Case Nos: 1401807/2021
1401808/2021
1401809/2021
1401810/2021
1401811/2021

EMPLOYMENT TRIBUNALS

Claimants: (1) Mr A Sposito
(2) Mr P Almey
(3) Mr S Langley
(4) Mr D Palmer
(5) Unite the Union

Respondents: (1) Walon Limited t/a BCA Automotive
(2) GBA Transport Limited

Heard at: **Bristol (by video)** **On:** **16-20 October 2023**

Before: **Employment Judge Ferguson**
Members: **Mrs D England**
Ms E Smillie

Representation
Claimants: Ms M Stanley, counsel
First Respondent: Mr R Downey, counsel
Second Respondent: Mr P Smith, counsel

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The complaints of unfair dismissal brought by the First, Second, Third and Fourth Claimants against the First Respondent are well-founded. Those Claimants were unfairly dismissed by the First Respondent.

2. Under section 163 of the Employment Rights Act 1996 it is determined that the First, Second, Third and Fourth Claimants are entitled to redundancy payments, the quantification of which will be determined at a remedy hearing.

3. There shall be no reduction to the Claimants' compensatory awards for unfair dismissal on the basis of the chance they would have been fairly dismissed in any event.

4. The First, Second, Third and Fourth Claimants' complaints in respect of holiday pay against the First Respondent are well-founded. The First Respondent made unauthorised deductions from the Claimants' wages by failing to pay them for holidays accrued but not taken on the date their employment ended.

5. The First, Second, Third and Fourth Claimants' claims against the First Respondent for breach of contract in relation to notice pay are well-founded.

6. The First, Second, Third and Fourth Claimants' complaints of unfair dismissal and for holiday pay and notice pay brought against the Second Respondent are dismissed.

7. The complaint of failure to consult pursuant to Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulation 2006 brought by the Fifth Claimant against the Second Respondent is dismissed.

8. The remedies to which the First, Second, Third and Fourth Claimants are entitled will be determined at a remedy hearing on 19 December 2023.

REASONS

INTRODUCTION

1. By five claim forms presented on 7 May 2021 the four individual Claimants and Unite the Union all presented claims against the Respondents. The individual Claimants bring claims for unfair dismissal, unpaid wages, failure to pay holiday pay and for redundancy payments. The union brings a claim against the Second Respondent for failure to inform and consult pursuant to Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

2. The final hearing took place by CVP with the consent of the parties.

3. The issues were agreed at Preliminary Hearing on 17 January 2023 and narrowed further at the start of the final hearing. The Claimants bring the following complaints:

    3.1. Unfair dismissal against the Second Respondent, alternatively against the First Respondent
    3.2. Breach of contract (notice pay) against the Second Respondent, alternatively against the First Respondent
    3.3. Holiday pay against the Second Respondent, alternatively against the First Respondent
    3.4. Redundancy payments against the First Respondent
    3.5. Failure to consult with the Fifth Claimant, against the Second Respondent

4. The primary dispute is whether the Claimants' employment transferred from the First Respondent to the Second Respondent due to a service provision change. The agreed issues under TUPE are:

   4.1. Was there a service provision change from the First Respondent to the Second Respondent on or about 30 November 2020 ('the Relevant Date') within the meaning of Regulation 3(1)(b)(ii) and 3(3) TUPE?

   4.2. Of particular relevance to this issue are the following questions:

      4.2.1. What was the service that the First Respondent provided to the client (GefCo 4PL)?

      4.2.2. What were the activities that were carried out by the First Respondent on behalf of the client?

      4.2.3. Immediately before the Relevant Date was there an organised grouping of employees situated in Great Britain which had as its principal purpose the carrying out of the activities concerned on behalf of the client?

      4.2.4. Did the individual Claimants carry out the activities?

      4.2.5. If there was an organised grouping of employees which had as its principal purpose the carrying out of activities concerned on behalf of the client, were any of the individual Claimants assigned to it?

      4.2.6. Were the activities being carried out by the Second Respondent after the Relevant Date fundamentally the same as the activities carried out by the First Respondent?

5. It is not in dispute that if the Claimants' employment did transfer, they were unfairly dismissed by the Second Respondent pursuant to Regulation 7 of TUPE. They were also dismissed in breach of the requirement to give notice and they were not paid in respect of accrued untaken holiday on termination.

6. There was some discussion of "Polkey" at the start of the hearing. The Second Respondent sought permission to adduce new evidence, not in its witness statements, that the Claimants would have been dismissed in any event post-transfer because the Second Respondent does not have night drivers. We refused that application.

7. As for the unfair dismissal claim against the First Respondent, the issues were agreed at the Preliminary Hearing as follows:

   7.1. In the event TUPE is found not to apply, was there a potentially fair reason for the dismissals of the individual Claimants by the First Respondent, namely redundancy.

7.2. Were the dismissals fair within the meaning of s. 98(4) ERA (with reference to the "band of reasonable responses" test)? In particular:

7.2.1. Did the First Respondent follow a fair selection process?

7.2.2. Did the First Respondent carry out sufficient consultation with the Claimants?

7.2.3. Did the First Respondent adequately address the issue of redeployment and alternative work?

7.3. In the alternative, in the event that TUPE is found not to apply, were the individual Claimants dismissed lawfully by the First Respondent for "some other substantial reason" and within the meaning of s.98(4) of the ERA and in accordance with the "band of reasonable responses" test?

7.4. If the individual Claimants were unfairly dismissed, how much compensation is payable? In particular, does Polkey v AE Dayton Services Limited apply: would the Claimants have been dismissed in any event and, if so, should compensation be reduced accordingly?

8. The "some other substantial reason" ("SOSR") was identified at the start of the hearing by Mr Downey as the First Respondent's belief there was a TUPE transfer. In closing submissions Mr Downey put SOSR as the First Respondent's primary case and redundancy in the alternative.

9. As for the claim for redundancy payments, it is not in dispute that if we find the reason or principal reason for the dismissal was that the Claimants were redundant, they are entitled to statutory redundancy payments.

