EMPLOYMENT TRIBUNALS

Claimants: (1) Miss C Seraphin
(2) Miss S Dawes

Respondents: (1) 29 Fleet Street Limited
(2) Dr Richard Dawood
(3) Dr Andrew Dawood
(4) Dawood & Tanner (trading as Temple Dental)

RECORD OF A HEARING

Heard at: London Central (via Cloud Video Platform) **On:** 10, 11, 12 and 13 October 2022 and 26, 27 and 30 January 2023 and 1 and 2 February 2023 (in chambers)

Before: Employment Judge Joffe
Ms J Cameron
Mr J Carroll

Appearances
For the claimants: In person
For the first and second respondents: Ms A Johns, counsel
For the third and fourth respondents: Ms G Holden, counsel

JUDGMENT

1. There was a transfer of undertaking between the first respondent and the third and fourth respondents.
2. The claimants' claims that they were automatically unfairly dismissed because of the transfer are upheld.

3. There was a 6% chance of each claimant being fairly dismissed had they not been unfairly dismissed because of the transfer.
4. Liability for the claimants' unfair dismissals passed to the third and fourth respondents.
5. The claimant's claims of direct race discrimination are not upheld and are dismissed.
6. The first claimant's claim of breach of contract is upheld, subject to calculating the loss occasioned by the breach.
7. Liability to the first claimant for her breach of contract claim has passed to the third and fourth respondents.

REASONS

Claims and Issues

1. The issues had been agreed between the parties and were as follows:

8.1. Was there a "relevant transfer" for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") from the 1st respondent to the 4th respondent in late 2020/early 2021?

8.2. If so, were the claimants' dismissals because of that TUPE transfer or in connection with that TUPE transfer?

8.3. Against which of the 1st and 4th respondents are the claimants' unfair dismissal complaints therefore properly made?

8.4. Can the 1st respondent/4th respondent as appropriate show an economic, technical or organisational reason entailing changes in the workforce?

8.5. Did the 1st/4th respondent as appropriate dismiss the claimants for a potentially fair reason? The reason relied on is redundancy.

8.6. Did the 1st/4th respondent carry out the dismissal reasonably in all the circumstances. The claimants have indicated that, in relation to this, issues to be considered will include consultation, alternative employment and selection for redundancy.

8.7. If the dismissal was unfair, should any adjustments to compensation be made under the principles in Polkey v AE Dayton Services Ltd [1988] ICR 142 HL?

8.8. The respondents all indicated that there was no argument that the claimants contributed to their dismissal.

9. Section 13: Direct discrimination because of race

9.1. Did the respondents, because of the claimants' race, treat the claimants less favourably than they treated or would treat others? The allegations of less favourable treatment relied on by the claimants are as follows:

9.1.1. That the reason why the 1st/4th respondent dismissed the claimants was race;

9.1.2. That the 2nd respondent succumbed to pressure put on him by the 3rd respondent to dismiss the claimants because of race, and was untruthful as to the real reason, instead falsely claiming that it was redundancy;

9.1.3. That the 3rd respondent did not wish the claimants to remain employed when he took over the practice from the 1st respondent and required them to be dismissed because of race.

9.2. In relation to all three allegations, the claimants rely on a hypothetical comparator and on the following actual comparators:

9.2.1. Dr Kelly and Dr Gesto (both dentists).

10. Unlawful deduction from wages (first claimant only)

10.1. The first claimant claims that she is entitled to be paid bonuses totalling around £833. She maintains that she was promised a contractual bonus of £500 a year; that this was on the basis that the respondent would retain 50p per hour which it would pay back at the end of the year in the form of this bonus; that this was agreed with the respondent in April 2018 and was payable once a year every April; that she received the bonus payable in April 2019 but that she had not received the bonus payable in April 2020 or a pro rata bonus up to the end of her employment.

10.2. Did the claimant have a contractual right to be paid the above bonus?

10.3. Whether this complaint is properly brought against the 1st or 4th respondent will depend on the answer to the TUPE questions in paragraph 8 above.

2. In addition to these agreed issues, the respondents said there were possible time issues in relation to the second allegation of direct race discrimination.

3. An issue was also raised that the first claimant had inserted an incorrect Early Conciliation number on her claim form with respect to the fourth respondent. On investigation, it appears from the file that this issue was considered by Employment Judge Clark when the form was submitted and she concluded that the first claimant had made an error and it would not be in the interests of justice to reject the claim. We therefore did not have to consider that issue further.

The hearing

4. We had witness statements and heard oral evidence from the claimants and the second and third respondents. We also saw witness statements from Heather Seraphin and Tianna Hudson. The latter witnesses were family members of the first and second claimants respectively and their evidence was essentially about the effect of the relevant events on the claimants. The respondents did not choose to cross examine those witnesses and we did not hear oral evidence from them.

5. The bundle grew to some extent over the course of the hearing and was ultimately 872 pages electronically. There was an unfortunate drip feed of late disclosure from the respondents and we considered that there had been failings by the respondents in this respect and in relation to relevant documents which the claimants had requested but which were only provided at the hearing itself. The claimants had to be provided with extra time during the hearing to read late disclosed documents.

6. The claimants did not pursue at the hearing an application they had made in correspondence to strike out the responses.

7. The full merits hearing was originally listed to be heard in its entirely in October 2022 but went part heard due to the ill health of the first claimant.

Parties

8. The first respondent is a general private medical centre offering a number of services including travel medicine, which is the second respondent's specialty, and optometry, which is his wife's specialty. The second respondent and his wife are the directors of the first respondent.

9. The first respondent began offering dental services in the 1990s through a third party tenant, Corporate Dental Services. When the tenant sold its practice, the first respondent was left with fitted dental rooms and decided to offer dental services itself. The dentists used by the first respondent were self-employed contractors. Latterly they included Dr B Marti, who had also worked for the fourth respondent. By time of the events we are concerned with, Dr Marti was in Spain on maternity leave and the dentists working at the first respondent were Dr S Kelly and Dr P Gesto. It was a small operation with one dental room and two dental nurses working part time. Reception services and other services were shared with the other medical services provided by the first respondent. At times, the first respondent premises hosted other services such as podiatry, which was provided by an independent practitioner but advertised on the first respondent's website and under its umbrella.

10. The third respondent is a dentist and a partner in the fourth respondent with his wife, also a dentist. The fourth respondent offers dental services from several locations. We were told that it is primarily a referral service providing specialist dental services, including implants. It has a satellite practice at Montagu Mansions, offering more general dentistry.

11. Both organisations had tens of staff of various types including medical or dental practitioners, nursing staff and support staff.

12. The second and third respondents are brothers and have a close relationship. The third respondent at times provided advice to his brother on the dental practice, including on recruitment and the selection of equipment. Dr Marti worked for both practices at times. The fourth respondent provided some training to staff of the first respondent and referrals were made between the dental practices.

13. The third respondent gave evidence which we accepted about the difficulties faced by the fourth respondent during the pandemic, which led to cuts to dental nursing staff at one point. He was under a great deal of stress at points and his health was affected.

Diversity of the first and fourth respondents

14. The claimants raised issues about the racial diversity of the first and fourth respondents' staff. So far as the first respondent was concerned, the claimants said that they, two afro Caribbean nurses, were not pictured on the website whereas other staff, who were not afro Caribbean, were. The first respondent said that staff were pictured on the website if patients could book an appointment with them. Dentists were named and pictured because they were the people with whom an appointment would be booked. The claimants gave evidence that if a dental nurse had particular qualifications, in some situations a patient might book with a nurse, but they did not give any evidence that either of them offered such a service or that it was possible for patients to book appointments with them.

15. In respect of the fourth respondent, the claimants raised an issue about the overall diversity of the staff and what was revealed by photographs of staff on the website. We could see that there was considerable diversity amongst the dentists, including one dentist the third respondent said was afro Caribbean and the claimants thought must be mixed race. There was a black dental nurse pictured but not named who was a former employee. Dental nurses were not individually named and pictured on the fourth respondent's website for the same reasons as they were not pictured and named on the first respondent's website, we were told. Looking at the pages from the fourth respondent's website, the front of house staff such as the practice managers and patient coordinators (seven staff) appeared to be all of white European origin as did most of the hygienists / hygiene therapists. We did not consider that that was material from which ultimately we could draw any inferences but we mention it because we can understand how it created an impression to the claimants of a lack of diversity.

Chronology

16. On 18 April 2017, the first claimant started employment with the first respondent as a dental nurse and on 6 June 2017, the second claimant started employment with the first respondent.

17. Each claimant worked two days per week and the first respondent's dental service ran four days per week

18. The first claimant's contract of employment is dated 1 December 2017, as is the second claimant's. The following section was relevant to the issues we had to decide.

    6.1 Your salary will be paid at the rate of £11.50 per hour gross, payable monthly in arrears by credit transfer or any other arrangement acceptable to the Employer and agreed between you and the Employer. In addition, a "loyalty" bonus payment of £500 gross shall be paid at the end of the first 12 months of employment

    6.2 Time off in lieu of overtime will be granted or, at the discretion of the Employer, overtime may be paid at the usual salary rate.

    6.3 Undertaking overtime does not entitle the employee to extra holiday entitlement.

    6.4 You will receive an itemised salary slip setting out your gross salary, statutory and other deductions and the net sum paid.

    6.5 On termination, your remuneration will be apportioned in respect of the period from the last monthly payment to the date on which your employment hereunder terminates.

    6.6 The Employer may also, in its complete discretion, pay a bonus of an amount to be determined by the Employer from time to time but the Employer reserves the right in any year not to operate any such scheme either generally or in respect of any category of employee and any bonus scheme introduced may be altered or withdrawn at any time and for any reason entirely at the discretion of the Employer. That discretion shall not be limited by any express or implied term of this contract.

19. The claimants provided chairside and administrative services and we understood that they formed good and close working relationships with the dentists they supported.

20. The claimants gave evidence of some incidents in support of their race discrimination claims. On 20 March 2018, the first claimant said that Dr Marti asked her to work a day with her at the fourth respondent. She said that the fourth respondent did not acknowledge her. He came in when she and Dr Marti were working on a patient. In about 2019, the second claimant had a similar experience. Both claimants agreed that these were occasions when the third respondent was called in to see a patient Dr Marti was treating and that he was masked. The fact that he was called in would be because there was something the treating dentist needed assistance with. The third respondent explained that he would have to speak to the dentist about the treatment and to the patient to direct them to open their mouth for example but that it would be a stressful situation and he would be endeavouring to make it appear that there was nothing out of the ordinary in him coming in to assist. He would therefore not have made a point of greeting other staff in the room. We understood that the third respondent provided training and mentoring to other dentists in specialist techniques.

21. The first claimant said that there were two occasions in October 2018 when the compressor was broken at Fleet Street and Dr Kelly saw patients at the fourth respondent's premises. She said she was told to go home on the second occasion because the fourth respondent had a spare nurse available. She was heavily pregnant and ready to work and then was sent away. She did not know who had made that decision. She was told by another staff member.

22. The third respondent said that he would have had no role in that decision but that in general if there was a nurse available who was familiar with the room and equipment, that nurse would have been used.

23. The second respondent said that this incident was not raised with him. If it had been brought to his attention, he would have looked into the matter.

24. Neither claimant had any disciplinary or performance issues raised during their employment with the first respondent.

25. On 18 April 2018, the first claimant had an appraisal with Ms D Lithman, practice manager. There was a discussion about pay and the first claimant said that she was told she could have a £500 bonus per year plus 50 pence per hour pay rise or a £1 per hour pay rise, and that she chose the former, much as described in the letter the second claimant received about her pay arrangements later from Mrs Karavadra. The first claimant did not receive confirmation of her arrangement in writing.

