EMPLOYMENT TRIBUNALS

Claimant: Mr J Benjamin

Respondents: Mr I D Jackson (1)
Embrace Education Limited (2)

Heard at: Manchester **On:** 14-16 August, 13 November and (in chambers) 14 November 2023

Before: Employment Judge Phil Allen
Mrs A Roscoe
Ms S Khan

REPRESENTATION:

Claimant: Miss C Page, counsel
First Respondent: In person
Second Respondent: Mrs K Griffiths, director

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. There was a transfer of an economic entity which retained its identity from the first respondent to the second respondent.

2. The claimant was assigned to the undertaking which transferred from the first respondent to the second respondent such that his employment contract transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006, including all rights and liabilities under or in connection to it.

3. The claimant was unfairly dismissed. His claim for unfair dismissal is well-founded.

4. The complaint of age discrimination is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the first respondent as a Graphic Designer from 5 September 2005 until 30 October 2020. The claimant alleged that he was automatically unfairly dismissed by reason of a TUPE transfer, or ordinarily unfairly dismissed. He also alleged age discrimination, comparing himself to younger workers who he said were retained in employment and transferred to, or recruited by, the second respondent. The claims were heard against the first respondent, by whom he was employed, and against the second respondent, a company to whom a contract and/or the business were transferred from the first respondent.

Claims and Issues

2. A preliminary hearing (case management) was held on 13 May 2021. It was agreed that the first respondent personally (as an individual person) had been the employer of the claimant (33). It was also recorded that the claimant accepted that he had been paid his redundancy pay entitlement and he was not pursuing a claim in respect of outstanding wages.

3. A further preliminary hearing took place on 19 October 2022, when the claim had been listed for a final hearing. At that hearing, it was identified that the second respondent should be joined as a party to the claim. That occurred because the Tribunal who conducted that hearing were concerned that the proper respondent to the claims might be the second respondent and the operation of TUPE might have transferred the claimant's employment to the second respondent (44). The second respondent was added as a party because the Tribunal decided it should be, not because the claimant sought that it be added. At a third preliminary hearing, on 20 April 2023, the claimant's application to amend his claim was refused.

4. At the preliminary hearing on 19 October 2022, a list of issues was identified and attached to the case management order (49). At the start of this hearing, it was confirmed with the parties that those issues remained the ones which needed to be determined. That list of issues is appended to this Judgment.

5. In this Judgment the Tribunal has determined the liability issues only, as it was confirmed at the start of the hearing that the liability issues would be determined first. The remedy issues were left to be determined later, only if the claimant succeeded in any of his claims.

Procedure

6. The claimant was represented by Miss Page, counsel. The first respondent represented himself. Mrs Griffiths, the sole director and shareholder of the second respondent, represented the second respondent.

7. The hearing was conducted in person with all parties and all witnesses attending in person in the Employment Tribunal.

8. A bundle of documents was prepared in advance of the hearing by the claimant's representatives which ran to 148 pages. That included documents disclosed by each of the parties. The numbering was difficult to read. The Tribunal read only the pages in that bundle to which it was referred either in the witness

statements or by the parties during the hearing. Where a number is referred to in brackets in this Judgment, that is reference to the page in that bundle.

9. The Tribunal was also provided with 14 pages of documents which had been exhibited alongside the claimant's witness statement. It was not entirely clear why those documents had not been included in the bundle, but nonetheless the Tribunal read those documents (and they are referred to as E followed by the number in this Judgment).

10. Two further pages were added to the bundle on the first day of hearing. On the second day of the hearing, the second respondent introduced some additional pages, which were also added to the bundle. At the start of the third day, the second respondent introduced a document which had been prepared by Mr Jones on 14 August 2023. The claimant objected to the document being admitted. After hearing brief submissions, the Tribunal agreed that the document could be considered (and it was read).

11. The Tribunal was provided with witness statements from the following, all of which were read on the morning of the first day of hearing: the claimant; the first respondent; Mrs Griffiths; and Mrs Rebecca Mills. Mrs Mills did not attend the hearing and therefore the Tribunal only gave limited weight to her statement (which had been presented on behalf of the second respondent). Included in the Exhibited documents (E15) was a page said to contain the statement of Ms Krissie Ainsworth. The document was not signed, and it was not clear how it had been obtained. That document was given very limited weight as a result. In practice, whilst the second respondent had stated that the document provided on the third day was not a witness statement, it was a statement provided by Mr Jones. In her closing submissions the claimant's counsel made very clear that the claimant was not suggesting that Mr Jones was lying in the statement provided and his statement was not disputed, and therefore the Tribunal gave the statement of Mr Jones some weight as its content was not disputed.

12. The claimant's counsel had prepared a document which was stated to be an opening statement. The first respondent objected to the opening statement being read and, accordingly, the Tribunal put that statement to one side unread. The claimant's counsel also provided a large bundle of authorities, to which reference was made during her submissions.

13. The Tribunal heard evidence from the claimant, who was cross examined by the respondents during the rest of the first day and the start of the second. At the start of the hearing reasonable adjustments had been requested to assist the claimant with giving evidence, and a document from STAMMA, the British Stammering Association, was provided to the Tribunal. The Tribunal agreed to the adjustments sought, albeit in practice the claimant did not need any adjustments to be made during his evidence.

14. After the claimant's evidence, the Tribunal heard evidence from the first respondent. At the start of his evidence, it was identified that the witness statement which had been provided to the Tribunal was not the final version of the first respondent's witness statement. A statement dated 20 June 2023 was identified and read by the Tribunal. The claimant also provided the Tribunal with a previous version

of the first respondent's witness statement which had been prepared for the previous hearing (when the second respondent had not been a party) dated 21 July 2021. The first respondent was cross-examined by the claimant's counsel during the second day. On the third day he was cross-examined by the second respondent's representative and asked questions by the Tribunal panel.

15. During the third day the Tribunal also heard evidence from Mrs Griffiths, the sole director of the second respondent. The claimant provided a copy of an earlier statement made by Mrs Griffiths for the hearing in October 2022 (when the second respondent had not been a party to the claim). Mrs Griffiths was cross-examined by the claimant's counsel, before being cross-examined briefly by the first respondent and asked questions by the Tribunal.

16. It took almost all of the time for which the hearing had been listed for the evidence to be heard. As a result, a further two days of hearing were arranged at a later date. Each of the parties provided written submissions in advance of the hearing re-commencing as had been agreed, and the Tribunal read the submissions in advance of the hearing re-commencing. On the morning of the first reconvened day (the fourth day of the hearing) the Tribunal heard oral submissions from the claimant's representative, the first respondent, and (briefly) Mrs Griffiths for the second respondent. The order of submissions followed the respondents' expressed preference for the claimant's representative to make submissions first (to which she had no objection).

17. Judgment was reserved and accordingly the Tribunal provides the liability Judgment and reasons outlined below.

Facts

18. The claimant worked for the first respondent from 5 September 2005. The first respondent traded using various names including Community Initiatives Associates and Embrace Education. There was no dispute that, throughout his employment, the claimant was employed as a Graphic Designer. The first respondent described the claimant's duties as involving the design of adverts and publications. The claimant was questioned about what he did for the first respondent whilst employed and his understanding of the first respondent's business. In summary, it was the claimant's evidence that he did the graphic design which he was asked to undertake. The Tribunal was provided with a statement of terms and conditions of employment (E2). That referred to the particulars as being those upon which Community Initiatives Associates employed the claimant. It was signed on the employer's behalf on 2 August 2012. There was no dispute that the employer of the claimant was the first respondent personally, as an individual.

19. Mrs Griffiths was employed by the first respondent. She was responsible for HR and recruitment for the first respondent.

20. The first respondent was a publisher. His organisation produced magazines and other publications. It undertook work relating to publications for the Police Community Clubs of Great Britain. As part of that arrangement, it obtained sponsorship for Barney & Echo books. The books were the property of the Police Community Clubs of Great Britain (who also received some profit from the

sponsorship), but the first respondent arranged for the books to be printed (to order) and to be distributed to local schools. The business model operated by the first respondent for those books was that local businesses were approached to sponsor a particular number of books to be provided to a local school or schools. Those books, on the back, had a sticker which described the sponsor or gave their details. The claimant prepared the graphic design for the statement of the sponsor and arranged for the stickers to be printed and attached to the books. He also, sometimes, packed the books for distribution. The first respondent described how schools had no budget for purchasing PHSE books for key stage 2 children, and the sponsorship of the local businesses enabled the school to receive the relevant title at no cost to the school.

21. The first respondent's witness statement stated that by 2019 and 2020 those books had become the primary focus of the first respondent's business. Mrs Griffiths, when she was asked, suggested that the extent to which the first respondent's business focussed on Barney & Echo books was less than the first respondent had described. However, as she also emphasised that her role was as HR Manager, and she was not involved in the sales side of the first respondent's business and did not know the details, the Tribunal accepted the first respondent's evidence about his primary business focus as being correct.

22. The claimant's evidence was that the first respondent had employed approximately twenty-four people on the sales team and around eight others who did things like invoicing and other administrative work. By 2020 the claimant was the only Graphic Designer employed by the first respondent. By March 2020 the number of employees had reduced and it was the first respondent's statement in submissions that by March 2020 he employed fifteen or sixteen people.