10. Although a claim for an enhanced redundancy payment was pleaded, the agreed list of issues following the Preliminary Hearing on 17 January 2023 did not include any such claim. A footnote to the list of issues states: "A claim for enhanced redundancy is also pleaded but there is presently no evidence of the existence of any enhanced redundancy scheme in operation so this is not reflected as an issue for determination". The Claimants sought to revive that claim on the first day of the final hearing but we determined that it had been abandoned and it would not be fair to allow the Claimants to pursue it in circumstances where the First Respondent had no notice of it until very shortly before 10am on the first day.

11. All parties confirmed that they were not seeking any uplift or reduction due to failure to comply with the ACAS Code.

12. As for the claim by the union against the Second Respondent, the issues were agreed at the Preliminary Hearing as follows:

12.1. It is accepted that the Fifth Claimant (trade union) is entitled to bring the claim.

12.2. If TUPE applied, in breach of its duty under Reg 13 of TUPE 2006, did the Second Respondent fail to adequately inform and consult with the Fifth Claimant's representatives that the transfer was going to take place?

12.3. If so, the Tribunal shall make a declaration to that effect. Should it also make an award of compensation and, if so, in what amount?

13. There is a dispute about whether the union should be permitted to argue that the Second Respondent failed to consult about "measures" the Second Respondent intended to take in connection with the transfer, namely their intention not to employ the Claimants. The Second Respondent argues that it was expressly agreed at the Preliminary Hearing that this issue was about informing the Claimants of the fact of the transfer only. Following discussion at the start of the hearing it was agreed that this dispute did not affect the evidence the parties intended to adduce so it would be addressed in closing submissions. I will return to this point in our conclusions.

14. If the Claimants' employment did not transfer to the Second Respondent, it is not in dispute that they were dismissed by the First Respondent in breach of the requirement to give notice and that they were not paid in respect of accrued untaken holiday on termination.

15. It was agreed that we would hear evidence and give judgment on all issues of liability and Polkey before considering any other remedy issues, which would be listed for a separate hearing if remedy was not agreed.

16. We heard evidence on behalf of the First Respondent from Kevin McGurl, Kevin Dodge and Matt Robers. On behalf of the Second Respondent we heard from Simon Cordey and Richard Bell. Two of the four Claimants gave evidence, Mr Sposito and Mr Almey.

FACTS

17. Both Respondents are logistics companies providing vehicle movement services to the automotive sector across the UK.
18. The first four Claimants were employed by the First Respondent as HGV drivers.

19. Mr Sposito commenced employment with the First Respondent on 1 September 2009. He was initially employed as a "roaming" driver, which involves spending the whole week Monday to Friday away from home, returning to base at the end of the week. In 2013 he moved onto a night contract based at Portbury. He worked five nights a week, starting and ending each shift at Portbury. Night work was better paid than day work.

20. Mr Almey commenced employment with the First Respondent on 15 August 2011. Like Mr Sposito, in 2013 he moved onto a night contract based at Portbury.

21. Mr Langley commenced employment on 9 May 1995.

22. Mr Palmer commenced employment on 21 November 2016.

23. At all material times all four Claimants were night drivers based at Portbury.

24. It is not in dispute that there were 8 night drivers in total based at Portbury. There were also 8 corresponding day drivers. The practice was for each night driver to be paired with a day driver who would use the same truck.

25. There were also around 80 roaming drivers based at Portbury.

26. For day and night drivers, the First Respondent would refer to journeys leaving Portbury as "outbound". If possible, the journeys would be arranged so that after finishing any outbound journey the driver would collect cars from the destination or another location and bring them back to Portbury. The First Respondent has referred to these trips as "backloads". They are also sometimes referred to as "inbound" journeys. On occasions drivers would do the outbound journey with an empty truck and complete inbound loads only.

27. At the relevant time Kevin Dodge was the operations manager at Portbury. He reported to the South West regional manager, Peter Huxtible, who in turn reported to Paul Kennedy, national operations manager. Above him was Kevin McGurl, Logistics Director.

28. From around 2017 until late 2020, one part of the First Respondent's work was to transport new cars from Portbury to a customer called Greenhous in Stoke-on-Trent. This was pursuant to a contract with a managing agent called Gefco 4PL ("Gefco"). We have not seen the contractual documents but there was no real dispute and we proceed on the basis that the relevant Gefco contract awarded to the First Respondent was for transport of vehicles of a particular make or makes from Portbury to "zone 10", which was a geographical zone that included Stoke-on-Trent. This has been referred to as the PO10 route.

29. Throughout the contract, the Claimants undertook work on the PO10 route, transporting cars from Portbury to Greenhous, among other work.

30. On 20 December 2019 Gefco launched a tender process for a number of routes, including PO10. Both the First Respondent and Second Respondent submitted bids for the work. The new contract was due to start on 1 November 2020 but this date must have been put back at some stage because the new contract in fact came into effect on 1 December 2020. The contract was due to last for two years and two months.

31. In mid-March 2020 the Claimants were placed on furlough due to the first Covid lockdown.

32. The First Respondent's case is that in July 2020 the 8 night drivers were brought back from furlough and a decision was made to dedicate six of them, including the four Claimants, to the Portbury to Greenhous route.

