress. It is my conclusion that her email comment that she didn't mind waiting 2 weeks genuinely represented her position. Her objection arose out of her belief that the Respondent had no legal right to make the change and she did not wish to facilitate them in doing so.

120 In the light of the Claimant's statement that she had no issue with a change of date alone and, as there was no contractual right to full payment for the month as at the end of each month, I conclude that the breach, insofar as there was one, did not operate so as to break the necessary relationship of trust and confidence between the parties and thus there was no fundamental breach amounting to a repudiatory breach of contract in this change.

121 The Claimant also complains about the failure to consult. There was no lack of communication but there was no one to one in person meeting with the Claimant. Possibly because a contractual provision detailing when salary payments will be made is not usual, the Respondent's management operated as though the Claimant's objections were incorrect. In this case the provision was not in a Handbook explaining methodology nor was there a clause offering some flexibility or a right to change terms and conditions. What is clear is that the Respondent's management had never come across this situation previously and they did not contemplate the possibility that they could not legally proceed with their intended changes as the Claimant alleged.

122 This is not a complaint about the failure to consult under the TUPE Regulations. This claim was never put forward as a breach of the TUPE Regulations. While the Claimant was unrepresented at this hearing, her submissions were prepared by lawyers, and she was assisted number of respects during the course of the litigation by them. It is clear that her particulars of claim were drafted by lawyers. Had it been their intention to claim under TUPE, that would have been made clear and the Respondent would have been able to address that case.

123 I note that the Claimant relies on the case of Cable Realisations Ltd v GMB Northern [2010] IRLR 42 but that is a case about the Tribunal's power to make a protective award and is not relevant to this situation.

124 To the extent that it could be argued that a failure to meet the statutory requirements for consultation is what amounts to the failure to consult, that was not made clear by the Claimant in her particulars of claim as being her complaint. What is more, I cannot reach a conclusion on that. I simply do not have the necessary evidence to determine whether there was a breach of the TUPE Regulations as regards the Respondents' obligations to

consult. For example, the first stage of consultation is the communication with employee representatives. I do not know who the relevant employee representatives were. It is not clear whether the Trade Union was recognised by Norse. While there have been references to the Union and I am aware that the Union played a role in negotiations over pay with Norse, I have not been given any clear evidence about the status of the Union or any invitation to elect representatives. The second part is the manner of consultation. I do not know the full picture because this case was never put forward by the Claimant as one about a statutory failure to consult. I note that the Claimant's submissions refer both to voluntary consultation and Regulation 13(6) of TUPE.

125 In my view the reference in the particulars of claim to the repudiatory breach being: "failing to effectively consult with the Claimant in relation to the TUPE transfer" is about the way in which the Respondent addressed the Claimant's concerns over the change of pay date. In the particulars of claim, the longer description of the complaint is that: "issues [about the harmonisation of pay periods by the Respondent] were raised by the Claimant, colleagues, and Trade Union representatives multiple times throughout the consultation period from 11 June 2021 but never resolved by the Respondent".

126 In her grievance, the Claimant refers to her objection being that she hadn't met with the Respondent to discuss her contract and none of her concerns had been taken seriously. Thereafter there was a further exchange with Mr Hughes and on 1 September the Claimant emailed saying she was still not happy with the proposed measures and the fact that she never did get the meeting she had asked for. Essentially at that stage her complaint was that she didn't have a one to one meeting with the Respondent, and I have no doubt she would still have considered her concerns hadn't been taken seriously. The Claimant's submissions indicate that her complaint who was that she had just one meeting with the Respondent as part of a group and that was insufficient. Accordingly, for the purposes of this claim, I have taken the complaint as being about a failure to carry out the consultation to the extent the Claimant thought appropriate, and in particular a failure to meet with her on a one to one basis, and not a statutory complaint

127 I note, however, that if there was a TUPE obligation on the Respondent to consult with the employee representatives, it was with a view to seeking their agreement to the intended measures and in the course of those consultations the employer was required to consider any representations made by the appropriate representatives and reply to those representations and, if it rejects any of those representations, to state the reasons.

