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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102744/2024**

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**Final Hearing  
held on the Cloud Video Platform  
on 23, 24 and 25 September 2024**

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**Employment Judge A Jones  
Tribunal Member F Paton  
Tribunal Member A Atkinson**

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**Mr John Coleman**

**Claimant  
Represented by:  
Mrs Travers, counsel  
Instructed by  
Morris Legal (Solicitors)  
Ltd**

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**Orkney Crab Ltd**

**Represented by  
Ms McJannett, solicitor**

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**JUDGMENT**

It is the unanimous judgment of the Tribunal that:

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1. The claimant was constructively and unfairly dismissed;
2. The claimant's dismissal was automatically unfair in terms of section 100 Employment Rights Act on the basis that the principal reason for his dismissal was that he had raised health and safety concerns with his employer.

3. The claimant's dismissal was not automatically unfair in terms of section 103A Employment Rights Act.
4. A one day hearing on remedy should be listed to take place on the Cloud Video Platform to determine what remedy the Tribunal should award to the claimant in terms of his unfair dismissal.
5. The respondent failed in the duty to inform and consult the claimant in terms of regulation 13 TUPE and is ordered to pay to the claimant compensation in the sum of £9256 being equivalent to 13 weeks' gross pay in that regard.

10 **Introduction**

1. The claimant submitted an application to the Tribunal on 15 February 2024 claiming that he had been constructively and unfairly dismissed in terms of section 98 Employment Rights Act 1996 ('ERA') and that his dismissal was automatically unfair in terms of sections 103A and/or 100 of ERA. In addition the claimant subsequently amended his claim to include a claim that the respondent had failed in the duty to inform and consult him in relation to the transfer of his employment in terms of the TUPE regulations.
2. The respondent's position was that the claimant had resigned to take up an alternative position and that his resignation was not related to health and safety issues or having made a protected disclosure. The respondent accepted that the duty to inform and consult had not been complied with but argued that there were special circumstances which rendered it not reasonably practicable to comply with the duty. There was no dispute that TUPE applied to the transfer of the claimant's employment.
3. A joint bundle of documents was lodged. The claimant gave evidence and prior to him giving evidence, evidence was led on his behalf from Mr Crichton who is his current employer. Mr Crichton was not available other than on the first day of the hearing and the respondent had no objection to his evidence being heard prior to that of the claimant. The claimant was not present for Mr Crichton's evidence. The respondent led evidence from four witnesses, being Ms McInnes who had been the General Manager of the respondent and Orkney Fisherman's Society Ltd ('OFS') before it, Mr

Adamson who had been the Shellfish Manager and was now Operations Manager for the respondent, Mr Tosh from the administrators and Mr Knight whose company had purchased OFS. Both parties then made submissions and helpfully provided an outline of those submissions in writing

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### Issues to be determined

4. The Tribunal was required to determine the following issues:

- 10 i. Was the claimant dismissed in that he terminated his contract of employment (with or without notice) in circumstances in which he was entitled to terminate it without notice by reason of the employer's conduct?
- 15 ii. If so, was the claimant's dismissal unfair in terms of section 98 ERA?
- 20 iii. If the claimant was dismissed, was his dismissal automatically unfair in terms of section 100 ERA, in that the reason for his dismissal (or if more than one, the principal reason) for the dismissal was that being an employee at a place where there was no health and safety representative or safety committee, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonable believed were harmful or potentially harmful to health or safety?
- 25 iv. Did the claimant make a protected disclosure in terms of section 43B ERA?
- 30 v. If the claimant did make a protected disclosure, was the reason for his dismissal, (or if more than one, the principal reason) for the dismissal that he made a protected disclosure.
- vi. If the claimant was unfairly dismissed what remedy should be awarded?
- vii. Were there special circumstances which rendered it not reasonably practical for the respondent or OFS to fail in a duty to inform and consult representatives in terms of Regulation 13, Transfer of Undertakings (Protection of Employment) Regulations 2016 ("TUPE").and if so, did the respondent or OFS take all such steps

towards performing that duty as were reasonably practicable in the circumstances?

- viii. If the Tribunal is not satisfied that there were such special circumstances, what compensation should be awarded to the claimant in that regard?

