**Case Number: 6028213/2025**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Clive Clapham**

**Respondent:** **Acefront Limited**

**Heard at:** **London East Tribunal Hearing Centre (by CVP)**

**On:** **13 to 14 May 2026**

**Before:** **Employment Judge Othen**

**Representation**

| | |
|---|---|
| Claimant | Thakerar (Counsel). |
| Respondent | Green (Counsel). |

# JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Claimant contributed to his dismissal to the extent of 15%, to be applied to the basic and compensatory award for unfair dismissal.

3. The Claimant's complaint of wrongful dismissal is well-founded and is upheld.

4. The Respondent made an unlawful deduction from wages by failing to pay the Claimant in lieu of accrued but untaken holiday due on termination of employment.

5. The Tribunal will decide the remedy for the above claims at a further hearing to be notified to the parties.

# REASONS

## Introduction

1. The Claimant asserts that he was employed as Managing Director and Property Manager from 1 April 2004 to 7 March 2025. ACAS Early Conciliation commenced on 23 May 2025 and concluded on 4 July 2025. The ET1 was presented on 30 July 2025.

2. The Claimant alleges that his employment originally transferred to the Respondent after it acquired a previous business that employed him, in or around March 2010, and that the Claimant thereafter continued to work as Managing Director and Property Manager.

3. The Respondent resists all claims. The Respondent denies that the Claimant was employed by the Respondent (or was transferred to it) as alleged, denies that the Claimant was dismissed, and contends that the Claimant was removed only from the office of director. The Respondent further denies liability for unfair dismissal, wrongful dismissal, unlawful deductions from wages, holiday pay or any other payment claimed.

**Hearing progress**

4. A full merits hearing took place on the above dates at which all the evidence was heard. There was insufficient time for the parties to make submissions and for the Tribunal to deliberate and deliver judgment.

5. In discussion with the parties therefore, I ordered that the hearing be adjourned and that the parties should send written submissions to the Employment Tribunal. These written submissions were not received by me until 18 August 2026. I have completed my deliberations as quickly as possible to produce this written judgment for the parties. I apologise on behalf of the Employment Tribunals for the delay in producing the judgment and the stress and inconvenience that will have been caused by this.

**Agreed List of Issues**

6. The agreed list of issues, which was discussed and clarified at the outset of the hearing, is attached to this judgment as Appendix A . In its written submissions, the Respondent confirmed that it no longer asserted that the claims had been submitted out of time and that jurisdiction was disputed on this basis. It was decided by me, in discussion with the parties that this hearing would determine liability only and the list of issues has been construed accordingly.

**General approach to evidence.**

7. In this case, as in many others, the evidence touched on a wide range of issues. Where I made no finding, or a finding without the depth in which the point was discussed before the Tribunal, that is not an oversight or omission. It is a reflection of the extent to which the point was truly of assistance to me. There were many disagreements of fact between the Claimant and the Respondents' witnesses on a number of the events about which I heard, either by way of background or matters of decision. Although I had much sympathy with the witnesses and parties, and the evident emotional pain resulting from their disputes, I gained limited assistance when determining the factual and legal issues in this matter from some such disagreements. It is not the Tribunal's role to adjudicate on each and every matter of disagreement unless it is necessary to the fair and just disposal of the claims that are brought. Where I have not directly addressed any such disagreements, that is not (as has been said) an oversight. It is a reflection of the fact that the Tribunal must focus on

resolving the matters that are factually and legally relevant to the dispute and to do so in a proportionate manner.

**The evidence heard and considered.**

8. There was a primary bundle of 529 pages and a supplementary bundle of 961 pages. The bundles were extremely poorly organised and the pagination did not correspond to the index or PDF page numbering. This led to significant confusion and affected my ability to efficiently and proportionately deal with the evidence.

9. The Claimant gave evidence. For the Respondent, evidence was given by Susan Clapham (the Claimant's wife) Joanne Goode (née Clapham) (the Claimant's daughter) and Robert Clapham (the Claimant's son).

**Interlocutory Issues**.

10. On review of the submissions on behalf of the Claimant, it became apparent that some of the Claimant's witness statement was missing: paragraph numbers were referred to which were not included in the versions before me. On my direction, the parties were written to on 7 and 8 September 2026, with responses provided by both parties on 8 and 11 September 2026. What emerged from this correspondence was as follows:

    10.1 The version of the Claimant's witness statement which had been exchanged with the Respondent and sent to the Tribunal, missed two pages;

    10.2 This had been the Claimant's witness statement in this case; the hearing proceeded on this basis and the missing pages had not been noticed by anyone until 7 September 2026;

    10.3 The version used by Claimant's counsel for submissions contained the missing pages;

    10.4 The Claimant made no application regarding this issue; it was of the view that there was no evidence contained within the missing pages that had not been adduced or tested elsewhere by way of bundle documents and answers given by witnesses, including the Claimant, to cross examination questions;

    10.5 Further, the Claimant's solicitor stated that submissions on his behalf only referred to one paragraph of the "missing" witness statement on one occasion;

    10.6 The Claimant was therefore content that I could fairly hear the case in accordance with the overriding objective and in the interests of justice without reference to this evidence for the Claimant;

    10.7 The Respondent submitted that I should only determine liability in this case on the basis of the evidence which was before me at the hearing

and that any of the Claimant's submissions which referred to "missing" evidence should be disregarded.

11. To that extent, I continued to deliberate on the basis of the evidence before me and my notes of that evidence, and I disregarded paragraph 31 of the response submissions on behalf of the Claimant.

**Findings of fact**

12. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the pdf pages of agreed Bundle of Documents (with SB prefixed for the supplementary bundle).

13. This case concerns a family business and a sad and bitter family dispute.

14. The Claimant was born into a property owning/letting business, started by his father in the 1960s. This became Clapham Holdings Limited (**CH**) and was eventually run and managed by the Claimant. The Claimant says that his employment with CH started on 1 April 2004. The board of directors comprised the Claimant, his brother Ralph and sister Kim. Later, these board members changed as Ralph left and Stella Clapham (the Claimant's mother) joined.

15. A contract of employment between the Claimant and CH dated 1 October 2004 (253) confirms that the Claimant was employed as Managing Director on a salary of £46,000 per year. This was shortly followed by a further contract dated 21 June 2005 (essentially the same but updated) which confirmed a fixed period of employment from 1 October 2004 to 31 [sic] June 2019 (257). It confirmed, amongst other things, his hours (to be agreed from time to time) holiday and sickness entitlement and was signed, dated and witnessed by both the Claimant and an unknown party on behalf of the CH. In evidence it was suggested to the Claimant that the contract termination date must have been 30 June 2019 with which the Claimant agreed.

16. Throughout his directorship, it is agreed that the Claimant performed various activities for CH and then for the Respondent company connected with all its properties. He collected rent, dealt with tenants and dealt with property maintenance and repairs, including, on occasions, by performing these himself such as clearing gutters etc.

17. CH was a profitable company and its property ownership increased over its lifetime.

18. A dispute arose between the three sibling directors from 2006 onwards which was resolved by way of a mediation agreement dated 1 July 2009 (266). This agreement:

    18.1 was between eight parties which included CH, the Claimant, his wife, children and siblings;

    18.2 confirmed the nature of business of CH as letting its own properties, which, by then, comprised seven;

18.3 split the shares of CH into two sections: A (53.15% in total) and B (46.85%);

18.4 confirmed that the Claimant, Joanne and Robert Clapham would be the "A Shareholders" (269);

18.5 split the company properties into two sections: four A properties and three B properties;

18.6 agreed that the shareholders would establish new companies and that thereafter, CH would be liquidated, at which point the properties would be distributed as above;

18.7 confirmed that CH had issued and paid-up 4000 ordinary shares and 4000 ordinary B shares which were allocated as set out;

18.8 agreed that on liquidation of CH: "*none of the parties shall have any claim whatsoever as against Clapham Holdings arising out of their appointment by employment by or their role as an officer of Clapham Holdings save only that…*" the employment of Stella Clapham would be terminated by way of a compromise agreement with a compensatory payments of £30,000, and that the Claimant would indemnify CH for any claims brought by Susan Clapham as a result of the termination of her employment (273).

