Case Number: 2304292/2022
3314490/2022
2300112/2023

THE EMPLOYMENT TRIBUNAL

SITTING: at London South (by CVP)

BEFORE: Employment Judge Tueje

BETWEEN:

MR PAUL BELLINGHAM

First Claimant

MR RICHARD JAKEMAN

Second Claimant

MR WILLIAM REID

Third Claimant

-and-

TGS GEOPHYSICAL COMPANY (UK) LTD

First Respondent

TGS ASA

Second Respondent

GX TECHNOLOGY EAME LIMITED (IN LIQUIDATION)

Third Respondent

ION GEOPHYSICAL CORPORATION

Fourth Respondent

ON: 5th and 6th November 2024

Appearances:

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For the First Claimant: In person
For the Second Claimant: Ms Jabir (counsel)
For the Third Claimant: Mr Pickard (counsel)

For the First and Second Respondents: Mr Palmer (counsel)
For the Third Respondent: No attendance
For the Fourth Respondent: No attendance

RESERVED JUDGEMENT ON REMEDY

1. Following a public preliminary hearing on 8th to 12th April 2024 I determined the Claimants' employment transferred to the First Respondent on 31st August 2022 under regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

2. Following a remedy hearing on 5th and 6th November 2024, Mr Palmer requested written reasons for any judgment given. I therefore reserved judgment on the Claimants' heads of loss. My reserved judgment is at paragraphs 5 to 48 below, with written reasons at paragraphs 49 to 233 below. I would like to thank the parties for their patience while waiting for this judgment.

3. Unless otherwise stated, all four Respondents are jointly and severally liable for the compensation dealt with at paragraphs 5 to 37 below payable to Mr Bellingham and Mr Jakeman.

4. The parties anticipate that on receiving this judgment in respect of the heads of loss, where required, they can agree the final sums payable as compensation. Separate directions have been issued in case the parties are unable to agree all outstanding matters.

JUDGMENT IN RESPECT OF MR BELLINGHAM'S CLAIM

Unfair Dismissal

5. Mr Bellingham was unfairly dismissed. The sole or principal reason for his dismissal was a relevant TUPE transfer, and he was automatically unfairly dismissed pursuant to regulation 7 of TUPE.

6. Mr Bellingham is entitled to compensation. The effective date of the termination of his employment was 26th August 2022. At the date of his dismissal, he was 49 years old and had been employed by Ion UK since February 2017, and had 5 complete years of service.

Basic Award

7. Mr Bellingham is entitled to a basic award for unfair dismissal of £4,282.50, calculated as 1.5 x 5 years x £571.

8. On 25th October 2022 Mr Bellingham was paid £4,282.50 as a basic award by the Insolvency Service. Unless the Insolvency Service requires repayment of this sum, it should be deducted from the basic award for unfair dismissal paid to Mr Bellingham, leaving a balance of 0.

Compensatory Award

9. Mr Bellingham is entitled to a compensatory award for the period from 1st October 2022 (being the end of his notice period, which period is covered by

the award for wrongful dismissal) to 5th November 2024, being a period of 109.4 weeks, for the following losses:

9.1 Loss of basic salary calculated as gross weekly pay x 109.4 weeks;

9.2 Once the sum at paragraph 9.1 above has been calculated, £57,979.68 shall be deducted to reflect the sums Mr Bellingham earned by way of mitigation.

9.3 Loss of employer's pension contribution calculated as the agreed sum of £293.72 per week x 109.4 weeks.

9.4 Once the sum at paragraph 9.3 above has been calculated, £25,000 shall be deducted to reflect the pension contributions Mr Bellingham has received since his dismissal.

9.5 Loss of private medical cover calculated as £27.05 x 109.4 weeks.

9.6 Loss of life cover payable at the weekly rate of £41.54 (£180 per month x 12/52 weeks) x 109.4

10. Loss of statutory rights £500.

11. There shall be no *Polkey* reduction.

12. There is no basis to make any other reductions.

13. The Recoupment Regulations do not apply.

Wrongful Dismissal

14. The claim for wrongful dismissal is well-founded and is allowed.

15. Mr Bellingham was dismissed without being given any of the 5 weeks' notice that he was entitled to. Therefore, he is entitled to the agreed sum of £17,068.60 as compensation. Unless the Insolvency Service requires repayment of this sum, it should be deducted from this award leaving a balance of £15,002.55.

Failure to Consult with Claimant on TUPE Transfer

16. Ion UK failed to consult in respect of the relevant TUPE transfer, contrary to regulation 13 of the TUPE Regulations 2006. Mr Bellingham is entitled to the sum of 13 weeks' pay, calculated as Mr Bellingham's gross weekly pay plus his weekly pension contributions.

17. On 13th June 2023 Mr Bellingham was paid £4,595.32 by the Insolvency Service in respect of the failure to inform and consult under TUPE. Unless the Insolvency Service requires repayment of this sum, it should be deducted from the sum paid by the Respondents, leaving a balance to be agreed between the

parties, or failing which, to be determined by the Tribunal.

18. Ion UK and TGS UK are jointly and severally liable to pay Mr Bellingham the sums at paragraphs 16 and 17 above.

JUDGMENT IN RESPECT OF MR JAKEMAN'S CLAIM

Unfair Dismissal

19. Mr Jakeman was unfairly dismissed. The sole or principal reason for his dismissal was a relevant TUPE transfer, and he was automatically unfairly dismissed pursuant to regulation 7 of TUPE.

20. Mr Jakeman is entitled to compensation. The effective date of the termination of his employment was 26th August 2022. At the date of his dismissal, he was 60 years old and had been employed by Ion UK since May 2013, and had 9 complete years of service.

Basic Award

21. Mr Jakeman is entitled to a basic award for unfair dismissal of £7,708.50 calculated as 1.5 x 9 years x £571.

22. Mr Jakeman was paid £7,708.50 as a basic award by the Insolvency Service. Unless the Insolvency Service requires repayment of this sum, it should be deducted from the basic award for unfair dismissal paid by the Respondents, leaving a balance of 0.

Compensatory Award

23. Mr Jakeman is entitled to recover a compensatory award from 29th October 2022 (being the end of his notice period, which period is covered by the award for wrongful dismissal) to 5th November 2024, being a period of 105.4 weeks, for the following losses:

    23.1 Loss of basic salary + weekly pension contributions x 105.4 weeks.

    23.2 Loss of commission payable as the average gross weekly commission of £615.93 x 105.4 weeks.

    23.3 Loss of private medical cover calculated as £58.70 x 105.4 weeks.

    23.4 Loss of life cover calculated as £21.46 per week (being £1,116/52 weeks) x 105.4 weeks.

24. Interest is not payable on any sums awarded.

25. Loss of statutory rights £500.

26. There shall be no *Polkey* reduction.

27. There is no basis to make any other reductions.

28. The Recoupment Regulations do not apply.

Wrongful Dismissal

29. The claim for wrongful dismissal is well-founded and is allowed.

30. Mr Jakeman was dismissed without being given any of the 9 weeks' notice that he was entitled to, therefore he is entitled to the following compensation:

    30.1 Payment of his basic weekly salary x 9 weeks;

    30.2 Loss of employer's weekly pension contribution x 9 weeks; and

    30.3 Loss of his average weekly commission x 9 weeks.

31. Mr Jakeman was paid £3,718.89 for notice pay by the Insolvency Service. Unless the Insolvency Service requires repayment of this sum, it should be deducted from the basic award for unfair dismissal paid by the Respondents, leaving a balance to be agreed between the parties, or failing which, to be determined by the Tribunal.

Failure to Consult with Claimant on TUPE Transfer

32. Ion UK failed to consult in respect of the relevant TUPE transfer, contrary to regulation 13 of the TUPE Regulations 2006. Mr Jakeman is entitled to compensation in the sum of 13 weeks' pay including his weekly pension contribution.

33. Ion UK and TGS UK are jointly and severally liable to pay Mr Jakeman the sums at paragraph 32 above.

Holiday Pay

34. The complaint in respect of holiday pay is well-founded. Ion UK made an unauthorised deduction from Mr Jakeman's wages by failing to pay him for holidays accrued but not taken on the date his employment ended.

35. Mr Jakeman is entitled to the following compensation:
    35.1 8.23 days x the daily rate of his gross basic pay; plus
    35.2 8.23 days x the daily rate of his gross average commission.

36. Mr Jakeman was paid £675.60 for holiday pay by the Insolvency Service. Unless the Insolvency Service requires repayment of this sum, it should be deducted from this award, leaving a balance to be agreed between the parties, or failing which, to be determined by the Tribunal.

37. Ion UK and TGS UK are jointly and severally liable to pay Mr Jakeman the above sums.

JUDGMENT IN RESPECT OF MR REID'S CLAIM

38. Mr Reid seeks compensation from TGS UK only. Therefore, the compensation awarded at paragraphs 39 to 48 are made against TGS UK only.

Unfair dismissal

39. Mr Reid was unfairly dismissed. The sole or principal reason for his dismissal was a relevant TUPE transfer, and he was automatically unfairly dismissed pursuant to regulation 7 of TUPE.

40. Mr Reid is entitled to compensation. The effective date of the termination of his employment was 26th August 2022. At the date of his dismissal, he was 35 years old and had been employed by Ion UK since June 2017, and had 5 complete years of service.

Basic Award

41. Mr Reid is entitled to a basic award for unfair dismissal of £2,855.00 calculated as 1x 5 years x £571.

42. Mr Reid was paid £2,8550.00 as a basic award by the Insolvency Service. Unless the Insolvency Service requires repayment of this sum, it should be deducted from the basic award for unfair dismissal paid by TGS UK, leaving a balance of 0.