26. The second respondent did not know about these arrangements and was unable to give any evidence about them.

27. The first claimant commenced maternity leave on 17 April 2019. On 2 August 2019, Ms Karavadra, clinic manager, sent a letter to the second claimant:

    This letter is confirmation that effective 1" July 2019, the following amendments have been made to your salary —

    - Your rate will increase to £13.50 per hour

    - You are entitled to a £500 lump sum payment in June 2020

28. There was no similar letter for the first claimant, who was on maternity leave at the time, but the contents of the letter matched the arrangement the first claimant had previously made with respect to her salary payments. There was nothing done to vary the second claimant's entitlement to a £500 lump sum in lieu of a 50p per hour pay rise.

29. On 18 March 2020, dental clinics in the UK, including the first respondent's, closed due to the pandemic.

30. On 19 March 2020, the second claimant was furloughed and on 20 April 2020, the first claimant was furloughed on her return from maternity leave.

31. On 1 June 2020, the second claimant attended a meeting at the fourth respondent's premises to speak with staff there about infection control and PPE

in advance of reopening the first respondent's dental services. The second claimant was responsible for cross infection measures at the first respondent's dental practice. The second claimant started working again in the dental practice in about early June 2020.

32. On 21 August 2020, Ms Sopa, the first respondent's compliance manager, contacted the first claimant with options for her return to work; she could work one day or two days. If she chose to work two days, one would be spent on nursing and one on admin. Ms Sopa said that the dental service was now open and offering services three days per week. They would extend the service if there was more of a demand. The first claimant chose to work two days. The claimants discussed the situation and split the nursing and admin work between them.

33. The second respondent's evidence about the dental practice was that after the first lockdown, the rest of the first respondent's business was showing growth but the dental practice was not.

34. The second respondent gave the Tribunal various statistics about the dental practice in his statement but there were no documents to support the statistics. He told us that the turnover of the dental service had fallen in 2017/2018 by 6%. It grew by 26% the following year but fell by 5% in 2019/2020 and by a further 18% in 2020/2021. We note that the latter two years were afflicted by lockdowns. The second respondent said that the turnover was 8% less in 2020/2021 than it had been in 2016/2017. He said this reflected a service in overall decline. That analysis seemed to us to disregard the effects of the pandemic.

35. The claimants both said in evidence that an effect of the pandemic was that a lot of NHS practices were closed and a lot of people were turning to private dentistry. The first respondent had acquired appropriate PPE to offer dental services.

36. In terms of documents, we were provided with some of the first respondent's accounts for 2016 onwards. These did not separate out the various parts of the business. Despite lockdowns, the business overall experienced very substantially increased profits in 2020 – 2021, we were told due to the first respondent undertaking PCR testing. There was no evidence as to how well any other department was doing and some such as travel medicine and, we imagine, optometry, would also have been adversely affected by the pandemic.

37. The second respondent said that he did not have a business background; he and his wife ran the practice with the assistance of a bookkeeper. The finance side was run by the bookkeeper. It was difficult to work out the profitability of the dental practice as one had to look at all the costs, including advertising and management time. It was his wife who analysed the monthly takings.

38. The second respondent said that there was a lack of continuity with dentists for a variety of reasons including maternity leave and dentists not returning after maternity leave. He said that by 2020 he was 'battle weary' with efforts to make the dental practice successful. He said that in 2020 there were internal discussions between the two directors (himself and his wife) and the practice manager about how to improve financial performance. Although the second respondent said the

conversations were spurred by financial challenges, it was not apparent, looking at the accounts, that there were financial challenges in terms of overall profits, which were much increased. He said that they decided the dental practice was not showing enough of a return on the investment of time and money and that they would put the claimants at risk of redundancy.

39. The first claimant returned to work in September 2020. She said that the diary was busy at this point. Dr Gesto had returned from Spain and Dr Kelly was also working. Dr Gesto was due to take maternity leave later in the year.

40. On 30 October 2020, Mr Hughes, the first respondent's solicitor wrote to both claimants

    I hope you are both well

    Myself, Richard and Gillian would like to meet with you to discuss the Clinic's Dental Service.

    We are proposing 3pm on Wednesday 4th November, please can you confirm you will be able to attend a meeting at this time?

    I look forward to hearing from you

41. As the second claimant pointed out, October 2020 was said by the second respondent to be a time of rebound for the dental service. The first respondent started consulting about redundancy before what the second respondent said was the November downturn. The second respondent said that takings fell by 68% in November compared with the previous month. There was no vaccine on the horizon and dentistry was an aerosol-generating practice and required significant measures such as waiting for air changes between patients. We note that there was of course a second national lockdown in November 2020, which no doubt was much of the reason for the downturn in takings. The second respondent said that the October rebound was not enough to give him confidence for the future; it could have been caused by pent up demand. There had been fluctuations in the past. He said that in general prospects for dentistry at that time were bleak whereas other areas were doing well. He and his wife were not dentists and always had difficulty evaluating dental complaints.

42. The second respondent's oral evidence about where the statistics he had provided were derived from was that he looked at the figures monthly and also before the redundancy meeting and discussed them with his wife. He said that there was no formal breakdown of profitability for each service but that he could lay his hands on information about the takings. He said it was difficult to unscramble dental costs from other costs. Calculation of income was easy but it was in amongst other information about the practice, some of which he said was private. He had chosen to just provide some statistics which he stood by, rather than the underlying documents. In answer to Tribunal questions, he said that he had not disclosed the source material as he felt that the information he provided was sufficient.

43. The claimants said that aerosol generation was managed by having aerosol generating procedures at 12 noon and at the end of the day so as to minimise time

needed to air room. The time required between patients was down from an hour to 15 minutes. The situation was improving and there was a significant demand for dental services and that demand had been evidenced during that autumn.

44. On 30 October 2020, the second claimant had a discussion with Dr Gesto about the meeting which had been scheduled. Dr Gesto did not know what the meeting was about and had no knowledge that there was a proposal to close the dental practice. Dr Gesto was planning to return to the practice after six months of maternity leave.

45. In early November 2020, Dr Gesto left on maternity leave early; she had intended to go in December 2020 but left early due to a family emergency.

46. On 4 November 2020 there was a redundancy consultation meeting between the claimants, the second respondent and Mr Hughes. The first claimant had thought the meeting would be about arrangements to be made in Dr Gesto's absence and was surprised it was about redundancy. The claimants said that the reasons given for closing the department were:

    - The financial effect of the pandemic;
    - That the first and second respondent had lost interest in the dental department;
    - That dentists kept having babies.

47. The claimants said that they made various suggestions to avoid redundancy, including:

    - Promoting the service;
    - Getting a replacement dentist. The first claimant suggested a contact she had.

48. The second claimant said that she asked the second respondent if he had asked for any advice from his brother and the second respondent said that he had.

49. Voluntary redundancy was mentioned and the second claimant asked what it was. Mr Hughes said he was not an employment solicitor and did not know. Neither he nor the second respondent were able to explain to the claimants what voluntary redundancy was. The second respondent accepted in evidence that no one ever explained to the claimants what that meant. He did not understand what it meant and could not advise the claimants. It did not appear in any event that any incentive to take voluntary redundancy was on offer.

50. The second respondent accepted that he did not know his responsibilities under TUPE in a transfer situation but said that he would have taken advice in that scenario. The claimants asked about furlough and Mr Hughes said an employee could only be furloughed if there was a job to come back to.

51. Both claimants said that the second respondent said that they would still have a job in the clinic doing administration if the dental department closed and both claimants said that he made the remark about dentists having babies. The second

respondent said that administrative work was discussed as a possibility but no job was promised.

52. The second respondent's account of what he said was that he said there was a significant downturn in the dental business with no sign of improvement. It was therefore not sustainable to continue to retain the current employed nursing support and they would be putting both roles at risk of redundancy. He said that due to the downturn and insufficient numbers of dentists, the department might close. He said that he talked to the claimants about the amount of management time being taken up by dental services, especially around management of covid health and safety measures and PPE.

53. He said that he would consider alternatives to redundancy and whether one or both roles would need to be made redundant. They envisaged that process would take up to three weeks. He said the meeting took about thirty minutes.

54. He agreed that the claimants asked if he had spoken to his brother. He sought in his evidence to say that he spoke to his brother about the business over the years and that he had not spoken to him at this stage about closing down the dental practice.

55. The second respondent agreed that the claimants did suggest alternative roles and expressed an interest in compliance and record keeping. They suggested improvements to the service such as hiring new dentists and the second claimant suggested possible dental connections and that she could help look for new dentists. The claimants said that the patient recall system was not working efficiently and that was why they did not see more patients. He denied he said that the dentists kept having babies.

56. The second respondent said that he was visibly very emotional in the meeting. The claimants said that he seemed uncomfortable rather than emotional.

57. The second claimant spoke with Dr Kelly after the meeting; she said that Dr Kelly appeared bewildered by the news, which suggested that the closing of the dental service had not been discussed with Dr Kelly.

58. The second respondent wrote to the claimants that day: *Further to today's meeting, I am writing to inform you of the following situation facing Fleet Street Clinic.*

    I am very sorry, but there has been a significant downturn in the business of the Dental Service and, despite our hopes for improvement, this is not expected to change for the foreseeable future. This downturn means that continuing to service the business at the current rate with the current level of employed nurse support is not sustainable. The Clinic is therefore unfortunately considering reducing the number of dental nurses it employs.

    The Clinic will review its options but has concluded there is a risk that it might be unable to continue to provide work for dental nurses and that it may therefore have to make redundancies.

The Clinic will be exploring ways of avoiding compulsory redundancies and minimising the number of employees affected. Measures which may assist in avoiding compulsory redundancies include restrictions on recruitment, offering alternative employment elsewhere within the Clinic or short-time working. Your requests and considerations raised during the meeting will be considered. If you have any further suggestions on ways to avoid redundancies, please let me know.

If the Clinic is not able to avoid the need for redundancies, we anticipate that one or all of the employees offering dental nurse services are likely to be at risk. If redundancies are necessary, the Clinic will have to decide which individual(s) will be selected for redundancy. This would be done on the basis of objective and quantifiable selection criteria.

As we discussed I envisage that our review of this matter and the consultation process will take between two to three weeks, although this is only a rough timescale and may be subject to change.

We will arrange a further meeting with you to consult on the Clinic's proposals in more detail and how you may be affected personally. If you have any questions in the meantime, please do not hesitate to contact me any time.

I would like to thank you for your continued hard work during this difficult period

59. We note that this letter does not suggest that a decision had been made to close the dental practice, nor does it suggest that a lack of dentist is a significant factor causing the risk of redundancies.

60. On 5 November 2020, the first claimant emailed the second respondent:

    Although its not the news I wanted to hear, I appreciate your honesty on the matter.

    I really hope the business can come back form the covid crisis and things return to normal promptly.

61. Cross examined about this email, the first claimant gave evidence that at the time she did not think the second respondent was dishonest. She said that at the time she thought he was sweet, intelligent and charming and she had a lot of respect for him. She said that she would not have expected him to be dishonest. She did not have access to the first respondent's accounts so she accepted what he said about there being a downturn due to covid.

62. On 9 November 2020, the second respondent emailed the claimants:

    As I explained at the meeting on 4 November and in my subsequent letter to you, there has been an ongoing and unsustainable downturn in the Dental Service. Covid-19 has impacted and will continue to impact patient interest in the Dental Service. After further consideration, the Clinic is now putting all dental nurse positions at risk of redundancy.