128 It is noticeable from the facts which I have recounted that there were considerable email exchanges between various of the Respondent's managers and the Claimant about the proposed change. There was one small group meeting but as the Respondent made clear in its communications with the former employer, Norse, this meeting was a welcome meeting and was not intended as a consultation meeting. Mr Kenworthy was not able to answer the Claimant's objections and referred the matter to the HR team. I understand that the Claimant did not then have

a face to face meeting with anyone, although there was probably one phone call and the extensive emails and offers to talk to the Claimant directly.

129 In this technological age, I do not think that the lack of a face to face meeting can be sufficient of its own to amount to a lack of consultation. There was extensive dialogue by email and the Respondent repeatedly communicated with the Claimant.

130 Leaving aside the question of whether the Respondent was consulting with the correct party, (as I have explained why I cannot address that question), I do consider that the Respondent met the legal requirements for the nature of the consultation set out in the TUPE Regulations, in that it aimed to agree to get agreement to the proposed change of pay date, and the Respondent did provide reasons why it rejected the Claimant's argument. I say that the Respondent aimed to get agreement on the proposed change of pay date because it is clear that they put it to staff including the Claimant and explained in some detail the reason why they were doing it as well as taking steps to accommodate what they believed to be the problems it might cause. They had also discussed it with the Trade Union representatives based near their offices.

131 The Claimant's main complaint in this situation is that the Respondent maintained that it was entitled to do as it proposed and there was no wavering in that view, notwithstanding the Claimant's efforts to draw the attention of the Respondent's management to the correct legal position as she saw it. In practice, the Claimant was right when she pointed out that the Respondent's references to an ETO reason were erroneous given that was no change in the workforce. Thus, the Claimant regarded her objections as falling entirely on deaf ears.

132 The Claimant argues that the payment date change together with what she saw as a failure to consult, amounted to a breach of trust and confidence. To the extent that the Respondent consulted directly with the Claimant, it did what it was required to do, albeit that it was wrong in its understanding of the legal position on the pay date.

133 The Claimant's argument is that this behaviour amounted to conduct calculated or likely to damage the relationship of trust and confidence between the employer and employee that would amount to a fundamental breach of contract. I have no doubt it was not calculated to damage the relationship.

134 The question is whether it as likely to damage the relationship of trust and confidence. The Claimant says that any breach of contract would do so, I do not concur. Some situations may be a breach but may not go so far as to be likely to damage the relationship of trust and confidence. I therefore have to consider whether the Respondent's conduct was likely to seriously damage the relationship of trust and confidence between employer and employee.

135 It was clear from the evidence of the Respondent's management that they did not meet with the Claimant on a one to one basis after she made clear her objections. It is also clear that the Respondent assumed it was entitled to make the change and never really considered the Claimant's argument

that this was a change they were not entitled to make. However, as I have noted, the obligation to consult does not necessarily require the Respondent to meet with the Claimant. I do not consider that the Respondent's erroneous references to the ETO reason for the change were sufficient to break the mutual trust between the parties.

136 It is important to note that the Claimant was clear at the time that she did not mind waiting for 6 weeks for her first payment. It was not the delay in payment as such but rather the fact that she was not being paid in full at that time up to that date which caused the Claimant to raise concerns and she did so very much on the basis that she thought this was not a permitted change and the Respondent needed her consent to make that change. As I have noted, the clause does not specify that all monies earned in the month would be paid at the end of that month and in practice Norse did not operate such a process.