19. On 10 July 2009, the Respondent was incorporated (279).

20. During cross examination, the Claimant explained that both the A and B properties were spread out geographically across Essex. They both comprised a mixture of commercial and residential properties. He explained that the reason for this split was that, although the A properties comprised 63%, they held 100% of CH debt; all the charges were against these properties, for which he had to take out a loan. He agreed, when asked, that the split did not reflect an organised grouping of properties and that what had happened, in effect was that all CH assets were "*fragmented*" and put back into two parts, according to the shareholders' attitude to risk/debt.

21. During cross examination, the Claimant agreed that from 10 July 2009 until 25 March 2010, CH was still the owner and lessor of all its properties and was still operating as normal and that although he was a director for the Respondent during this time, he was still working for CH in the same capacity. He could not explain whether the Respondent company had a bank account before 2010 or any employer's liability insurance. He could not cogently explain any transfer and any transfer date. The winding up procedure for CH started on 25 March 2010.

22. The Claimant's case is that his employment transferred to the Respondent, under the Transfer of Undertakings (Protection of Employment) Regulations 2006. The Claimant's witness statement says at paragraph 12 that his employment transferred "*on or around the autumn of 2009 and continued on the same terms*". Written submissions for the Claimant concede that the

transfer must have taken place when CH ceased operations and winding up commenced, that being on 25 March 2010.

23. On 8 April 2011, the Respondent, at the direction and authorisation of the Claimant, issued shares to his children and wife which included a new class of 1000 B shares (which had no voting rights) between himself and his wife (280). The Respondent's evidence is that no one other than the Claimant knew that this had been done. I accept this evidence as it was corroborated by all witnesses.

24. By summer 2011, the ordinary shares in the Respondent company were split fairly equally between the Claimant, his wife and two children, whereas the Claimant and his wife were the only parties to own the 500 ordinary B shares each. The Claimant's evidence is that by that time: "*I was working full-time as managing director and property manager for the Respondent and the B shares were to reflect that position to compensate both Susan and me for our employment with the Respondent*" (paragraph 18 WS). At that time, the Claimant and his wife were the only employees of the Respondent company. These shares were allocated by Macinyre Hudson LLP accountants (page 283) and it is the Claimant's evidence that this was effected on the advice of previous accountants, Tiffin Green. I accept this evidence, given that there is no documentary evidence to contradict it and it appears consistent with the participation of Macintyre Hudson.

25. On 7 October 2011, CH was dissolved (286). The Respondent's case is that the Claimant's employment ceased (with CH) at this point and did not transfer to the Respondent and, that he was never employed by the Respondent thereafter, his role being purely as a director.

26. The Claimant's evidence is that he agreed with Susan Clapham that his remuneration would be paid as a mixture of salary, subject to PAYE deductions and share dividends. "*It is a director's duty to minimise taxation for the benefit of shareholders and this was a means of doing so*" (paragraph 18 WS). I accept the Claimant's evidence that at least some extent, his remuneration was organised in this way, for this reason and, as reflected above, it was done so having taken professional advice.

27. Over the years that followed, until 2023, the Claimant appears to have effectively run and controlled every aspect of the Respondent company. There appears to have been very little, if any, consultation with Susan Clapham. Evidence given by her during cross examination, for example, was that tax returns were submitted on her behalf without her involvement.

28. During this time, the majority of the Claimant's remuneration comprised dividends (an average of 83%) (para 19 Claimant's witness statement). Not all the Claimant's payslips and P60 documentation is included in the bundle but the majority which are included from pages 441-447 and 450-454 appear to be consistent with the Claimant's witness statement at paragraph 19 which set out his PAYE earnings of between £7,000 and £9,000. His dividend income was between approximately £38,000 and £51,000 according to the same paragraph.

29. In 2023, the Claimant's PAYE earnings went down to £1,300, although his dividend income increased to £51,299. No payroll was processed the tax year 2023-2024 (241). Since 6 April 2023, the Claimant's remuneration has been by way of 100% dividends and no PAYE earnings (524) (see paragraph 60 below).

30. The evidence regarding the manner in which the Claimant (and Susan Clapham) were paid was confusing. The Claimant's case was that they were paid by way of a monthly standing order in the sum of £2300. Robert Clapham's evidence was that this payment of £2300 was not employment income but was a "drawdown" from funds accumulated in the directors' loan account of the Respondent. During cross examination, it was put to Robert Clapham that the standing order was part of the Claimant's remuneration for the work he did for the Respondent company, with which he disagreed. It was clarified however that the full sum of £2300 was paid by way of standing order into a joint, personal account of the Claimant and Susan Clapham every month.

31. The Claimant's evidence with regard to his employment duties performed for the Respondent were that they were the same as those performed for CH. The Respondent's witnesses did not disagree that the Claimant performed those duties but said that they were done poorly or not regularly enough. During cross examination, Joanne Goode admitted that no one else performed these duties before the appointment of Hair and Sons (see paragraph 52) and that clearing gutters, for example, was not normally a duty which one would have expected of a director. She disputed that property maintenance was the Claimant's full-time role.

32. On 11 October 2023, Susan Clapham resigned as a director of the Respondent although she was not removed as a director with Companies House until July 2024. After her resignation, the Claimant became the sole director (70). By that time, the relationship between the Claimant and Susan Clapham had significantly deteriorated due to a background dispute regarding the administration of the estate of the Claimant's late mother, Stella Clapham.

33. During cross examination, it was put to the Claimant that his fixed term contract (see paragraph 15 above) would have expired on 30 June 2019 and he was asked why no further contract was executed at that stage. The Claimant replied that he had understood that his employment would and did continue, that as he was working as the Managing Director of a small company, he didn't see the need for additional documents.

34. End of year accounts for 2022/23 show the number of employees as three (336) which, in cross examination, Robert Clapham agreed included the Claimant. He agreed that from the financial year 2023/24 onwards however, the Claimant did not receive any PAYE income and all remuneration was paid as dividends only. These accounts also show a significant increase in profits from 2022 to 2023 (341).

35. The change in the Claimant's remuneration (from a consistent amount of salary to a nominal amount in 2023 and no salary thereafter) appears to have taken effect at the same time as the dispute between the Claimant and the rest of his

family, with regard to the Respondent, its finances and operations, became significant.

36. On 24 May 2024, Robert Clapham and Joanne Goode were appointed as directors of the Respondent. Put neutrally, the Claimant and his children had a difficult relationship, both personally and as board members. All parties assert that obstructive and belligerent behaviour was perpetuated at their expense. Neither the Claimant on the one hand, nor his wife and children on the other trusted each other.

37. Both Robert Clapham and Joanne Goode say that until April 2024, they were unaware of their shareholdings in the Respondent company.

38. Since May 2024, correspondence between the three parties demonstrates strained communication, with each referring to each other by their first names rather than familial names. The correspondence shows the requests of Robert Clapham for various information and documents, with the Claimant replying that he did not think it was appropriate or reasonable for him to provide this information (80 to 97).

39. Because of volume, it is difficult to determine from this correspondence alone, the extent to which either party was unreasonable in their approach. However, an email from the Claimant to Robert and Joanne dated 12 June 2024 appears reasonable. This suggests a board meeting (again) with a proposed agenda of various important issues such as providing access to the company accounts and bank for Robert and Jo. It concludes "P*lease let me know if you would like to add any other matters*" (99). The Respondent disputes that this correspondence was genuine and that his actions betrayed contrary opinions.

40. Board meetings were not held, or were held only with the Claimant present, because neither Robert nor Joanne wanted to attend them due to their mental health difficulties (which they assert stemmed from their upbringing by the Claimant) and because of his alleged refusal to provide information ahead of them.

41. On 5, 8 and 18 July 2024, board meetings finally took place. Put briefly, they usually turned into arguments between the parties. They disagreed about how the Respondent company should be run and all manner of other things. Notable points from those meetings include a discussion regarding the pay of the Claimant on 5 July 2024. The Claimant referred to salaries and the way that "*we*" have managed the company: Robert did not disagree but appears to suggest that this should change going forward: "*the company's underneath management now*" (SB 26).

