EMPLOYMENT TRIBUNALS

Claimant: Mr Khook Tung Foo

First Respondent: iOffice Limited

Second Respondent: Mighty Visage Studios Limited

Heard at: London South Employment Tribunal, in private (by Video Hearing – CVP)

On: 18 & 19 March 2024

Before: Employment Judgment McCann

Representation

Claimant:	Mr J Camps (lay representative / friend of claimant's)
First Respondent:	Mr J Turpin (legal representative, Peninsula Legal Services)
Second Respondent:	Unrepresented

RESERVED JUDGMENT

Having directed that the name of the Second Respondent (Mighty Visage) be amended to its correct name, Mighty Visage Studios Limited; and having ascertained (via Companies House) that the Second Respondent remains active, albeit with a proposal to strike off (which was suspended on 12 December 2023), **the judgment of the tribunal is that:-**

1. All of the Claimant's claims against the Second Respondent are not well-founded and they are dismissed.

2. The Claimant's claim for unfair dismissal against the First Respondent is well-founded. The Claimant was unfairly dismissed by the First Respondent.

3. The Claimant's claim for breach of contract in respect of notice pay is well-founded. The First Respondent dismissed the Claimant on 15 June 2023 with only two weeks' and one day's notice (his employment terminating on 30 June 2023) when it should have given him eleven weeks' notice.

4. The Claimant's claim for unlawful deduction from wages against the First Respondent is well-founded. The First Respondent made an unauthorised

deduction from the claimant's wages on 1 August 2023 in the sum of £778.16.

REMEDY JUDGMENT

5. The First Respondent shall pay compensation to the Claimant of **£28,170.73** made up as follows:

   (i) A basic award for unfair dismissal of £7073
   (ii) A compensatory award for unfair dismissal (of loss of earnings of £11,669.57 and loss of statutory rights of £500)
   (iii) Damages awarded for wrongful dismissal of £6864 (awarded on a gross basis)
   (iv) Compensation for unauthorised deduction from wages of £778.16
   (v) An award under section 38 of the Employment Act 2002 of £1286

6. The recoupment provisions apply as the Claimant was in receipt of Jobseeker's allowance. The parties are directed to the Annex to this Judgment for the recoupment rules.

REASONS

BACKGROUND

1. The Claimant presented his ET1 Claim Form (and Details of Claim) on 10 August 2023 against both Respondents, having notified ACAS of the potential dispute on 1 August 2023 (and ACAS early conciliation certificates were issued in response of both respondents on 12 September 2023).

2. The Notices of Claim were sent to both respondents on 19 October 2023.

3. The First Respondent duly submitted its Response on 15 November 2023, although this was not provided to the Claimant. The first time he was aware of and saw this document was on the morning of 18 March 2024 (that is, the first day of the Final Hearing) when he received a hearing bundle prepared by the First Respondent's legal representatives. It is at pages 15 to 23 of the Bundle.

4. On 16 November 2023, the envelope containing the Notice of Claim for the Second Respondent was returned to the Tribunal. No Response had been received by the Tribunal on behalf of the Second Respondent.

5. The case was listed for a two-day Final Hearing by a Notice of Hearing dated 22 November 2023.

6. A referral was made to an employment judge on 13 December 2023 in respect of the Second Respondent's failure to submit a Response. A direction was given for the Claim to be re-sent. On 9 February 2024, the Notice of Claim etc was re-sent to the Second Respondent at the registered office address on the Companies House website (PO Box 4385, Cardiff CF14 8LH). The letter was copied to the Claimant and it provided that the Hearing listed for 18 March 2024 was not postponed.

7. To date, no Response has been submitted by the Second Respondent.

8. Upon checking with Companies House on the morning of 18 March 2024, it was apparent that:

    i. The appointment of the Second Respondent's sole Director (Mr Emmanuel Andreas Beyer) was terminated on 23 March 2023 with his resignation.

    ii. The Registrar of Companies gave notice on 14 November 2023 that, unless cause is shown to the contrary, the Company (Mighty Visage Studios Limited) will be struck off the register and dissolved not less than 2 months later.

    iii. On 12 December 2023, as a result of an objection to the striking off having been received by the Registrar, action under section 1000 of the Companies Act 2006 was temporarily suspended.

    iv. On 28 December 2023, the registered office address was changed by the Registrar of Companies to the Companies House default address (namely, a PO Box address in Cardiff).

9. I was informed by Mr Turpin, for the First Respondent, that Mr Emmanuel Beyer was no longer entitled to take action for or on behalf of the Second Respondent as his appointment as its Director had been terminated in March 2023. That was consistent with the information obtained via Companies House (above). I was informed by Mr Lee Probert (Director of the First Respondent) that Mr Beyer continued to provide his services to the First Respondent, although Mr Probert had not seen him since Christmas.

10. From the information before me, I was satisfied that the Second Respondent had not been dissolved and was not struck off by the Registrar; but that it had not submitted a Response or an application for an extension of time for presenting a Response. This was likely to be the result of there being no active director, nor other personnel, who was/were permitted to take action in connection with the company.

11. I, therefore, considered whether – on the available material – a determination could properly be made of the claims (rule 21(2) of the ET Rules of Procedure 2013).

12. I decided that I could make such a determination at this Final Hearing, at which the Claimant and the First Respondent were both present and represented.

13. I determined that it was likely that Mr Beyer had knowledge of the Claimant's claims and the Hearing but was not entitled formally to represent or act in any way on behalf of the Second Respondent since his appointment as a Director had been formally terminated; but that he could have been called as a witness by the First Respondent, had it wished to do so.

14. I decided that an adjournment for a re-listed hearing was not in accordance with the overriding objective nor in the interests of justice as Mr Beyer's situation was unlikely to change to afford him an entitlement or ability to participate formally (on behalf of the Second Respondent) at any re-listed hearing; and no postponement was requested by either the Claimant nor the First Respondent.

15. In those circumstances, I decided to proceed with the Final Hearing and to determine the claims, having regard to all the material before me.

Amendment to name of Second Respondent

16. It appeared to me that the name of the Second Respondent on the Claimant's ET1/Claim Form (Mighty Visage) was not correct and that the proper name of the legal entity was Mighty Visage Studios Limited. I, therefore, directed (without any objection from the Claimant or the First Respondent) that the name of the Second Respondent be amended to: Mighty Visage Studios Limited.

Application by First Respondent to strike out the Claimant's claims

17. On the morning of 18 March 2024, Mr Turpin emailed a document to the Claimant and the Tribunal applying to strike out the Claimant's claims against the First Respondent, on the basis that he was employed at all times by the Second Respondent (rather than the First Respondent).

18. I took some time to consider this document, bearing in mind that the Claimant had been given no notice of this application.

19. I concluded that, as I would need to make findings of fact to determine the merits of the First Respondent's application which were likely to cover the same ground as the factual findings required for determination of the claims, it was not proportionate to take further time to determine the application, particularly given that it had not specifically been listed for hearing, nor provided in advance to the Claimant.

Documents / Evidence

20. The Claimant had prepared an 8-page witness statement and accompanying bundle of relevant documents (63 pages) on 31 January 2024, as well as an updated schedule of loss; and had provided these documents to the First Respondent and to the Second Respondent (to the PO Box address in Cardiff). The Claimant had provided his disclosure (on 3 January 2024) in accordance with the tribunal's case management orders.

21. It did not appear to me that the First Respondent had complied with its disclosure obligations. Ms Terri Knowles (First Respondent's HR Manager) had, however, produced a witness statement and provided this to the claimant earlier in March 2024, along with some invoices from the Second to the First Respondent [pages 24 to 27 of the Hearing Bundle].