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### Findings in fact

5. Having considered the evidence, the documents to which reference was made and the submissions of the parties, the Tribunal found the following material facts to have been established.
6. The claimant was employed by OFS from 3 May 1993. His employment was transferred to the respondent on 18 October 2023 by virtue of TUPE. The claimant's employment terminated on 31 October 2023. He had been employed as Factory Manager for 27 years. His father had previously been employed in the role of Factory Manager.
7. His normal take home pay was £2345.24 per month and his annual salary was £37,000. His gross weekly pay was £712.
8. OFS was a company which processed, cooked and sold crab. The claimant was responsible for ensuring that the processing and cooking of the crab was done in accordance with the relevant food safety regulations and policies operated by his employer. The claimant had, in consultation with others, drafted the policies which applied in this regard and was responsible for ensuring that these were adhered to and providing training to staff to ensure such adherence.
9. OFS had a board of directors and the general manager from around 2018 was Ms Fiona McInnes ('FM') who had previously been employed in the role of Financial Controller. The claimant reported to FM who reported to the Board. Processing and cooking staff together with the production manager and quality manager reported to the claimant.
10. Karl Anderson ('KA') was at the time of the relevant events employed as Live Shellfish Manager. He also reported to FM and was of a similar level of seniority to the claimant. He was responsible for dealing with orders and delivery of live shellfish, which were mainly crab, to the factory for

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processing. In that regard, he engaged with suppliers in relation to the sourcing and transporting of crab to the factory.

- 5 11. Until around mid-2023, the claimant had been consulted upon and involved in strategic decision making in relation to OFS, including in relation to suppliers and customers.
12. OFS had suffered significant financial difficulties following the pandemic and BREXIT and these worsened throughout 2023. OFS experienced difficulties in paying suppliers. In addition, the availability of supply of crab from Orkney fishing boats decreased at various times of the year.
- 10 13. From 2023, OFS began sourcing crab outwith Orkney more than had previously been the case. The claimant was not involved in these discussions in the manner he had previously participated and the discussions took place instead between KA and FM. Crab had previously been sought from outwith Orkney but the claimant had been involved in the discussions and decision making.
- 15 14. For health and safety reasons, crab ought only to be cooked when it is still alive and the respondent's practice was to cook crab when it was alive and had been stunned. There is a risk of bacterial infection if crab is not cooked according to health and safety standards. The claimant sought to maintain the highest health and safety standards throughout his employment.
- 20 15. OFS did not have in place a health and safety representative or health and safety committee in terms of section 100 ERA.
16. During summer of 2023, the claimant became aware that when crab was being transported increasingly from suppliers outwith Orkney the number of dead crab arriving at the factory was increasing.
- 25 17. On 20 June OFS received a delivery of crab in large skips. The claimant had not been consulted about this method of supply which had in the past caused difficulties with high mortality rates and difficulties emptying the containers. On this occasion a high mortality rate was reported by the claimant's staff.
- 30 18. The claimant spoke to FM and expressed his extreme concern about crab being delivered in this manner. FM indicated she would address the issue and would speak to KA about the difficulties. The claimant was never

informed of any action taken in this regard and similar issues arose a few weeks later.

- 5 19. Around this time the claimant also raised concerns with KA regarding problems with waste building up in the yard which was KA's responsibility to move. The claimant raised a concern that there was a risk of infestation and asked KA what the issue was. KA indicated that bills were not being paid. The claimant tried to raise potential ways of saving money with KA regarding improving the condition of the crab which arrived but KA became aggressive and indicated fisherman wouldn't take the steps being
- 10 suggested, so the claimant ended the discussion. The claimant had been a fisherman prior to his role with the respondent.
- 15 20. On 1 August KA entered the chill area of the factory during the night shift and instructed one of the boilermen, Bobby Halco ('BH') to keep a pallet of dead crab in a chiller with live crab overnight. This was not the respondent's practice due to health and safety concerns. KA had not discussed this proposed change in practice with the claimant despite this being the claimant's responsibility and the staff member concerned reporting to the claimant and not KA. BH engaged in a series of Whatsapp messages with
- 20 the quality manager Vicky Toth ('VT') and the claimant regarding these issues. KA encouraged BH to breach the health and safety procedures as there was a financial value in the dead crab being sold as bait and he wanted the dead crab stored in a way in which it would be sellable for this purpose which required it to be chilled.
- 25 21. In addition on 1 August KA had an argument with BH and said that in his opinion BH should have cooked some of the crab which BH had discarded as being dead.
- 30 22. The following morning these issues were reported to the claimant by BH and VT to whom BH had initially reported the incident. The claimant viewed the CCTV footage which was available although sound was not recorded. The claimant concluded that KA had had an argument with BH and that it appeared that KA had been instructing BH to cook crab which BH had concluded was dead and that BH had made clear his refusal to do so.