42. Between 25 and 30 October 2024, there were a series of telephone conversations between the Claimant and Robert Clapham. Most of these were recorded and full transcripts referred to which are, again, extremely lengthy and which it is neither proportionate nor helpful to examine in detail. They were recorded by the Claimant without Robert Clapham knowing. I have taken this into account in my findings of fact about these telephone conversations as the Claimant's intention was clearly to use the content for the benefit of his self-

interest at some point in the future and as such, would have managed his language, behaviour and communication style accordingly. Robert Clapham, however, would have been unaware of this. Indeed, in cross-examination, he states that the Claimant had "*rage-baited*" him and became distressed at times. I have taken into account the possibility of manipulation in this way.

43. Despite this however, the conversations do betray extremely strong feelings of personal animosity towards the Claimant by his son. Examples include:

    43.1 on SB page 328, Robert is clearly very angry and hurt by, what he says, is the historic way the family have been treated by the Claimant, with a torrent of swearing;

    43.2 on SB page 418, Robert calls the Claimant "*a fucking insignificant idiot*";

    43.3 on SB page 435, Robert states that "*you will be marching to our fucking beat*" and on page 931, refers to a takeover because the Claimant "*won't let anyone do anything*";

    43.4 on SB page 528, Robert stated "*don't bother arranging any of your board meetings because they're not going ahead*"

44. During the winter of 2024 into January 2025, there was a series of acrimonious conversations and emails, primarily between the Claimant and Robert Clapham.

    44.1 On 6 January 2025, Robert Clapham commented that the Claimant had been "*paid for your service on the basis of PAYE salary that you deemed appropriate in addition to dividends*…." (140);

    44.2 Emails from the Claimant on 29 on 30 January 2025 appear to show a reasonable response. He seems to be open to discussing various details about properties and their requirements with regard to upkeep, finances, insurance and other requirements. He discusses the company's VAT return and offered to go through it with Robert Clapham. He seems to offer encouragement: "*what you had done on the books was very good, only it was incomplete the bank hasn't been reconciled and ditto the credit card bank account and the tenant's accounts not cleared down*". This email concludes: "*in future Bob if you text me was swearing in I will ignore it, I have no idea what account you are referring to*" (172).

45. What is clear from the documentary evidence is that there was a long-standing and sustained pattern of dysfunctional communication between the directors for the Respondent company which meant that it could not be effectively run. This also included communications with the company accountants, with which these personal recriminations were shared (for example, page 112 and 133).

46. On the balance of probabilities, I do not find that the Claimant was responsible for this poor communication and confrontation for the following reasons:

46.1 there is significant evidence, as indicated above, that the negative personal feelings, particularly of Robert Clapham, adversely affected these interactions and the quality of communication;

46.2 I do not find that the documentary evidence demonstrates a one-way street with the Claimant being uncooperative and belligerent; the documentary evidence suggests that lack of cooperation is at least as much part of Robert Clapham as it is the Claimant, and on balance, is more so;

46.3 there is evidence of the Claimant offering opportunities to cooperate and communicate on a constructive basis and I am unable to find, on the evidence before me, that this was disingenuous

46.4 despite this however, there is some evidence of foul language, belligerence and resentment from the Claimant at what he clearly felt, was interference and ineptitude by his children: "It's my fucking company" (SB 237).

47. It is clear that Robert Clapham and Joanne Goode feel and felt very strongly that they had been subjected to personally abusive treatment by the Claimant over many years. Their evidence supports each other in this respect and is also supported by the evidence of Susan Clapham. For this reason, this allegation may be true, but it is not something on which I must make a finding for the purposes of this case.

48. Its significance is to the reasons for the Claimant's departure from the Respondent company and to the impact, if any, of his conduct as an alleged employee.

49. On 30 January 2025, the Claimant transferred £55,000 from the Respondent's current bank account to its savings bank account. Robert Clapham discovered this and immediately contacted the bank by telephone. Because of his concern, the bank blocked the Respondent's current account. A text exchange between Robert Clapham and the Claimant on this date shows Robert telling his father not to unilaterally "*remove company money about without telling the other directors*" and that "*they've blocked the account*". In response, the Claimant asked "*wot* [sic] *account*?". Robert responded by swearing at the Claimant, to which the Claimant responded by saying "*there is no need to swear*" (372).

50. The Claimant had thought that the block had been placed on the account by Robert and in an email exchange between the two on 4 and 5 February 2025, this was cleared up, with the Claimant apologised with what appears to be a very reasonable and measured tone (pg187-188).

51. During cross examination, Robert Clapham stated that this incident was the "*straw that broke the camel's back*" after the volume of emails and phone calls that he had been receiving. I accept that this incident was a catalyst for his decision regarding the removal of the Claimant from the Respondent company, to the extent and in the manner set out in paragraph 59 below.

52. I find that by that stage, Robert Clapham had decided to remove the Claimant from his role and from the Respondent company. The reasons for this are also set out in paragraph 59 below.

53. On 5 February 2025, a property management company (Hair and Sons) (**H&S**) was appointed to manage the Respondent's properties. A letter from H&S dated 3 February 2025 is at page 174. The services provided included rent collection, dealing with repairs and tenant enquiries. Its remuneration was to be 5% of all amounts collected.

54. During cross examination, Robert Clapham confirmed that the Claimant was not consulted regarding this appointment. He did not disagree that H&S took over the Claimant's role from him. He did not disagree that this might amount to a redundancy situation. He asserted that the reason for this was that the Claimant was doing a poor job.

55. On 19 February 2025, Robert Clapham gave notice of his intention to propose a resolution for removal of the Claimant as a director of the Respondent company (378). The other directors voted in support of this proposal and the Claimant was removed as a director by way of a further board meeting on 4 March 2025 (page 384).

56. On or around 7 March 2025, Robert Clapham cancelled the monthly standing order of £2300 to the Claimant (228). The Claimant asserts that this was his effective date of termination and that it amounted to a dismissal. He additionally asserts that he is entitled to pay in lieu of untaken holidays on termination of employment.

57. On 4 April 2025, the Claimant was removed as a director of the Respondent at Companies House. Thereafter, a protracted commercial dispute arose between all the parties regarding the Respondent's shareholding and other matters.

58. Para 117 of the witness statement of Robert Clapham states: "… *It is clear from the events and background described above…. That our relationship with Clive Clapham had broken down beyond repair. As such, there was simply no way that any working arrangements that existed could have continued any longer….. Leading to no other alternative but his removal*".

59. I find, on the balance of probabilities, that the most likely reason for the decision to remove the Claimant was the personal feelings that Robert and Jo had towards their father and the inability of all parties to communicate and work with each other. The extent of hurt and anger which is expressed in the correspondence and transcripts is visceral and disproportionate to the actual, practical, company matters which were discussed. It is understandable, for example that Robert may be frustrated and concerned at the Claimant's action in moving the £55,000 (above). In normal circumstances, one director would contact the other about this straight away. The matter would be discussed and resolved in a constructive manner, without intensely emotional reactions. Indeed, normally, such unilateral decision making would not take place. This incident happened as it did because there was no effective communication and

absolutely no trust. This was because of the familial history of personal, relationship breakdown between the Claimant and his wife and children. While I accept that the Claimant may have been difficult to work with on a professional basis as a board member; he may have been stuck in his ways, stubborn and his communication may have been poor, the evidence does not support a conclusion that working with him, professionally, was impossible, or that his conduct as a co-director amounted to a fundamental breach of trust. Instead, I find that this lack of trust was born from the views and experiences of Robert and Jo about his conduct as a father. This manifested as significant anger and intolerance, which led to the decision to remove him from the Respondent company. That these feelings may have been understandable or even justified, is not something which I am required to consider.

60. On 15 April 2025, Robert Clapham confirmed with the Respondent's company accountant that there would be no payroll run from 2024 to 2025, thus ensuring that the Claimant received no salary for this financial year (245).

61. During cross examination, a series of photographs and other evidence (401, 406, 408, 414-6, 527-9) allegedly demonstrating the disrepair of the Respondent's properties was put to the Claimant. The Claimant disagreed that these demonstrated disrepair or health and safety issues, pointing out that none of these issues were raised prior to his removal and that the Respondent's insurance company were happy with all properties. I accept the Claimant's evidence in this regard as it appears consistent with the documentary evidence and with the evidence about the significant increase in profits of the Respondent which appears to demonstrate a successful company. On balance, it seems as if this evidence was gathered after the Claimant's removal, to justify this decision and that the Claimant was offered no opportunity to meaningfully respond to any accusations of poor management.