33. Mr McGurl's evidence in his witness statement was as follows:

> "[Greenhous] is a compound and accepts deliveries on both days and nights unlike many retailers who only accept deliveries 8am to 5pm. Greenhous were also always tight for space so appreciated the deliveries being spread across 24 hours where possible as it gave them time to park up and clear the vehicles away from the reception area. As a result, we delivered the volume fairly equally split between days and nights.
>
> …
>
> Volume is not guaranteed by the client in its contracts either in its totality or by port. The carrier is expected to react as the volume ebbs and flows throughout the contract term which it always does. Throughout BCA's involvement with Greenhouse their remained a constant stream of shipments to both Portbury and Killingholme and as is the nature of this industry the volume would fluctuate but there was never a cessation of shipments coming into either port. Post lockdown there was a marked increase of vehicles coming into Portbury hence our decision to dedicate a group of night drivers to that specific run but that did not mean that work from Killingholme ceased, it fluctuated as is common but continued as a going concern, indeed this specific contract continued after BCA with a third party carrier.
>
> During and after covid the Corsa model volume increased dramatically through Portbury and lead to increased deliveries to Greenhous from July 2020 (approx. 15 truckloads over 24-hour period Monday to Friday). Deliveries during the day were carried out by our networking fleet. The bulk of our drivers work across the UK during the day leaving Monday and returning Friday. Night deliveries are minimal in number and we have a small number on this permanent shift pattern, again as most deliveries are carried out between 8am and 5pm.
>
> Given the increase in volumes for the Corsa model and factoring in that post covid in particular there were even fewer customers willing to accept night deliveries it made sense that at a site level the manner in which the Greenhous contract was serviced was reorganised. To that end, at a regional management level it was decided that 6 night drivers, all of whom had previously carried out work on Greenhous runs, would be dedicated to that contract from an allocation perspective. It operated in this manner from July 2020 until the transfer date."

34. In his oral evidence Mr McGurl said that there were no day drivers dedicated to this work, but that 7-8 day drivers each day would service the route. This could be any of the 300-400 drivers across the network.

35. Kevin Dodge's evidence in his witness statement was as follows:

> "In this specific case the contract we had with Gefco had an increased requirement for deliveries to Greenhous, Stoke on Trent around July 2020, post—covid. There had always been deliveries from Portbury to Greenhous, certainly for the years we had operated that contract, however the volume, which is subject to a degree of ebb and flow in any event, had a significant increase following lockdown. Specifically, the OEM had a requirement for certain model type to be delivered to Greehous and this model type Port of Entry was Portbury, a change which came about as the country came out of lockdown and our industry was recommencing deliveries. Greenhouse was a 24-hour delivery location, which we felt was best serviced with the organised grouping of night drivers, a change that was accepted by Gefco. It was my teams aim to ensure Greenhous received their daily requirement with the available night drivers each evening, filling any shortfall in requirement with natural day resource received into the Portbury distribution area from a pool of around 100 national network trucks each day.
>
> The organised grouping, made up of 6 employees including the Claimants, would carry out the Greenhous work on each shift and the team would attempt to find them a backload to return to Portbury if possible, to avoid wasted driver hours. These backloads could be a load from the midlands back to Portbury and other days they would return to Portbury and complete some local short journeys to Avonmouth to fill their time, however if nothing was available, they would return empty and end their shift. Put simply, the allocation of the work to these 6 drivers revolved around the Greenhous contract from late July 2020 onwards and any other work or loads was secondary to their primary purpose.
>
> The change in Greenhous delivery requirement started around July 20 and continued throughout 2020, an uncertain time in the industry post lockdown, we continued to service this demand with the organised group of night drivers. Although this was a clear change in organisation within the business, and it was communicated at an allocation level, it wasn't something that was necessarily explained to the individual drivers, although no doubt they would have noticed the shift in priority to Greenhous work upon their return from furlough, because it did not amount to a change in their terms and conditions and it was a route and contract they were already familiar with."

36. Both witnesses were questioned in cross-examination about this decision "to create an organised grouping". Mr McGurl said it was Mr Dodge who made the

decision and that it was a local operational issue, although he was aware of it. When asked if he agreed with Mr Dodge's evidence that this was "a clear change in organisation within the business" he said that they have dedicated teams across the business. Of the six drivers in question, he said "they are not Greenhous drivers, they're BCA drivers. It's up to operations how they are assigned". He accepted that the six drivers were not "formally informed" of any decision to dedicate them to the Greenhous work. Mr McGurl was also asked about Gefco's knowledge of this decision. He said they would have been aware of it as a result of discussions between July and September.

37. Mr Dodge said in cross-examination that he personally made the decision to dedicate the six drivers to the Greenhous work. When asked about his evidence that the change was "accepted by Gefco" he eventually said that he had not had any conversation with Gefco in which they endorsed the decision to dedicate a team of drivers to the work. He said he had meant that they were carrying out the deliveries at night and the client was happy with that. He accepted that the six drivers were not informed of the decision. He explained that the loads for each truck were set manually by a "load-builder" and were then allocated to drivers by "allocators". He said there were three or four allocators, with an allocations team leader. He said an instruction "would have been given to the allocations team-leader to make sure the work was dedicated to these guys".

38. He accepted that the other two night drivers did some Greenhous work from July 2020 onwards. He said this would only be where it was necessary to make up a load dropped during the day or if one of the other six night drivers was off sick or on holiday.

39. When the Tribunal asked Mr Dodge how the decision was made to allocate the six particular drivers to Greenhous work, he said, "They are all night drivers. We just allocate to the work that suits work and time patterns. There was no particular logic to it."

40. There is a striking absence of documentary evidence relating to this alleged decision, and very little evidence of the First Respondent's communications with Gefco about the re-tender for the PO10 route. Mr McGurl said in his oral evidence that Gefco would have asked during that process whether there were any TUPE implications and that he told them in July, August or September about the organised grouping of drivers. There is no documentary evidence that he did so.

41. We were referred to one email exchange between Mr McGurl and David Johnson of Gefco. It appears from that exchange that by 8 September 2020 the First Respondent had been told that they would not, or were unlikely to, be awarded the PO10 contract. Mr McGurl wrote to Mr Johnson on that date:

> "Hi David will we receive official confirmation at a point?
> Also can you provide detail as to who has been awarded zone 3 at that point ie Greenhous zone as we will need to commence Tupe discussions

> Many thanks
> Kevin"

42. He then sent a follow-up saying "Sorry zone 10 not 3". It is not in dispute that what was being discussed here was the "zone 10" work for Gefco, which included routes from both Portbury and another location, Killingholme. The next email in the chain is on 7 October 2020 from Mr Johnson to Mr McGurl, saying "Can you please provide the TUPE information relevant to the ST [zone 10] deliveries from KGH [Killingholme]?". Mr McGurl responded on 13 October saying that they would get that information to him "by Thursday" and also asked "Can you confirm which carrier has been awarded Greenhous?". Mr Johnson responded that Killingholme to Greenhous had been awarded to "ECM". Mr McGurl then asked about Portbury and Mr Johnson confirmed that route had been awarded to the Second Respondent. Mr McGurl then said that they had "2 drivers at Doncaster to Tupe to Ecm and 5 at Portbury for GBA". He wrote:

> "These are night drivers. We average 15 loads per day into GREENHOUS. 8 on days and 7 at night on average. We don't have any day drivers or roamers dedicated."