23. It was the claimant's evidence that he was not always paid from the same bank account. He accepted that, save one occasion when his account had recently changed, he was always paid on time. The first respondent's evidence was that the claimant was paid from the same account, but the reference he used when making the payment would on occasion change.

24. One of the names under which the first respondent traded was Embrace Education. At least some of the books referred to were distributed (at least in part) using that trading name. The first respondent's evidence was that it was a nice name which was used from time to time. From the first respondent's answers to questions in cross-examination, there appeared to be little rationale to which trading name was used for which part of the business (save that Community Initiatives had historically been used for much of it).

25. Included in the bundle of documents was a document dated 5 August 2019 which appeared to be signed by the first respondent and his brother (81). The claimant's evidence was that the letter was circulated to all employees. During cross-examination, the first respondent stated that he had never seen the document before and that he had not signed it (he did not address the document in his witness statement). He suggested that the claimant had fraudulently created it. Mrs Griffiths' evidence in cross examination was also that she had never seen the document before and she also suggested it had been fraudulently prepared (albeit she also did not address the document in her witness statement). In reaching its decision the

Tribunal did not place reliance upon the disputed document and did not find that it needed to determine the dispute about it.

26. In the grounds of resistance which it entered with its response form (148), the second respondent stated that on 1 September 2019 it purchased the Barney & Echo product and projects from the first respondent. During cross-examination of the claimant, Mrs Griffiths said that she was not asserting that the business had transferred on the date included in the Grounds of Resistance. She was later cross-examined about this. She stated that the date included in the second respondent's grounds of resistance had been a typographical error. It was her evidence that it should have said 30 October 2020 (that is that the entire date was a typographical error, including the month, the year, and the date in the relevant month).

27. The second respondent was incorporated as a company on 20 March 2020 (E4), with Mrs Griffiths as the sole director and sole shareholder. Mrs Griffiths confirmed in evidence that she remained the sole director and shareholder. It was the first respondent's evidence that he had no ownership interest in the second respondent, and he was neither a director nor employee of the second respondent. Mrs Griffiths' evidence was that, because she had used a particular provider to set up the company, she had actually made the decision to set up the company some days before, and 20 March was just the date when the process was actioned.

28. The respondents' witnesses were questioned about the timing of the incorporation of the company. In answer to the questions put to him, the first respondent stated that he did not know at the time that Mrs Griffiths had incorporated a company using a trading name which he had used in March 2020, and that he remained unaware that she had done so until July 2020. When asked about his reaction to finding out that she had done so, he explained that he was not feeling emotions by that time, as a result of the loss of his business. Mrs Griffiths' evidence was that, sadly, her father had passed away in 2019 and one of the last things he had said to her was that she needed to "*go out and embrace life*". That was why she said she had used the name. She said she had set the company up because she wanted to leave the first respondent (having inherited some money) and launch a company which produced educational books. From her answers, Mrs Griffiths did not appear to have considered it to be at all untoward for her to have incorporated a company using a trading name of her current employer, whilst she was still employed.

29. The claimant's case was that the incorporation of the company on the date recorded showed that the first respondent and Mrs Griffiths had discussed the transfer of the business and had agreed the transfer on, or around, that date. Both the first respondent and Mrs Griffiths denied having done so and they both denied that there had been any conversations about Mrs Griffiths' company and business prior to late July 2020. The Tribunal's findings about the timing of the incorporation of the company and the name used are explained in the conclusions section of the Judgment below.

30. The Tribunal was provided with a table which showed where the payments which the claimant received as salary were recorded as having come from (from December 2019) (97). The vast majority were shown as from Police Comm and the claimant confirmed in evidence that was what was recorded for his previous

payments prior to December 2019. The payment for 20 March 2020 (only) was shown as being from Embrace Education (which was corroborated by a bank statement print out) (80). It was accepted by the first respondent that the claimant on that occasion was paid from that name. The payments for October and November 2020 were from Fur FP Oct 2020 and Community Initiatives. The first respondent's evidence was that what was shown was the reference on the payment only, it did not identify where the payment had come from. When it was put to Mrs Griffiths, she denied that the second respondent had made the payment to the claimant which had the reference Embrace Education.

31. There was some dispute about what exactly the claimant was doing in his working time in the period immediately prior to lockdown. There was no dispute that the claimant was employed as a Graphic Designer and that historically he had undertaken graphic design work for advertising. There was also no dispute between the first respondent and the claimant that, prior to lockdown, the claimant spent at least 50% of his time doing graphic design work, including (primarily) time spent on the adverts placed on the Barney & Echo books. The claimant also spent some time assisting with administrative tasks such as filling envelopes. There was a dispute about how much time (over 50%) was spent on graphic design. The claimant's evidence was that only 10% of his time was spent on administrative tasks and the remainder was spent on graphic design. The first respondent asserted that, by early 2020, it was more like 50/50. The first respondent did confirm that, earlier in his employment, the claimant had worked entirely as a graphic designer, and also that he had been a good employee. Mrs Griffiths was somewhat dismissive of the graphic design involved in the preparation of the stickers used with the Barney & Echo books. The Tribunal found that in practice the claimant was primarily assigned to undertaking work related to the Barney & Echo books (including both graphic design work and other administrative work related to them).

32. When giving evidence, the first respondent described how the traditional business had reduced due to the reduction in the take up of print advertising and the increasing dominance of Google and the internet generally. That had resulted in some reduction in the first respondent's business' traditional sources of income. The first respondent explained other projects which he had taken on to find revenue from other avenues. In his witness statement he stated that it had been decided from 2019/20 that the business would "*concentrate*" on Barney & Echo sales, in an attempt to mitigate the downturn in advertising revenue. In cross-examination he said that by 2020 probably about seventy percent of the business was Barney & Echo. In practice, based upon the lack of evidence about other sources of revenue at that time, it appeared to the Tribunal that the reliance on Barney & Echo and related work for the Police Community Clubs of Great Britain was probably greater than the amount evidenced by the first respondent.

33. It was the first respondent's evidence that, in March 2020, the business was at its maximum overdraft level. Due to the Covid related lockdown, schools closed. The debt was increasing and there was no prospect of financial recovery. With no income and expenses mounting, the first respondent said that the decision was taken to close the business. When cross-examined about this, it was the first respondent's evidence that the decision was taken in March 2020 and not later.

34. On 20 March 2020, shortly before or at the time of the onset of the first lockdown, the claimant was sent home from work. He was sent home at the same time as all of the first respondent's employees. The Tribunal was provided with a letter received by the claimant at around that time (59) from Mrs Griffiths. It was his evidence that it was enclosed with the March payslip. The first respondent was not sure when it had been sent. Mrs Griffiths accepted that she had discussed what was said in that document with the first respondent. That document told the claimant that he was being laid off. The respondents' evidence was that the same thing happened to all of the first respondent's employees.

35. There was no dispute that the claimant was placed on furlough from the start of the furlough scheme (together with the other employees including Mrs Griffiths) and he was paid in accordance with the furlough scheme at the relevant rate. The Tribunal was not shown any formal furlough agreement or detailed furlough documentation. Mrs Griffiths' evidence was that she did not recall having any contact with the the claimant at all following the 20 March letter. The Tribunal was shown two text messages (E16) on 2 and 20 April 2020 which addressed details of furlough payments.

36. It was common ground between the claimant and the first respondent that throughout the period from 20 March 2020 until the text message of 27 or 28 July 2020, the only contact which was had with the claimant was a single conversation with the first respondent. The claimant's evidence was that the conversation was about computer passwords. The first respondent's evidence was that was not true. However, whatever the conversation involved, the parties agreed that neither the issues with the business, nor the potential redundancy, were discussed with the claimant. There was no evidence that anybody involved in the first respondent undertook any work or conducted any business during the initial period of lockdown.

37. On 28 or 29 July 2020 the claimant received a text message from the first respondent. The Tribunal was provided with a document which contained the text which was sent (56). That said:

> "*I am sorry to have to inform you that due to circumstances beyond our control we have taken the incredibly difficult decision to close Community Initiatives Associates and any associated trading names including Embrace Education, Street Safe and Community Aware completely and permanently.*
>
> *The Coronavirus extended lockdown has meant zero income for the business and given the current economic climate we have decided that it will not be viable to reopen the business and continue trading.*
>
> *As an employee registered on the Community Initiatives Associates payroll, we will continue to claim furlough payments on your behalf until the Government bring these payments to an end or you take alternative employment. However, the Government furlough payments are being reduced to 50% salary in August and then 20% in September & October,*
>
> *Should you have any further questions, please email me at* [email address]
>
> *I'll give you a call later today to catch up too*

We wish you all success in your future career

Yours Faithfully"

38. It was the first respondent's evidence that all employees were sent the same text on the same date. He also stated that he took no advice on it from Mrs Griffiths, who was the person in the operation normally responsible for HR. Mrs Griffiths also said that the second respondent did not take any advice on the message from her, and she highlighted that she was also a recipient of it. The first respondent could not explain why the text message referred in places to "*we*". Both he and Mrs Griffiths denied that the "*we*" referred to, was the two of them.