22. Peninsula Legal Services came on the record for the First Respondent on the afternoon of Friday 15 March 2024. Mr Turpin, from Peninsula, compiled the parties' documents into a 169-page Hearing Bundle which was of real assistance to the Tribunal. It contained most, although not all, the documents in the Claimant's witness statement bundle of documents.

23. A witness statement for Mr Lee Probert (First Respondent's Managing Director) was also produced. The Bundle and Mr Probert's Statement were was only provided to the Claimant and the Tribunal in the early hours of Monday 18 March 2024 (i.e. the first day of the Hearing), in non-compliance with the tribunal's case management orders.

24. I gave the Claimant time to review these documents during the morning of 18 March 2024 and he indicated, via Mr Camps, that he was able to continue with the hearing, notwithstanding the late provision of these documents and did not wish the case to be postponed.

25. Having had time to review the documents, the Hearing resumed in the afternoon when I heard evidence from the Claimant who was cross-examined by Mr Turpin for the First Respondent. The cross-examination continued into the second day (19 March 2024) and, thereafter, I heard evidence from Ms Knowles and Mr Probert, who were both cross-examined by Mr Camps (for the Claimant). I then heard closing submissions on behalf of the First Respondent and the Claimant. By then it was 4:30pm so I had to reserve my Decision. I apologise for the delay in promulgating this Judgment and Written Reasons. I had indicated to the parties that it was likely there would be a delay as I only sit part-time.

Day 2 – possible attendance of Mr Beyer

26. At the start of the second day of the hearing, Mr Turpin suggested that I exercise my power under rule 32 of the Rules of Procedure 2013 to direct Mr Beyer to attend the Tribunal to give evidence, documents or information. I enquired whether the First Respondent was making an application or whether Mr Turpin was simply inviting me to exercise this power of my own initiative. He confirmed it was the latter. Mr Camps (on behalf of the Claimant) objected. He pointed out that if the First Respondent had wanted to adduce witness evidence from Mr Beyer, they could have provided a witness statement (by the deadline of 31 January 2024). He submitted that it was now too late and the Claimant would have no notice of what Mr Beyer might say. The Claimant had already been ambushed by Mr Probert's witness statement, which was only provided just before the start of the hearing.

27. I declined to exercise my power to direct the attendance of Mr Beyer. I concluded that it was not in accordance with the overriding objective,

particularly as neither side had applied for Mr Beyer to be permitted to give evidence (without a witness statement having been prepared and exchanged). I considered that it would risk derailing the hearing when it was already going to be difficult to conclude in the available time.

The Issues

28. The claimant brings claims against both respondents for unfair dismissal, wrongful dismissal (breach of contract in relation to notice pay) and unauthorised deductions from wages in respect of an alleged deduction made from his final salary due for the month of June 2023. If the Tribunal concludes that the Claimant was dismissed fairly by reason of redundancy, the Claimant brings a claim for a statutory redundancy payment.

29. The issues for determination were as follows:

    (1) Was the Claimant dismissed and, if so, when and by which respondent, if any?

        i. It was accepted by the Claimant and First Respondent that the termination of his employment was communicated to him in a phone call with Ms Knowles on 15 June 2023, followed up by email and taking effect on 30 June 2023.

        ii. The Claimant alleges that he was employed by the Second Respondent until March 2023 when his employment transferred under the TUPE Regulations 2006 to the First Respondent. Accordingly, he asserts that his contract of employment was not terminated but continued to have effect after the transfer as if it had originally been made between the Claimant and the First Respondent (Regulation 4(1) TUPE).

        iii. The First Respondent denies that there was a TUPE transfer. It alleges that Ms Knowles' telephone call on 15 June 2023 was made on behalf of, and in order to assist, the Second Respondent and that the First Respondent never employed the Claimant who was employed at all material times by the Second Respondent, with the First Respondent merely providing some support/assistance to the Second Respondent from March 2023 onwards, given the financial difficulties which the latter found itself in and whilst the two companies explored some sort of arrangement or partnership.

    (2) What was the reason or principal reason for the Claimant's dismissal?

        i. The First Respondent asserts that the Claimant was dismissed by the Second Respondent and that this was by reason of redundancy.

           Accordingly: Was the dismissal wholly or mainly attributable to the fact that the Second Respondent ceased or intended to cease to carry on the business for the purposes of which the Claimant

was employed by him or that the requirements of that business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish (s139 of the Employment Rights Act 1996)?

ii. The Claimant asserts that the reason or principal reason for his dismissal was the transfer, such that his dismissal was automatically unfair contrary to Regulation 7 TUPE.

Accordingly: Either before or after a relevant transfer, was the sole or principal reason for the Claimant's dismissal that transfer?

iii. The First Respondent maintains that there was no relevant transfer under TUPE; and it does not assert any case (in the alternative) based on Regulation 7(2) TUPE (i.e. that the sole or principal reason for dismissal was an economic, technical or organisational reason entailing changes in its workforce) (in fact, it says that it offered the Claimant a job in May or June 2023 albeit working from its office premises in Sussex).

(3) If the reason for dismissal was redundancy or some other substantial reason, did the First Respondent or, alternatively, the Second Respondent act reasonably in treating that reason as a sufficient reason to dismiss the Claimant in all the circumstances of the case (s98(4) of the Employment Rights Act 1996)?

(4) If the reason for dismissal was redundancy, and the Claimant's dismissal by the First or Second Respondent was fair, is the Claimant entitled to a statutory redundancy payment and, if so, in what amount?

Remedy (for any unfair dismissal):

(5) If the Claimant's dismissal was unfair, to what remedy is he entitled, if any? He claims:

i) Basic Award
ii) Compensatory Award
iii) Loss of statutory rights
iv) Uplift for breach of the ACAS Code of Practice on Disciplinary & Grievance procedures

Wrongful dismissal

(6) Was the Claimant's dismissal in breach of contract, in that he was not given due notice of his dismissal?

The Claimant asserts that he was entitled to 12 weeks' notice of dismissal and was only given 2 weeks and 1 day's notice, such that he was dismissed in breach of contract.

Unauthorised deduction from wages

(7) In respect of his the payment of his wages on 1 August 2023, in respect of his last month's salary, did the First Respondent or, alternatively, the Second Respondent make an authorised deduction from those wages in the sum of £778.16?

Section 38 of the Employment Act 2002

(8) Is this a case concerning proceedings to which s38 of the Employment Act 2002 applies?

i) If so, when those proceedings began was the First or Second Respondent in breach of a duty to give the Claimant a written statement of particulars of change under s4(1) of the Employment Rights Act 1996?

ii) If yes, should the tribunal make an award of, or increase any award it otherwise makes by, an amount equal to two weeks' or four weeks' pay or are there exceptional circumstances which would make such an award unjust or inequitable?

THE LAW

Unfair dismissal

30. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is a potentially fair reason falling within subsection (2) – i.e. in this case, redundancy.

31. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which causes them to make the decision to dismiss the employee (see *Abernethy v Mott Hay and Anderson* [1974] ICR 323, 3309, cited with approval by the Supreme Court in *Jhuti v Royal Mail* [2019] UKSC 55, [2020] ICR 731, at paragraph 44).

TUPE

32. A relevant transfer under TUPE 2006 operates to assign to the transferee the contracts of employment of those who would otherwise have been dismissed upon the transfer (Regulation 4 TUPE).

Automatic unfair dismissal

33. Where, either before or after a relevant transfer, an employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the Employment Rights Act 1996 (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer (Regulation 7(1) TUPE).