43. Mr McGurl's evidence was that the reference to 5 drivers was a mistake and that he meant to say 6. Mr McGurl said in cross-examination that Mr Johnson did not respond to this email.

44. On 22 October 2020 the First Respondent wrote to all four Claimants informing them that the Portbury to Greenhous route had been awarded to GBA with effect from 1 December 2020 and each of them had been "identified as a TUPE transferee, due to the transfer of work to which you are assigned". They were invited to a consultation meeting on 3 November.

45. On or around the same day Sarah Zdanowicz, HR Manager for the First Respondent, wrote to the Second Respondent in the following terms:

> "Congratulations, we have been advised by Gefco 4PL that GBA have been awarded the Vauxhall vehicle movements below that are currently undertaken by BCA Automotive:
>
> - Portbury to Greenhouse (Stoke on Trent) Vauxhall volume.
>
> In accordance with the provisions of the TUPE Regulations (2014) we believe that a relevant transfer exists for six employees who are currently assigned to this work. As I am sure you aware, we now have a duty to provide you with information pertaining to the affected employees, and likewise you have a duty to provide information regarding any measures you envisage taking in relation to those employees whose employment will transfer to you from the 1st December 2020."

46. Ms Zdanowicz chased for a response to this letter on 30 October 2020.

47. On 3 November 2020 Nick Walker, Commercial Sales Director for the Second Respondent, wrote to Ms Zdanowicz as follows:

> "Further to your letter, 22.10.2020, in relation to the above contract can you please provide the information pertaining to the affected employees. Having discussed this matter with Gefco they, alongside GBA, do not believe that any drivers are dedicated to the contract and ask that you provide evidence that they are please."

48. Ms Zdanowicz responded on the same day. She wrote:

> "As requested, the attached spreadsheet shows the number of Vauxhall loads carried between Portbury and Greenhous by the six drivers in questions, and the percentage of their total workload that these movements amount to.
>
> As you will see, the significant majority for all six drivers working time is dedicated to GH, with any other volume carried being done as a back load to minimise empty running on their return to Portbury, hence our believe that TUPE applies."

49. The attached spreadsheet showed the number of loads each of the 6 drivers had undertaken from Portbury to Greenhous by week in the period 27 July to 23 October 2020. It also gave the total number of "non GH outbound loads" during the period and included a column entitled "GH% of Drivers Workload". This was calculated as the number of Greenhous loads compared to the total number of outbound loads. The figures ranged from 78% to 90%.

50. Nick Walker responded asking for the figures to be recalculated including back loads. Ms Zdanowicz said:

> "The back loads have not been in the data provided as the Drivers are employed to do outbound loads from Portbury, the backloads are done as an add on if the work is available and their hours allow for it. I.e. whether there was a back load available or not, does not affect them being dedicated to the Portbury to Greenhous Vauxhall trunk."

51. On 6 November 2020 Simon Cordey, HR Manager for the Second Respondent, wrote to Ms Zdanowicz saying that the Second Respondent did not agree that TUPE will apply. He wrote:

> "The rationale for our decision to reject your assertion that TUPE applies in this case is as follows:
>
> The portion of the service provision contract awarded to GBA Transport in respect of Gefco 4PL, Vauxhall moves is fragmented to such a degree as to be fundamentally different to any previous

service provision to which your company may have been engaged, therefore it is our opinion that TUPE will not apply in this case.

In addition, the evidence presented to date is lacking in any significant detail, and by your own admission does not include measurement of any other work carried out by the employees in question. Therefore, it is our firm belief that it does not constitute substantial evidence of any organised grouping of employees that has as its principal purpose carrying out of the services for the client in respect of this service provision. This assertion is underpinned by the case of Eddie Stobart Ltd v Moreman and Others, in which the Employment Appeal Tribunal (EAT) held that it is not enough for employees to carry out most of their work for a particular client; they must be organised by reference to the client's requirements and be identifiable as members of that client's team.

Should you be able to provide substantive evidence to the contrary, we will of course follow the requirements of the TUPE regulations (2006) in relation to this matter."

52. The First Respondent was having discussions with the Unite representative, Steve Nutt, around this time in relation to the proposed transfers. During those discussions Mr Nutt requested data relating to the six drivers' work in the period January to March 2020. On 20 November 2020 Ms Zdanowicz provided a spreadsheet showing the numbers of Greenhous loads, other outbound loads and total inbound loads. The data shows that all six drivers were carrying out fewer outbound loads generally than in the period July to October. The proportion of the outbound work that was made up of journeys to Greenhous varied widely. For Mr Sposito and Mr Palmer it made up the majority of their outbound work. For all six drivers the numbers of inbound loads was far higher than outbound.

53. A consultation meeting took place between the First Respondent and the six affected drivers on 23 November 2020. It appears that the drivers and/or the union queried the accuracy of the data relied upon by the First Respondent to show that these six drivers were dedicated to the Greenhous work.

54. On 26 November 2020 the First Respondent wrote to each of the six drivers as follows:

"Following the second TUPE consultation meeting of Monday 23rd November 2020 and the questions raised as to the accuracy of the data upon which your proposed transfer to GBA is based, i.e. the number of outbound loads delivered during the reference period (weeks 31 to 43), I write to confirm BCA Automotive's position.

A manual check of your timesheets has now been conducted and a comparison made between the load data previously presented from our system report and the data gathered manually from your submitted

timesheets, and I can confirm that whilst there was a very slight difference in the figures, a relevant TUPE transfer still clearly exists. I enclose both sets of data for your reference below and can confirm that the difference between the figures is due to you having delivered loads which were not recorded automatically on our IT system. You will however be able to check for yourself that the latest information below, corresponds to what you actually booked on your submitted timesheets.