Notice Pay

43. The claim for notice pay is well-founded and is allowed.

44. Mr Reid was dismissed without being given any of the 5 weeks' notice that he was entitled to. Therefore, he is entitled to the sum of £6,447.40 as compensation.

45. Mr Reid was paid £2,066.05 as notice pay by the Insolvency Service. Unless the Insolvency Service requires repayment of this sum, it should be deducted from this award, leaving a balance to be agreed between the parties, or failing which, to be determined by the Tribunal.

Failure to Consult with Claimant on TUPE Transfer

46. Ion UK failed to consult in respect of the relevant TUPE transfer, contrary to regulation 13 of the TUPE Regulations 2006. Mr Reid is entitled to compensation in the sum of 13 weeks' pay.

Failure to consult under TULRCA

47. Mr Reid's complaint that Ion UK failed to carry out consultation in accordance with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") is well founded and succeeds.

48. The Tribunal orders payment of a protective award under section 189(3) of TULRCA for the protected period of 90 days, beginning on 26th August 2022. The payment shall be calculated based on Mr Reid's weekly pay.

REASONS

INTRODUCTION

49. For consistency, in this judgment, as in the reserved judgment on the preliminary issue, the Respondents will be referred to either using their corporate name or by adopting the following acronyms or abbreviations:

    49.1 First Respondent: TGS Geophysical Company (UK) Limited (or TGS UK);
    49.2 Second Respondent: TGS ASA
    49.3 Third Respondent: GX Technology Eame Limited (in liquidation) (or Ion UK);
    49.4 Fourth Respondent: ION Geophysical Corporation (or ION).

50. TGS UK and TGS ASA will be collectively referred to as TGS.

51. Ion UK and ION will be collectively referred to as the ION Group.

BACKGROUND

52. ION was a global technology company incorporated in the United States. ION was the parent company of the ION Group, comprised of several subsidiaries.

53. Ion UK was a limited company registered in the United Kingdom, and a wholly owned subsidiary of ION. It had 34 UK-based employees.

54. TGS ASA is a company registered in Norway, with its corporate headquarters in Oslo, and operational headquarters in the United States.

55. TGS UK is a limited company registered in the United Kingdom, it is a wholly owned subsidiary of TGS ASA.

56. It is common ground that by spring 2022 the ION Group was in financial difficulty. In April 2022 Mr Reid and Mr Jakeman were amongst 4 individuals who were notified that Ion UK was looking to reduce costs by making one person in its business development team redundant, and they were at risk of

redundancy. It was Mr Reid who was later notified he had been provisionally selected for redundancy. Then around one week later, Mr Reid was notified his provisional selection for redundancy was withdrawn, and that Ion UK no longer intended to make any redundancies in the team.

57. It was around this time that the ION Group embarked on financial restructuring. On 12th April 2022 ION and 3 of its affiliates filed petitions in the United States Bankruptcy Court seeking relief under Chapter 11 of the United States Bankruptcy Code. Following an auction on 29th June 2022, parts of the ION Group's assets were sold; TGS were amongst the successful bidders. Completion of the transaction was subject to approval by the US bankruptcy court.

58. Michael Mellen, a former ION Vice President, was engaged as a consultant to advise on the sale of the ION Group's assets. In an e-mail sent on 11th June 2022 he wrote to Chris Anderson, a Senior Vice President at Ion UK, requesting a meeting, stating that:

This relates specifically to ION UK staff and projects to which they are currently assigned. We are trying to sort out who we might want to bring over to TGS vs. those that UK law will require us to bring over because we are assuming the projects they are working on (proprietary and MC).

59. On 11th July 2022, James Kubisch of TGS, sent an e-mail attaching a document titled *"Ion HR Integration Presentation (11 JUL 2022)",* which is at pages 363 to 378 of the bundle, including the following (at page 369):

- *UK TUPE process*
  - *Awaiting ION's feedback on process*
  - *May dictate who needs to become a TGS employee depending on project load and employment details.*

60. The above document also included a list of Ion UK's top 20 employees who included Mr Bellingham.

61. Mr Bellingham cross examined Mr Craig about this document. In his oral evidence Mr Craig confirmed the *"Ion HR Integration Presentation"* was prepared before Ion UK concluded TUPE did not apply. Mr Craig also confirmed in his oral evidence that there were no documents, nor had any plans been prepared, to deal with redundancies in the event that TUPE did apply. He continued, that if the legal advice had been TUPE applied, plans would then have been made about the TUPE process.

62. On 12th July 2022 Mr Usher, CEO of the ION Group, sent an e-mail to Kristian Johansen, CEO of TGS, stating: *"In the UK I know our HR folks have discussed the likely TUPE transfer requirement, and seem to be converging on similar thinking."*

63. Then the following day, Whitney Eaton, one of TGS USA's Vice Presidents writes:

The UK TUPE process is likely not going to be resolved this week as I do not necessarily share the opinion we are aligned on the rationale. I think we will ultimately come to a resolution but it will take a few more discussions to get there and this will likely carry over through the next week.

64. In cross examination Mr Pickard put to Mr Craig that in her e-mail, Ms Eaton was seeking to steer the conclusion away from a finding that TUPE applied, Mr Craig's response was that he was unable to comment or provide an opinion.

65. On 21st July 2022, Emma Tate, Ion UK's HR Manager, e-mailed Ion UK employees with an update; her e-mail began:

Following a detailed review by external legal counsel representing ION and TGS, the Company has been advised that the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) does not apply on the sale of certain assets and contracts to TGS.

66. Ms Tate's e-mail continues:

On the basis of the advice we have received that TUPE does not apply this does mean that we will be entering into a period of consultation with employees in regard to redundancy at a later date.

67. On 3rd August 2022 Mr Usher e-mailed ION Group employees explaining that TGS had made offers to 67 employees and contractors. As far as offers to Ion UK employees were concerned, these offers were made without TGS interviewing them. Those who accepted job offers enjoyed continuity of service, reflecting the period they were employed by Ion UK.

68. Three staff representatives were elected and announced on 11th August 2022; they included Mr Reid. On being notified who the elected representatives were, Mr Bellingham e-mailed Ms Tate enquiring when statutory redundancy consultation would begin. Ms Tate responded by an e-mail sent on 12th August 2022, which stated: "*We should commence the consultation process following the court case."* This was a reference to the approval required from the US Bankruptcy court. In due course, the first meeting for consultation was due to take place at 4.30pm on 24th August 2022.

69. Mr Bellingham also e-mailed Mr Reid with queries he wished the latter to raise in his capacity as an elected representative. For instance, on 15th August 2022 Mr Bellingham e-mailed Mr Reid about what funds the ION Group had to pay salaries and make redundancy payments. On 23rd August 2022 he e-mailed Mr Reid about the ION Group's $5m winding up budget approved by the US Bankruptcy court, and whether those funds would be made available to pay salaries and redundancy payments.

70. As to the redundancy process that Ion UK had instigated, Mr Craig said the following in his witness statement (see paragraph 15):

It is clear from looking at the papers identified above that GXT was experiencing severe financial difficulties in the weeks prior to the Claimants' dismissals. Hence, from what I have seen, it embarked upon the collective consultation process. As transpired, GXT did not have the financial capital to continue operating beyond August 2022 and to pay its staff. From my experience in conducting similar redundancy exercises, given the stage that the process was at (with representatives elected and consultation with those reps commencing), it would likely have taken only two further weeks for the process to reach a conclusion. I based my conclusion on the likely timeframe remaining in the redundancy exercise that GXT was undertaking.

71. In the interim, some senior managers at Ion UK had been informed that ION would cease funding Ion UK on around 12th August 2022, which would leave Ion UK unable to pay its employees. In the end, Ion UK secured additional funding until 26th August 2022.

72. The bankruptcy court granted conditional approval in respect of the sale of the ION Group's assets on 18th August 2022. The conditions were met on 22nd August 2022.

73. According to Ion UK's Grounds of resistance (for instance see paragraph 20, page 80 of the joint remedy bundle), ION *"… made clear … that no additional funding would be available beyond 26 August 2022."*

74. At a meeting on 23rd August 2022 Ion UK's directors decided steps should be taken to place the company in liquidation.

75. As stated, the first consultation meeting was due to take at 4.30pm on 24th August. Shortly before that meeting, at 3.41pm on 24th August 2022, Ms Tate e-mailed the elected employee representatives a Redundancy Proposal explaining the directors' decision to place the company in liquidation, and providing the information in the Insolvency Service's HR1: Advance Notification of Redundancies form.

76. Shortly afterwards, in an e-mail sent by Mr Usher at 3.54pm on 24th August 2022 to Ion UK employees (although Mr Reid does not appear to be amongst the recipients), they were informed of the decision to that Ion UK would go into liquidation, and that they were being dismissed with effect from 26th August 2022.

77. The consultation meeting began, as planned, at around 4.30pm on 24th August 2022, but by then, the decision had already been taken and notified to employees that the company was being wound up, and employees would be dismissed with effect from 26th August 2022.

78. RSM was appointed as Ion UK's liquidators on 2nd September 2022.

79. The Claimants were all formerly employed by Ion UK. Each brought claims alleging their contracts of employment with Ion UK were transferred to TGS.

80. Mr Bellingham was employed by Ion UK as Vice President of Eastern Hemisphere E&P Advisers. His direct reports included Elisabeth Gillbard, Emily Kay and Neil Hurst; all 3 accepted offers of employment at TGS UK. He says that the TGS UK role of Director of Geoscience is the equivalent of his Ion UK role. Verity Agar had been employed by Ion UK as Vice President of New Ventures and Late Sales. However, TGS UK offered the role of Director of Geoscience to Verity Agar, and at TGS UK Elisabeth Gillbard, Emily Kay and Neil Hurst are now her direct reports.