    The Clinic has taken steps to try and avoid compulsory redundancies where possible and without incurring additional cost to the Dental Services.

Unfortunately, these steps were either not achievable or have not avoided the need to put the positions at risk of redundancy.

I should stress that this is only a provisional decision and the Clinic will consult with you further.

We would like you to attend a Consultation Meeting at approximately 12.30pm, Friday 13th November. Given the current lockdown circumstances, this meeting will be held remotely and will be by way of an online video call. Details will be shared with you by email nearer the time.

You may, if you would prefer, bring a colleague or a trade union representative to this Meeting as your companion. As we held the first meeting with both dental nurses together, the intention is for us to also have this follow up Meeting in the same format (each of you being a 'colleague' to the other). However, you are at liberty to request a separate meeting if preferred.

If you wish to bring an alternative colleague or trade union representative to the Meeting, please let me know the name of your companion as soon as possible. This would also mean that separate meetings would need to be held and could alter the time of your particular meeting to a time slightly later than 12.30pm.

• The aim of the meeting is to give you a chance to discuss the proposed redundancies in more detail and, in particular, how they affect you. Issues for discussion may include:

• Why the Clinic has decided that it is necessary to make redundancies.

• Why your position has been provisionally selected for redundancy.

• Possibilities for alternative employment within the Clinic.

• Any further ideas you may have for avoiding redundancy or reasons why you think the Clinic should not select you for redundancy.

• That you have the right to take time off to look for alternative employment.

Following the Meeting, the Clinic will consider any submissions you made at the Meeting. I will then arrange a further final meeting to discuss its response.

I appreciate how this news may have affected you personally. If you have any questions or issues that you want to discuss prior to the Meeting on Friday 13th November, please do not hesitate to contact me.

Again, I would also like to thank you for your continued contributions to the Clinic during this difficult period.

63. On 13 November 2020, prior to the consultation meeting, the second claimant exchanged some WhatsApp messages with Dr Kelly. The second claimant said to Dr Kelly that she thought they would close the whole dental service 'which doesn't make any sense'. Dr Kelly agreed and said it was odd. The second claimant commented that they were doing so well, even post covid.

64. The second meeting was held by Zoom. The second respondent said that the meeting lasted 15 – 20 minutes. He said that he said that he had considered the issues and suggestions made at the first meeting but that these had not changed the impact of the overall performance of the business. He said that he was considering the closure of the dental service. He said that neither he nor his wife had the skills to improve the financial performance of the dental practice and that he was battle weary. He said that he looked at the patient recall system and it was not fixable. He said that the claimants seemed surprised and did not offer new suggestions but asked if alternative vacancies had been considered. He said he said that possible roles across the business had been reviewed but none were suitable for the claimants. He told them that the final meeting would be held in a week.

65. The claimants said that the meeting very brief and they were told no decision about redundancy had been made. They were asked if they had any further suggestions to try and avoid the redundancies. There were lots of awkward pauses and mostly Mr Hughes was speaking.

66. The second respondent said in oral evidence that on 17 November 2020 Dr Kelly gave notice to terminate her engagement on 17 December 2020. She had obtained new work with Bupa. She later retracted her notice because the Bupa job did not work out immediately; we did not have evidence as to when the retraction occurred. He said that he asked Dr Kelly to stay on during the winding down of the dental practice.[1]

67. The second claimant said that on 19 November 2020, Ms Karavadra asked her to come in to work the following day.

68. The final redundancy meetings were held on 20 November 2020 and the first claimant was unable to have her mother as her representative because she ended up having the meeting in person rather than by Zoom, because she had been asked to come into work. She said that she was told they were going to be made redundant because the dental department was shutting down. She asked about the administration jobs and Ms Karavadra said that they were not recruiting at the moment.

69. As to redeployment, the second respondent told the Tribunal there were no admin jobs. It would have been filing and pretty basic work if it had existed.

[1] The second respondent gave two dates in oral evidence for Dr Kelly giving notice: 17 September and 17 November 2020. Ultimately we concluded that the earlier date was more likely and that the retraction of notice had clearly occurred by the time of the redundancy consultation; had that not been the case, it seemed to us that 'lack of dentists' would have been much more prominent as a reason given for the potential redundancies (to the claimants and in the pleadings). If Dr Kelly had given notice and not retracted it and Dr Gesto was shortly going on maternity leave at the point when redundancy consultation started, an imminent lack of dentists would have been the obvious main reason to provide to the claimant for the proposed redundancies. Dr Kelly giving notice is not even mentioned in the second respondent's witness statement. What the second respondent emphasised was that he was 'battle weary' in part because of the coming and going of dentists over the years. This was another area of the case where the respondents' vagueness about dates and details and the paucity of documentary support for their evidence led to us having to make carefully judged decisions on a balance of probabilities having scrutinised with care the evidence which we did have.

There was not a demand for that work at the time. He accepted that the claimants had transferable compliance skills but said that the business already had someone in that role. He said that if he had had a role available, he would have considered redeployment very seriously.

70. The first claimant's meeting was at 11 am and the second claimant's at 12:30.

Evidence about discussions between the respondents that day

71. The second respondent said in his witness statement that he spoke with his brother the day of the claimants' redundancies. He said that he spoke with him about the possibility of his brother renting the dental rooms.

72. In oral evidence, the second respondent said that this was the first time he spoke with his brother about closing the dental practice. To his surprise, his brother who had never previously been interested in the Fleet Street dental business, was interested in his suggestion that he rent the room space. He said that it was an ongoing conversation; the third respondent had to speak with colleagues and his partner. He said that he recommended the claimants to the third respondent.

73. In his witness statement, the third respondent said that he first had discussions with the second respondent in January 2021 about renting the dental rooms. There were repeated denials in his witness statement about earlier discussions, for example: '*At that time, December 2020, R1 and R4 were not in any conversations at all with a view to R4 offering dental services from the premises'*

74. The third respondent said that by December 2020, the fourth respondent had not even considered offering a dental service from the premises, that at that time another lockdown had been announced and the fourth respondent had previously had to make a dental nurse redundant. He said that he had no thought of opening a dental service from premises where such services had already failed.

75. In oral evidence, the third respondent said that 'although Richard might have mentioned his intentions in November I really did not start giving it any kind of serious concern until January and did not give it serious consideration until later than that. It was a very general chat at that stage.' He said that the location was not attractive to him and that the trend was for people to attend a dentist nearer their homes.

76. When asked why he did not put the November or December date in his statement, he said that he speaks to his brother all the time and that it was difficult to tie a date down in particular. They were busy and he had a large difficult practice to run with a lot of people who depended on him. He said that the conversation was so peripheral to what he was doing, he had no thought to make anything happen. It was pretty much the last thing on his mind to start something in Fleet Street, which was a desert. He would not have got involved in conversations about employing nurses.

77. The issue of what was discussed was of particular importance in the light of WhatsApp messages between the second claimant and Dr Kelly from about 18:12 on the evening of 20 November 2020. The second claimant told Dr Kelly they had been made redundant. Dr Kelly then told the second claimant 'between u and me' that Dr Andrew Dawood had telephoned her that day and said he was 'taking over the clinic'. He had asked her if she would work two days per week 'and some man is coming 2 days and one day hygiene maybe… He asked me about you. He said he was going to start afresh with nurses but I said that was a big mistake and to keep you on that the clinic was blessed to have you. He seemed to take that on board'.

78. Dr Kelly said in the messages that she had always wanted to work for Dawood and Tanner and the second claimant congratulated her. They had a discussion about whether and how someone should tell Dr Gesto about the situation.

79. In a long series of messages that evening, Dr Kelly said that the third respondent had offered to teach her how to do implants, that he 'just kept saying this is run by Dawood and Tanner now so no ties to Fleet Street. But I put £ on it he will approach you. I hope you say yes'. She said: 'They will change the other room into another surgery. That's his plan.'

80. The second claimant commented in a message that the second respondent had said that they were losing money 'which we know is a lie'. Dr Kelly replied: 'Of course it's a lie'.

81. As to these messages, in oral evidence the third respondent said that he had a discussion with Dr Kelly in general terms - what did she think about it, was it something which would interest her - because he could not think of taking on the rooms if he did not have a dentist. He did not think it was necessarily a good idea but Dr Kelly was very excited about it.

82. He had denied in his statement having the conversations with Dr Kelly that were described in the WhatsApp messages. When asked about the specific details Dr Kelly provided, he said that he had an idea at the time of what he might try to achieve. He said that it was hardly likely that at that time he would have wanted the challenge due to the covid surge. He said that the first step to see whether a dental provision is viable is to see if you can engage a dentist.

83. We did not accept that the first time the second and third respondents spoke about the dental business was after the claimants were given notice of redundancy. It was inherently improbable that given the closeness of the brothers and the fact that they spoke a great deal, the second respondent would not have discussed with his brother, a dentist, the fact that he was considering closing down his own dental practice at any time between deciding he might shut down the dental practice and over the weeks of consultation. It also seemed to us inherently improbable that the second respondent would have ploughed on with a decision to close down the dental practice without making any enquiries about whether another dental service could be provided from what was a fully fitted dental room which would otherwise be lying empty. Even

if he did not think his brother would be interested, his brother was the obvious person to talk to about the dental market and whether there might be someone else interested.

84. In any event, the timescale was problematic. If the claimants' meetings were finished by around 1 pm on 20 November 2020, the brothers would have to have conversed about the situation and the third respondent telephoned Dr Kelly with some fully formed ideas about how to use the rooms over the course of that afternoon. We concluded that it was far more likely that the brothers had discussed the situation in advance and the third respondent had had time to think how about how he might run a practice at the clinic. He had waited to speak with Dr Kelly until the claimants knew that the second respondent would no longer be running the dental business.

85. We did not accept, particularly having regard to the messages from Dr Kelly, the account the third respondent gave as to his lack of interest in running a dental practice at the Fleet Street clinic. For the third and fourth respondents, this would be another general dental practice which could make referrals to the main specialist service. The Fleet Street location was an attractive one if, as would have appeared to be the case in late 2020, people were likely to return to work in offices. We can see no plausible reason other than enthusiasm about taking on the premises for the third respondent to have contacted Dr Kelly so quickly.

86. On 27 November 2020, the first respondent wrote to the claimants:

Further to our meeting on 20 November 2020 and your meetings and consultations with Richard over the last month, I am writing to confirm that the Clinic is making your position redundant.

As you know, the Company has explored ways in which your redundancy could be avoided, and the possibility of alternative employment. Unfortunately, we have not been able to identify any suitable alternative employment for you or any way in which your redundancy could be avoided. However, should any suitable alternative positions become available during the notice period, we shall inform you of them and we would be happy to do this next year.

The Company is serving 3 weeks' notice to terminate your employment, in accordance with your contract of employment. Your employment will therefore terminate by reason of redundancy on 11 December 2020. You will receive your pay and benefits up to that date in the normal way.

…

Under law you have the right to appeal against the Company's decision to make you redundant. Please submit any appeal to Sandeep Karavadra in writing by Monday 7th December 2020, specifying the grounds on which you are appealing.

87. The claimants gave evidence as to why they did not take up the offer of an appeal.

88. The first claimant said that she felt overwhelmed and powerless after found out what Dr Kelly had said to the second claimant, on 21 November. She had no ‘fight or energy’ in her.

89. The second claimant asked rhetorically what would an appeal have achieved if the dental business was closing down. She did not want to stay in an organisation where she felt she had been discriminated against, where she was deceived and not treated fairly.

