EMPLOYMENT TRIBUNALS

Claimant: Mr J Hegarty

Respondent: Penny Post Credit Union

Heard at: Manchester Employment Tribunal

On: 4, 5, 6, 7 and 8 September 2023
28 September 2023 (in chambers)

Before: Employment Judge Dunlop

Representation

Claimant: Miss A Robinson (counsel)
Respondent: Miss C Barry (counsel)

JUDGMENT

1. The claimant's claim of unfair dismissal under Regulation 7(1) Transfer of Undertakings (Protection of Employment) Regulations 2006 is not well-founded. That claim is dismissed.

2. The claimant's of unfair dismissal under s.94 and s.98 Employment Rights Act 1996 is well-founded. That claim succeeds.

3. If the claimant had not been unfairly dismissed, he would have been fairly dismissed by reason of redundancy on 9 April 2021. Following such a dismissal, he would have been entitled to receive a statutory redundancy payment and to be given notice (or alternatively payment in lieu of notice) 12 months.

4. The compensation payable to the claimant in view of this Judgment will be calculated at a Remedy Hearing, on a date already notified to the parties.

REASONS

Introduction

1. The claimant, Mr Hegarty, was employed as the CEO of Voyager Alliance Credit Union, a predecessor of the current respondent. In spring 2021 it was proposed to make him redundant, and that process advanced almost to the point of dismissal, before the respondent instead commenced a disciplinary process. That resulted in Mr Hegarty's summary dismissal for alleged gross misconduct on 18 May 2021.

2. Mr Hegarty claims, primarily, that his dismissal was 'automatically unfair' as the reason (or principal reason) for the dismissal was an anticipated transfer of the business under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Alternatively, he alleges that the dismissal was unfair under s.98 Employment Rights Act 1996 ("ERA") because the respondent chose to dismiss him for misconduct to avoid liability for a lengthy notice payment that would otherwise be due. Mr Hegarty has, at an earlier point in these proceedings, withdrawn a breach of contract claim for notice pay, that has not been dismissed given Mr Hegarty's expressed wish to pursue that claim in a civil court.

The Hearing

3. There were some procedural difficulties with this hearing, which I will set out below in more detail than might often be necessary, as they provide the context for various decisions made.

4. Unfortunately, the start of the hearing was delayed as I was unavailable on the morning of what was scheduled to be the first day. The parties were therefore notified on the Friday afternoon prior to the hearing commencing, that their attendance would not be required on the Monday and that the Tribunal would instead use Monday afternoon to undertake preliminary reading in accordance with the reading lists supplied.

5. I had been provided with a respondent's bundle reaching almost 1,000 pages, two witness statements on behalf of the claimant, three on behalf of the respondent and agreed various ancillary documents (reading lists, chronologies etc). In addition, there was a claimant's bundle of several hundred more pages. This was printed-off as a sheaf of documents – there was an index but no bundle pagination (each document was individually paginated) and the documents had not been placed in a file. Miss Robinson's opening note made reference to some documents within this (as did the claimant's witness statement) but suggested that those did not need to be read as part of pre-reading. I arranged for two copies of the claimant's bundle to be hole-punched and put into files by the Tribunal administration for my use and for the witness table. (This should not be the job of the administration and takes up Tribunal resources.) I anticipated that each party would be bringing its own copy of the claimant's bundle to the hearing the following day.

6. On the morning of day 2 (Tuesday) the parties and representatives attended and the hearing began with a housekeeping discussion. I was surprised to learn that neither claimant's counsel (instructed on a direct access basis), nor respondent's counsel, had copies of the claimant's bundle. Mr Hegarty

had simply delivered the bundles, by post, to the Tribunal in the form described.

7. On behalf of the respondent, Miss Barry agreed that documents 1-11 in the claimant's bundle could be admitted into evidence. These were documents which the respondent had declined to add to its bundle on grounds of relevance and/or because they were received after its bundle had been finalised. They amounted to around 20 pages.

8. The remainder of the claimant's bundle comprised transcripts of calls/conversations covertly recorded by Mr Hegarty. The respondent objected to any of these documents being admitted. Miss Barry explained that Mr Hegarty had, at an earlier stage in the proceedings, disclosed lengthy transcripts of such recordings and (whether at the same time or later) disclosed audio files of the recordings themselves. The respondent had objected to the transcripts being introduced into evidence on various grounds, including that they were not fully accurate when compared to the recordings. This issue had caused problems in the preparation for the case, and had resulted in a preliminary hearing before Employment Judge Batten a few weeks ago.

9. EJ Batten had rejected the respondent's application to vacate this hearing on the grounds that the parties would not be ready. She had instead set out a roadmap, in the form of case management orders, to get the case back on track. Crucially, this required Mr Hegarty to provide the respondent with a hard copy bundle (indexed and paginated) containing all of the transcripts he wished to rely on by 3 August 2023.

10. Mr Hegarty had not complied with this order. Instead, he had updated his transcripts (his position is that the earlier ones had been edited to exclude bad language and third-party conversations) and sent five copies of the bundle to the Tribunal in the form I have described.

11. A considerable time was spend discussing the way forward. Miss Robinson recognised that Miss Barry would need time to read the transcripts, and that the respondent may wish to introduce their own versions if there were areas which remained disputed. She believed this could be done if we adjourned for a day, and that the case could still be heard within the time available.

12. Miss Barry submitted (and I ultimately accepted this submission) that it was simply not possible to deal with the volume of documentation involved in a day, and that if the material was to be introduced then the entire case would have to be postponed. This was the case even if the new material was restricted to transcripts of the disciplinary appeal hearing (which were by far the longest transcripts in any event), something which had been suggested by Miss Robinson as a fall-back position.

13. In an oral Judgment, given with reasons on the afternoon of Day 2, I decided to admit a small portion of the disciplinary appeal transcript, dealing with one point raised in Mr Hegarty's witness statement. I decided not to admit the remaining transcripts and the case proceeded without further reference to them.