39. It was the claimant's evidence that he believed that a single text had finished the job which he had held for fifteen years. He described himself as having been hung out to dry. Mrs Griffiths' evidence was that when she received the same message, she had also understood the message to have been a dismissal, emphasising the end of the first paragraph.

40. Whilst the message appeared to the Tribunal to suggest that employees were able to remain on the furlough scheme until it ended if they wanted, the first respondent's evidence was that that did not happen. His evidence was that the employment of all employees had ended by the end of October 2020 at the latest.

41. It was the evidence of both the claimant and Mrs Griffiths that the percentages of salary for furlough referred to in the text message were completely wrong. The first respondent emphasised the difficult circumstances at that time and stated that he had believed they were correct. The Tribunal is aware that the percentages stated were incorrect. The Tribunal was not provided with Mrs Griffiths' subsequent personal correspondence with the first respondent, but it was her evidence that she brought this to the first respondent's attention when she responded to the text. No such document was provided. The first respondent was keen to emphasis that all employees did, in fact, receive the correct furlough payments to which they were entitled.

42. When cross-examining the claimant, the first respondent suggested that he also telephoned each of his employees to speak about what had been said in his text. The claimant was very clear in evidence that he did not have any subsequent conversation with the first respondent. There was no evidence of any such conversation, nor was there any note or letter recording what it was claimed had been said. As a result, the Tribunal found that there was no conversation with the claimant about his dismissal.

43. The claimant emailed the first respondent on 29 July (60). He did so after speaking to an adviser at ACAS about his entitlements. He said the furlough percentages quoted were wrong. He explained that, if redundant, he was entitled to notice pay, redundancy pay and holiday pay. It was the first respondent's case that the claimant had asked to be made redundant. The claimant denied that he had done so. The Tribunal did not find that the claimant's response highlighting his rights, sent in response to the text of 28 or 29 July, had constituted the claimant asking to be made redundant. We found that he was clarifying the position and asserting the

payments to which he was entitled if redundant, something to which the first respondent had omitted to make any reference in his text message.

44. The claimant received a letter from the first respondent dated 3 August 2020 (62). The claimant's evidence was that it was received on 6 August. The letter was headed "*formal notice of redundancy*" and started with the following:

> "*Further to our recent correspondence and your request for redundancy. As explained to you, the company will cease to exist and consequently, your employment will therefore terminate by reason of redundancy.*
>
> *You have chosen to start this process with immediate effect therefore, your monies have been worked out based on that fact.*
>
> *Your length of service entitles you to 12 weeks' notice which will commence on 1st August 2020. You are not required to work your notice and your last day of employment with the Company will be Friday 30th October 2020*."

45. The letter appended a document (106) which set out the sums which would be paid to the claimant. It informed the claimant that he had a right of appeal. It confirmed that a reference would be provided. That stated that the notice period ran from 1 August to 30 October 2020.

46. The Tribunal was also provided with the letter sent to Mrs Griffiths on the same date (136). Save for the name and address, the letter was in identical terms (the Tribunal was not provided with a copy of the appendix, albeit that Mrs Griffiths gave evidence that it reflected the schedule to the claimant's letter but with different figures). Mrs Griffiths said in evidence that she had asked to be made redundant, rather than remain on furlough.

47. In cross-examination, the first respondent accepted that the claimant had not been told how he had been selected for redundancy, what selection criteria had been applied, or how that had been applied to the claimant. It was clear that absolutely no consultation had been undertaken with him (or with any representatives on his behalf).

48. As already recorded, the first respondent's evidence was that he first spoke to Mrs Griffiths about her new company in late July 2020. For the reasons explained below, the Tribunal was sceptical about that evidence. By 30 October 2020 (as detailed below) various agreements were put in place between the first and second respondent. Neither the first respondent nor Mrs Griffiths gave any evidence about the negotiations which took place between them or when or how those negotiations were conducted. The absence of such evidence, which could have easily been given, did not assist the Tribunal in identifying when the operation of the work for the Police Community Clubs of Great Britain did in practice transfer between the two. It was clear that the second respondent must have undertaken at least some discussions with the Police Community Clubs of Great Britain prior to the end of October 2020.

49. In the witness statement which she had prepared in July 2021, Mrs Griffiths recorded that the notice on 29 July did not come as a shock since the business had

been under financial pressure for some time and had attempted to rebrand itself on more than one occasion, clearly without success. That statement was omitted from the statement she prepared for this hearing. In her evidence given during cross-examination, Mrs Griffiths described herself as shocked when she received the 29 July text. She also distanced herself from having any knowledge of the first respondent's business or financial difficulties. The Tribunal preferred the evidence given by Mrs Griffiths in the statement she had initially prepared (when the second respondent was not a party to the proceedings, and she had no vested interest in a particular outcome).

50. In her witness statement for this hearing, Mrs Griffiths recorded that when she was notified that the business was closing due to financial difficulties, she decided to enquire about the Barney & Echo product. She said that the first respondent agreed to negotiations. She stated that she bought the Barney & Echo product and the contract with the Police Community Clubs of Great Britain on 30 October 2020. She stated that she did not purchase the business Community Initiatives Associates or any other entity. In the statement which she had prepared in July 2021 she stated that she thought the products associated with the contracts owned by Ian Jackson t/a Community Initiatives Associates, namely Barney and Echo range, were good products and a market existed. She went on to say in that statement that she offered to buy the contracts with the business and the right to sell the products. The Tribunal preferred the evidence of Mrs Griffiths in her initial statement, rather than what was said for this hearing.

51. The payslips provided to the Tribunal for the claimant all recorded the company name for the payer as Community Initiatives Associates. There was no company or other legal entity with that name. The Tribunal was provided with three different payslips dated 31 October 2020 for the claimant (91), all recording different amounts as net pay. The Tribunal was provided with three different P45s for the claimant (98). The leaving date was recorded as 31 October 2020 on two of them and 23 October 2020 on the other. The employer name on the P45s, was recorded as Community Initiatives Associate. It was the first respondent's evidence that the business which he had operated closed completely on 30 October 2020.

52. On his response form (21), the first respondent stated that Community Initiatives Associates and all associated businesses closed on 30 October 2020, and that the company had not traded since that date. There was in fact no company to trade, but that terminology appeared to reflect the fact that the first respondent frequently referred to his operations as if they were corporate entities even though he was a sole trader operating with a variety of trading names. In the response form it was stated that the contracts that the company once had were sold to other businesses and the lease on the office was sub-let. The response form also referred to the company being sold to other businesses (plural), but there was only evidence of the business being sold to one other entity, which was the second respondent (and the sale was not of a company as there was no company in existence which was or could have been sold).

53. When asked, the first respondent's evidence was that he was not aware of TUPE until the second preliminary hearing in the case. At the time when he dismissed his employees (including the claimant), the first respondent said he had absolutely no knowledge about, or awareness of, TUPE.

54. The first respondent also provided a letter from a firm of accountants dated 28 April 2021 (112). That stated that the firm had acted as accountants to the first respondent and Stephen Jackson (his brother) trading as Community Initiatives. The accountants confirmed their instructions that the business formally ceased trading on 30 October 2020 after a period of inactivity and it said that a final return to HMRC would be submitted for the period for that date.

55. The Tribunal was provided with a letter regarding the assignment of the rights under contract of: Barney & Echo Products including The Community Education Awards, Now Netiquette, Community Aware and future Magazine Products (114). The letter was signed by both the first respondent and Mrs Griffiths (on behalf of the second respondent) on 30 October 2020. It stated that the date of assignment was 30 October 2020. For a price (which had been redacted) the first respondent irrevocably assigned to the second respondent with full title guarantee all the Assigned Rights. Whilst Assigned Rights appeared to be a defined term, the agreement did not contain a definition.

56. A second copy of the first page of the same agreement was also provided to the Tribunal (132). That differed from the first agreement because the assignor was described as both the claimant and his brother of Community Initiatives Associates. The first respondent said that he thought that must have been a draft version and the inclusion of his brother had been a typo. As only one page of that agreement was provided and there was no evidence it had been signed, the Tribunal considered the first agreement as being the final document (114) in preference to the second one (132).

57. The Tribunal was provided with an Asset Purchase Agreement between Community Initiatives Associates (described in it as the Seller) and the second respondent (described in it as the Buyer) (119). It was signed on behalf of each of the parties, apparently on 30 October 2020. That agreement incorrectly stated that Community Initiatives Associates was a company in England & Wales with a registered office. The agreement recorded at clause 4 that:

> "*Under the terms of this Agreement and in order that the Business is transferred as a going concern, the Seller sells and assigns with full title guarantee and the Buyer purchases with effect from and as at the Transfer the following Assets of the Seller:*
>
> *a. the Moveable Assets;*
>
> *b. the Fixed Assets;*
>
> *c. the right to use the Business Name;*
>
> *d. the Intellectual Property;*
>
> *e. the Goodwill; and*
>
> *f. the Stock"*

58. Of the defined terms used:

> the Business was defined as "*The business being carried on by the Seller, namely the business of The Seller is involved in the business of publishing education resources*";
>
> the Assets were "*The Fixed Assets and Moveable Assets owned by the Seller and used in the Business at the Effective Time, being the assets to be sold and purchased*";
>
> the Fixed Assets were "*All of the fixed plant and machinery, furniture, utensils, templates, tooling, implements, chattels and equipment wherever situated belonging to the Seller and used or intended for use in connection with the Business attached or fixed to the property as at the Effective time"*;
>
> the Goodwill was "*The goodwill, custom and connection of the Seller in relation to the Business, together with the exclusive right to use the Business Name, the Domain Names and Website, telephone numbers, facsimile numbers and any other contact numbers reasonably required by the Buyer"*;
>
> the Moveable Assets were "*The loose plant, including moveable plant, machinery and equipment, fixtures and fittings, desktop computers, office equipment, spare parts and tooling used or intended for use in connection with the Business";* and
>
> the Stock was "*The stock-in-trade of the Business at the Effective Time*".