23. The claimant's view was that BH had acted properly and in line with health and safety policies and procedures in his interactions with KA. KA did not approach the claimant directly thereafter to discuss the matter. Instead KA approached FM and had a meeting with her where they discussed that too much crab was being discarded and not cooked.
24. In the days following this incident, FM asked the claimant to attend a meeting with her. When the claimant arrived KA was also present. Both KA and FM expressed concerns that BH was discarding too much crab as dead and that as the company was already in a precarious financial situation, if this position continued it could cause the company further difficulties. The claimant expressed the view that BH had acted appropriately. The claimant was the most qualified to express a view on this matter given it was his responsibility, he had drafted the policies and neither KA nor FM were familiar with the practical operation of the factory procedures. The claimant was satisfied with the performance of BH and his judgment was that the issues in relation to the financial situation of the company were being exacerbated in relation to the transportation and the quality of the product being supplied and not the cooking of the crab.
25. Following this meeting the claimant considered the matter further. He was concerned that further pressure might be placed on his staff to either cut corners in relation to health and safety procedures to save money or to follow instructions which might be in breach of those procedures. He therefore proposed to FM that all the cooking of crab should be done during the day when he was present in the factory, and no cooking to take place on nightshifts. The claimant expressed the view to FM that this would allow him to take back control of the process from the potential interference of KA or FM.
26. From this stage the working relationship between the claimant and KA became cold and there was very little communication between them.
27. In addition from this stage the relationship with FM and the claimant, which had previously been a positive working relationship became difficult. While the claimant had previously had regular meetings to discuss issues with FM, he very rarely saw her from this point and was not invited to meetings which

he witnessed taking place between FM and KA. In addition, FM began working from home more regularly because she was finding it increasingly difficult to cope with the financial position of the company and trying to remain positive with other staff while at work. FM was also off work with stress arising from this issue for a few weeks.

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28. On 29 August following a further delivery in the large containers about which the claimant had complained, VT was waiting for the claimant when he arrived at work. Twenty four five hundred kilos skips, rather than the normal 300 kilo skips had been delivered. There was around twelve tonnes of crab in total. The claimant took pictures of the crab, which were black and decomposing. The smell was so bad that the claimant and VT had to wear face masks. Almost all the crabs which had been delivered were dead. Both the claimant and VT were extremely upset at the situation and in particular the issue of animal welfare.

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29. OFS had a procedure whereby concerns could be raised by completing a Non- Conformance Report. The claimant and VT completed a report in relation to this delivery and gave it to FM. The purpose of such reports was to provide specific detail of what had happened so that this could be formally investigated and recommendations made to prevent a reoccurrence. FM did not take any formal action when she received the report. She did not discuss the report with the claimant or tell him what action she might take or why she was not taking any action. At the time FM was struggling to cope with carrying out her duties and had in mind that there were no funds to pay the company concerned for delivery, and did not take any formal action.

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30. A further delivery arrived on 13 September where again most of the crab were dead. On this occasion OFS transportation had been used to bring the crab to the factory. The refrigeration of the transportation was not working at the time and it was during a very hot period of weather. KA had been aware of issues in relation to the transportation but had not discussed these with the claimant.

31. The claimant completed a second non-conformance report regarding this delivery and provided it to FM. No action was taken by FM in relation to this



report and she did not provide any feedback to the claimant regarding the report or any steps she might or might not take or the reasons for so doing.

32. By this stage the claimant had reasonably formed the view that health and safety was no longer a priority for OFS and that FM and KA had taken the view that the claimant was causing problems for the respondent by continuing to raise food safety concerns with FM.

33. While the claimant had an awareness that OFS was in serious financial difficulty, in that he had heard that local suppliers were now refusing to supply the company because of unpaid bills, no information was provided to him from FM about the position or what steps might be taken. The claimant heard a report on Radio Orkney that OFS was in serious trouble shortly before 13 September and that the company was looking for buyers. The report suggested that OFS were confident of keeping the live shellfish department and the fish shop open. The claimant's staff who heard this broadcast expressed concern to him (as it was suggesting that their jobs might be at risk) and he spoke to FM to ask if this was accurate. The claimant was told that this was not accurate and that a buyer was being sought.

34. During this period the claimant was required to deal with an unannounced audit from a major customer on his own as FM was not at the premises when they arrived. FM subsequently followed up on this audit with VT, rather than the claimant as would normally have been the case. The claimant understood that FM had attended the Highland Show rather than be present for the audit and understood that she had "given up".

35. At the beginning of October, FM sent an email to the claimant indicating that representatives were coming to assess assets and that the claimant was required to be available to conduct tours for them. KA was kept up to date by FM regarding potential buyers, one of whom was well known to KA. KA gave this information to his staff, including those in the fish shop where he was based regarding the possible sale. No such information was provided to the claimant to allow him to inform his staff.