90. She said that she did not raise what Dr Kelly had said as it was confidential and Dr Kelly had asked her to keep it to herself. She did not want to ‘throw Dr Kelly under the bus’. She did not feel strong enough or ready to challenge the decision.

91. The first claimant said that during her notice period:

- A travel nurse asked Dr Kelly what was happening and Dr Kelly said ‘I’m staying. The nurses are going’
- One day the second respondent came into the dental room with a man and said he was a dentist from the third respondent’s practice. The dentist asked a series of questions about the room.

92. She was upset by these incidents.

93. The third respondent said that the dentist in question was not from his practice. He was a dentist who called him up and said that he was unhappy as he had no patients. He was looking for something else. The third respondent said he should go and take a look at the Fleet Street room. He said that he suggested that this man might want look in his own right to start something there. The third respondent said that he had half a mind that if Dawoood and Tanner were to do something at the Fleet Street premises this dentist could be a possible candidate. We did not hear evidence about whether this was the dentist ultimately employed by the fourth respondent to work in the Fleet Street dental rooms but it seems likely it was and that it was also the ‘man’ referred to by Dr Kelly.

94. On 9 December 2020, the first claimant sent an email to Ms Karavadra: *I would like to request my bonus for the period April 2019 to April 2020. Could you kindly look into this for [me] asap.*

95. This was a reference to the £500 per year the first claimant said had been agreed should be paid in a lump sum in lieu of an increase to hourly pay.

96. On 10 December 2020, there were further WhatsApps from Dr Kelly to the second claimant:

Apparently they Richard and Andrew are having a meeting to finale [sic] the agreement. And tomorrow I will know what’s happening

97. The respondents denied that there was such a meeting and such an agreement. We heard no evidence as to why Dr Kelly would have invented such a meeting or any of the other information in her messages. Dr Kelly did not

attend to give evidence, although the claimants had intended at some point to call her as a witness. We were not told why she had not attended to give evidence.

98. 11 December 2020 was the claimant's last day of employment. Ms Karavadra messaged the second claimant that day to say:

D & T's clinic manager would like your telephone number. Are you happy for me to share this with her?

99. On 14 December 2021, Ms Karavadra replied to the second claimant's query about her 'bonus':

As detailed in your redundancy outcome letter sent on the 27th November 2020, you had the right to appeal the decision until Monday 7th December. However this period had lapsed when you sent your email on 9th December, we are unable to investigate this further and consider the matter closed.

Please also note the following statements within your contract regarding bonus payments.

Clause 6.6 - 'The Employer may also, in its complete discretion, pay a bonus in the amount to be determined by the Employer from time to time but the Employer reserves the right in any year not to operate any such scheme either generally or in respect of any category of employee and any bonus scheme introduced may be altered or withdrawn at any time and for any reason entirely at the discretion of the Employer. That discretion shall not be limited by any express or implied terms of this contract.'

Clause 6.1 'bonus payment of £500 gross shall be paid at the end of the first 12 months of employment'.

100. The first claimant did not pursue that matter further.

101. The respondents' evidence was that between December 2020 and April 2021, Dr Kelly was engaged to complete dental work commenced on existing patients of the first respondent and that the fourth respondent played no part in this and received no income as a result of this work. We were told that Dr Kelly's work was completed before the fourth respondent started offering services at the Fleet Street premises on 21 April 2021.

102. The second respondent said that Dr Kelly was not obliged to provide the ad hoc services and ceased to provide them on 7 April 2021. We saw no documentary evidence as to the relationship between the first and second respondents and Dr Kelly or its termination.

103. The second respondent said that the first respondent used agency dental nurses during this period as they were flexible. He did not realise the winding period would be as long as it was.

104. 16 December 2020 was the first date on an invoice sent by an agency to the first respondent for an agency nurse

105. We saw a transcript of Dr Kelly's voice message to the second claimant of 16 December 2020. Dr Kelly said they had run out of materials and asked the second claimant where to get them from.

106. The third respondent's witness statement said that January 2021 was when he entered into discussions with the first respondent about renting the dental rooms.

107. He said that he attended Fleet Street to discuss with his brother and saw Dr Kelly and had a general chat with her. He said that he explained that the fourth respondent might be starting a new dental service from the premises and that it would be a trial offering to begin with using some of the fourth respondent's existing dentists and agency nurses until the fourth respondent knew whether the practice was viable.

108. He said that Dr Kelly suggested recruiting a dental nurse instead of using agency nurses as she felt it would be better for the fourth respondent as patients prefer seeing the same nurse. He said that he told Dr Kelly he would think about that once he was satisfied the premises were viable.

109. He said that Dr Kelly mentioned the claimants and said maybe the fourth respondent could employ one of them; he said that she spoke highly of the second claimant but not the first claimant.

110. Given what we have found about earlier discussions between Dr Kelly and the third respondent, it seemed to us that a discussion in these precise terms could not have occurred in January 2021. No doubt the third respondent did *continue* to discuss the proposed arrangements with Dr Kelly.

111. The third respondent said that he then asked his practice manager, Caroline Carey, to contact the second claimant to see if she was looking for a job and would be interested in working for the fourth respondent.

112. Ms Carey told him she had a conversation with the second claimant and that the second claimant was interested in exploring the opportunity. He said that Ms Carey said that she would contact the second claimant if the fourth respondent decided to employ a dental nurse at the premises.

113. After some discussions, the third respondent said there was an oral agreement that the first respondent would allow the fourth respondent to use the premises to offer dental services through the fourth respondent, trading as Temple Dental, part of the fourth respondent.

114. It was not clear when this agreement was said to have taken place, save that the third respondent said that it was 'long after' December 2020.

115. Initially, he said, the agreement was that the first respondent would charge no rent or equipment hire so that the fourth respondent could test the viability of operating from the premises before entering into a formal rental agreement. If, after a free rent period, the fourth respondent was satisfied that it was a viable venue, it would pay a rental fee to the first respondent for use of the premises.

116. On 4, 5, 6 and 11 January 2021, it appears that the first respondent hired agency dental nurses. The invoices in this period are sent to 'Fleet Street Dental Practice' and are from Tempdent. Tempdent was liaising with the first respondent's employees.

117. We saw a transcript of a voicemail on 11 January 2021 from Dr Kelly to the second claimant. Dr Kelly said that she had had spoken to Caroline, a manager at Dawood and Tanner. She said that the transfer had happened now. Dawood and Tanner were managing Fleet Street going forward. 'she…asked me to ask you again if you're a hundred per cent sure you wouldn't think about coming back…she feels very regretful about how you weren't asked sooner and that we may have lost you.'

118. There were also WhatsApp messages that day from Dr Kelly to the second claimant encouraging her to consider the role. Dr Kelly said that Dr Gesto was going to be hired again.

119. On 13, 18, 20, 25 and 27 January 2021, the first respondent hired agency nurses.

120. On 14 January the second claimant left a voicemail for Dr Kelly. The second claimant said that she had spoken to Caroline [Carey] who wanted to know what the second claimant did at Fleet Street. She did not have anything concrete to offer. Caroline was going to draft a job description to send to her.

121. The second claimant said that after that conversation with Ms Carey, no job description was in fact sent to her.

122. On 1 February 2021, Dr Kelly sent a WhatsApp message to the second claimant asking if the third respondent had telephoned her.

123. On 2 February 2021, Dr Kelly sent a WhatsApp to the second claimant:

I am handing my notice at Fleet Street soon. I wanted to give you the heads up before he called you x

124. The second claimant believed 'he' to be a reference to the third respondent, which appeared to us to be correct in the context.

125. The second respondent's evidence was that Dr Kelly was 'out of contract' after December because of her original notice and could have left at any time but this does not appear to have been Dr Kelly's perception.

126. The third respondent texted the second claimant. He explained that he was the second respondent's brother and said that he would like to speak with her about taking on a role at Dawood and Tanner.

127. The second claimant thanked him for considering her for a role within his organisation at Fleet Street but said that she had decided to pursue a career in dental nursing education. She said that she was flattered by the invitation.

128. The second claimant's evidence was that Dr Kelly was nagging to have a nurse as she was fed up with agency nurses and she believed the third respondent was approaching her in order to please or placate Dr Kelly.

129. On 1, 3, 8, 10, 15, 17 and 24 February 2021, the first respondent employed agency dental nurses.

130. On 17 February Dr Kelly sent a WhatsApp message to the second claimant: 'Yes I have handed my notice but have nothing [sic] given a leaving date yet. I may leave soon as temp nurses etc is taking its toll'.

131. On 1, 3, 8, 10, 15, 17, 20, 22, 24, 29 and 31 March 2021, the first respondent employed agency dental nurses.

132. On 30 March 2021, the first respondent said in its newsletter: *We are no longer providing an in-house dental service. A trusted company will be establishing their own service over the coming months based at our premises, operating and owned independently of Fleet Street Clinic. If you require an appointment, please send us an email and we'll transfer your request across*

133. We saw some rather confusing documents which were provided as evidence of the fourth respondent's use of agency nurses at the Fleet Street premises. These appeared to show that a dental nurse was hired for the week ending 3 April 2021 (date unclear) for 6 April 2021 and for 7 April 2021. There was also an invoice for 13 April 2021. Someone has handwritten 'Daniela Trial' on the document evidencing payment for the last two dates.

134. We were provided with a series of Dr Kelly's invoices to '29 Fleet Street' from December 2020 to April 2021.The last dates of work on these invoices are 7 and 8 April 2021.

135. On 7 April 2021, we saw a time sheet provided for Daniela Miric, an agency nurse paid for by the fourth respondent.

136. 15 April 2021 is the date when the second respondent told us that the fourth respondent entered into a trial arrangement for Temple Dental to use the dental rooms at Fleet Street

137. 21 April 2021 is the date when the third respondent said the fourth respondent started to offer a dental service from the Fleet Street premises. There is no written agreement or record of the agreement between the first and fourth respondent.

138. The third respondent was asked about what Ms Miric would have been doing during her trial days when it was Dr Kelly who was the dentist at work in the Fleet Street premises. He said that she would have been tidying and sorting out the rooms as these had been used by agency nurses and as storage and needed 'a jolly good sort out'. He said that she would not have been working chairside, but 'dusting off cobwebs' and changing to the new systems.

139. We did not accept this evidence. Ms Miric was employed for full shifts on days when Dr Kelly was carrying out dental work at the Fleet Street premises. We

also accepted what the claimants said that it was unlikely a dental nurse sent by an agency would have spent several shifts doing work which in part consisted of cleaning and in part consisted of some wholly unspecified getting familiar with the premises and preparing for changes. It was in any event hard to see how she could have been carrying out these activities at the same time as Dr Kelly was carrying out dental work. There was no evidence that the first respondent had engaged a nurse on these days to assist Dr Kelly.

140. 21 April 2021 is also the commencement date of Dr Orlans, who was engaged by the fourth respondent to work at the Fleet Street premises. We note that there must have been a recruitment process and Dr Orlans may well have had to serve a period of notice. We saw no documents and were provided with no evidence about these arrangements. If he was the dentist who visited the premises in December 2020, Dr Orlans may have had an offer considerably earlier than April 2021, and been serving his notice, but we had no evidence on this and can make no finding.

141. The third respondent said that some of the first respondent's previous patients contacted the fourth respondent to have dental work carried out after being informed they could do so in the newsletter. The third respondent said that they could not have treated these patients unless they had been approached by the patients.

142. The third respondent said that he did ask for the patient list from the first respondent but the first respondent said no due to data protection reasons.

143. The respondents say that the fourth respondent used the first respondent's booking and payment systems for a period as its website was not up and running.