14. We then commenced the respondent's evidence. I heard evidence from Sara O'Hara on the afternoon of day 2. On the morning of day 3 we heard evidence from Graham Roberston. On the afternoon of day 3 we interposed the evidence of the respondent's third witness, John Mellor, whose ability to attend was limited due to caring responsibilities. Ms O'Hara and Mr Mellor gave evidence by CVP, whilst everyone else participated in person.

15. On day 4 we concluded Mr Robertson's evidence by mid-morning. Mr Hegarty then gave evidence on his own behalf which continued throughout the remainder of day 4 and into day 5. Mr Hegarty's supporting witness, Mr Chapman, then gave evidence, ending around 12.30 on Day 5. Both counsel had prepared written submissions and spoke to them. Given the time lost at the start of the case due to my absence and the dispute about admitting the transcripts it was not possible to deliver a Judgment within the time slot allocated for the hearing. The Judgment was therefore reserved. I gave the representatives opportunity to make further written submissions on one point, which was not well-developed in the original submissions of either party. This is discussed further below.

16. I considered the matter in chambers on 28 September 2023 and subsequently produced this Judgment.

The Issues

17. As part of my initial discussions with the parties I identified that the List of Issue prepared at an early stage in the proceedings did not appear to accurately reflect the matters I would have to decide. I discussed the proper framing of the issues with the representatives and, with the agreement of both parties, the final List of Issues for the liability hearing was framed as follows:

Unfair dismissal

1. **Was the relevant transfer the reason or principal reason for dismissal (Reg. 7(1) TUPE)? If so, the claimant will be regarded as unfairly dismissed. (The respondent confirmed no ETO dismissal argument was relied on).**

2. **If not, has the respondent shown that the dismissal was for a potentially fair reason i.e. misconduct? If not, the claimant will be regarded as unfairly dismissed. (The claimant asserts that the real reason for dismissal may have been redundancy and/or avoidance of a redundancy/notice payment). In the circumstances of this case, if the Tribunal finds that that was the real reason, then the respondent acknowledges the dismissal was unfair.**

3. **If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:**

    i. **The respondent genuinely believed the claimant had committed misconduct**
    ii. **there were reasonable grounds for that belief;**
    iii. **at the time the belief was formed the respondent had carried out a reasonable investigation;**
    iv. **the respondent followed a reasonably fair procedure;**
    v. **dismissal was within the band of reasonable responses.**

4. **If the claimant is successful, then the Tribunal will make findings as to any propriate deduction for contributory fault and/or in accordance with Polkey principles. Other remedy issues will be determined at the remedy hearing.**

5. The claimant's claim had originally included a complaint of wrongful dismissal relating to failure to pay notice pay. The claimant's contractual notice period is disputed. At an earlier stage in proceedings the wrongful dismissal claim had been withdrawn (but not dismissed) on the basis that the claimant intended to pursue that claim in the High Court.

6. I confirmed with Miss Robinson that no claim had yet been lodged in any civil court. I considered, of my own volition, whether it was appropriate to proceed with hearing this case given that it may involve making findings of fact which would trespass on areas of dispute in any potential civil proceedings. I decided it clearly was appropriate to proceed given that neither party was seeking a stay of these proceedings, these proceedings were ready for trial, and the putative civil proceedings had not yet been commenced. Following discussion with the parties, I confirmed that I would confine myself to making findings about the claimant's notice period and whether he actually had committed gross misconduct (as opposed to whether the respondent reasonably believed that he had) only where such findings were directly necessary in the course of the decisions I had to reach to determine the claim. Both counsel acknowledged that it may be necessary for me to make some findings which could overlap with matters which would overwise be at issue in any future civil claim.

Findings of Fact

Background and contract

7. The present respondent is a successor to Voyager Alliance Credit Union which was Mr Hegarty's employer at the time of the events with which this claim is concerned. References to "the respondent" are to Voyager Alliance Credit Union in the context of the events of 2021 and earlier, and to Penny Post Credit Union Limited in the context of the conduct of this litigation.

8. The respondent was, at the time, a Credit Union operating mainly in the transport and retail sector. It was governed by a Board of Directors, headed by a President. There was a convention that the President did not vote save in cases where the votes of the Board members were tied. The Directors were unremunerated, but there seems to have been something of a "revolving door" with individuals often moving from Board positions to remunerated administrative positions within the Union, and sometimes back again. Broadly, governance at the Union appears to have been weak, at least in certain areas.

9. Mr Hegarty commenced employment on 30 March 2015 as a Business Development Manager (BDM). Immediately prior to this he had been the President of the Board, a role he had held for about ten years. The bundle contains an unsigned contract relating to Mr Hegarty's BDM role. The terms on which he was employed were designed to match another employee with the same job title, Barry Duggin. The contract is based

on a simple template which I am told originated as a bus driver contract. Although it is unsigned, Mr Hegarty confirmed that essentially it correctly represents his terms of employment as a BDM. The main difference is that Mr Hegarty says he had negotiated a more generous annual leave provision (which does not appear to be disputed).

10. In August 2016, it was agreed between Mr Hegarty and the Board that he would be promoted to chief executive officer. The respondent had operated for much of its history without a chief executive officer or equivalent (it appears there had been a short lived experiment with a CEO in around 2008 which had not worked out).

11. Around this time, the Union received some funding for professional HR advice. Mr Hegarty decided to use this to obtain updated template employment contracts, including a senior management contract which would be appropriate for his CEO role.

12. It appears there were on-going discussions about the terms of contract between Mr Hegarty and member of the board. Initially, this was primarily with John Mellor and Gary Robertson, and latterly with John MacDonald, who was then President. This is recorded in Board minutes, for example in January 2017 where there is a query in the minutes as to why the CEO contract had not yet been signed.

13. I find that the negotiations were protracted for several reasons. Firstly, they were not an immediate priority for those involved. As the Board members were volunteers, business was conducted via monthly meetings and progress could therefore be slow. I find there was also a lack of knowledge around how to conduct a contractual negotiation of this sort and about the importance of having a written contract in place for the most senior employee of the organisation.