62. **Relevant law and conclusions**

63. **The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).**

64. TUPE applies to a "relevant transfer": "*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*" (regulation 3(1)(a), TUPE).

65. Case law has established that TUPE can apply to the transfer of all or part of a business and can take effect by a single or series of transactions. There is also nothing within TUPE which precludes a transfer to multiple transferees. The key question is always whether the transferring economic entity retains its identity, so that it still exists after the transfer. The case of Spijkers v Gebroeders Benedik Abattoir CV [1986] 2 CMLR 296 considered this question in detail, setting out the requirement that each case will turn on its own facts and to which a series of test factors should be applied:

65.1 Whether the business's tangible assets (such as buildings and movable property) are transferred.

65.2 The value of the transferor's intangible assets at the time of the transfer.

65.3 Whether goodwill has been transferred.

65.4 Whether the majority of the employees are taken over.

65.5 Whether the customers are transferred.

65.6 The degree of similarity between the activities carried on before and after the transfer.

65.7 The period, if any, for which the activities carried on before and after the transfer are suspended or disrupted.

65.8 The use of the employees by the transferee.

66. Following this, the EAT reviewed and applied these principles in Cheesman and ors v R Brewer Contracts Ltd 2001 IRLR 144, EAT, which emphasised the need to consider all relevant criteria, rather than prioritising one or some of them.

67. In ISS Facility Services NV v Govaerts and anor 2020 ICR 1115, ECJ, the ECJ considered how the Acquired Rights Directive protects a transferring employee where the transferring entity is fragmented. There, a contract for cleaning services at three locations was initially held by ISSFS but was then awarded to two different businesses, one of which took over the provision of services at two locations and the other of which took over the provision of services at the remaining location. G was employed by ISSFS as project manager overseeing all three locations and the question arose whether her contract was transferred under the Directive. The ECJ rejected the possibility that fragmentation prevents an employee from becoming employed by either of the transferees. It is relevant that this case focussed on the question of whether and how G's employment transferred, rather than whether fragmentation precludes the existence of a relevant transfer — the referring court held that the economic entity had retained its identity despite the fragmentation.

68. Regulation 4(1) TUPE provides:

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

69. Whether an employee is "assigned" to the organised grouping is a factual question, taking into account a number of factors, including the percentage of time spent working in the undertaking being transferred. This was the approach taken in MRS Environmental Services Ltd v Dyke and anor EAT 93/96 noting

that, in certain circumstances, the measure of time might be the only relevant factor.

70. **Employment/Worker status and continuous employment.**

71. Section 230 Employment Rights Act 1996 ("ERA") provides:

*(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

*(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)-*

*(a) a contract of employment, or*

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.*

*(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*

*(5) In this Act "employment"—*

*(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and*

*(b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.*

72. An employment contract need not be in writing and may be express or implied, so there is no strict requirement for a contract to be signed.

73. Where there is no express contract, a contract will be implied if this is necessary to give effect to the reality of the relationship (Tilson v Alstom Transport [2011] IRLR 169.

74. The Supreme Court has considered the above definitions of an employee and worker in a series of notable cases, including Pimlico Plumbers Ltd v Smith [2018] IRLR 872 and Uber BV and others v Aslam and others [2021] IRLR 407).

75. In determining whether the Claimant is a worker, the classic starting point is the test set out in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497:

"*A contract of service exists if these three conditions are fulfilled (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to that other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service*..."

76. In Express & Echo Publications Ltd v Tanton [1999] IRLR 367, the Court of Appeal held that: (1) the Tribunal should establish what the terms were of the agreement between the parties, and that is a question of fact; (2) the Tribunal should then consider whether any of the terms of the contract were inherently inconsistent with the existence of a contract of employment, (3) if there are no such inherently inconsistent terms, the Tribunal should determine whether the contract is a contract of service or for services, having regard to all the terms.

77. Contracts of employment

77.1 The Supreme Court in Autoclenz Ltd v Belcher [2011] IRLR 820 confirmed that in an employment context, even in cases where express written terms exist, the question in every case is: **what was the true agreement between the parties?** In other words, do those written terms reflect their actual legal obligations?

77.2 It is impossible to set out a definitive set of criteria for what constitutes an employee, and the authorities advise against a checklist approach. A determination should be made on the accumulation of relevant detail. However, the case law suggests that determination of the issue is likely to focus on various indicia of employment, the presence or absence of which individually is unlikely to be determinative:

77.3 Was there mutuality of obligation in that the employer was obliged to provide work and the worker to do it?

77.4 Was the worker given an unfettered right to send a substitute to perform the work?

77.5 What degree of ultimate control did the employer hold over the worker (it being recognised that skilled workers often hold a large degree of autonomy in how they actually perform the tasks)?

77.6 To what extent was the worker integrated into the business?

77.7 What was the remuneration and how was it paid?

77.8 Did the worker invest in his or her future and, did they share in the opportunity for profit and loss?

77.9 Did the worker supply their own tools or equipment?

77.10 How did the parties categorise their relationship?

77.11 Was the worker tied to one employer?

77.12 What was the traditional structure of the industry?

77.13 What was the tax and national insurance situation?

77.14 How was the arrangement terminable?

78. The irreducible minimum for a contract of employment is:

78.1 Control;

78.2 Personal performance; and

78.3 Mutuality of obligation.

79. Company Directors and employment status.

80. As a result of and since the EAT judgment in Clark v Clark Construction Initiatives Ltd and anor 2008 ICR 635, a series of cases have considered whether Claimant directors and shareholders have also been employed in accordance with Section 230 ERA. In Clark, Elias P had suggested that the way payments were made to Claimants "*could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight*" (paragraph 98(7). The cases since Clark have included a variety of relevant circumstances:

80.1 Directors and controlling shareholders;

80.2 Directors and shareholders of companies both with, and without other employees;

80.3 Claimants with and without written contracts of employment;

80.4 Varying pay arrangements: those paid by way of PAYE salaries alone, or with dividends, or a mixture of both, or with no pay at all.

81. The Court of appeal decision in Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and another case 2009 ICR 1183, CA, considered and distilled much of this case law into helpful guidance. It included the following criteria (some of which was adopted from Clark) which should be considered for each case:

81.1 There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee, even if the person has total control over the company;

81.2 Whether the shareholder/director is an employee is a question of fact for the Tribunal;

81.3 In cases where matters have been dealt with informally it may be a difficult question as to whether the correct inference is that the shareholder/director was truly an employee;

81.4 In considering the issue it will be necessary in particular to consider how the parties have conducted themselves, what they have actually done and how they have been paid;

81.5 Where the conduct of the parties is inconsistent with the existence of a contract of employment or is in some areas not governed by such a contract, that will be an important factor pointing away from a finding that the shareholder/director is an employee;

81.6 It follows that the lack of any written employment contract or other record thereof, is likely to be an important consideration;

81.7 The fact that the shareholder/director has control of the company or that his personal investment in it will stand to prosper with the company will be "part of the backdrop" but will not ordinarily be relevant to the issue and can and should therefore be ignored.

82. From Neufeld:

83. "*85. In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court or Tribunal will want to be satisfied that the contract meets them. ….. in many cases involving small companies, with their control being in the hands of perhaps just one or two director/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually doing, it will also be relevant to consider whether he was acting merely in his capacity as a director of the company; or whether he was acting as an employee*."

84. It is not helpful beyond this to go into infinite detail about the other decisions of the EAT and higher courts which have relevance to this case. To do so, would involve an infinite level of detail on what is, ultimately, a fact-specific application of the above principles. A few further cases are noteworthy however, and have been considered by me in this case:

85. Stack v Ajar-Tec Ltd [2015] EWCA Civ 46: The Claimant was one of three equal shareholders and directors. The other two were looking for financial backing. The Claimant was looking for a project in which to invest and had other company and property interests. The Claimant was found by the ET (after remittance by the EAT) to be a worker and employee. The EAT, again,

disagreed with the ET conclusions but the Court of Appeal disagreed and restored the ET judgment. Relevant factors included:

85.1 At one point, the company's solicitor produced a draft contract entitled "Senior Executives' Employment Agreement". One outcome of the meeting was the circulation of the draft contract. However, that was not taken any further and no agreement was ever signed. It is significant that the terms which were discussed or presented to the Claimant tended to show that there had been an intention to create an employment relationship albeit to be fully detailed at some point not yet determined."