59. A price was included, which had been redacted. A licence of the business name was granted. All contracts which were capable of assignment were to be assigned from the Seller to the Buyer (with the contracts being defined as all contracts related to the Business). The agreement also included restrictive covenants in which the seller undertook not to do certain things. Clause 15 of the agreement also said the following (Liabilities, Creditors and Effective Time were all defined in the agreement with reference to the Business):

> "*The Buyer will assume full responsibility for the Liabilities and the Creditors for the Effective Time*."

60. In the witness statement which he had prepared in July 2021 the first respondent had referred to and placed reliance on the Asset Purchase Agreement. In referring to it, the first respondent stated that "*in order to mitigate debts the business was sold to Embrace Education Ltd on 30/10/2020*". That sentence had been changed in the statement which the first respondent had prepared for this hearing dated 30 June 2023 in which he instead said: "*In order to mitigate debts, some of the contracts of the business were sold to Embrace Education Ltd on 30/10/2020*". The document referred to was instead the assignment of rights letter (114). When cross-examined about the change, the first respondent stated that he no longer wished to place reliance upon the Asset Purchase Agreement. The Tribunal considered the Asset Purchase Agreement to be an important document which recorded the agreement reached between the first and second respondent at the relevant time. The Tribunal also preferred the evidence of the first respondent as recorded in the first witness statement which he had prepared about what he had

sold to the second respondent (consistent as it was with the Asset Purchase Agreement), in preference to the revised statement.

61. It was Mrs Griffiths' evidence that she accepted that the document recorded that the whole business was assigned to the second respondent, but she said that was not what had happened. She contended that she had not transferred the business, she had bought a contract. Her evidence was inconsistent with what was recorded in the contemporaneous document signed at the time.

62. The Tribunal was provided with one page of a document headed "*Assignment of Intellectual Property*" (134). It was an agreement to assign intellectual property rights from the first respondent to the second respondent. The document provided to the Tribunal was not dated or signed and did not include the schedule which recorded the rights assigned. When being cross-examined, the first respondent said that he no longer wished to rely upon that document. Mrs Griffiths could not answer the questions she was asked about the document and appeared to have no understanding of what it meant. She said was not sure what documents she had signed at the time of the purchase.

63. The Tribunal was also provided with a single page document (or part of a document) headed "*Lease*" (135). The document was full of typographical errors and in places the content did not make sense. It appeared to be dated 30 October 2020 but the copy provided was incomplete and unsigned. It was an agreement between Community Initiatives Associates (described as the Landlord) and the second respondent (described as the Tenant). The first respondent's evidence was that he obtained a lease document from the internet and used it. His evidence was that he was personally liable for the lease on the premises which had been used and therefore, to cover the losses from the lease, he sub-let to the second respondent. The lease recorded that the second respondent had agreed to pay £20,000 per annum. The first respondent said that the name Community Initiatives Associates was used because that was the name on the lease with the (ultimate) landlord.

64. There was no dispute that the second respondent effectively took occupation of the premises which the first respondent had previously used from the start of November 2020 (Mrs Griffiths said she thought she had the keys from 2 or 3 November). Mrs Griffiths' evidence was that the second respondent occupied the premises for a month before moving to alternative premises. Neither respondent gave any evidence about what subsequently occurred in relation to payments for the rent or the payments apparently due in accordance with the lease document.

65. When asked, Mrs Griffiths denied that the second respondent took possession of anything from the first respondent. It was her evidence that it did not take any stock. The second respondent purchased its own computers and mobile telephones and took them with them when they left the premises.

66. In her evidence, Mrs Griffiths described in some detail the second respondent's business model. It was her evidence that the second respondent sells the Barney & Echo books directly to schools and Councils and does not obtain sponsorship for them. It was her evidence that the second respondent does not employ a graphic designer. It was also her evidence that the second respondent does not use graphic design. As it sells the Barney & Echo books directly, the

second respondent does not need to add stickers to the books or use design for advertisements, sponsorship, or stickers.

67. It was the claimant's evidence that a new Barney & Echo book was launched on 20 October 2020 called "The Woodland Virus". It was his evidence that this must have been in the works for many months previously. It was also his evidence that 25,000 copies had been sold by 3 February 2021. The Tribunal was provided with some screenshots from the Barney & Echo website (101). One entry, dated 20 October 2020, described how the website was excited to announce the launch of the brand-new Barney & Echo educational resource called The Woodland Virus. An entry from 3 February 2021 described how that publication had been distributed to over 25,000 children "*since 1st October 2020*". An entry from 6 July 2021 stated it had been distributed to over 350,000 children "*since 31st October 2020*". The first respondent's evidence was that the Woodland Virus was not part of his contract with the Police Community Clubs of Great Britain and that the website was run by the Police Community Clubs of Great Britain. The Tribunal found that one of the respondents must have worked with the Police Community Clubs of Great Britain on the new title and its distribution as it was inconceivable that one of them did not do so, where the valuable contract was the distribution rights for the Barney & Echo products. Mr Jones' statement of 14 August 2023 was inconsistent with there having been a third-party distributor between the first respondent and the second respondent (which he described as being the first respondent's successor). The Tribunal was not provided with evidence (at least in detail) about when and how the transition occurred, but if the first respondent had ceased to operate as he said in evidence, the Tribunal found that the second respondent must have had some engagement with the Police Community Clubs of Great Britain about the distribution of the new publication prior to the date of the launch of the new publication (or at the very latest at the time of its launch).

68. During the hearing, the claimant also added to the bundle two pages from the website collectively headed "*Barney and Echo*" and "*Sponsor your local schools*" (144). It appeared to be common ground that the pages were from a website accessed at the time of the hearing. That described in detail how a business could sponsor a school in a way which reflected the business model for the books which the first respondent had evidenced. There was a link in the document. At the foot of the pages was the second respondent's address. Mrs Griffiths' evidence was that she and the second respondent had nothing to do with the website, which was operated by the Police Community Clubs of Great Britain. It was also her evidence that, despite what was said on the website and the fact that she had been assigned the first respondent's contract with the Police Community Clubs of Great Britain, the second respondent does not operate the business model described with the books and has never done so.

69. The claimant was 62 years old at the time of his dismissal. A table provided to the Tribunal (104) recorded the ages of what were described as all Community Initiatives staff at 28 July 2020. Two of the staff were aged 62 and all the rest were younger; many being considerably younger. That was consistent with the claimant's evidence that, save possibly for one other person, he was the oldest employee of the first respondent.

70. It was Mrs Griffiths' evidence that she did not transfer any staff from Community Initiatives Associates. She said that once she started her business, she recruited two sales people and a credit controller within the first month of trading (which she described as November 2020). She provided the Tribunal with a document which it was her evidence recorded the recruitment process followed for all staff recruited by the second respondent (137).

71. In the witness statement which was provided by the second respondent, Mrs Mills (who had been employed as a credit controller) stated that she was made redundant by Community Initiatives Associates on 1 August 2020. She said she applied for a position with the second respondent having seen an advert in November 2020 and commenced working for the second respondent on 10 November 2020. The Tribunal did not hear evidence from Mrs Mills and, as already explained, gave her statement limited weight where she did not attend the hearing and was not able to be questioned and her evidence was in dispute.

72. Mrs Griffiths' evidence was that Mrs Mills was recruited by the second respondent following an advertisement on Indeed for a credit control role. Mrs Griffiths explained that credit controllers were very hard to find. When asked why she had needed a credit controller in her first month of business, Mrs Griffiths said that, initially, Mrs Mills had been recruited as an administrator. In her evidence, Mrs Griffiths evidenced that Mrs Mills had been recruited very quickly after the advert was placed. No documents were provided which evidenced the recruitment process undertaken.

73. The documents provided included an exchange of messages between the claimant and Mrs Mills dated 25 April (80) (presumably being 2021 or later). In the messages provided, the claimant asked Mrs Mills if she would be prepared to give a statement and Mrs Mills responded that she was sorry, but the answer was no "*as I still work there*".

74. The Tribunal was also provided with an exchange of messages between the claimant and Sian Vaughan dated 30 July 2020 (80). In those messages, Ms Vaughan informed the claimant that she had had a phone call from Mrs Griffiths, who had asked if she wanted her job back. The message described this as "*weird*". Mrs Griffiths' evidence was that Ms Vaughan had never been contacted by her, had not been offered a role with the company, and had never worked for the second respondent. There was no other evidence (besides the messages) which showed that Ms Vaughan had been offered a job or had worked for the second respondent.