36. FM appointed FRP administration and insolvency practitioners and an Accelerated Mergers and Acquisitions process commenced in relation to

OFS on 25 September 2023. A notice of intention of administration was filed at Kirkwall Sheriff Court on 5 October 2023. PDK made an offer to purchase OFS on 10 October and the sale was completed on 18 October.

- 5 37. The claimant's quality manager, VT and his production manager Steven Ward, had both resigned by this time and left OFS around 13 October.
38. On Friday 13 October, FM walked past the claimant's office and in passing told him that Mr Knight had bought the company. She asked the claimant whether he would be staying and he replied that he would. FM appeared surprised by the claimant's answer.
- 10 39. No efforts were made to formally inform or consult with staff regarding a potential transfer of their employment or any potential redundancy situations. There was no discussion about electing representatives with whom to consult on these matters.
- 15 40. The claimant took the weekend to consider his position given the events of the previous months. The claimant's whole career had been with OFS and he was justifiably proud of his work. He did not wish to give up his career and wanted to try to find a way to stay with the company.
- 20 41. On Monday 16 October, when he attended work a junior member of staff from the fish shop told the claimant that the new owner would be coming to the site the following day and that he would be bringing a new production manager to the site. Another member of staff approached the claimant on 16 October and indicated that he had been offered BH's job by KA. There had been no discussion with the claimant in relation to this issue. The member of staff was at the time in BH's team and junior to him.
- 25 42. The claimant went back to his office and wrote a letter of resignation. He first carried out some research on the internet as to how to draft a letter of resignation and understood that he should be brief and non-confrontational. He then delivered that letter to FM. FM did not ask him why he was leaving, despite being aware that he had 30 years' service and knowing that a new owner would be in place imminently. FM did not ask the claimant why he
- 30 resigned as she was already aware of the health and safety concerns the claimant had raised and knew that she had not taken any action in relation to them and that the claimant was very unhappy with developments in the

company. In addition, FM made no attempt to dissuade the claimant from resigning as might have been expected if FM had been of the view that the claimant's departure following the departure of other members of team, might impact on the sale of the business. FM and KA were both aware at this stage that there had been discussions regarding the new owner bringing in some of his own staff to help with the running of the business. None of this was discussed with the claimant.

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43. The claimant indicated that he still had holidays to take and FM agreed that the claimant could take these holidays instead of working a notice period.
- 10 The claimant then packed up his belongings and left the factory.
44. Had the claimant raised a formal grievance regarding his employment, this would have been unlikely to have been dealt with by FM or anyone else.
45. The claimant received a letter on 20 October at his home which was dated 19 October indicating that his employment had been transfer to PDK Shellfish Ltd on 18 October in accordance with the Transfer of Undertakings (Protections of Employment) Regulations 2006.
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46. Representatives from FRP attended at OFS on 18 October and had previously unannounced meetings with the staff who were present to tell them of the transfer. The claimant was not invited to any meetings. There was no further contact from anyone from OFS or the new owner with the claimant prior to the termination of his employment.
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47. On the transfer of the business, KA was promoted to the role of Operations Manager. A consultant was engaged as production manager who took over the claimant's responsibilities. The employment of approximately fifty five members of staff (including that of the claimant) transferred to PDK on 18 October.
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48. Had the claimant not resigned from his employment his intention was to remain in post until his retirement.
49. The claimant contacted Mr Crichton, who had previously been MD of OFS on 16 October after he had handed in his resignation. Mr Crichton was now MD of Stockan's Oatcakes. Both VT and Steven Ward had taken up managerial appointments with Stockan's Oatcakes on their departure from OFS. Mr Crichton indicated that he could offer the claimant employment but
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it would not be in a managerial role. He indicated that he did have factory floor positions available. The claimant took up employment in that role with effect from 1 November. The claimant now reports to Steven Ward, who used to report to him. The claimant finds the physical and monotonous nature of the work both physically and mentally challenging. He has sought to obtain more senior roles on Orkney with no success. He has recently reduced his hours to four days per week because he finds the role too physically demanding.