85.2 The Claimant was never paid and never sought payment for his services at the material time.

85.3 Each of the directors here had loan accounts. They also received dividends.

85.4 The Claimant was found to have worked part time – approximately 80% of his time.

85.5 It was found overwhelmingly likely that the parties agreed when they were promoting this company that the Claimant would perform work for the company; albeit that the hours fell to be agreed at a later stage, or would be determined as needed depending on the amount of work that the Respondent was successful in securing.

85.6 It was found that there was an implied term that the Claimant would be paid for what he did.

86. Dugdale v DDE Law Ltd UKEAT/0169/16/LA: The Claimant was a solicitor with the Respondent, which was a private limited company incorporated in 2008. The Claimant had been a shareholder and director since its incorporation along with two other solicitors. The EJ, concluded that the Claimant was a director of the Respondent and not an employee and this was upheld on appeal. Relevant facts include that:

86.1 There were no express employment contracts and no shareholder's agreement.

86.2 There was no evidence before the Employment Judge that the employment status of the directors was ever considered at the time of foundation. Nor was there any agreement about hours of work or holidays.

86.3 For the most part the Claimant and the other directors were remunerated by taking money out of the Respondent which was credited to their director's loan account. They would draw monthly amounts which might vary according to the cash available. At the end of the year the loan account was reduced by declaring dividends out of the profits of the company.

87. Rainford v Dorset Aquatics Ltd EAT 0126/20: the Claimant was one of two directors in a small family company. He had a 40% shareholding. Each brother director was paid an equal "salary" agreed between them (latterly £1,500 per month) and had PAYE and NI deducted/paid in respect thereof. They also agreed between them on the amount of dividends to be paid at the end of the year in accordance with their shareholdings. An ET held that he was not a worker or employee: a decision which was upheld by the EAT and Court of Appeal. Relevant details taken into account included that:

    87.1 There was no written contract or documentary record relevant to the Claimant's claimed status as an employee or worker and no evidence was given of any relevant oral agreement between the parties.

    87.2 the Respondent normally had between two and four employees in addition to the Claimant and his brother. The judge found that there was a clear difference in status between the brothers on the one hand and these employees on the other.

    87.3 The Claimant worked predominantly as site manager. He also took on responsibility for marketing the company and its website and social media; it was his choice to take on these tasks. He decided on his own hours of work and there was no control over how he carried out the work. He took holidays when he wished.

    87.4 Salary payments were arranged simply on the advice of the company accountants for tax reasons and neither brother had any positive input on the issue. On this, it was considered that the payment of "salary" with payslips and PAYE/national insurance deductions is a relevant factor which would point towards employment but is by no means decisive in itself; and it may be of little significance if, in a case like this, it is organized entirely by a company accountant for tax reasons without any particular awareness on the part of the putative employee and covers only a small part of the total payments to a shareholder/director.

**Illegality.**

88. An illegality defence operates as a common law bar to a Tribunal's statutory jurisdiction to hear employment claims and can apply to claims flowing from contract (such as wrongful and unfair dismissal). To establish an illegality defence in cases such as this one (where it is alleged that a contract has been illegally performed) the employer must show three things:

    88.1 The Claimant knew of the illegality. The employee must have known of the illegality in question. This is a subjective question and a matter of fact for the Tribunal to determine.

    88.2 The employee must have participated in the illegality. As with knowledge, this is a question of fact.

    88.3 The illegality infected the contract. The illegal performance must have been sufficient to turn a "*valid contract into an illegal contract*", or the

employee "*needed to rely on their illegality to succeed*" in their claim (Colen and another v Cebrian (UK) Ltd [2003] EWCA Civ 1676).

89. In Patel v Mirza [2016] UKSC 42, the Supreme Court allowed money paid under an illegal contract to be repaid to a Claimant who had participated in the illegal contract. The Court focused on the broader question of whether, as a matter of public policy, giving the Claimant relief would undermine the integrity of the legal system and concluded that it would not. It endorsed the consideration of a range of factors which, although not set out in a prescriptive manner, were considered to include a summary if the following:

89.1 How seriously illegal or contrary to public policy the conduct was.

89.2 Whether the party seeking enforcement knew of, or intended, the conduct.

89.3 How central to the contract or its performance the conduct was.

89.4 How serious a sanction the denial of enforcement is for the party seeking enforcement.

89.5 Whether denying enforcement will further the purpose of the rule which the conduct has infringed.

89.6 Whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy.

89.7 Whether denying enforcement will ensure that the party seeking enforcement does not profit from his conduct.

89.8 Whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.

**Approbation and Reprobation.**

90. This principle (described to have narrow legal manifestation) was set out in Express Newspapers plc v News (UK) Ltd and others [1990] 1 WLR:

90.1 "*There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance".*

91. The cases which have considered this doctrine have concerned the adoption of inconsistent approaches to litigation or legal arguments within the case context, for example Skymist Holdings Ltd v Grandlane Developments Ltd [2018] EWHC 3504 (TCC).

**Dismissal and unfair dismissal**

92. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that (s)he was dismissed by the Respondent under section 95, which states that an employee is dismissed if their contract of employment is terminated. Usually, clear and unambiguous notice of termination of employment is required to amount to an actual dismissal. However, it is possible for dismissal to be inferred, but a clear intention must be evident. Removing an employee from payroll, referring to termination in without prejudice correspondence and unilateral imposition of different contractual terms have all been held to amount to dismissals.[1]

93. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2), or that the employer was dismissed for "..*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*".

94. The starting point, when considering the reason for a dismissal, is to identify the "*set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee*" (Abernethy v Mott, Hay & Anderson [1974] ICR 323). In UPS Ltd v Harrison UKEAT/0038/11, the EAT stated that the correct approach is for a Tribunal:

    94.1 First to make factual findings as to the employer's reasons for dismissal.

    94.2 Then to decide how the employer's reasons are best characterised in terms of the statutory reasons in section 98(1) of the ERA 1996.

95. If the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

96. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

[1] *Radecki v Kirklees MBC [2009] EWCA Civ 298*; *Meaker v Cyxtera Technology UK Ltd [2023] EAT 17*; *Hogg v Dover College [1990] ICR 39*.

**Adjustments to compensation.**

97. The Tribunal should consider whether any adjustment should be made to compensation on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed, in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL 8, Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.

98. The Tribunal may, also, reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

99. Section 122(2) provides as follows:

"*Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly*."

100. Section 123(6) then provides that:

"*Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*."

1. Employers considering dismissal for poor performance or misconduct are required to have regard to the Acas Code of Practice on Disciplinary and Grievance Procedures, which contains various procedural requirements. Where the employer (or employee) has failed to follow the Acas Code and the Tribunal considers that the failure was unreasonable, it may increase (or reduce) the amount of compensation that would otherwise have been payable. The Code expressly excludes dismissals for redundancy or the non-renewal of a fixed-term contract but is silent on dismissals for other reasons. As a result, there is conflicting case law on its application. The case of Rentplus UK Ltd v Coulson [2022] EAT 81 has suggested that the Code can apply to dismissals for some other substantial reason, where they relate to or arise from poor performance or capability; for example, where such allegations have been made or a disciplinary process invoked.

**Unauthorised deductions from wages.**

2. Section 13(1) of ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from

wages pursuant to Section 23 ERA. The definition of “wages” in section 27 ERA includes holiday pay.

3. On termination of employment, a worker is entitled to pay in lieu of unused statutory holiday (to which they were entitled to under regulations 13 and 13A, see 5.6 weeks' holiday each leave year).

4. There will be an unauthorised deduction from wages if the employer fails to pay the Claimant on termination of employment in lieu of any accrued but untaken leave.

**Relevant law and conclusions – Wrongful dismissal / Notice pay**

5. Section 86 of the Employment Rights Act 1996 states as follows:

*"Rights of employer and employee to minimum notice.*

*(1)The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—*

*(a)is not less than one week’s notice if his period of continuous employment is less than two years,*

*(b)is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years"*

**Conclusions**

6. My conclusions will be structured by reference to the agreed list of issues (Annex A) (relevant to liability only) unless consideration of some of those issues, in a different order, would be appropriate.

