EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. Gilston (deceased) & ors	v	**Kalamazoo IT Limited**

Heard at: **Birmingham** **On:** **7,8,9 and 10 August 2023**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **Miss. Skinner, counsel**

Respondents: **Mr. P. Collins, representative**

JUDGMENT

1. The respondent's application to postpone the final hearing was refused.
2. All of the claimants' claims for wrongful dismissal were well founded and succeed.
3. All of the claimants' claims for unfair dismissal were well founded and succeed. The dismissals were both substantively and procedurally unfair.
4. The Tribunal made the following awards :-
   (a)Mr. Gilston (deceased) total award of £35,797.51
      (i)Basic award £5,472.08
      (ii)Compensatory award £27,100
      (iii)Notice Pay £2,287.39
      (iv)Grossing up £938.04
   (b)Mr. Hayes total award of £52,068.24
      (i)Basic award £14,960
      (ii)Compensatory award £30,676.88
      (iii)Notice £4,560.95
      (iv)Grossing up £1,870.41
   (c)Mr. T. Marriner total award of £14,256.74
      (i)Basic award £4284.72
      (ii)Compensatory award £9049.31
      (iii)Grossing up £922.71
   (d)Mr. G. Stephens total award of £12,381.96
      (i)Basic award £3981.78
      (ii)Compensatory award £7608.64
      (iii)Notice £791.54

REASONS

1. These are the written reasons requested by the parties following oral reasons given on 10 August 2023. By claim form dated 11 October 2021 the claimants, Mr. Roy Gilston (now deceased); Andrew Hayes, Tim Marriner and Gordon Stephens brought complaints of (a)unfair dismissal and

(b)wrongful dismissal. Mr. Gilston's claims are brought by his widow Mrs. Gilston.

2. The cases they pursue before the Tribunal share the similar factual background; all claimants allege they were informed by the respondent, their employer, that it had lost a contract with Cegedim to a competitor CDW UK Limited so that they would be eligible to TUPE transfer to CDW UK Limited. Later they were told that CDW UK Limited had refused to transfer them over and that CDW UK Limited was now responsible for the claimants' employments and they were no longer employed by the respondent as of 31 May 2021. The respondent maintains there was a transfer of the claimants' employment to CDW Limited or alternatively they were dismissed fairly by reason of redundancy.

Postponement application

3. At the commencement of the final hearing the respondent renewed its application dated 3 August 2023 to vacate the hearing. Employment Judge Kenward had previously dismissed the application. The basis of the respondent's paper application was that the director (one of the two respondent's witnesses) was unavailable to attend the hearing. The respondent renewed its application orally at the final hearing. The Tribunal refused the application on the basis that it was not satisfied that there were exceptional reasons for doing so and that it was in the interests of justice to postpone; it was in the interests of justice to proceed with the hearing. However, the Tribunal granted an indulgence to the respondent by modifying the timetable to hear the respondent's evidence on Wednesday morning. It was a matter for the respondent's witness, Mr. Shaikh, if he chose to fly back from France to the UK to give evidence (it not being possible this week to secure consent from France for him to give evidence from abroad).
4. The history of the case is that on 11 April 2022 at a preliminary hearing Regional Employment Judge Findlay listed the case for a 4 day final hearing running from 27 to 30 of March 2023. The listing was postponed because of congestion in the Tribunal list. Notice of the new listing from 7 to 10 August 2023 was sent to the parties on 17 April 2023. The respondent's representatives Peninsula accept that they had received notice of the new listing but failed to notify the director Dr Kamran Hameed Shaikh until 27 July 2023. The respondent did not apply to postpone the case until 6 days later on 3 August 2023. The respondent's application to postpone the case is dated 3 August 2023 and timed at 17.24.
5. This case was issued by the claimants on 11 October 2021 some 22 months ago. In that time, one of the claimants Mr. Gilston, has sadly passed away.
6. There is no dispute that the respondent's representatives received this notice. They did not inform their client of the new listing until 27 July 2023. In that correspondence Mr. Shaikh one of two witnesses for the respondent stated *"I am not available on those dates as I hadn't heard anything and have now made other commitments for those days which will be extremely difficult to cancel."* There was no suggestion in that email correspondence that the witness was actually travelling abroad with his family for a holiday. The postponement application of Peninsula stated that the representative had a further conversation with Dr. Shaihk on 3 August 2023 who said that he had booked a holiday in France with his family starting on 5 August 2023 and ending on Thursday 10 August 2023 when he would return to the U.K.

The respondent accepted that it's procedure of informing the client of the trial date had fallen short but the communication of the final date had not made been made to the client. No other contact appears to have been made by Peninsula to the respondent or the respondent to Peninsula between March 2023 and 27 July 2023 when Mr. Collins representing the respondent contacted Dr. Shaikh. Dr. Shaikh at that time had returned from a flight from Pakistan to the United Kingdom and returned to work on 28 July 2023.

7. In writing the claimant's solicitors robustly opposed the written application to postpone and sought a strike out/deposit order. They stated that the respondent had changed representatives on a number of occasions and had an obligation to keep in touch with advisers as the progress of the case. On 22 December 2022 BPE solicitors ad previously representing the respondent had come off record. The respondent represented themselves until 6 March 2023 when they instructed Wildings Solicitors to prepare for the full merits hearing. Wildings came off record on 24 March 2023, the Friday prior to the first trial listing. On 24 March 2023 Peninsula business services Limited wrote to the Tribunal to confirm they were the new representatives for the respondent. The hearing was re listed for 7 to 10 August 2023. The claimants also referred to the fact that the respondent had a second witness in the absence of Mr. Shaikh, Mr. Dunn.
8. Judge Kenward refused the application to postpone taking into account *"the lateness of the application; the proximity to the hearing; the fact that the events at the heart of the case happened over two years ago that any re-listed four day hearing would be unlikely to take place until May 2024 at the earliest; the postponement would also result in 4 days hearing time being lost to the Tribunal".* Judge Kenward stated that the hearing would proceed on 7 August 2023 and the respondent could make an application at the hearing for any evidence from Dr. Shaihk, at a later date.
9. The respondent renewed the application before me today stating that Peninsula had now become aware that Mr. Dunn left the respondent's employment in March 2023 but the respondent had not made Peninsula aware of this fact until very recently. Peninsula and the respondent were unaware as to where Mr. Dunn was or could not seek a witness order for his attendance. He stated that during Peninsula's conversation with Mr. Shaihk on 3 August 2023 Mr. Shaihk did not make Peninsula aware that Mr. Dunn had left the respondent's employment and that is why it was not included in the letter applying for a postponement.
10. The Tribunal made enquires about the possibility of a re-listing. From enquiries a possible listing could be week commencing 11 September or 18 December 2023 but there was no guarantee if placed in the list in those weeks whether it would be a firm listing because other cases were already listed in those weeks. If other cases stood up and did not settle it may well be that this case would have to be relisted for final hearing in May 2024. Further from enquiries with Judicial Administration seeking and obtaining permission for Mr. Shaihk to give evidence from France was very unlikely to be arranged this week at short notice. The claimant's counsel instructed for trial was unavailable for the dates in September or December 2023 and the claimants had already taken time off work to attend this hearing and would have to seek further time off for a further listing. Although Peninsula was available in the weeks referred to there was no information as to whether Mr. Shaihk or Mr. Dunn would be available. In fact, there was no information

about Mr. Dunn at all; the respondent was unaware as to where Mr. Dunn was presently because he had left the business and there was no information as to whether he would attend a future listing. The claimant submitted that a costs award against the respondent was insufficient in the circumstances that this was the second listing; the case was already old dating back some two years; delay affects memory and therefore the cogency of evidence and one claimant had already passed away. It was unfair to Mr. Gilston's widow who acts for the estate who had to endure the distress of a further re-listing of the case with all the unpleasant memories that it brings with it.

11. The starting point for a postponement application in these circumstances is Rule 30A of the Employment Tribunal Constitutional Rules of Procedure Regulations 2013 which states that where a party makes an application for a postponement for hearing less than seven days before the hearing on which the hearing begins the Tribunal may only order the postponement where (i)all other parties consent to the postponement and it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement or (ii)it is otherwise in accordance with the overriding objective (iii)the application was necessitated by an act or a omission of another party or the tribunal or there are exceptional circumstances. The tests in the particular circumstances are "exceptional circumstances" or otherwise in accordance with the overriding objective.
12. The respondent's representative had not been provided by the respondent with any information or evidence as to when Dr. Shaihk booked his holiday to France or any steps taken upon becoming aware of the hearing on 27 July 2023 to re-arrange any commitments. The respondent's representative failed to inform the respondent until 27 July 2023 as to the date of the hearing on 7 August 2023. The representative had made an error but the Tribunal does not find that this meets the exceptional test in the context of no information as to when the respondent actually booked the holiday to France or any steps made to change commitments. Further it would appear neither respondent nor its representative have engaged in communication about the trial for over four months. The respondent and its representative both have obligations to ensure they are aware of the progress of the case.
13. Peninsula has not been able to inform the Tribunal or provide any evidence to substantiate when the director of the respondent booked a holiday to France (returning to the UK on the final day of the proposed trial listing). Only at today's hearing, Peninsula has disclosed that the second witness for the respondent Mr Dunn is no longer employed by the respondent and has not been in their employment since March 2023. This was not included in the first application to postpone dated 3 August and it is contended was not a matter discussed between Dr. Shaihk and his representative until today. The respondent does not appear to have communicated that with its advisers. If there is fault in informing a client as to the listing of a final hearing that is a matter for the client to take up with its advisers. The Tribunal determined these matters, and the lack of full information did not satisfy the exceptional test in Rule 30A of the 2013 Rules.
14. The Tribunal considered the overriding objective. The Tribunal should deal with cases fairly and justly by so far as practical ensuring that (i)the parties are on an equal footing (ii)dealing with cases in ways which are proportionate to the complexity and importance of the issues (iii)avoiding

unnecessary formality and seeking flexibility in the proceedings(iv) avoiding delays so far is compatible with proper consideration of the issues and (v)saving expense.

15. In respect of ensuring that parties are on an equal footing; there is no dispute that both parties by way of their representatives were made aware of the final hearing date some four months ago. The respondent's representative did not make the respondents witnesses aware of the new listing; but there is no evidence to show that the respondent (aware of the hearing postponement in March) made any attempts to establish from its representative the dates of the new listing. The respondent remains represented at the hearing and can put its case to the claimants; including any documentary evidence and submit the respondents witness statements as written representations. Alternatively, the Tribunal could modify the hearing timetable to accommodate the return of Mr. Shaihk to give evidence. This would ensure that the case is heard within the trial window in accordance with the case of **Emmereuko v Croma Vigilant (Scotland) Limited & ors UKEAT/0014/20**. The claimants have been waiting a significant amount of time for this case to come to final hearing. One claimant has passed away; his widow has to relive this case on each occasion it is relisted. The claimants have taken time off this week to attend. On another occasion they would have to negotiate further time off work. The passage of time does affects memory and therefore the cogency of evidence.
16. In respect of dealing with cases in ways which are proportionate to the complexity and importance of the issues, this is the second listing of the case which concerns matters dating back some two years. The core issue in this case his whether there was an intentional grouping carrying out particular work for the contractor which can be evidenced by way of oral evidence and documentary evidence. Both parties are represented and the respondent is able to put its case to the claimants witnesses.
17. In respect of avoiding unnecessary formality in seeking flexibility in the proceedings the Tribunal considers that it can allow time in its timetable to permit the respondent to give evidence on Wednesday. The respondent's witness is located in France, a short distance from the UK and given the time scale the tribunal can be flexible to allow the witness to return to the UK and give his evidence. The witness appears to have known since the 27th of July that this hearing was listed for the 7th of August 2023 but there is no information or evidence as to when the witness booked the holiday and why it was not feasible to rearrange this.
18. In respect of avoiding delay so far is compatible with proper consideration of the issues, this listing is the second listing of this case which dates back some two years. Delay affects memories and affects the cogency of evidence. One claimant has already passed away. His widow has to relive these events each listing. The claimants have taken time off to have their case heard I would have to re go negotiate time with their new employers to take time off work for a second listing. A firm listing of this case could not take place realistically until May 2024 despite the tribunals efforts to see if there may be a potential gap in the listing diary; any such earlier date could not be a firm listing on the basis of the cases already listed in the tribunal's diary. In terms of saving expense as this case is the second listing the parties have already engaged representatives to conduct the proceedings

on their behalf it would not be saving expense to postpone the case to another day.

19. The respondent had no information about Mr. Dunn the second witness for the respondent as to his whereabouts or willingness to attend the hearing.
20. The Tribunal takes into account the EAT decision of **Emuemukoro.** In all the circumstances the Tribunal determined that there were no exceptional circumstances and/or it was not in accordance with the overriding object to postpone the hearing.

Day 2

21. The claimants completed their evidence mid-afternoon on day 1. The case was adjourned to day 2 at 10 a.m. and the Tribunal was awaiting an update from the respondent's witness, Mr. Shaihk as to whether he was to return to the UK to give evidence on Wednesday day 3. There was no further update about the whereabouts of Mr. Dunn.
22. Mr. Collins on behalf of the respondent stated that Dr. Shaikh was unhappy to interrupt his holiday but suggested he could give evidence from the Netherlands, Luxembourg or Belgium on Wednesday. These were not countries where there was an agreement in place for witnesses to give evidence in the absence of permission from the state; so this was not a practical suggestion. The Judge highlighted to the respondent that it had the opportunity to provide evidence as to when the actual holiday was booked but no evidence had been forthcoming. Mr. Collins said he had no information or evidence from Mr. Shaihk as to when the holiday was booked and he would emphasise the need for Mr. Shaihk to attend to give evidence on Wednesday but would confirm to the Tribunal at 2:00 p.m. on day 2, as to whether this was at the case. The hearing was postponed until 2:00pm.
23. At 2:00 p.m. the respondent's representative informed the Tribunal that Dr. Sheikh was travelling back from France to the UK this evening and would be available to give evidence at 10:00 a.m. on Wednesday. There was no further update as regards Mr Dunn and it was therefore assumed he would not attend the Tribunal to give evidence.

List of issues

The Tribunal adopted the list of issues in the claimant's suggested list which fairly replicated the 2006 TUPE Regulations.

Unfair dismissal

Did the claimants implement transfer to CDW limited?

24. Was that a relevant transfer within the meaning of regulation 3(1)(b)(ii) of the TUPE regulations 2006. In particular
    (a) Was that a situation in which 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 all carried out instead by another person or subsequent contractor on the client's behalf regulation 3(1)(b)(ii) bearing in mind the provisions of regulation 3 (2A) TUPE?
    (b) Immediately before the service provision change was there an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client Regulation 3 (3)(a)(i)?
    (c) Immediately before the provision service change did the client intend that the activities will following the service provision change be carried out by

the transferee other than in connection with a single specific event or task of short term duration Regulation 3 (3)(a)(ii)?

(d) Did the activities concerned not consist wholly or mainly of the supply of goods for the client's use (Regulation 3 (3)(b)). This is accepted

25. if there was a relevant transfer were any of the claimants assigned to the organised grouping of resources or employees that were subject to the relevant transfer Regulation 4 (1)?
26. Where the claimants dismissed?
27. What was the reason or principal reason for the dismissal
    (a) the respondent says the claimants transferred to CDW limited. If the claimants transferred was the transfer the reason or principal reason for the dismissal within regulation 7 (1) of TUPE? If so, the claimants will be regarded as unfairly dismissed. The claimants accept that liability for such dismissal would fall to CDW limited.
    (b) The respondent says that if there was no transfer, the reason was redundancy.
28. If there was no transfer and the reason for dismissal was redundancy, did the respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the claimant? The tribunal will usually decide in particular whether
    (a) the respondent adequately warned and consulted the claimant;
    (b) the respondent adopted a reasonable selection decision;
    (c) the respondent took reasonable steps to find the claimant suitable alternative employment;
    (d) dismissal was within the range of reasonable responses.

<u>Remedy for unfair dismissal</u>

29. Does the claimant wish to be reinstated to their previous employment?
30. Does the claimant wish to be re engaged to comparably employment or other suitable employment?
31. Should the tribunal order reinstatement? The tribunal will consider in particular whether reinstatement is practicable and if the claimant caused or contributed to dismissal whether it would be just?
32. Should the tribunal order re engagement? The tribunal will consider in particular whether re engagement is practicable and if the claimant caused or contributed to dismissal whether it would be just.
33. What should the terms of the re engagement order be?
34. If there is a compensatory award how much should it be? The tribunal will decide (a) what financial losses has the dismissal caused to the claimant? (b) has the claimant taken reasonable steps to replace their lost earnings for example by looking for another job (c) if not for what period of loss should the claimant be compensated? (d) if there is a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason? (e)if so should the claimants compensation be reduced by how much? (f) did the HS code of practise on disciplinary and grievance procedures apply? (g) did the respondent or the claimant unreasonably fail to comply with it? (h) if so is it just an export to increase or decrease any award payable to the claimant? By what proportion up to 25% (i) does the statutory cap of 52 weeks pay or £105,707 apply?
35. What basic award is payable to the claimant if any?

Wrongful dismissal/notice pay

36. Was the claimant employed by the respondent at the point of dismissal
37. What was the claimants notice.
38. What was the claimant paid for that notice.
39. If not was the claimant guilty of gross misconduct/did the claimant do something so serious that the respondent was entitled to dismiss without notice.

The hearing

40. The Tribunal was provided with an electronic bundle of 678 pages. The claimant called evidence from Tim Marriner, Andrew Hayes and Gordon Stephens (field engineers). The respondent relied upon the oral evidence of Dr. Sheikh and the statement of Mr Dunn was submitted as a written representation. The weight to be attached Mr Dunn's statement, in the absence of his attendance at the Tribunal and in the absence of any cross examination, was minimal.

FACTS

41. The respondent, in the main, provides outsourced IT services, IT support, hardware maintenance, business continuity service desk and field engineering services to companies throughout the UK through service level agreements SLAs. The claimants, all field engineers, commenced employment with the respondent as follows; 30 July 1987 Andrew Hayes; 15 October 2013 Roy Gilston; 1 September 2014 Tim Marriner and Gordon Stephens in June 2015.
42. The contract of employment of Mr. Gilston is in the bundle at page 41 and that of Mr. Hayes is at page 44; the contracts refer to them both as "field engineers" and the contracts did not allocate them to any specific contract or client.
43. The respondent provided I.T. services to a number of companies across the United Kingdom including Cedegim RX Limited (a pharmacy business); Howden Joinery Corporate Services Limited; Elliott Group Limited Paragon Banking Group PLC, Red Bull Technology Limited, the Race Equality Centre, Open GI limited, Zone 2 UK Limited; HC One Limited; Lyco Direct Limited and Anstey and District Funeral Services. The contract between the respondent and Cedegim can be found at pages 47 and 109 of the bundle.
44. All of the claimants were home based and allocated work by a call controller. The respondent's system for allocation of work to engineers was that call tickets were sent from the service desk of the respondent to a call controller. There were two call controllers in the UK; Tim Marriner was the call controller for the North as well as working as a field engineer. In the course of Mr. Marriner's work as a call controller (and this was the general practice) he would assign fault tickets to the most suitable or local field engineer. The engineer he selected for a job depended on the location of the engineer in the field to the client and stock levels; it was not part of the process nor was Mr. Marriner ever informed by the respondent that only certain engineers should be sent to particular clients such as Cedegim pharmacies. Dr. Shaihk stated that there was dedicated team of field 6 engineers solely servicing the contract of Cedegim. However, the Tribunal rejected this evidence. Dr. Shaihk was the director and shareholder of many companies and sole director and majority shareholder of the respondent and accepted in cross

examination he did not get involved in the day to day running of the respondent. The day-to-day running of the company was left to Mr Dunn. Dr. Sheikh's evidence to the Tribunal was limited to what he had actually been informed by Mr Dunn. In contrast the evidence of Mr. Marriner was compelling; he was a call controller and was in the best position to give evidence as to what went on day to day in the business and as to how he allocated work to field engineers. All engineers had the same training. Principally, the work completed by the engineers for Cedegim involved the replacement of fuses and any engineer employed by the respondent was competent to do this work and carried it out.

45. There was a significant dispute of evidence between the claimants' evidence and the respondent's witness Dr. Shaihk as to how much of the claimant's time was spent on the Cedegim contract and if at all the claimants were intentionally organised into a grouping to service Cedegim's work. The Tribunal preferred the evidence of the claimants; Dr. Shaihk had limited knowledge of the day to day running of the business.
46. Mr. Marriner was home based and spent 80% of his working time acting as a call controller and 20% in the field. From 8 March 2021 he recorded 34.5 hours of call controlling (see page 433) and week commencing 15 March 2021 he recorded 37 hours of call controlling (page 431). The evidence of Mr. Marriner is that he spent 17.67 hours 32.33% of his time on the Cedegim contract; and 35.24 hours 64.47% of his time on the Howden Joinery contract; 1.25 hours namely 2.29% on the Elite Group Limited Contract and 0.5 hours (0.91%) on the HC One Limited contract.
47. Mr Hayes was a field engineer. From his timesheets in 2021 he recorded 228.87 hours of billable work against various contracts. He spent 96.6 hours namely 42.24% on the Cegedim contract; 89.23 hours 38.99% on the Howden joining joinery contract 20.33 hours namely 8.88% on the Elliott group limited contract 11.39 hours 4.98% on the Red Bull technology limited contract and the remainder of his recorded hours on other contracts.
48. Mr Stevens was a field engineer. He accepted that as part of his role he worked on the contract for Cegedim which involved repairing, upgrading and installing computer systems. He also worked on other contracts providing IT services to other companies including Howden Joinery Corporate Services Limited, Elliott Group Limited, HC1 Limited, Woolsey Limited and Cineworld.
49. On 30 April 2021 page 114 in an email from N. Molyneux of Cedegim to Mr. Dunn of the respondent it was stated Cedegim had requested no dedicated engineers just like the offer made by the respondent last week if the contract was renewed. The respondent had pitched for the Cedegim work by stating it would not have dedicated engineers.
50. On 21 May 2021 at page 126 Cedegim's letter to Mr. Dunn of the respondent requested information about the organised grouping. It asserted the respondent's engineers served all of the respondent's clients. From its records it identified that 31 calls were taken by Mr Gilston, 32 calls taken by Mr Hayes and 37 calls taken by Trevor Collins. It asserted that there was no organised grouping to conduct its work at the respondent.
51. On 24 May 2021 the claimants attended a team meeting with Nigel Dunn the respondent's managing director. During that meeting Nigel informed the claimants that the respondent had lost the contract with Cegedim and that the claimants would be TUPED across to the new provider. This was confirmed by Mr. Dunn in a follow up e-mail later that day (see page 130).

52. Mr. Dunn stated *"first the meeting this morning I just wanted to clarify a few things*
Cegedim have decided not to renew with Kalamazoo IT and informed us of their decision 27 April;
I contacted them 29 April requesting the details of the new supplier so that we could send the anonymous details of the engineers that were identified as eligible for the TUPE process;
after much chasing we were finally informed late 20 May that the new supplier was CDW
21 May I contacted CDW sending the anonymous details and requesting the details of the person who is handling everything for them
24 May I informed you of the process."
53. Mr Dunn presented the claimants with two options in the circumstances that the contract with Cedegim expired on 1 June; they accept and will become an employee of CDW with existing terms and conditions or claimants decline and will cease to be employed by Kalamazoo IT.
54. Mr Dunn also informed the claimants that he was removing them from the flexible furlough scheme with immediate effect but sough the claimant's agreement to withdraw from the scheme.
55. On 25 May 2021 (page 133) Martin Syzdek of CDW said he could not confirm there was a TUPE transfer or that the employees had transferred to CDW. He also noted that the respondent had attached statistics identifying 4 employees namely Mr Khalid, Mr Hayes, Mr Gilston, and Trevor Collins working for over 50% on the Cedegim account and the ELI sent on Monday from the respondent was different noting 6 employees namely Mr Gilston, Andrew Hayes, Michael Keeble, Tim Marriner, Roy Moore and Gordon Stevens. Mr Syzdek invited Mr Dunn to clarify this information.
56. On 1 June 2021 Mr Dunn telephoned the claimants to say CDW UK Limited had refused to transfer the claimants as they did not think TUPE applied. Mr Marriner was told that this was not correct and he was the responsibility of CDW UK Limited and had transferred from the respondent's business on 31 May 2021. Mr. Dunn followed this up with a letter on the same day (see page 164). The letter states *"we can confirm that we have not received any measures from CDW in respect of the transfer and we can only therefore assume that CDW have no changes to make your contract following the transfer. As you are currently in possession of a Kalamazoo company car will need to arrange pickup of the vehicle as the insurance is no longer valid and we would be grateful if you would therefore ensure that you do not drive the vehicle. As a company vehicle is part of your contractual terms CDW should provide you with a new vehicle upon starting your employment window. We have confirmed to CDW as to why we believe that you are in scope to transfer and trust that they are now willing to accept the transfer of your employment."*
57. On 1 June 2021 Andrew Hayes sent an e-mail to Martin Syzdek at CDW UK Limited attaching the letter that Nigel Dunn had sent him explaining he had transferred to CDW and asking if Martin Syzdek could advise on how to proceed. On 2nd June 2021 Mr Hayes received an e-mail from Martin Syzdek advising of the specific conditions that needed to be met in order for TUPE to apply and they considered that these conditions had not been met. Mr. Marriner was advised that if CDW was wrong on that point he was dismissed with immediate effect.

58. On 3 June 2021 the claimants submitted an appeal to the respondent arguing that they had not transferred to CDW UK limited and therefore the respondent had in fact dismissed them unfairly see page 173 and 175. The claimants sought a response from the respondent by 18th June 2021. The respondent advised Mr Marriner that they would not hear any appeal because they considered that he was no longer their employee and mirrored what was communicated to Roy Gilston at page 180. Mr Dunn on 18 June 2021 informed Mr Gilston *"I do not treat your requests lightly but from our perspective you ceased to be an employee of Kalamazoo by 31 May 2021 and became an employee of CDW June 1 2021 and to this end it is the duty of CDW as your new employer to hear your appeal".*
59. In Mr Dunn's letter to CDW dated 1 June 2021 (page 155) he asserted that 6 individuals listed in the ELI were all part of an organised grouping of employees whose principal purpose was the carrying out of the relevant activities on behalf of Cedegim. It was also asserted that identifiable engineers were allocated to particular customers; he stated that he identified a team of individuals whose principal purpose was to service the Cedegim contract to meet the demands of the service level agreement; he stated he had removed certain individuals from the team who were known to have previously failed to meet Cedegim's expectations and the individuals were trained as potential backups but were not classified as part of the second team. Mr Dunn identified all four claimants in this case based on call volumes and the amount of work done as part of an organised grouping to carry out Cedegim's work. He asserted Mr Andrew Hayes covered London/ the east 87.18%; Gordon Stephens to cover north of england 51.4 percent 6%; Roy Gilston to cover the north of West England, North Wales and down to the Midlands 55.35% of his workload and Mr Marriner to cover Bristol and South Wales along the M4 corridor and up to the Midlands at 51.8%. The figures relied upon here were unsupported by any objective or transparent evidence before the Tribunal. The Tribunal concluded that it was unsafe to rely upon this material.
60. None of the claimants who gave evidence to the Tribunal were ever informed that they were part of a specific group that was assigned to Cedegim. None of the designated call controllers including Mr. Marriner were ever informed about any group created by Mr Dunn who were designated to cover Cedegim calls. Mr. Marriner's evidence which the Tribunal found to be cogent and credible and was accepted by the Tribunal was that there was no way he could have controlled calls without being aware that such a grouping existed as the call controllers were totally responsible for selecting engineers for each call. At no point were the ticket allocation decisions overwritten by senior staff to allocate tickets to other engineers because of any undeclared specialism or grouping.
61. Mr Marriner requested from Mr Dunn a copy of the advice he had received that the TUPE regulations applied. He did not provide it.
62. The claimants dispute the percentage of work they carried out for Cedegim is accurate as contained in Mr Dunn's letter dated 1 June 2021 to CDW. Mr Hayes says that he was a field engineer and in fact he may have had most contact incidentally with Cedegim as he lived within the local area of many of their sites but his working time for all of them were still less than 50%. Mr Stephens was not part of a specific group that was assigned to Cegedim nor was he aware that such a group existed.

63. Mr Marriner is the sole carer of his disabled wife. He spent two months attempting to find a job that would allow him to continue caring for her by maintaining a work from home role. He no longer had the benefit of a company car and no direct method of transport so was required to purchase a vehicle to work on a site at Bath Spa University who were willing to offer him the flexibility he required. However, the job means that Mr. Marriner spends more time away from caring by travelling to site plus the continued extra costs involved in running a private car to do so.
64. Mr Stephens immediately started to search for alternative employment by posting his CV on numerous employment sites.
65. Mr Hayes anticipated that he if he had not been dismissed by the respondent he would have continued to work for them until his retirement he enjoyed the work and it suited his lifestyle. He now works at a call centre as a call handler for the NHS.

Submissions

66. Miss Skinner submitted on behalf of the claimants that there was no evidence that the claimants were part of an organised grouping with the principal purpose of conducting work for Cedegim. She referred the Tribunal to a number of cases. The claimant relied upon the following authorities in respect of whether there was a service provision change; **Ceva freight UK limited v Seawell limited (2013) CSIH 59; Costain limited v Armitage UKEAT/0048/14; Duncan Weboffset (Maidstone) Limited v Cooper and another (1995) IRLR 633; Eddie Stobart limited v Moreman and others 2012 ICR 919 Edinburgh Home Link Partnership v the City of Edinburgh Council (UKEATS/0061/11)** and **Tees Esk and Wear Valleys NHS Foundation Trust v Harland (2017) ICR 760**.
67. In respect of the issue of redundancy the claimant relied upon the cases of **Abethnethy v Mott (1974) ICR 323; Associated Society of Locomotive Engineers and Firemen v Brady (UKEAT/0057/06); Herts v Ferrao (UKEAT/057005).**
68. On behalf of the claimants, Miss. Skinner submitted that there was no organised grouping and no assignment of the claimants to any such organised grouping because it could not be shown that there was any deliberate decision to put together a team or for the claimants to conduct work for Cedegim. She relied upon the words of Lady Smith, the claimants did some work for Cedegim as “a matter of happenchance”. It was a fact sensitive matter. In terms of assignment to the organised group it is not simply a question of considering the time spent by claimants on a contract; that is not the test. There was a lack of evidence produced by the respondent to establish a service provision change by reason of the fact that Mr Dunn has not attended to give evidence. The claimant submitted that Mr Sheikh was removed from the day-to-day running of the company and did not have any direct knowledge as to what the claimants did and the respondent has failed to provide any statistical evidence to support there was an intentional organised group principally doing categories of work before the alleged transfer. Even if it can be believed Mr Dunn made a decision to have an organised group there is no evidence to show it was put into effect; it was certainly not communicated to the call controller. Mr. Dunn was unable to provide evidence of an organised grouping; see his response on 27 of May (page 141); he was stalling for time. He was disingenuous; he had clearly been asked for evidence in previous communications and his

evidence contained mere assertions of the work conducted by the claimants on the 1st of June at page 156 which is unsupported by any data. Mr Dunn did not organise a team and certainly did not tell the call controllers. The claimant relied upon page 126 dated 21st of May 2021 which it was submitted shows further evidence there was no organised grouping created; see page 127 three engineers Gilston, Hayes, Collins responded to most of the call outs by the client Cedegim; Collins is not even suggested by the respondent as being part of the group even though he did most of the calls.

69. In the circumstances, the claimant submitted there was no such transfer and the claimants were therefore dismissed by the respondent.
70. The burden rests on the respondent to establish that the claimants were in fact redundant within the meaning of section 139 of the Employment Rights Act of 1996. The claimant submitted that the respondent had failed to establish that reason. The respondent had also not established the claimants were part of an organised group. The Tribunal was invited to find that the respondent had not established a reason and was not required to go on to establish or determine what the real or principal reason was. In all the circumstances it was submitted that the respondent did not follow a process; did not consult; did not create a pool; took no steps to find alternative work and did not offer an appeal. The dismissals fell way outside the band of reasonable responses. Furthermore, all employees were dismissed without notice. There was no dispute they were not paid notice and were entitled to notice in accordance with statutory notice.
71. The claimant submitted that the respondent had not established on the balance of probabilities the reason or principal reason for the dismissals of the claimants. It was accepted that there was a potential reason of redundancy following the loss of the Cedegim contract but the respondent had no direct evidence as to why these claimants had been selected. The respondent could not show that there was an organised grouping of employees to conduct Cedegim's work nor could it be established the claimants formed a part of an organised grouping to conduct Cedegim's work. The statistics asserted by Mr. Dunn in his June letter were not substantiated on any objective evidence and the call controller had no knowledge when allocating work as to any organized grouping. In the circumstances the respondent pretended that these claimants had been transferred to CDW; their defence to the claim should be rejected. The case of **Abethnethy v Mott (1974) ICR 323** establishes that although the employers had erred in law by informing a claimant that his dismissal was by reason of redundancy, the wrong legal label did not matter as long as there was a set of facts made known to the employee before or when he was given notice which the Tribunal could find was the principle reason for the dismissal. Lord Justice Cairns stated at page 330(B) a reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee In the case of **Associated Society of Locomotive Engineers and Firemen v Brady (UKEAT/0057/06)** it was established the Tribunal found that the real reason was the hostility directed towards the claimant and not the ostensible reason of gross misconduct relied upon by the employer. At paragraph 69 of the judgement the case of **Timex Corporation and Thompson 1981 IRLR 522** was quoted where the employee was found to be unfairly dismissed when the employer dismissed for redundancy or reorganisation. The

Tribunal found that although there was a redundancy situation they were not satisfied that the employee was dismissed for that reason.

72. The case of **Hertz v Ferao** held at paragraph 61 of the judgement it cannot be a necessary prerequisite to the rejection of an employer's case as the reason for dismissal that it should be possible for the tribunal to ascertain the true reason; there may be cases in which the tribunal simply does not believe the employers assertion as to his reason for dismissal and in which the true reason does not emerge from the evidence. In some cases, the evidence may be such as to enable the Tribunal to ascertain and make a finding as to the true reason. In other cases the Tribunal should not enter into speculation.
73. The respondent agreed with the claimant's summary of the law. It submitted that the Tribunal should take into account the written statement of Mr. Dunn which was clear that an acceptable group of engineers to the client were put together to conduct Cedegim's work. The respondent referred to correspondence in the bundle between Cedegim, CDW and the respondent; pages 119-120, 124, 128,132,138,140-2, 147, 151-3,157-8,165 and 170-2. The respondent submitted this documentary trail evidenced that CDW initially agreed there was a transfer but then changed its mind. The respondent's case is that there was an organised grouping consisting of the claimants who carried out work for the client. Alternatively, the respondent submitted on losing the Cedegim contract there was less work to go round. There was a redundancy situation. The respondent selected the six employees as there was no alternative work and the dismissal fell within the band of reasonable responses following Iceland Foods. The respondent did consult as far as it could and it was not appropriate to hear the appeals once it believed the claimants' employment had transferred.

Law

74. A relevant transfer is defined under regulation 3 (1) (b) of the Transfer of Undertakings Protection of Employment Regulations 2006 as including a service provision change namely a situation where
(ii) activities cease to be carried out by a contractor on as 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 contract are on the client's behalf.
75. There must be pursuant to regulation 3(3)(a) of the Regulations that
(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
(ii) the client intends that the activities will following the service provision change be carried out by the transferee other than in connection with a single specific event or task or short-term duration and
(b) the activities concerned do not consist wholly or mainly of the supply of goods for the clients use.
76. The approach for the tribunal to take in considering whether there is a service provision change is first, to establish that there is an organised grouping. The approach for the tribunal to adopt is set out in the case of **Enterprise Management Services Limited v Connect up Limited 2012 IRLR 190 EAT** as follows
(i) identify activities performed by in-house employees/original contractor;

(ii) all these activities fundamentally the same as those carried out by a new contractor;

(iii) if activities have remained fundamentally the same whether (a) before the transfer there was an organised grouping of employees which had at its principle purpose the carrying out of activities on behalf of the client; (b) whether exceptions in regulation 3(3)(b) apply (c) where each individual is assigned to the organised grouping of employees.

77. An organised grouping has the principal purpose to carry out relevant activities to a particular client. The organisational grouping must be intentional. Further the principal purpose of organised grouping of employees must be carrying out of activities on behalf of the client. In the case of **Eddie Stobart Limited v Moran** the question was whether the split of work had come about intentionally. Furthermore, the tribunal must consider whether the organised grouping existed immediately before the service provision change.

78. In the case of **Ceva Freight UK Limited v Seawell** at paragraph 31 of the judgement it states “having regard to that consideration we agree with the view expressed by the Employment Appeal Tribunal at paragraph 18 of its judgement in **Eddie Stobart Limited v Moreman** that the concept of an organised grouping of employees, there must be an element of conscious organisation by the employer of his employees into a grouping of the nature of a team which has as its principal purpose the carrying out de facto of the activities in issue.

79. In the case of **Costain**, HHJ Eady KC (as she was then) reviewed a number of cases on service provision change and stated it was necessary to first consider whether there must be an organised grouping of employees dedicated to the client pursuant to regulation 3(3)(a)(ii) and secondly, the employee must be assigned to that grouping. Those questions are analytically distinct in accordance with Underhill J (as he was then); at paragraph 16 of **Eddie Stobart Limited v Moreman 2012 IRLR 356**. The Learned Judge went on to state the two points nevertheless self-evidently overlap to a very considerable extent since for the purpose of considering who is assigned to a putative organised grouping it is necessary to identify what that grouping consists of. On the first question the concept of an organised grouping of employees is that there is an element of conscious organisation by the employer of its employees in the nature of a team which has as its principal purpose the carrying out of the activities in question. So, there must be a deliberate putting together of a group of employees for the purpose of the relevant client work; it is not a matter of happenstance. There will not be an organised grouping of employees with the relevant purpose, if the employees in question simply happened to be working on that activity at the time of the transfer, perhaps because of shift arrangements. At paragraph 36, it states on the second question, particular employees assignment the starting point is generally taken to be the judgement of the European Court of Justice in **Bozen** where it was stated “an employment relationship is essentially characterised by the link existing between the employee and the fact of the undertaking or business to which he was assigned to carry out his duties in order to decide whether the rights and implications under an employment relationship are transferred under the directive it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned. In approaching that question it is

often tempting to try to establish assignment by reference to the percentage of time and employees engaged in working in the relevant undertaking or part or on the particular activities in question. That might not be an irrelevant question but it is not the test. In **Duncan Webb offset Maidstone Limited v Cooper and another 1995 IRLR 633** the EAT observed that the question of assignment is one of fact for the employment tribunal albeit that it might be relevant to look at the amount of time an employee spends on one part of the business or the other, the amount of value given to each part by the employee, the terms of the contract showing what the employee could be required to do and how the cost to the employer of the employees services had been allocated between the different parts of the business; see paragraph 1 of the judgement of Morrison J in that case. What is to be given weight in any particular case will be a matter for the employment tribunal as the tribunal of fact but it will not be determinative that the different aspects of the employees work are carried out for the same client. As Lady Smith observed at paragraph 19 of her judgement in **Edinburgh Home Link Partnership v the City of Edinburgh Council UK** regarding the issue of assignment, the question has to be asked in respect of each individual employee, it is not to be assumed that every employee carrying out work for the relevant client is assigned to the organised grouping. If for instance an employee's role is strategic and is principally directed to the survival and maintenance of the transferor as an entity it may then not be established that, that employee was so assigned.

80. Further in the case of **Argyll Coastal Services Limited v Sterling and others UKEATS/0012/11** Lady Smith again had to consider the interplay between regulations 3 and 4 and offered the following analysis: First in respect of the question of an organised grouping of employees for regulation 3(3)(a)(i) *"it seems to me that the phrase organised grouping of employees connotes a number of employees which is less than the whole of the transfer for his entire workforce deliberately organised for the purpose of carrying out the activities required by the particular current contract and who work together as a team.. Thus the organised grouping of employees need not have as its sole purpose the carrying out of the relevant client activities that must be its principal purpose. If a claimant can show that a relevant service provision change occurred he then requires to satisfy the requirements of regulation 4 (1) that involves considering whether or not the claimant was assigned to the assigned grouping of resource is referred to in regulation 3(3)(a)(i)"*. In respect of the question of assignment it was stated the issue of whether or not a particular employee was assigned to the organised grouping of employees affected by the transfer and thus entitled to the protection of TUPE is not a mere formality. It can only be resolved after a proper examination of the whole facts and circumstances. Lady Smith was emphasising that an employment tribunal needs to take care to consider the whole facts and circumstances in which a particular employee worked in order to answer the assignment question. It is not a question that will be answered simply by reference to the percentage of time worked by the employee on a particular contract unless the factual context demonstrates why that would be relevant test in the particular circumstances. Simply stating that an employee spent 100% of their time on the contract in question would not be sufficient. That might simply have represented a snapshot of the position at a particular moment in time, not an

assignment to the organised grouping. Similarly, there might be cases where a Tribunal finds that an employee is assigned to the organised group but at a particular time spent less than 50% of their time on that work.

81. Redundancy is a potentially fair reason under section 98 of the employment rights act 1996 pursuant to section 139 of the Employment Rights act defines redundancy as including "the requirements of the business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where the employee was employed by the employer has ceased or diminished or expected to cease or diminish".
82. It is for the employer to show the reason for dismissal and that it was a potentially fair reason, that is, one which falls within the scope of section 98 of the Employment Rights Act 1996. A reason for dismissal has been described as a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee see **Abernethy v Mott Hay & Anderson 1974 ICR 323, CA.** The burden of proof on employers at this stage is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. If the Tribunal rejects an employer's asserted potentially fair reason for dismissal finding that the reason could not have been the one operating on the employer's mind at the relevant time, the Tribunal is not obliged to go on and ascertain the real reason for dismissal if there is insufficient evidence to do so following **Hertz UK Limited v Ferrao EAT/0570/05.** In these circumstances the dismissal will be unfair. In determining the reason for dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal. This means that no account will be taken of matters coming to light or occurring after the dismissal has taken place following **W Devis & Sons Limited v Atkins 1977 ICR 662.** Even employees dismissed on the employers' whim for no reason at all, the dismissal will not be made retrospectively fair if the employer later finds that the employee had been engaged in longstanding embezzlement from the company that would have amply justified the dismissal if it had been discovered earlier.
83. A fair redundancy process should include consultation and selection.

<u>Credibility</u>

84. The Tribunal found the claimants' evidence to be cogent and credible. In particular, the evidence of Mr. Marriner was very useful. As a call controller he was responsible for allocating work to the field engineers and was in a good position to confirm whether there was a specific grouping of employees to carry out work for Cedegim. Mr. Dunn did not attend to give evidence for the respondent and was not subject to cross examination. In the circumstances the Tribunal attached little weight to his witness statement. Mr. Shaihk was a busy businessman and was unaware of the day to day running of the business which he had placed in the hands of Mr. Dunn to manage. The Tribunal therefore found his evidence lacking in particularity because he simply did not have the hands on knowledge of how the business was run day to day. In the circumstances, where there was a dispute in the evidence the Tribunal preferred the evidence of the claimants.

Activities performed by the original contractor

85. The respondent provided IT support and maintenance for the contract with Cedegim pursuant to the contracts including one dated 2018. Cedegim had a number of pharmacies located across the UK.

Activities the same carried out by new contractor

86. The Cedegim client terminated its contract with respondent with effect on 31 May 2021 and thereafter CDW Limited fulfilled Cedegim contractual needs instead of the respondent. It is important to note that as part of the respondent's pitch to continue to provide a service to Cedegim, the respondent specifically quoted on the basis (in accordance with the instructions of Cedegim) there would be no organised grouping of employees.

Before the transfer an organised grouping with a principal purpose of carrying out activities for Cedegim

87. The Tribunal determined having considered the available evidence that there was no organised grouping prior to the alleged service provision change with the principal purpose to carry out relevant activities for a particular client because there was no evidence of an organisational grouping nor any credible evidence that there was any intention to have an organised grouping. The Tribunal relied upon the following :-

(a)the contracts of the claimants – The available contracts in the bundle of two of the claimants namely the contracts of Roy Gilston (page 41) and Mr. Hayes (page 44) noted their positions with the respondent described as *"Field engineer"*. It further states that the *"employees shall from time to time work at such places as the company may direct".* The claimants were not contracted to only do work for Cedegim or for any particular client of the respondent. Further, there was no evidence of any updated job descriptions or contracts for any of the claimants when the respondent contends it determined that six employees would form part of an organised grouping.

(b)The evidence accepted by the Tribunal from the claimants was that they were all field engineers and received the same training; they were no more specialised to work on the Cedegim contract as any other of the 20 or so engineers employed by the respondent at the material time;

(c)The allocation of work was carried out by the call controller who was in the Tribunal's judgment in the strongest position to provide accurate evidence as to the allocation of work and whether there was an organised grouping of employees conducting the Cedegim work. Mr. Marriner at no time was ever instructed by Mr. Dunn or any person from the respondent's business that only 6 engineers or any reserve engineers were to be allocated the work for Cedegim. Mr. Shaihk's evidence was rejected; he was not in the best position to describe the day to day running of the business or allocation of field engineers to work. The Tribunal accepted the evidence of Mr. Marriner that work was allocated by reason of locality of the engineer to the job and availability of stock. Much of the work of Cedegim required the replacement of fuses and all field engineers had a stock of these available; in the circumstances the Tribunal determined which engineer performed work for Cedegim was a matter of happenchance;

(d)In respect of the allocation of work the Tribunal did not find it intentional that some claimants did more of the work than others. Mr. Stephens, for example, was the only field engineer in the locality and was close to some of

the Cedegim sites. As a matter of location therefore he was bound to do more work for Cedegim.

Assignment

85. The Tribunal did not find that the claimants were assigned to a grouping (a)The statistical information produced by the claimants showed that the claimants provided work for a large number of clients of the respondent. In respect of Mr. Marriner, in the week commencing 8 March 2021 (page 433) he recorded 34.50 hours of call controlling and for week commencing 15 March 2021 he recorded 37 hours of call controlling (page 431). He worked for Howden Joinery Corporate Services Limited and Cedegim from January 2021 to June 2021 he recorded a total of 54.66 hours of billable work for both Howden and Cedegim. He spent 17.67 hours that is 32.33% on the Cedegim contract; 35.24 hours that is 64.47 percentage on the Howden Joinery contract; 1.25 hours that is 2.29% on the Elliott Group Limited contract and 0.5 hours; 0.91% on the HC1 Limited contract. Mr Hayes on the basis of his timesheets for 2021, recorded 228.87 hours of billable work against the various contracts. He spent 96.67 hours that is 42.24% on the Cedegim contract; 89.23 hours 38.99% on the Howden Joinery contract; 20.33 hours that is 8.88% on the Elite Group Limited contract and 11.39 hours that is 4.98% on the Red Bull Technology Limited contract. The remainder of recorded hours Mr Hayes worked on other contracts.
The Tribunal determined that the variety of hours and percentages that the claimants were working was a good indication (along with the evidence of the call controller Mr Marriner) that the allocation did not concern any organised grouping of individuals. The fact that Mr. Hayes did slightly more namely just over 2% more 3% more for the Cedegim contract than for the client Howden did not establish that he was organised into a group. He conducted work for a number of different clients. The work on behalf of Mr Stephens was slightly more for Cedegim because he so happened to be close to a number of Cedegim's pharmacies. There was no organised grouping by the respondent in order for Mr. Stephens to do that work or for any other claimant to do Cedegim work. The evidence was also that for the latter part of the claimants' employments Howden was closed so inevitably a greater amount of work was completed for Cedegim; this was happenstance and there was no evidence of a deliberate and intentional grouping of the claimants to do Cedegim's work. Therefore, the Tribunal finds that it cannot be established that there was an intentional organised grouping of employees doing principally Cedegim's work. Therefore, there could be no transfer and the respondent dismissed these claimants with immediate effect.

Wrongful dismissal

88. In those circumstances the claimant 's contracts were terminated immediately and in breach of their contracts of employment and their wrongful dismissal complaints succeed.

Unfair dismissal

89. The respondent has the burden of establishing the reason or the principal reason for the dismissal. The respondent's alternative case is that the admissible reason for dismissal is that of redundancy. The claimant challenges this on the basis that the respondent has failed to establish on the evidence that was an admissible reason for dismissal in the context that

the respondents sought to avoid liability and fabricated an alleged organised group hoping the transferrer would pick up the claimants employment.

90. Redundancy is defined in accordance with section 139 of the Employment Rights Act 1996. It is defined as including "the requirements of the business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, has ceased or diminished or are expected to cease or diminish".
91. There is no dispute that the respondent lost a significant contract when it lost the Cedegim work. The Tribunal having found all field engineers carried out work for Cedegim inevitably means that the requirements of the respondent's business for employees to carry out work of a particular kind namely carrying out work for Cedegim ceased or diminished upon the loss of that contract. The Tribunal finds that there was a potential redundancy situation here.
92. However, the individual who made the determination to dismiss was Mr. Dunn. He has not attended the Tribunal to give evidence and the Tribunal therefore attaches minimal weight to his witness statement. The respondent at the material time was asserting that the claimants were part of an organised grouping. Mr. Dunn asserted this in a letter dated 1 June in the absence of any objective or transparent statistics to support this. In accordance with the case of **Abernethy** the respondent must establish beliefs held by him which caused him to dismiss the employee. Mr Sheikh was unable to assist the Tribunal with this issue because he left the running of the business in the hands of Mr Dunn. Mr Dunn has failed to give evidence to the Tribunal who could have assisted the Tribunal with his thought processes.
93. The burden of proof rests on the respondent to establish the admissible reason for dismissal. In the absence of Mr. Dunn, the respondent has failed to discharge that burden. Accordingly, no admissible reason having been established, the Tribunal concludes that the dismissal of all of the claimants was substantively unfair. The Tribunal is not required to go as far as to find another reason in accordance with **Hertz v Ferraro**.
94. Also the Tribunal finds that the dismissal of these claimants was procedurally unfair for the following reasons:-
    (a) there was a lack of consultation; the respondent became aware of the loss of the contract on 27 April 2021. The respondent failed to inform the claimants about this until some four weeks later. No reasonable opportunity was afforded to the claimants in the timescale to provide alternatives to dismissal in the circumstances that a suggestion of a service provision change/transfer would be rejected by the transferor;
    (b) the claimants were not placed in a pool with the other field engineers who performed work for Cedegim or other clients;
    (c) there was no transparent process of selection of the claimants for redundancy; all of the claimants along with their colleagues had the same training as field engineers; the respondent had put forward the argument that the claimants formed part of an organised grouping principally doing work for Cedegim. The Tribunal rejected that and it does not accept the statistics put forward by Mr Dunn in his letter dated 1 June 2021 which is unsupported by any objective evidence or material included in the Tribunal

bundle. The Tribunal concluded the selection process of these claimants is untransparent, unclear and unfair;
(d) there was no offer of suitable alternative employment or the possibility of any job share or part time working with other field engineers;
(e) all the claimants sought to appeal the decision to terminate their contracts of employment. The respondent refused to hear their appeals suggesting that the responsibility for their employment had moved to the transferor. This was at a time when the transferor disputed any transfer and the respondent had no grounds to refuse the claimants an appeal hearing or consideration of an appeal on the papers.

95. In all of the circumstances, the Tribunal determined that the dismissal of the claimants was substantively unfair and fell outside the band of the reasonable responses test.

Remedy

96. Following giving judgment on liability, the parties were given time to consider compensation and the claimants' schedules of loss.
97. The only contentious issue between the parties in terms of the schedules of loss was the loss of statutory rights and how this should be calculated. The claimant contended following the case of **Countrywide Estate Agents v Turner (EAT/0208/13)** that for a long period of employment the loss of statutory rights should be awarded.
98. The respondent argued that it was a matter for the Tribunal's discretion but following the case of **Superdrug v Corbett** where an excessive sum of £1420 was awarded for loss of statutory rights that it should be a nominal amount.
99. The Tribunal determined but it was a matter for its discretion as to the amount awarded for loss of statutory rights in accordance with section 123 of the Employment Rights Act of 1996 considering what was just and equitable.
100. The general practice in the Employment Tribunal was to award a sum in the region of about £500 as compensation for a claimant who will have to work for a further period of time to establish a right to bring a claim of unfair dismissal. The Tribunal determined that the case of **Countrywide Estate Agents v Turner** was particular to its facts and the Tribunal determined in its discretion it was just an equitable to award the usual sum to the respective claimants in the sum of £500.
101. The parties having taken further time to consider the schedules of loss, the Tribunal made the following awards :-

(a)Mr. Gilston (deceased) total award of £35,797.51
- (i)Basic award £5,472.08
- (ii)Compensatory award £27,100
- (iii)Notice Pay £2,287.39
- (iv)Grossing up £938.04

(b)Mr. Hayes total award of £52,068.24
- (i)Basic award £14,960
- (ii)Compensatory award £30,676.88
- (iii)Notice £4,560.95
- (iv)Grossing up £1,870.41

(c)Mr. T. Marriner total award of £14,256.74
- (i)Basic award £4284.72
- (ii)Compensatory award £9049.31

(iii)Grossing up £922.71
(d)Mr. G. Stephens total award of £12,381.96
(i)Basic award £3981.78
(ii)Compensatory award £7608.64
102. (iii)Notice £791.54

Employment Judge Wedderspoon

3 October 2023