144. We saw an invoice dated 18 October 2021 from Temple Dental to 29 Fleet Street Limited which included 'Dental fees taken by FSC and invoiced in Filemaker (15th April – 5th July 2021),

145. There is also a 'Refund to Td for previous FSC discount schemes' and a 'Refund for Simone's failed work' (ie work done by Dr Kelly).

146. The respondents said that the reference to a 'refund' would in fact refer to the fourth respondent doing remedial work and charging the first respondent for that work.

147. The third respondent said that the fourth respondent initially used agency workers but since May 2021 had used employed nurses at Fleet Street. We saw the last page of an employment contract for Ms Miric. She signed the contract on 17 May 2021 and the contract had an issue date of 10 May 2021. We could not see anything else about the terms of her employment.

148. We saw a contract for a Ms Szalku who was to be employed as dental nurse and service manager from 11 August 2021 for a full time Monday to Friday working week. We were not told whether her employment overlapped with that of Ms Miric.

149. On 30 April 2021, the first respondents sent a newsletter saying: *Dental Service Update*

We are no longer providing an in-house dental service. A trusted company will be establishing their own service over the coming months based at our premises, operating and owned independently of Fleet Street Clinic. If you require a dental appointment, please send us an email and we'll transfer your request across.' There was a link which could be clicked on to send such an email.

150. We concluded that the first and second respondents did everything they reasonably could to encourage the transfer of patients to the fourth respondent.

151. On 7 May 2021, a dental patient of the first respondent wrote to the first respondent's reception and asked for a consultation. He received an email back from the same email address saying: 'We are only offering dental services every other Wednesday at the moment. The first available appointment is the 2nd of June.' This patient was known to the claimants and provided a copy of these emails to the claimants.

152. On 19 May 2021, Ms Carey wrote to a Mr Knespl for advice:

I hope you are well.

I am so pleased to report that the new practice at Fleet Street has a name – Temple Dental!

Andrew has suggested that I reach out to you for some help Deja.. we are starting from scratch with this, and will need to increase visibility quickly. There is another practice by the name of Temple Dental but they are based in Oxfordshire, I am hoping we can be clever and increase of SEO to push them down.

153. On 5 July 2021, Ms Carey wrote to Ms Karavadra:

Our marketing manager would like to manage Temple Dental's google listing, to run ads etc.

I note that we access our email via google.. I wonder if your IT dep. Would be happy for me to share the password for this account so that marketing manager can keep things together all in one place.

I don't want to double his work!

154. Ms Karavadra replied to Ms Carey:

Which email address? The templedental@ one? If so yes thats fine.

Also the payment terminal has arrived. I have plugged it in and connected it to the wifi. Its asking for some further details. Can you call reception and talk through it with them?

Could you also order some extra paper rolls for this terminal? I would happily use ours but they are too large for the terminal.

155. On 6 July 2021, Ms Karavadra wrote to Ms Carey:

Will the google ads direct people to our website?

We are not sure if google will allow two separate accounts to have ad words to one website? Also our online booking system has been switched off for dental as it is linked exclusively to FM. Does Denntally have an online booking functionality?

We have a couple of emails on the go, might be worth a quick call?

156. Ms Ryan of the first respondent wrote to Ms Karavadra and Ms Carey:

I have looked into this further today and spoken with Google. They have confirmed my concerns that having 2 accounts linked to the same website URL is likely to result in both accounts being suspended - sometimes irreversibly. They do not advise us to pursue this idea.

Is Temple Dental only being advertised on the FSC webpage or is it going to have it's own website set up? Your Google Adwords could point to your website URL if the latter. Alternatively, a separate landing page made specifically for your Google Adwords could be set up with a link to your dentally booking system under a domain you already own - this would mean the URL would be different from FSC URL?

Sorry for being the bearer of bad news.

157. Mr Knespl wrote to Ms Ryan and Ms Karavadra:

If we need to set up adverts, we can use a different ads account in that case. Temple Dental is being set up as a new website. The site has been created and I am now making general design edits.

I now need general information for the site pages; info about the new practice, treatments, team members etc. Once I have this, it can be launched.

Who is in charge of the new practice? It would really help to speak to one of your team so I can gather this information and progress with the site development.

Andrew is very keen to get the site up and running as soon as possible - I am available to tomorrow morning if that works for a Zoom call?

158. Ms Karavadra replied:

In terms of info and practice management, it might be best to have a call with Caroline and I tomorrow so we can explain how Temple Dental and FSC fit together.

159. That correspondence was some evidence of two things: that the first and fourth respondents were separate entities but that there was a significant degree of cooperation between them.

160. Other evidence we heard as to how Temple Dental and the first respondent fit together was:

- Temple Dental advertise on the first respondent's website.
- Bookings for Temple Dental are taken via the first respondent's phone number by the first respondent's reception team.

161. On 6 August 2021, an associate dentist agreement with the fourth respondent was produced for Dr Gesto, who signed the agreement on 23 August 2021. Internal emails of 28 June 2021 had described Dr Gesto as 'waiting on a contract'.

162. We saw an email from the fourth to the first respondent dated 5 August 2021 asking for records to be shared in respect of a dental patient who has consented to the transfer of records. The respondents were not able to tell us how many such patients had transferred.

163. On 3 September 2021, Dr Gesto started working for the fourth respondent at Temple Dental.

164. On 8 September 2021, the first respondent sent a newsletter to its patients including the following:

Being able to provide complete patient care is important to us so we are pleased to give a warm welcome to Temple Dental, a satellite practice of Dawood & Tanner..;

165. The newsletter went on to say that dental services would not be offered five days a week and that Dr Gesto, 'who has cared for our patients at the clinic for over 9 years', would be joining the Temple Dental team.

166. The newsletter then said:

If you would like to transfer your dental records for ongoing care to Temple dental, click below:

There followed an electronic button to press.

167. On 28 October 2021, the first respondent sent the fourth respondent an invoice for rent from June to October 2021 at a rate of £2000 per month

168. On 24 January 2022, there was another request from Temple Dental to the first respondent for a patient's notes.

169. There was some discussion in evidence about the role of the Care Quality Commission ('CQC'). The second respondent said that at some point he disclosed to the CQC that the first respondent was no longer offering a dental service. He did not provide a date and we saw no relevant documents. The fourth respondent said that Temple Dental was awaiting inspection by the CQC

but again had no dates or documents to show when the CQC had been notified about Temple Dental.

History of the proceedings

170. The claim forms were presented on 17 May 2021. The first and second respondents submitted their responses on 10 August 2021.

171. The narrative included the following account:

Following the Claimant's redundancy, one dentist continued to operate on a self-employed basis, using agency support staff on an ad- hoc basis as and when needed.

The remaining dentist had no obligations to the 1st Respondent to continue to work and likewise, the 1st Respondent had no obligation to provide work. Consequently, this arrangement could have come to an end at any time and did so on 7th April 2021.

The 3rd Respondent trading as Temple Dental, began making use of the 1st Respondent's dental room on 21st April 2021 on a 'trial basis' in order to establish whether using the premises could prove beneficial for the business. Initially, Temple Dental occupied the room for 1 day per week and since 3rd June 2021, it has occupied it for two days per week.

26. Whilst it is typical for the 1st Respondent to issue other businesses licenses to occupy unoccupied rooms in exchange for payment of rental fees or daily hire fees, this arrangement has been on a more casual basis in these circumstances as the 2nd and 3rd Respondents are brothers.

27. The 1st Respondent has not benefitted financially from this arrangement to date but the parties are in the process of negotiating fees in the event that the arrangement continues.

172. The responses of the third and fourth respondents were presented on the same date and arose from instructions given by the third respondent. He told the Tribunal he gathered information from others and made mistakes about accuracy. He would have been the person who checked the pleading before it was submitted.

173. That pleading said:

5. The First Respondent agreed to allow the Fourth Respondent to:

15.1 Rent the dental room on a commercial basis for the purpose of providing dental services through the Fourth Respondent.

15.2 The First Respondent would agree a rent free period allowing the Fourth Respondent to use the dental room so it could consider the viability of operating a dental practice from the dental room on its own account.

15.3 After a trial period, if the Fourth Respondent was satisfied that the dental room was a viable venue to operate from, the Fourth Respondent would rent the dental room from the First Respondent.

16. The Fourth Respondent accepted the offer and has been operating from the dental rooms since January 2021 when it started ordering materials for use at the dental rooms.

However, no fees were received by the Fourth Respondent from any patients using the dental rooms until April 2021.

17. Whilst the Fourth Respondent is operating from the dental room under the terms of a commercial arrangement, there is no business relationship between the First Respondent and the Fourth Respondent. Whilst there is no business relationship in place between the First and Fourth Respondents, the Fourth Respondent has been having technical issues with its booking system relating to the dental room and as such the First Respondent has:

17.1 Been taking bookings on behalf of the Fourth Respondent in order to assist it on a temporary basis.

17.2 Been taking payments on behalf of the Fourth Respondent, which have been immediately transferred to the Fourth Respondent in order to assist it on a temporary basis.

174. On 4 January 2022, there was a case management preliminary hearing in front of Employment Judge Norris. There was a further case management preliminary hearing in front of Employment Judge Baty on 1 March 2022.

175. On 1 September 2022, the third and fourth respondents applied to amend their responses, in particular to address the date when it was said the fourth respondent had started operating at the first respondent's premises, which differed significantly from the date put forward by the first and second respondent.

176. The reasons for requiring the amendment were set out:

The Third and Fourth Respondent's recollection of the Date was hampered by the following facts:

2.1 The First and Third Respondents are brothers resulting in the Arrangement being verbal and there being little paperwork being available to confirm the Date.

2.2 At the time of filing the original Grounds of Resistance the country was in the midst of the Covid-19 pandemic which was seriously affecting the Third and Fourth Respondent's business, resulting in a lot of stress and concern which caused the Third and Fourth Respondent to mis-state the Date that the Fourth Respondent started using the First Respondent's dental room.

177. The amendment included the following text*: It is the Third and Fourth Respondents' understanding that the First Respondent made the decision to*

close the dental practice within the First Respondent in December 2020 and that following the completion of any outstanding/incomplete dental works, the First Respondent's dental practice ceased to operate in April 2021.

15. After the First Respondent ceased to operate its dental practice, the Fourth Respondent started offering a completely different dental service from the First Respondent's premises ("Dental Room") from 21 April 2021. This dental service is completely independent to the dental service previously offered by the First Respondent. The Fourth Respondent did not purchase the assets of the First Respondent and no assets were transferred to it by the First Respondent. It rented the Dental Room from which the First Respondent had run its business over 4 months after the First Respondent had closed its business and made its staff redundant.

20. The Fourth Respondent has since May 2021 employed a dental nurse to provide dental nursing services at the Dental Room.

Law

Direct race discrimination

178. Direct discrimination under section 13 Equality Act 2010 occurs when a person treats another:
- Less favourably than that person treats a person who does not share that protected characteristic;
- Because of that protected characteristic.

179. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

180. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision. "

181. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the

context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

182. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: ‘The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.’ The ‘something more’ need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

183. The tribunal cannot take into account the respondent’s explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof: (Laing v Manchester City Council and others [2006] ICR 1519; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

184. The distinction between explanations and the facts adduced which may form part of those explanations is not a water tight division: Laing v Manchester City Council and anor [2006] ICR 519, EAT. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12. In Commissioner of Police of the Metropolis v Denby EAT 0314/16 the EAT confirmed that a tribunal may consider all relevant evidence at the first stage of the burden of proof exercise, even if some of it is of an explanatory nature and emanates from the employer, whether or not it is called by the employer. The case law did not require the tribunal at the first stage to ‘blind itself to evasive, economical or untruthful evidence’ from the employer which may help the

tribunal to decide that there are sufficient facts to shift the burden on to the employer to provide an explanation.

185. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16 Mrs Justice Simler said that: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

186. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

187. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

188. For an individual to be an actual comparator for the purposes of a direct discrimination claim, there must be no material difference in their circumstances: s 23 Equality Act 2010. Whether the situations of a claimant and her comparator are materially different is a question of fact and degree: Hewage v Grampian Health Board [2012] ICR 1054, SC.

Unfair dismissal: redundancy

189. Redundancy is one of the potentially fair reasons for dismissal: section 98(2)(c).

190. The definition of redundancy is found in section 139 of the Employment Rights Act 1996. It has a number of elements. The provisions which are relevant for the purposes of these claim are s 139(1)(b):

'*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 –*

……

(b) the fact that the requirements of [the employer's] business -

(i) for employees to carry out work of a particular kind …

(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.'

191. When considering redundancy dismissals, tribunals are not normally entitled to investigate the commercial reasons behind the redundancy situation. The reasonableness of the business decision which leads to a redundancy situation is not a matter on which the Tribunal can adjudicate: Moon and ors v Homeworthy Furniture (Northern) Ltd [1977] ICR 117, EAT. This does not mean, however, that we are obliged to take the employer's stated reasons for the dismissal at face value. In order to establish that the reason for the decision was genuinely redundancy, an employer will usually have to adduce evidence that the decision to make redundancies was based on proper information and consideration of the situation: Orr v Vaughan [1981] IRLR 63, EAT, and Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59, EAT.

Reasonableness

192. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…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 that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) of the ERA).

193. When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the employer were within the band of reasonable responses which a reasonable employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss.

Reasonableness in redundancy cases

194. In cases of redundancy, an employer will not normally be deemed to have acted reasonably unless it warns and consults any employees affected, adopts objective criteria on which to select for redundancy, which criteria are fairly applied, and takes such steps as may be reasonable to consider redeployment opportunities.

195. In R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price) [1994] IRLR 72, Glidewell LJ approved the following test of what amount to fair consultation: 'Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information

on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.'

196. An employer will need to identify the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and the choice of the pool should be a reasonable one or one which falls within the range of reasonable responses available to a reasonable employer in the circumstances. The definition of the pool is primarily one for the employer and is likely to be difficult to challenge where the employer had genuinely applied his mind to the problem. (Capita Hartshead Ltd v Byard 2012 ICR 1256 (EAT)).

197. In selecting employees for redundancy, the selection criteria must be reasonable and not merely based on the personal opinion of the selector. Provided the selection criteria are objective and applied fairly a tribunal should not seek to interfere in the way the individuals are scored or engage in a detailed critique of the scoring (British Aerospace v Green [1995] ICR 1006, CA and Nicholls v Rockwell Automation Ltd EAT/0540/11).

198. In Pinewood Repro Limited v Page UKEAT/0028 the EAT held that fair consultation during redundancy also involves giving an employee an explanation for why they have been marked down in a scoring exercise. Although this was a case primarily concerned with the now repealed statutory dismissal procedures, in Alexander v Brigend Enterprises 2006 IRLR 422, the EAT held that for an employee to understand the basis of the selection made by the employer, the employer should tell the employee the selection criteria and the scores.

199. When considering the question of the employer's reasonableness, the tribunal must take into account the process as a whole, including the appeal stage (Taylor v OCS Group Limited [2006] EWCA Civ 702).

200. We bear in mind this guidance from HHJ Richardson in Morgan: 'A Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A Tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4).'

201. The employer will have to conduct the selection process in good faith and give proper consideration to the applications of the potentially redundant employees: Darlington Memorial Hospital NHS Trust v Edwards and anor EAT 678/95.

Polkey reduction

202. Section 123(1) ERA provides that

> '…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the 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.'

A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

203. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

204. As Elias J said in Software 2000:

> 'The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.'

TUPE

205. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') apply to:

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

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

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

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

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

(regulation 1)

206. Under Reg 3(1)(a), four questions must be answered in the affirmative in order for there to be a 'business transfer' under that provision:

- was there a transfer 'to another person'?
- did an 'economic entity' transfer?
- did the economic entity 'retain its identity' after the transfer? And

- was that entity 'situated immediately before the transfer in the United Kingdom'?

207. The Tribunal must identify whether there is an identifiable economic entity. 'Economic entity' is defined as 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. (regulation 3(2).

208. In Cheesman and ors v R Brewer Contracts Ltd [2001] 1 IRLR 144 the EAT set out the following guidelines for determining the question of whether there is an 'economic entity' in existence:
   - there needs to be a stable economic entity, that is an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity that pursues a specific objective;
   - in order to be such an undertaking, it must be *sufficiently structured and autonomous* but will not necessarily have significant tangible or intangible assets
   - 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; and
   - an activity is not of itself 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.

209. In order for TUPE to apply to the transfer of part of an undertaking, the part in question need not exist as an identifiable, stable, economic entity prior to its transfer. It is sufficient that part of an economic entity becomes identifiable as a separate economic entity on the occasion of the transfer that separates the part from the whole: Fairhurst Ward Abbotts Ltd v Botes Building Ltd and ors [2004] ICR 919, CA.

210. In order to decide whether a retention of identity has occurred, all the factual circumstances of the transaction in question must be taken account of, including:

   - the type of business or undertaking
   - the transfer or otherwise of tangible assets such as buildings and stocks
   - the value of intangible assets at the date of transfer
   - whether the majority of the staff are taken over by the new employer
   - the transfer or otherwise of customers
   - the degree of similarity of activities before and after the transfer, and
   - the duration of any interruption in these activities.

   All of these are factors in the overall assessment and cannot be considered in isolation: Spijkers v Gebroeders Benedik Abattoir CV and anor [1986] 2 CMLR 296, ECJ.

211. The EAT set out guidance on the retention of identity issue in Cheesman and ors v R Brewer Contracts Ltd.:

- the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, among other things, by the fact that its operation is actually continued or resumed
- in a labour-intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by its predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity
- in determining whether the conditions for the existence of a transfer are met, it is necessary to consider all the factors characterising the transaction in question, but each is a single factor and none is to be considered in isolation among the matters falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they were suspended
- in determining whether there has been a transfer, account must be taken of, among other things, the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on
- where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets
- even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer
- where maintenance work is first carried out by a cleaning firm and then by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer
- more broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor
- the absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but is certainly not conclusive as there is no need for any such direct contractual relationship
- when no employees are transferred, the reasons why that is the case can be relevant as to whether there was a transfer; and
- the fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of work by one subcontractor and the start of work by the successor.

212. The fact that a business is carried out in a different way following the transfer does not necessarily mean TUPE does not apply. The provision of medical services is a type of undertaking in which it is particularly likely that different

ways of carrying on the undertaking may be adopted without destroying its identity: Porter and anor v Queen's Medical Centre (Nottingham University Hospital) [1993] IRLR 486, QBD

213. There are three different types of service provision change:

a. where 'activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor")' — Reg 3(1)(b)(i).

b. where 'activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf'

c. where 'activities cease to be carried out by a contractor or subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out by the client on his own behalf'.

Reg 3(1)(b)

214. Transfer of assets can occur without the actual ownership of the assets changing hands, where the transferee takes over use of the tangible assets needed for the activity carried out by the undertaking: Abler and ors v Sodexho MM Catering GmbH and anor 2004 IRLR 168, ECJ:

215. The fact that clients are free to choose whether to continue to use the services of the transferee does not preclude there being a transfer: Dodič v Banka Koper and anor 2019 ICR 1352, ECJ

Automatically unfair dismissals under TUPE

216. Regulation 7(1) provides that:

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

217. In determining the reason for the dismissals, we must apply the burden of proof in accordance with the guidance in Kurzel v Roche Products Ltd [2008] ICR 799, CA. The burden remains on the employer to show the reason for dismissal. If the employee asserts that the dismissal is instead for an automatically unfair reason, the employee has the burden of showing some evidence to support her case, but that is not a burden of proving the case. If the employer does not prove that the reason for dismissal was the one put forward by the employer, it is open to us to find that the real reason was that

asserted by the employee. But it does not follow, that we must find, if the reason was not that put forward by the employer, then it was the reason asserted by the employee. It is open to us to find that, on a consideration of all the evidence in the case, the true reason for dismissal was not advanced by either side: Marshall v Game Retail Ltd EAT 0276/13 .

ETOR

218. An employer can defeat a claim of automatically unfair dismissal by proving that the reason or principal reason for dismissal; was an ‘economic, technical or organisational reason’ which ‘entailed changes in the workforce’: (regulation 7(2).

219. Dismissing employees to enhance the saleability of a business is not an ETOR: Gateway Hotels Ltd v Stewart and ors 1988 IRLR 287, EAT. In Spaceright Europe Ltd v Baillavoine and ors [2012] ICR 520, CA, Lord Justice Mummery stated that ‘there must be an intention to change the workforce and to continue to conduct the business, as distinct from the purpose of selling it. It is not available in the case of dismissing an employee to enable the administrators to make the business of the company a more attractive proposition to prospective transferees of a going concern’.

220. The change to the workforce must an objective of the plan: Berriman v Delabole Slate Ltd [1985] ICR 546.

221. ‘Changes in the workforce’ means a change:

a. in the numbers of the workforce overall

b. in the functions of members of the workforce, or

c. to the place where employees are employed (regulation 7(3A)

222. The reasons for dismissal must relate to the future conduct of the business concerned: Wheeler v Patel and anor [1987] ICR 631, EAT. The transferor may not dismiss for a reason related to the transferee’s future conduct of the business: Hynd v Armstrong and ors 2007 SLT 299, Ct Sess (Inner House).

223. If an ETO reason is established, the dismissal will be regarded as having been by reason of redundancy or some other substantial reason and we will have to consider the fairness of the dismissal in the usual way.

Liability for dismissals

224. Under regulation 4(1) of TUPE, the contract of any person employed by the transferor and assigned to the organised grouping of resources or employees subject to the transfer will have effect as if made with the transferee. The transferor’s rights powers duties and liabilities in relation to the contract will transfer to the transferee. The circumstances in which the contract will

transfer are either that the employee is employed by the transferor and assigned to transferring entity immediately before the transfer or would have been so employed if she or he had not been dismissed in the circumstances described in regulation 7(1): (regulation 4(3).

Submissions

225. We had helpful oral submissions from all of the parties and Ms Holden also provided us with helpful and detailed written submissions. We have taken all of these submissions into account in reaching our conclusions but refer to them only insofar as that is necessary to explain those conclusions.

Conclusions

Issues with the evidence

Documents which might have expected to see

226. We generally have to assume where parties are legally represented that their representatives will provide them with appropriate advice as to the evidence relevant to particular issues in the claims. In a redundancy case, evidence about economic performance may well be relevant. In a transfer case, issues such as what clients / patients go from one business to the other are likely to be of relevance. In this case, it was clear that there were issues to be considered about who was running the dental practice at the Fleet Street premises in early 2021 and that documentary evidence on that issue would have been relevant.

227. In this case, we were not provided with:

- Evidence of the performance of the first respondent's dentistry department, although we were told that it would have been possible to obtain that evidence;
- Patient numbers: The second respondent said it would have been possible to interrogate the database to find out about dental patient numbers and that the information as to how many patient records were sent to the fourth respondent was 'probably extractable';
- Evidence about CQC registration and deregistration: no documentary evidence was produced.

228. Other evidence relevant to who was running the dental practice was provided late after requests by the claimants, in particular the evidence as to payments to agency staff, to Dr Kelly, and between the first and fourth respondents.