ETO reason

34. However, where the reason for the dismissal is an 'economic, technical or organisational reason entailing changes in the workforce' of either the transferor or the transferee then the dismissal will not be automatically unfair (Regulation 7(2) and (3)(a) TUPE). Changes in the workforce include a change to the place where employees are employed (Regulation 7(3A) TUPE). If the reason falls within this category (i.e. an 'ETO' reason), it will be a fair reason for dismissal, either by reason of redundancy or for some other substantial reason justifying dismissal (Regulation 7(3)(b) TUPE) and the Tribunal will then need to consider the usual principles of fairness under s.98(4) of the Employment Rights Act 1996 (set out below).

35. In this case, the First Respondent asserts that there was no relevant transfer at all; that it was merely providing assistance and support to the Second Respondent which remained the Claimant's employer throughout and which dismissed him with effect from 30 June 2023 by reason of redundancy. The First Respondent does not, in the alternative (should I conclude that there was a 'relevant transfer' under TUPE), seek to rely on an 'ETO' reason for the Claimant's dismissal.

Burden of proof as to reason for dismissal under TUPE

36. In considering a claim for unfair dismissal, the burden of proof is applied in the same manner as where it is alleged that the reason or principal reason for the dismissal was that the employee made a protected disclosure, per *Kuzel v Roche Products Limited* [2008] EWCA Civ 789, [2008] ICR 799 (CA). The employee must, therefore, produce some evidence in support of his case but, having done so, the burden then lies on the employer to establish that the reason for the dismissal was not the automatically unfair reason (i.e. the alleged TUPE transfer).

"Relevant transfer"

37. In deciding whether the sole or principal reason for the Claimant's dismissal was automatically unfair under Regulation 7 of TUPE, the tribunal needs, first, to decide whether there was a relevant transfer, in this case under Regulation 3(1)(a) which provides that a relevant transfer is "*a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity*".

38. In deciding whether there has been a relevant transfer, the critical question is whether the undertaking retains its identity and is carried on by the transferee; and, in determining this question, all the factual circumstances must be considered and, in particular:

    i. The type of undertaking or business concerned;
    ii. Whether tangible assets, such as building and moveable property are transferred;

iii. The value of intangible assets at the time of the transfer;
iv. Whether employees are taken over by the new employer;
v. Whether customers are transferred;
vi. The degree of similarity between the activities carried on before and after the alleged transfer; and
vii. The period, if any, for which those activities are suspended.

See *Spijkers v Bebroeders Benedik Abbatoir CV:* 24/85 [1986] 2 CMLR 296. The multi-factorial approach required means that all factors must be balanced and no single aspect is necessarily determinative of the question of whether there has been a relevant transfer (*Balfour Beatty Power Networks Ltd v Wilcox* [2006] EWCA Civ 1240 [2007] IRLR 63

39. In *Cheeseman v R Brewer Contracts Ltd* [2001] IRLR 144 (EAT), the Employment Appeal Tribunal observed as follows: "…the decisive criteria for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated…by the fact that its operation is actually continued or resumed"; and, on the significance of the transfer or not of an undertaking's assets, it stated, "where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction…cannot logically depend on the transfer of such assets" and "even where the assets are owned and are required to run the undertaking, the fact that they do not pass doe not preclude a transfer". The EAT also noted that, "the absence of any contractual link between the transferor and transferee may be evidence that there has been no relevant transfer, but it is certainly not conclusive as there is no need for any direct contractual relationship".

40. A relevant transfer is not limited to a change in legal ownership but applies also where there is a change in the employer, irrespective of whether the ownership of assets used in the relevant undertaking has been transferred – see *Landsorganisationen i Danmark v Ny Molle Kro:* 287/86 [1989] ICR 330 (ECJ); and regulation 3(6)(b) of TUPE. As stated by the European Court of Justice, "*it is of no importance to know whether the ownership of the undertaking has been transferred. In fact, the employees of an undertaking which changes it employers without a transfer of ownership are in a comparable situation to that of employees of an undertaking which has been sold and therefore need equivalent protection*". This approach was applied by the EAT in *Charlton v Charlton Thermosystems (Romsey) Ltd* [1995] ICR 56 in the context of a transfer of an undertaking to former directors of a dissolved company. The EAT found that the former directors of the dissolved company had become personally liable for the claimant's claims of unfair dismissal when those former directors continued to run the business for several weeks after the company was struck off the Register of Companies and dissolved for failure to file annual accounts. The EAT held that the business retained its identity in the hands of the former directors by virtue of the operation of TUPE, irrespective of the fact ownership of the undertaking was not transferred.

Redundancy

41. If the claimant fails in his primary argument that there was a "relevant transfer" (within the meaning of Regulation 3(1)(a) TUPE) and that this was the sole or principal reason for his dismissal, then the tribunal has to consider, first, whether the respondent employer has proved that the definition of 'redundancy' in s.139(1)(b)(i) ERA 1996 is satisfied – namely, whether the requirements of the employer "*for employees to carry out work of a particular kind…have ceased or diminished or are expected to cease or diminish*" and whether the dismissal is "*wholly or mainly attributable*" to that state of affairs. The House of Lords in *Murray and ors v Foyle Meats Ltd* [2000] 1 AC 51 made clear that these are questions of fact for the tribunal and that the language of the statute was simple and should be applied without gloss. It was emphasised that the statute does not refer to "*employees of a particular kind*" nor to "*work specified in their contracts of employment*" but to "*the requirements of the business for employees to carry out work of a particular kind*" (emphasis added).

42. In deciding what the requirements of the business are for the purposes of s.139 ERA 1996, the tribunal is not to investigate the reasons behind the employer's actions (*James w Cook and Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716). However, the investigation of the employer's reasons is relevant to what the sole or principal reason for the dismissal was.

43. If dismissal is for a potentially fair reason (such as redundancy), then the tribunal must consider whether, in all the circumstances (including the size and administrative resources of the employer's undertaking), the respondent employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (s.98(4)(a) ERA 1996). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s.98(4)(b)). At this stage, neither party bears the burden of proof – it is neutral (*Boys and Girls Welfare Society v McDonald* [1997] ICR 693). The tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were in all respects, including as to the procedure and the decision to dismiss, within the range of reasonable responses open to the employer (*Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

44. In redundancy cases, in deciding whether the dismissal is fair in all the circumstances within s.98(4), the principles in *William v Compair Maxam* [1982] ICR 156 apply, as adjusted to dismissal where (as here) there is no union involvement – so:

    (1) The employer must give as much warning as possible of impending redundancies so as to enable alternative solutions to be considered.

    (2) The employer must consult as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible.

(3) The employer must 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 must seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

(5) The employer must see whether, instead of dismissing an employee, he could offer him alternative employment.

45. Not every procedural error renders a dismissal unfair – the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee (*Taylor v OCS Group Ltd* [2006] ICR 1602, at paragraph 48). A failure to afford the employee a right of appeal may render the dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536); and a fair appeal may cure earlier defects in procedure (per *Taylor v OCS Group*); but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. Unfairness at the appeal stage is always relevant and may render a dismissal unfair even if dismissal was fair in all other respects, but not necessarily – it is a matter for assessment by the tribunal on the facts of each case (*Mirab v Mentor Graphics (UK) Limited* UKEAT/0172/17, paragraph 54, per HHJ Eady QC (as she then was)).

46. Where the dismissal is found to be unfair on procedural grounds, the tribunal must also consider whether, by virtue of *Polkey v AE Dayton Services* [1987] IRLR 503 (HL), there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

Wrongful dismissal

47. Unless an employee has repudiated his contract of employment, entitling his employer to dismiss him summarily (i.e. with immediate effect), he is entitled to be dismissed with notice (which must be at least the equivalent of statutory minimum notice under s86(1) of the Employment Rights Act 1996). A dismissal without due notice (or payment in lieu of notice) is a breach of contract, entitling the employee to claim damages.