[data table]

In light of the above figures you remain identified as a TUPE transferee, due to the transfer of work to which you are assigned. Meaning, that with effect from the 1st December 2020 it is proposed that your contract of employment will transfer to GBA under the protection of the Transfer of Undertakings (Protection of Employment) Regulations 2014 (TUPE) Regulations (2014). However, as explained during the consultation meeting, GBA, are at this stage refuting the transfer and are unwilling to engage with us regarding the transfer of your employment. Therefore, it is with great regret that I must advise you to seek advice from your UNITE Representative about the most appropriate course of action for you to take.

I understand that this will be an extremely upsetting situation for you and we are unable to offer continued employment on your current night shift pattern post 30th November as this work is longer available to us. I can advise you however that we will make available as an option to you, a full-time roaming position out of Portbury with effect from 1st December 2020 should you wish to apply for this. Please note that if you accept a roaming position you will transfer onto the Walon 2 Roamer terms and conditions and pay structure. If you would like to take up this opportunity please apply in writing to Kevin Dodge your Regional Manager, directly as soon as possible and no later than 30th November 2020.

If you do not wish to be considered for a roaming contract you will remain employed by BCA Automotive up until 30th November 2020 and will receive your final wages, paid in the usual way, two weeks in arrears on Thursday 17th December 2020, at which point you will be processed as a leaver and your P45 forwarded to your home address.

…"

55. On 27 November 2020 the First Respondent held a further consultation with the six drivers and Mr Nutt. The Second Respondent also attended the latter part of this meeting. During the meeting Second Respondent requested further data in relation to the drivers' work.

56. On 30 November 2020 Ms Zdanowicz provided to the Second Respondent updated data covering the period to 20 November 2020. This showed very similar figures to the information about outbound loads previous supplied. On

the same date Mr Cordey responded requesting all data for inbound and outbound loads for the six drivers for the previous 12 months. This has never been provided and was not produced for these proceedings either.

57. On the same date the six drivers submitted a collective grievance to the First Respondent. This included the following:

> "We have received notification by letter that we are assigned to this contract. We have never notified that we were assigned to this contract. In fact, drivers in all but a few cases, are not assigned to any contract.
>
> Following the return to work from March lockdown, it has now become clear that this work has been managed in such a way to make a case to TUPE us out of BCA."

58. Mr Nutt sent the grievance on behalf of the drivers and requested the same data that had been requested by the Second Respondent.

59. A grievance hearing took place on 3 December, conducted by Paul Kennedy. An outcome letter was sent on 10 December 2020. The grievance was not upheld. Mr Kennedy wrote:

> "A question was raised regarding the Drivers being assigned to the contract, the assignment referred to is simply the percentage of work carried out on the particular contract and the percentages are extremely high. The Company would not make anybody aware that there was a potential TUPE transfer until the Company received confirmation of the loss. The Company were informed on the 12th October 2020 that they were losing this work and at that point made GBA aware that BCA believed TUPE applied for 6 Drivers."

60. The drivers appealed against the outcome, with the exception of one who had accepted the offer a roaming role. One of the other drivers had also accepted this offer. The four Claimants did not accept the offer and their employment with the First Respondent terminated on 30 November.

61. An appeal hearing took place on 19 January 2021, conducted by Matt Roberts, Operations Director – Logistics. By letter dated 27 January 2021 the appeal was dismissed. Mr Roberts wrote:

> "If we look back at the shape of the world in July when night deliveries re-commenced, the country and the industry were trying to understand the requirements of our clients in a pandemic, while also trying to support our workforce with their various shift patterns undertaken. It is with a great degree of confidence that I can say that the assignment of drivers to the various contracts/volumes were purely operation driven by our clients demands and requirements. Therefore I can conclude that two drivers were not purposely kept away from the Greenhous movements

to avoid TUPE. The shape of the Greenhous work was completely different post lockdown."

62. Mr Roberts gave the following evidence in his witness statement about the grievance appeal process:

> "As part of my investigations I reviewed the data on our systems, Vision and Verizon, data from which has been used to compile the information on loads which can be seen in the bundle (bundle page 240 / PDF Page 245). I also spoke to the Portbury Allocation Team to ensure that I fully understood how the service provision had evolved from before the Covid lockdown, March 2020, to post lockdown, i.e. June 2020 onwards.
>
> I found that customer requirements had changed due to outside factors, such as the types of vehicles that Greenhous were requiring (a demand that was being driven by their customer base), we saw a swing to Vauxhall product that entered the country via the port of Portbury. This had in turn impacted on movements and therefore the team had to reassess how we assigned work in a changing work environment. In relation to the Greenhous specifically, this was felt to be best served by a specific team of 6 night drivers, all of whom had previously carried out some work for this client, who would from that point on would be designated to that contract. This change in allocation priority would not necessarily have been communicated to the individual employees because from their perspective their work remained the same in terms of hours, but from an organisational perspective, at a business level, there was a definite change post lockdown.
>
> In reaching my conclusions I considered which drivers had been assigned to the Greenhous contract. It was evident from my review that Darren Palmer, Peter Almey, Andrew Sposito, Chris Burden, Steve Langley and Huwie Lewis were part of a team of dedicated drivers on nights assigned to fulfil the Greenhous requirements following the lifting of the Covid lockdown. Specifically, they were assigned Greenhous as their prime loads to fulfil the customer contractual obligations. In more general terms it was also evident that the type of work that could be completed on nights in a post pandemic world had changed, specifically we had found that dealers that had previously offered night access were no longer willing to do so. On that basis we had changed how we operated and specifically how we assigned work to night drivers, i.e. so that they were deployed on work that could be carried out at night and that there was a demand for, hence in this case 6 night drivers being dedicated to the core of movements to Greenhous from June 2020.
>
> In order to satisfy myself that the Greenhous contract was the primary function of Darren Palmer, Peter Almey, Andrew Sposito, Chris Burden, Steve Langley and Huwie Lewis| analysed the nature of the work they performed (using the traffic management system — VISION). This included identifying prime loads, distinguishing between those prime