81. Mr Bellingham's claim was presented on 22nd November 2022, Mr Jakeman's claim was presented on 5th December 2022, and Mr Reid's claim was presented on 9th January 2023.

82. Mr Reid's claim included a complaint of breach of contract relating to Ion UK's failure to pay him commission and other sums which he says he is entitled to, and he also claimed a 25% uplift due to an alleged failure to comply with the ACAS Code in respect of a grievance he had brought in June 2022 in connection with these payments.

83. In a judgment dated 19th April 2023, made in respect of case number 2303760/2022 heard with other cases, Employment Judge Dyal made a protective award for a period of 90 days beginning on 26th August 2022 in favour of around 31 of Ion UK's former employees who brought their claims as affected employees. Mr Reid was not amongst the claimants. The claim was brought against Ion UK as the First Respondent, with the Secretary of State for Business, Energy and Industrial Strategy as the Second Respondent.

84. At a private preliminary hearing on 13th September 2023, Employment Judge Atkins confirmed Mr Bellingham, Mr Jakeman and Mr Reid's claims would be heard together for the purposes of dealing with the preliminary issue.

85. TGS have actively participated in these proceedings. There has been limited participation from the ION Group: solicitors instructed by Ion UK's liquidators filed an ET3 Response Form and Grounds of Resistance to all claims. There has been no response from ION.

86. The claims were listed for a public preliminary hearing on 8th to 12th April 2024 to determine whether there had been a relevant transfer under regulation 3(1)(a) of TUPE.

87. In a reserved judgment dated 10th May 2024, I determined there had been a relevant transfer. I issued a corrected judgment dated 11th July 2024.

88. The parties subsequently notified the Tribunal that in light of the decision on the preliminary issue, the parties agreed the next hearing should be a remedy hearing, which took place on 5th and 6th November 2024.

THE REMEDY HEARING

89. Before hearing any evidence, I dealt with some preliminary issues.

90. Firstly, on 17th October 2024 TGS applied to strike out Mr Reid's claim for a 25% ACAS uplift, but in light of Mr Reid's application for a stay (see paragraph 91 below), Mr Palmer confirmed at the start of the remedy hearing that the strike out application was no longer pursued.

91. Mr Reid applied for a stay in respect of part of his claim, specifically the breach of contract claim in respect of unpaid commission and other sums, and the claim for a 25% ACAS uplift (see paragraph 82 above). Mr Reid intends to pursue these claims in the High Court. The Respondents did not object to the application for a stay, which the Tribunal therefore granted.

92. Ms Jabir, on behalf of Mr Jakeman, requested that certain outstanding issues on liability should be dealt with before dealing with remedy. However, to manage time more efficiently, I decided the hearing should proceed by hearing evidence and argument in respect of both liability and remedy.

93. I heard evidence from the Claimants, and from Mr Troy Craig, TGS UK's HR Business Partner, all of whom had provided witness statements as follows:

    93.1 Witness statement from Mr Bellingham dated 28th October 2024;
    93.2 Witness statements from Mr Jakeman dated 30th October 2024 and 4th November 2024;
    93.3 Witness statement from Mr Reid dated 28th October 2024; and
    93.4 Witness statement from Mr Craig dated 30th October 2024.

94. No representatives or witnesses attended on behalf of the ION Group.

95. In addition to the above evidence, I was provided with the following documents:
    95.1 870-page Joint Hearing Bundle;
    95.2 120-page Supplementary Bundle;
    95.3 Inter partes correspondence from 30th October 2023 to 28th November 2023 regarding disclosure;
    95.4 6-page Skeleton Argument from Mr Bellingham;
    95.5 3-page Closing statement from Mr Bellingham;
    95.6 25-page Opening Note on behalf of Mr Jakeman;
    95.7 5-page Skeleton Argument on behalf of Mr Reid;
    95.8 9-page Closing/Speaking Note on behalf of Mr Reid;
    95.9 4-page Opening Note on behalf of TGS; and
    95.10 3-page Closing Summary on behalf of TGS.

96. At the conclusion of the hearing on 6th November 2024, I reserved judgment on the Claimants' heads of loss. The parties anticipated that they would agree on the quantum upon receiving this judgment.

THE ISSUES

97. There was no single agreed list of issues. Although the Claimants raised different, albeit mostly overlapping complaints, there was a broad consistency in the Claimants' list of issues. One main difference between the Claimants and TGS's list of issues was that the latter set out the outstanding liability issues. For that reason, it is more appropriate to work to TGS's list of issues, which raised the following matters.

Unfair Dismissal

98. Were the Claimants automatically unfairly dismissed pursuant to Regulation 7(1) of TUPE?

99. Were the Claimants employed by Ion UK at the time of the relevant transfer so that their employment automatically transferred from Ion UK to TGS UK?

100. If not, did liability for any of the Claimant's claims transfer to TGS UK?

101. What basic awards are payable to the Claimants, if any, where the Claimants have received a payment in respect of their statutory redundancy entitlement from the UK Government's Insolvency Service?

102. What compensatory award is payable to the Claimants pursuant to sections 123 and 124 of the ERA?

103. In particular:

    103.1 What amount does the Tribunal consider just and equitable in all the circumstances to award to the Claimants having regard to any loss sustained by the Claimants in consequence of the dismissal in so far as that loss is attributable to action taken by Ion UK?

    103.2 What, if any, financial losses has the dismissal caused the Claimants?

    103.3 Has TGS UK shown that the Claimants acted unreasonably in relation to the duty to mitigate any financial losses?

104. For what period of loss should the Claimants be compensated?

105. Should there be a *Polkey* reduction to any award of compensation? If so, by how much?

106. Should there be any other reduction to the Claimants' compensatory award on the basis that it is just and equitable to do so?

Failure to Inform and Consult under TUPE

107. Did Ion UK and TGS UK comply with their obligations to inform and consult appropriate representatives of the Claimant, including:

107.1 Did Ion UK comply with its obligations to appoint employee representatives in accordance with regulation 13(3) TUPE or elect such representatives in accordance with regulation 14 TUPE; and

107.2 Did Ion UK provide the information required under regulation 13(2) TUPE to said representatives and consult with regard to any measures under regulation 13(6) TUPE?

108. What remedy should be awarded under regulations 15 and 16 TUPE for failure to inform and consult under TUPE?

109. If the Employment Tribunal determines that an award of compensation should be made, what compensation is "*appropriate*" to award to the Claimants, being such 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 (Regulation 16(3) of TUPE).

110. If any compensation is due to the Claimants under regulations 15 and 16 TUPE for any failure to inform or consult, does the principle of joint and several liability apply?

Wrongful Dismissal

111. What was the amount of notice payable to the Claimants?

112. To what amount are the Claimants entitled to receive in respect of notice taking into account the payment in respect of notice which the Claimants have received from the Insolvency Service?

Unlawful Deduction from Wages

113. What was the amount of accrued but unpaid holiday owing to Mr Jakeman on termination of his employment?

114. To what amount is Mr Jakeman entitled to receive in respect of unpaid holiday pay taking into account the payment in respect of holiday pay which he received from the Insolvency Service?

Claim for a Protective Award (s.188 & s.189 TULRCA)

115. To what extent did the obligations under s.188 TULRCA apply to the Respondents in respect of Mr Reid (taking into account that claims for protective awards under ss. 188 & 189 TULRCA were pursued by employee

representatives of Mr Reid's colleagues at Ion UK in the Employment Tribunal and were the subject of a judgment (Case No. 2303760/2022 & ors)?

116. If the obligations under s.188 TULRCA applied to the Respondents in respect of Mr Reid, to what extent did the Respondents fail to comply with those requirements?

117. Should the Tribunal make a protective award and if so, what should this award be?

THE LAW

118. The relevant legislation and case law authorities are set out at paragraphs to 119 to 137 below.

The Legislation Relevant to the Automatically Unfair Dismissal

119. TUPE protection applies to a relevant transfer, including in the following circumstances set out in regulation 3.

3.- A relevant transfer
(1) These Regulations apply to-

(a) 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;

120. And by regulation 4(1), the effect of a relevant transfer is it:

… shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

121. Regulation 4 continues:

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to

that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

122. Finally, insofar as is relevant, regulation 7 reads:

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

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies-
(a) paragraph 1 does not apply;

123. By section 94 of the Employment Rights Act 1996 an employee has the right to not be unfairly dismissed.

<u>The Legislation Relevant to the Failure to Inform and Consult under TUPE</u>

124. The duty to inform affected employees and consult their representatives is at regulation 13, the relevant provisions of which are set out below.

(1) In this regulation and regulations 13A 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—
(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

125. By regulation 13(3)(b)(ii) appropriate representatives include:

… employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

126. Finally, as regards the duty to inform and consult, regulation 13(9) states:

If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

127. Enforcement of regulation 13 is dealt with by regulation 15, and regulation 15(1) states that aside from failures relating to the election of employee or trade union representatives, in any other case, a failure to comply with regulation 13 may be presented to the Employment Tribunal by an affected employee.

128. Regulation 15(2) reads:

If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

129. As to the burden, regulation 15(4) states

On a complaint under paragraph (1)(a) it shall be for the employer to show that the requirements in regulation 14 have been satisfied.

130. So far as is relevant, regulation 15 continues:

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

The Trade Union and Labour Relations (Consolidation) Act 1992

131. So far as is relevant, an employer's duty under section 188 of the 1992 Act comprises:

131.1 A duty to consult where it is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.

131.2 An individual is dismissed as redundant where the dismissal is for a reason not related to the individual concerned or for a number of reasons all of which are not so related (see section 195).

131.3 Where the employer is proposing to dismiss at least 20 but fewer than 100 employees, consultation must begin at least 30 days before the dismissals take effect.

131.4 Consultation shall include ways of avoiding or reducing the numbers of dismissals and mitigating the consequences of the dismissals. To be meaningful, it should take place when the proposals are still at a formative stage; the representatives must have sufficient information and adequate time in which to respond; and the employer must give conscientious consideration to the response.

131.5 The employer must disclose in writing to the representatives specific information regarding the proposed redundancies including, the reason for them, the number and description of those to be dismissed, the total number of employees, the method of selecting those to be made redundant and the method of calculating redundancy payments.

131.6 If the employer fails to inform or consult, the remedy is to raise a complain to an Employment Tribunal.

131.7 Where the Tribunal finds there has been a failure to comply with the relevant requirements, it can make a declaration to that effect, it can make a protective award, ordering the employer to pay remuneration to individual employee for the protected period. This period starts when the first dismissal takes effect and lasts for as long as the Tribunal thinks just and equitable having regard to the seriousness of the employer's default. It cannot exceed 90 days' pay.

131.8 In deciding how much to award, the emphasis is on the extent of the employer's failure to consult, whether it was deliberate and whether legal advice was available.

131.9 Where there has been no consultation at all, the starting point is to consider the 90-day maximum and to reduce it only if there are appropriate mitigating circumstances.

131.10 Mitigating circumstances could be that the employer had already discussed matters at an earlier stage, or that the employer would have been unable to consult for the 30 days anyway, because it very suddenly became insolvent. However, insolvency is not in itself a reason not to make a protective award.

Case law regarding Consultation

132. In *Susie Radin Ltd v GMB [2004] ICR 893* the Court of Appeal gave guidance in relation to awards under section 189 of TULRCA 1992, stating (at paragraph 45):

I suggest that ETs, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind: (1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in s.188: it is not to compensate the employees for loss which they have suffered in consequence of the breach. (2) The ET have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employers default. (3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult. (4) The deliberateness all the failure may be relevant, as may the availability to the employer of legal advice about his obligations under s.188. (5) How the ET assess is the length of the protected. Is a matter for the ET, but a proper approach in a case where there has been no consultation is to start with the maximum. And reduce it only if there are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate.

133. *Sweetin v Coral Racing 2006 IRLR 252 (EAT)* confirmed the above principles in Susie Radin Ltd also apply when determining an appropriate award made under regulation 15 of TUPE.

Polkey -v- AE Dayton Services Limited [1988] ICR 142

134. As to case law authority regarding Polkey reductions, Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 states (at paragraph 24):

A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.

135. The various stages of a Polkey assessment were summarised in *Software 2000 Ltd v Andrews ors 2007 ICR 825 (EAT)*. The stages which are relevant to this case are as follows:

135.1 Applying common sense, experience and a sense of justice to assess how long the employee would have been employed for but for the dismissal;

135.2 Where the employer argues employment would have ceased in any event had fair procedures been followed, the employer is required to adduce evidence in support, which the Tribunal shall take into account, together with any other relevant evidence;

135.3 The Tribunal should assess the reliability of the evidence to consider whether it can reconstruct what might have happened, or whether the evidence is so unreliable that no sensible prediction can properly be made;

135.4 In assessing the reliability of the evidence: The Tribunal must carry out an evaluative exercise, which:

"… is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of

speculation is involved is not a reason for refusing to have regard to the evidence."

135.5 After considering the evidence, the Tribunal should determine whether the dismissal:

(i) The dismissal would have occurred in any event;

(ii) There is reliable evidence the dismissal might have occurred, in other words there is a less than 50% chance but one that could result in a percentage reduction;

(iii) Employment would have continued for a limited fixed period; or

(iv) "… employment would have continued indefinitely. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

Mitigation

136. By section 123(4) of the Employment Rights Act 1996 a Tribunal must take into account the employee's duty to mitigate their loss when deciding what compensation is just and equitable.

137. The relevant principles to be applied when considering mitigation of loss are set out in *Cooper Constructing Ltd v Lindsey [2016] I.C.R. D3.* It confirms the employer bears the burden of proving the claimant has acted unreasonably so as to fail to mitigate their loss. It is not for the claimant to show they have acted reasonably, and there is a distinction between acting reasonably and not acting unreasonably. It is a matter of fact for the Tribunal to decide what is reasonable or unreasonable. While the claimant's views and wishes may be taken into account, the assessment is one for the Tribunal to reach. In doing so, the Tribunal should not impose on the claimant too demanding a standard.

LIABILITY

138. Because the public preliminary hearing was listed solely to determine the issue of whether there had been a relevant transfer, there were some issues on liability which had not yet been determined. These were, firstly, whether the Claimants had been automatically unfairly dismissed, and secondly whether there had been a failure to consult in breach of the statutory requirements.

Automatic Unfair Dismissal

139. Ms Jabir took the lead in addressing this issue, advancing various factors pointing to this being a case of automatically unfair dismissal.

140. Relying on *Hare Wines Ltd v Kaur [2019] IRLR 555,* Ms Jabir argued there is a presumption that the transfer was the sole or principal reason for the dismissal due to the proximity of the dismissal on 26th August 2022 to the transfer, which completed on 31st August 2022. Ms Jabir also relied on, and quoted from the IDS Employment Law Handbook, which states Volume 13, paragraph 4.36):

In general, the closer in time a dismissal is to a relevant transfer, the more likely an employment tribunal will be to find that the transfer was the principal reason for the dismissal. In fact, where a dismissal takes place around the time of the transfer, there will be a strong presumption to this effect.

141. Furthermore, as far as timing is concerned, Ms Jabir also argued that while Ion UK instigated a redundancy consultation in the mistaken belief that TUPE did not apply, that consultation was not due to begin until after the US bankruptcy court approved the sale of some of the ION Group's assets to TGS, with the decision to wind up Ion UK taken a few days after the court's approval. She points out no former employee of Ion UK, including those currently employed by TGS UK, has given evidence regarding the reason for dismissal. Mr Troy Craig was the only person to give evidence on TGS's behalf, but he was never employed by Ion UK. Accordingly, she submits, there is no evidence to rebut the presumption that the transfer was the sole or principal reason for the dismissal.

142. Mr Palmer sets out TGS's position at paragraphs 8 and 9 of his written closing summary as follows:

R1 relies upon what it understands and C concedes was the parlous financial position of R3. R3 was no longer in receipt of funding and on 24/ 08/ 2022, R4's CEO announced that all employees would be made redundant and liquidation of R3 would follow.

R1 submits that it is open to the ET to find that the sole or principal reason for the dismissals of C was not the relevant transfer but rather the pending liquidation.

143. The Respondent contends it is open to the Tribunal to find that the sole or principle reason for the Claimants' dismissals was insolvency, not the TUPE transfer. However, as Ms Jabir points out, due to the timing, case law authority states there is a presumption that the dismissals were due to the transfer. I have taken into account the timing of the sequence of events at that time.

144. Firstly, with the US court giving conditional approval on 18th August 2022, those conditions being met on 22nd August 2022. Then just one day later, Ion UK's board votes in favour of winding up the company, with employees being told the following day that they being dismissed with effect from that Friday 26th August 2022. Allowing for the intervening bank holiday Monday, the transfer completed on the second working day following the dismissal, being Wednesday 31st August 2022. This timing supports the presumption that the

dismissals were due to the TUPE transfer.

145. A further indication that it's more likely that the transfer was the sole or principal reason for their dismissal was Ion UK sought to coordinate redundancy consultation with the transfer process. In particular, planning its redundancy consultation, which was postponed so it would begin after the US bankruptcy court approved the sale, indicates a link between the dismissals and the sale and transfer. If, as the Respondents concluded, TUPE did not apply, one would expect redundancy consultation to begin after that decision had been reached. I cannot see any reason why (and the Respondents have not provided any), the consultation was postponed until after the sale was approved, unless it is because the sale effecting the transfer, was also the reason for the dismissals. The absence of any direct evidence to rebut the presumption, and these other surrounding circumstances which support the presumption, lead me to conclude it is more likely than not that the sole or principal reason for the Claimants' dismissals was the TUPE transfer.

146. In my judgment, to the extent that Ion UK's funding is relevant, I note funding had originally been due to end on 12th August 2022, when the US bankruptcy court had still not approved the sale of assets. I consider it is more likely than not that funding was extended to 26th August 2022 to allow for court approval of the transaction to be obtained, in order that there would be a transfer of a going concern. So, in my judgment, funding was extended to 26th August 2022 to facilitate the transfer. Therefore, I do not consider there is evidence supporting TGS's position that the dismissals were due to Ion UK's insolvency.

147. Therefore, having regard to the presumption, the surrounding circumstances, and the absence of any evidence to rebut that presumption, I find on the balance of probabilities that the TUPE transfer was the sole or principal reason that the Claimants were dismissed.

148. As to whether the Claimants were employed by Ion UK at the time of the relevant transfer. My determination of the preliminary issue found that the Claimants were dismissed by Ion UK on 26th August 2022, being a few days before the transfer completed. By regulation 4(1), where there has been a relevant transfer, it will not terminate the employment contract of an existing employee of the transferor. So, following the transfer, it will be as if that employee's contract was a contract made between them and the transferee. However, regulation 4(3) extends that protection to cover those who would have been employed immediately before the transfer if they had not been automatically unfairly dismissed under regulation 7(1).

149. Therefore, although the Claimants were dismissed a few days prior to the TUPE transfer, by virtue of regulation 4(3), the Claimants were effectively deemed to be employed by Ion UK at the date of the transfer.

150. Another matter in TGS's list of issues is, if the Claimants were not employed by TGS UK at the time of the relevant transfer did liability for any of the Claimant's claims transfer to TGS UK?

151. As stated, the Claimants were effectively deemed to be employed by Ion UK at the date of the TUPE transfer. Accordingly, by regulation 4(2)(a):

> … *all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee;*

152. This means Ion UK's liabilities were transferred to TGS UK.

Failure to Inform and Consult under TUPE

153. In broad terms, the common theme in the Claimants' arguments regarding TUPE consultation is that firstly, in light of Ion UK's view that TUPE did not apply, there was a wholesale failure to comply with any aspect of the duty to inform and consult under TUPE. Secondly, they suspect that the timing of the first consultation meeting that was supposed to take place on 24th August 2022 was a deliberate attempt to frustrate the consultation. Finally, they argue there was no meaningful consultation because by 24th August 2022 Ion UK's directors had already decided to wind up the company.

154. Whereas TGS argues it did not seek to avoid its TUPE obligations, but instead, after carefully analysing the position, it concluded in good faith that TUPE did not apply. It further argues this mitigation is relevant to the amount awarded under regulations 15 and 16.

155. I take into account that the Claimants' complaint is that Ion UK failed to comply with regulation 13 (not 14).

156. I consider that Ion UK failed to comply with regulations 13. There was no meaningful consultation: the first consultation meeting was due to take place on 24th August 2022, but by the date of the meeting, Ion UK's directors had already decided (the previous day) to wind up the company. There was no opportunity for consultation, the decision had already been taken.

157. Having regard to the seriousness of the failure, I also consider it is just and equitable to make an award representing 13 weeks to all Claimants. My reasons are, firstly, I consider it is more likely than not that the Respondents' conclusion that TUPE did not apply was a deliberate attempt to avoid their TUPE obligations. When Mr Pickard put to Mr Craig that Ms Eaton's e-mail of 12th July 2022 showed an attempt to steer matters towards a conclusion that TUPE did not apply, he was unable to offer a view. So, although Mr Craig did not accept Mr Pickard's interpretation, he also did not dispute it. My assessment of the communications referred to at paragraphs 58 to 66 above is that they support Mr Pickard's point. The earlier communications from Mr Mellen and Mr Usher indicate a provisional view that TUPE was likely to apply. However, in time, and for reasons which have not been explained, Ion UK and TGS subsequently concluded TUPE did not apply.

158. In addition to the apparent and unexplained shift in Ion UK's views about whether TUPE applied, there is the unexplained postponement of the first consultation meeting until after the US bankruptcy court approved the sale of the ION Group's assets. If, as the Respondents state, they considered TUPE did not apply, it's unclear why consultation needed to be postponed. Again, without an explanation for this incongruity, I consider the more likely explanation was the aim of limiting the opportunity to consult employee representatives.

159. A further reason is that during cross examination, Ms Jabir put to Mr Craig that TGS UK wished to cherry-pick those former Ion UK employees it would offer jobs to. Surprisingly, Mr Craig admitted that was the case. That is something TUPE protection would not allow TGS UK to do, therefore seeking to avoid TUPE's requirements would serve TGS UK's purpose in that respect. Mr Craig began at TGS UK in July 2022, and is the most senior person employed in TGS UK's HR department. Therefore, I would expect him to be aware of such a plan, and so I accept his evidence that that was TGS UK's intention. I consider Mr Craig's evidence on this point tends to undermine TGS's claim that its conclusion TUPE did not apply was reached in good faith.

160. I also consider the absence of any planning for a scenario where TUPE applied supports the view that TGS deliberately sought to avoid TUPE. If they were open minded as to the possibility of TUPE potentially applying, I would have expected there to be some evidence of plans, even if only tentative plans pending legal advice on the issue. Furthermore, as the provisional view in Ion UK was that TUPE was likely to apply, it is even more surprising that TGS UK made no plans for that scenario. And while no plans were made in the event TUPE might apply, there were plans for the alternative scenario, even before the legal advice was obtained on 18th July 2022. For instance, by 7th July 2022 TGS obtained information about the top 20 Ion UK employees, indicates TGS's strategy was entirely focussed on a scenario where TUPE did not apply.

161. I reject TGS's assertion that the Respondents acted in good faith when concluding TUPE did not apply, because for the above reasons, I consider they deliberately sought to avoid TUPE requirements. And as no other mitigation has been put forward, I consider the maximum award of 13 weeks' pay is appropriate.

162. TGS's list of issues asks whether Ion UK and TGS UK complied with their duty under regulations 13(3) to elect employee representatives in accordance with regulation 14, and whether they complied with their duties under regulations 13(2) 13(4), 13(6) and 13(7).

163. The Claimants' complaint relates to Ion UK's failure to comply with regulation 13, which is the duty to inform and consult. No complaint is brought under regulation 14 in respect electing employee representatives. Regulation 13(3) is primarily descriptive, setting out who may be an elected representative, it does not impose an obligation as such; the duty to make arrangements to elect representatives is at regulation 14. Their complaint is also not alleging TGS UK breached its obligations under regulation 13(4).

164. In my judgment, Ion UK did not comply with the duty to provide information as set out at regulation 13(2). That duty requires information is provided *"Long before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives…"* and to provide the information set out at regulations 13(2)(a) to 13(2)(d). In this case, information was provided in the e-mail sent by Ms Tate at 3.41pm on 24th August 2022, being less than one hour before the first consultation meeting was due to begin, and one week before the relevant transfer. Therefore, to the extent information was provided, it was not provided in accordance with regulation 13(2) in that it was not provided sufficiently long before the transfer to enable any effective consultation to take place.

165. The manner in which the information was provided also amounted to a breach of regulation 13(6) in that firstly, there was not any meaningful consultation regarding the dismissals, because the decision had already been taken that the company was to be wound up. Secondly, because Ion UK was due to cease trading within days, there was no opportunity to seek agreement to the measures Ion UK had decided to take.

166. There is also no evidence that such questions the employee representatives put to Ion UK were ever answered. For instance, during the meeting with Ms Tate on 24th August 2022, Mr Reid asked about the approved £5m winding up budget, and whether that might be used to fund employees' redundancy payments and similar payments. I have not been shown any subsequent communication where Ion UK addressed that question.

167. At the remedy hearing, it was common ground between those parties that attended that compensation paid pursuant to regulation 16 Compensation is designed to punish the employer for default (*Sweetin v Coral Racing* [2006] IRLR 252). And by regulation 15(9) the transferor and the transferee will be jointly and severally liable.

168. Based on the above findings, I consider that this was a deliberate and therefore a serious breach of regulation 13, and that there was any or any meaningful consultation, so the starting point is to award 13 weeks. I am not satisfied that there any mitigating circumstances that would justify a reduction. TGS rely on acting in good faith, but as I have found that there was a deliberate attempt to avoid the TUPE requirements, it follows I reject that argument. No other mitigating circumstances were relied on, meaning I consider there are no grounds to reduce the award. Accordingly, I award 13 weeks' pay per claimant.

<u>Conclusions on Polkey</u>

169. As Mr Palmer points out, there was documentary evidence confirming the ION Group's financial difficulties, and that TGS would not require all of Ion UK's employees. He also relied on Ion UK having instigated redundancy

consultation, to support his submission that a *Polkey* reduction was appropriate.

170. The argument is addressed in TGS's counter schedule of loss prepared in respect of both Mr Bellingham and Mr Jakeman as follows:

The Active Respondents will argue that regardless of the putative transfer found to have occurred in respect of the Claimant's employment from the Third Respondent to the First Respondent in the Employment Tribunal's Judgement, the Claimant would have been dismissed in any event, applying: Polkey -v- AE Dayton Services Limited [1988] ICR 142 ***(Polkey).***

The Active Respondents' arguments in respect of Polkey arise from:

1. *At the time of the claimant's dismissal, the Third Respondent was undertaking collective consultation for redundancy pursuant to s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992. It is the Active Respondents' position that the Claimant's employment would have been terminated in any event by reason of redundancy within two weeks of the EDT.*

2. *The undisputed evidence provided by the Active Respondents during the preliminary hearing on 8-12 April 2024 made it clear that there was no business requirement for the First Respondent to employ all of the Third Respondent's employees.*

   As such, any compensation due to the Claimant should be reduced, if not in line with the sums outlined above, then compensation should be limited to the period of time it would have taken the Third Respondent to undertake a full redundancy process.

171. The situation relating to paragraph (1) above was also dealt with in Mr Craig's witness statement (see paragraph 70 above). In her Opening Note, Ms Jabir described this as TGS's Polkey Defence 1. Ms Jabir's response to the Polkey Defence 1 is that, if the Claimants were not unfairly dismissed on 26th August 2022, Ion UK's employees could not have been made lawfully redundant by Ion UK within the following two weeks, because their employment would have transferred to TGS UK on 31st August 2022.

172. As to the other Polkey defence, which Ms Jabir described as Polkey Defence 2, she summarised her legal analysis at paragraphs 84 to 86 of her Opening Note, which read:

84. *The burden of proving that an employee would have been dismissed in any event is squarely on the employer: Brittool v Roberts and ors 1993 IRLR 481 (EAT) per HHJ Peppitt.*

85. *As held in King and ors v Eaton Ltd (no.2) 1998 IRLR 686 per Lord Prosser at p.662, Ct Sess (Inner House), in case of seriously flawed*

dismissal procedures, a Tribunal cannot be expected to embark on a "sea of speculation" about what might have happened had the employer acted differently.

86. A Tribunal may find that an employee would have continued in employment indefinitely on the same terms where the evidence to the contrary (i.e. that employment might have terminated earlier) is so scant that it can effectively be ignored: Software 2000 Ltd v Andrews ors 2007 ICR 825 (EAT) per Elias J in § 54.

173. In assessing whether a *Polkey* reduction should be applied in this case, I have had regard to the approach set out in the *Software 2000* case. Therefore, I have considered that as TGS argues the Claimants would have been made redundant even if they had not been unfairly dismissed, it is for TGS to adduce evidence to support its contention.

174. I have also considered the reliability of any evidence available on which I could make an assessment as to whether the Claimants would have been made redundant by TGS UK. However, there is no evidence on which such an assessment can be made. Mr Craig's oral evidence was that TGS UK had not made any plans for redundancies in the event that TUPE applied. Based on the legal advice the four Respondents received, which concluded TUPE did not apply, that was the only scenario for which plans were made. Furthermore, Ms Tate's e-mail sent on 21st July 2022 indicates that Ion UK intended to instigate redundancy consultation ***because*** Ion UK concluded TUPE did not apply. This provides no indication that Ion UK would be considering redundancies if it had concluded TUPE did apply. In my judgment, this means no sensible prediction can be made of whether TGS UK would have made the Claimants redundant following my earlier determination that TUPE does apply. If TGS UK did not make plans for that scenario, I have no evidence on which I can assess the likelihood of what TGS UK would have done.

175. I have considered whether there is other evidence or material that may assist an assessment of the likelihood that TGS UK may nonetheless have made the Claimants redundant. I have therefore taken into account the ION Group's financial difficulties, that it had instigated redundancy consultation, and TGS would not require all of Ion UK's employees. These factors are capable of supporting TGS's contention. However, it does not follow that this would have led to redundancies. Taking each of these points in turn, the transfer was intended to address the ION Group's financial difficulties. In fact, in its Grounds of Resistance, Ion UK acknowledged when ION filed for bankruptcy, it hoped the sale of its assets would result in a full rescue. Furthermore, while redundancy consultation had been instigated, that was limited to electing employee representatives, no actual consultation had taken place. Such consultation would have covered ways of avoiding or reducing the number of dismissals, so it's not known what the outcome of that negotiation may have been. In particular, it's unclear whether those negotiations may have removed the need to make redundancies or to what extent it might have reduced the need to make redundancies. Yet further, while TGS would not require all of the

ION Group's employees, the number of job offers TGS made exceeded the number of Ion UK's employees.

176. In addition to the above evidence potentially supporting TGS's contention, there is other evidence pointing in the opposite direction. For instance, the *"Ion HR Integration Presentation"* states which Ion UK employees retained by TGS UK would depend on whether TUPE applied. But as stated, there are no plans for that scenario. The likelihood is that if TGS had been working on the basis that TUPE applied, it would have made more job offers to Ion UK employees in preference to the 12 contractors who were offered positions. Bearing in mind that Ion UK had 34 UK-based employees, and TGS made a total of 67 job offers, it is far from clear how many, if any, Ion UK employees might have been made redundant. There was no redundancy selection criteria from which to assess the likelihood that the Claimants might have been selected for redundancy. Furthermore, there is no information regarding TGS UK's workforce in August 2022, who would have been part of any redundancy selection pool.

177. In light of all the evidence available, in my judgment, the Claimants' employment would have continued indefinitely. Any evidence to the contrary is scant, and does not meaningfully assist in finding that a *Polkey* reduction is appropriate.

Conclusions on TULRCA

178. As these conclusions apply only to Mr Reid, they are dealt with at paragraphs 216 to 233 below.

REASONS FOR MR BELLINGHAM'S AWARD

179. I consider it is just and equitable to award Mr Bellingham the compensation set out at paragraphs 5 to 18 above, for the reasons stated at paragraphs 180 to 189 below, to reflect the financial losses that his dismissal has caused.

Unfair Dismissal – Basic Award

180. The parties agree this award should be calculated as 1.5 x 5 years x £571 = £4,282.50.

Unfair Dismissal - Compensatory Award

181. Mr Bellingham's claim for a compensatory award comprises:

    181.1 Loss of basic salary from 27th August 2022, being immediately after his dismissal, to 5th November 2024, a period of 114 weeks.

    181.2 Uplift for expected inflation-based salary increase, which TGS disputes. My decision is that Mr Bellingham is not entitled to this uplift, because the Tribunal does not have jurisdiction to make such an award under

Part 10 Chapter II of the Employment Rights Act 1996.

181.3 Pension loss: the parties agree the weekly figure is £293.72.

181.4 Uplift for pension loss to reflect expected inflation-based salary increase. For the reasons stated at paragraph 181.2 above, this amount is not recoverable.

181.5 Private medical cover: the parties agree the weekly figure is £27.05.

181.6 Loss of statutory rights is agreed between the parties at £500.

181.7 Loss of life cover: Mr Bellingham has not obtained life cover, but based on quotations he estimated this cost which he claims at £180 per month for 26 months being a total of £4,680. TGS disputes Mr Bellingham is entitled to recover this because he has not incurred the cost of alternative life cover, it also argues he would not be a beneficiary of any life cover. Therefore, it values this element as nil. I consider it is just and equitable for Mr Bellingham receive compensation for the loss of this fringe benefit; it's similar to private health cover which an employee may have for themselves and for the benefit of their family.

182. A significant area of dispute between the parties regarding Mr Bellingham's compensatory award is the period for which he is entitled to recover compensation. TGS's position is that a *Polkey* reduction should reduce the period for which the award is made from the 114 weeks Mr Bellingham claims, which covers 27th August 2022 to 5th November 2024. TGS argues this period should be reduced to two weeks to reflect the period they say it would have taken to complete collective consultation for redundancy that Ion UK instigated. TGS's alternative position was that there should be a *Polkey* reduction to the period of time it would have taken for the redundancy process to be completed.

183. As stated, Mr Bellingham is claiming the compensatory award from 27th August 2022. However, as this period is covered by the award for wrongful dismissal, this would lead to double recovery. Therefore, I consider the period for the compensatory award should start from 1st October 2022. I have awarded Mr Bellingham's compensatory award from 1st October 2022 up to the date of the remedy hearing on 5th November 2024, which is 109.4 weeks, and has not limited this period on the basis of either of TGS's *Polkey* defences.

184. I do not accept either *Polkey* defence is made out for the reasons stated at paragraphs 169 to 177 above. Therefore, all elements of the compensatory award that Mr Bellingham is entitled to recover, will be payable for 109.4 weeks.

185. In addition to the reasons stated at 169 to 177, I also consider the Polkey defences fail in relation to Mr Bellingham because his equivalent role at Ion UK was offered to Ms Agar, who, Mr Bellingham states, continues to be employed in that role by TGS UK. That Ms Agar is in the equivalent role that Mr Bellingham held at Ion UK, is supported by the fact that three of his direct reports at Ion UK,

now report to Ms Agar at TGS UK. In light of Mr Bellingham's unchallenged evidence on this point, I consider this further demonstrates a *Polkey* reduction is not justified as his role would not be redundant. Yet further, as Mr Bellingham was named as one of Ion UK's top 20 employees, if a fair selection redundancy process had been followed, his track record is likely to have put him in a favourable position.

186. Another area of dispute about which Mr Palmer cross examined Mr Bellingham was regarding mitigation of loss, pointing out that he had applied for fewer jobs in the last 14 months than during the earlier period since dismissal. Mr Bellingham accepted that he had applied for fewer jobs in the later period. He explained he became more selective in the jobs he applied for during the later period, focusing on more senior roles commensurate with his experience. In my judgment, it was not unreasonable for Mr Bellingham to focus his job hunting during the later period as he describes. In fact, Mr Craig seemed to criticise Mr Bellingham for applying for junior roles, believing that applying for such roles may have adversely affected him securing another job. While I do not consider there is any merit in Mr Craig's criticism, Mr Bellingham's more selective approach removes the basis for such criticism. I also find it inconsistent for Mr Palmer to criticize Mr Bellingham for applying for fewer jobs, when his reasons for doing so align with Mr Craig's views. In any event, while Mr Palmer reiterated the decreasing applications during his closing submissions, he acknowledged Mr Bellingham had made efforts, having both applied for various jobs and established a business. I consider Mr Bellingham has mitigated his loss by applying for numerous jobs, setting up a business, and in my judgment TGS has not shown he has acted unreasonably.

Wrongful Dismissal

187. The parties agree this award should be calculated as 5 weeks x (£3,120 + £293.72) = £17,068.60.

Failure to Consult with Claimant on TUPE Transfer

188. Mr Bellingham claimed this as 13 weeks gross weekly pay plus his weekly pension contributions; TGS argued this should be no more than 6.5 weeks gross weekly pay. Having regard to the decision in *University of Sutherland v Drossou UKEAT/0341/16/*RN (see paragraph 19), I consider Mr Bellingham is entitled to have pensions contributions included when calculating this head of loss. That case confirms that section 221 of the Employment Rights Act 1996 defines a week's pay to include the amount payable by an employer. Mr Bellingham's pension contributions are an amount that was paid by his employer, therefore it should be included in the calculation of the weeks' pay that has been awarded.

189. For the reasons stated at paragraphs 153 to 168 above I assess this at 13 weeks

REASONS FOR MR JAKEMAN'S AWARD

190. I consider it is just and equitable to award Mr Jakeman the compensation set out at paragraphs 19 to 37 above, for the reasons stated at paragraphs 191 to 215 below, to reflect the financial losses that his dismissal has caused.

Unfair Dismissal – Basic Award

191. The parties agree this award should be calculated as 1.5 x 9 years x £571 = £7,708.50.

Compensatory Award

192. Mr Jakeman's claim for a compensatory award consists of the following elements:

192.1 Loss of basic weekly pay plus weekly pension contributions.

192.2 Private medical cover: the parties agree the weekly figure is £27.05.

192.3 Loss of commission claimed at the rate of £338.76 per week. TGS has not included payment of commission in its counter schedule. No reason is given for this omission. The statutory basis for the compensatory award is section 123 of the Employment Rights Act 1996, which covers *"…loss of any benefit which he might reasonably be expected to have had but for the dismissal."* In my judgment, this includes the commission which, according to Mr Jakeman's unchallenged evidence, he earned during his employment. While Mr Craig's witness statement pointed out Mr Jakeman was not guaranteed 100% of any commission for sales he had worked on, I consider Mr Jakeman is entitled to include commission, which he has calculated as an average based on his 2022 payslips, because commission reflects remuneration he received during his employment.

192.4 Loss of life cover: Mr Jakeman claims this at a rate of £1,116 per annum for 105.4 weeks, amounting to ££2,262.05. TGS disputes Mr Jakeman's entitlement to this, and it values this element as nil. I consider it is just and equitable for Mr Jakeman receives compensation for the loss of this fringe benefit; it's similar to private health cover which an employee may have for themselves and for the benefit of their family.

192.5 Loss of life cover: Mr Jakeman has not obtained life cover but has estimated this at £1,116 per annum. TGS has not provided any alternative figure; it objects to this on the basis that Mr Jakeman not has incurred the cost of alternative life cover, it also argues he would not be a beneficiary of any life cover. Therefore, it values this element as nil. I consider it is just and equitable for Mr Jakeman to receive

compensation for the loss of this fringe benefit; it's similar to private health cover which an employee may have for themselves and for the benefit of their family. And in the absence of any alternative figures, this should be calculated at £1,116 per annum, over 105.4 weeks, amounting to £2,262.05.

192.6 Mr Jakeman's compensatory award included a claim for interest to reflect late receipt up to the date of the remedy hearing. While interest may be payable where a tribunal award is unpaid, Mr Jakeman has provided no statutory or other authority for awarding interest for the period before judgment is given.

192.7 Loss of statutory rights is agreed between the parties at £500.

193. Mr Jakeman claims the above compensatory award in respect of the period from 29th October 2022, being 9 weeks from the effect date of termination, to 5th November 2024. This is a period of 104.5 weeks. TGS relies on two separate legal defences to challenge the period for which the compensatory award is payable to Mr Jakeman. Firstly, on the grounds of its two-fold *Polkey* defence. Secondly, it argues Mr Jakeman failed to mitigate his loss.

194. As to whether Mr Jakeman mitigated his losses, Mr Palmer questioned him very closely on this point, relying heavily on the fact that Mr Jakeman had not applied for any jobs in the two years since his dismissal. However, I am not satisfied that Mr Jakeman has acted unreasonably as explained below.

195. On completing his education in 1980 Mr Jakeman began working in seismic processing until 1990, and since then has worked as an account manager within the seismic industry at various companies and in various countries. In around 2000 he was headhunted, and joined a company based in Nigeria. The following year, he was headhunted by another company based in the UK, where he worked from 2001 to 2012. He was then headhunted by Ion UK, and joined them in 2013, working as an account manager at the date of his dismissal. He was employed in the Late Sales team, which I understand relates to the marketing and sale of seismic or geophysical data to clients in the Eastern Hemisphere.

196. I have taken into account and accept Mr Jakeman's evidence that this is a specialist sector meaning there are limited equivalent jobs available. I also accept his evidence that he was taken aback by his dismissal, which took him some time to come to terms with. Nonetheless, in September 2022 he had called 4 of his existing contacts whose firms collectively are the main companies which had multi-client sales businesses like Ion UK. He made enquires of these contacts, asking whether they had any suitable vacancies, but none did.

197. His oral evidence was that he has maintained regular contact with his contacts in the industry via social media, but also meeting in person at least once per month. He stated he continued to ask about job vacancies, but there haven't been any.

198. In around April 2023 he signed on with Working Smart, who he says is the main agency in the sector. And after speaking with its managing director, Deidre O'Donnell, he uploaded his CV on its website on 5th May 2023. Ms O'Donnell had also informed him that due to his age *"… it would be nigh on impossible to get work … as companies wanted younger people."* He accepts her advice is a realistic assessment of his job prospects. He was told the agency would contact him if he was matched to any vacancies, but he heard nothing from them. He chased them up with calls on 2-3 occasions.

199. I do not accept that Mr Jakeman has failed to mitigate his loss.

200. I have taken into account that the burden is on the employer, who must establish an employee has acted unreasonably, as opposed to an employee needing to show they have acted reasonably. In my judgment TGS has failed to show Mr Jakeman acted unreasonably in not applying for any jobs since his dismissal. Although he has not applied for any jobs, he has made speculative enquiries in September 2022 and in his subsequent and regular communications with his contacts, he is taking proactive steps to try to secure alternative employment. By reaching out to contacts he has established during his time working in the sector he has been seeking employment, but has so far been unsuccessful.

201. I also take into account that in the last 20 or so years, Mr Jakeman has not applied for a job, but has been head hunted into the jobs he has held over the last two decades. In other words, networking has secured him jobs in the past, so it is not unreasonable that he has used this method since being dismissed. Mr Craig is an HR professional, and yet the only jobs he has been able to find are were as follows:

    201.1 Senior Account Executive Oil & Gas: responsibilities included developing *"direct relationships with key stakeholders in Digital, IT, Business etc. including C-suite relationships in assigned priority accounts"* And the role required *"5+ years of experience and a demonstrable track record in selling technology solutions within the Oil & Gas industry."*

    201.2 Client Services/Key Account Manager based in Jarrow, with an annual salary range of £44-£48,000. The advertisement stated: *"This position would suit an experienced Customer/Client facing Manager with a minimum of 12 months experience in a similar role …"*

    201.3 Account Manager – Multi Utilities based in Oldham, offering a salary of £40,000 per annum. The advertisement stated knowledge of the multi-utilities sector and services was required, and the firm's services included water, gas, electric, telecoms and drainage solutions.

202. I do not find it unreasonable that Mr Jakeman did not apply for these roles or for jobs like these as they require experience and knowledge which he does not have, and none are related specifically to geophysical data, which is the sector

Mr Jakeman has been working in since 1980. As Mr Jakeman explained during his oral evidence, these are roles which require knowledge and skills that he has no experience in, they are not jobs in the seismic sector. And although they are account manager jobs, without relevant knowledge and sector-specific experience, I accept his evidence that it's unlikely he would secure the jobs or be able to do them.

203. A further reason why it was not unreasonable that Mr Jakeman did not apply for these jobs are that their salaries are considerably lower than his Ion UK salary, and all of the jobs are some considerable distance from his home. In some way, these being the most suitable jobs Mr Craig seems able to have found tends to support Mr Jakeman's evidence that no suitable job vacancies have arisen since his dismissal. If suitable vacancies had arisen, I would expect Mr Craig is likely to have been aware of them and put them forward as evidence Mr Jakeman has not mitigated his loss by failing to apply for them.

204. Yet further, I consider Mr Craig's implied criticism of Mr Bellingham for applying for jobs at a lower level compared to his role at Ion UK, is inconsistent with Mr Craig proposing Mr Jakeman should apply for much more junior roles, as reflected in the lower salaries.

205. While it is regrettable, I also consider Mr Jakeman is correct to appreciate that his age may count against him in seeking alternative employment, particularly if he is searching in fields that he has no experience in. Potential employers may be sceptical about his ability to adapt to a new sector and learn new skills.

206. Therefore, these are the reasons I consider TGS has not shown Mr Jakeman failed to mitigate is loss.

207. As stated, TGS's position is that a *Polkey* reduction should reduce the period for which the award is made to two weeks to reflect the period it would have taken Ion UK to complete collective consultation for redundancy. TGS's alternative position was that there should be a *Polkey* reduction to the period of time it would have taken for the redundancy process to be completed.

208. I do not accept either *Polkey* defence is made out for the reasons stated at paragraphs 169 to 177 above. Therefore, all elements of the compensatory award that Mr Jakeman is entitled to recover, will be payable for 105.4 weeks.

209. An additional reason why the *Polkey* defences fail in relation to Mr Jakeman is that when there was an earlier round of possible redundancies at Ion UK in April 2022, although Mr Jakeman was at risk of redundancy, he was not selected. This makes it unclear whether he would have been selected for redundancy even if he had not been unfairly dismissed.

<u>Wrongful Dismissal</u>

210. Mr Jakeman claims compensation for wrongful dismissal calculated as his net salary plus his pension contribution as a weekly total of £1,433 x 9 weeks.

211. He claims for a loss of commission for the same period, being £338.76 his average net weekly commission x 9 weeks.

212. TGS does not disputes the period of the claim, but it has not included payment of commission in its counter schedule. No reason is given for this omission. I have already stated (see paragraph 192.3 above) that I consider Mr Jakeman is entitled to include commission; I consider commission is part of his normal pay.

213. Mr Jakeman's claim for wrongful dismissal included a claim for interest to reflect the delayed payment since his dismissal. As stated above, I consider there is no legal basis to award interest for the period being claimed.

Failure to Consult under TUPE

214. Mr Jakeman claimed this as 13 weeks gross weekly pay, whereas TGS calculated this as 6.5 weeks of his gross weekly pay. Having regard to the seriousness of the breach of this duty, I consider 13 weeks' pay is the appropriate compensation for the reasons stated at paragraphs 153 to 168 above.

Holiday Pay

215. Mr Jakeman claims for 8.23 days accrued as annual leave, equating to £3,478.47 as gross basic pay, plus £1,013.81 in respect of his average commission. TGS's position is that Mr Jakeman has not provided any evidence to substantiate his claim for holiday pay, and so it makes no admission in respect of any potential liability. I am satisfied based on Mr Jakeman's evidence that he is entitled to claim for 8.23 days. I note his evidence is supported by the letter from the Insolvency Service dated 25th October 2022 stating he was owed 8.23 days holiday pay at the date of his dismissal. I also note there is no evidence to the contrary. Accordingly, I award Mr Jakeman 8.23 days holiday pay in the amount claimed of £4,492.28.

REASONS FOR MR REID'S AWARD

216. I consider it is just and equitable to award Mr Reid the compensation set out at paragraphs 38 to 48 above, for the reasons stated at paragraphs 217 to 233 below, to reflect the financial losses that his dismissal has caused.

Unfair dismissal – basic award

217. A basic award at the agreed sum of £2,855.00, representing 1 x 5 years x £571.

Unfair dismissal - compensatory award

218. Loss of statutory rights is agreed between the parties at £500.

Notice Pay

219. Mr Reid claims compensation for notice pay calculated as his net salary of £1,289.48 x 5 weeks. Except that TGS have calculated this loss using Mr Reid's gross weekly pay, there is no dispute between them, as TGS agree the notice period is 5 weeks.

Failure to Consult with Claimant on TUPE Transfer

220. Mr Reid claimed this as 13 weeks gross weekly pay, whereas TGS calculated this as 6.5 weeks of his gross weekly pay. Having regard to the seriousness of the breach of this duty, I consider 13 weeks' pay is the appropriate compensation for the reasons stated at paragraphs 153 to 168 above.

Failure to consult under TULRCA

221. TGS disputes the Tribunal's jurisdiction to deal with this complaint on the grounds that Ion UK had been conducting an internal redundancy process, and employee representatives were elected. Further, as regards jurisdiction, TGS also argues that evidence in respect of Ion UK's statutory consultation has already been considered by an earlier Tribunal. This is a reference to previous proceedings brought by various former Ion UK employees, in their capacity as affected employees (see paragraph 83 above). TGS relies on Mr Reid's decision to not participate in those earlier proceedings, in which a protective reward was made in respect of his former colleagues. And so, TGS argues, Mr Reid has failed to mitigate his losses.

222. I note that the parties to the earlier proceedings before Employment Judge Dyal were former employees in their capacity as affected employees, the Secretary of State and Ion UK. Yet Mr Reid is claiming a protective award from TGS UK, which was not party to the earlier claim; he does not pursue this complaint against Ion UK. He pursues this claim in his capacity as an elected employee representative, and alternatively, as an affected employee. Mr Pickard therefore argues that Mr Reid has standing to bring the claim under subsections 189(1)(b) and 189(1)(d) of TULRCA, and that the claim was brought in time.

223. He further argues there was a failure to comply with section 188 of the 1992 Act in various respects. For instance, Ion UK was aware of its financial difficulties for many months. He also argues consultation should have begun promptly after Ion UK concluded on 18th July 2022 that TUPE did not apply. He also says that employees should have been informed about the funding difficulties when it was anticipated funding Ion UK's funding would end on 12th August 2022. There was an unjustifiable postponement of to hold the consultation meeting after the US court approved the sale.

224. In the circumstances, where the complaint involves different parties, I see no reason why the Tribunal lacks jurisdiction to deal with this complaint, so I will deal firstly my findings on whether there has been a breach.

225. I note that while employee representatives had been elected, the relevant steps were not taken in good time. For instance, consultation must begin at least 30 days before the dismissals take effect. That did not happen in this case. Nor was there adequate time for the employee representatives to consider the information sent to them on 24th August 2022. The information was e-mailed to the representatives less than one hour before the meeting was due to begin. Furthermore, the meeting cannot properly be described as consultation, because ION UK's board had already taken the decision to wind up the company and dismissal employees. It follows that there was no consultation regarding ways to avoid or reduce those dismissed or to mitigate the consequences of the dismissal.

226. In my judgment, these are serious and fundamental breaches of the statutory requirements. That is because, although representatives were elected, the purpose of electing them was for them to be informed and participate in consultation. As stated, such information that was provided was very late. The information was not provided at a formative stage, it was provided after the decision to wind up the company had already been taken. Consequently, there was no real consultation. I also take into account that Ion UK had access to legal advice. Yet further, I consider there was a delay in meeting employee representatives, and I find the delay was deliberate on the basis of Mr Pickard's submissions. Namely, that Ion UK would have known for some months about the extent of its financial difficulties. That it waited until late July 2022 to arrange for the election of employee representatives, and that it postponed the first consultation meeting until 24th August 2022, these decisions prevented any effective consultation. There has been no explanation for these delays, and in my judgment, the most likely explanation is that it was deliberately intended to frustrate meaningful consultation. Therefore, in my judgment, the appropriate starting point is to make a protective award equivalent to 90 days' pay.

227. I have considered whether there are mitigating circumstances, and I am not persuaded there are any. TGS's position is that the ION Group had been experiencing financial difficulty for some time, its board and others are likely to have appreciated the severity of those financial problems. The mitigation that has been put forward is that the Respondents acted in good faith, but as I have found there was a deliberate delay which prevented any real consultation, it follows I do not accept that argument.

228. As Mr Pickard pointed out, there is no evidence from Ion UK, even though its then HR Manager employee, Ms Tate, led the consultation. Mr Reid's alleged failure to mitigate his loss is not relevant: as a punitive award, it is intended to punish the employer and not compensate the employee for actual losses incurred.

229. I also find Mr Reid has standing as an elected employee representative.

230. I am satisfied, based on the Claimants' unchallenged evidence, that the UK-based employees based at the same establishment.

231. In light of Judge Dyal's judgment on 19th April 2023, I am also satisfied that 20 or more employees were dismissed as redundant on 26th August 2022.

232. The period of the protective award starts when the first dismissal took effect, which in this case was 26th August 2022. The rate of remuneration is one week's gross pay without any ceiling on the amount of a week's pay and it is calculated on a daily rate.

233. The purpose of the award is to ensure that consultation takes place and not to compensate Mr Reid. In deciding how much to award, my emphasis is therefore on the extent of the failure to consult and whether it was deliberate. I have found the breaches were fundamental by effectively depriving the employees an opportunity of consultation through their representatives. I have also found that the Respondents acted deliberately. I therefore make a protective award in respect of each claimant for the maximum of 90 days.

Conclusion

234. A summary of the decisions reached in respect of each Claimant is set out in the Appendix below.

Employment Judge Tueje
Date: 2nd January 2025

Judgment sent to the parties
Date: 3rd January 2025

APPENDIX

Mr Bellingham			
	Claim	Response	Decision
Unfair dismissal (basic award)	1.5 x 5 x £571	1.5 x 5 x £571	1.5 x 5 x £571
Unfair dismissal[1] (compensatory award)	Basic salary x 114 weeks Salary increase: 6.15% Pension x 114 weeks Salary increase: 6.15% Medical cover x 114 weeks Life insurance x 114 weeks Loss statutory rights: £500	Basic salary x 2 weeks Salary increase: 0 Pension x 2 weeks Salary increase: 0 Medical cover x 2 weeks Life insurance: 0 Loss statutory rights: £500	Basic salary x 109.4 weeks Salary increase: 0 Pension x 109.4 weeks Salary increase: 0 Medical cover x 109.4 weeks Life insurance x 109.4 weeks Loss statutory rights: £500
Wrongful dismissal	Basic salary x 5 weeks	Basic salary x 5 weeks	Basic salary x 5 weeks
Failure to inform & consult (TUPE)	Week's pay x 13 weeks	Week's pay x 6.5 weeks	Week's pay x 13 weeks

[1] Sums received by way of mitigation are to be deducted from amounts awarded for basic salary and pension contributions

Mr Jakeman			
	Claim	Response	Decision
Unfair dismissal (basic award)	1.5 x 9 x £571	1.5 x 9 x £571	1.5 x 9 x £571
Unfair dismissal (compensatory award)	Basic salary x 105.4 weeks Pension x 105.4 weeks Commission x 105.4 weeks Medical cover x 105.4 weeks Life insurance x 105.4 weeks Loss statutory rights: £500	Basic salary x 2 weeks Pension x 2 weeks Commission: 0 Medical cover x 2 weeks Life insurance: 0 Loss statutory rights: £500	Basic salary x 105.4 weeks Pension x 105.4 weeks Commission x 105.4 weeks Medical cover x 105.4 weeks Life insurance x 105.4 weeks Loss statutory rights: £500
Wrongful dismissal	Basic salary x 9 weeks	Basic salary x 9 weeks	Basic salary x 9 weeks
Failure to inform & consult (TUPE)	Week's pay x 13 weeks	Week's pay x 6.5 weeks	Week's pay x 13 weeks
Holiday pay	8.23 days x basic pay 8.23 days x average commission	No admissions No admissions	8.23 days x basic pay 8.23 days x average commission

Mr Reid			
	Claim	Response	Decision
Unfair dismissal (basic award)	5 x £571	5 x £571	5 x £571
Unfair dismissal (compensatory award)	Loss statutory rights: £500	Loss statutory rights: £500	Loss statutory rights: £500
Wrongful dismissal	Basic salary x 5 weeks	Basic salary x 5 weeks	Basic salary x 5 weeks
Failure to inform & consult (TUPE)	Week's pay x 13 weeks	Week's pay x 6.5 weeks	Week's pay x 13 weeks
Failure to consult (TULRCA)	90 days' pay	Nil	90 days' pay