Unauthorised deduction from wages

48. Under s13(1) of the Employment Rights Act 1996, an employer shall not make a deduction from wages of a worker employed by him, unless the deduction is required or authorised to be made by virtue of a statutory

provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

49. By virtue of s13(3) of the 1996 Act, where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages "properly payable" by him to the worker on that occasion, the amount of the deficiency is treated as a deduction made by the employer.

50. For convenience, I have dealt with the legal principles on issues of remedy below.

THE FACTS

51. The Claimant started working for Mighty Visage Studios Limited (the Second Respondent) on 16 July 2011. His job title was Senior 3D Artist.

52. The Second Respondent was a 3D visual and rendering company and had employed a team of "Artists" such as the Claimant skilled in 3D visualisation processes, including rendering. 3D rendering is a process of converting 3D models into 2D images on a computer, often to create photorealistic effects. It is, therefore, a sort of visualisation process and is often used by architects, interior designers and other designers to show what a design or product will look like.

53. Emmanuel Beyer was the Director of the Second Respondent company. The Claimant was supervised in his work by Alex Stokes who occupied a Team Leader role.

54. The First Respondent, iOffice Ltd (trading under the name OCS Software) describes itself in its ET3 Form (Box 6.1) as a Sports, Digital and Studio Design software company. Mr Lee Probert is one of two directors of the First Respondent.

55. In the Claimant's evidence, which I accept, he recalled having been provided with written terms and conditions of employment at some point in 2011. The Claimant confirmed that he no longer had a copy of this document.

56. I note that, in her email to the Claimant of 22 June 2023, Terri Knowles stated, "your employment contract is with Mighty Visage / Emmanuel [*Beyer*]"; and, in her email of 27 June 2023, she stated, "you were an PAYE employee of Might Visage Ltd before it ceased trading and closed in March 23". The First Respondent, therefore, appears to have accepted in this correspondence that the Claimant was employed under a contract of employment with the Second Respondent, at least until around March 2023.

57. By the time of the relevant events, the Claimant worked 40 hours per week and was paid a fixed monthly net salary of £2633.76 with occasional additional overtime (paid on an hourly basis). His gross salary was £780 per week (£40,560 per annum), according to his Schedule of Loss, which was

not challenged. Since the Claimant was not provided with payslips after August 2022, I have not been able to consider these.

58. The Claimant's working hours were flexible, although he normally worked between 10am and 6pm on Mondays to Fridays. As he explained in an email to Ms Knowles on 9 May 2023, sometimes he started and finished earlier, and at other times he started and finished later.

59. Before the Covid pandemic, the Claimant had worked a hybrid model, with 3 days per week in the Second Respondent's office and 2 days per week from home. In 2019, this had moved to mainly homeworking and after the pandemic, the Claimant's working arrangement was permanently varied to one where he worked fully remotely (i.e. working from home), with the exception of the occasional 'in person' meeting which he attended at the Second Respondent's office. The Second Respondent employed at least one other fully remote employee, who was based outside of the UK.

60. The Claimant received his normal pay each month into his bank account from the Second Respondent until December 2022. Thereafter, he noticed that payments were made less regularly, and in different amounts. For example, he received no payment at all in January 2023, then £1000 on 24 February 2023, then his normal pay again on 2 March 2023.

61. From 3 April 2023 onwards, he received payments directly into his bank account from iOffice Ltd t/a OCS Software (i.e. the First Respondent). He received the following payments:

    i) On 3 April 2023: £4267.52
    ii) On 2 May 2023: £2633.76
    iii) On 1 June 2023: £2633.76
    iv) On 1 August 2023: £1855.60

62. In March 2023 (the Claimant says it was 13 March 2023 whilst Ms Knowles and Mr Probert say it was 9 March 2023, which they specifically recall because it was Ms Knowles' birthday), he was asked to and did attend a meeting. The precise date of the meeting is not relevant for the determination of the claims so I make no finding on it.

63. The Claimant joined via Zoom. His colleagues from Mighty Visage Studios Limited, the Second Respondent, attended in person. The parties agree that the meeting took place at the First Respondent's offices. In addition to the Claimant and his co-workers, the meeting was attended by Emmanuel Beyer, Terri Knowles and Lee Probert.

64. The Claimant's evidence is that staff were told by Mr Probert (who presided over the meeting) that the Second Respondent was experiencing financial difficulties and that iOffice Ltd would be taking over Mighty Visage's business; and that this would create a new division within the First Respondent's business structure. Mr Probert explained that the office would be relocated to the First Respondent's office space and he reassured everyone that they could all keep their jobs.

65. The evidence of Ms Knowles and Mr Probert was that there was a long discussion in which the Second Respondent's employees were told that there was no guarantee that they would be paid at the end of March, given the financial difficulty the company was in; and that they could leave immediately if they wished. They said that two employees left, meaning that that the majority remained (including the Claimant).

66. I accept the Claimant's evidence that Mr Probert led the meeting as this is highly plausible, given the meeting took place at his company's premises. I also accept the Claimant's evidence that he and his fellow workers were reassured that their jobs would continue as before, doing the same work, but that the physical office would relocate to the First Respondent's business premises.

67. The First Respondent's evidence was that it planned to "delve into" the Second Respondent's business to explore a "financial package to support and ultimately turn the Company around" and that no takeover or merger was ever discussed. Ms Knowles, however, refers in her statement to the possibility of a "strategic partnership" as the two companies would complement each other well.

68. I find that the First Respondent's intended to, and indeed, did, set up a new division in its portfolio to continue the activities which had previously been carried out by the Second Respondent – namely, 3D design and rendering. This is consistent with the Claimant's evidence and evidence in the Bundle that, shortly after the meeting in March 2023:

    i) The Mighty Visage website redirected to the OCS Software website (the trading name for the First Respondent);
    ii) The LinkedIn page for Mighty Visage was updated to show the telephone contact number for the First Respondent;
    iii) The OCS Software websites were updated to reflect a new (third) division, called "OCS Studios" (described as "CGI, Still Renderings, 3D Walkthrough & Virtual Reality")

69. In his oral evidence, Mr Probert stated that the idea for OCS Studios was "born" in 2016 or 2017 but, at that time, it was a 3D visualiser for golf and that it became named as "OCS Studios" following the "demise" of Mighty Visage Studios Ltd.

70. The website evidence provided by the Claimant shows OCS Sport and OCS Studios as two separate divisions (and a third division called OCS Digital).

71. I find that OCS Studios was only created after the March 2023 meeting when the Claimant and his colleagues were told that that OCS Software would be taking business activities over from the Second Respondent but with no real changes to working practices and arrangements.

72. After the meeting in March 2023, the Claimant received a call from Emmanuel Beyer in which he was reassured that, in practical terms, nothing would change – the Claimant would continue doing the same job, under the same working conditions, pay, holidays and so on.

73. On 21 March 2023, the Claimant was invited to and did visit the First Respondent's office where he went through an induction process with Ms Knowles. They discussed the Claimant's role, hours, holiday pay, salary payments and reporting structure and there were no changes from his previous arrangements. Ms Knowles expressed a strong preference for the Claimant to work in the office but he explained that the commute was too long and expensive. The Claimant was given some forms to fill out which he duly completed:

    i) Employee Details form (by which he provided his bank details and contact details)
    ii) Emergency Contact Details form
    iii) HMRC "Starter checklist" which referred to a "start date" of 1 March 2023 (this is presumably a typo for 1 April 2023).

    The Claimant was also provided with an OCS Software email address and door access to the First Respondent's office premises.