loads (dictating the routes the driver/truck operates on) versus infill loads. My analysis revealed that for these 6 specific drivers, Darren Palmer, Peter Almey, Andrew Sposito, Chris Burden, Steve Langley and Huwie Lewis, the primary function was to perform the night movements to Greenhous, this meant that this route was performed before any other i.e. it was their priority. If there were any movements that could be performed that complemented this routing then that would also be completed thus allowing the Company to avoid wasted driver hours and operate as efficiently and cost effectively as possible. My review looked at the difference between the prime load (Greenhous) and infill loads such as an Avonmouth ferry load. The prime load would generally be a 260+ mile round trip whereas an infill load could be as little as a 13-mile round trip. Therefore, if talking on a strictly percentage terms, and ignoring primary purpose, if a driver carried out a Greenhous load and an infill load although that looks like two loads and 50/50 split of work, the time/mileage associated to complete the two are very different and the percentage would be heavily weighted towards the Greenhous work."

63. In cross-examination he said that he had spoken to Luke Huxtible, the allocations team leader. From this discussion had ascertained that Mr Dodge made the decision to allocate the six drivers to the Greenhous work.

THE LAW

64. Regulation 3 of TUPE provides, so far as relevant:

> **A relevant transfer**
>
> (1) These Regulations apply to—
>
> …
>
> (b) a service provision change, that is a situation in which—
>
> (i) …;
>
> (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
>
> (iii) …,
>
> and in which the conditions set out in paragraph (3) are satisfied.
>
> …
>
> (2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.
>
> (3) The conditions referred to in paragraph (1)(b) are that—
>
> (a) immediately before the service provision change—

> (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
> (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
>
> (b) …

65. An organised grouping requires an element of conscious organisation on behalf of the employer (Ceva Freight (UK) Limited v Seawell Ltd [2013] IRLR 726).

66. In Eddie Stobart Ltd v Moreman and ors 2012 ICR 919, EAT, the EAT held that, for Regulation 3(3)(a) purposes, the organisation of the grouping must be more than merely circumstantial; the employees must have been organised intentionally. Mr Justice Underhill (the then President of the EAT) held (at paragraph 18):

> "Taking it first and foremost by reference to the statutory language, reg. 3(3)(a)(i) does not say merely that the employees should in their day-to-day work in fact (principally) carry out the activities in question: it says that carrying out those activities should be the (principal) purpose of an 'organised grouping' to which they belong. In my view that necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. The statutory language does not naturally apply to a situation where, as here, a combination of circumstances – essentially, shift patterns and working practices on the ground – mean that a group (which, NB, is not synonymous with a 'grouping', let alone an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. The paradigm of an 'organised grouping' is indeed the case where employers are organised as 'the [client A] team', though no doubt the definition could in principle be satisfied in cases where the identification is less explicit."

67. Regulation 13(6) of TUPE provides:

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

68. Pursuant to section 98 of the Employment Rights Act 1996 ("ERA"), in a claim for unfair dismissal it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons, or "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". Redundancy is a fair reason within section 98(2) of the Act.

69. Redundancy is defined in s.139 ERA as follows:

> **Redundancy**
>
> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
> (i) to carry on the business for the purposes of which the employee was employed by him, or
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
> (i) for employees to carry out work of a particular kind, or
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish.

70. According to section 98(4) ERA the determination of the question whether the dismissal is fair or unfair "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."

71. In redundancy cases, the employer will not normally act reasonably "unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation" (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, per Lord Bridge).

72. In Williams v Compair Maxam Ltd 1982 ICR 156, the Employment Appeal Tribunal laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These include, in a case with a recognised union:

72.1. The employer will give as much warning as possible to allow the union and the individual employees to consider possible alternative solutions;

72.2. The employer will consult the union (in particular as to the relevant selection criteria);

72.3. The employer will seek to establish objective selection criteria;

72.4. The employer will seek to select fairly in accordance with those selection criteria and allow the union to make representations on selection;

72.5. The employer will seek to see whether there is suitable alternative employment.

73. If the Tribunal finds the dismissal unfair, it should assess the chance that the employee would have been dismissed in any event and take that into account when calculating the compensation to be paid (Polkey)

74. In Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT, Mr Justice Elias, the then President of the EAT, summarised the principles on the application of Polkey reductions. These included:

> "(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)
>
> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
>
> (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."

CONCLUSIONS

Was there a relevant transfer?

75. The first task for the Tribunal is to identify the relevant activities (Kimberley Group Housing Limited v Hambley [2008] ICR 1030, EAT). There is little if any dispute about this. Ms Stanley initially said that the activities should be defined as "the driving of trucks (which was done at night) from Portbury to Greenhous

in Stoke-on-Trent for the purposes of fulfilling the contract with Gefco 4pl". She later said, however, that the fact that the work was done at night was not an essential feature of the activities.

76. We are satisfied that the relevant activities conducted by the First Respondent that were then conducted by the Second Respondent after 1 December 2020 were: Transporting vehicles on trucks from Portbury to the "zone 10" region, the main location being Greenhous in Stoke-on-Trent.

77. The central dispute in this case is whether there was an organised grouping of employees which had as its principal purpose the carrying out of those activities.

78. We consider the evidence of the First Respondent as to the alleged decision to "dedicate" six of the night drivers to the Greenhous route was wholly unsatisfactory.

79. There is no documentary evidence at all of any such decision in July 2020 or at any other time. It may be that decisions of this type are not always recorded in writing in this industry, but one would expect some documentary evidence of it prior to these proceedings. Both Mr McGurl and Mr Dodge said in cross-examination that it had been Mr Dodge's decision, but neither of them said that in their witness statements. There was no mention of any such decision having been made by Mr Dodge in the correspondence between the First and Second Respondents relating to the dispute about whether TUPE applied, and no mention of it in the grievance process.