50. Prior to reducing his hours, the claimant's monthly net pay was £1453.

#### 10 **Observations on the evidence**

51. The Tribunal found the claimant to be an impressive witness. He was credible and reliable and had clearly taken his duties in relation to health and safety seriously. He presented as a thoughtful individual who took time over making important decisions and who had taken pride in his career and was extremely reluctant to give up his career. Where the claimant's evidence was in conflict with that of the respondent's witnesses, the Tribunal had no hesitation in preferring that of the claimant. In addition, the Tribunal noted that much of the claimant's evidence was not challenged. He was not challenged for instance on having been told that a new production manager would arrive on site on 17 October, nor that Mr Halco's role had been offered to another member of staff by KA without any discussion with the claimant. The respondent's position appeared to be that the claimant had resigned not because of issues with OFS and the transfer of his employment, but because he had obtained alternative employment. The respondent produced no evidence to support that position, which in any event appeared entirely incredible. The respondent did not put forward any logical basis on why an employee with 30 years' service would give up his managerial employment to take on a manual role earning half the pay and reporting to someone who had previously reported to him. While the respondent's witnesses said they had 'heard rumours' that the claimant would go to work at Stockan's Oatcakes, they did not say who they heard this from, or when and certainly did not suggest that had actually asked the

claimant about whether he had obtained alternative employment. The Tribunal accepted the claimant's evidence and that of Mr Crichton, neither of which was actually challenged, that the claimant did not contact Mr Crichton to discuss alternative employment until after he had handed in his resignation.

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52. The Tribunal found FM to be somewhat defensive in her evidence. While the Tribunal accepted that she had a very difficult time in seeking to manage OFS through an administration and sale, she did not give the impression that she taken any steps to make herself aware of issues which might arise in relation to the workforce as a result of these difficulties. She said that she put a poster in the canteen at some point saying something to the effect that there might be good news for staff soon, but otherwise did not engage in any way staff in terms of consultation, arrange staff meetings or provide information to staff. She kept KA apprised of developments despite him being of the same level of seniority of the claimant and took no steps whatsoever to ensure that the claimant and his staff were kept advised of developments. Indeed the Tribunal formed the view that FM had become quite hostile to the claimant by August 2023 and communicated with him as little as possible thereafter. It was astonishing to the Tribunal that the most senior member of staff of an organisation would not ask a member of staff with 30 years' service why he was resigning. The Tribunal concluded that FM was, as was the claimant's evidence, relieved that the claimant was resigning as he had become as the claimant put it "a thorn in her side". She would also have been aware of the potential of new staff being brought in to replace the claimant and those who had already resigned.

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53. KA's evidence was that in the last few months of the claimant's employment his relationship with the claimant had become "cold". The Tribunal accepted that evidence and concluded that this was because the claimant was viewed as a difficult employee who raised issues of health and safety on a regular basis, when KA and FM wished to focus on the sale of OFS. KA was well known to the ultimate purchaser and is now employed in a more senior role than with OFS and took over the claimant's office when he left. The Tribunal therefore concluded that KA saw the claimant's departure as an

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opportunity for him. The Tribunal accepted KA's evidence that he was willing to breach procedures by keeping dead and alive crab together in a chill where there was a financial benefit in so doing.

5 54. The evidence of Mr Tosh was straightforward. He made clear that FRP had not been engaged to give employment law advice to OFS and said that he was not aware of anyone ever informing FM that she could not say anything to staff regarding the potential sale of the company.

10 55. Mr Knight was also straightforward and the Tribunal had a great deal of sympathy with the position in which he found himself. The Tribunal accepted his evidence that at least part of his intention in completing the purchase was on an emotional level to save the company. It was clear that Mr Knight had been given very little information regarding the background to the claimant's claim and that only negative things had been said to him by KA and FM regarding the claimant.

15 56. One of the key issues in dispute was the extent to which either FM or KA asked either the claimant or BH to cook dead crab. The Tribunal accepted that the claimant was never directly asked to cook dead crab by anyone. However, the Tribunal formed the view that FM and KA made it clear to the claimant at the meeting with him that corners could be cut in terms of  
20 adherence to health and safety rules in terms of cooking crab and that a failure to reduce the number of crab received and not cooked would impact on the company's already precarious financial position. The claimant was entitled to form the view that he was being asked to oversee the cooking of crab which was not in a state that would ordinarily be cooked.

25 57. In terms of the interaction between BH and KA, while it was accepted that the claimant was not present at the incident, based on his evidence of having viewed the CCTV footage, the WhatsApp messages sent by BH and the evidence from KA, the Tribunal concluded that KA had said to BH that he should have cooked crab which BH had determined was already dead.