74. Ms Knowles followed up (on 23 March 2023) by email, asking the Claimant for his passport details and right to work; and in emails between 27 April and 11 May 2023, she enquired about the Claimant's booked holidays. She also advised him how to indicate when he was at work (or absent) on the First Respondent's online "Slack" calendar and she instructed him to log on to "Slack" during his working time.

75. After the meetings in March 2023, the work which the Claimant and his colleagues had previously carried out for the Second Respondent continued to be carried out by them in the same way but under the umbrella of OCS Studios. The same software was used by the Claimant and he serviced the same clients as he had previously. The Claimant (and the other remote worker) continued to work from home, and his former colleagues from Mighty Visage worked from the First Respondent's office.

76. The Claimant continued to be supervised by Alex Stokes, his previous supervisor and he continued to work remotely from home. The 3D rendering projects continued to be overseen by Mr Beyer who worked, along with the Claimant's colleagues, from the First Respondent's premises.

77. The Claimant's salary was paid in April, May and June 2023, but from the First Respondent's bank account. The Claimant was not required to input his hours into timesheets or similar (and, indeed, had not done that previously). In other words, he continued to be paid a fixed salary for normal working hours. The Claimant took some paid holiday in the period from March to June 2023 which he notified to Ms Knowles.

78. Documents provided by the First Respondent appear to show that the Second Respondent invoiced an entity called OCS Software Limited (at the First Respondent's address) on 1 December 2022 and again on 1 January, 1 February and 1 March 2023 for "project names" and "works completed" in each of December 2022, January, February and March 2023. However, the

"project names" are actually a list of initials which appear to equate to the Second Respondent's employees, including "GF".

79. There are handwritten dates on the invoices – "paid 01.04.23" (in relation to the invoice dated 1 December 2022); and "3.05.23", "01.06.23" and "01.07.23" (in relation to the invoices dated 1 January, 1 February and 1 March 2023).

80. Aside from 1 July 2023 (when the Claimant did not receive any payment), the dates on the invoices (and amounts) are consistent with the dates and amounts received by the Claimant from the First Respondent into his bank account.

81. I find that these "invoices", therefore, correspond to salary payments made by the First Respondent to the Claimant and his colleagues.

82. In their witness statements, Ms Knowles and Mr Probert both stated that the First Respondent agreed to supply funding for the Second Respondent by way of small monthly loans, to help cover salaries and short-term expenses. Thy stated that this was to give Mr Beyer the time to negotiate with creditors to see if a company voluntary arrangement could be accomplished. There is, however, no other evidence of any loan arrangement between the two companies.

83. By 23 March 2023, Mr Beyer's directorship of the Second Respondent was terminated and, from then onwards, the Second Respondent no longer had any director (and, as already found, the First Respondent took over paying the salaries of the Claimant and his colleagues from the start of April 2023).

84. On 10 June 2023, the Claimant and his colleagues (including all those who he had worked with at Mighty Visage) attended a work social event – a barbecue at Mr Probert's private residence in Uckfield.

85. On 15 June 2023, the Claimant received a telephone call from Ms Knowles during which she informed him that his position was no longer viable and that he was being dismissed with effect from 30 June 2023. She stated that she would inform Mr Beyer about the decision.

86. The Claimant received a follow-up email from Ms Knowles that day. In the email, there was no mention at all of the Second Respondent. It stated:

"*Over the last few months, the 3D team have experience financial difficulties due to several factors. After exploring various options to improve the situation and changing the spend drastically to combat the lowered income, our efforts have still been unsuccessful, and we find that we must reduce our workforce to ensure the financial stability of the company.*

After reviewing our options, it is with regret that I inform you that your position is not longer viable effective 30 June 2023.

Your final pay will be on 01 July 2023 for the period 01 June 2023 to 30 June 2023 salary. It will be paid direct to your bank account. Your holiday entitlement from 20 March 2023 was 7.9 days, you have taken 8.5 days. However, as a good will gesture, there will be no deductions from your pay.

Within the next week, please reach out to Emmanuel or Terri if you have any remaining questions"

It was signed off, "Terri Knowles, OCS Software".

87. The Claimant received a call later that day from Mr Beyer who expressed his shock. He had not been aware of the First Respondent's decision and mentioned that, following the takeover, he no longer had any influence.

88. As the Claimant states in his witness statement, prior to the call from Ms Knowles on 15 June 2023, there was no warning or consultation and nor formal process was adhered to.

89. Ms Knowles' oral evidence was that she was conveying a decision to terminate the Claimant's employment on behalf of Mr Beyer and that it was the Second Respondent's decision to dismiss the Claimant and she was just helping out. She said that she sent the follow-up email to the Claimant at his request so that he could secure a statutory redundancy payment from the Secretary of State in respect of his redundancy by the Second Respondent who was, by now, insolvent.

90. However, the email came from OCS Software (the First Respondent's trading name), from its HR/Admin Manager (Ms Knowles) and makes no mention at all of the Second Respondent nor of insolvency. As Mr Camps pointed out in his questions in cross-examination (and which I accept), the email from Ms Knowles would serve no use at all for securing a statutory redundancy payment by reference to any alleged insolvency of the Second Respondent. I find that the email was sent to confirm the Claimant's dismissal, not as some kind of device to enable the Claimant to secure a statutory redundancy payment in connection with the Second Respondent.

91. On 20 June 2023, the Claimant messaged Mr Beyer to ask for his payslips, which he had not received since August 2022. Mr Beyer told him to "try Terri" as "she has everything".

92. On 21 June 2023, the Claimant emailed Ms Knowles to complain about the termination of his employment and note his right to a redundancy payment, notice and consultation. He also asked for copies of his payslips.

93. In her emails in response, Ms Knowles stated that the Claimant's employment contract was with the Second Respondent / Mr Beyer and that she had no payslip information to give him.

94. On 26 June 2023, the Claimant submitted a formal grievance in which he referred to his rights under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and listed his concerns as including: unfair

dismissal, denial of redundancy payment, lack of notice period, failure to apply TUPE regulations and non-provision of payslips. He asked, amongst other things, for a proper investigation and a written response to his grievance.

95. On 27 June 2023, Ms Knowles emailed the Claimant to say that his grievance should be addressed to the Second Respondent as she understood that he had been its PAYE employee "*before it ceased trading and closed in March 23*". She mentioned that she had collected information from him in March 2023 when he visited the First Respondent's offices which she "*had hoped to use if you came to work as an employee for our 3D Division, but you explained you were unable to work with us at our office as were too far for you to travel*". She referred to the telephone call in June 2023, stating that she had explained to him in that call that the First Respondent was unable to give him the hours of work that would equate to the same salary he had received from Mighty Visage Ltd and "*our client base would not cover the amount you requested*". As regards TUPE, she stated that "*there was no company takeover to apply TUPE with*".

96. The Claimant continued to work until 30 June 2023, although in the last week of June 2023, he found that his computer access was not working. He checked this with Alex Stokes who messaged him to say that there wasn't any work for the Claimant at the moment but he would let him know as soon as there was.

97. The Claimant was not paid his June salary in early July 2023 so followed this up by email dated 6 July 2023. Correspondence followed in which Ms Knowles asked him for a record of the "project hours" he had worked in June and she would get these signed off. The Claimant replied to state that he did not keep a record of project hours as he was paid monthly and not by reference to days/hours. He chased up payment and on 25 July 2023, Ms Knowles stated that she had confirmed that he worked 15.5 days in June "*which amounts to £1855.60*". He received that amount on 1 August 2023 and claims for the shortfall which he asserts was an unauthorised deduction from his wages.

98. The Claimant started to search for new employment from 20 June 2023 onwards. He made well over 30 applications, a number of which were included in the hearing bundle. He secured a new position which he started on 15 January 2024. He explained that he was in receipt of jobseeker's allowance from 21 July 2023 until 3 January 2024, receiving a total of £2204.80.