80. We also query the reliability of the First Respondent's witness evidence on this issue generally because of the assertions by both Mr McGurl and Mr Dodge that the client, Gefco, knew of this organised grouping and endorsed it. When pressed there was absolutely nothing to back up the assertion and Mr Dodge's witness statement was revealed to be misleading on the point, possibly intentionally. The fact that Gefco were content for the First Respondent to carry out deliveries at night had no bearing on their knowledge or approval of there being a dedicated group of drivers. Both Mr Dodge and Mr McGurl would have understood that. The email exchange between Mr McGurl and Mr Johnson of Gefco, at a time when the First Respondent already knew it was losing the contract, was also mischaracterised by Mr McGurl in an attempt to bolster the First Respondent's case. Both witnesses' assertions that Gefco endorsed an organised grouping were, at best, disingenuous.

81. We also note that Mr Huxtible, who according to both Mr Dodge and Mr Roberts, was the person giving effect to the decision to dedicate the six drivers to the Greenhous work, has not given evidence to the Tribunal and there is no explanation for his absence. We place very little weight on the evidence of Mr Roberts about the alleged decision to create the organised grouping because it is all hearsay, and in parts hearsay of hearsay.

82. The First Respondent argues that the fact that the six drivers were carrying out Greenhous work as the majority of their outbound work shows that a decision had been made to dedicate them to that route.

83. Even assuming that the data as presented by the First Respondent, which the Second Respondent takes issue with in some respects, is reliable and accurate, we do not accept that it necessarily shows that a decision was made to dedicate the six drivers to the Greenhous route in the sense contended for by the First Respondent.

84. It is potentially significant that the other two night drivers were not doing the Greenhous work from July 2020 onwards, except if covering for a missed load in the day or the absence of one of the other night drivers, but no evidence has been produced by the First Respondent to support that assertion. Mr McGurl accepted that the two drivers were doing Greenhous work from time to time. Without equivalent data for those drivers we do not know whether there was a marked difference in the number of loads they took to Greenhous as compared to the other six. Nor do we have any evidence or data as to the day drivers who were allocated to the Greenhous route. It is possible that there were individual day drivers who, as it happened, were driving from Portbury to Greenhous more frequently than other day drivers.

85. Even if it is correct that the six drivers in question were conducting far more of the Greenhous work than other drivers, we do not accept that it shows a decision was made to "dedicate" them to the route. The First Respondent has never said that these drivers were exclusively carrying out this work, and indeed it is accepted that they sometimes went to other destinations as their outbound route. The First Respondent's case is as set out in Mr Dodge's witness statement: *"Put simply, the allocation of the work to these 6 drivers revolved around the Greenhous contract from late July 2020 onwards and any other work or loads was secondary to their primary purpose."* The implication is that this *"clear change in organisation"* involved giving priority to the Greenhous work even where it compromised efficiency in the overall load-building. There is no evidence at all that that was the position. There is nothing in the evidence we have seen to show that Greenhous work was "prioritised" in that way, or that the allocation of the work in the period from July 2020 was not entirely consistent with maximising revenue to the First Respondent generally. Indeed we consider it would be surprising, even illogical, for the First Respondent to organise its work in that way and to limit its flexibility, particularly in the context of the pandemic and the fluctuations in the work as described by the First Respondent's witnesses.

86. We accept that the data shows an increase in the loads taken by the six drivers to Greenhous from July 2020 onwards, and that in that period it made up the majority of their outbound work, but that is consistent with the normal allocation of work according to the requirements of the business. It is notable that it appears to have come as news to the six drivers, on receiving the letters on 22 October 2020, that they were dedicated to the Greenhous work as opposed to simply carrying out the work that they were allocated to do. Nor is there any

evidence of any working practices that distinguished the six drivers as a team or any other organised grouping.

87. We are not in a position to speculate about the reasons for these six drivers doing more Greenhous work than the other two (if that was the case) without knowing more about the process of allocation, but that fact alone is not sufficient to show there was a deliberate decision to create an organised grouping, as opposed to it being a consequence of "working practices on the ground" as referred to in Eddie Stobart v Moreman. In the context of there being no other evidence of a deliberate decision, and our having rejected the First Respondent's witness evidence on the issue as unreliable, we find that there was no organised grouping which had as its principal purpose the carrying out of the Portbury to Greenhous work.

88. We consider this is a situation similar, although not identical, to the situation in Eddie Stobart v Moreman. The drivers may have been carrying out these activities principally as a matter of fact, but we cannot say it was their principal *purpose* in the sense that it was prioritised to the detriment of other work, or even that their work "revolved around it". They were simply allocated a considerable volume of that work because there was a lot of it available during that period.

89. We have given some thought to the requirement in Regulation 3 of TUPE to consider the position "immediately before the transfer". It was common ground that this involves taking a snapshot of the transferor's working practices, but none of the parties argued for any particular date as representing the time "immediately before" the transfer. We consider, however, that this requirement supports the guidance in Eddie Stobart that the test cannot be about what some employees happened to be doing on a particular day, or even over a particular period. That is why it is important to consider whether the employer has made a conscious decision to create an organised grouping for the principal purpose of carrying out the activities.

90. It also accords with the comments of Underhill P at paragraphs 19-20 of Eddie Stobart. He rejected the contention that the finding of no transfer in that case was objectional on policy grounds. He said:

> "No doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in the specified circumstances they 'go with the work' (though the assumption that in every case that will benefit, or be welcome to, the employees transferred is not universally true). But it remains necessary to define the circumstances in which a relevant transfer will occur, and there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible.
>
> Indeed the policy considerations point, if anything, the other way. If the putative 'grouping' does not reflect any existing organisational unit there are liable to be real practical difficulties in identifying which employees

> belong to it. It is important that on a transfer employees should, so far as possible, know where they stand."

91. This case is a good example of the employees not knowing where they stood because they did not know, the union did not know and the two companies could not agree, whether there was an organised grouping. Even within the First Respondent there seems to have been some confusion about the grouping and who was assigned to it. We are not convinced that Mr McGurl's reference to five drivers in his email of 13 October to Gefco was an error. He goes on to refer to there being 7 drivers going to Greenhous, made up of 5 from Portbury and 2 from elsewhere. If "5" was a typing error one would not expect the same mistake to be repeated when giving the total number of drivers.