14. By summer 2017 there was still no contract in place. There had been discussions around a pay rise for Mr Hegarty but the Board made this contingent on the contract being finalised. I find that Mr Hegarty would have been happy to continue indefinitely without a finalised, signed contract, but that this development lent some urgency to the situation. A board meeting took place on 15 October 2017. The notes record that Mr Hegarty was asked to leave the meeting and a discussion about the contract subsequently took place, which is also summarised in the notes. Mr Hegarty has challenged the authenticity of these notes. I find that there was a discussion about the contract, but make no finding as to whether the notes accurately record the full extent of that discussion.

15. Following that Board meeting, a version of the contract of employment was signed by both Mr Hegarty and Mr McDonald on 19 October 2017. That document came to light when Mr Hegarty produced it in the course of these proceedings. The respondent initially appeared to be arguing that it was not, in fact, a contemporaneous signed document. During the course of the litigation, and the hearing, however, the respondent rowed back from that suggestion. In any event, I find as a matter of fact that the document was signed by both individuals on the date stated above.

16. The key provision of the document for the purposes of this case is that it provides for 12 months' notice to be given in the event of termination by the respondent, after Mr Hagerty has attained 5 years' service. The date of commencement of continuous employment is (wrongly) stated to be 23 March 2014.

17. Importantly, at the time of signing this contract, Mr McDonald had stepped down as President had was no longer a Board member (he also stepped down to take a reumunerated role with the union). Mr Hegarty's evidence in his witness statement was that he had met with Mr Robertson (previously a Board Member and now the incoming President) and Mr McDonald on 20 October 2017 over a lunch. Mr Robertson was shown the signed contract and confirmed that he was content with it, and content that Mr McDonald had signed it on behalf of the board.

18. Mr Hegarty has produced receipts from the lunch and a photograph of an undated letter, which he says he received from Mr Robertson after this meeting. The letter records the pay offer agreed in August, and the fact that this was contingent on the contract being signed. It goes on to state "*As you have now signed this contract I am pleased to inform you that your wage increase will be reflected in your wage paid on 24th November 2017".*

19. In giving evidence, Mr Robertson appeared to dispute that this letter was genuine, although the respondent's counsel did not suggest to Mr Hegarty that he had falsified this document. I find that the letter is genuine, and that it was sent shortly after the lunch at which Mr Robertson was shown the contract signed the previous day by Mr Hegarty and Mr McDonald.

20. The respondent's case was that Mr Hegarty had deliberately got Mr McDonald to sign a contract which he knew the other members of the board would not agree to because of the generous notice clause. The respondent says that Mr McDonald had no authority to sign that contract, and that it is invalid. I will return below to the legal implications of the findings I have made above, and the status of the signed contract.

Proposed redundancy

21. It is not disputed that Mr Hegarty had some notable achievements during his time as CEO, including launching partnerships with a number of major employers and securing a major funding grant.

22. As with many businesses, however, the onset of the Covid-19 pandemic had a major impact for the respondents. As many clients were able to save more, the union's capital to asset ratio became problematic, raising concern for the Unions' regulator, the Prudential Regulation Authority (PRA). Employees, including (from 1 November 2020) Mr Hegarty, were also furloughed for periods of time which did not help the situation.

23. Mr Hegarty gave evidence that he overheard a conversation in September 2020 between three Board members, John Coverley, John

Mellor and Martin Logan. It is alleged that the three were criticising the fact that Mr Robertson too, had now been given a remunerated role within the union, and proposing to "get rid of" Mr Hegarty, Mr McDonald and Mr Robertson. It is patently obvious that factionalism and internal politicking was rife within the organisation, and I have no difficulty in accepting that Mr Hegarty may well have heard a conversation of broadly this nature. However, I find this had little or no bearing on later events.

24. Between September 2020 and spring 2021 the financial situation of the Union deteriorated drastically and the events which subsequently unfolded did so in response to that, rather than due to some conspiracy amongst a faction of the Board.

25. The witnesses on both sides recognised that by early 2021, the situation had become parlous. The most pressing problem was the capital to asset ratio, which continued to worsen. There was also a problem arising from an IT project which had gone wrong, significant levels of bad debt (and a dispute as to how this should be managed/accounted for) and various other pressing issues. Realistically, the respondent was in a position of either having to wind itself up and close down, or looking for another credit union which could take over the business. Mr Roberston, as President, and Mr Hegarty, were both in tentative discussions with their industry contacts about other Unions that might be in a stronger financial position which may be willing to explore the possibility of a merger.

26. A dial-in Board meeting took place on 3 March 2021. Mr Hegarty was not invited and did not attend. Mr Roberston tabled two matters for discussion. The first was a proposal to open up negotiations around a possible Transfer of Undertakings (as it was described) to another credit union, Transave. The notes record that there was "*a long discussion*" about how the respondent had come to find itself in such a precarious financial situation, which the board members were "*very unhappy*" about, and what could be done about it. The resolution was that "*a dialogue should open*" between the respondent and Transave at board level, and that Ms O'Hara (Chief Operating Officer) was authorised to provide information to Transave as required.

27. The second items discussed was a proposal to make Mr Hegarty's role redundant. The minutes record that cost-cutting measures had already been implemented by the respondent, and that headcount had been reduced by ten in the previous year. It was recorded that the total annual cost of employing Mr Hegarty was in the region of £100,000, which would represent a significant cost saving. It was resolved "*with some reluctance*" that Mr Hegarty would be informed that his position was at risk of redundancy and noted that the procedures and negotiations relating to this would be overseen by HR Solutions (an external HR consultancy).

28. A meeting took place between Mr Hegarty, Mr Robertson and another board member (Mr Coverley) on 10 March 2021. Mr Hegarty was informed both of the possible transfer of the business to Transave and

about the proposal to make him redundant. During cross-examination, Mr Robertson admitted that in this conversation he had commented (about Transave) "*I don't think they'd want another CEO*", or words to that effect.