75. The Tribunal was provided with a list of the employees of the second respondent (138). That showed: an office manager; two administrators; a credit controller (Mrs Mills); a cleaner; six sales staff; and two people who worked in the warehouse. It was Mrs Griffiths' evidence that, of those named, only Mrs Mills had previously worked for the first respondent (in addition to Mrs Griffiths herself, who was not included in the staff listed). When she was asked, Mrs Griffiths also confirmed the ages (or approximate ages) of each of the people named on the list. Those employees' ages varied from 23 to 62, but notably including three employees in or around their 60s, and three in their 50s. Mrs Mills was stated to be 49 years old.

76. Mrs Griffiths' evidence was that she has not employed a graphic designer. It was also her evidence that the second respondent has not had any graphic design work whatsoever. This was explained with reference to the business model which she evidenced is now operated. She explained that the second respondent does not prepare or fix stickers on the books and does not have sponsors whose details (or logo) need to be used.

77. In his witness statement, the claimant made various allegations about the operation of the first respondent's business and the first respondent's relationship with Mrs Griffiths. When he was questioned about these issues, it was clear that there was no evidence to substantiate what was said. The Tribunal accepted that there was no truth to the allegations made. It found it to have been (at the least) inadvisable for the claimant to have included those matters in his witness statement.

78. During his cross examination, the claimant was questioned at some length about the work he has undertaken since his dismissal. In his schedule of loss (38) he recorded no subsequent earned income. Whilst being cross-examined the claimant confirmed that he had undertaken work since leaving employment for Mr Jones (of the Police Community Clubs of Great Britain). He initially described this as being a job which he had on the go when he left, and he said it was just corrections and nothing new (he also referred to two to three days' work and a low figure for earnings). He admitted that the earnings had not been included in the schedule of loss, and explained its omission as being due to the fact that he had spent more on advertising and administration costs for his self-employed operation which he endeavoured to launch under a relevant scheme, so he had not included it. Later in his cross-examination he confirmed that he had more recently undertaken more work for Mr Jones. The claimant had omitted to either include those amounts in his schedule of loss or to update the schedule to include the amounts. Some documents added to the bundle showed that the claimant had held himself out on various social media as being a digital artist able to offer various services and, from April 2022, as a freelance graphic designer as Jim's Digital Art. It was the claimant's evidence that he had received no income as a result of any such offering. The Tribunal did not draw any inferences or conclusions about the claimant's credibility from the omission of these (relatively limited) earnings from his schedule of loss.

79. The Tribunal heard some limited evidence about the dismissal of Ms K Ainsworth in 2019. The claimant asserted that she had been dismissed and immediately replaced by Jade, a much younger worker. The first respondent confirmed the dates of dismissal and commencement of employment, and the difference in ages of Ms Ainsworth and the new recruit. He asserted that Jade was recruited for a different role (in packing) paid considerably less than Ms Ainsworth had been as a credit controller. Mrs Griffiths also gave evidence about the differences in roles, but she asserted that Ms Ainsworth had not been dismissed at all but had decided to leave. The Tribunal did not hear evidence from Ms Ainsworth, save for the provision of the email referred to above. In that email, Ms Ainsworth did not herself actually assert age discrimination, but did record that when she had left, the first respondent had recruited someone younger. The Tribunal did not find that there was sufficient genuine evidence about Ms Ainsworth and the reasons for her departure (and the recruitment of a new employee), to provide it with any genuine assistance in determining the claimant's claims for age discrimination.

80. In her evidence, Mrs Griffiths said that she had renegotiated the second respondent's contract with the Police Community Clubs of Great Britain in November 2022, and it was now in place for longer than the outstanding term had been with the first respondent. The Tribunal was not shown any contractual documents which recorded the terms agreed between the Police Community Clubs of Great Britain and either respondent.

81. On the third day of the hearing, the Tribunal was provided by the second respondent with a document dated 14 August 2023 on the headed paper of the Police Community Clubs of Great Britain and signed by Mr Jones. Whilst the Tribunal did not hear from Mr Jones in person, as the claimant's counsel emphasised that the content of the letter was not disputed and there was no suggestion from the claimant that Mr Jones was lying, the Tribunal accepted the content of the letter as providing an accurate statement from Mr Jones about the matters to which it referred. The letter recorded that the ownership of the Barney and Echo publications had belonged at all times to the Police Community Clubs of Great Britain. It described the engagement of the first respondent by the Police Community Clubs of Great Britain to seek sponsorship for the publications in the Barney & Echo series. Mr Jones went on to say:

> "*After many years of engagement with CIA* [in practice, being the first respondent]*, and towards the end of 2020, we understood that the company CIA was to close due to the pandemic and financial strain, and the contracts sold to one of its senior employees, whom we have also known for many years a Mrs. Kelly Griffiths who had formed a company called Embrace Education Limited [EEL].*
>
> *As our dealings with Mrs. Griffiths had always been excellent and she was clearly aware of the past relationship between ourselves [PCCGB], CIA and our clear and outright ownership of the B & E series of publications, she/her company was an obvious successor to handle the distribution of our product[s] which have/do include the Community Education Awards and no doubt future projects in the future"*

82. Mr Jones' statement provided some detail about the way in which the Police Community Clubs of Great Britain worked with the first respondent, but did not reference at all the business model of its work following the second respondent taking on the contract and did not refer to any changes in the way in which the contract was operated.

The Law

TUPE

83. This case involved the Transfer of Undertakings (Protection of Employment) Regulations 2006, which are referred to in this Judgment as TUPE. TUPE is there, as the title makes clear, as a protection of employment measure. TUPE provides employees with rights on the transfer of an undertaking, when the law would not otherwise afford them any protection. Those rights include: not to be dismissed because of a relevant transfer; and to transfer with all rights, powers, duties and liabilities under, or in connection with, the employment contract.

84. What transfers under regulation 3(1)(a) is an undertaking, business or part of an undertaking, to another person, where there is a transfer of "*an economic entity which retains its identity*".

85. Regulation 3(2) provides that "*economic entity*" means an organised grouping of resources which has the objective of pursuing an economic activity (whether or not that activity is central or ancillary).

86. Alternatively, regulation 3(1)(b) provides for a transfer where there is a service provision change. In her submissions the claimant's counsel confirmed that the claimant was not relying upon the service provision change provisions in asserting that there has been a transfer, and so those provisions have not been considered further by the Tribunal when reaching our decision.

87. Regulation 2 provides that assigned means "*assigned other than on a temporary basis*".

88. Regulation 4(1) provides

> "*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*".

89. 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, or would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1)"*

90. Regulations 7(1), (2) and (3) of TUPE say:

> "(1) *Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.*
>
> *(2) This paragraph applies where 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.*
>
> *(3) Where paragraph (2) applies – (a) paragraph (1) does not apply"*

91. Regulations 7(3) goes on to provide that where it applies the reason for the dismissal shall be regarded as redundancy (or some other substantial reason).

92. The claimant's counsel placed emphasis on the test to be applied as explained by the Employment Appeal Tribunal in **Cheesman v R Brewer Contracts Ltd** [2001] IRLR 144. The questions set out in that Judgment are: whether or not there was an identifiable business entity constituting an entity within the meaning of TUPE; and, if there was, whether or not there was a relevant transfer. In that Judgment the Employment Appeal Tribunal identified a number of factors, all of which this Tribunal considered but which will not be reproduced in full in this decision. The EAT emphasised that all the factors characterising the transaction in question were to be considered, and no single factor was to be considered in isolation. Amongst other things, the Employment Appeal Tribunal said the following:

> "*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…*
>
> *Where an economic entity is able to function without any tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets…*
>
> *When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer…*
>
> *The aim of the Directive is to ensure continuity of employment relationships within the economic entity irrespective of any change of ownership… and our domestic law illustrates how readily the courts will adopt a purposive construction to counter avoidance"*

93. In **Fairhurst Ward Abbotts Ltd v Botes Building Ltd** [2004] ICR 919 Mummery LJ said:

> "*Neither the legislation nor the case law expressly requires that the particular part transferred should itself, before the date of the transfer, exist as a discrete and identifiable stable economic entity. Nor do I think that such a requirement is implicit in the need to identify a pre-existing stable economic entity. In my judgment, it is sufficient if a part of the larger stable economic entity becomes identified for the first time as a separate economic entity on the occasion of the transfer separating a part from the whole"*

94. Guidance on the proper test for assignment was given in **Duncan Web Offset (Maidstone) Ltd v Cooper** [1995] IRLR 633. Mr Justice Morrison said:

> "*There will often be difficult questions of fact for industrial tribunals to consider when deciding who was 'assigned' and who was not. We were invited to give guidance to industrial tribunals about such a decision, but decline to do so because the facts will vary so markedly from case to case. In the course of argument a number were suggested, such as the amount of time spent on one part of the business or the other; the amount of value given to each part by the employee; the terms of the contract of employment showing what the employee could be required to do; how the cost to the employer of the employee's services had been allocated between the different parts of the business. This is, plainly, not an exhaustive list; we are quite prepared to*

> *accept that these or some of these matters may well fall for consideration by an industrial tribunal which is seeking to determine to which part of his employers' business the employee had been assigned."*

95. It is clear from the Judgment in **Duncan Web** that the Tribunal must consider all relevant circumstances when determining assignment.

96. In respect of when the transfer occurs, the claimant's representative relied upon the decision of the European Court in **CELTEC Ltd v Astley** [2005] ICR 1409 where it held that the date of the transfer was to be understood as referring to the date on which responsibility for carrying on the business of the entity in question moved from the transferor to the transferee. **Housing Maintenance Solutions Ltd v McAteer** [2015] ICR 87 made clear (based upon European case law) that there can be a transfer of a business at a time when no employees are working and no activities are being carried out, as what is relevant is whether and when there is a change in the person responsible for carrying on the business (and by virtue of that, the obligations relating to transferring employees).

97. In **Hare Wines Ltd v Kaur** [2019] IRLR 555 the Court of Appeal held that proximity of dismissal to the transfer was strong evidence in a claimant's favour (although it was not conclusive), in a case in which the claimant had been dismissed on the day of the transfer. The claimant's representative also relied upon the Judgment of LJ Mummery in the case of **Marcroft v Heartland (Midlands) Ltd** [2011] IRLR 599. That case considered the interrelation between an employee's notice of termination of employment and the transfer (or potential transfer), as that claimant had submitted his notice of resignation before he was informed of the sale of the business, and he had not been required to actively work his notice (albeit that he remained employed at the date of transfer). It was held that the claimant in that case had transferred, and it was stated that it could not be right that an employee ceased to be assigned to the entity transferring and lost the protection of TUPE based upon what he was required to do during the notice period.

98. As it is employment protection legislation, TUPE is to be applied purposively in order to achieve that objective. One way in which the case law has developed to achieve that is in the interpretation of when the protection against dismissal applies. Whether an employee is employed immediately before the transfer, must involve consideration of whether the individual would have been so employed immediately before the transfer if he had not been dismissed unfairly for a reason connected to the transfer. That requirement was identified in UK law in the case of **Litster v Forth Dry Dock & Engineering** [1989] IRLR 161 and is now incorporated into the wording in regulation 4(3) of TUPE as quoted above.

99. When considering whether or not a dismissal is for an economic technical or organisational reason entailing changes in the workforce, it is important to consider the reason of that party for dismissing at the time when the dismissal was made. The pre-transfer employer cannot simply rely upon a post-transfer organisation's wish not to receive any employees by virtue of TUPE (or the expectation that it will not do so), as that also would undermine the very protection which TUPE is there to provide to employees. The claimant's representative said it would not apply where the true reason was to make the undertaking a more attractive proposition to a prospective transferee and relied upon what was said by Mummery LJ in **Spaceright Europe**

Ltd v Baillavoine [2012] ICR 520. Whilst what was said in that case was focussed on administrators, it must equally apply to all employers looking to sell their business (or a part of it):

> "*For an ETO reason to be available there must be an intention to change the workforce and to continue to conduct the business, as distinct from the purpose of selling it. It is not available in the case of dismissing an employee to enable the administrators to make the business of the company a more attractive proposition to prospective transferees of a going concern"*

Unfair dismissal

100. As already explained, Regulation 7(1) provides that if the principal reason for the dismissal is the transfer, then the dismissal will be automatically unfair (save where it was for an economic, technical or organisational reason entailing a change in the workforce).

101. If the Tribunal does not find the dismissal to be automatically unfair, we must also consider whether the dismissal was unfair by considering it as an ordinary unfair dismissal claim. The starting point is section 98 of the Employment Rights Act 1996.

> *"(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."*
>
> *"(2) A reason falls within this subsection if it…is that the employee was redundant."*
>
> *"(4) 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) – 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 shall be determined in accordance with equity and the substantial merits of the case.*"

102. Section 139 of the Employment Rights Act 1996 defines redundancy:

> **"***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 – … the fact that the requirements of that business – for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.***"**

103. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The Tribunal is not to sit in judgment on the business decision to make redundancies.

104. In determining whether a redundancy situation exists, a Tribunal must decide:

a. Was the employee dismissed?

b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

105. In **Williams v Compair Maxam Ltd** [1982] IRLR 83 (a case emphasised by the claimant's counsel in her submissions), the Employment Appeal Tribunal set out the standards which should guide the Tribunal in determining whether a dismissal for redundancy is fair under section 98(4). Browne-Wilkinson J, expressed the position as follows (including only the factors relevant to this case):

> *"the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But … there is a generally accepted view in industrial relations that… reasonable employers will seek to act in accordance with the following principles:*
>
> *(1) The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *(2) ….*
>
> *(3) … the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
>
> *(4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria ….*
>
> *(5) The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*
>
> *… The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."*

106. The House of Lords in **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 summarised the relevant procedures required in a redundancy dismissal in the following terms:

> "… *in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation*."

107. Fair consultation has been held to mean the following: consultation when the proposals are still at a formative stage; adequate information on which to respond; adequate time in which to respond; and conscientious consideration of the response to consultation. Section 98(4)(a) of the Employment Rights Act 1996 makes clear that the size and administrative resources of the employer's undertaking are factors which should be taken into account when considering whether the dismissal is fair or unfair in all the circumstances of the case. In **De Grasse v Stockwell Tools Ltd** [1992] IRLR 269 the Employment Appeal Tribunal said:

> "*In our judgment while the size of the undertaking may affect the nature or formality of the consultation process, it cannot excuse the lack of any consultation at all. However informal the consultation may be, it should ordinarily take place"*

108. The Employment Appeal Tribunal has recently confirmed that the legal tests to be applied when considering the fairness of a dismissal during the Covid pandemic remained the same without alteration, albeit that the pandemic may be highly relevant to some of the decisions made (**Lovingangels Care Ltd v Mhindurwa** [2023] ICR 1021). The Judge in that case had been right to consider whether a failure to properly consider the possibility of furlough had rendered that particular dismissal to be unfair.

Age discrimination

109. The discrimination claim is brought under section 13 of the Equality Act 2010 which provides 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."*

110. Section 5 of the Equality Act 2010 provides that age is a protected characteristic, and that age is reference to a person of a particular age group. Section 13(2) provides that for the protected characteristic of age, if A can show that A's treatment of B was a proportionate means of achieving a legitimate aim, that is not discrimination.

111. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include dismissal.

112. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

113. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> *"(2) 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 that the contravention occurred.*
>
> *(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".*

114. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the relevant respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he has been treated less favourably than his comparator and there was a difference in age between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

115. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of age.

116. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his or her motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

117. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare, and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves. Age does not have to be the sole or only reason for the conduct, provided that it is an effective cause or a significant influence on the outcome. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment.

118. The way in which the burden of proof should be considered has been explained in many authorities, including **Madarassy v Nomura International PLC** [2007] ICR 867 (upon which the claimant's counsel relied), **Nagarajan v London**

Regional Transport [1999] IRLR 572, **Igen Limited v Wong** [2005] ICR 931; and **Royal Mail v Efobi** [2021] UKSC 33.

119. The claimant's representative referred to the case of **Deman v Commission for Equality and Human Rights** EWCA Civ 1279 in which the Court of Appeal said that it agreed with the submissions it had heard in that case that the "*more*" required to shift the burden of proof "*need not be a great deal*". She also relied upon **Solicitors Regulation Authority v Mitchell** UKEAT/0497/12 as authority for the fact that a false explanation from a respondent for the treatment could constitute the "*something more*" required, and **Base Childrenswear v Otshudi** [2020] IRLR 118 that a wholly untruthful response when discrimination is alleged could also indicate that the allegation is well-founded. She also contended that the Tribunal's assessment of witnesses when giving evidence is an important part of making/drawing inferences (which the Tribunal may do, relying upon **Talbot v Costain Oil, Gas and Process Ltd** [2017] UKEAT/0283/16).

120. Age discrimination differs from other types of discrimination in that the less favourable treatment can be justified if it is a proportionate means of achieving a legitimate aim.

121. There was other case law included in the bundle of authorities produced by the claimant's representative and referred to in her submissions. The Tribunal noted all of the cases referred to, albeit they have not all been referred to in this Judgment. Unsurprisingly, neither of the respondents referred to any specific case law in their submissions.

Conclusions – applying the Law to the Facts

TUPE

122. The first question in the list of issues asked whether there was a transfer of an economic entity which retained its identity between Mr Jackson and Embrace Education Ltd? Both the first respondent and the second respondent's representative contended that there had not been a transfer. The claimant's representative asserted that there had been (albeit she submitted that the claimant should succeed in his claims, whether or not there had been such a transfer).

123. As stated in the section on the law above, what is required for a transfer is an economic entity which retains its identity. An economic entity means an organised grouping of resources which has the principal purpose of pursuing an economic activity.

124. By March 2020, the principal part of the first respondent's business (if not the entirety of it in practice) was the work undertaken for the Police Community Clubs of Great Britain, involving primarily the Barney & Echo books (together with other related matters). The first respondent's evidence was that it was the principal part of the first respondent's business contributing at least 70% of the revenue, and we have found that it was in all likelihood more. In his statement of 14 August 2023, which was not in dispute, Mr Jones of the Police Community Clubs of Great Britain described the second respondent as being the successor to the first respondent to

handle the distribution of their products. The Tribunal found that to be an economic entity which retained its identity.