Status.

*TUPE*

7. *Was the Claimant employed by Clapham Holdings Limited immediately prior to the incorporation of the Respondent on 10 July 2009?*

7.1 I conclude that the Claimant was employed by Clapham Holdings Limited immediately prior to the incorporation of the Respondent on 10 July 2009 because:

7.1.1 A written contract of employment was concluded in October 2004, and amended in June 2005, which appears to have reflected the essential terms of agreement between the parties. The job title appears consistent with the duties performed by the Claimant and there is no evidence which contradicts any of the other terms at that time.

7.1.2 These contracts were signed by both by the Claimant and another party on behalf of CH.

7.1.3 The Claimant performed work for CH at that time which appears consistent with the role of Managing Director.

7.1.4 At that time, there were three directors, of which the Claimant was one.

7.1.5 There is no evidence that anything significant changed before the mediation agreement which was concluded 1 July 2009.

7.1.6 There is significant evidence of mutuality of obligation, control and personal performance, reflected by the written terms of contract. The Claimant performed his duties personally and there is no evidence of substitution. He performed them for or on behalf of CH, so that it could carry out its business objectives of successful ownership and letting of properties.

7.1.7 The terms of the mediation agreement clearly envisaged that CH had employees as well as directors and shareholders. This is evident from its term that no party should have a claim against CH arising out of employment. Although the employment of Stella and Susan Clapham are specifically mentioned, there would appear to be no credible reason why they would be employees and the Claimant would not, given the other corroborating evidence of his working for, and employment status with CH at that time.

8. *Within the meaning of r3(1)(a) and (2) of TUPE 2006, did an organised grouping of resources of Clapham Holdings Limited, which had the objective of pursuing an economic activity, and which retained its identity, transfer to the Respondent?*

8.1 On balance, I have concluded that the answer to this question is yes. The evidence which dissuades me from this conclusion, and which I have taken into account, is as follows:

8.1.1 In evidence, the Claimant could not cogently explain any transfer or any transfer date.

8.1.2 The Claimant's evidence has been inconsistent, initially relying on a transfer in the autumn of 2009 and later, on 25 March 2010.

8.1.3 In cross-examination, the Claimant agreed, when it was specifically put to him, that the split of properties from CH and to the Respondent was not an organised grouping and that its assets were "fragmented".

8.1.4 It seems that CH was operating as normal after the incorporation of the Respondent company and was still the owner and lessor of all its properties.

8.2 Despite this, I am of the view that there was a transfer under r3 TUPE. Regulation 3(1)(a) states that a relevant transfer may include part of an undertaking or business which is reflected in various precedent cases. Applying the test factors from Spijkers:

8.2.1 CH owned seven properties. Its sole purpose was to let these properties to generate income.

8.2.2 The majority of these properties were transferred to the Respondent company (four of them). Transferred with them were all the rights, liabilities, tenants and obligations arising from them. Altogether, this amounts to a definable part of a business. I do not agree, despite the Claimant's verbal concession in evidence, that this amounts to fragmentation such that business identity no longer existed.

8.2.3 The business activities which preceded the dissolution of CH were continued after the Respondent acquired the properties. It continued to let them in exactly the same way. Business activities did not change. The only change appears to have been that there were fewer properties to let.

8.2.4 Although the mediation agreement envisaged that two of CH's employees did not transfer to the Respondent company (Stella and Susan Clapham), it can be seen that the Claimant, whom I have already found was employed by CH before the incorporation of the Respondent, continued to perform the same job duties for the Respondent after the properties were transferred.

8.2.5 There appears to have been no period of business disruption. The fact that it is difficult to identify a specific transfer date does not amount to suspension or disruption of business activities.

9. *When did that transfer take place?*

9.1 There was no conclusive evidence before the Tribunal of a specific date on which the transfer of relevant properties between CH and the Respondent took place, or the date on which the economic activities which related to them, ceased to be carried out by CH, and were subsequently carried out by the Respondent. The only documentary evidence regarding these issues is the mediation agreement, and the evidence of the incorporation of the Respondent company and the dissolution of CH.

9.2 The best evidence available is the Claimant's witness evidence which is consistent with the suggestion that the date of the relevant transfer was

25 March 2010, that being the date that winding up procedures for CH commenced. As such, I find that this was the date of the transfer.

10. *Did that transfer have the effect provided for by r4(1) TUPE2006?*

10.1 The relevant question I am required to answer here is whether the Claimant was assigned to the part of the undertaking which was subject to the transfer.

10.2 The evidence is that the majority of the Claimant's work before the transfer related to the four properties which transferred to the Respondent company. They comprised the majority of the properties and were the properties to which company debts were attached. There is no evidence before me to indicate that the Claimant was required to perform more work in relation to the three properties which were not transferred and on the balance of probabilities therefore, I have concluded that the majority of his work would have related to the four transferring properties. In accordance with the case of MRS Environmental Services, it may be sometimes appropriate to conduct analysis based on the only available evidence of measurable criteria such as time. On this basis, I have concluded that regulation 4(1) TUPE operated regarding the Claimant's contract of employment.

10.3 I also find that the contents of the mediation agreement were consistent with the transfer of employment of the Claimant. It envisaged that Stella Clapham and Susan Clapham may be able to bring claims in relation to the termination of their employment by CH. It does not mention the termination of employment of the Claimant. Rather than this being consistent with the fact that he was not employed by CH, for the reason stated in paragraphs 7.1.7 and 8.2.4 above, I find that this is more consistent with an assumption that his employment may continue thereafter.

*Fixed-term contract*

11. *Was the Claimant's employment with Clapham Holdings Limited for a fixed term? If so, when did that fixed term come to an end?*

11.1 The signed and dated contract of employment of 21 June 2005 confirmed a fixed period of employment from 1 October 2004 to 31 (30) June 2019. There is no evidence of termination prior to this date. As such, I conclude that the fixed term under this contract expired on this date.

12. *On that end date (and assuming that the Claimant's employment transferred to the Respondent): did the Claimant's employment with the Respondent: Terminate automatically by the expiry of the fixed term; or continue and become a permanent contract of employment?*

12.1 I have concluded that the Claimant's employment continued after the expiry of the fixed term for the reasons set out in paragraph 13 below.

*Director/employee consistency*

13. *Was the Claimant's relationship with the Respondent consistent with his being engaged on a contract of service within the meaning of s230(1) ERA1996?*

13.1 This was the most difficult of all the questions to answer in this list of issues. There were changes in relevant circumstances throughout the lifecycle of the Claimant's engagement.

13.2 I have already concluded that the Claimant was employed by CH before 25 March 2010, and transferred to the Respondent on this date.

13.3 From this date, and until the summer of 2011, the Respondent company had three directors and four shareholders: the Claimant, Susan Clapham (after the allocation of shares in April 2011) Robert Clapham and Joanne Clapham (Goode). Ordinary shares were spit fairly equally.

13.4 The evidence given was that the Claimant's work throughout his engagement, in terms of type and responsibility, did not change. In cross-examination, Jo Goode conceded that the Claimant worked for the Respondent in performing duties that a director would not normally perform.

13.5 There was no evidence before me that his hours of work decreased significantly at any point.

13.6 How the Claimant was paid changed from time to time. The evidence on pay by CH was that he received a salary: initially £46,000 a year. After the transfer, the Claimant's B shares became relevant as those shares, to some extent, reflected his remuneration for the work that he provided. The evidence of his pay from 2014 the end of the financial year of 2022 indicates that he was paid a consistent amount in terms of salary.

13.7 From 2022 to 2023 he was paid a nominal amount of £1300 and thereafter, he was paid no salary. This change however, at least for the financial year 2023 to 2024 was approved by Robert Clapham who ensured, with the response company accountant that there would be no payroll run for that year.

13.8 The manner in which payments were received by the Claimant was not straightforward given that the pay, in part, was combined with the remuneration owed to Susan Clapham and was paid into a joint account as a fixed monthly amount.

13.9 Evidence of the Claimant's apparent employment, by way of tax returns and Companies House evidence, appears most recently in the end of year accounts for 2022/2023. It seems that only after this date, the dispute regarding the Claimant's alleged employment status arose.