29. By letter dated 13 March 2021 Mr Hegarty was invited to a stage 1 redundancy consultation meeting to take place on 17 March 2021. The letter set out the rationale for the proposed redundancy in some detail, making reference to financial pressures and scrutiny from the PRA. It noted that the business was contracting, the workforce had reduced and reserves had been eroded. There is a reference, somewhat in passing, to a potential merger with another credit union, Planesaver. Transave is not mentioned. The letter goes on to states that the board has concluded that the CEO role represents an additional cost which is not required given the size of the organisation and that it is therefore proposed that the role of CEO be removed.

30. The letter then outlines a timetable for the proposed consultation process, with a second consultation meeting to take place on 24 March and the consultation process to close on 31 March with the redundancy proposed to take place on 1 April 2021 (although the letter noted that the time scale may change).

31. The first consultation meeting was rescheduled, at Mr Hegarty's request, to take place on 23 March 2021.

32. On 15 March 2021 Mr Hegarty submitted a grievance. The grievance alleged that there was a campaign to "get rid of" Mr Hegarty organised by John Mellor, John Coverley and Martin Logan, making reference to the alleged overheard conversation on 20 September 2020 and demanding this be investigated. It accused Mr Logan and Mr Coverley of sending aggressive emails, and alleged that Mr Coverley had made (unspecified) inappropriate sexual comments to a female staff member. It demanded that the three Board members be suspended from the Board pending investigation.

33. It was clear from the evidence of Mr Robertson and Mr Mellor that those named in the grievance, and the Board generally, were very angry about the allegations that it contained.

34. Joanne Clayton of HR Solutions was managing the redundancy process on behalf of the respondent and informed Mr Hegarty that the redundancy consultation now scheduled for 23rd March would go ahead, which it duly did. This was conducted by Mr Robertson, supported by another HR Consultant, Kathryn Rawding.

35. I pause to note that Mr Hegarty has raised criticisms of the active role played by HR consultants in the various meetings. It does seem to be correct that they have done much of the talking, both in terms of providing information and in asking questions. Contrary to Mr Hegarty's view, there is nothing necessarily wrong with that from an employment law perspective. It is common for small businesses to involve HR

consultants in such processes, and often to the benefit of both parties in ensuring that a robust procedure is followed.

36. The meeting opened with an explanation of the rationale for the redundancy. Reflecting the earlier letter, this was around the contraction of the business and the financial difficulties it was facing. The possibility of a transfer of the business was raised by Mr Hegarty, and Mr Robertson explained that there were discussions taking place with three other unions too and, although a merger was a potential option, nothing had been agreed.

37. Mr Hegarty's evidence is that he told Ms Rawding in this meeting that he had a 12 month notice period. I reject that evidence, and find that that was a matter which was discussed in the next consultation meeting, which took place on 31 March 2021.

38. The notes of the 31 March meeting record Ms Rawding setting out the redundancy package which Mr Hegarty would be entitled to and Mr Hegarty questioning the fact that that was based on three-months' notice, as opposed to twelve. The respondent's position was that the claimant was entitled to a statutory redundancy payment of £4,869 plus notice pay and accrued holiday pay. The difference between a three-month notice payments and a 12-month notice payment would be very substantial in the context of this package. I consider that if this had been raised in the earlier meeting, it would have been minuted. I also find that in this meeting Mr Hegarty put forward proposals aimed at avoiding redundancy, including suggesting that his pay could be reduced.

39. At the conclusion of the meeting Mr Hegarty was informed his proposals would be considered. The next step in the process, if it was to lead to dismissal, would be a letter terminating Mr Hegarty's employment by reason of redundancy. The timetable had slipped slightly from that originally set out, but it was envisaged that there would be an outcome on 9 April 2021.

40. In the meantime, a grievance hearing had taken place on 22 March 2021, heard by John Hughes (another Board Member) supported by Joanne Clayton. By letter dated 9 April 2021 Mr Hegarty's grievance was rejected. The letter included the following passages:

"You have raised the fact that you have made £600K savings for the Credit Union in the last six months. My investigation has found that this has been challenged by Board members and laterally the PRA. Indeed as a result of the PRA being disappointed in the level of detail provided by you and that they did not consider you were entering into timely communication, they were considering escalating the case. This is clearly a very serious matter.

I have therefore made the highly unusual decision that the PRA should be advised of my concerns with regard to the ongoing relationship between CEO and board of VACU as I believe this may have a fundamental impact on any future survival of the Credit Union."

41. The bundle contains an email dated 12 April 2021 from Joanne Clayton to Mr Roberston, Mr Coverley, Mr Mellor and Ms Rawding entitled "Next Steps" which purports to set out points discussed between those parties in an earlier discussion. The email posits that the Board must consider whether trust and confidence in Mr Hegarty has broken down and, if so, the redundancy process should be stopped as it is no longer genuine and those conducting it could not consider Mr Hegarty's cost-saving proposals in good faith. The email raises the question of why trust and confidence has broken down and suggests various answers, including "*investigation into grievance has uncovered misleading/incorrect information given by CEO*" and "*Work for PRA/FCA has found lack of communication/responses given to formal Bodies*" and other, broadly similar, points.

42. The email goes on to outline "risks" the first of which is noted to be that there has been no sight of a finalised, signed contract so there is uncertainty as to what the respondent is contractually bound to. The emails goes on "*John Mr Mentioned there is a contract which states 3 months notice, which is what the board agreed. Not signed but this is better than previously thought*." The email then records "*John C advised strong evidence to support dereliction of duty of CEO, therefore gross misconduct, therefore termination without notice. Would need to firm up which acts are gross misconduct"* and finally to say *"our HR advice would be to gain legal advice with regards to most robust reason for termination... ie some other substantial reason or gross misconduct"*

43. At this point the redundancy process had effectively reached its conclusion. All that remained was for the respondent to formulate a letter to the claimant advising him of the outcome. Instead, the decision was made to pivot abruptly to a disciplinary/SOSR route. Whilst those involved seem very certain of necessity of changing course in this way, they seem relatively unclear about what the conduct on Mr Hegarty's part actually is which has created that necessity.

Disciplinary process

44. By letter dated 23 April 2021 Mr Hegarty was invited to a disciplinary hearing. Some time had evidently gone into formulating the allegations and putting together a supporting pack of documents. The first allegation was that Mr Hegarty had committed a serious breach of his obligations as CEO by failing to communicate appropriately with Regulatory bodies. There were three examples given: a failure to communicate with the PRA, a failure to communicate with the FCA and a failure to communicate with the financial ombudsman. In each case reference was made to specific emails which appeared in the pack of documents. The second allegation was that Mr Hegarty had committed a serious breach of his obligations as CEO by failing to carry out actions which resulted in loss to the credit union. This related specifically to the renegotiation of a sub-ordinated debt agreement which another organisation, ABCUL. It was alleged that this had caused a loss to the respondent of £86,000.

45. The disciplinary hearing was chaired by Mr Mellor and took place (after some delays) on 14 May 2021. Mr Hegarty produced documents and put forward his position in respect of each of the allegations in the meeting. In a detailed, 8-page, outcome letter dated 18 May 2021 Mr Mellor set out his findings in respect of each of the allegations. I deal with them in turn below.

Failure to communicate appropriately with the PRA

46. This allegation arose from a series of emails from Judith Hooley at the PRA 'chasing' Mr Hegarty for an update on the respondent's financial position following a conference call in October. It is clear on the face of the correspondence that there had been a failure to respond. In my judgment, however, it is far from clear that this was an act of misconduct, nor that Mr Mellor could legitimately have taken that view.

47. Firstly, there were some practical difficulties in replying – there appeared to have been a technical email problem, and the exchanges were taking place at a time when Mr Hegarty had significant absence due to furlough and sickness. Perhaps more fundamentally (and which seems to have been overlooked by Mr Mellor) was the fact that the dire financial position of the respondent meant that Mr Hegarty was simply unable to provide Ms Hooley with the reassurance that she was seeking. No doubt he hoped that the situation would improve and he would be able to make a positive report to the PRA in due course, but from the perspective of the respondent, it wasn't in their interest to draw the regulator's attention to the extent of the difficulties. I find that the Board members shared Mr Hegarty's appreciation of these difficulties and his apprehension about communication with the PRA. Board members were copied into some of the correspondence, including Ms Hooley's email of 8 March 2021 in which she expresses "disappointment" and which formed the specific basis of the allegation in the disciplinary process. Nevertheless, there had been no suggestion that this email gave rise to a disciplinary concern until after Mr Hegarty and the Board were in dispute around the redundancy and grievance processes.

Failure to communicate appropriately with the FCA and Financial Ombudsman regarding a money-laundering issue

48. The background to this allegation was complex. It is alleged (and I understand is not in dispute between the parties to this case) that a fraudster had used an account with the respondent to deposit large sums of money unlawfully gained. Mr Hegarty had sought assistance from various official bodies, including the police, but had had been able to make little headway. The respondent faced conflicting demands from the alleged fraudster, to release the funds, and from other parties to return them. Various factors, including the tipping-off provisions in the Proceeds of Crime Act 2002, left the respondent somewhat hamstrung as to how to resolve the situation. The grave impact of this situation across the organisation can be demonstrated by the fact that there was an incident where the alleged fraudster had seemingly turned up at the respondent's premises threatening to throw acid at staff.

49. It is agreed between the respondent and Mr Hegarty that a request was made by the FCA on 11 December 2020 for a Suspicious Activity Report to be completed in respect of this matter. Mr Hegarty says (again, I understand this is not disputed) that he had been asked to complete such forms on a repeated basis, and had done so several times with no evidence of progression to show for it. It is also agreed that Mr Hegarty did not respond to that request and had to be chased by the FCA case worker.

50. Whilst appreciating that the Board members were volunteers who did not have a daily presence in the office, I accept Mr Hegarty's evidence that this serious matter was, generally, well-known amongst the Board. Having regard to the length of time it had gone on for, and the difficulty in making progress, as well as Mr Hegarty's absence from work on furlough and leave in the relevant period and that pressing nature of the broader concerns facing the business, my conclusion is that this specific failure to respond was not a matter which caused serious concern to the Board at the time that it took place. To the extent that they may have been unaware of chasing emails, again, I am satisfied that that would not have changed their view.

51. I note that the third allegation in the disciplinary letter also related to this matter (concerning communication with the Financial Ombudsman Service rather than the FCA). These two matters were rolled together in the disciplinary outcome and the comments above apply.

Failure to communicate with FCA regarding a request for information

52. This matter was not set out in the original invitation letter, and concerned an alleged failure to respond to an email from the FCA regarding the authorisation of Mr Robertson as a person regulated to perform certain functions. The allegation was based on an email requesting information dated 29 November 2020 and a 'chaser' email dated 23 February 2021, indicating that that the initial request had not been responded to. There was no suggestion that there was any on-going issue after February 2021, nor that there had been any wider repercussions arising from this matter.

Failure to respond to Robert Kelly, Chief Executive of ABCUL

53. A subordinated debt agreement existed between the respondent and ABCUL, and was due for renewal. This would be negotiated between the claimant and Mr Kelly. The allegation rested on an email from Mr Kelly to Ms O'Hara dated 8 April 2021 stating that he had made numerous attempts to contact Mr Hegarty since December 2020. Mr Mellor accepted, based on evidence provided by Mr Hegarty, that any failure to respond had not delayed the renewal of the loan agreement, and had therefore not caused any loss to the respondent. He nonetheless concluded that Mr Hegarty's failure to respond had been reputationally damaging for the respondent.

Conclusion

54. Mr Mellor's conclusion following the disciplinary hearing was that Mr Hegarty should be summarily dismissed for gross misconduct. His employment terminated on 18 May 2021.

Appeal

55. Mr Hegarty appealed against his dismissal by letter dated 24 May 2021. The thrust of the appeal was that he had provided full explanations for his actions in respect of each allegation but, in any event, the allegations did not amount to gross misconduct. He also made several procedural criticisms, raised points of mitigation and noted his belief that the disciplinary process was an attempt to avoid liability to pay his notice period.