Mr Probert's evidence

99. In oral evidence, in response to questions in cross-examination, the key points asserted by Mr Probert were that:

    i) He met Mr Beyer through his accountant (in early March 2023), who had explained to Mr Probert that the Second Respondent was in real trouble.

ii) He (i.e. Mr Probert) decided that he would help Mr Beyer to save his business but not for any financial or other gain.
iii) When Mr Camps expressed some scepticism about this during cross-examination, Mr Probert said that he had saved other businesses in the past and when asked why, he stated, "it's the type of guy I am".
iv) At Mr Beyer's request, Mr Probert agreed to attend the meeting with the Second Respondent's employees and this was on 9 March 2023.
v) Mr Beyer did the talking and he was jusdt there as an observer because he wanted to help out.
vi) Mr Beyer told those present at the meeting, including the Claimant, that they would continue to be employed by Mighty Visage. He said that the First Respondent (iOffice Limited or OCS Software) was never even mentioned.
vii) Shortly after that meeting, Mr Beyer discovered that the Second Respondent's landlord had locked staff out of their office, so Mr Probert stepped in to negotiate the release of the Second Respondent's computers and equipment to be brought to the First Respondent's premises and the employees were then all instructed to attend those premises and carry on their work for Mighty Visage but at the First Respondent's office.
viii) Whilst he did intend to explore a financial bail-out, Mr Probert said nothing was ever agreed and that bail-out could have been by way of a loan or even a gift. He said that, during discussions between the two Respondents after the meeting with staff, he decided that he would bankroll the Second Respondent for a while as he just could not let the business of Mighty Visage go under. He decided that this would enable ongoing projects to be finished and to get started on projects which had not yet commenced and this would give the Second Respondent a chance to sort things out. He accepted that this bankrolling was to the tune of £100,000 or more.

100. When Mr Camps asked Mr Probert about the invoices from the Second Respondent to "OCS Software Ltd", he said that they were for staff wages and explained that VAT was charged on top to prove that this was "not a loan" but a "services invoice". However, Mr Probert later stated that these payments (totalling over £120K, including VAT) were actually a gift.

101. When Mr Camps asked Mr Probert about the provision of OCS Software email accounts to the staff who had previously worked for Mighty Visage and about the fact that the Mighty Visage website and LinkedIn pages directed users to OCS Software, he said, "*we lost control of the domain name*". When asked about his reference to "we" (in his answer) and whether he accepted this showed that OCS was fully involved in decision-making, he agreed that OCS was taking decisions with Mr Beyer.

102. Mr Probert was also asked about an email which was sent on 28 January 2024 to the Claimant's mightyvisage.co.uk email address and which was responded to by Mr Beyer (from his OCS Software email account), Mr Probert accepted that enquiries still coming in for the Second Respondent were finding their way quickly to the First Respondent. He said he didn't mind how business came in.

103. When asked by Mr Camps whether it occurred to Mr Probert to put any of the arrangements he had allegedly discussed with Mr Beyer in writing, even if only to protect himself or the First Respondent, Mr Probert said it had not.

104. Mr Probert explained that, in mid-April 2023, he decided that the bankrolling of the Second Respondent had to end. He decided that he would make sure ongoing projects were finalised and the staff were paid for the work contracted via the Second Respondent but that this would then bring the arrangement to an end.

105. As noted above, however, the Claimant continued to receive payments from the First Respondent's bank account in May and June and August 2023, well after the mid-April 2023 date when Mr Probert said, in his oral evidence, he decided that the funding had to stop and the experiment had failed.

106. Mr Camps asked Mr Probert about the Claimant's previous colleagues. Mr Probert explained that three of them commenced employment with the First Respondent on 1 July 2023 under new employment contracts under which their length of service with the Second Respondent was not recognised. He said that they were employed as 3D designers for OCS Studios.

CONCLUSIONS

107. The First Respondent's case has not been consistent. In Mr Probert's witness statement, he stated that the salaries which the First Respondent paid to the Claimant (and his former colleagues from Mighty Visage), by reference to invoices from the Second Respondent, were loans to the Second Respondent.

108. However, the First Respondent states in its ET3 that it was a "paid consultant" to the Second Respondent; yet, in his oral evidence, Mr Probert stated that the monies provided to help out the Second Respondent and/or Mr Beyer were a "gift".

109. I have detailed much of Mr Probert's oral evidence in these Written Reasons. I found Mr Probert's evidence very unsatisfactory. It was almost entirely all new evidence, in that none of it was contained in his witness statement (which itself had only been produced very close to the Final Hearing in any event). Furthermore, the evidence was implausible. I could not accept that a businessman of Mr Probert's experience and sophistication would simply bankroll another business out of the goodness of his heart and without anything being consigned to writing. This seemed even more implausible given that Mr Probert and Mr Beyer had never previously met and so did not even know each other and the amount allegedly gifted was over £100,000.

110. In some respects, Mr Probert's evidence was also internally inconsistent (for example, whether the funding provided to or on behalf of the Second Respondent was a loan, as per Mr Probert's statement, a gift as per his oral evidence, or a services fee because the First Respondent was a paid consultant to the Second Respondent (as per the ET3)).

111. I concluded that Mr Probert's evidence was a narrative contrived to obfuscate, in order to deflect attention from the clear account given by the Claimant, which had remained consistent and which was supported by the contemporaneous documents and the undisputable facts. I decided that I could place little if any confidence in the veracity of Mr Probert's evidence.

112. Therefore, where there was a dispute of fact in the evidence between the Claimant's account and that of the First Respondent, I preferred the Claimant's evidence.

Was there a relevant transfer?

113. Adopting the multi-factorial approach impressed upon me in the case law about the definition of a relevant transfer under TUPE, and applying that to my findings of fact, I have concluded that there was a transfer of an economic entity which retained its identity from the Second to the First Respondent with effect from 1 April 2023 at the latest. That economic entity was 3D Visual and Rendering activities carried out by Artists for clients, using specialist computer software. I have reached this conclusion for the following main reasons:

    i) The information conveyed at and after the meeting in March 2023 attended by Mr Beyer, Mr Probert, Ms Knowles and the Second Respondent's staff demonstrates that the First Respondent both intended to and then did undertake the economic activities which had been undertaken by the Second Respondent;

    ii) The Second Respondent's business premises were closed down and computers/equipment was moved to the First Respondent's offices and then continued to be used for the purposes of the same 3D visual and rendering projects (many of which were ongoing and continued). The activities were very similar, if not identical, before and after and the clients were the same;

    iii) Those staff who wished to remain working for the First Respondent did so (including the Claimant). Indeed, the majority of the Second Respondent's staff continued to work, on the same projects and for the same clients, from the First Respondent's premises.

    iv) The First Respondent's website was changed to show a new division (OCS Studios) which pretty much exactly described the business activities which the Second Respondent had been engaged in. The Second Respondent's website and Linkedin page diverted contacts to the First Respondent.

    v) Mr Beyer was removed as a company director of the Second Respondent on 23 March 2023 but continued to oversee projects and clients for the First Respondent, and later (on 15 June 2023) told the Claimant he no longer had any influence over business decisions.

    vi) The arrangements discussed between the Claimant and Ms Knowles on 21 March 2023 and then duly implemented, the forms which the

Claimant completed and the email correspondence are all consistent with the Claimant working for the First Respondent, from late March 2023 onwards. The Claimant took instructions from Ms Knowles about how to use the First Respondent's systems and informed her of holidays etc. He was given and OCS Software email and access to its online work calendar and door access to its premises.

vii) The First Respondent took over paying the Claimant and other staff who had previously worked for the Second Respondent from 1 April 2023 onwards.

viii) The Claimant and his former colleagues from Mighty Visage and their new colleagues all attended a work social at Mr Probert's private residence, marking the taking over of the Second Respondent's business activities and then the integration of its staff.

ix) There was no suspension in the 3D visual/rendering activities carried out by the Second and then the First Respondent.

114. There was no evidence before me of any formal transfer of ownership or of any contractual transaction by which property or other assets were transferred from the Second to the First Respondent but that is not determinative. I have concluded that Mr Probert's evidence is not reliable or credible and so I cannot be satisfied one way or the other as to whether there was a formal transfer of any property or other assets but I do not consider this is decisive, particularly in the context of all the other factors pointing so strongly towards a relevant transfer taking place. As for the invoices from the Second to the First Respondent, I find that these were an accounting mechanism by which salary payments could be budgeted and accounted for and, in any event, they referred to work completed in the months before and at around the time the relevant transfer happened (December 2022, January, February and March 2023).

115. Accordingly, there was a relevant transfer within the meaning of Regulation 3(1)(a) of TUPE 2006, on or around 1 April 2023 at the latest. The Claimant's contract of employment and the Second Respondent's rights, powers, duties and liabilities under or in connection with his contract transferred to the First Respondent.

Who dismissed the Claimant and what was the sole or principal reason for his dismissal?

116. The Claimant was dismissed on 15 June 2023, two and a half months later.

117. Who was he dismissed by and has he produced some evidence in support of his case that the sole or principal reason for his dismissal was the transfer?

118. I conclude that the Claimant was dismissed by Ms Knowles on behalf of the First Respondent, who now stood in the shoes of the Second Respondent, by reason of the relevant transfer, as the Claimant's employer.

119. The Claimant has produced some evidence in support of his case that the sole or principal reason for his dismissal was the transfer: the dismissal happened two and a half months after the transfer; the Claimant's contractual arrangements with the Second Respondent, which transferred to the First Respondent, were to work from home; the Claimant was onboarded and inducted (when he visited the First Respondent's office on 21 March 2023) and then continued to work effectively on his projects; but the First Respondent disliked his home-working arrangement, which it was bound to permit by virtue of TUPE, and tried to get him to agree to work from the office. He explained that this was not feasible for him (given the duration and expense of the commute from London to Sussex). The Claimant's home-working situation is not given as a reason in the email of 15 June 2023 from Ms Knowles confirming his dismissal which refers to financial difficulties and the need to reduce "our workforce". Whilst there was evidence of the Second Respondent having had financial difficulties, there was no suggestion to the Claimant in the period April to June 2023, nor indeed, in the evidence before me, that the First Respondent had been experiencing any financial difficulties. Therefore, the reason for the dismissal given in the email of 15 June 2023 is not supported by other events or evidence. Given the recency of the transfer, the Claimant does succeed in raising a *prima facie* case that the sole or principal reason for his dismissal was the transfer.

120. The First Respondent then has the burden of proving the reason for dismissal and, in particular, that the sole or principal reason for it was not the transfer. I conclude that it cannot do so. Whilst Ms Knowles referred (in her follow up email) to there being financial difficulties, there is no evidence of this; no-one else was put at risk of redundancy or dismissed at the time or since. Indeed, the evidence before me is that the Claimant's former colleagues who decided to remain have continued to be employed by the First Respondent. Furthermore, the First Respondent contrived a narrative to try to obfuscate the real events, including the fact of the TUPE transfer (saying in evidence that the arrangement between the two respondents was variously, a services contract, a loan or even a gift). All of this leads me to the clear conclusion that the principal reason for the Claimant's dismissal was the transfer, the First Respondent disliking having inherited an employee who was entitled to work from home.

121. The Claimant's dismissal by the First Respondent is, therefore, automatically unfair.

122. I note, however, that there was no process carried out at all to effect the Claimant's dismissal. Therefore, even if the Claimant's dismissal by the First Respondent was by reason of redundancy or some other substantial reason – which I have found it is not – I would have gone on to find that the First Respondent did not act reasonably in treating such reason as sufficient in all the circumstances. I would, therefore, have found the Claimant's dismissal to have been unfair under s.98(4) of the Employment Rights Act 1996 in any event.

Was the Claimant dismissed in breach of contract?

123. As already found, the Claimant was dismissed on 15 June 2023 and his employment terminated with effect from 30 June 2023. He, therefore, worked two weeks' and one day's notice. His employment is treated as having commenced on 16 July 2011. By 30 June 2023, he had 11 full years' continuous employment. He was, therefore, entitled to 11 weeks' notice.

124. The Claimant was, therefore, dismissed with short notice and is entitled to damages to compensate him for 8 weeks and four days' notice which he was not given and not paid for.

Was there an unauthorised deduction from wages?

125. The Claimant was a salaried employee who was paid a fixed monthly salary for normal working hours (of 40 hours per week). The Claimant remained employed and available and willing to work until his dismissal took effect on 30 June 2023. However, on 1 August 2023, he was only paid for 15.5 days for June 2023, rather than the full monthly salary that he was properly due.

126. As such, the First Respondent made an unauthorised deduction from the Claimant's wages on 1 August 2023.

The position of the Second Respondent

127. The Claimant's contract of employment and all rights and liabilities relating to it transferred from the Second to the First Respondent by 1 April 2023 at the latest. Consequently, the Second Respondent was not the Claimant's employer in respect of any of his claims and those claims, as against the Second Respondent, accordingly fail and are dismissed.

128. I, therefore, need to go on to consider remedy in respect of the claims against the First Respondent which are well-founded.

THE LAW ON REMEDY

Unfair dismissal

129. An award of compensation is the most common result in unfair dismissal cases. It is assessed under two heads; the basic award and the compensatory award (s118 of the Employment Rights Act 1996).

130. The provisions relating to the basic award are contained in ss119 to 122 of the ERA 1996. The award is calculated according to a formula based on age, length of service and gross weekly pay. A week's pay is subject to a statutory maximum which, at the time of the Claimant's dismissal, stood at £643 (s227 ERA 1996). As the claimant was aged 37 when he was dismissed, the relevant rate is one week's gross pay, capped at £643, for each full year of service.

131. The provisions relating to the compensatory award are contained in ss123, 124, 124A and 126 of the ERA 1996.

132. A compensatory award is intended to compensate for loss actually suffered and not to penalise the employer for its actions. Furthermore, where a loss of earnings would have been taxable in a claimant's hands, loss must be calculated net of tax and NI (*British Transport Commission v Gourley* [1956] AC 185). The relevant questions are: whether the loss was occasioned or caused by the dismissal; whether it is attributable to the conduct of the employer; and whether it is just and equitable to award compensation.

133. Permissible heads of loss include past and future loss of earnings; loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights (the latter reflects the fact that the claimant will have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed. The award is generally for a conventional amount, at present in the region of £500.

134. This is not a case where it has been suggested that any deduction would be made for misconduct prior to dismissal, contributory fault or under *Polkey*.

135. An employee who has been unfairly dismissed must mitigate his loss by taking reasonable steps to reduce his losses to the lowest reasonable amount. This does not mean that he has take all possible steps; and the burden of proving a failure by a claimant to mitigate lies on the respondent.

136. By s124 of the ERA 1996, there is a cap on the compensatory award for unfair dismissal which, at the date of the claimant's dismissal, was the lower of 52 weeks' (gross) pay or £105,707.

The relevance of Codes of Practice

137. Under s207A of the Trade Union and Labour Relations (Consolidation) Act 1992, an award of compensation for certain claims (including unfair dismissal, wrongful dismissal and unauthorised deduction from wages) can be increased by up to 25% if the employer has unreasonably failed to comply with a relevant Code of Practice issued by ACAS or the Secretary of State (there is a corresponding power to reduce awards by up to 25% where an employee unreasonably failed to comply with a relevant Code). This power to increase or reduce does not apply to a basic award for unfair dismissal (per ss118 and 124A of the ERA 1996).

138. The Claimant seeks an uplift for the Respondent's breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). This Code does not apply to dismissals because of redundancy or 'some other substantial reason' unless, on the facts, the dismissal is one where disciplinary or similar formal proceedings (eg, for poor performance) are, or ought to be, invoked against the employee. The ACAS Code, in addition, applies to grievances at work and, so, where the claim arises out of a concern, problem or complaint that an employee rases (in writing) with his employer, any breach of the grievance provisions in the Code can be considered in determining whether there should be an uplift in any compensation awarded for that claim (*SPI Spirits (UK) Ltd v Zabelin* [2023] EAT 147).

Section 38 of the Employment Act 2002

139. Under s38 of the Employment Act 2002, where a tribunal finds in favour of an employee's claim and where – at the date the proceedings were commenced – the employer was in breach of the duty to give the employee written particulars of employment under s1 of the ERA 1996 (or a statement of changes to particulars under s4(1) of the ERA 1996), then the tribunal will make an ward of 2 weeks' gross pay unless it would be unjust and inequitable to do so; and may, if it considers it just and equitable in all the circumstances, make an award of 4 weeks' gross pay.

140. A week's pay for this purpose is subject to a statutory maximum which stood at £643 at the date of the claimant's dismissal. The award, if made, must be added *after* the application of any uplift or reduction in relation to compliance with Codes of Practice (see *Digital Equipment Co Ltd v Clements* [1998] ICR 258).

CONCLUSIONS ON REMEDY (First Respondent only)

Unfair dismissal – basic award and compensation for loss of statutory rights

141. The Claimant's gross weekly salary was £780 (607.79 net).

142. Having regard to the Claimant's age and length of service at dismissal and the cap on a week's pay (£643, at the date of his dismissal), I award him 11 weeks' gross pay (capped), so **£7073** by way of a basic award.

Unfair dismissal – compensatory award

Loss of statutory rights

143. I award **£500** for loss of statutory rights.

Past loss of earnings

144. The Claimant's losses stopped when he commenced his new job on 15 January 2024 so this is a case where only past loss of earnings will be awarded.

145. The claimant made a large number of relevant job applications, and started his search before his effective date of termination (i.e. on 20 June 2023). A number (but not all) the applications were produced in evidence. The Claimant managed to secure a new job which started on 15 January 2024 (with gross pay of £41,000 per annum, so just higher than his salary with the Second, then First Respondent). I conclude that the Claimant took reasonable steps to mitigate his loss and that I should award him his past loss of earnings but I do this from the day after what would have been the expiry of his full notice period on Friday 1 September 2023 until his job

started on Monday 15 January 2024 (19 weeks and 1 day – i.e. 19.2 x £607.79) = **£11,669.57**.

Wrongful dismissal

146. I will separately award 8 weeks and 4 days' pay as compensation for wrongful dismissal (he was given 2 weeks and 1 day's notice, on 15 June 2023, instead of the 11 weeks he was entitled to).

147. This avoids double-counting his loss for the period between his effective date of termination (30 June 2023) and the end of what should have been his notice period (31 August 2023).

148. I award this on the basis of his gross pay (8.8 x £780), subject to deductions at source for tax and national insurance by the First Respondent, so **£6864** (gross).

Redundancy payment

149. The Claimant was not dismissed by reason of redundancy and, in any event, I have awarded him a basic award for unfair dismissal so he would not be entitled to an additional statutory redundancy payment in any event.

Unauthorised deduction from wages

150. On 1 August 2023, the First Respondent paid the Claimant £1855.60 for his June 2023 wages, instead of his full monthly salary (net) properly due of £2633,76. It, therefore, made an unauthorised deduction from his wages in the sum of £778.16 which I award him in respect of this claim.

ACAS adjustment

151. I conclude that the ACAS Code of Practice on Disciplinary Procedures did not apply to the Claimant's dismissal as he was not dismissed for conduct or poor performance or similar which would require the disciplinary aspects of the Code to be followed.

152. However, the Grievance Procedures part of the ACAS Code of Practice did apply. The Claimant submitted a written grievance on 26 June 2023 and asked for a response in writing (rather than a meeting). He received a written response on 27 June 2023. However, little if any investigation had actually been carried out, the First Respondent denied that it was the Claimant's employer and it did not afford the Claimant a right of appeal (although, in Ms Knowles' email, she did state, "*I hope this clarifies my position. However, as I previously explained, I would be happy to help with anything I can*". In these circumstances, I do not consider there was an unreasonable failure to following the grievance procedures in the ACAS Code and I have decided that it would not be appropriate to award an uplift.

Section 38 Award

153. I have to decide whether there has been a breach of the duty to provide a statement of changes under s4(1) of the ERA 1996 (since the Claimant accepts he had been provided with a statement of initial particulars). Under s4(6) and (7) of the ERA 1996, it is apparent that the First Respondent was required to provide a statement of changes to confirm the Claimant's continuous service and to update the identity of the Claimant's employer (i.e. to amend this from the Second Respondent to the First Respondent).

154. When the Claimant commenced these proceedings, the First Respondent was in breach of s4(1) of the ERA 1996. I, therefore, award the minimum of 2 weeks' pay (capped at £643). I do not consider that 4 weeks should be awarded. The First Respondent is not a large employer and appeared not to understand, at least initially, the circumstances in which the protections under TUPE 2006 would apply. This is not the most egregious of breaches and it, therefore, would not be appropriate to award 4 weeks' pay.

CALCULATION

(1)	Basic award (unfair dismissal) 11 x £643	£7073
(2)	Loss of statutory rights	£500
(3)	Compensatory award (unfair dismissal) for 19 weeks & 1 day (19.2 weeks) 19.2 x £607.79 (net)	£11,669.57
(4)	Wrongful dismissal for 8 weeks & 4 days (8.8. weeks) 8.8 x £780 (gross)	£6864
(5)	Unauthorised deduction from wages (net)	£778.16
(6)	Award under s38 EA 2002 2 x £643	£1286
	TOTAL	**£28,170.73**

Note: there is no need for any grossing up as the total of the awards is less than £30,000 which is the maximum amount enjoyed tax free in respect of payments (other than post-employment notice pay) in consideration of or in consequence of termination of a person's employment (s401 of ITEPA 2003).

Recoupment

155. The Claimant claimed and was in receipt of jobseeker's allowance so I am required, in this Judgment, to identify four items of information which must then be provided to the Department for Work and Pensions:

(i) The amount of any prescribed element
(ii) The prescribed period
(iii) The total amount of the award
(iv) The balance

156. This enables the sum to be identified within any award from which the Secretary of State for Work and Pensions may seek recoupment.

157. In this case, the prescribed element is the past loss of earnings for unfair dismissal, totalling £11,669.57.

158. The prescribed period is calculated from the day after of what should have been the end of the Claimant's notice period (1 September 2023) to the date the parties were sent this Judgment (2 May 2024), so 34 weeks and 4 days.

159. The total of all awards is £28,170.73.

160. The balance (which is the difference between the total and the prescribed element) is £16,501.16.

161. The parties are directed to the Annex to this Judgment which explains the Recoupment of Benefits rules and what the First Respondent must do in respect of payments to the Claimant now or at a later date, subject to whether a Recoupment Notice is served.

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Employment Judge McCann

_1st May 2024_____

Date