125. We noted and placed considerable weight on the documents included in the bundle which recorded what the first and second respondent had agreed at the time. The second respondent occupied the same offices as the first respondent had occupied (albeit only for a short period) and agreed a lease (135). Intellectual property was assigned (134). As addressed in some detail in the factual section above, the first and second respondents also entered into a letter which assigned rights under the contract with the Police Community Clubs of Great Britain (which included the Barney & Echo products and other matters) and (most importantly) they entered into an asset purchase agreement (119) which was signed by/on behalf of both the first and second respondent. That agreement stated that it transferred: assets; the right to use the business name; the intellectual property; the goodwill; the stock; and the liabilities and creditors. Whilst the evidence heard was that no stock or assets did in fact transfer, the terms of the asset purchase agreement and the matters which it recorded, evidenced clearly a transfer between the first and second respondent of an economic entity which retained its identity. As recorded above, we also noted the way in which both the first respondent and Mrs Griffiths described the sale of the business in the first witness statements which they had written (for the previous hearing), which was entirely consistent with what was agreed in the agreement which they concluded at the time.

126. We heard evidence about how the business model which the second respondent operated differed from that which the first respondent had operated. That was a material factor which we considered. However, we did not find that the fact that the second respondent utilised the arrangement with the Police Community Clubs of Great Britain to obtain income in a different way, altered the fact that what had transferred was an economic entity which retained its identity. We also noted that most of the staff did not transfer (we will address the exceptions in more detail when considering discrimination below). However, the reason why the staff did not transfer was because both the first and second respondent did not consider TUPE and, therefore, whilst it was a factor to be considered, it was not a significant factor in this case. Balancing all the factors and, in particular, the obvious continuity of the arrangements with the Police Community Clubs of Great Britain described by Mr Jones, the significance of that work to both respondents (pre and post-transfer), and the terms of the asset purchase agreement, we found that there was a transfer of an economic entity which retained its identity.

127. The second question asked was, if there was a transfer, when it took place? The claimant's counsel proposed three potential dates for the transfer: 20 March 2020; 28/29 July 2020; or 30 October 2020.

128. We noted that Mrs Griffiths incorporated the second respondent on 20 March 2020. Whilst we accepted Mrs Griffiths heart-felt evidence about why the name particularly meant something to her, nonetheless it was still the case that she incorporated a company using one of the first respondent's trading names on 20 March when still employed by the first respondent. We found it inconceivable that, when she did so, she did not at that time have the intention of operating the company in a way which to some extent relied upon the existing goodwill and name as it had been used by the first respondent. As a result, we found that the date of

incorporation and the use of one of the first respondent's trading names evidenced that what transpired was envisaged (at least to some extent) by Mrs Griffiths on 20 March 2020.

129. In asserting that the 20 March was the date of the transfer, the claimant's counsel also relied upon: the salary paid to the claimant in the name of Embrace Education; and the first respondent's financial position and his evidence about when he had made his decision about the future of the business. Both factors were indicative of the potential of a transfer having occurred at that date. However, the position was somewhat complicated by lockdown and the fact that the work for the Police Community Clubs of Great Britain effectively stopped for several months at that time (as did many businesses). The employees of the first respondent were place on furlough by the first respondent and continued to be paid by him. The first respondent also subsequently dismissed all the employees (including the claimant and Mrs Griffiths) on 3 August 2020, something which would appear to have been inconsistent with the economic entity having already transferred prior to that date.

130. Applying **Celtec v Astley** we have to identify the date on which the responsibility for carrying out the business of the economic entity (which we have found transferred) moved from the first respondent to the second respondent. Whilst **Housing Maintenance Solutions v McAteer** does make clear that there can be a transfer when no activities are being carried out, lockdown made it particularly difficult to identify when that responsibility moved. We noted that Mr Jones in his letter recorded that his engagement with CIA (being in practice the first respondent) ended towards the end of 2020. There was no evidence before us that the second respondent took responsibility for the business in the period between March and August 2020 (save for the very limited matters we have described) and therefore we did not find that the business of the economic entity moved from the first to the second respondent in that period (albeit that we have found that Mrs Griffiths had envisaged the possibility of it doing so).

131. We then considered the subsequent dates relied upon by the claimant's counsel as being the date when the transfer occurred. For the same reasons we have explained for finding there was a transfer, we have found that there was a transfer of the business at some point between 2 August 2020 and 30 October 2020. At the very latest the business was transferred on the latter date when the asset purchase agreement was signed by/on behalf of the first and second respondent. It is not necessary for us to identify precisely when in that period the transfer occurred, as it made no material difference to the decisions we needed to make in the claims being brought. As explained in the facts part of this Judgment, we noted that the new Barney & Echo publication was launched in October 2020 and we found that it was inconceivable that the second respondent was not aware of or engaged with that launch, as the key part of the business which transferred was the exclusive distribution agreement with the Police Community Clubs of Great Britain. As the claimant's counsel submitted, Barney & Echo books continued to be produced and distributed and there must have been some continuity between the first and second respondent. Taking into account the first respondent's evidence about the fact that he no longer operated the business, it appeared that responsibility must have transferred at some point in this period, culminating in the agreements signed on 30 October 2020.

132. The third question asked whether the claimant was assigned to the undertaking which transferred such that his contract of employment transferred? We found that he was. Applying all the circumstances of this case and the work undertaken by the claimant for the first respondent immediately prior to lockdown in March 2020, we found that he was assigned to the entity which transferred. In the facts section above we have addressed our findings about the work which he was undertaking, and we have found that meant that he was in fact assigned to the economic entity which transferred. The period of lockdown in this case made no material difference to the question of assignment, we have considered whether he was assigned based upon the work he carried out before furlough commenced. The fact that the claimant may have been given notice prior to the date of transfer, also did not alter the fact that he would have transferred during his notice period. Whenever the transfer occurred in the period we have identified, the claimant would have transferred to the second respondent as he was still employed (or, possibly, because of the wording of regulation 4(3) following the decision in **Litster v Forth Dry Dock & Engineering).**

133. In her evidence Mrs Griffiths was very keen to emphasise that, in fact, the claimant had never been employed by the second respondent. That was something upon which the parties agreed. There was no question that the claimant had ever actually in practice (aside from the potential application of TUPE) been employed by the second respondent. However, the way in which TUPE operates is that, as we have found that there was a transfer and the claimant was assigned to the entity which transferred, legally the position is that he transferred to the second respondent under TUPE. TUPE effectively creates the required employment relationship (as an employee protection arrangement) which means that the second respondent will be liable for all rights and liabilities outstanding/arising from the claimant's employment and its termination. That includes the second respondent being liable for his unfair dismissal (as we went on to find that he was unfairly dismissed).

Unfair dismissal

134. Question 4 asked what was the reason for the claimant's dismissal? We found that the reason for the dismissal was that the first respondent no longer required employees. He did not consider that his employees transferred. As a result, he dismissed the claimant (and others).

135. We found that the dismissal of the claimant by the first respondent was for an economic technical or organisational reason entailing changes in the workforce. The first respondent no longer required employees, as he was ceasing to operate his business. The second respondent did not have any requirement for a graphic designer. Whilst the dismissal was by reason of the transfer, we did not find that it was automatically unfair, because it was for an economic technical or organisational reason entailing changes in the workforce. We would mention that neither respondent actively argued that they were relying upon an ETO reason when defending the claim. However, we considered that as they were both not professionally represented it was appropriate and in accordance with the overriding objective for us to consider whether the dismissal was for an ETO reason and reached the decision in any event. In her submissions, the claimant's counsel (fairly and appropriately) addressed the potential of an ETO reason being found and made her submissions about it. We did not find that the true reason for the claimant's

dismissal was to make the business a more attractive proposition to the second respondent as was contended.

136. Issue 4.3 was whether the reason for dismissal was redundancy? We found that the dismissal by the first respondent was for the reason of redundancy. That finding followed from our decision about the ETO reason when applying regulation 7(3) of TUPE, but in any event we found that the reason for the claimant's dismissal was that set out in section 139 of the Employment Rights Act 1996.

137. Issues 5 and 6 were whether the first respondent acted fairly in all the circumstances of the case when he dismissed the claimant by reason of redundancy, applying section 98(4) of the Employment Rights Act 1996? We have considered and applied that section and the factors set out in the Judgment in **Williams v Compair Maxam Ltd** (noting what was said in **De Grasse v Stockwell Tools Ltd**). We have found that the claimant was dismissed by text message. The claimant was not given any warning. There was no consultation with him whatsoever. No selection criteria was applied and there was no explanation given to the claimant about his selection. No consideration was given to any alternatives to dismissal and there was no consultation with the claimant about what they might be. We have considered those factors in the context of the first respondent closing his business during the early months of Covid. However the complete absence whatsoever of any consultation or discussion with the claimant and the fact that he was simply dismissed by text message, have meant that we have concluded that the dismissal was unfair in all the circumstances.

138. The first respondent argued that the claimant somehow elected to be made redundant. We found that argument to have no merit whatsoever. The claimant was informed that the business was closing and would not continue trading. He asked about his entitlements and corrected the first respondent's misrepresentation of the payments which would have been due under the furlough scheme. In response, the first respondent processed the termination of the claimant's employment. The claimant did not choose to be made redundant. He was unfairly dismissed.

139. As we have found that there was a transfer, and the claimant was assigned to the economic entity which transferred, the liability for the unfair dismissal is the second respondent's (albeit that the failings in the process were all the fault of the first respondent).

Age discrimination

140. Issue 7 recorded that it was not in dispute that the claimant was dismissed. The claimant compared himself to two comparators. Mrs Mills was 45 years old at the relevant time, when the claimant was 62. She was younger than him. Ms Vaughan was in her 20s and therefore was significantly younger than the claimant.

141. To determine whether or not there was less favourable treatment of the claimant than his named comparators, we considered what had occurred for each of the named comparators.

142. Mrs Mills was engaged by the second respondent when the claimant was not. That was less favourable treatment. We did not find that the evidence given by Mrs

Griffiths about Mrs Mills was genuine or credible. At the very least the process undertaken to recruit Mrs Mills was cursory. She commenced work on 10 November after she said she had responded to an advert she saw in early November. We do not accept that a genuine process of advertising a position and recruiting a successful applicant following open and fair competition can have been undertaken in the period of fewer than ten days. We also noted the absence of any documents which evidenced a full and fair recruitment process, which would have been easily available to the second respondent had a full process been followed as Mrs Griffiths said. We have noted the exchange of messages with Mrs Mills (80) and Mrs Mills Linked In profile, which both suggest that Mrs Mills viewed her employment by the second respondent as being continuous with that at the first respondent, and that she had never left. We have therefore found that Mrs Mills was engaged by the second respondent without a full recruitment process and as such the claimant was treated less favourably than she was.

143. The Tribunal had very little evidence available about the circumstances of Ms Vaughan. We accepted Mrs Griffiths evidence that the second respondent had not employed her. However, we found the exchange of messages between the claimant and Ms Vaughan (80) to read in an entirely genuine and credible way and we accepted the claimant's evidence that they were messages which he had exchanged with her. Those messages record that Ms Vaughan had been contacted by Mrs Griffiths and had been offered work. We find that occurred. We therefore found that the claimant was treated less favourably than Ms Vaughan because the second respondent did not offer him work, when she did offer work to Ms Vaughan.

144. Issue 11 asked whether the less favourable treatment found was because of age, or the claimant's age? In considering this issue we have applied the burden of proof and followed the steps which we have set out in the section of this Judgment explaining the law, above. The claimant was a graphic designer who had been employed as a graphic designer (even though he had also undertaken other duties particularly at the latter end of his employment). Ms Vaughan and Mrs Mills were an administrator and a credit controller. They were only two of the fifteen or sixteen employees who worked for the first respondent at the time of the transfer. There was no evidence that other employees were offered employment by the second respondent and, other than Mrs Mills, none were employed. The Tribunal did not hear any evidence which we believed provided the something more required to reverse the burden of proof in this case, to show that the less favourable treatment was because of the claimant's age. The Tribunal did not find anything which it found to be the something more required, save for the differences in treatment itself.

145. In her submissions the claimant's counsel relied upon the following factors which she said showed the prima facie case: that Mrs Mills was not dismissed or was re-employed; that Ms Vaughan was offered a job; and the precedent of Ms Ainsworth. We considered that the first two factors were simply restating the difference in treatment. As we have recorded in the section on facts, we did not find that the evidence we heard about Ms Ainsworth was sufficient to reverse the burden of proof. The claimant's counsel also relied upon four things from which she said the Tribunal should infer discrimination: limited disclosure; the inability to explain Ms Vaughan's messages; the inconsistent explanations for Ms Ainsworth's dismissal; and Mrs Mills not attending to give evidence. Of those factors, Mrs Mills non-attendance was explained by her holiday, we did not find that there was anything

about disclosure which would lead to any inference, and we did not find that the varied recollections about Ms Ainsworth's departure were surprising or significant. What we have found about Mrs Griffiths' evidence might have been a factor which could have provided the something more to reverse the burden of proof, but in the circumstances of this case we have not found that it was sufficient to demonstrate a prima facie case of age discrimination where: the evidence relates to only two of the first respondent's employees; they undertook very different roles to the claimant; the second respondent has not employed a graphic designer or engaged someone to undertake graphic design work; and there is no real evidence at all that age was a factor in the decisions which were taken (save for an assertion by the claimant without anything to genuinely back it up).

146. We have accordingly not found that the second respondent treated the claimant less favourably because of his age, than it treated Mrs Mills or Ms Vaughan (even though the second respondent did treat him less favourably than them). The second respondent did not put forward any argument that its treatment of the claimant was a proportionate means of achieving a legitimate aim, so we did not need to consider what the outcome would have been for issue 12 had we found that direct age discrimination occurred.

147. For the first respondent, we accept that he dismissed all employees. He did not treat the claimant less favourably than his named comparators as they were all dismissed (and there was no evidence to the contrary). As a result, there could not have been direct age discrimination by the first respondent, because there was no less favourable treatment. The first respondent did submit that he did have a proportionate means of achieving a legitimate aim because his business had ceased. In practice we have accepted that submission as meaning that there was no less favourable treatment at all, rather than considering it to have been a justification for less favourable treatment which occurred.

148. In their submissions both the first respondent and the second respondent's director raised various other matters including their view of the claimant and the evidence which he gave. In reaching this decision, we have focussed on the list of issues and the matters which we needed to determine. We have reached our decision for the reasons given. We have not addressed each and very argument raised in this Judgment, but where they have not been explicitly addressed and were relevant to the decisions we needed to reach (including as they applied to the claimant's credibility on the issues we needed to determine), we have not found the matters raised. We accepted that Mrs Griffiths had found the process draining and depressing as she asserted and we understood that both respondents would face financial challenges if a finding was made against them, nonetheless we have focused on the issues we needed to determine and have made the findings we have explained for the reasons we have given. The fact that only the claimant brought a claim to the Employment Tribunal following the events which we have described, was of no relevance to the issues which we needed to determine.

Summary

149. For the reasons explained above, we have found that the claimant was unfairly dismissed when he was dismissed by text message by the first respondent (on notice) on 28 or 29 July 2020. We have not found that there was direct age

discrimination, as alleged. We have found that there was a TUPE transfer and the claimant was assigned to the economic entity which transferred. As a result, at least by the date when his employment transferred, all rights and liabilities under the contract of employment had transferred to the second respondent. That means that the second respondent (and not the first respondent) will be liable for the remedy due to the claimant as a result of his unfair dismissal.

150. A remedy hearing has already been listed for 5 February 2024. At that hearing, we will determine the remedy due to the claimant from the second respondent as a result of his unfair dismissal. It is unlikely that the first respondent will take any active part in that hearing, and he does not need to attend.

151. The claimant had updated his schedule of loss prior to this hearing reconvening on 13 November 2023. In the light of our findings, the schedule will need updating further. The claimant must send that updated schedule to the second respondent no later than 21 days after the date when this Judgment is sent out to the parties. If either party wishes to rely upon any additional documents not already included in the Tribunal bundle, they must send to the other a list and copies of those documents by no later than 10 January 2024. The claimant must prepare an additional bundle of documents for the remedy hearing by no later than 17 January (if there are any additional documents) and must provide a copy of that bundle to the second respondent by that date. If either party wishes to call any further evidence at the remedy hearing (including the claimant), statements of the evidence which the witness will give must be sent to the other party by no later than 29 January. The claimant must bring five copies of his statement(s) and the additional bundle to the remedy hearing and the second respondent must bring five copies of her own witness statement(s) if there are any. The evidence to be considered at the hearing on 5 February will be limited to evidence relevant to the remedy which the claimant should be awarded. The parties are reminded that the services of ACAS remain available.

Employment Judge Phil Allen
15 November 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
16 November 2023

FOR THE TRIBUNAL OFFICE

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

LIST OF ISSUES

TUPE

1. Was there a transfer of an economic entity which retained its identity between Mr Jackson and Embrace Education Ltd?

2. If so, when did this transfer take place?

3. If so, was the claimant assigned to the organised grouping of resources or employees that was the subject of the relevant transfer, such that his contract of employment transferred to Embrace Education Ltd?

Unfair Dismissal

4. What was the reason for the claimant's dismissal? In particular:
   4.1 Was the sole or principal reason for dismissal the transfer (if a transfer is found to have taken place)?
   4.2 Was the sole or principal reason an economic, technical or organisational reason entailing changes in the workforce of the transferor or transferee (if a transfer is found to have taken place)?
   4.3 Was the reason for dismissal redundancy?

5. If the sole or principal reason for dismissal was the transfer the dismissal will be automatically unfair. If the dismissal was for the reasons set out at 4.2 or 4.3 above, did the relevant respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

6. The claimant contends in particular that he was not adequately warned and/or consulted

Direct Age Discrimination

7. It is not in dispute that the claimant was dismissed

8. The claimant was 62 years of age at the date of his dismissal. He compares himself with two individuals who are materially younger than him

9. The claimant says that he was treated worse than two named individuals, namely Rebecca Mills and Sian Vaughan. Were these individuals offered continued employment or re-engagement by the first or second respondent? What were the circumstances surrounding this?

10. Was this less favourable treatment?

11. If so, was it because of his age?

12. Was the treatment (namely, dismissal and/or failure to re-engage) a proportionate means of achieving a legitimate aim?