## Discussion and decision

### Was the claimant dismissed?

- 5 58. In the first instance it was necessary to determine whether the claimant was  
entitled to resign and treat himself as dismissed. This involved a  
consideration of whether the test set out in **Western Excavating v Sharp**  
10 **[1978] ICR 221**, was met. This involved determining whether the  
respondent had committed a repudiatory breach of contract, whether the  
claimant had accepted that breach, had resigned in response and not  
delayed unduly in so doing. As highlighted in the claimant's submissions, in  
last straw cases, the last straw may revive previous breaches of contract  
which an employee might otherwise have been found to have affirmed  
15 **(Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA)**. In  
addition, it is not fatal to an employee's case not to expressly inform the  
employer of the reason for resigning if there is sufficient evidence before the  
Tribunal to infer the reasons for the employees' resignation **(Mruke v Khan**  
**ICR 1146, CA)**. If an employee resigns with notice that may but does not  
necessarily indicate that an employee has affirmed the contract. Each case  
20 will turn on its own facts.
59. In **Kaur**, the Court of Appeal suggested that the following questions were  
relevant in a last straw case.
- 25 i. what was the most recent act (or omission) on the part of the  
employer which the employee says caused, or triggered, his or her  
resignation?
  - ii. has he or she affirmed the contract since that act?
  - iii. if not, was that act (or omission) by itself a repudiatory breach of  
contract?
  - 30 iv. if not, was it nevertheless a part of a course of conduct comprising  
several acts and omissions which, viewed cumulatively, amounted to  
a repudiatory breach of trust and confidence?
  - v. did the employee resign in response (or partly in response) to that  
breach?

60. In the present case, the claimant relied on a number of breaches of contract, being

- i. a failure to adequately address the legitimate concerns he had raised over health and safety;
- 5 ii. a deterioration in the respondent's treatment of the claimant, in particular that at various times he had his authority as factory manager undermined, was excluded from key decisions and process that were necessary for him to do his job and that he had been involved in previously, and that general communications with him became both less frequent and/or more hostile.
- 10 iii. An increasing acceptance within the company of poor food safety standards/health and safety risks which had the potential to put both end consumers and the company at risk
- iv. a failure to adequately communicate to employees and the claimant in particular the seriousness of the company's financial situation and the potential impact of this on their future employment.
- 15 v. Separately, or as a result of the above, that the respondent created or allowed to be created, an intolerable work environment.

61. The claimant's position was that there were then "last straws" on 16 October 2023. First, the claimant was informed by a colleague that KA who appeared to be acting as quasi general manager at this point, had offered the claimant's direct report, BH's job to someone else, BH being still in employment at this time and that second, also previously unbeknown to the claimant, that the new owner and new production manager would be arriving the next day.

62. The respondent's position was that nothing the employer did amounted to a breach of any express or implied term of the claimant's contract of employment and that even if there had been a repudiatory breach the claimant had waived the breach. Finally the respondent's position was that the claimant's resignation was not in response to any breach or in connection with the sale to the respondent. The respondent maintained the position that the claimant resigned in order to take up alternative



employment, although no evidence was introduced to support that submission.

5 63. The Tribunal considered whether the events said to amount to breaches of contract occurred. The Tribunal accepted that these events did occur and that individually and collectively they amounted to breaches of the claimant's contract of employment.

10 64. The Tribunal then considered whether the 'last straw' events occurred. The Tribunal accepted that the claimant was informed by a colleague that he had been offered BH's employment. The claimant was not cross examined on this point and no evidence was led from KA regarding the position. The claimant's evidence was therefore accepted as unchallenged. In the Tribunal's opinion, that was a clear breach of contract on the part of the respondent. In addition the Tribunal accepted that the claimant was informed by a member of the sales staff in the Fish Shop where KA was based that the new owner would be arriving the next day with a new production manager. It was put to the claimant that this was simply rumour and conjecture. However, the claimant's evidence, on which he was not cross examined, was that in fact this is what subsequently happened. In addition, this was consistent with the evidence of KA and Mr Knight. The Tribunal accepted that this was not the exact evidence given by either Mr Knight of KA, but it noted that Mr Knight did not, unsurprisingly, have a clear recollection of the order of events around this time given the speed at which events had moved. KA appeared aware of the issue and gave evidence that he had given information about the sale to colleagues. The Tribunal  
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25 therefore concluded that these events took place and that the claimant was entitled to view them as more than rumour or conjecture.

30 65. As set out above, these last straw events did not of themselves require to amount to fundamental breaches of contract in order of the claimant to rely on them. The breach required to be more than trivial and the Tribunal accepted that the offering of a job within the claimant's team to someone without the claimant's knowledge was a breach as was the introduction of a new production manager (whether as a consultant or employee) which would inevitably impact on the claimant's role.

66. The Tribunal therefore concluded that the respondent had fundamentally breached the claimant's contract of employment in a manner in which the claimant was entitled to resign without notice.