92. The Claimants have been caught in the middle of an argument between these two companies and have had to wait for nearly three years for a finding by the Tribunal and compensation when they would, at the very least, have received redundancy payments at the time if the First Respondent had not pursued the TUPE argument.

Unfair dismissal

93. The burden is on the First Respondent to establish a potentially fair reason for dismissal. The First Respondent's only case on the facts is that the reason was the belief that TUPE applied. The Claimants have not suggested this was not a genuine belief and we proceed on the basis that it was. We have found, however, that that belief was wrong. The First Respondent argues that even if it was wrong, it was not unreasonable, and it therefore qualifies as a "substantial" reason for s.98 purposes.

94. We do not accept that argument. If an employer is wrong about whether TUPE applies and proceeds on the basis that it does, to the extent of dismissing the Claimants without going through any other process, it must take the consequences. We do not accept that the mistaken belief that TUPE applied amounted to a substantial reason for the purposes of s.98(1) ERA.

95. That fact that an employer proceeds only on the basis of a TUPE transfer does not, however, preclude a finding that the employees were dismissed due to redundancy.

96. The Claimants argue that the First Respondent has not established that the reason for the Claimants' dismissals was a redundancy situation. Ms Stanley argues:

> "31. The burden of proving the reason for dismissal is on R1. There has been no evidence of the other work available at the Portbury depot as of 1 December 2020 from R1 save for some very general evidence that the other outbound night work was the Toyota work in Derby. R1 has failed to give any evidence as to:

31.1 The overall volume and requirements of night work;

31.2 Whether any work which happened to be being done during the day could (in
fact) have been done at night;

31.3 The other contracts being fulfilled by R1 at the relevant time (as opposed to the Gefco contract);

31.4 R1's likely prospects (as of 1 December 2020) and in particular what work it
might hope to win in the future (and the value, requirements and timings on this
work).

32. R1 has not come close to discharging the burden of showing a redundancy situation."

97. We agree that the First Respondent's evidence on this issue is thin, but there is no dispute that the Greenhous work made up the majority of the Claimants' actual outbound work from July 2020 onwards, and the First Respondent's uncontested evidence was that at the time there were only two outbound destinations for night work, Greenhous and the Toyota plant in Derby. In those circumstances the loss of the Greenhous work meant that the requirements for employees to carry out night work inevitably diminished. We are satisfied that there was a redundancy situation within the meaning of s.139 ERA.

98. Although this was not the reason in the First Respondent's mind for the Claimants' dismissals, we accept that their dismissals were "wholly or mainly attributable" to that redundancy situation as a matter of fact, so we accept that the First Respondent has established redundancy as a potentially fair reason for dismissal.

99. We find, however, that the First Respondent did not act reasonably and the dismissals were therefore unfair. The only consultation that took place was about the First Respondent's belief that TUPE applied. The discussions with the union and the drivers were all directed to that issue. The First Respondent did not consult with the union or the individual employees about avoiding a redundancy situation. Nor was there any consultation about the pool or selection criteria. If there was a redundancy situation then there is no reason on the evidence before us not to have included all eight night drivers in the pool for selection. The First Respondent did not give proper consideration to alternative employment, simply offering a job with lower pay and wholly different lifestyle implications four days before it intended to terminate the Claimants' employment.

<u>Polkey</u>

100. It is clear from Software 2000 v Andrews that we must, unless it is truly not possible to do so, consider the chance that the Claimants would have been fairly dismissed due to redundancy.

101. We must consider not only whether the First Respondent *could* have dismissed fairly but whether they *would* have done (Hill v Governing Body of Great Tey Primary School 2013 ICR 691, EAT).

102. The First Respondent has not put forward any evidence at all that if had not believed TUPE applied it would have conducted a redundancy process and that the Claimants would have been dismissed.

103. It was put to Mr Sposito in cross-examination that there was no other night work and therefore his employment probably would have terminated in any event, and he agreed, but we place no weight on that evidence because he is not in a position to say what the First Respondent would have done.

104. Even if it is correct that there was no other outbound night work, we note that prior to the lockdown there appears to have been much less outbound work in general and the Claimants were mainly undertaking inbound work. There is no evidence on which we could make a finding as to whether the First Respondent would have reverted to allocating the night work in that way, or indeed whether it could or would have arranged its day work in a way that allowed for more work to be done at night. We have no evidence either of what the PO10 route represented as a proportion of the First Respondent's overall work, and whether there were other contracts that would or could have replaced any lost work under that contract in the near future.

105. The only evidence from the First Respondent on this issue came in cross-examination of Mr McGurl and all he said was that they would have consulted the union. He did not say there would have been a redundancy exercise. Even if there would have been a redundancy exercise, there is no evidence on which we could make a finding as to the chances of the Claimants being selected for redundancy. We also do not know what alternative employment might have been offered in a proper consultation process.

106. As explained in Software 2000, if an employer seeks to contend that an employee would or might have ceased to be employed had a fair procedure been followed *it is for the employer to adduce any relevant evidence*. It has not done so. Even having regard to all of the available evidence, we consider this case properly falls into the category of one where the whole exercise of seeking to reconstruct what might have happened is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made.

107. We therefore conclude there should not be any reductions to the compensatory awards on Polkey grounds.

Failure to consult

108. It is not necessary for us to determine the Regulation 13 claim because we have found that there was no transfer, but for completeness we would not have found a breach of Regulation 13(6). That paragraph refers to measures that the transferee envisages taking in relation to an affected employee in connection with the relevant transfer. It is too much of a stretch of the ordinary language to suggest that that extends to the current situation where the Second Respondent simply did not accept that there was a relevant transfer. The refusal to accept the affected drivers as employees is not a "measure in connection with the relevant transfer". If the Second Respondent had been wrong about the transfer, the remedy would have been compensation to the affected employees for unfair dismissal and wrongful dismissal. Given we would have dismissed this claim in any event, there is no need for us to address the question of whether the Fifth Claimant should be allowed to pursue the argument.

Employment Judge Ferguson
Date: 6 November 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
27 November 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE