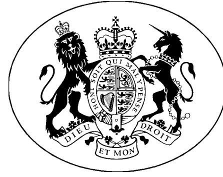

EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 20 June 2023

Claimant: Mr Kunil Tailor

Respondents: (1) Outstanding Branding Limited (in liquidation)
(2) Sandy Branding Limited

Before: Employment Judge Ramsden

Representation:

Claimant Mr James Wynne, Counsel

Respondent Not in attendance

RESERVED JUDGMENT

1. The Claimant's complaint of unlawful deduction from wages against the First Respondent is upheld. The First Respondent is Ordered to pay the Claimant the sum of **£4,504.50** gross.
2. Each of the Claimant's complaints of unfair and wrongful dismissal against the First Respondent fail.
3. The Claimant's complaint of unlawful deduction from wages against the Second Respondent is upheld. The Second Respondent is Ordered to pay the Claimant the sum of **£5,544** gross.
4. Each of the Claimant's complaints of unfair and wrongful dismissal against the Second Respondent are upheld. The Second Respondent is Ordered to pay the Claimant:
   a) **£1,453.84** gross by way of statutory redundancy payment (being four weeks' wages at £363.46 per week in light of the fact that he was 28 years old when dismissed, and should be treated as having worked for the Second Respondent for a period of four years);
   b) **£2,596.16** gross in respect of the unfair dismissal claim (comprising by way of basic award of £0 and £2,596.16 by way of compensatory award); and
   c) **£1,453.84** gross in respect of the wrongful dismissal claim.

5. The Claimant's complaint of unlawful deduction from his wages in respect of his accrued but untaken holiday at the date of his dismissal is upheld. The Second Respondent is Ordered to pay the Claimant the sum of **£331.56** gross.

6. Each of the Claimant's complaints against the Second Respondent of:

    a) Harassment related to his race;

    b) Direct race discrimination;

    c) Failure to give the Claimant the opportunity to elect a representative under Regulation 14 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**);

    d) Failure to give the Claimant the required information under Regulation 13 of TUPE; and

    e) Failure to consult with elected representatives or affected employees under TUPE,

    fail.

REASONS

Factual Background

<u>Summary</u>

7. The business of the First Respondent was, and the Second Respondent is, concerned with supplying promotional gifts and branding merchandise.

8. The Claimant was engaged by the First Respondent on 12 May 2017.

9. Following the financial difficulties encountered by the First Respondent, the directors of the First Respondent incorporated the Second Respondent on 10 March 2021.

10. The Claimant claims that his employment transferred to the Second Respondent on or around 31 May 2021, and that that employment only terminated when he accepted its repudiatory breach (of not paying him) on 5 June 2022. He contends that the Second Respondent:

    a) owes him various sums (in arrears of pay and holiday pay) relating to his employment with that Second Respondent from 1 June 2021 onwards;

    b) is liable for race-related harassment and direct race discrimination that occurred while he was employed by the First Respondent; and

    c) failed to inform and consult with elected representatives or with affected employees (including him) pursuant to TUPE, and

    if the Tribunal finds that the Claimant was dismissed by the Second Respondent earlier than 5 June 2022, the Claimant avers that:

d) that dismissal was unfair; and

e) that dismissal was wrongful.

11. No Response to any of the claims made by the Claimant has been filed by either Respondent, and so the Tribunal's understanding of the facts comes from the evidence provided by the Claimant, the correspondence between the parties and the Tribunal, and information publicly available on Companies House.

More detailed chronology

12. The First Respondent was incorporated on 18 June 2009. It had two statutory directors, Andrew Thorne and Sarah Massey, each of whom owned half of the First Respondent's issued shares. That remained the position (save for the allotment and redemption of a few additional shares to and from Mr Thorne and Ms Massey) over the next few years.

13. The Claimant began working for the First Respondent as a Finance Assistant from 12 May 2017. His contract of employment provided (among other things) that:

a) he was entitled to four weeks' notice from the First Respondent to terminate his employment; and

b) the Claimant was entitled to 22 days' leave per calendar year, together with eight additional days for Bank and public holidays, and "*a further three days' concessional days, as detailed in the employee handbook and may vary from year to year at the Company's discretion*".

14. The Claimant says that, at some time in or prior to March 2020 (i.e., when he was still performing work for the First Respondent), Mr Thorne referred to the Claimant, who is Asian, as a "terrorist" as part of office "banter" on a number of occasions (the **Racial Banter Incidents**).

15. On 1 April 2020, the Claimant was furloughed by the First Respondent, pursuant to the Coronavirus Job Retention Scheme (**CJRS**), and he never returned to work. The Claimant was paid 80% of his salary by the First Respondent for the period 1 April 2020 until 28 February 2021, and he agrees that no sums are owed to him by the First Respondent in respect of that period.

16. By letter dated "*3rd November*" (which must be 3 November 2020, given the context, as the CJRS finished in September 2021), the First Respondent extended the furlough arrangements applicable to the Claimant for a further period. That letter stated:

"*In the event that the disruption to our business is still continuing when the furlough arrangements end and/or there is any reduction in our requirements for work of the kind you are employed to do at that stage, we reserve the right to lay you off (without pay except statutory guaranteed payments), and/or to reduce*

your working hours with a proportionate reduction in contractual pay for such period as we consider appropriate. If it is necessary for us to take either of these steps, we will confirm relevant details nearer the time…"

"*We anticipate that you will be on furlough for a temporary period only, but we do not currently know how long it will last. It is currently anticipated that the furlough arrangements will initially last for approximately one month, but this could be extended.*

"*You will therefore be required to return to your usual working arrangements unless altered as above or by any further Government decisions at the end of the furlough arrangements or earlier upon request, although this may change.*"

17. The Second Respondent was incorporated on 10 March 2021. Its two directors were the same Mr Thorne and Ms Massey who had been the directors of the First Respondent, and they each subscribed for half of the Second Respondent's issued share capital.

18. As part of the Claimant's role as Finance Assistant of the First Respondent, he has access to the First Respondent's bank statements, and has provided print outs for each of the months of March and April 2021, with redactions (i.e., portions are not visible to the Tribunal). Those statements do not identify the name of the account holder, but the Claimant asserts these statements are of the bank account of the First Respondent. The statements show receipt of furlough funds on each of 26 March 2021 and 28 April 2021, and payment of salaries to various named individuals, which do not include the Claimant (though, as noted, numerous entries on those statements are redacted), in each of those months.

19. The equivalent bank statement for the month of May 2021 does not show a furlough payment, but instead shows the payment of a grant.

20. On 11 May 2021, the Claimant emailed Ms Massey. That email included the following:

"As I haven t spoken to you since the Christmas reunion, I thought to email to check in with you and let you know that I am still around and that I have yet to receive March and April s furloughed salary and I am getting concerned and just wondering if there are any developments on this.

"I would also like to inform you that I am attending a 4-week electrician course from May 17th to June 11th. I did request leave through Rhys however now that OB is undergoing liquidation I am unsure of what the protocol is hence I am letting you know…"

21. The Claimant did not receive a reply to this, and so he emailed Ms Massey again, also addressing the email to Mr Thorne, on 1 June 2021, which included:

"*I am extremely upset at the zero communication which is disappointingly unprofessional and completely unacceptable. Having spoken to HMRC to check to see if Outstanding Branding had received the JRS grant, they advised me to*

check my personal tax account which I was shocked to see furlough claims were not made for me for March and April which explains why I was without salary for those months. The disappointment continued as I have received no formal communication indicating whether I have been sacked/made redundant after seeing this information leaving me in limbo."

(It should be noted that the Claimant's personal tax account subsequently showed that furlough claims were made in respect of him for these months.)

22. Ms Massey – by this time, due to a change in personal circumstances, known as Ms Penn - then replied on 7 June 2021, an extract of which is below:

"In terms of the furlough funds, this should all have been claimed for on your behalf, either under OB Ltd or the new trading entity, Sandy Branding Ltd. I will need to check if this was applied for or if TC Group have made an error.

I did receive your email regarding your training course; I had intended to reply, and I'm sorry that life got in the way, and I never managed to find the time. Are you considering a career change? It would make sense to be open and transparent about what your plans for the future are so we can work together as amicably as possible through these difficult times.

"I appreciate you are frustrated at the lack of salary payments; neither Andy or I have taken salary payments since February, so am well aware of the stress and pain it brings.

"Please do let me know what your thoughts are for the future, and please bear with me while I work back through the info on the furlough payments.

"Thank you for your patience and understanding; I'm sure you know that this is far from how Andy and I like to operate, and it's devastating to be in this position and put other people into it too."

23. The Claimant replied on the same day, which included:

"*Regarding my career, my plans are to train to become an electrician and I am currently in the final week of my training… Whilst on this course I am also running my dad's pharmacy…*"

24. On 4 July 2021, the Claimant received a letter from National Employment Savings Trust (**NEST**), informing him that:

"*Your employer Sandy Branding Ltd enrolled you into NEST with effect from 04 July 2021*".

25. On 3 August 2021, Mr Czerwinke, one of the liquidators of the First Respondent, emailed the Claimant, and said:

"*According to the most recent information provided to us by the director relating to employees, you were dismissed on 22 April 2021 and are owed wages for the period 01 April 2021 to dismissal date.*"

26. The Claimant apparently replied to Mr Czerwinke on 4 August 2021, but that reply is not included in the bundle.

27. On 22 September 2021, Begbies Traynor on behalf of the joint liquidators wrote "*TO ALL KNOWN EMPLOYEES*" informing them of the fact that the First Respondent was expected to be placed into liquidation on 7 October 2021, and stating that:

    "*As a consequence, the Company is no longer able to make payments to you under your contract of employment, which is therefore terminated for reasons of redundancy.*"

    The letter went on to advise how the employees may claim for sums owed to them from the Redundancy Payments Office.

28. The Claimant proceeded to make such a claim, and his claim was acknowledged by The Insolvency Service on 8 October 2021 (and, in respect of his subsequent claim for notice pay, 22 October 2021).

29. On 13 October 2021 the Claimant received a copy of his P45 from Begbies Traynor, and that records his date of leaving the employment of the First Respondent as 31 May 2021.

30. On 14 October 2021 the First Respondent passed a special resolution to appoint Dominik Thiel-Czerwinke and Lloyd Biscoe, both of Begbies Traynor (Central) LLP, as joint liquidators for the purpose of voluntary wind-up.

31. The Insolvency Service paid the Claimant:

    a) £2,810.07 (net) on 15 October 2021, comprising:

        i. A statutory redundancy payment of £1,449.88, based on his four years' service, using £362.47 as the figure for a week's pay;

        ii. £1,594.87 gross by way of arrears of pay for the period 1 to 30 April 2021; and

        iii. £217.48 gross for three days' accrued but untaken holiday; and

    b) £1,449.88 (gross) on 22 October 2021, by way of four weeks' notice pay, again using £362.47 as the figure for a week's pay.

32. The Claimant's online portal with NEST indicates that NEST began made a report to The Pensions Regulator on 4 December 2021 concerning the Second Respondent's failure to pay contributions to the scheme. Similar reports appear to have been made on 12 December 2021, 11 January 2022, 11 February 2022 and 5 April 2022.

33. An email forwarded by Ms Penn to the Tribunal on 24 June 2022 relating to correspondence with ACAS on this matter noted that:

    "*The new business entity, Sandy Branding Ltd t/a Outstanding Branding, is trading at a turnover of approximately £100,000 a year, compared to the £5million*

OB Ltd was turning over.
The decreased turnover means we've been unable to pay your claimant or any other staff, who have all left the business now….

"In short we have been personally, professionally, and financially devastated by the loss of the business during the pandemic. The original business went into liquidation with no assets; there is not sufficient profit in the new entity to pay the Claimant, and he has not been required to do any work in that time."

Procedural background and time limits

The First Claim: Claim number 23003340/2021 against the First Respondent

34. The Claimant filed a Claim Form on 7 August 2021, bringing a claim against the First Respondent for unpaid wages for the period 1 March to 31 May 2021 inclusive.

35. The Claimant complied with early conciliation requirements, and that claim was brought within the limitation period prescribed by section 23(2) of the Employment Rights Act 1996 (the **1996 Act**).

36. The First Respondent did not file a Response to this claim.

37. On 14 September 2021, the Claimant purported to amend his claim to add complaints of unfair and wrongful dismissal against the First Respondent.

The Second Claim: Claim number 2303522/2021 against the Second Respondent

38. The Claimant filed a Claim Form on 25 August 2021 against the Second Respondent, claiming unpaid wages for the period of 1 June to 31 July 2021. His Claim Form did not "tick the box" for unfair dismissal but referred to his making such a claim in one of the "free text" boxes.

39. Again, he complied with early conciliation requirements, and that claim was brought within the applicable limitation period.

40. The Second Respondent did not file a Response to this claim.

41. As for the claim against the First Respondent, on 14 September 2021, the Claimant purported to amend his claim to add complaints of unfair and wrongful dismissal against the Second Respondent to his pre-existing unlawful deductions complaint.

42. On 17 June 2022, at the Claimant's request, his first two claims, 2303340/2021 and 2303522/2021, were consolidated.

The Third Claim: Claim number 2301529/2022 against the Second Respondent

43. On 6 May 2022, the Claimant filed a second claim against the Second Respondent claiming:

    a) Harassment on the grounds of race (contrary to section 26 of the Equality Act 2010 (the **2010 Act**)), pertaining to:

        i. The Racial Banter Incidents. This is a claim the liability for which the Claimant says has passed to the Second Respondent pursuant to Regulation 4(2)(a) of TUPE; and

        ii. The failure to pay him (also characterised as direct discrimination, as below);

    b) Direct discrimination by the Second Respondent's failure to pay the Claimant, which he says was in contrast to the Second Respondent's payment of its other employees (contrary to section 13 of the 2010 Act). This is characterised as a series of failures, continuing until his employment terminated on, as he avers, 5 June 2022;

    c) That the Second Respondent had failed to comply with its obligations to:

        i. give the Claimant an opportunity to elect a representative for the purpose of Regulation 13(3), as detailed in Regulation 14, of TUPE;

        ii. provide the required information under Regulation 13 of TUPE to the Claimant's elected representatives or directly to the affected employees (including him) (in breach of Regulation 13(2)); and

        iii. consult with the Claimant (directly or through his elected representatives) about the measures the Second Respondent envisaged taking in respect of affected employees (in breach of Regulation 13(6) of TUPE),

    and that it was reasonably practicable for the Second Respondent to comply with those duties. The Claimant's position is that his employment transferred to the Second Respondent pursuant to TUPE on or around 31 May 2021, so those failures would have occurred in the period preceding that transfer;

    d) Unlawful deduction from his wages:

        i. in respect of the period 1 June 2021 to 30 September 2021, in the amount of 80% of his normal salary (as the Claimant was furloughed); and

        ii. in respect of the period from 1 October 2021 to 5 June 2022, in the amount of 100% of his normal salary. The Claimant's position is that his employment with the Second Respondent only ended when he accepted the Second Respondent's repudiatory breach – being its failed to pay him – the day before he commenced new employment;

e) Constructive unfair dismissal under section 98 of the 1996 Act. As described above, the Claimant's position is that he accepted the Second Respondent's repudiatory breach on 5 June 2022; and

f) In the partial alternative, if the Claimant's employment is found to have been terminated by the Second Respondent prior to 5 June 2022, the Claimant's position is that:

i. the Second Respondent did not have a fair reason for dismissing him, and that it had not acted reasonably in dismissing him for the reason it did, giving rise to a complaint under section 98 of the 1996 Act; and

ii. the dismissal was wrongful.

44. Each complaint brought by the Claimant under this third Claim Form has an apparent primary limitation period of three months. There is no adjustment to this by the early conciliation certificate submitted with this Claim Form, given the pre-existing early conciliation certificate naming those same prospective claimant and prospective respondent relating to post-transfer unlawful deductions – so the same "matter" for early conciliation purposes. Given the date the Third Claim Form was filed, matters pre-dating 7 February 2022 are, on the face of it, out of time.

45. The Claimant acknowledged that some of these claims were or may have been brought outside of the applicable time limits but considered that the Tribunal has jurisdiction to hear them.

46. On 18 July 2022, in compliance with a Case Management Order dated 20 June 2022, the Claimant set out the basis for his claim against the Second Respondent, asserting that his employment transferred to the Second Respondent pursuant to Regulation 4(1) of TUPE. He contends that the First Respondent's business transferred to the Second Respondent on or around 31 May 2021, as shown by:

a) the Second Respondent's use of the First Respondent's website - though the web address provided by the Claimant appears, at the time of the hearing of this matter, to no longer be in use, and the Claimant's bundle does not include printouts of this;

b) the fact that that website apparently showed that the Second Respondent offered the same products for sale, provided the same information, included testimonials relating to the work of the First Respondent, and referred to the Second Respondent having *"over 9 years' experience in supplying promotional merchandise, corporate giveaways, and branded clothing to a variety of different businesses throughout the UK, EMA, North America & APAC*". None of this can be seen by the Tribunal, as described above;

c) the Claimant appended a copy of the privacy notice, apparently taken from the Second Respondent's website, which refers to "*Sandy Branding t/a*

Outstanding Branding via the Website", and which identifies the company number as being the registered company number for the Second Respondent (this print out has been seen by the Tribunal);

d) the Second Respondent's website apparently used post and email address details which indicated a transfer of freehold or leasehold interests in the same properties used by the First Respondent, and a transfer of intellectual property from the First Respondent to the Second Respondent – again, this cannot be seen by the Tribunal, and the Claimant has not provided a print-out to show this;

e) the Second Respondent's website apparently listed some of the same employees who were employed by the First Respondent, including the Claimant, the Claimant's line manager, and three other individuals. Again, this cannot be seen by the Tribunal; and

f) the Second Respondent's use of the social media platforms previously operated by the First Respondent. The Claimant has provided no evidence of this.

The hearing

47. Neither the First nor the Second Respondent appeared at the hearing. The Claimant was represented by Counsel, Mr Wynne, and he gave witness evidence in support of own case.

48. The Claimant served hearing bundle of 259 pages, which was provided to the Tribunal at the start of the hearing, together with the Claimant's witness statement. Counsel for the Claimant also provided the Tribunal with a skeleton argument at the outset of the hearing.

Issues

49. Although neither Respondent has resisted the claims against them or sought to engage with these proceedings, various matters fall to the Tribunal to determine, not least because some of the alternative claims the Claimant raises.

50. The key factual issues to determine are:

Factual issue 1: Did the Racial Banter Incidents occur?

Factual issue 2: Was the Claimant entitled to be paid by the First Respondent in respect of the period 1 March to 31 May 2021?

Factual issue 3: Was the Claimant in fact paid for that period?

Factual issue 4: Were other employees of the First Respondent paid during this period?

Factual issue 5: Was the failure to pay the Claimant less favourable treatment because of his race?

Factual issue 6: Did the First Respondent have a sufficiently identifiable economic entity (for TUPE purposes)?

Factual issue 7: Was there a transfer of that economic entity?

Factual issue 8: If so, was there an organised grouping of resources or employees at the First Respondent that transferred to the Second Respondent when that economic entity transferred?

Factual issue 9: If so, was the Claimant part of that organised grouping?

Factual issue 10: If so, when did that transfer occur?

Factual issue 11: Was the Claimant entitled to be paid for any period from 1 June 2021 onwards, i.e., when did the Claimant's employment with either the First Respondent or the Second Respondent terminate?

Factual issue 12: Was that termination effected by the Claimant, the First Respondent, or the Second Respondent? If effected by the First or Second Respondent, what was the reason for the Claimant's dismissal?

Factual issue 13: If the Claimant was dismissed, was a fair process followed in connection with that dismissal?

Factual issue 14: When the Claimant's employment terminated, did he have accrued but untaken holiday outstanding? If so, how many days?

Factual issue 15: Was the Claimant entitled to be paid for any period from 1 June 2021 onwards? Was he paid for this period?

Factual issue 16: If so, what are the sums owed to him, and by whom?

Factual issue 17: Was there any process undertaken for the election of representatives for TUPE purposes?

Factual issue 18: Were any "measures" proposed in connection with the TUPE transfer from the First Respondent to the Second Respondent?

Factual issue 19: Was there any information and consultation process conducted in connection with any TUPE-transfer from the First Respondent to the Second Respondent?

Legal issue 1: Should the Claimant's applications to amend his first and second claims be granted?

Legal issue 2: How do the statutory provisions on the primary time limits for bringing claims apply here?

Legal issue 3: If any of the Claimant's claims were brought outside of the primary time limit, is the Tribunal's discretion to extent time engaged, and if so, should that discretion be exercised?

Legal issue 4: If he was dismissed, was the Claimant fairly dismissed by the First Respondent, or the Second Respondent (as the case may be)?

Legal issue 5: If he was dismissed, was the Claimant wrongfully dismissed?

Legal issue 6: Were either or both of the First Respondent and the Second Respondent obliged to inform the Claimant's elected representatives, or affected employees (including the Claimant) directly, about the TUPE transfer, and provide related information to them, pursuant to Regulation 13(2) of TUPE?

Legal issue 7: If the First Respondent was obliged to do so, did that liability transfer to the Second Respondent at the time the Claimant TUPE-transferred into the Second Respondent's employment?

Legal issue 8: Was there a failure to consult with the Claimant about the TUPE transfer?

Legal issue 9: Was either the First Respondent or the Second Respondent obliged to make arrangements for the election of employee representatives in respect of employees which included the Claimant?

Legal issue 10: If the First Respondent was obliged to make arrangements for the election of employee representatives in respect of the Claimant, did that liability transfer to the Second Respondent at the time the Claimant TUPE-transferred into the Second Respondent's employment?

Law

<u>Harassment related to race</u>

44. Section 26(1) of the 2010 Act provides that:

"*A person (A) harasses another (B) if—*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

<u>Direct discrimination because of race</u>

45. Section 13(1) of the 2010 Act sets out that:

"*A person (A) discriminates against another (B), if because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

46. Section 136(2) of the 2010 Act sets out the burden of proof applicable to proceedings under that Act:

"*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold the contravention occurred.*"

In other words, a two-stage enquiry should be carried out:

a) Firstly, the claimant must establish, on the balance of probabilities, facts from which the inference could properly be drawn by the tribunal that, in the absence of any other explanation, an unlawful act was committed; and then

b) Secondly (if the claimant has made out a *prima facie* case for discrimination, as per the first stage), the burden of proof shifts to the respondent to prove, on the balance of probabilities, that the treatment in question was in no sense whatsoever on the ground of the claimant's race

(*Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong* [2005] ICR 931).

51. The issue of what is sufficient to establish a *prima facie* case for discrimination (i.e., to shift the burden of proof to the respondent) has been considered in numerous cases, including the Court of Appeal decision in *Deman v The Commission for Equality and Human Rights* [2010] EWCA Civ 1279. Lord Justice Sedley, giving the judgment of the Court, said:

"*In* Madarassy v Nomura International Ltd *[2007 EWCA Civ 33 , §56, this court, per Mummery LJ, held:*

> *"The bare facts of a difference in status [e.g. race] 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."*

We agree with both counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."

52. The conclusion of the Court in *Deman* was that a "*bare assertion*" that a difference in treatment was because of a protected characteristic was insufficient to shift that burden.

<u>TUPE: transfers generally</u>

53. Regulation 4(1) of TUPE provides that:

"*… a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*"

54. The meaning of "*relevant transfer*" is provided by Regulation 3, and the relevant part of Regulation 3 relied upon by the Claimant is Regulation 3(1)(a):

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

where "*economic entity*" is defined in Regulation 3(2) as:

"*An organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary*".

55. Whether an economic entity exists is a question of fact (*Cheesman v R Brewer Contracts Ltd* [2001] IRLR 144).

56. The EAT in *Cheesman* provided five guidelines for assessing that question:

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

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

c) 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.

d) 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.

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

57. As to whether an economic entity has transferred, again this is a question of fact, centring upon whether the economic entity has retained its identity (Regulation 3(1)(a)). The European Court of Justice in *Spijkers v Gebroeders Benedik Abattoir CV* [1986] 2 CMLR 296 provided some insight on that question, as was

examined and applied by the EAT in *Cheesman*. The EAT used that analysis to arrive at the following 12 principles:

a) The decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, *inter alia*, by the fact that its operation is actually continued or resumed.

b) 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 his 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.

c) In considering 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.

d) Amongst the matters thus 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 are suspended.

e) In determining whether or not there has been a transfer, account has to be taken, *inter alia*, of 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.

f) 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.

g) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer.

h) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer.

i) 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.

j) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer, but it is certainly not conclusive as there is no need for any such direct contractual relationship.

k) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.

l) 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 the work by one subcontractor and the start by the successor.

58. The focus in answering the question of whether an economic retains its identity is examining the transferring entity's identity – not looking at the overall similarities or differences between the putative transferor and transferee (*Playle v Churchill Insurance Group Ltd* (1999) EAT/570/98). A purposive approach should be taken to this question in order to protect employees when a change of employer occurs (*Skittrall v Camden Primary Care Trust* [2005] All ER (D) 205 (Jul)).

59. If there is an economic entity that retains its identity, the question then becomes whether the Claimant was assigned to the undertaking transferred.

60. Regulation 2(1) provides that "*assigned*" means "*assigned other than on a temporary basis*", and whether an individual is so assigned is a question of fact.

61. Regulation 4(3) provides that:

"*Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer*".

62. In the case of an employee absent before the transfer, the question is whether they would be assigned to the undertaking or part transferred upon their return. As per the judgment of His Honour Judge Serota QC in the EAT decision of *BT Managed Services Ltd v Edwards* [2016] ICR 733, assignment:

"*Required some level of participation, or an expectation of future participation, in carrying out the relevant activities, and a mere administrative connection was insufficient; that, although a temporary absence from work would not necessarily mean that an employee was no longer assigned to grouping, an employee who had no connection with the group's economic activity could not be regarded as "assigned to" that group*".

63. If a TUPE transfer has occurred, one effect of that transfer is that, as per Regulation 4(2):

"*On the completion of a relevant transfer-*

(a) *All of the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee*".

TUPE: failure to inform and consult (including right to elect representatives)

64. TUPE requires a sharing of information between the transferor and transferee prior to transfer, and for information to be provided, and consultation to be conducted where appropriate, with affected employees.

What is required by way of information provision

65. Regulation 13(2) provides that:

"*Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees,* ***the employer*** *shall inform those representatives of* [a list follows]" (my emphasis).

66. Regulation 13(3) then sets out what is meant by "*appropriate representatives*":

"*For the purposes of this regulation the appropriate representatives of any affected employees are—*

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b) in any other case, whichever of the following employee representatives the employer chooses—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1)."

67. "*Affected employees*" are defined in Regulation 13(1) as:

"*Any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly*".

68. Regulation 13(11) provides that:

"*If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).*"

What is required by way of consultation

69. Regulation 13(6) then requires that consultation occurs in certain circumstances:

    "***An employer** of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.*" (My emphasis.)

70. The term "*measures*" is not defined in TUPE, but the following emerges from the case law:

    a) "*measures*" includes any action, step or arrangement (*Institution of Professional Civil Servants and ors v Secretary of State for Defence* [1987] IRLR 373, ChD);

    b) changes do not need to be disadvantageous to the affected employees to amount to "*measures*" (*Todd v Strain and ors* [2011] IRLR 11);

    c) simple administrative changes, changes which would have occurred in any event, and changes of emphasis (in this case, a change in the emphasis of tasks falling within an employee's job description) do not amount to "*measures*" (*Baxter and ors v Marks and Spencer plc and ors* EAT 0162/05); and

    d) changes to non-contractual benefits, collective issues and occupational pensions can amount to "*measures*" (*Baxter*).

Failure to inform and/or consult

71. There is a recognition by the statutory draftsperson that a TUPE transfer may occur in a situation where it is not possible to fully comply with the duties outlined above in Regulation 13(9):

    "*If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.*"

72. It is for the employer that is the subject of a complaint to show that such special circumstances applied, and that it took all such steps towards its performance as were reasonably practicable in the circumstances (Regulation 15(2)).

73. Where there has been non-compliance with either Regulations 13 or 14 (the latter concerning the required procedure for the election of employee representatives),

a complaint may be made to an employment tribunal as prescribed in Regulation 15(1):

"*Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—*

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;

(c) in the case of failure relating to representatives of a trade union, by the trade union; and

(d) in any other case, by any of his employees who are affected employees."

74. The obligations in Regulation 13 fall on the employee's employer at the relevant time (see the emboldened text quoted above), so in the case of an employee transferring from the transferor to the transferee in connection with the transfer, the obligations fall on the transferor. Mrs Justice Slade DBE, giving the EAT's judgment in *Allen v Morrisons Facilities Services Ltd* [2014] IRLR 514 observed that:

"*The standing of an employee to bring a claim for breach of an obligation under TUPE reg. 13 is determined at the date of the breach of the obligation, not at the date the claim is lodged. If a transferor fails to give representatives of their affected employees the information required by reg. 13(2)(d) they can pursue a claim against the transferor notwithstanding that at the time of lodging an ET1 the employees may have transferred to the transferee… An employee of a transferor cannot obtain standing to claim against a transferee for breach of pre-transfer obligations because he became an employee of the transferee on the transfer of the undertaking.*"

75. Regulation 15(8) concerns complaints made to an employment tribunal against a transferor:

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

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

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

76. Regulation 15(9) reads:

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

77. Regulation 15(5) concerns complaints about failures to consult about "*measures*". It states that:

"*On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d)* [the obligation on the transferor to provide information about any measures the transferor envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer]*… he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4)* [the obligation on the transferee to give the transferor such information as will enable the transferor to consult about measures] *unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.*"

In other words, this paragraph refers to the situation where the transferor's failure to consult about "*measures*" is attributable to the transferee's failure to give it the requisite information about measures. This is described by Mrs Justice Slade DBE in *Allen*:

"*It is only if the affected employees bring a claim against the transferor and the transferor alleges that the transferee had failed to give them the requisite information at the requisite time in accordance with reg. 13(4) and give the transferee notice under reg. 15(5) that the transferee is made a party to the proceedings. It is clear from the scheme of the Regulations that the transferee cannot be made a party to the proceedings by any other means. An order can only be made against a transferee if the tribunal finds the complaint against the transferor under reg. 15(1) well founded and the transferor shows that the transferee failed to perform their obligations under reg. 13(4).*"

78. Regulation 15(7) provides that:

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

79. However, as Mrs Justice Slade DBE noted in *Allen*:

"*Regulation 15 sets out who can make a complaint to an ET of failure to comply with a requirement of reg. 13. Regulation 15 does not impose obligations. It provides a means of redress for breach of the requirements of regs. 13 and 14.*"

Election of employee representatives

80. Regulation 13 anticipates that affected employees are represented for the purpose of the duty and inform and consult pursuant to TUPE. Regulation 14 sets out "*requirements*" for the election of employee representatives where there are no pre-existing representatives for that purpose (or any other purpose where those representatives are not authorised by the TUPE-affected employees for this purpose).

81. The requirements in Regulation 14 include that the employer must make such arrangements as are reasonably practicable to ensure a fair election process for representatives for TUPE information and consultation purposes.

82. Regulation 15(1)(a) provides that:

"*Where an employer has failed to comply with a requirement of regulation 13… a complaint may be presented to an employment tribunal on that ground– (a) in the case of a failure relating to the election of employee representatives, by any of **his** employees who are affected employees*" (my emphasis).

83. An employer may defend such a complaint (pursuant to Regulation 15(2)) if it shows that it was "*not reasonably practicable for him to perform the duty*", and that "*he took all such steps towards its performance as were reasonably practicable in those circumstances*" – but "*it shall be **for him** to show*" that those conditions apply (my emphasis).

84. Regulation 15(7) provides that:

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

Amendments

85. Rule 29 of the Employment Tribunals Rules of Procedure 2013 is a wide case management power:

"*The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order…*"

86. This Rule (along with all the others) must be interpreted and exercised in light of Rule 2 – the overriding objective to deal with cases fairly and justly.

87. The seminal cases on the question of whether an amendment should be permitted (some of which were determined under the predecessor rules to Rule 29) are *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore* [1996] IRLR 661, *Vaughan v Modality Partnership* UKEAT/0147/20/BA (V), *Abercrombie v Aga Rangemaster* [2013] EWCA Civ 1148, *Transport and General Workers Union v*

Safeway Stores Ltd UKEAT/0092/07/LA and *Ladbrokes Racing Ltd v Traynor* UKEAT/0067/06.

88. What is clear from those authorities is that when answering the question of whether the discretion in Rule 29 should be exercised to permit the amendment, the assessment is 'what does the overriding objective require?', or to put it another way, 'in which party's favour does the balance of injustice and hardship sit?'. The burden sits with the party seeking the amendment to persuade the Tribunal that the overall balance of injustice and hardship makes the amendment appropriate.

89. The factors to be taken into account in conducting this weighing exercise include, where appropriate on the facts:

    a) The nature of the amendment (e.g., is it a clerical error, or more substantive?);

    b) The extent to which the amendment likely involves substantially different areas of inquiry than the existing claims;

    c) The applicability of time limits;

    d) The timing and manner of the application for amendment;

    e) The merits of the amendment;

    f) The compensation available; and

    g) The real, practical consequences of allowing the amendment.

90. On the "applicability of time limits", Underhill LJ in *Abercrombie* noted that the relevance of whether fresh proceedings would have been out of time depends on the circumstances:

    "*Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and* a fortiori *in a re-labelling case – justice does not require the same approach*".

91. On the fourth factor, the timing and manner of the application for amendment, the lateness of making application for amendment does not necessarily mean that other party is prejudiced - it depends on whether there is any difficulty in meeting the claim and what it is (*Blackburn v Aldi Stores Ltd* [2013] ICR D37, EAT).

92. In *Ladbrokes Racing Ltd v Traynor* EATS 0067/06 the EAT gave some guidance as to how a tribunal may take account of the timing and manner of the application in the balancing exercise. It will need to consider:

    a) why the application is made at the stage at which it is made and why it was not made earlier (*Selkent*);

b) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and

c) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

93. When considering the real, practical consequences of the amendment, cases such as *Vaughan* encourage tribunals to look at the practical consequences of (in the case of an amendment sought by a claimant) the respondent resisting it, e.g., additional counsel fees, witnesses having left the respondent's organisation because of time gone past, papers lost, CCTV tapes recorded over, etc. This must be considered alongside the prejudice to the claimant if the amendment is not permitted.

94. As shown by the Court of Appeal decision in *Office of National Statistics v Ali* [2004] EWCA Civ 1363, the scope of a claim should be judged by reference to the whole document. A "*bare reference*" on its own may be insufficient to found a complaint, but where, in the context of the form as a whole, such a bare reference makes clear to the respondent the complaint he has to meet, it will be sufficient.

Time limits – unfair dismissal

95. The time limit for presenting a complaint of unfair dismissal is set out in section 111 of the 1996 Act, subsection (2) of which reads:

"*(2) … an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal:*
(a) before the end of the period of three months, beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

96. As subsection (2) clearly shows, time limits are not a mere formality – the Tribunal does not have jurisdiction to hear a complaint unless the condition(s) in either (a) or (b) is satisfied.

97. The phrase, in subsection (2)(a), "***before** the end of the period of three months*" (my emphasis) means that, where an employee is dismissed on 15 January, the last day for bringing a claim (subject to any extension for ACAS early conciliation) is 14 April – 15 April is one day too late (*Hammond v Haigh Castle & Co Ltd* [1973] ICR 148).

98. As noted in subsection (2)(a), section 207B of the Act extends the limitation period for bringing an unfair dismissal claim so as to facilitate conciliation between the parties before institution of proceedings on the following terms:

"*(2) In this section—*

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

13. In other words, where the limitation period for bringing an unfair dismissal claim would otherwise expire *during* a period of ACAS early conciliation, the limitation period shall be extended as prescribed by subsection (3) or subsection (4) where that applies. The provision has no impact where a limitation period expires prior to the start of the ACAS early conciliation period.

99. Where the three-month time limit (as extended by early conciliation if appropriate) has expired, in order for the Tribunal to hear the complaint it must be satisfied both that:

a) it was not reasonably practicable for the Claimant to bring their claim within the time limit; <u>and</u>

b) it was presented within such further period as the tribunal considers reasonable.

100. The test of reasonable practicality is a strict one (*Palmer v Southend on Sea Borough Council* [1994] ICR 372).

101. The Court of Appeal in *Palmer* considered that the test of reasonable practicability means something like 'reasonably feasible'.

102. On the second question, Mr Justice Underhill, then President of the EAT, commented in the case of *Cullinane v Balfour Beatty Engineering Services Ltd and anor* EAT 0537/10 that this requires an objective consideration of both the factors causing the delay and the period that should reasonably be allowed in those circumstances. Crucially, this assessment must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly.

Time limits – race discrimination and harassment

103. Claims of discrimination because of race, or harassment on the ground of race, are subject to a time limit stipulated in section 123(1) of the 2010 Act, and:

“*May not be brought after the end of—*
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.”

104. For these purposes, pursuant to subsection (3), “*conduct extending over a period is to be treated as done at the end of the period*”. As per the Court of Appeal’s decision in *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, in assessing whether conduct should be regarded as “*extending over a period*” the focus should be on the substance of the claimant’s allegations: do they indicate that there was an ongoing or continuing act extending over a period, as distinct from a succession of unconnected or isolated specific acts?

105. The three-month time period in section 123(1)(a) is extended in connection with ACAS early conciliation pursuant to section 140B of the 2010 Act where either:

a) The day after Day A, and Day B, both fall within the period of three months starting with the date of the act to which the complaint relates. In that case, none of those days are to be counted; or

b) The three-month time limit would otherwise expire in the period beginning with Day A and ending one month after Day B. In that case, the time limit expires one month after Day B.

106. Where an alleged act (or failure or series) falls outside the primary time limit (as extended, if applicable, by section 140B), the question arises as to whether the claim was brought within such longer period as is “*just and equitable*” (section 123(1)(b)). This conveys a wide discretion on Employment Tribunals, that should be exercised after considering the relative prejudice that would be caused to each party by the exclusion or inclusion of the claim. Exceptional circumstances are not required in order to extend time: what is required is that an extension of time should be just and equitable (*Pathan v South London Islamic Centre* UKEAT/0312/13).

107. The factors relevant to that consideration will be case-specific, but the tribunal may wish to have regard to those described in the EAT decision of *British Coal Corporation v Keeble* [1997] UKEAT 496/98, [1997] IRLR 336, being:

   a) the length of and the reasons for the delay;

   b) the impact of the delay following the expiry of the relevant deadline (e.g., if key witnesses are no longer available);

   c) the conduct of the respondent after the act or omission complained of (e.g., did the respondent's actions cause the claimant to delay bringing their case, or did the respondent cooperate with the claimant's requests for information);

   d) how long the reason given by the claimant for the delay applied;

   e) the extent to which the claimant acted promptly and reasonably once the reason for the delay ceased to apply; and

   f) what steps, if any, the claimant took to prepare for bringing the claim, e.g., seeking legal advice, and the nature of any such advice he may have received.

<u>Time limits – TUPE</u>

108. Regulation 15(12) of TUPE sets out the time limit applicable to failure to inform and consult claims – they must be presented to the tribunal:

   "*Before the end of the period of three months beginning with… the date on which the relevant transfer is completed… or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months*".

   In other words, the scheme for assessing whether a TUPE complaint has been brought "in time" follows exactly the same approach as that for unfair dismissal and differs from that applicable to discrimination claims in the 2010 Act.

109. The primary time limit of three months beginning with the date on which the relevant transfer completed may be adjusted by compliance with the ACAS early conciliation regime (pursuant to Regulation 16A) where either:

   a) The period beginning on the day after Day A to (and including) Day B is not to be counted towards the three-month time limit; or

   b) The three-month time limit would otherwise expire in the period beginning with Day A and ending one month after Day B. In that case, the time limit expires one month after Day B.

110. The starting assumption is that, in passing TUPE in those terms, Parliament has set an expectation that the primary time limit is the period within which, in the

ordinary course of events, it *is* reasonably practicable for would-be litigants to meet. There is also a strong public interest in claims being brought promptly. The burden of proof is on the claimant to show the reason or reasons which rendered it not reasonably practicable to meet the limitation period (*Porter v Bandridge Ltd [1978] IRLR 271*) (not a TUPE case but considered applicable given the same legislative language about time limits is used in Regulation 15(12) to that in section 111 of the 1996 Act).

111. Where the claimant is ignorant as to his rights, the Court of Appeal decision in *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53, as considered in *Porter*, indicates that the tribunal is to ask whether the claimant's ignorance was reasonable in the circumstances.

112. If the claimant is confused about his rights, for example, because of confusing correspondence from others, that may render it not reasonably practicable for the claimant to bring their claim earlier - *Glenlake Computers Ltd v Eards* (1999) EAT/434/99. In that case, the employee was informed by the insolvency practitioners appointed in respect of his employer that his employment had terminated, and that he may have claims against the Redundancy Payments Office. He was not informed about the possibility of his employment TUPE-transferring with the sale of part of his employer's business to an acquirer, and consequently of the fact that he may have claims against that entity. His confusion about his rights was found to have been caused by that correspondence, and therefore it was not considered that he "ought" to have known about them.

<u>Unfair dismissal</u>

113. Section 94(1) of the 1996 Act provides that:

"*An employee has the right not to be unfairly dismissed.*"

114. Section 98 provides more colour as to what is meant by unfair dismissal:

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

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

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

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

…

(c) *is that the employee was redundant.*"

115. The meaning of redundancy is set out in section 139:

"*(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-*

(a) the fact that the employer has ceased or intends to cease-

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business-

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

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

116. If the employer has a potentially fair reason for dismissing the employee, it still needs to be reasonable in the particular factual circumstances for the employer to rely on that reason to dismiss the employee, and it needs to follow a fair procedure in doing so, as required by section 98(4) of the 1996 Act:

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

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

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

117. Where a dismissal has been found to be procedurally unfair, a tribunal, when assessing the appropriate remedy to be awarded, should consider whether the employer *could* have dismissed the employee fairly, and *whether* it would have done so (*Polkey v AE Dayton Services Ltd* [1988] ICR 142).

118. If the tribunal considers that the respondent could and would have dismissed the employee fairly, the compensatory award made to the claimant should reflect the period that the tribunal judges it would have taken the respondent to carry out a fair dismissal process.

Dismissal of an employee after a TUPE-transfer

119. Dismissal of an employee in connection with a TUPE-transfer is, on-the-face-of-it, automatically unfair, as provided for by Regulation 7(1) of TUPE:

"*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.*"

120. This is subject to an exception, set out in Regulation 7(3), where:

(As per Regulation 7(3)(a), which cross-refers to Regulation 7(2)) "*the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.*"

121. If an "*economic, technical or organisational reason entailing changes in the workforce*" (an **ETO reason**) applies, the employee is to be regarded as having been made redundant or as having been dismissed for "*a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held*" (Regulation 7(3)(b)).

122. In other words, Regulation 7(3) acknowledges that there are two potentially fair reasons for dismissing an employee in connection with a TUPE-transfer, though a fair dismissal in that situation still requires that it is reasonable, on the facts, for the employer to rely on one or other of those reasons to dismiss the employee, and that it follows a fair process, as Regulation 7(3) of TUPE does not displace the requirements of the 1996 Act.

123. If a dismissal takes place shortly after a TUPE-transfer, the question therefore arises as to what the reason or reasons for the dismissal were. If the dismissal was not for the sole or principal reason of the transfer, Regulation 7 does not apply. Where the sole or principal reason for the dismissal was the TUPE-transfer, the dismissal is still potentially fair if it was for an ETO reason.

Wrongful dismissal

124. An employee, by dint of their contract of employment with their employer, is entitled to be given a period of notice before that contracted is terminated. Where an employer dismisses an employee without notice or payment in lieu of notice in breach of that contract, the employee has been wrongfully dismissed and is entitled to seek damages equal to the pay and value of benefits they would have received had their employer complied with the terms of the contract.

Adjustment for unreasonable failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures

125. Pursuant to s207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULR(C)A**), awards in respect of complaints of (among other things):

a) unauthorised deductions from wages;

b) a failure to pay a statutory redundancy payment; and

c) unfair dismissal – just the compensatory award,

may be increased or decreased by an amount which the tribunal considers "*just and equitable in all the circumstances*", up to a maximum uplift or reduction of 25% if the tribunal considers that there has been an unreasonable failure on the part of the employer (prompting an increase) or employee (prompting a decrease) to comply with the ACAS Code of Practice on disciplinary and grievance procedures (the **ACAS Code**).

Findings

Factual issue 1: Did the Racial Banter Incidents occur?

126. No Response has been filed by either Respondent to any of the three Claim Forms filed by the Claimant. There is no reason to doubt, and no evidence to counter, the Claimant's word that these incidents occurred. I find that they did.

Factual issue 2: Was the Claimant entitled to be paid by the First Respondent in respect of the period 1 March to 31 May 2021?

127. There are five pieces of evidence that support the Claimant's contention that he was entitled to be paid during this period:

a) His contract of employment, stating that he was entitled to be paid a salary of £18,000 per annum, payable in equal monthly instalments in arrears. There is no evidence to suggest that that contract had been terminated in this period (and, in fact, evidence that it had not been, described in the following sub-paragraphs);

b) The furlough letter of 1 April 2020. Although there is no signed copy of this letter provided to the Tribunal, the facts that:

i. the First Respondent claimed monies under the CJRS in respect of the Claimant; and

ii. the correspondence between the Claimant and Ms Penn indicate that they understood he was furloughed,

show that the parties operated under the shared understanding that his contract of employment had been varied by the terms of this letter;

c) The statement from the Claimant's online personal tax account, showing that the First Respondent made claims in March, April, and May 2021 under the CJRS in respect of him;

d) A record from the Claimant's online personal tax account to the effect that the First Respondent informed HMRC that the Claimant was paid in

respect of April and May 2021. This document does not refer to what the First Respondent told HMRC about the Claimant's earnings in March 2021, but this is presumably because that month fell in a different tax year; and

e) The correspondence between Ms Penn and the Claimant cited at paragraphs 20 to 22 (inclusive), where both agree that the Claimant was entitled to be paid for this period, the implication being that that entitlement was at a rate of 80% of his non-furloughed earnings.

128. The evidence to the contrary is the email from Mr Czerwinke, one of the joint liquidators of the First Respondent, on 3 August 2021, that he was informed by a director of the First Respondent that the Claimant had been dismissed on 22 April 2021. However, none of the Claimant, Ms Penn nor the Second Respondent seems to have understood the Claimant's employment to have terminated on that date given:

a) The Claimant's emails to Ms Penn on 11 May 2021 - referring to the fact that he had sought permission to take annual leave for the period 17 May to 11 June – and 1 June 2021, referring to the lack of communication with him and saying that "*I have received no formal communication indicating whether I have been sacked/made redundant… leaving me in limbo"*;

b) Ms Penn's email to the Claimant on 7 June 2021, where, in relation to the Claimant's training course she said: "*Are you considering a career change? It would make sense to be open and transparent about what your plans for the future are so we can work together as amicably as possible through these difficult times. I appreciate you are frustrated at the lack of salary payments; neither Andy or I have taken salary payments since February, so am well aware of the stress and pain it brings. Please do let me know what your thoughts are for the future, and please bear with me while I work back through the info on the furlough payments.*" This email is not entirely clear about Ms Penn's understanding, but the fact that she asks for transparency going forward suggests that Ms Penn was expecting to be in a position to call the Claimant back from furlough when the business picked up; and

c) The statement from the Claimant's online personal tax account shows that the First Respondent made claims under the CJRS in respect of him for May 2021.

129. I find that the Claimant was not dismissed on 22 April 2021, and that he was entitled to be paid for the period 1 March to 31 May 2021 by the First Respondent.

<u>Factual issue 3: Was the Claimant in fact paid for that period?</u>

130. The Claimant has not supplied copies of his own bank account to show that payments were not received by him from the First Respondent in this period, but

the contemporaneous correspondence between him and each of Ms Penn and Robert Keen (the latter of whom appears to have worked for the First Respondent's accountants) is consistent with the fact that he was not paid, as is his claim to and payment from The Insolvency Service. In light of that evidence (and the absence of any evidence to the contrary), I find that he was not paid during this period.

Factual issue 4: Were other employees of the First Respondent paid during this period?

131. The bank statements accessed by the Claimant, whilst not identifiable on their face as pertaining to the First Respondent, show receipt of furlough monies in each of March and April 2021 and payment of salaries to various people. They appear to be what the Claimant says they are (and again, there are no pleadings and no evidence at all from either Respondent).

132. There are entries in those statements indicating that certain individuals were paid salary instalments during March and April 2021, e.g.

"*Bill Payment*
[Name redacted by Tribunal]
OB SALARY BBP",

"*Bill Payment*
[Name redacted by Tribunal]
OUTSTANDINGBRAND BBP" and

"*Bill Payment*
[Name redacted by Tribunal]
SALARY BBP".

133. There are seven entries of these kind in the March 2021 statement, five in the April 2021 statement and one in the May 2021 statement. Numerous entries have been redacted by the Claimant.

134. I find that some employees of the First Respondent were paid in this period, with the numbers diminishing as time went on.

Factual issue 5: Was the failure to pay the Claimant less favourable treatment because of his race?

135. As noted above, the Claimant has provided evidence to the effect that, in failing to pay him, the First Respondent treated him differently to at least some of its other employees.

136. In oral evidence, the Claimant said he thought there were other employees of the First Respondent beside himself who were also not paid.

137. The Claimant is Asian and says that there were no other Asian employees of the First Respondent at the relevant time.

138. I find that the Claimant has established a difference in treatment between him and at least some of his other colleagues, but I consider his complaint that this was because of his race to be a "*bare assertion*". I do not consider that he has done enough to shift the burden of proof to the First Respondent (as per the Court of Appeal decision in *Deman*), not least because his evidence suggests that there were other, non-Asian employees, who were also not paid in this period.

139. I therefore find that the Claimant has not established that the failure to pay him was less favourable treatment because of his race.

<u>Factual issue 6: Did the First Respondent have a sufficiently identifiable economic entity (for TUPE purposes)?</u>

140. As per the *Cheesman* guidelines on economic entity, the evidence from the Claimant is that:

    a) The First Respondent's promotional gifts and branding merchandise business was a stable economic entity, not limited to performing one specific works contract (as shown by the various Google and Trustpilot customer reviews included in the bundle), and that there was an organised grouping of persons and assets involved in pursuing the activities of that economic entity (as per *Cheesman* economic entity guideline 1);

    b) The First Respondent's promotional gifts and branding merchandise undertaking was sufficiently structured and autonomous (as per *Cheesman* economic entity guideline 2) for the outside world – suppliers and customers - to recognise it as such (again, as evidenced by the Google and Trustpilot reviews); and

    c) Either:

        i. this economic entity included assets such as freehold/leasehold properties, and intellectual property in social media accounts and webpages (even if those assets have subsequently been disposed of), which contributed to its clear identity (as per *Cheesman* economic entity guideline 5); or

        ii. if there was no transfer of freehold/leasehold properties, or of intellectual property in social media accounts and webpages (i.e., if the Claimant's suspicions are wrong), the promotional gifts and branding merchandise business of the First Respondent was recognised as being the same in the hands of the Second Respondent by external parties (as per the Google and Trustpilot reviews). If no assets transferred from the First Respondent to the Second Respondent, this business falls within the description of *Cheesman* economic entity

guidelines 3 and 4, being reducible to its manpower and organised grouping of wage-earners.

141. Although the evidence of the webpages and social media accounts appears to now have fallen away, in my judgement the most compelling evidence of the existence of the First Respondent's economic entity is the evidence of the outside world recognising it as such. I find that the First Respondent's promotional gifts and branding merchandise business was an economic entity.

Factual issue 7: Was there a transfer of that economic entity?

142. A consideration of the 12 factors identified in *Cheesman* about whether an economic entity has transferred supports the Claimant's assertion that the First Respondent's promotional gifts and branding merchandise business did transfer to the Second Respondent. The particularly weighty factors in this assessment are those set out below.

a) While the webpage and social media source evidence is now lost, the Claimant's argument, that the Second Respondent presented itself to the outside world as a continuation of the First Respondent, is supported by the Google and Trustpilot reviews:

"*They then went in voluntary liquidation, but mysteriously still seem to be trading*";

"*Went into voluntary liquidation but still trading?!*"; and

"*Don't for god's sake do any work with this company, now trading as Sandy Branding, but Still going as Outstanding Branding too*".

As per the first *Cheesman* transfer guideline, "*the fact that [the First Respondent's] operation is actually continued or resumed*" is a "*decisive criterion*" for establishing the existence of a transfer. I do not consider that *Cheesman* transfer guideline 9 is engaged – the business of the Second Respondent was not merely "similar" to the business of the First Respondent – it was considered by the outside world to the same, and this was an impression that the Second Respondent sought to create by its use of the name of the First Respondent as its trading name (as shown by Ms Penn's email to ACAS of 24 June 2022 – see paragraph 33), the evidence provided by the Claimant about the privacy notice on the Second Respondent's website, and the unchallenged assertions from the Claimant about the Second Respondent's use of the First Claimant's website and social media accounts.

b) Other factors, such as whether the First Respondent's tangible or intangible assets transferred, whether or not the majority of its employees are taken over by the new company, the degree of similarity between the activities carried on before and after the transfer (*Cheesman* transfer

guideline 4) – taking the Claimant's evidence on what the Second Respondent's website indicated on these points before it was taken down - all point towards the transfer of the business from the First Respondent to the Second.

c) The fact that some employees do appear to have transferred to the Second Respondent (*Cheesman* transfer guideline 11): Ms Penn's email to ACAS refers to "*other staff*" who "*have left the business now*" – the implication being that they worked for the Second Respondent for a time.

143. Ms Penn's email to ACAS (quoted at paragraph 33 above) refers to the turnover of the Second Respondent being c£100,000 per annum, compared to the First Respondent's turnover of c£5m per annum.

144. In light of the case of *Playle* (cited above), the focus of examination when answering the question of whether there has been a transfer of an economic entity should be on whether an economic entity retaining its identity has transferred from the First Respondent to the Second Respondent, rather than considering the overall similarities or differences between the putative transferor and transferee. The fact that the external world regards the business as having transferred from the First Respondent to the Second is the relevant analysis, and consequently I find that there has been a transfer of the First Respondent's promotional gifts and branding merchandise business to the Second Respondent. I regard this as consistent with the purposive approach that should be taken to the interpretation of TUPE, as per the *Skittrall* case.

<u>Factual issue 8: If so, was there an organised grouping of resources or employees at the First Respondent that transferred to the Second Respondent when that economic entity transferred?</u>

145. Yes, I find that there was, in light of the same evidence referred to in relation to Factual Issues 6 and 7, particularly the email of Ms Penn to ACAS.

<u>Factual issue 9: If so, was the Claimant part of that organised grouping?</u>

146. The above analysis indicated that all, or substantially all, of the First Respondent's business transferred to the Second Respondent, even if the business of the First and Second Respondents has, as described by Ms Penn, been "*devastated*" by the pandemic.

147. While the Claimant was absent from work due to furlough from 1 April 2020 onwards, the decision in *Edwards* shows that the relevant question is whether he would be assigned to the undertaking or part transferred on his return. The answer to that question is "yes", as shown by:

a) Ms Penn's email of 7 June 2021 when, in response to the Claimant's observation that he had been undertaking a course to retrain as a plumber,

she said “*It would make sense to be open and transparent about what your plans for the future are so we can work together as amicably as possible through these difficult times.*” This clearly indicated that the Second Respondent needed to understand the Claimant’s plans for the future – i.e., that their working relationship was ongoing at this point;

b) Ms Penn’s email to ACAS, where she referred to “*The decreased turnover [of Sandy Branding Ltd t/a Outstanding Branding] means we’ve been unable to pay [the] claimant or any other staff, who have all left the business now*”. This shows that Ms Penn regarded the Second Respondent as having liability to pay the Claimant;

c) The fact that the Claimant’s online personal tax account shows that the Second Respondent made claims under the CJRS in respect of the Claimant; and

d) The fact that the Second Respondent enrolled him into the NEST pension scheme.

148. I find that the Claimant was assigned to First Respondent’s economic entity and part of the organised grouping which transferred with it to the Second Respondent.

<u>Factual issue 10: If so, when did that transfer occur?</u>

149. I find that the transfer occurred on or around 31 May 2021, in light of the entries in the Claimant’s online personal tax account showing that the First Respondent made claims under the CJRS in respect of the Claimant in the period up to and including May 2021, and that the Second Respondent made claims thereafter, from June to September 2021.

<u>Factual issue 11: Was the Claimant entitled to be paid for any period from 1 June 2021 onwards, i.e., when did the Claimant’s employment with either the First Respondent or the Second Respondent terminate?</u>

150. It seems clear that – both from the claims made under the CJRS in respect of the Claimant, and from the correspondence between Ms Penn and the Claimant in June 2021 – that the Claimant was employed by the Second Respondent in June 2021. (This renders the letter from the liquidators of First Respondent of 22 September 2021 to “ALL KNOWN EMPLOYEES”, dismissing them, irrelevant to the Claimant – he had already TUPE-transferred into the employment of the Second Respondent.)

151. In light of the fact that the Second Respondent continued to make claims under the CJRS in respect of the Claimant for the period ending September 2021, and the fact that the Claimant agrees that he performed no work at all for the Second Respondent (or for the First Respondent following 1 April 2020, when he was first

placed on furlough), it appears that his employment with the Second Respondent terminated on 30 September 2021. While the Second Respondent did not, as might have been expected in light of the amendments to the Claimant's contract of employment made by the furlough letters, "*[require him] to return to [his] usual working arrangements*" at the end of furlough, the Claimant did not show up for work either – both parties seemed to share an understanding that his services were no longer required.

Factual issue 12: Was that termination effected by the Claimant, the First Respondent, or the Second Respondent? If effected by the First or Second Respondent, what was the reason for the Claimant's dismissal? Was that reason for the sole or principal reason of the TUPE-transfer?

152. In light of my finding in the preceding paragraph, I find that the parties understood that the Claimant's role was redundant with effect from 30 September 2021, i.e., that the Second Respondent terminated his employment on that date.

153. To my mind, it is plain that the reason for the Claimant's dismissal was the dire economic situation facing the business operated by the First Respondent and then by the Second Respondent. In reality, the First Respondent had not needed the Claimant's services for some time, as it furloughed him on 1 April 2020. By the time of the TUPE-transfer on or around 31 May 2021, that situation had not changed. The fact that the First Respondent had neglected to effect the Claimant's redundancy does not alter the fact that that redundancy after the transfer was not for the sole or principal reason of the TUPE-transfer – it was because the business acquired by the Second Respondent was overstaffed in light of the business's needs, which had changed so dramatically by reason of the pandemic – as described in Ms Penn's email of 24 June 2022 to ACAS (quoted in paragraph 33 above).

Factual issue 13: If the Claimant was dismissed, was a fair process followed in connection with that dismissal?

154. It is self-evident from all that has been described above that no dismissal process whatsoever was followed by the Second Respondent in relation to the Claimant's dismissal.

Factual issue 14: When the Claimant's employment terminated, did he have accrued but untaken holiday outstanding? If so, how many days?

155. The Claimant's employment contract provided that the First Respondent's holiday year ran from 1 January to 31 December each year, and that he was entitled to 22 days' holiday, together with eight Bank or public holidays, "*and a further 3*

days' concessionary days, as detailed in the employee handbook". The Claimant's evidence is that he was never provided with an employee handbook.

156. The Claimant was furloughed, and so did not perform any work, from 1 April 2020.

157. On the termination of his employment on 30 September 2021, he had worked nine of the 12 months of that holiday year. There is no evidence before me as to whether he had "carried over" any holiday from any previous years.

158. In the absence of the employee handbook, it is unclear what the "*concessionary days*" are, but I consider it a fair interpretation of the contractual documentation that we have that the words referring to them were intended to confer an additional entitlement to leave, and therefore I consider that they should be treated as additional holiday days for these purposes.

159. His holiday entitlement for the portion of the holiday year that he worked up to the date of the termination of his employment was therefore nine-twelfths of 25 days - being 18.75 days which, according to his contract of employment, would have been rounded up to 19 days - plus the Bank or public holidays that fell in the period 1 January to 30 September 2021, which were six. The Claimant was therefore entitled to 25 days' holiday in the portion of the 2021 holiday year for which he was employed.

160. The Claimant's email to Ms Penn of 11 May 2021 shows that he took leave to attend an electrician course, which used 19 days of that entitlement.

161. He therefore had four days of accrued but untaken holiday on the termination of his employment by the Second Respondent. It is irrelevant that a portion of that holiday fell in the period when he was paid by the First Respondent, as the Second Respondent was responsible for any such liability for holiday on the termination of the Claimant's employment pursuant to Regulation 4(2) of TUPE.

<u>Factual issue 15: Was the Claimant entitled to be paid for any period from 1 June 2021 onwards? Was he paid for this period?</u>

162. Ms Penn's email to ACAS in June 2022 acknowledges that the Claimant was entitled to be paid for this period – rather than denying the Claimant's entitlement to be paid, she said "*we've been unable to pay your claimant or any other staff*".

163. Consequently, I find that the Claimant was entitled to be paid from 1 June 2021 until his employment terminated on 30 September 2021, and that he was not paid for this period.

<u>Factual issue 16: If so, what are the sums owed to him, and by whom?</u>

164. The Second Respondent is responsible for any unpaid sums to the Claimant, whether accrued during the Claimant's employment by the First Respondent (by

operation of Regulation 4(2) of TUPE) or after his employment transferred to the Second Respondent.

165. The fact that the Second Respondent claimed furlough funds under the CJRS in respect of the Claimant from 1 June to 30 September 2021 indicate that the Claimant was still furloughed for this period, and so he was entitled to be paid 80% of his salary for this period. The uncontested evidence on his latest Claim Form is that he was paid £1,575/month gross which, over the four-month period of 1 June to 30 September 2021 would have amounted to £6,300 gross. Reducing that to his furloughed salary of 80% his normal earnings, that would come to £5,040 gross. He would also have been entitled to employer pension contributions in respect of this period. According to his contract of employment, his employer made pension contributions for his benefit in an amount equal to 3% of his earnings, so £504 (based on his unreduced earnings) over that period, coming to an aggregate of £5,544 gross.

Factual issue 17: Was there any process undertaken for the election of representatives for TUPE purposes?

166. The Claimant's contract of employment states that there were no collective agreements that directly affected the terms of his employment, and so there was no trade union recognised in respect of him.

167. The Claimant's evidence is that the reason he did not bring any TUPE-related claims until a considerable period after the putative TUPE-transfer is because he did not know a TUPE-transfer had occurred. He would have been aware of it had the First Respondent undertaken a process for the election of representatives for TUPE purposes.

168. Consequently, I find that there was no process undertaken for the election of representatives for TUPE purposes.

Factual issue 18: Were any "measures" proposed in connection with the TUPE transfer from the First Respondent to the Second Respondent?

169. While the Claimant's pleadings refer to the "measures" of "most of his colleagues [being] made redundant at the date of the transfer", the evidence is insufficiently clear on that point. Ms Penn's email to ACAS in June 2022 suggests that there were a number of the Claimant's colleagues who transferred but were not paid, and so then left the Second Respondent's employment.

170. In light of this, I do not consider there to be any evidence of any "measures" that were envisaged in connection with the transfer.

Factual issue 19: Was there any information and consultation process conducted in connection with any TUPE-transfer from the First Respondent to the Second Respondent?

171. The Claimant's evidence is consistent – that he was effectively neglected by the First Respondent in relation to what was happening with its business – as shown and acknowledged by Ms Penn in her correspondence with the Claimant in June 2021, where she said:

"*Lack of communication I know is unacceptable… As an overview, the original liquidation process was halted… the process has now recommenced.*"

172. I find that there was no TUPE information process (nor consultation process) conducted in relation to the Claimant.

Legal issues

Legal issue 1: Should the Claimant's applications to amend his first and second claims be granted?

173. The Claimant has applied for the first and second claims to be amended so as to include claims for unfair dismissal and wrongful dismissal. In light of the *Ali* case (cited above), there is no need to amend the second claim to permit his unfair dismissal complaint to proceed – he had referred to that in his Claim Form.

174. In relation to the amendments that do need to be considered, the fact that neither the First nor the Second Respondent has played any part in this litigation (each having failed to file a Response and neither having sought to engage at all in these proceedings) is, in my view, relevant to considering the question of whether the balance of injustice and hardship favours allowing or refusing the amendments – they presumably would have engaged with this litigation if they considered facing such claims would be unjust or cause them real hardship, and so their failure to engage is a weighty factor in favour of permitting these amendments.

175. As for the factors identified in the case law, I consider the following relevant to the facts here:

a) *The nature of the amendments*: These would add additional causes of action to the proceedings (these amendments could not be described as "re-labelling").

b) *The extent to which the amendments would involve substantially different areas of inquiry than the existing claims*: I do not consider that they do. The TUPE claims involve consideration of any consultation process – as does the unfair dismissal against the First Respondent, and the unlawful deduction claims involve consideration of when the Claimant's employment terminated, as do the wrongful dismissal claims and the unfair dismissal claim against the First Respondent.

c) *The applicability of time limits*: Here, the complaints of unfair dismissal (against the First Respondent) and wrongful dismissal (against both Respondents) would, in light of my factual finding about when the date the Claimant's employment terminated, be out of time. I consider these claims to be closely connected to the claims originally pleaded, as the Respondents' neglect of the Claimant not only left him without promised pay, but also meant he was unclear whether and when his employment terminated.

d) *The timing and manner of the application*: The Claimant's application for amendment was a matter of a few weeks after his original claims. It seems clear from the correspondence between the Claimant and Ms Penn that the Claimant was genuinely unclear about his employment status for a while, and she failed to clarify the position.

e) *Real, practical consequences of the application*: Given the Respondents' have not engaged with these proceedings, the requested amendments have had no real or practical consequences for them.

176. I therefore judge that the balance of these factors is in favour of permitting the amendments, and they are granted accordingly.

<u>Legal issue 2: How do the statutory provisions on the primary time limits for bringing claims apply here?</u>

177. The Claimant brought the following complaints within the primary time limit set by the applicable legislation:

a) His claim against the First Respondent for unlawful deduction from his wages for the period March to May 2021;

b) Now that the amendment is allowed, his claim against the First Respondent for unfair dismissal;

c) Now that the amendment is allowed, his claim against the First Respondent for wrongful dismissal;

d) His claim against the Second Respondent for unlawful deduction from his wages for the period June and July 2021;

e) His claim against the Second Respondent for unfair dismissal; and

f) Now that the amendment is allowed, his claim against the Second Respondent for wrongful dismissal.

178. The Claimant's other complaints, each against the Second Respondent, were brought outside of the primary time limit set by the applicable legislation. Those complaints, and the applicable primary time limit for each, were:

a) Harassment related to his race in connection with the Racial Banter Incidents (at the latest, if there was course of conduct that ended on 31

March 2020, just before the Claimant went on furlough, the primary time limit for that complaint expired on 30 June 2020);

b) Direct discrimination because of his race relating to the failure to pay his wages (in light of my factual finding on when his employment terminated – the primary time limit for this complaint expired on 29 December 2021) - but as I have found this claim not made out, there is no need to consider time limits in respect of it;

c) Failure to provide him with the opportunity to elect representatives for the purposes of the TUPE information (and possible consultation) process (30 August 2021);

d) The failure to inform elected representatives, or affected employees (including him) directly, about the TUPE transfer and consult with them about any measures envisaged in connection with it (30 August 2021); and

e) Unlawful deductions from his wages by the Second Respondent for the period August 2021 until 5 June 2022 (in light of my factual finding on when his employment terminated – 29 December 2021).

<u>Legal issue 3: If any of the Claimant's claims were brought outside of the primary time limit, is the Tribunal's discretion to extent time engaged, and if so, should that discretion be exercised?</u>

179. The harassment complaint is subject to the time limit set out in section 123 of the 2010 Act, whereas the TUPE claims are subject to the time limits in Regulation 15. The unlawful deductions complaint is subject to the time limits in section 23 of the 1996 Act. Taking each of those in turn:

Harassment in connection with the Racial Banter Incidents:

180. The Claimant has contended that this should be regarded as a course of discriminatory conduct together with the failure to pay him, which should then "*be treated as done at the end of the period*", delaying the start of the primary time limit. The decision in *Hendricks* means that in assessing this, the focus should be on whether the substance of the Claimant's allegations indicate that there was an ongoing or continuing act extending over a period, as distinct from a succession of unconnected or isolated specific acts. I need not consider whether the Racial Banter Incidents should be regarded as a course of conduct alongside the allegation of direct race discrimination in connection with the failure to pay the Claimant, as the latter is not made out, but to the extent that there was a series of incidents where Mr Thorne referred to the Claimant as a terrorist, I do consider that to be a course of conduct. The latest date that the last of those incidents

could have occurred is 31 March 2020, just before the Claimant was placed on furlough.

181. The Claimant says that this claim was brought within "*such other period* [beginning three months after the last of Mr Thorne's such comments, which cannot have occurred later than 31 March 2020 as the Claimant was furloughed on 1 April 2020] *as the tribunal thinks just and equitable*" (section 123(1)(b) of the 2010 Act).

182. The Claimant's claim was brought on 6 May 2022 – which represents approximately 22 months later.

183. The *Keeble* factors that I consider it relevant to take account of when assessing whether it is "just and equitable" to extend time are:

a) *the length of and the reasons for the delay*: In this case, the delay is around 22 months, and no reason has been offered for that delay by the Claimant – these weigh in favour of refusing the extension;

b) *the impact of the delay following the expiry of the relevant deadline (e.g., if key witnesses are no longer available)*: the First Respondent has gone into liquidation. While Mr Thorne apparently remains connected to the Second Respondent, Ms Penn's email to ACAS of June 2022 indicates that none of the First Respondent's employees remain in the Second Respondent's employ, besides herself and Mr Thorne. It may reasonably be assumed that the delay in bringing this claim would hinder any defence of it, although I place little weight on this factor, given the Second Respondent has not resisted this claim or sought to play a part in the hearing to determine it;

c) *the conduct of the respondent after the act or omission complained of (e.g., did the respondent's actions cause the claimant to delay bringing their case, or did the respondent cooperate with the claimant's requests for information)*: there has been no conduct on the part of the Second Respondent (or indeed, the First Respondent) that has either been obstructive or cooperative – this factor is of neutral impact;

d) *how long the reason given by the claimant for the delay applied*: no reason has been offered – this weighs against the extension sought;

e) *the extent to which the claimant acted promptly and reasonably once the reason for the delay ceased to apply*: This is the factor on which I place most weight. I do not think the Claimant has acted promptly at all, given his first complaints against the First Respondent (which Mr Thorne worked for at the time of the acts complained of), and his first complaints against the Second Respondent (identified as the respondent to this claim), were both brought in August 2021 – some nine months before this harassment complaint was made. No reason has been provided for why the Claimant

did not include the complaint of harassment as part of his August 2021 claims; and

f) *what steps, if any, the claimant took to prepare for bringing the claim, e.g., seeking legal advice, and the nature of any such advice he may have received*: the Claimant did not take legal advice until early 2022. While the Claimant's inaction in relation to this TUPE claims is more understandable, given the fairly esoteric nature of that area of law, the Claimant knew at the time that Mr Thorne was making these comments, that they were discriminatory. I regard this as a factor of some weight (but less than the previous factor) against extending time in relation to this complaint.

184. Overall, I do not consider that the Claimant has shown that it is just and equitable to extend time by that period.

185. This complaint therefore fails for being out of time.

The TUPE complaints:

186. The Claimant acknowledges that these were not brought within the three-month primary time limit but asserts that it was not reasonably practicable for these complaints to be presented sooner, as the Claimant was unaware, until he took legal advice, that he had TUPE-transferred. He says that when he became aware he brought his claim within a reasonable further period, and so (he says) the Tribunal has the discretion to hear his complaint and should exercise it.

187. In this case, the complaints are just over eight months out of time (in light of the fact that the second early conciliation certificate naming the Claimant as the prospective claimant and the Second Respondent as the prospective respondent has no effect).

188. The relevant test as to whether time is extended is the stricter "*reasonable practicability*" test. I consider that the correspondence from Ms Penn, together with the conflicting email and letter from the liquidators of the First Respondent about the termination of employment, caused the Claimant considerable - and understandable – confusion, and on that basis his ignorance of his rights does mean that it was not reasonably practicable to bring his TUPE complaints within the primary time limit (in a similar way to the *Glenlake* case above).

189. This prompts the question of whether the Claimant brought his claim within a further reasonable period. It appears that the Claimant appointed solicitors in respect of this matter in early 2022 (according to his Counsel's submissions). His filing of the TUPE claims followed four months later. Again, given the confusion caused by the liquidators and Ms Penn, I consider he brought these claims within a reasonable further period (as per Regulation 15(12) of TUPE).

190. I therefore find that this Tribunal does have the jurisdiction to consider the Claimant's TUPE complaints.

The unlawful deductions claim:

191. The same analysis as for the TUPE claims apply to this claim for unlawful deductions from August 2021 onwards. In light of my factual finding on when his employment terminated, the primary time limit would have expired on 29 December 2021. The Claimant was understandably confused about when his employment ended. For the same reasons as applied to the TUPE complaints, I find that it was not reasonably practicable for him to bring this claim on or before 29 December 2021, and that he did bring this claim within such further period as was reasonable (as per section 23(4) of the 1996 Act).

<u>Legal issue 4: If he was dismissed, was the Claimant fairly dismissed by the First Respondent, or the Second Respondent (as the case may be)?</u>

192. As set out in paragraph 152 above, I have found that the Claimant was dismissed by reason of redundancy on 30 September 2021. In the circumstances, namely that:

    a) The Claimant had been furloughed since April 2020; and

    b) Ms Penn's email to ACAS in June 2022 describing the reduced size of the business performed by the Second Respondent compared to that of the First Respondent (with the Second Respondent having an annual turnover at that time of approximately £100,000, compared to the annual turnover of the First Respondent prior to the pandemic of approximately £5 million),

    it appears there was a diminished need for employees to carry out the work that the Claimant carried out. The Claimant's dismissal was not for "*the sole or principal reason*" of the TUPE-transfer, and so Regulation 7 of TUPE is not engaged. If I am wrong about the application of Regulation 7, I find that the Second Respondent had an ETO reason for dismissing the Claimant, being the covid-19 pandemic and the economic consequences of that. I consider those economic consequences, in the circumstances of the Second Respondent's business, to be an economic reason that entailed changes in its workforce, as Ms Penn described in her email to ACAS.

193. The Second Respondent therefore had a fair reason for dismissing the Claimant.

194. The evidence presented to the Tribunal indicates that there was no dismissal process followed by the Second Respondent whatsoever, and therefore the Claimant's dismissal was unfair. While the requirements for procedural fairness "[*depend*] *on whether in the circumstances (including the size and administrative resources of the employer's undertaking)*", in this case the Second Respondent even failed to inform the Claimant of his dismissal. Although the Second Respondent has not offered any Response to the Claimant's claims, or sought to make representations in the hearing, even taking account the pressures that Ms

Penn describes on her and Mr Thorne professionally and personally (in her email to ACAS of 24 June 2022), the Claimant's dismissal was procedurally unfair.

195. However, I consider that the Second Respondent could have carried out a fair consultation process with the Claimant over a matter of a small number of weeks prior to dismissing him and, in light of Ms Penn's expressed desire in June 2022 to "*work together as amicably as possible through these difficult times*", she would have conducted that process. However, the evidence also suggests that it would have taken the Second Respondent longer than it might have taken a different employer, given the pressures on the Second Respondent at that time. In the circumstances, I find that such a fair consultation process could and would have been carried out in six weeks, and that it would have concluded with the Claimant's dismissal. It is therefore appropriate to confine the compensatory award to the Claimant to that period (as per the principle set out in the decision of *Polkey*).

Legal issue 5: If he was dismissed, was the Claimant wrongfully dismissed?

196. The Claimant was not given or paid in lieu of his notice period by the Second Respondent, and therefore he was wrongfully dismissed.

Legal issue 6: Were either or both of the First Respondent and the Second Respondent obliged to inform the Claimant's elected representatives, or affected employees (including the Claimant) directly, about the TUPE transfer, and provide related information to them, pursuant to Regulation 13(2) of TUPE?

197. The language of Regulation 13(2) is clear that the obligation to inform applies before the transfer, and it is "*the employer*" which is obliged to do that. The obligation therefore falls on the transferor – the First Respondent in this case. No obligation fell on the Second Respondent in this regard, as it was not, at that time, the Claimant's employer. This conclusion is consistent with the EAT decision in *Allen* (cited above).

Legal issue 7: If the First Respondent was obliged to do so, did that liability transfer to the Second Respondent at the time the Claimant TUPE-transferred into the Second Respondent's employment?

198. As per the EAT decision in *Allen*, the Claimant does not obtain standing to claim against the Second Respondent (as transferee) for a breach of a pre-transfer obligation because he became an employee of the Second Respondent upon the TUPE-transfer of his employment.

199. Rather, the Claimant's only claim would be against the First Respondent for this failure, save that the Claimant would be able to bring a claim against the First Respondent and the Second Respondent jointly if the failure to inform was

attributable to the Second Respondent's failure to provide information on the "measures" it envisaged in respect of the Claimant to the First Respondent (as envisaged by Regulation 15(8)(b)). On the facts here, I find there were no measures envisaged in respect of his employment, so even if the Claimant had brought a claim against the First Respondent as well as the Second, that joint liability (the potential for which is provided by Regulation 15(7)) is not applicable on the facts here.

Legal issue 8: Was there a failure to consult about the TUPE transfer?

200. As set out in paragraph 170 above, I find that there were no "measures" proposed in relation to the Claimant, so no consultation obligation arose in respect of him.

Legal issue 9: Was either the First Respondent or the Second Respondent obliged to make arrangements for the election of employee representatives in respect of employees which included the Claimant?

201. As set out above, Regulation 14 obliges "*the employer*" to make arrangements for the election of employee representatives. The logical meaning of "*the employer*" must be the employer at the time when information (and consultation, if applicable) is required to be shared (and conducted, in the case of consultation), i.e., pre-transfer. The Claimant's employer before the transfer was the First Respondent.

202. As per paragraph 168 above, I find that the First Respondent failed to make these arrangements and, as it has failed to engage with these proceedings, it has not mounted a defence of this failure under Regulation 15(2) (that it was "*not reasonably practicable for [it] to perform the duty*" and that "*[it] took all such steps towards its performance as were reasonably practicable in those circumstances*"), and it is not for me to speculate about whether it could have made out such a defence (as per Regulation 15(2), "*it shall be for him to show*" if this defence is engaged).

Legal issue 10: If the First Respondent was obliged to make arrangements for the election of employee representatives in respect of the Claimant, did that liability transfer to the Second Respondent at the time the Claimant TUPE-transferred into the Second Respondent's employment?

203. No - the legislative scheme laid out in TUPE provides that the Claimant may bring a claim in relation to this failure, pursuant to Regulation 15(1)(a), against the First Respondent. As per the EAT decision in *Allen*, the fact that the Claimant's employment TUPE-transferred to the Second Respondent does not give the Claimant standing to bring that claim against the Second Respondent.

204. Although the cases brought by the Claimant against the First Respondent and the Second Respondent were heard together, that does not alter the fact that the Claimant brought this claim against the Second Respondent alone.

Summary of liability findings

205. In light of the findings above:

a) The First Respondent failed to pay the Claimant for the period 1 March to 31 May 2021;

b) The unfair and wrongful dismissal claims against the First Respondent fail – it did not dismiss the Claimant before the TUPE transfer occurred on or around 31 May 2021;

c) The Second Respondent failed to pay the Claimant for the period following the TUPE transfer from 1 June 2021 to 30 September 2021 (when the Claimant's employment terminated);

d) The unfair dismissal claim against the Second Respondent succeeds, as that dismissal was procedurally unfair, but Second Respondent had a fair reason to dismiss him, and the compensatory award should be limited to six weeks' pay;

e) The wrongful dismissal claim against the Second Respondent succeeds;

f) The claim against the Second Respondent of unlawful deduction from the Claimant's wages in respect of his accrued but untaken holiday on the termination of employment succeeds;

g) The claim of harassment relevant to the Claimant's race relating to the Racial Banter Incidents is out of time, and so fails;

h) The claim of direct race discrimination concerning the First Respondent's failure to pay the Claimant fails (the Claimant failed to prove a *prima facie* case of discrimination);

i) The claim that the Second Respondent failed to inform employee representatives or affected employees directly (including the Claimant) about the TUPE transfer fails – the Second Respondent had no such obligation; and

j) The claim that the Second Respondent failed to provide the Claimant with an opportunity to elect representatives for the purposes of the TUPE information and consultation process fails for the same reason.

Remedy

206. According to the Claimant's third (and latest) Claim Form, he was earning £1,575 per month gross, which equates to £363.46 per week gross. The Claimant's

contract provides that the First Respondent paid 3% contributions to his pension scheme which, calculated on a weekly basis, amounted to £10.90.

207. The First Respondent is liable to the Claimant for:

a) Unlawful deductions from wages in respect of the month of March 2021, being at the rate of 100% of the Claimant's salary (as he was not placed on furlough until 1 April 2021), in the sum of **£1,575** gross; and

b) Unlawful deductions from wages in respect of the months of April and May 2021, at the rate of 80% of his salary (as he was furloughed for this period), i.e., **£2,520**,

i.e., £4,095.

The question then arises as to whether an adjustment for unreasonable failure to comply with the ACAS Code is appropriate.

Here, the Claimant brought the non-payment of his wages to the First Respondent's attention on numerous occasions, and complained about that fact, i.e., raised a grievance. The First Respondent unreasonably failed to investigate or take any action in respect of that grievance, and so an uplift is appropriate. Here, taking account of the anxiety, stress and financial difficulty the failure to pay caused for the Claimant, and on the other hand the financial difficulties of the First Respondent together with the personal difficulties affecting the two statutory directors of the First Respondent (described by Ms Penn in her email correspondence with the Claimant in June 2021 and with ACAS in June 2022), I consider an uplift of 10% appropriate. This takes the unlawful deduction from wages award in respect of the First Respondent to **£4,504.50** gross.

208. The Second Respondent is liable to the Claimant for:

a) Unlawful deductions from wages in respect of the months of June to September 2021 (inclusive), at the rate of 80% of his salary (as he was furloughed for this period), i.e., £5,040 gross.

As for the unlawful deductions award against the First Respondent, and for the same reasons, I consider it appropriate to make an uplift for unreasonable failure on the part of the Second Respondent to comply with the ACAS Code. This takes the unlawful deductions from wages award against the Second Respondent to **£5,544** gross;

b) A statutory redundancy payment. The Claimant was 28 years' old at the date of his dismissal on 30 September 2021, and he had accrued four years' service. His weekly gross wage was £363.46. His statutory redundancy payment is therefore four weeks' wages at £363.46 rate per week, amounting to **£1,453.84**.

A statutory redundancy payment is also susceptible to an adjustment for unreasonable non-compliance with the ACAS Code, upwards or downwards as the tribunal considers just and equitable, subject to a

maximum adjustment of 25%. I do not consider such an adjustment appropriate in this case, as both parties appear to have been ignorant about when, if and why the Claimant's employment terminated, and the focus of the correspondence and complaints from the Claimant to Ms Penn was in respect of his unpaid wages;

c) Compensation for unfair dismissal, calculated as follows:

    i. *Basic award*: Pursuant to section 122(4)(a), the basic award that would otherwise be payable to the Claimant is reduced by the amount of the statutory payment payable to him. Those payments are in this case of equal value, so the basic award payable to the Claimant is £0; and

    ii. *Compensatory award*:

        (1) I have found that the Second Respondent could have dismissed the Claimant if it had followed a fair consultation procedure, and that such a procedure would have taken the Second Respondent six weeks. The Claimant's weekly gross wage was £363.46, and therefore his compensatory award is £2,180.76;

        (2) Unpaid pension contributions during the compensatory period: The First Respondent made pension contributions in respect of the Claimant's employment of 3%, and the value of those lost contributions over the period it would have taken the Second Respondent to carry out a fair redundancy consultation process, i.e., six weeks, are therefore added to his compensatory award, being £65.40; and

        (3) Loss of statutory rights: The Claimant had accrued sufficient service for protection from unfair dismissal, a right which has been lost by his dismissal. I award him £350 in respect of that lost right,

    and so his aggregate compensatory award is £2,596.16.

This compensatory award sum is also eligible for adjustment for an unreasonable failure on the part of the employer or employee to comply with the ACAS Code. My assessment is the same as for the statutory redundancy payment, and for the same reasons – I do not think it appropriate to adjust this sum.

As the total unfair dismissal award is **£2,596.16**, which is less than £30,000, I am not required to consider grossing it up;

d) Damages for wrongful dismissal: The Claimant was entitled to be given four weeks' notice, which he was not given, and therefore he is awarded damages for wrongful dismissal of four weeks' pay, amounting to **£1,453.84** gross; and

e) Unlawful deduction from his wages in respect of his accrued but untaken holiday as at the date his employment terminated, being four days. The Claimant was paid £18,900 per annum. Taking account of 104 weekend dates, his holiday entitlement of 25 days and eight Bank or public holidays, he was to work for 228 days per year. One day's pay for him was therefore £18,900 divided by 228, amounting to £82.89 per day. His accrued but untaken holiday entitlement on his dismissal was therefore four times that daily rate, being **£331.56 gross**,

i.e., **£11,379.40** gross in total.

193. The Claimant has received some payments from the Redundancy Payments Office in connection with the purported termination of his employment by the First Respondent, and those payments – as he asserts and which my findings agree with - were erroneously claimed.

Conclusions

209. For all of the above reasons, the Claimant's complaints:

a) against the First Respondent of unlawful deduction from wages in respect of the period of 1 March to 31 May 2021; and

b) against the Second Respondent of:

  i. Unlawful deduction from wages in respect of the period of 1 June to 30 September 2021;

  ii. Unfair dismissal;

  iii. Wrongful dismissal; and

  iv. Unlawful deduction from wages in respect of the holiday he had accrued but not taken on the date his employment terminated,

succeed, whereas his complaints against the Second Respondent of:

c) harassment related to his race;

d) direct race discrimination;

e) failure to give the Claimant the opportunity to elect a representative under Regulation 14 of TUPE;

f) failure to give the Claimant the required information under Regulation 13 of TUPE; and

g) failure to consult with elected representatives or affected employees under TUPE,

fail.

Employment Judge Ramsden

Date 10 July 2023