56. The appeal hearing took place on 18 June 2021 and was heard by Mr Robertson. It was part of Mr Hegarty's case that, in the course of the appeal meeting, Mr Robertson had acknowledged that he had no authority to overturn the dismissal as the Board had decided on the termination of Mr Hegarty's employment. I allowed Mr Hegarty to introduce the transcript of the recording for this part of the meeting only. The content of the transcript was agreed.

57. The transcript does not indicate that such a statement was made in the direct way suggested by Mr Hegarty (although it does appear to indicate that Mr Chapman, as Mr Hegarty's representative, was attempting to elicit such a statement from Mr Robertson). I accept, as a matter of governance, that it would be for the Board to formally uphold any decision to re-instate Mr Hegarty, but that the Board had delegated the role of conducting the hearing (and making a recommendation) to Mr Robertson. That is not an unusual situation and does not, in my view, bear on the fairness of the dismissal.

58. By letter dated 22 July 2021, Mr Robertson rejected Mr Hegarty's appeal and upheld the decision to dismiss.

Transfer

59. On 1 February 2022 Voyager Alliance Credit Union merged with Penny Post Credit Union Limited (the current respondent). The respondent acknowledges that this was a "relevant transfer" within the meaning of the TUPE Regulations. Penny Post Credit Union Limited is unrelated to Transave, the organisation involved in the anticipated potential transfer, which Mr Hegarty says prompted his dismissal. It was also not one of the other organisations with which Mr Hegarty or Mr Robertson were discussing the possibility of merger/transfer in early 2021.

Relevant Legal Principles

Formation of contract

60. A contract of employment may be express or implied and, if express, it may be made orally or in writing. An unsigned contract may be evidence of terms agreed orally or by implication between the parties.

61. Generally, an employer will be bound by the actions of an officer who has either actual or ostensible authority to enter into the contract in question.

TUPE Transfer and dismissal

62. Under Regulation 7(1) Transfer of Undertakings (Protection of Employment) Regulations 2006 an employee of the transferor who is dismissed before or after a relevant transfer will be regarded as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

63. The following principles emerge from the authorities:
    73.1 The question is one of fact (**Page v Lakeside Collection Ltd t/a Lavender Hotels UKEAT/0296/10**).
    73.2 It is for the claimant to produce some evidence in support of his case. If he has done so, then the burden rests on the respondent to establish a non-TUPE related reason for the dismissal (**Marshall v Game Retail Ltd UKEAT/0276/13**).
    73.3 The proximity of the dismissal to the transfer is an important factor. Although not conclusive, where the two occur close together that will be strong evidence in favour of the claimant (see **Hare Wines Ltd v Kaur [2019] EWCA Civ 216**).

64. In **Spaceright Europe Limited v Baillavoine [2011] EWCA Civ 1565** the Court of Appeal considered conflicting lines of authority as to the construction of Regulation 7(1) and concluded that the specific transfer which ultimately takes place does not need to be in contemplation at the time the dismissal takes place in order for the dismissal to be caught by Regulation 7(1). On the facts of that case the business was in administration and the Administrators dismissed a number of employees, including the claimant, with a view to making the business more attractive to potential purchasers as a going concern. The claimant was found to have been dismissed for a reason connected with the transfer because the dismissal took place in order to achieve a sale at a later date.

65. It is notable that the **Spaceright** decision pre-dated the 2014 change in wording in the TUPE Regulations. Whilst the previous form of wording required only that the dismissal be “connected with” that transfer, the later form of wording required the transfer to be the “sole or principal reason”. Arguably, this might exclude cases where the dismissal occurs before the transferor has been identified. However, this point was not taken by Ms Barry in her submissions, and I have proceeded on the basis that **Spaceright** provides appropriate guidance, notwithstanding the reformulation of the Regulations.

66. Regulation 7(1) will not apply where the dismissal is for an “economic, technical or organisational reasons entailing changes in the worforce”

(see Regulation 7(2)). The respondent in this case did not seek to rely on Regulation 7(2).

Unfair dismissal – generally

67. It is for the respondent to show that it has a potentially fair reason for dismissal within s.98 ERA. Where it has done so, the Tribunal will decide whether the dismissal is fair or unfair having regard to the reason shown by the employer. In making that decision, the Tribunal will take account of the size and administrative resources of the undertaking and whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason to dismiss.

68. There are significant bodies of law which have developed around the principles to be applied in both misconduct dismissals and redundancy dismissals. Given the conclusions which I have reached in this particular case (set out below), I consider it is neither necessary nor desirable to rehearse those principles in detail. They remain the backdrop against which I have exercised my Judgment and, in particular, I am alive to the dangers of substituting my own view for that of the respondent, and the necessity of applying a "range of reasonable responses" test when assessing the reasonableness of any decision taken by the employer in relation to dismissal.

Submissions

69. Both counsel prepared detailed written submissions which were of great assistance in preparing this Judgment. I am grateful to them both.

70. Broadly, Ms Robinson, for the claimant, submitted that the purported final grounds for dismissal did not stand up to scrutiny. She placed reliance on the comment made by Mr Roberston about Transave "not needing two CEOs" to draw a link between the proposed transfer and the dismissal. It was the need to smooth that way for the transfer which, on the claimant's case, led to the redundancy proposal. Later, when it became apparent that redundancy would be more costly than anticipated, the respondent changed course to a 'trumped up' misconduct process, in order to avoid the cost of the redundancy.

71. Ms Barry's submissions focused on the dire financial situation of the respondent and contended that that was the reason for the proposed redundancy, rather than any putative transfer, which was at very early stage. She argued that the concerns about the claimant's performance came to light due to the grievance investigation and that they left the respondent no choice but to investigate and act accordingly. The disciplinary process was carried out in a reasonable way, and it had to be kept in mind that the respondent was a small organisation with a limited range of personnel it could draw on.

72. At the end of the parties' submissions I canvassed with them the possibility that I may need to make a finding as to whether Mr Hegarty actually was entitled to a 12-month notice period by virtue of the contract signed by him and Mr McDonald. Whilst I would avoid making such a decision if it was not strictly necessary, I could envisage that it might

become necessary. Although Ms Barry had asserted that Mr McDonald had no authority to bind the respondent's Board at the time he signed the contract, neither party had made detailed legal submissions on the issue, including addressing delegated or ostensible authority. I invited the representatives, if they wished, to provide further written submissions on that subject.

73. Miss Barry did provide further submissions. These focused on the facts (in particular, the circumstances in which the contract came to be signed) rather than on the law.

Discussion and conclusions

74. My started point is to consider whether the "sole or principal" reason for the claimant's dismissal was a relevant transfer within Reg 7(1) TUPE. I find that the decision to dismiss was, to all intents and purposes, made on 3 March 2021 when the Board convened without Mr Hegarty to discuss a possible transfer to Transave and the possibility of his redundancy. The Board had already taken some advice and realised that the correct process was to put Mr Hegarty "at risk" of redundancy. The reality is that, absent some major unforeseen matter coming to light, either from Mr Hegarty or from a third party, once the Board had resolved to commence the redundancy process it was highly likely that the final end-point of that process would be the dismissal of Mr Hegarty.

75. There are two key pieces of evidence which link the redundancy to the putative transfer. The first is the fact that the two matters are raised in the same Board meeting. The Board meeting was extraordinary in the sense that it was outside the usual scheduled programme of meetings and it was called without reference to Mr Hegarty. These were the only two matters discussed. The second piece of evidence is the comment (which Mr Robertson accepts was made in some form) that Transave already had a CEO and would not want Mr Hegarty.

76. There are, however, other matters which weigh against a significant connection between the putative transfer and the redundancy proposal. The first is the dire financial predicament of the respondent. Both sides accept that this was genuine, and very grave, albeit that Mr Hegarty's view is that it was recoverable. I find that at the point where the decision to place Mr Hegarty at-risk of redundancy was made, a transfer of the business was only one possible outcome. There were different possibilities as to what such a transfer might look like, and the Board had some agency in relation to that – for example they stopped discussions with two potential transferors who, in the eyes of the Board, were only interest in asset-stripping. The reality of that agency is reflected in the fact that the present respondent was not a name which had been mentioned at all as a potential transferee around the time of the redundancy process, and the eventual transfer did not take place until much later, in early 2022. There was also no certainty that a transfer would take place at all. Whilst the parties disagree on whether the respondent could feasibly recover its position without outside help, both agree that a managed winding-up of operations and closure of the business was also a realistic possibility at this stage.

77. Mr Hegarty's employment costs represented a significant cost to the business. Other expenditure had been cut, including making other staff redundant and Board members stopping claiming expenses. Further, the size of the business had shrunk. I find that the Board's rationale was that the business could no longer sustain the employment of a highly-paid CEO and that, by saving the money associated with that employment, they hoped to put themselves into a better position to transition into a new era – whether through finding a buyer for the business, engaging in a managed closure, or finding a way to slim down the business and continue on a smaller scale. I am satisfied that Mr Robertson's remark about Transave's CEO was an "off the cuff" remark as the putative transfer to Transave was nothing more than a possibility. Whilst reducing the wage bill generally might well have the effect of making the business more attractive to potential buyers, the primary motivation in proposing Mr Hegarty's redundancy was simply to save money, which the respondent desperately needed to do.

78. Given that I have found that there is no sufficient link between the transfer and the proposed redundancy, the claimant's claim under the TUPE regulations must fail. I need not go on to consider whether the link was broken by the subsequent dismissal for alleged gross misconduct.

79. I do, however, need to consider subsequent events for the purpose of the claimant's 'standard' unfair dismissal claim. The respondent relies on misconduct as being the potentially fair reason under s.98. I do not accept that that was genuinely the respondent's reason for dismissal. My reasons for this are:

79.1 As will be clear from my findings above, I am of the view that the most serious of the alleged misconduct matters were already known to the Board before Mr Hegarty raised his grievance. There had been no suggestion of disciplinary action prior to Mr Hegarty's redundancy being proposed, and the grievance which he then submitted.

79.2 Whilst the matters identified may have caused dissatisfaction, I am not persuaded that they were sufficiently serious as to merit disciplinary action under normal circumstances. In making that finding, I have regard to the context being that of an organisation which appears to have been run in a somewhat unprofessional way, and in which governance was not rigorous.

79.3 The allegations are scattergun and they developed through the disciplinary process. Overall, they have the flavour of matters which arose from an email trawl seeking material which could be used to justify a disciplinary response, rather than concerns which came to light organically and demanded a disciplinary response.

79.4 In line with the point above, the advice email dated 12 April talks about "*firming up which acts are gross misconduct*" and "*taking legal advice as to most robust reason for termination*". Both these phrases suggest that the cart is being put before the horse – there is a settled wish to dismiss, followed by a search for appropriate justification.

80. The particularly striking thing about the 12 April email is that it was written three days after the decision in respect of redundancy was intended to be communicated to Mr Hegarty. Given the matters set out

above, I am drawn to the inevitable conclusion that the respondent had identified a problem with the redundancy. I do not accept the respondent's position that the "problem" was that they could not in good conscience carry on with a redundancy process when matters undermining the relationship of trust and confidence had come to light. Employers commence and carry out redundancies every day in such circumstances.

81. As I see it, there are only two realistic possibilities. The first is that the respondent did not believe it had good grounds to dismiss Mr Hegarty by reason of redundancy. In this respect, I note that Mr Hegarty had put forward alternative proposals to redundancy which appear to be well-thought out and considered, and included him taking a pay cut. Perhaps that had not been anticipated by the respondent. Ultimately, however, the respondent's obligation was only to consult with Mr Hegarty over his proposals in good faith, it need not necessarily have accepted them. I have found that the redundancy was genuine. Although there was no transfer of ownership for almost a year after these events, there is no suggestion that another CEO was recruited, or that Mr Hegarty's activities were not genuinely redistributed amongst existing staff or the board. Finally, there is nothing in the crucial 12 April email to suggest a problem with the redundancy itself. I find that the respondent remained of the view that it had good grounds for a redundancy dismissal at the time it chose to abandon that process.

82. The second possibility is that the respondent had baulked at paying the costs associated with the redundancy. Although this is not expressly acknowledged in the 12 April email, it is, in my view, implied by way of a reference to an unsigned contract showing three months' notice having been found and this being "*better than previously thought*" and in the reference to potential compensation for unfair dismissal including a basic award which is calculated in the same way as a redundancy payment. I also consider that the chronology of events supports the claimant's case. As noted above, the question of 12 months' notice pay was raised by the claimant on 31 March 2021. The redundancy process had essentially proceeded as expected until that point, notwithstanding Mr Hegarty's attempts to ague that it should be halted pending resolution of the grievance. I find the question of whether the Mr Hegarty was actually entitled to a 12-month notice period is not critical at this point – in my view the respondent anticipated that Mr Hegarty was going to argue that he had a 12-month notice period, they had no clear evidence that the contract provided otherwise, and that represented a problem.

83. Whilst the putative 12 month notice clause was part of the reason the respondent baulked at making the termination payments that would become due to Mr Hegarty upon redundancy it was not, in my view, the only reason. It was clear from the evidence of the respondent's witnesses, and particularly Mr Robertson, that Mr Hegarty's grievance had caused a significant degree of ill-feeling towards him on the part of those he had complained about, and the broader Board. I have made no findings about, for example, the allegations of sexual misconduct made in the grievance, but it is clear, at the very least, that these are divisive and inflammatory allegations for Mr Hegarty to have made.

84. I find that both the prospect of paying a higher termination payment than had been envisaged, and the damage to relationships caused by the allegations made in the claimant's grievance gave rise to a strong desire on the part of the Board to seek a rationale for termination of Mr Hegarty's employment which would not involve any sums being payable on termination. That was the reason why the redundancy dismissal did not go ahead on 9 April as planned, and that was the prompt for the misconduct proceedings which led, ultimately, to the dismissal for ostensible conduct reasons on 18 May 2021.

85. The result of that conclusion on the issues in these proceedings is that the respondent has failed to demonstrate a fair reason for dismissal within s.98 ERA. That means that Mr Hegarty's claim of unfair dismissal succeeds, and I need not go on to examine in more detail the disciplinary process and the various procedural criticisms made.

86. The question of the compensation which will be due to the claimant as a result of this discussion will be addressed at a Remedy hearing. A provisional date was agreed with the parties, and this will now go ahead.

87. However, as discussed with the parties it is more appropriate to determine the question of any **'Polkey'** deduction from the compensatory award as part of the liability hearing. In their questions and submissions, both parties duly addressed the question of what would have happened to the claimant's employment in the event that I found the misconduct dismissal to be unfair.

88. In the unusual circumstances of this case, I am satisfied that the claimant could have been fairly dismissed for redundancy, and that the respondent would have proceeded with that dismissal, as planned, had they not been distracted by their attempt to achieve a less costly form of termination. For that reason, any assessment of compensation based on Mr Hegarty remaining in employment, even if only on a percentage chance basis, would represent a windfall to Mr Hegarty.

89. The calculation of the compensatory award will hinge on what Mr Hegarty's entitlement would have been to a termination payment on the event of his redundancy having gone ahead (as I find that it would have done) on 9 April 2023. It must be calculated on the basis that the respondent would have acted lawfully and in accordance with the terms of Mr Hegarty's contract, as properly construed. Therefore, although for the purposes of the finding that Mr Hegarty was unfairly dismissed it was sufficient to find that the respondent considered there was a real risk that the contractual notice period was 12 months, for the purpose of assessing the parameters of the compensatory award, I find myself in the position of having to make a determination as to what the notice period actually was. Making that determination is unavoidable in light of the conclusions I have reached up until that point.

90. The starting point for my conclusion is that the only version of the contract which was ever signed was the one produced by Mr Hegarty, counter-signed by Mr Mcdonald. If that contract is not valid, then the

terms of the employment would be those agreed orally, or which can be implied between the parties.

91. I conclude that the signed contract did not become binding at the point where it was signed by the individuals involved. Mr McDonald was not part of the Board at that point, and I have seen no evidence that he had actual or ostensible authority to agree to the terms put forward by Mr Hegarty, and particularly to agree the 12 month notice clause.

92. However, I find that the signed contract was adopted by the Board when Mr Roberston met Mr Hegarty (and Mr McDonald) for lunch on 20 October, discussed the fact that there was now a signed agreement in place and authorised Mr Hegarty's payrise on that basis. As President, Mr Robertson did have authority to act on behalf of the Board in this matter. The terms of that signed contract may have been different to those which the Board understood to have been put forward when they discussed the matter on 15 October, but I find there was no clear focus from the Board about what would be acceptable/unacceptable as regards the specific contract terms. They were focused on the need for a signed contract.

93. Mr Hegarty may have been content to include the notice clause he wished and hope it escaped scrutiny but it was incumbent on Mr Roberston and/or the Board to check that they were happy with the terms that Mr Hegarty had signed, and not simply that he had signed something before confirming that an agreement was in place, writing to Mr Hegarty and authorizing his pay rise. They may have done so, and decided that the 12 month notice period was a price worth paying to secure Mr Hegarty's services. Equally, they may have failed to do so, or they may have trusted Mr McDonald to do so. Whichever way, I am satisfied that the contract was approved, and there was therefore a valid agreement on the terms of the written document. There was no point taken by the respondent in relation to (for example) mistake or misrepresentation. The respondent's argument relied purely on the lack of authority of Mr McDonald, and in my view that argument simply cannot survive the subsequent approval of the contract by Mr Robertson.

94. So far as the terms of that document are compatible with the law (I acknowledge that to some extent they are not – for example it is not open to the parties to unilaterally agree an employment start date which different to the employee's actual commencement of employment) I find that they do represent valid and enforceable terms of the agreement between the claimant and respondent. This means that Mr Hegarty's contractual notice period was 12 months, and that his compensatory award falls to be assessed accordingly.

Employment Judge Dunlop

Date: 9 October 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

11 October 2023

FOR EMPLOYMENT TRIBUNALS