137 I also note that, as the Claimant argued in her submissions, the fact that the Respondent offered a proposal to mitigate the impact on employees demonstrated the fact that they recognised there could well be one. In a world where many people have no savings to fall back on, delaying pay for as much as two weeks can be a very serious matter. I bear in mind the fact that the Respondent offered a loan to mitigate the impact of the delay but as the Claimant noted in her submissions, this amounted to the Respondent putting her in debt to them in order to reduce the impact of their breach of contract. However, to the extent there was any breach of contract, the loan was interest free and was a genuine effort to mitigate the impact and it would have assisted some employees.

138 In all the circumstances my conclusion is that the Respondent's consultation with the Claimant was not a breach of contract and that alone did not amount to a repudiatory breach of contract which entitled the Claimant to resign.

139 Notwithstanding the fact that I do not consider there was a fundamental breach of contract in the payment date change, or the consultation, it is possible that the change of pay date, coupled with the form of consultation, might break the necessary term of trust and confidence. I therefore considered whether, notwithstanding that neither the change of pay date and the consultation were in their own right matters which were likely to break the relationship of trust and confidence, the two issues together were sufficient to do so.

140 I have considered whether the Respondent's approach towards the consultation (in which they steadfastly maintained they were entitled to make the change without apparently ever considering the Claimant's arguments and the documentation she forwarded to support her case) would be likely to aggravate the change of payment date and go so far as to be likely to damage the necessary trust and confidence between employer and employee. There was an extensive effort to communicate the Claimant. Full reasons were given for the change. There was a misconception on the part of the Respondent but overall, I do not consider their attitude would be likely to break the necessary trust and confidence between the parties.

141 I consider the real reason that the Claimant resigned was because she thought the Respondent was not entitled to make the change as she saw it as harmonisation, rather than because of the change itself. The Claimant's e-mail to Mr Dorsett dated 16 August 2021 repeatedly refers to the fact that the fact that the pay date change was something she thought could not be done and needed to be agreed. Furthermore, she assumed the Respondent had the ability to update or change the system to make it work in the same way that the Norse's system had done. Her focus was on the effect of TUPE. In the light of that finding, I do not need to go further in considering the issues that arise in relation to constructive dismissal claim.

Automatically unfair dismissal pursuant to Regulation 7 of TUPE and/or under Regulation 4(9) of TUPE

142 In the light of my determination it is not necessary to consider this alternative argument insofar as it depends on there being a constructive dismissal.

Regulation 4(9) of TUPE

143 It is still possible for a dismissal to be unfair pursuant to the Transfer of Undertakings Regulations even though it does not amount to a constructive dismissal. This arises where regulation 4(9) of TUPE applies. Regulation 4(9) is clearly a different test to the test of constructive dismissal because regulation 4(11) refers to it paragraphs ..(9) as without prejudice to the right of any employee arising apart from these regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

144 In order to determine this question, I have to consider a series of points.

Did the transfer involve a substantial change in the working conditions of the Claimant?

145 There was a change being the fact that the Claimant's monthly basic pay was being delayed by two weeks. The question arises as to whether that was a change in her working conditions. That is a matter of fact for the Tribunal to determine and working conditions can be determined very widely. Payment is the consideration made by the employer for the employee's effort. In my view, a change of date of payment is a change in working conditions as the date and sequence of payment is inextricably part of the working pattern.

146 The next question is whether it was a substantial change. The first instalment of the Claimant's basic pay was delayed by almost half a month, but thereafter there would be regular payments at monthly intervals. The Claimant's pay would be paid in full. The Respondent offered to ameliorate the effect of the delay by an interest free loan which was repayable over a six month period.