67. No potentially fair reason was put forward by the respondent for the claimant's dismissal and the Tribunal was satisfied that his dismissal was unfair.

#### **Was the claimant unfairly dismissed in terms of section 100 ERA?**

68. The Tribunal then went on to consider whether the principal reason for the claimant's dismissal related to health and safety issues in terms of section 100 ERA.

69. While the claimant had responsibilities for health and safety matters, there was no evidence led to suggest that he was a representative of workers in relation to matters of health and safety. The respondent did not lead any evidence to suggest that there was a health and safety committee or representative with whom the claimant ought to have raised any concerns. The Tribunal therefore concluded that the provisions of section 100(1)(c) applied in this case. The respondent did not address this issue directly in submissions and its position was a bare denial that the claimant had been automatically unfairly dismissed. The respondent's position was that the claimant had resigned voluntarily in order to take up alternative employment. The claimant's evidence regarding the raising of non-conformance reports and raising concerns with KA regarding waste in the yard and the potential for vermin, was not challenged. KA accepted that he had asked the claimant's staff to store dead crab in the chill alongside live crab. The Tribunal has also already made findings in fact in relation to KA asking BH to cook dead crab and that the claimant was entitled to form the view that he was being asked to oversee the cooking of dead crab following the meeting in early August with FM and KA.

70. There was no dispute that these matters were potentially harmful to the health and safety of consumers of the respondent's products.

71. The question therefore for the Tribunal to consider was whether the raising of these matters was the principal reason for the claimant's resignation.

72. While the Tribunal has found that the last straw applied to the claimant's resignation, it was also of the view that the underlying cause of these matters and for the claimant's resignation was the breakdown in relationship between the claimant and KA. This breakdown in relationship was caused by the claimant continuing to raise concerns regarding health and safety matters with them. The Tribunal was of the view that if the claimant had not continued to raise concerns regarding health and safety the circumstances which led to his resignation would not have arisen.

73. The Tribunal therefore concluded that the principal reason for the claimant's dismissal was that he raised health and safety concerns with the respondent.

#### **Was the claimant unfairly dismissed in terms of section 103A ERA?**

74. The Tribunal was then required to consider whether the principal reason for the claimant's dismissal was that he had made a protected disclosure.

75. The respondent's position in submissions was that the claimant had not made any protected disclosures. That position was not foreshadowed in its grounds of resistance and the claimant was not cross examined on the extent to which any of the concerns raised amounted to a protected disclosure.

76. In any event, the Tribunal had no hesitation in accepting that the claimant raising with KA the risk of vermin, and submitting two non-conformance reports were protected disclosures in that they raised concerns regarding health and safety. In addition, the disclosures were in the public interest given the implications for consumers.

77. However, while the Tribunal accepted that the claimant believed he was being asked to cook dead crab, he did not raise this with respondent directly. He did not provide information to the respondent as it was the respondent who was issuing an albeit implicit instruction to him in relation to the cooking of dead crab. This therefore did not amount to a protected disclosure for the purposes of section 43C ERA.

78. The Tribunal was mindful that there were a number of issues in relation to health and safety which caused the breakdown in the relationship between the claimant and the respondent leading to an intolerable working environment. The Tribunal's conclusion was that the claimant had not  
5 resigned directly in response to the making of the protected disclosures as it was the wider issues in relation to the claimant's view that the respondent was requiring him to cut corners and when it was clear he was not willing to do so, isolated him such that his working environment became intolerable. There was no direct link between the making of the protected disclosures  
10 and the claimant's resignation and therefore the Tribunal concluded that the claimant had not been unfairly dismissed for having made protected disclosures.

#### **TUPE - Failure to inform and consult**

15 79. The Tribunal then went on to consider the claimant's claim that the transferor and transferee had failed in their duties in terms of regulation 13 TUPE. The respondent's position on this point was somewhat confusing. Prior to the commencement of the hearing the respondent was asked to confirm whether it accepted that it was relying on the special circumstances  
20 defence in terms of regulation 13(9). The Tribunal understood that this was the respondent's position. In submissions, the respondent indicated that it carried out its obligations under Regulation 13 "insofar as was possible given the commercial and time pressures involved in securing the purchase of OFS. Accordingly there were special circumstances which rendered it not  
25 reasonably practicable for the respondent to comply with its duty to provide further information to the claimant and the respondent will content that it took all such steps towards performing that duty as were reasonable practicable in the circumstances." However, the only evidence led in that regard was that a letter had been sent to the claimant's home address after  
30 the transfer of his employment to inform him of the transfer. There was no evidence for instance about consideration which had been given to electing employee representatives, or any steps taken after the transfer to inform the claimant (or any other staff) of any legal, economic or social implications for

him or that no such measures would be taken. It is of course for the employer to establish that a special circumstances defence can be relied upon. In addition, the defence should be narrowly construed (see for instance **Clarks of Hove Ltd v Bakers' Union 1978 ICR 1076, CA**) and that insolvency which was reasonably foreseeable nor confidentiality requirements is likely to amount to special circumstances.

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80. FM gave no evidence about any consideration given to the impact on employees of either the transfer of employment of staff or the potential for redundancy if a buyer were not found. It appeared to the Tribunal that no consideration at all was given by OFS or the respondent to the rights of staff in terms of TUPE. The Tribunal appreciated that FM clearly had no experience in this regard and that Mr Knight was focussing on completing the sale. In addition, the Tribunal noted that there was a significant degree of urgency regarding the purchase given the precarious financial position of OFS and that there were insufficient funds to pay wages that month if the sale did not go through.

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81. However, OFS had been aware of the potential for a purchase for almost 2 months prior to the purchase. FM was aware that something had to be done and engaged FRP in that regard. The Tribunal did not accept that there were exceptional circumstances regarding the confidentiality of the process and indeed KA had told some of his staff of the potential sale, when the claimant and his staff were not told.

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82. In addition, even when the sale had gone through, there was no effort to comply with the duty other than FRP meeting with what staff were present and telling them about the transfer. The claimant was not invited to any meetings. While the claimant was technically on holiday at the time of the meetings, it was not at all clear to the Tribunal why he could not have been invited to a meeting. This might have provided an opportunity for him to clarify whether his role was to be impacted and for him to reconsider his position.

83. Therefore the Tribunal was not satisfied that the respondent had discharged the burden of proof of demonstrating that special circumstances rendered it not reasonable practicable to comply with its duties in terms of regulation

13. In addition, if the Tribunal was in error in that regard, the Tribunal did not consider that any steps were taken by the respondent to comply with those duties as soon as was reasonably practicable.

## 5 Remedy

84. The Tribunal then went on to consider the question of remedy. In terms of the claimant's unfair dismissal claim, the claimant's representative indicated in submissions that the claimant had not until she had explained to him the previous day, been aware that he could seek to be reinstated or reengaged. 10 The respondent had not been given any opportunity to lead any evidence on that point or cross examine the claimant on the extent to which it would be reasonably practicable to reinstate or reengage the claimant. Therefore a further hearing on remedy should be listed to take place to determine 15 whether it would be reasonably practicable for the claimant to be reinstated or reengaged by the respondent. If the claimant does not wish to pursue that remedy, then he should inform the Tribunal as soon as possible and a further judgment dealing with the issue of compensation will be promulgated. The Tribunal would make clear at this stage however, that it is 20 not satisfied that there would be any basis on which to reduce any compensatory or basic award because of the claimant's failure to raise a grievance. The claimant was involved in raising two non-conformance reports and nothing was done about these. He raised other concerns with KA and FM and nothing was done about them. There was no evidence to 25 suggest that had the claimant raised a grievance at any stage, any action would have been taken or indeed that anyone would have dealt with such a grievance.

85. In terms of an award for failure to comply with the duties of regulation 13 TUPE, regulation 16 (3) provides that appropriate compensation is "such 30 sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

86. An award is to be punitive not compensatory (**Sweetin v Coral Racing 2006 IRLR 252 EAT**). Even where a Tribunal has rejected the special circumstances defence, it may take into account mitigating circumstances. While no particular submissions were made by the respondent in this regard, the Tribunal did take into account the circumstances relied upon by the respondent in seeking to establish the special circumstances defence. However, the Tribunal was mindful that there was a wholesale failure to comply with the duties of regulation 13 other than the information on 18 October that there had been a relevant transfer. In addition, the claimant resigned in circumstances where he reasonably believed his role to be impacted by a new production manager and where there was a proposal to replace one of his team. Had the claimant been involved in any discussions regarding the transfer, or been privy to the information which KA had regarding the transfer, then the claimant may not have resigned. Therefore the failures had a direct impact on the claimant's resignation.

87. In these circumstances, the Tribunal saw no reason to reduce the award of compensation from 13 weeks' pay. The respondent is therefore ordered to pay to the claimant the sum of £9,256 as compensation for comply with the duties under regulation 13.

**Employment Judge: A Jones**  
**Date of Judgment: 30 September 2024**  
**Entered in register: 2 October 2024**  
**and copied to parties**