13.10 I find the appointment of H&S to have been significant. The agreement at page 174 reflects the responsibilities which H&S would be required to perform which included all those duties which the Claimant had hitherto had responsibility for. H&S was remunerated for the services. This is consistent with required work for which remuneration is necessary.

13.11 Taking the above points and applying to them the range of factors set out by cases such as Autoclenz and Neufeld, the following conclusions are significant:

13.11.1 there was a contract of employment in place which appeared to reflect the true agreement of terms between the parties and their actual legal obligations. This expired in June 2019 but is significant in determining the ongoing relationship between the Respondent and the Claimant thereafter as none of his terms appears to have materially changed.

13.11.2 There appears to have been mutuality of obligation indicated by that contract but also in the manner of work that was required and done. The Respondent needed its properties to be managed and let and that is what the Claimant did/oversaw for a significant period of time on a regular and uninterrupted basis.

13.11.3 Until the engagement of H&S, no other party was substituted to perform this work on behalf of the Claimant.

13.11.4 As far as control is concerned, there is conflicting evidence. To some extent, the evidence suggests that the Claimant always self-regulated how and when he worked; even for CH. The contracts of employment contained no job description or set working hours. The apparent commercial and operational success of CH and then of the Respondent company (in terms of increasing profits) would appear to demonstrate that the Claimant performed his work duties consistently for the benefit of both companies: the properties were let and used successfully by tenants. For most of the Respondent's lifetime, the Claimant appears to have been his own boss. His wife and himself were the only directors. All decisions were taken by him, including regarding finances and remuneration (including his remuneration and that of Susan Clapham). This led to the decisions about the proportion of pay which would be received as dividends and salary, and those decisions were to his benefit in terms of income tax savings. The decisions regarding the allocation of shares, particularly the B shares were taken by him without knowledge or in consultation with the other shareholders. It was only when Robert Clapham and Joanne Goode were appointed as directors in May

2024 that things began to change and his decision-making, control and accountability regarding the Respondent began to be challenged, in particular by Robert Clapham. Ultimately and finally however, the Claimant did not have total control over the Respondent company as key decisions regarding his work, remuneration and then his removal were taken by Robert Clapham and Joanne Goode when H&S was appointed, the monthly standing order to him was cancelled and then he was removed as a director.

13.12 Taking all of the above into account, on balance, I am of the view that the Claimant was engaged on a contract of service within the meaning of s230(1) ERA1996 throughout material time. I find that the majority of the evidence suggests that the Claimant provided work to the Respondent and that this work, and the manner in which he performed it, was controlled by it. Personal performance was required of, and provided by him. In addition, there was an ongoing expectation of the Claimant that the Respondent needed him to work for it and that he would perform this work (mutuality of obligation); furthermore, that he would be paid for this work, over and above any payment that he would receive as an office holder and/or shareholder.

13.13 I have taken into account the significant control that the Claimant held as a shareholder and director but do not consider this to have totally undermined the above conclusions, in all the circumstances.

13.14 I have also considered the unusual pay arrangements for the Claimant, the fact that the majority of its income was by way of dividends and, for the last year at least, he received no salaried income. Despite this though, and particularly taking into account the guidance in Clark regarding the exceptional influence that payment may have in such circumstances, I did not consider this to be fatal in this case.

13.15 I find the facts of Stack v Ajar-Tec Ltd [2015] EWCA Civ 46 to be of helpful comparison. In that case, the Claimant received absolutely no payment for his services at the time of his engagement but despite this, as with the Claimant in this case, there was still expectation that he was required to work for the Respondent company and would be paid for this work. In that case, as in this one, the existence of a previously drafted contract of employment was held to be of particular significance, albeit that it was not concluded at that time. Conversely, there are differences between this one and the cases of Rainford and Dugdale which I regard as significant, namely the absence of any previous intention or evidence of written employment contractual documents, the varying monthly drawings (Dugdale) and the evidence of difference in Rainford between the Claimant and the other employees.

Illegality.

14. *Is any contract of employment between the Claimant and the Respondent tainted by illegality, specifically by the arrangements for remuneration and the consequences for the payment of taxes and National Insurance?*

    14.1 I am not of the view that the Claimant knew that his arrangements for remuneration and the consequences of this for payment of tax and national insurance were illegal. I have accepted the Claimant's evidence that he allocated shares and declared dividends and arranged salary payments on professional advice. I have not found that there was any evidence of deliberate tax evasion or misrepresentation to HMRC of the manner in which income was earned. Until 2022, the Claimant earned a consistent amount of PAYE earnings, albeit that this comprised a relatively small proportion of his income. The best evidence regarding the Claimant hours of work were that he worked on a part-time basis. There is no evidence before me to suggest that this PAYE income was not honestly representative. From 2023 onwards, I have found that the dispute between the Claimant and his other directors had a material effect on the level of his PAYE income; indeed, Robert Clapham signed off on accounts for 2024 which declared no payroll run.

    14.2 Even if I am wrong about this, I am not satisfied that:

        14.2.1 any illegal performance was sufficient to have meant that the Claimant's (valid) contract of employment was illegal; or

        14.2.2 that he needed to rely on illegality to succeed; or as per Patel v Mirza it would be consistent with the principles of public policy to deny enforcement of the contract of employment in this case.

    14.3 This is not a case in which the Claimant had misrepresented his employment status to HMRC and had received all his income by way of dividends or other payments. His status as an employee was declared throughout his engagement. To deny the Claimant the right to bring his claims relating to his contract of employment is a serious sanction, disproportionate to the facts in this case.

    14.4 I do not accept the Respondent's submission that this is a case in which the Claimant has pursued two different legal courses of action at any stage (consistent, for example, with the facts of Skymist) and as such, I do not accept that his conduct has amounted to approbation and reprobation.

Dismissal.

15. *(It is accepted that the Claimant was dismissed). What is the effective date of termination (EDT)?*

    15.1 This issue is one which was not adequately dealt with by the submissions either party. Both agree that the Claimant was dismissed,

despite the lack of any clear and unambiguous evidence of notice of termination of his contract of employment at any stage. The Claimant's pay was stopped on 7 March 2025 when the monthly standing order to him was cancelled by Robert Clapham. In addition, he was removed as a director of the Respondent on 4 April 2025. At no point was he informed that his employment had been terminated or that he was dismissed.

15.2 Employees' pay can be withheld, or other fundamental terms of employment breached by employers. Without resignation (acceptance of repudiation) this does not necessarily amount to a dismissal as a matter of law. In addition, removal of a company director need not affect employment status.

15.3 In this case, I have taken into account guidance from the cases set out above[2] which demonstrate the important influence of contextual findings. It is relevant that:

15.3.1 H&S were appointed on 5 February 2025, without consultation with the Claimant, thus removing the Claimant's employment duties; and

15.3.2 on 19 February 2025, Robert Clapham provided notice of his intention to remove the Claimant as a director; and

15.3.3 that this removal took place at a board meeting on 4 March 2025.

15.4 Thus, I find that when the Claimant's regular monthly, standing order payment was cancelled on 7 March 2025, in the context of the above facts, this amounted to a termination of his contract of employment and was his effective date of termination.

16. *What was the reason for dismissal? The Respondent relies on Some Other Substantial Reason (SOSR) justifying dismissal.*

16.1 It is important to remember the correct statutory formulation under section 98(2) ERA: "..*some other substantial reason* ***of a kind such as to justify the dismissal of an employee holding the position which the employee held***".

16.2 The Respondent's primary position was of course that the Claimant was never dismissed as he was never an employee. However, its evidence regarding the reason for dismissal (if he were found to have been dismissed) is inconsistent. Its grounds of resistance relied on conduct, capability and redundancy as reasons for dismissal and some other substantial reason in the alternative (48). This is consistent with the facts pleaded by the Respondent, referring to alleged misconduct

[2] Radecki v Kirklees MBC [2009] EWCA Civ 298; Meaker v Cyxtera Technology UK Ltd [2023] EAT 17; Hogg v Dover College [1990] ICR 39.

but also to the fact that the Respondent no longer had any need for the Claimant's role following the appointment of H&S.

16.3 Robert Clapham's witness statement explains the reason for the Claimant's removal as the breakdown in the relationship between him and his children. During cross examination, he agreed that, following the appointment of H&S, a redundancy situation arose (although he then asserted that the reason for the appointment of H&S was that the Claimant had been doing a poor job).