229. Some evidence was incomplete. For example, it was not at all clear why we were not provided with Ms Miric's employment contract in its entirety.

Amendment of the response and explanation for the amendment

230. It was notable that the third and fourth respondent's response originally said that the fourth respondent started operating out of the rooms from January 2021 although not receiving fees and that was when it ordered materials for the practice. This was inconsistent with what the first and second respondent said but consistent with what Dr Kelly had said in WhatsApp messages about an agreement being reached in January 2021. We did not consider that the third respondent's explanation for how the 'wrong' date came to be included was satisfactory. If this was information the third respondent obtained from others as to dates, it is revealing that others he perceived to be more closely connected with the arrangements considered that the arrangements had commenced in January. We note that the response was submitted only some four months after the April dates; we considered that these were not such elderly matters that the third respondent would credibly have forgotten the sequence of events to that extent.

231. We concluded that the third and fourth respondents amended the response and stuck with the April 2021 dates as these corresponded with what the first and second respondents had said and were perceived by all the respondents as better supporting their joint case that there had been no transfer, in circumstances where the deal had been done by January 2021 and the fourth respondent was very much preparing to take over the dental rooms.

232. The third respondent frequently said he had little recall or knowledge of particular points. We accepted that he was a busy person running a busy practice during what is probably fairly categorised as a globally stressful time. However, it was open to the respondents to call other witnesses on some of the detail about arrangements and discussions such as Ms Carey, and they chose not to do so.

Dr Kelly documentary evidence conflicts

233. A significant issue was the tension between what Dr Kelly had said in her WhatsApp messages and what the respondents were representing about the discussions and agreements. We were conscious we had to treat Dr Kelly's messages with some care in circumstances where she did not attend as a witness.

234. No one suggested that Dr Kelly had any reason to be untruthful or any malign motivation. The second respondent simply said she must have gotten the wrong end of the stick.

235. The third respondent described Dr Kelly as a very enthusiastic and exuberant person who was keen to work with him and had put two and two together to make ten.

236. In assessing whether we accepted that Dr Kelly was mistaken in what she said in her various messages, we had to bear in mind that the version of events put

forward by the third respondent in his witness statement about what discussions he had with Dr Kelly and when was clearly incorrect. He ultimately accepted that it was incorrect as to timing. He also had to accept that some of the content of Dr Kelly's messages was correct in that the plan she outlined married up with the actual plan for the Fleet Street arrangements; in essence he sought to suggest that her enthusiasm made her believe that discussions which were just scoping discussions reflected more fully formed plans or arrangements. We also bear in mind that, for example when Dr Kelly indicated that the second claimant would be approached for work by someone at the first respondent, that did indeed happen. She indicated that she expected the third respondent to contact the second claimant and that happened, despite what the third respondent told us in evidence about how he would not get involved in dental nurse recruitment.

237. Given the unreliability of the third respondent's evidence about these discussions and the correlation between what Dr Kelly and said and such other evidence as we had, we concluded that the WhatsApp messages were a reasonably accurate account of the discussions which Dr Kelly had with the third respondent.

238. Another factor which influenced our findings on points in dispute or where the evidence was thin, was a certain caginess on the part of the respondents. We have highlighted some examples where evidence was not volunteered. Another example was the third respondent's failure to mention in evidence in chief that the fourth respondent already had a satellite general dental practice at Montagu Mansions. That was relevant to the experience he had in running such a practice and his interest in having satellite practices but perhaps was not perceived as fitting with his case that he only reluctantly took on the dental practice at Fleet Street.

8. Unfair dismissal

Issue 8.1. Was there a "relevant transfer" for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") from the 1st respondent to the 4th respondent in late 2020/early 2021?

239. We considered first whether there was a business transfer.

240. Logically the first question was whether there was an economic entity capable of transferring.

241. We had regard to the Cheesman guidance. It seemed to us that the dental services offered at the Fleet Street premises involved an organised grouping of persons: the dental nurses and dentists. They used assets in the form of the room and its equipment to pursue a specific objective of providing dental services to the patients. It seemed to us that the dental services were sufficiently structured and autonomous to amount to a stable economic entity

in themselves, but if we were wrong about that because of the overlap of support personnel and shared premises with the other services offered by the first respondent, we reminded ourselves that where the transfer of a part of an undertaking takes place, the part in question need not be a discrete economic entity in itself prior to transfer.

242. The next question was whether the economic entity or part transferred to the third and/or fourth respondents. Here we had to bear in mind all of the Spijkers and Cheesman guidance.

243. The type of entity in question was a dental practice providing general dentistry. It seemed to us that the premises themselves were of considerable importance. The premises were located in an area where they would be convenient for those working in surrounding offices. The patient base itself was clearly an important part of the entity. We were told that the dentists had changed frequently over the years so clearly the entity was not dependent on the dentists remaining the same although clearly it was advantageous if they did so since no doubt patients would prefer to continue to see a practitioner they knew and trusted.

244. It seemed to us that in terms of assets, the significant assets passed from the first to the fourth respondents in terms of use of the premises themselves and the dental equipment contained in those premises.

245. The services provided appeared to have been identical – general dentistry.

246. In terms of intangible assets, it appeared to us that these were association with the first respondent and its broader services and reputation and the patient connections themselves. The first respondent did everything it reasonably could do to make clear that Temple Dental was a trusted provider of services and also did everything it reasonably could to encourage transfer of patients. In circumstances where the respondents could have provided, but failed to provide the Tribunal with actual figures as to the patients who transferred from the first to the fourth respondent, we concluded that there must have a been a significant transfer. We could see no sensible reason why the respondents would have failed to provide this clearly relevant information had that not been the case.

247. In terms of staff, the claimants were the only staff wholly dedicated to the dental services and they did not transfer. However, it was relevant to consider why they did not transfer. We concluded that this was because the third and fourth respondents wanted to start afresh with new nurses. There could be no reason to require their dismissal prior to the third and fourth respondents taking over the dental rooms other than to avoid any responsibilities or liabilities the third and fourth respondent might inherit. In these circumstances, we give relatively little weight to the fact that the dental nurses were not taken on by the third and fourth respondents.

248. As to the dentists, clearly there was a new dentist in the form of Dr Orlans. By the time the third and fourth respondents took over the dental rooms, we concluded that there was already an agreement with Dr Gesto, based on the

messages Dr Kelly sent to the second claimant in Janaury 2021. Again it was open to the respondents to provide evidence showing when Dr Gesto was approached and an agreement was reached but they did not do so.

249. The support staff in the form of reception services were the same before and after the move. Patients would telephone the same number to make an appointment.

250. So far as timings and whether there was any gap in provision of services, we concluded that there was an agreement in principle between the second and third respondent by the time the claimants were given notice of redundancy. We could not otherwise account for the fact that, as we found, the third respondent was able to approach Dr Kelly with detailed proposals that afternoon. Some of the detail was clearly still under discussion and things were finalised in January 2021. That would tally with what Dr Kelly said in her messages and the version of events in the original responses of the third and fourth respondents. It would also account for some of the missing documents we have described earlier in these Reasons. That may have included arrangements about a likely date for the transfer to take place. It appears that Dr Kelly was still anticipating starting work for the fourth respondent for a period into 2021 whilst carrying out dental work on behalf of the first respondent.

251. We had no clear evidence as to why Dr Kelly did not ultimately work for the fourth respondent and when such a decision had been made. The third respondent said in evidence that he had never made her an offer of work and that he had become aware of problems with her practice and complaints about her later on. In fairness to Dr Kelly, we should record that we had no detailed evidence of any such problems and our observation that it suited the third respondent's case to say that he would not have been happy to employ Dr Kelly.

252. We concluded that if there was no job offer, there was something very close to one and that at least into January / February 2021, Dr Kelly was in close contact with both the third respondent and also in discussions with Ms Carey. At some point she decided to give notice that she did not want to continue to work at Fleet Street; it is unclear whether that was a decision she conveyed to both the second and third respondents. It may be that the third respondent had already made an agreement with Dr Orlans and also Dr Gesto by the time Dr Kelly decided to leave.

253. There was clearly some overlap in April 2021 in the sense that the fourth respondent employed Ms Miric to start her trial period whilst Dr Kelly was still finishing up her work for the first respondent. We concluded that the third respondent perceived that it would damage his case to acknowledge that Ms Miric was working as a dental nurse assisting Dr Kelly. There was no gap in the provision of services, although we accepted that the level of services was depressed.

254. Looking at all of those factors in the round, we concluded that there was a transfer of a stable economic entity or part of such an entity which retained its identity from the first respondent to the third / fourth respondents.[2] Exactly the same sort of dental services were being provided to, we conclude, substantially the same patient base at the same premises with the same equipment using the same reception services. Although the agreement was made earlier, the actual transfer itself appears to have been in April 2021.

255. In the circumstances, we did not have to go on to consider whether there was a service provision change. Had we had to do so, we would not have found that to be the case. This was not an outsourcing situation where the third and fourth respondents were providing services for the first respondent.

Issue: 8.2. If so, were the claimants' dismissals because of that TUPE transfer or in connection with that TUPE transfer?

256. The test is of course whether the dismissal was *by reason* of the transfer and we had to decide whether the transfer was the sole or principal reason for the dismissal.

257. The account given by the first and second respondents was that a decision was made to close down the dental services before there was any discussion about the rooms being used by the third and fourth respondents. There was a redundancy situation since there was no plan to continue to provide the services and therefore the first respondent had no requirement to continue to employ dental nurses.

258. We have already found we did not accept that account and that the second and third respondent had agreed in principle that the third and fourth respondents would be taking on the dental rooms prior to the decision to dismiss the claimants. The third respondent had told the second respondent that he wanted to start afresh with nurses so it was necessary for the first respondent to dismiss the claimants in order to move forward with the arrangements with the third and fourth respondents. The fact that the third respondent later thought of taking on the second claimant, encouraged by Dr Kelly, does not seem to us to undermine the evidence that his initial plan was to start afresh.

259. Absent that agreement, we concluded that the first respondent would not have dismissed the claimants at that time for redundancy or any other reason. We were not persuaded that the first respondent would have simply closed down the dental service leaving the room and the equipment fallow at a point in time

[2] We have concluded that the third and fourth respondents were the transferees because we understand the fourth respondent to be a partnership of Dr A Dawood and Dr Tanner and so they are the legal persons to whom the business transferred. Arguably the fourth respondent should simply be Dr Tanner. We did not hear any submissions on this issue and the parties should write in if this is a matter which they say requires reconsideration.

where the business overall appears to have been very profitable, and far more profitable than in previous years. There was no urgent financial need to save costs and it would clearly be more prudent to seek to find another dental service to take on the rooms. We accepted that the dental service had been picking up and that there was demand post lockdown, as the claimants said. We also accepted that the first and second respondent may well have experienced ennui with running a dental practice, an area in which they personally had no skill and which they said consumed a lot of management time, and decided they would prefer to dispense with running one. We did not accept that they would simply have shut it down with no takers. Had the second respondent's evidence been that he had made investigations and there were no possible takers or that he had planned an alternative use for the rooms, a decision simply to shut down the service might have been more credible.

260. In those circumstances, we concluded that the reason or principal reason for the claimants' dismissals was the planned transfer.

Issue: 8.4. Can the 1st respondent/4th respondent as appropriate show an economic, technical or organisational reason entailing changes in the workforce?