147 There was an initial impact which, without the loan, would be substantial. I then looked at the impact with the loan. I think the fact that the effect was going to work its way out over time does not prevent the change being a substantial one. By my calculation if the Claimant had taken the loan, she would have had two weeks money at the end of September rather than the

full months money. Assuming the loan was a sum equivalent to net pay, two weeks net pay would be £582.30. I do not know if the Claimant would have been able to make any repayment when on 14 October, she received her full pay for the month of September as that pay would have to last for a month, though had she done so the reduction would have been £97.05. She might have waited till the next month being 14 November when she would have had to repay one fifth of the loan which would have been a deduction of £116.46 deducted from her net income of £1261.65, leaving £1145.00. Either way, the repayments would have reduced her monthly income each month up to 14 March by the same sum. Only on 14 April would she have received her full pay without deductions for the loan. The loan would have reduced but extended the impact of the change. The impact is always one of fact and depends on the individual's circumstances. Overall, looking at the sums involved for the Claimant as a person on a low income, the extended period of reduced income is in my view a substantial change.

Did the Claimant consider that change a detriment?

148 The Claimant undoubtedly regarded that change as a detriment. She explained repeatedly that the delay meant she would have to wait longer for her pay.

Was that a reasonable position for the Claimant to adopt? Note this arises out of the fact that there must be a material detriment

149 It was a reasonable position for the Claimant to adopt. Although the Respondent sought to ameliorate the change with the loan, that meant the Claimant had to pay the money back and as noted, even though the repayment period was extended to six months, it still required some adjustment while the pay cycle was evened out. I have applied the test proposed in case law. I have also considered the general wording "material detriment" and the case law guidance and consider that there was a material detriment in that the change was certainly more than trivial of fanciful.

150 In the circumstances, the Claimant was entitled to resign, and under regulation 4(9) of TUPE the Respondent is treated as having dismissed her. The impact of that dismissal is that it is an automatically unfair dismissal under regulation 7 of TUPE because the principal reason for the dismissal was the transfer.

Wrongful Dismissal

If the Claimant was dismissed did the Respondent failed to pay her notice pay?

151 Since I have concluded that the Claimant was dismissed pursuant to regulation 4(9), she is not entitled to notice pay under her contract for the days she did not work.

Remedy

152 The Claimant is entitled to a Basic Award. Given the Claimant's 7 complete years of service and her age as well as the pay I have identified, her Basic

Award is 3 years' service at 1 week per year amounting to 3 x 1 x £324.39 equals £973.17 and 4 years' service where she was entitled to 1.5 weeks per year at £324.39 equals £1,946.44. The total Basic Award is therefore £2,919.51.

153 The Claimant is also entitled to a Compensatory Award, the main element of which is loss of earnings. I have taken a series of sequential periods in order to calculate the loss at each point.

154 The Claimant's s employment ended on Friday 3 September 2021 and she began her employment with Navigator on Thursday 16 September 2021, thus she was unemployed from Monday 6 September until Wednesday 15 September 2021. Normally I would calculate the loss of pay for this period. However, Regulation 4(10) of TUPE states that no damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work. In those circumstances I have to consider whether any compensation is due under the unfair dismissal regime in the Employment Rights Act. The relevant provision is section 123(1) of the Employment Rights Act 1996 which I have cited in the law section of this judgment. I have to consider what loss was sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. In circumstances where Parliament has decided that loss for the part of the notice period not worked, where section 4(9) is applicable, is not payable by the employer, the Claimant's losses during her notice period are not recoverable and this included the period when she was unemployed.

155 The Claimant's notice period was 7 weeks as that is her minimum statutory entitlement under section 86 of the Employment Rights Act. That 7 week notice period would have ended on 22 October 2021, as the Claimant's employment ended on 3 September when she resigned with immediate effect. For that period, for the same reasons as I have explained above, I cannot award any compensation

156 After the Claimant began her employment, for the period from Monday 25 October 2021 until Monday 31 January 2022, the Claimant had a continuing loss being the difference between the earnings she would have had had she remained with the Respondent and her earnings with Navigator. That is a period of 14 weeks and 1 day. I have taken the net weekly pay for her employment with the Respondent as £291.15. None of the documents suggest the Claimant would have earned less during that holiday period. Rather, I understand that the Respondent averaged out pay over 11 months and Norse also averaged pay out, so I have taken the standard net monthly figure throughout for the Respondent. I have used the actual net figures for Navigator from the payslips. I have taken each month in turn as the Navigator payments did vary according to the school holiday at Christmas, which affected the December 2021 and January 2022 pay. I have calculated the loss based on a five day working week.

157 Monday 25 October to 29 October 2021 = 1 week at £291.15 less earnings from Navigator. I calculate the net earnings from Navigator (based on the only full month's earnings on the payslip for November 2021) as £947.48

for four weeks and two days or 22 working days equals £43.07 per day net or £215.34 net per week. £291.15 less £215.34 = £75.81 loss

158 1 November to 30 November 2021 equals 4 weeks and 2 days for which the Claimant would have earned 4 weeks' pay at £291.15 and 2 days at £58.23 per day totalling £1281.06 less earnings from Navigator of £947.48 equals a loss of £333.58.

159 1 December 2021 to 31 December 2021 equals 4 weeks and 3 days which I calculate amounts to £1339.29 that the Claimant would have earned at the Respondent, less earnings at Navigator which are reduced due to the holiday period and total £770.00 net leaving a loss of £569.29.

160 1 January 2022 to 31 January 2022 equals 4 weeks and 1 day for which I calculate the Claimant would have earned £1222.83 at the Respondent, less earnings from Navigator of £748.00 = a loss of £474.83

161 I day in February 2022 for which the Claimant would have earned £58.23 but for which she earned £22.00 leaving a loss of £36.23.

162 Thereafter the Claimant went on sick leave. There was no evidence to support the Claimant's contention that she believed the Respondent's conduct was a major contributing factor in her stress related illness. She first took sick leave at the beginning of February 2022, approximately 5 months after she had left the Respondent's employment. I have only the Claimant's assertion and no supporting evidence to conclude that the Respondent is liable for her loss of earnings while she was off sick. A gap of 5 months before the Claimant became sick with stress requires some evidence to explain it. I cannot conclude that the Respondent is liable for that sickness. The aim of compensation is to put the party back in the position they would have been in, had the unfair dismissal not occurred. Had the Claimant been off sick while employed by the Respondent, she would have been on statutory sick pay. The statements of terms and conditions of employment of both Norse and Navigator refer to sickness absence being paid by statutory sick pay only. Although the Respondent had significant references to various employee assistance programmes in its documentation, there was no specific reference to sick pay that I could locate, so that if they had continued their obligations under the contract with Norse, they would have been liable to pay statutory sick pay only.

163 The Claimant's loss of her position with Navigator was as a result of their inability to determine when she might return to work. She has not, I am told, returned to work as at the date of this hearing. The Respondent is not liable for the Claimant's loss of that position. I have no other evidence about the Claimant's future employment prospects. In the circumstances, I can award no further loss of earnings.

164 Total loss of earnings = £1,489.74

165 In the Claimant's schedule of loss, she also seeks a sum in respect of loss of statutory rights of £450.00. That is a reasonable sum and I award that sum.

166 The Claimant has not included any information about her loss of any pension or other benefits. I therefore conclude that her total compensatory award is: £1939.74.

RECOUPMENT

I am required to set out the figures for recoupment purposes.

Prescribed Element
The Prescribed Element is that part of the monetary award which is attributable to loss of wages for the period before the conclusion of the Tribunal proceedings, but it does not include loss of statutory rights or the loss of any benefits. This is the sum that must be held back until the value of any state benefits which are subject to recoupment procedures is known.

That figure is £1,489.74

Prescribed Period
The prescribed period is the period between the termination date and the date when this judgment is sent out.

That period is 3 September 2021 to 22 November 2022

Total Award

The total award is £4,849.25

Balance

This is the difference between the total award and the prescribed element and is the sum that must be paid to the Claimant. That difference is £3,369.51.

Employment Judge Walker

Date: 21 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES

8 December 2022

FOR EMPLOYMENT TRIBUNALS