16.4 I have found that the decision to dismiss the Claimant was taken by Robert before the appointment of H&S; indeed, this was the first step in the removal process. I have also found that the reason for this was the personal anger and mistrust of the Claimant, rather than his conduct as an office holder or employee (albeit that I have accepted that the Claimant's actions as set out in paragraph 49 were a catalyst for the decision which was taken). I must therefore decide how these reasons are best characterised in terms of the statutory reasons in section 98(1) of the ERA 1996.[3]

16.5 I do not find that this amounted to some other substantial reason of a kind such as to justify the dismissal of the Claimant holding his position. I am of the view that the motivation for his removal was on personal grounds, rather than anything which justified his dismissal as Manging Director. However, even if I am wrong about that, his dismissal was unfair for the reasons set out below.

17. *Was it fair or unfair for the Respondent to dismiss the Claimant for that SOSR reason?*

17.1 In accordance with section 98(4) ERA, his dismissal was unfair for the following reasons:

17.1.1 There was no fair procedure: There was no warning. There was no consultation or discussion.

17.1.2 There was no evidence of consideration of alternative action, of mitigation or length of service etc.

17.1.3 Dismissal was not within the range of reasonable responses in all the circumstances.

Contributory fault

18. *In the event that the Claimant was unfairly dismissed:*

18.1 *Would it be just and equitable to reduce the basic award as a result of the Claimant's conduct, and if so, to what extent?*

[3] UPS Ltd v Harrison UKEAT/0038/11

18.2 *Did his own actions contribute to his dismissal?*

18.3 *If so, to what extent?*

18.4 *What would be a fair reduction to the compensatory award to apply in the circumstances?*

18.5 I do not find that the Claimant's conduct as an employee significantly contributed to his dismissal. I have found that there was no fair reason for dismissal. In relation to any decisions about fairness under section 98(4), there was some evidence of anger and foul language from the Claimant, and the unilateral decision to transfer the sum of £55,000 played a part in galvanizing Robert Clapham to dismiss him; to take such action without consultation showed a lack of regard and consideration.

18.6 I do not accept that the facts set out in paragraph 61 should mean that compensation should be reduced, for the reasons set out there.

18.7 I therefore consider it just and equitable to reduce the Claimant's basic and compensatory awards by 15%.

Polkey

19. *In the event that the Claimant was unfairly dismissed:*

19.1 *What is the prospect that, if the Respondent had acted fairly, the Claimant would have been fairly dismissed?*

19.2 *What would be a fair reduction to the compensatory award to apply in the circumstances?*

19.3 I do not accept that any fair reduction should be made to reflect Polkey. There was no fair reason for dismissal and in the alternative, the Claimant's dismissal was unfair on substantive a procedural grounds. If the Respondent had acted procedurally and substantively fairly, the likelihood of dismissal would have been low.

ACAS Code of Practice

20. *Did the Respondent fail to apply the ACAS Code of Practice on disciplinary and grievance procedures? If so: would it be fair to alter the compensatory award, and to what extent?*

20.1 I have found that there was no fair reason for dismissal, and that this reason was not the Claimant's conduct or poor performance as an employee. As such, considering that the Code expressly applies to such situations, and applying the reasoning in Rentplus UK Ltd v Coulson [2022] EAT 81, I do not consider that the Respondent wrongly failed to apply it in these circumstances and that compensation should be increased.

Unauthorised deductions from wages (Part II ERA1996)

21. *If the Claimant has suffered unauthorised deductions: on what occasion was he paid less than he properly ought to have been paid?*

    21.1 A sum of £2,300 was paid, by standing order, to a joint account of the Claimant and Susan Clapham every month in 2024/2025. This was cancelled on 7 March 2025 which was his effective date of termination. There are therefore no outstanding sums owed in terms of basic salary.

    21.2 I have found that he was an employee/worker throughout the material time. He would therefore be entitled to pay in lieu of any untaken holidays in accordance with Regulation 13 WTR.

Wrongful dismissal

22. *Was the Respondent entitled under that contract to dismiss the Claimant without notice?*

23. The Respondent was not entitled to dismiss the Claimant without notice. He is therefore entitled to notice pay in accordance with section 86 ERA.

**Approved by:**
**Employment Judge V Othen**
**Dated: 18 September 2026**

**APPENDIX A**

**IN THE EAST LONDON EMPLOYMENT TRIBUNAL**

**Case No: 6028213/2025**

**B E T W E E N :**

**MR CLIVE CLAPHAM**

**Claimant**

**-and-**

**ACEFRONT LIMITED**

**Respondent**

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## LIST OF LIABILITY ISSUES

*13 May 2026*

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24. Jurisdiction

1. If the Claimant was dismissed, what is the effective date of termination (EDT)?

2. If the Claimant has suffered unauthorised deductions: on what occasion was he paid less than he properly ought to have been paid?

3. Was the claim presented within three months, plus the Early Conciliation (EC) period, of each of the dates set out at ¶¶1-2 above? The following dates are agreed:

    a. EC commenced on 23 May 2025.

    b. The EC certificate was issued on 4 July 2025.

    c. The ET1 was received by the Tribunal on 30 July 2025.

25. Unfair dismissal (Part X ERA1996)

25.1 Status

25.1.1 TUPE

4. Was the Claimant employed by Clapham Holdings Limited immediately prior to the incorporation of the Respondent on 10 July 2009?

5. Within the meaning of r3(1)(a) and (2) of TUPE2006, did an organised grouping of resources of Clapham Holdings Limited, which had the objective of pursuing an economic activity, and which retained its identity, transfer to the Respondent?

6. When did that transfer take place? The Claimant says that it took place on 10 July 2009.

7. Did that transfer have the effect provided for by r4(1) TUPE2006?

25.1.2 Fixed-term contract

8. Was the Claimant's employment with Clapham Holdings Limited for a fixed term?

9. If so, when did that fixed term come to an end?

10. On that end date (and assuming that the Claimant's employment transferred to the Respondent): did the Claimant's employment with the Respondent:

    a. Terminate automatically by the expiry of the fixed term; or

    b. Continue and become a permanent contract of employment?

25.1.3 Director/employee consistency

11. Was the Claimant's relationship with the Respondent consistent with his being engaged on a contract of service within the meaning of s230(1) ERA1996?

25.2 Illegality

12. Is any contract of employment between the Claimant and the Respondent tainted by illegality, specifically by the arrangements for remuneration and the consequences for the payment of taxes and National Insurance?

25.3 Reason for dismissal

*If the Claimant was an employee it is agreed that he was dismissed.*

13. What was the reason for dismissal? The Respondent relies on Some Other Substantial Reason (SOSR) justifying dismissal.

14. If the Respondent is correct: was it fair or unfair for the Respondent to dismiss the Claimant for that SOSR reason?

25.4 Contributory fault

15. In the event that the Claimant was unfairly dismissed:

    a. Would it be just and equitable to reduce the basic award as a result of the Claimant's conduct, and if so, to what extent?

    b. Did his own actions contribute to his dismissal?

    c. If so, to what extent?

    d. What would be a fair reduction to the compensatory award to apply in the circumstances?

25.5 Polkey

16. In the event that the Claimant was unfairly dismissed:

a. What is the prospect that, if the Respondent had acted fairly, the Claimant would have been fairly dismissed?

b. What would be a fair reduction to the compensatory award to apply in the circumstances?

25.6 ACAS Code of Practice

17. Did the Respondent fail to apply the ACAS Code of Practice on disciplinary and grievance procedures?

18. If so: would it be fair to alter the compensatory award, and to what extent?

26. Unauthorised deductions from wages (Part II ERA1996)

19. On the occasion referred to at ¶2 above, what amounts was the Claimant entitled to be paid in respect of:

a. Basic pay;

b. Holiday pay;

c. Notice pay;

d. Other sums failing within the definition of wages at s27 ERA1996?

20. To what extent did the Claimant's pay fall short of what was properly payable?

27. Wrongful dismissal

*It is agreed that, if the Claimant was dismissed, he was dismissed without notice.*

21. If the Claimant was employed under a contract of service: was the Respondent entitled under that contract to dismiss the Claimant without notice?