261. We have found that the first respondent's reason for dismissing the claimants was to transfer the services / rooms to the third and fourth respondents unencumbered by dental nurses. We did not find for example that his reason was simply to reduce costs during the 'winding down' period by employing agency nurses instead. It appeared that the winding down or transition period was of uncertain duration. In any event, had this been his motivation, it is hard to understand why he would not have consulted with the claimants as to whether one or both of them would like to cover such work as there was during that period. In those circumstances, the reason for the dismissals was not an economic, technical or organisational reason entailing changes in the first respondent's workforce.

262. The first respondent cannot rely on any ETO reason of the third and fourth respondents so it was not relevant to consider any such reasons.

263. The effect of our findings is that the claimants' dismissals were automatically unfair.

Issue: 8.3. Against which of the 1st and 4th respondents are the claimants' unfair dismissal complaints therefore properly made?

264. The effect of regulations 4 and 7 of TUPE is that liability for the dismissals passes to the third and fourth respondents. We say the third and fourth respondents as we understand the fourth respondent to be a partnership of Dr A Dawood and Dr Tanner.

Issue 8.5. Did the 1st/4th respondent as appropriate dismiss the claimants for a potentially fair reason? The reason relied on is redundancy.

265. We have already found that the reason for the dismissals was the transfer itself.

Issue: 8.6. Did the 1st/4th respondent carry out the dismissal reasonably in all the circumstances. The claimants have indicated that, in relation to this, issues to be considered will include consultation, alternative employment and selection for redundancy.

266. Although we did not have to consider this issue in the circumstances, it seemed to us that that the consultation was essentially a cosmetic exercise. The first and second respondents were aware there were certain motions that had to be gone through to make redundancies and went through those motions.

267. So far as redeployment was concerned, we accepted that there was no admin role or available compliance role but, had this been a redundancy situation, it would have been fair to consider with the claimants whether they were interested in covering the dental nursing work available during any winding down period.

Issue 8.7. If the dismissal was unfair, should any adjustments to compensation be made under the principles in Polkey v AE Dayton Services Ltd [1988] ICR 142 HL?

268. We had to consider what the prospects were of the claimants being fairly dismissed had they not been unfairly dismissed. This involved considering what would have happened had the second respondent not acceded to the third and fourth respondents' request or requirement that the claimants' services be dispensed with prior to the transfer.

269. Logically there were two possibilities:

- The third and fourth respondents decided to take the dental services on in any event
- The third and fourth respondents declined to take the services on.

270. As a first stage we had to form a view of how likely each of these eventualities was. We bore in mind that the claimants were both part time and their overall salaries did not represent a huge expense in relation to the turnover and profits of the first respondent. We bore in mind that whilst the third respondent was vocal about how unattractive the Fleet Street business was to him during the hearing, the actions of the third and fourth respondents and in particular the alacrity with which the third respondent approached Dr Kelly, suggested to us that there was a reasonable appetite on the part of the third and fourth respondents to acquire a general dentistry practice in that location. Unlike the second respondent, they had expertise in running a dentistry practice. We accepted the claimants' evidence that there was a growing demand for private dentistry.

271. It seemed to us that it was somewhat more likely than not that if the second respondent had stood firm and not dismissed the claimants, the third respondent would nonetheless have gone ahead with the transfer. At worst he would have acquired the equivalent of one FTE dental nurse and that might well have seemed a burden worth assuming in the circumstances. We put this possibility at 60%.

272. Had the third respondent not required their dismissal, was there a prospect that the claimants would nonetheless have been fairly dismissed? It seemed to us that there was a small chance. During the 'winding down' period, there was a reduction in the need for dental nursing and the first respondent might have fairly conducted a redundancy exercise. That exercise, we consider, would have fairly involved selecting one of the claimants for the available work.

273. We conclude that there was no more than a 20% chance that the first and second respondents would have gone through a redundancy process and dismissed one of the claimants during this period. The period was a relatively short one and the amount of work to be done during the period was uncertain, the claimants were not very expensive staff and there appeared to be considerable genuine goodwill between the second respondent and the claimants. So there was a 10% chance of each claimant being made redundant on the assumption that the third and fourth respondents did not pull out of the transfer.

274. Had the third and fourth respondents declined to enter the transfer arrangements, we considered that the first and second respondents would have investigated whether another dental service would be interested in the rooms. What would have happened in that situation is, on the basis of the evidence we have so speculative that we cannot sensibly form any view as to what percentage reduction we should make for a possible dismissal and we do not assess any such reduction.

9. Section 13: Direct discrimination because of race

Issue 9.2. In relation to all three allegations, the claimants rely on a hypothetical comparator and on the following actual comparators:

9.2.1. Dr Kelly and Dr Gesto (both dentists).

275. We considered that there were material differences between the claimants and Dr Gesto and Dr Kelly. The difference in profession was a material difference as was the fact that the dentists were on contracts which were contracts for services rather than contracts of employment. These were differences which could account for differences in treatment. An additional complicating factor or difference was Dr Gesto's absence on maternity leave which meant, as we understood it, that she was not being paid by any respondent during the transition period.

276. We therefore considered the race claims on the basis of hypothetical rather than actual comparators.

Issue:9.1. Did the respondents, because of the claimants' race, treat the claimants less favourably than they treated or would treat others? The allegations of less favourable treatment relied on by the claimants are as follows:

9.1.1. That the reason why the 1st/4th respondent dismissed the claimants was race;

277. This allegation is logically simply a way of characterising the remaining two, more specific, allegations, rather than an additional allegation, and we consider those allegations individually.

9.1.2. That the 2nd respondent succumbed to pressure put on him by the 3rd respondent to dismiss the claimants because of race, and was untruthful as to the real reason, instead falsely claiming that it was redundancy;

278. The claimants were dismissed by the first respondent and the decision was made, as we understood it, essentially by the second respondent in consultation with his wife, as fellow director. We had to consider whether race played any part of that decision.

279. Were there any facts from we could reasonably conclude that the second respondent was influenced by the claimants' race so as to cause the burden of proof to shift?

280. The appropriate hypothetical comparators were white nurses whom the second respondent had been told that the third and fourth respondents did not wish to retain.

281. We could find no facts which caused the burden of proof to shift. We accepted the second respondent's evidence that the reason why the claimants were not on the first respondent's website was that it was not possible to book appointments to see the dental nurses alone. The first and second respondents had employed the claimants in the first place and the relationships appeared to be good and cordial ones prior to the events around the claimants' dismissal. There was simply no evidence from which we could properly conclude that the claimants' race played a role. All of the evidence pointed to the second respondent dismissing the claimants in order to accede to the wishes of his brother and get rid of the burden of running a dental practice whilst retaining the benefit of having such a service available to the first respondent's clients.

282. As to the reasons put forward by the first and second respondents for the dismissals, we considered whether the fact that we rejected those reasons was material from which we could properly draw inferences. It was not clear to us that the second respondent understood that the dismissals were not genuinely for redundancy; we did not consider that his assertion of redundancy as the reason for the dismissals was consciously misleading. Where he and the third

respondent were deliberately misleading was as to the circumstances around the business transferring to the third and fourth respondents. However it seemed far more likely that the reason for that was that the respondents were conscious that obligations to the claimants might pass to the third and fourth respondents and the second respondent was keen to help his brother avoid any ongoing liability. It seemed to us that this motivation was much the most likely reason for the evidence we found unreliable, given the context and in particular that we found no facts which pointed to race being a conscious or unconscious motive for the second respondent.

283. We did not uphold this claim.

Issue: 9.1.3. That the 3rd respondent did not wish the claimants to remain employed when he took over the practice from the 1st respondent and required them to be dismissed because of race.

284. We concluded that the third respondent did want to take over the undertaking free from the existing dental nurses. Were there facts from which we could reasonably conclude that the claimants' race formed a material part of his reasons?

285. As to the incidents described by the claimants where the third respondent did not acknowledge them / greet them on occasions when they were assisting Dr Marti at his premises, we accepted the third respondent's evidence as to why he would not have made a point of greeting the attending dental nurses on the occasions described. This was not a matter from which we could draw any inferences.

286. Similarly, we did not consider that the pictures of staff from the Dawood and Tanner website were material from which we could draw any inferences, although we could understand why the claimants looked at these pictures and felt that they did not see any staff who, as they put it, 'looked like them'.

287. A more significant matter was the fact that we have rejected a proportion of the third respondent's evidence in particular as to the discussions with Dr Kelly and how far advanced the plans for the transfer were at various points. We have to consider with care whether it is reasonable to conclude that the evidence has been misleading to cover up conscious or unconscious race discrimination.

288. A theoretical possibility was that the third respondent was seeking to conceal his desire to start afresh with new nurses because that was in part a desire to start afresh without two black nurses. We gave that possibility considerable scrutiny but ultimately rejected it. We considered that the evidence was misleading because the respondents were seeking to avoid a conclusion that there had been a transfer of an undertaking with the liabilities that might entail. It might have been a reasonable inference that the claimants' race played some role in the desire to start afresh if there were contextual facts which supported that analysis. We did not find such facts and, in particular, the fact that the third

respondent investigated the possibility of employing the second claimant seemed to us to point away from such an inference. We did not consider that either the evidence of the claimants' encounters with the third respondent or the apparent ethnic makeup of staff pictured on the fourth respondent's website was material from which we could draw inferences. The incident where the first claimant was sent home because one of Dawood and Tanner's nurses was used to support Dr Marti was not material which led us to draw any inferences. There was no evidence that the third respondent had played any part in the incident. We considered that the most likely reason for the third respondent to want to start with a clean slate was that the third respondent did not perceive the second respondent to have been successfully running the dental practice, as he told us in evidence.

289. For all of these reasons we did not uphold the claims of direct race discrimination.

Issues: 10. Unlawful deduction from wages (first claimant only)

10.1. The first claimant claims that she is entitled to be paid bonuses totalling around £833. She maintains that she was promised a contractual bonus of £500 a year; that this was on the basis that the respondent would retain 50p per hour which it would pay back at the end of the year in the form of this bonus; that this was agreed with the respondent in April 2018 and was payable once a year every April; that she received the bonus payable in April 2019 but that she had not received the bonus payable in April 2020 or a pro rata bonus up to the end of her employment.

10.2. Did the claimant have a contractual right to be paid the above bonus?

10.3. Whether this complaint is properly brought against the 1st or 4th respondent will depend on the answer to the TUPE questions in paragraph 8 above.

290. The basis on which the respondents defended this claim was that it was described as a 'bonus' and the contract said that, after the first year, bonuses were entirely discretionary.

291. Our finding, on the basis of the facts we have found, is that whilst this was called a 'bonus' at times, what it was in fact was an agreed lump sum in lieu of an hourly pay rise. The first claimant entered into an agreement that she would take the lump sum rather than that part of the pay rise in 2018. At the point when pay arrangements were being agreed in 2019, it appears that the first claimant was on maternity leave. We heard no evidence of any discussion or further variation to her pay arrangements.

292. We concluded that the first claimant continued to have a right to be paid in accordance with the original variation to her contract, ie that she would be paid £500 a year in lieu of a 50p per hour pay rise. We will need to hear more detailed evidence and submissions as to what sum is properly owing given the first claimant's period of maternity leave. We have upheld the first claimant's claim, subject to calculation of its value.

293. Because the first claimant was unfairly dismissed by reason the transfer and that prevented her from being employed immediately before the transfer, liability for this sum has passed to the third and fourth respondents.

Remedy hearing

294. The parties should write in as soon as possible if they are of the view that there is inadequate time for the parties to be ready for the hearing provisionally listed for 20 March 2023 and with any applications for directions they consider are required for that hearing.

Employment Judge Joffe
02/03/2023

Judgment sent to the parties on:07/03/2023

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For the Tribunal Office: