EMPLOYMENT TRIBUNALS

Claimants: Mrs G Mitchell
*__**Mrs J Domotor***__
Mrs M Versluis
Mrs M Howarth
Mrs P Leighton
Mrs T Arnold

Respondent: (1) NCS Skills Limited
(2) NCC Professional Limited

Heard at: Leeds **On:** 30, 31 October, 1-3 and 6-8 November 2017

Before: Employment Judge Maidment
Members: Mrs JA Bowen
Ms LE Benstead

Representation
Claimants: In person
First Respondent: Mr L Godfrey, Counsel
Second Respondent Mr S Storey, Counsel

RESERVED JUDGMENT

The Claimants' complaints against the first and second Respondent for unfair dismissal, breach of contract and a redundancy payment fail and are dismissed.

REASONS

The issues

1. Originally these Tribunal proceedings had involved 16 Claimants but by the time of this live hearing 11 Claimants remained. The Claimants' complaints were of constructive unfair dismissal in circumstances where they said they had not been provided with work for a significant period of time by their employer the first Respondent and had then received from

the first Respondent demands for the repayments from their wages, they say, in circumstances where the Respondent had no entitlement or basis for making such demands. Shortly after this request, all of the Claimants resigned from their employment.

2. The Claimants further claim damages for breach of contract in respect of their notice periods in circumstances where they had resigned from their employment with immediate effect, they said in response to the Respondent's fundamental breach of contract.

3. Finally, the Claimants sought declarations of their entitlement to receive statutory redundancy payments.

4. During the case management process the Employment Tribunal had at an attended preliminary hearing recognised within the Claimants' complaints that there was reference to another company, the second Respondent, having taken over or carried on work of a type which the Claimants had been performing. This had caused the Employment Tribunal to consider that it was appropriate to join in the second Respondent in these proceedings on the basis that any liabilities might have passed to the second Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'). Mr Storey on behalf of the second Respondent sought to persuade the Tribunal that since the Claimants had never brought a claim based on the application of TUPE and, following the addition of the second Respondent, had not provided any further particulars of claim, there were no pleaded complaints in respect of which the second Respondent could be liable. Any TUPE based complaints ought therefore to be struck out. The Tribunal disagreed. Fundamentally, the Employment Tribunal at the earlier preliminary hearing had made it an issue in these proceedings such that if any liabilities arose there would need to be a determination of whether such liability is rested with the first or second Respondent or transferred indeed pursuant to TUPE from the first to the second Respondent. The Tribunal noted, however, that there was no TUPE based claim in these proceedings. For instance, it was not being argued by the Claimants that the reason for their dismissal was a relevant transfer such that their dismissals were automatically unfair in the absence of an economic, technical or organisational reason for dismissal.

5. It appeared to the Tribunal that some of the Claimants attending this hearing were not fully aware of the claims being pursued by them and what was required to be shown for the claims to succeed. The Tribunal spent time in explaining the issues to the Claimants. There was, amongst some of the Claimants, a significant misunderstanding in that they thought that the Respondent was in these Tribunal proceedings seeking the repayment of the monies it said were due to it by way of overpayments evident to the Respondent on subsequently becoming aware that

assessments submitted by the Claimants did not meet audit requirements and were not ones for which the Respondent could itself claim payment. There was no employer's claim. The Claimants, it was explained, were therefore not at risk of an award being made against them and furthermore it would not be for the Respondent to prove that the monies it had claimed from the Claimants were in fact properly due to it. The issue instead was that the Claimant's had a burden of proving that the Respondent had acted in fundamental breach of contract and that, insofar as they relied on the demands for repayment, they would have to show something improper in the request - that the request amounted to a breach of an express term of their contracts of employment or constituted a breach of the implied term of mutual trust and confidence.

6. This lack of understanding was surprising in the context of each of the Claimants having been sent copies of the summaries of previous case management discussions which set out clearly the issues before the Tribunal. It was, however, perhaps understandable to an extent in that a Mr Sutherland had been previously been, but was not by the stage of this final hearing, a Claimant in these proceedings and he had, it appeared to a large extent, managed the litigation on behalf of the group of Claimants without some of them ever having attended the preliminary hearings. Mr Sutherland obviously was not still a live Claimant, nor was he continuing to act as any form of representative. No one had been informally appointed or allocated this task in behalf of the 11 Claimants who continued.

7. Not all of the Claimants attended the entirety of this live hearing and indeed some of the Claimants rather drifted in and out of the proceedings at times to suit themselves. This caused at one point Mr Godfrey, on behalf of the first Respondent, to allude to the possibility of the Tribunal striking out some of the Claimants' complaints on the basis that they were not being actively pursued. Again, the Tribunal disagreed that such approach was appropriate in circumstances where it was clear that all of the remaining Claimants clearly wished their claims to proceed and be determined and all wished to take the opportunity to give evidence to the Tribunal.

8. Nevertheless, some of the Claimants clearly felt themselves to be inconvenienced in having to attend the Tribunal other than for limited periods, difficult to determine in advance, when it would be their turn to give their own personal evidence. Whilst the Tribunal appreciated that the Claimants or some of them had work and/or family or other commitments elsewhere (and in some cases had to travel significant distances to attend the Employment Tribunal in Leeds) the feelings at times of some indignation as expressed by them were unfounded in circumstances where these were indeed their claims and it would ordinarily be expected that a claimant would attend on each day of a live hearing, particularly in circumstances where they were unrepresented. At times, the Tribunal was

left with having to re-explain the situation and update individual Claimants at points in time when they did attend the hearing as to the stage reached and the future progress of the case.

9. The Tribunal was particularly concerned that the Claimants seemed not to have appreciated at the start of the hearing that, at some point, Mrs Fisher was going to give evidence on behalf of both of the Respondents and that if her evidence was to be challenged it would have to be done so by way of the Claimants or one or some of them asking her questions in cross examination. The Tribunal explained that whilst it could ask questions in clarification and where particular issues arose which caused it concern, it could not effectively descend into the arena and seek to itself cross examine Mrs Fisher and seek to make the Claimants' cases for them.

10. Ultimately, Mrs Arnold undertook the burden of the bulk of cross examination of Mrs Fisher on behalf of the Claimants and indeed the making of final submissions to the Tribunal, although the Tribunal did separately receive some written submissions on behalf of individual Claimants (including Mrs Leighton, Howarth and Mitchell) on the basis that these were intended to supplement rather than contradict or compete with those made by Mrs Arnold. The Tribunal has been at all stages mindful of Mrs Arnold's history of ill health and current feelings of anxiety arising from her condition which made her task even more difficult than it would already have been. The Tribunal was at pains to ensure that Mrs Arnold was given appropriate time to consider what she wanted to say and to prepare for the various stages in the proceedings which would require a greater involvement and assist her insofar as was appropriate. The Tribunal would record that the other Claimants ought to be very grateful for Mrs Arnold taking on this burden, not least given her personal circumstances, and for the rigour with which she sought to explore the issues which were of primary concern to the Claimants.

11. Some of the Claimants, on the days they attended the Tribunal, entered into private discussions with the Respondent's representatives which resulted in forms of agreement being reached which involved the dismissal of their Tribunal complaints on their withdrawal of them. The Tribunal has separately issued dismissal judgements in respect of the Claimants: Susan Hall, Duncan Taborda, Rosemary Cooper, Mary Cavill and Akosua Hercules-Walker, who in fact gave brief evidence to the Tribunal before she settled her own complaint.

Evidence

12. On the first morning of the hearing, having identified the issues with the Claimants at that point in attendance, the Tribunal took some time to privately read into the witness statements and relevant documentation.

This meant that when each witness came to give her evidence she could do so by simply confirming the contents of her statement and, subject to brief supplementary questions, then be open to be cross examined.

13. The Tribunal heard firstly from the Claimant, Mrs Thelma Arnold and then from her former colleagues, Maxine Versluis, Margaret Howarth, Gail Mitchell, Polly Leighton and Judit ***Domotor***. The Tribunal then heard on behalf of both Respondents from Mrs Amanda Fisher, director.

14. The Tribunal had before it three lever arch files of documents which effectively formed a core bundle of documents. In total, however, the bundle consisted of a further 21 volumes and on a rough estimate approximately 12,000 pages of documentation. The Tribunal had not been forewarned of the vastness of disclosure in these proceedings.

15. The size of the bundle has to be viewed in the context of the Tribunal only in fact being referred during the course of these proceedings by all the parties to around 200 separate pages. The Tribunal is not in a position to apportion blame as to how anyone can have thought it appropriate or necessary for a bundle of such a disproportionate size to be produced. The Tribunal obviously appreciates that the Claimant's are unrepresented and will not have had experience in Employment Tribunal proceedings before. The same cannot be said for those acting on behalf of the Respondents. The size of the bundle was predominantly due to the inclusion of every assessment paper of a learner which had been failed on audit and in respect of which a claim for repayment had been made by the first Respondent. Obviously, however, the first Respondent had no interest effectively in the Tribunal making findings in respect of individual assessment papers in circumstances where no monies were being claimed by it by way of an employer's claim in these proceedings. The Claimants in their own primary witness statement evidence did not address any specific examples or queries they had regarding the markings of their learners' assessments and, indeed, even at the point of the cross examination of Mrs Fisher, Mrs Versluis was the only Claimant with more than a passing interest in putting to Mrs Fisher any discrepancies suggested in the auditing of these assessments and, even then, only quite briefly.

16. The Tribunal had during the proceedings various requests from the Claimants to introduce additional documentation and the Tribunal allowed this to be put before it once the Respondents had been given a due opportunity to consider the documents and take any necessary instructions. The only exception was in relation to privileged communications with ACAS and a qualification marking scheme which was sought to be introduced at a late stage after all the Claimants had given evidence without any reliance on it and with no reason why it could not have been sought to be admitted at an earlier stage. This was not a brief document which could be dealt with by the Respondents' counsel

taking quick instructions. Specific challenges could still be made of Mrs Fisher in her cross examination.

17. The Tribunal notes at this stage that a number of the Claimants' witness statements were in very similar form and that of the Claimants who remained in these proceedings there was no uniqueness in the arguments one Claimant might be pursuing as opposed to any other.

18. Having considered all of the relevant evidence the Tribunal makes the findings of fact as follows.

Facts

19. The first Respondent was incorporated in January 2009 to serve the National Consortium of Colleges to deliver Skills for Life (English and maths courses) to employed adults in their individual workplaces. The first Respondent operated as an independent training provider contracting with individual further education colleges to undertake the delivery of this work. At all material times it had three directors, namely Amanda Fisher, responsible for business development and audit, Harvey Young, responsible for quality and operations and Amanda Fisher's father, Lawrence Mintz, as a non-executive director.

20. The provision of teaching through to the attainment of a qualification was delivered as a result of funding provided by the Skills Funding Agency ('SFA') pursuant to contract between that Agency and individual colleges. The first Respondent then acted as a subcontractor delivering the courses on behalf of the colleges and receiving a proportion of the SFA funding by way of payment. The courses led to basic skills attainment in English and maths at entry level 3, level I and, following the government's commitment to ensure that all achieved a minimum of GCSE grade C, the equivalent level 2. However, in practice, the first Respondent's learners infrequently progressed to level 2. The Respondent's business focused upon the enrolment of employees working in the care home sector where it was allowed to run courses for the learners of typically eight weeks duration, sufficient only to enable the learners to achieve the lower level awards. Significant staff turnover in the sector also made any higher level attainment more difficult. The learners were also separately taught vocational courses relevant to the sector in which they worked.

21. At all material times, the first Respondent's examination/awarding body was Ascentis which was paid a fee by the Respondent for every learner enrolled on one of their qualifications and again on the achievement of a qualification. Ascentis is regulated by the Office of Qualifications and Examinations Regulations. This required Ascentis to ensure that the Respondent carried out its obligations in a manner which ensured that

Ascentis could comply with its own statutory obligations. The relationship between the Respondent and Ascentis was governed by an agreement dated 1 August 2015. The first Respondent's business grew such that by 2015 it was working with over 30 different colleges and over 500 employers, delivering to over 10,000 adult learners.

22. An associated non trading company called NCCP had existed since 25 February 2008. It was subsequently renamed NCC Products Ltd and came to be used as a vehicle for Mr Young and Mrs Fisher to hold the intellectual property rights in learning materials/resources. From January 2013 it started to sell learner resources including those used by the first Respondent. As will be explained, this company was then renamed NCC Professionals Limited and became the chosen vehicle for the delivery of apprenticeship qualifications.

23. The Claimants were all employed by the first Respondent as tutors whose primary purpose was to teach the learners who were predominantly themselves employed within the care industry. They were at liberty to source their own employer clients who would be willing to allow them to come on site to teach the care workers with a view to achieving the relevant qualifications. Alternatively, they would be provided with the details of employers who had already been signed up by the first Respondent.

24. All of the Claimants were employed under similar written contracts of employment. They referred to them has being employed as a "Skills for Life Tutor". At clause 3 it was stated that the employees' caseload would be assigned to them on the basis that the first Respondent was under no obligation to provide them with work or to provide them with a minimum or maximum caseload. In turn, it was explicitly stated that the Claimants were not obliged to accept any work offered to them. They were said to have no normal hours of work. Once the Claimants had accepted a particular caseload, they were however obliged to undertake the necessary teaching and submission of assessments.

25. Mrs Mitchell referred the Tribunal to a letter from the Respondent to her dated 1 August 2014 which referred to targets to deliver and successfully complete 200 learners per annum. Further, a bonus was stated to be payable per learner on the exceeding of such target. The Tribunal has been reference otherwise to subsequent targets being set of 160 learners per annum. Mrs Mitchell however, together with the other Claimants, accepted that the targets were "aspirational". It was accepted that some tutors often did not meet the targets and there were no consequences for them other than they would receive encouragement from their line manager to try to increase the number of learners in respect of whom qualifications were achieved.

26. The first Respondent undoubtedly incurred a cost in providing necessary training, management, supervision and associated administration resources to enable the tutors to provide their services and clearly it wanted the tutors to be productive in the sense of more than covering their costs. The Respondent hoped that the tutors would be able to sustain a caseload of, most typically, around 160 learners per annum, but again from the tutors' point of view, certainly on the evidence of all of the Claimants in these proceedings, there was a recognition that they had no guarantee of that level or any other particular level of work. Indeed, the evidence was that there was a hope on the part of the tutors that the Respondent would have the contracts and contacts to be able to provide the tutors with work and therefore an income. At the same time, there was a recognition that there were and would always be peaks and troughs in the number of learners available for the tutors to work with. The Claimants did not complain when there were periods of a lack of work provided to them in the past, recognising the uncertain nature of the first Respondent's activities and their own workloads.

27. Ms ***Domotor*** referred the Tribunal to an advert she had responded to, placed on a "jobs in Sussex" website. This referred to the position of tutor as being an employment on a zero hours basis but went on to say that it was a full-time role and it was expected that this would be the tutor's only employment. The contract was said to be 'zero hours' because the Respondent couldn't dictate when the work take place. However, regardless of the form of advert, she signed a contract in similar terms to the other Claimants appreciating a lack of obligation on the first Respondent's part to provide work. As regards employment elsewhere, the contract signed by the Claimants required them to obtain written permission to carry on any business activities during their hours of work for the first Respondent and stated that they must not engage in any of business outside their hours of work if that would be prejudicial to the first Respondent. There was evidence that tutors had in practice sought and obtained consent to carry out other work within the education sector. In any event, the Claimants accepted that they had all been told at some point in 2015 that, because of a change in the law, they were free to work for other employers and there was no exclusivity regarding their arrangement with the first Respondent.

28. The standard contract provided for the Claimants' remuneration to be based upon a two stage payment. The first one headed "*enrolment"* stated: *"On successful enrolment of a learner and receipt of all relevant, fully completed and accurate paperwork a payment of £60 will be due."* Under the heading then of *"achievement*" it was stated: *"On successful completion and achievement of the qualification by the learner and you having provided your line manager with completed and accurate paperwork separated for Audit and Moderation purposes you will be due a payment of £100".* Clause 5. 4 provided that: *"The Company will make all*

necessary deductions from your salary as required by law" and clause 5. 5 that: *"The Company shall be entitled to deduct from your pay any money which you may owe the Company at any time".*

29. The reference to Audit was to administrative formalities and requirements regarding the completion and submission of assessment papers showing for instance when and under whose supervision an assessment had been carried out. The reference to Moderation was to the actual marking of the assessment/examination paper by the tutor albeit this overlapped with Audit in that the front sheet of the examination paper had to be correctly completed to pass Moderation. Historically, if minor non-compliance issues were identified by the first Respondent's internal assessors they would work with the tutors to see if the error might be rectified or alternatively arrangements might be made for the learner to resit the assessment. The Claimants did submit to periodic performance reviews conducted by their line managers and these discussions included the identification of any compliance issues where it was felt that the tutors needed to change their practice. However, there is no evidence that any sanctions of, for instance, a disciplinary nature were imposed on the first Respondent's tutors.

30. There is however evidence that tutors, albeit not necessarily all of the Claimants, did suffer deductions from their wages by way of a recovery by the Respondent of monies paid to them when Audit and/or Moderation failures were subsequently identified. The first Respondent's practice was to make any deductions it deemed appropriate from monthly salary paid in arrears and to highlight the deductions on the payslip given to each tutor. The tutors then had an opportunity, if they wished, to challenge any deduction. Mrs Arnold's evidence was that she had in the past suffered deductions from her wages in respect of fees which the Respondent considered on review that she was not entitled to, due to perceived Audit and/or Moderation issues. Ms Domotor provided to the Tribunal in email she had sent to one of the first Respondent's managers containing a list of learners in respect of whom an enrolment deduction of £60 had been made from her wages. She referred in this email to her having taken those particular learners on as a favour to keep the Respondent's reputation intact and that regretfully there was no opportunity for any final assessment of those learners. On that basis, she sought the repayment of the deductions to which indeed the Respondent agreed.

31. The first Respondent held a regional meeting on 16 December 2015 at a hotel in Hemel Hempstead which was attended by a number of the Claimants (not, the Tribunal accepts, Mrs Arnold). In any event, after the meeting the eight pages of the meeting minutes were published and accessible by all the tutors. The meeting included an explanation by Mr Harvey Young, Director, of the state of the business referring both to areas of uncertainty and, more positively, to hopes for the future. It is clear that

much of the first Respondent's work was dependent upon funding decisions including those made at central government level. He referred to one of the main areas of focus for the government to be the delivery of apprenticeships and that the first Respondent was considering an apprenticeship side to the business putting plans in place to launch that in August 2016. In fact, this proposal was discussed by the first Respondent's directors in February 2016, but one of the three owner/directors, Mr Mintz, did not want any part in this new area of business for the first Respondent considering it not to be of likely benefit to the first Respondent. The decision was taken by the remaining two directors, Mr Young and Mrs Fisher to seek to develop apprenticeship based services through their separate company, NCC Professionals Limited.

32. In late December 2015/early January 2016 a whistleblower contacted Ascentis alleging malpractice on the first Respondent's part. This resulted in an internal investigation within the first Respondent which also came under significant scrutiny from its awarding body. The Claimants all received a letter from Mrs Fisher dated 26 January 2016 explaining the situation. This referred to the first Respondent having identified incidents of malpractice within the enrolment and assessment of the English and maths qualifications including fraud in the assessment papers submitted, tests being completed by someone on a learner's behalf, enrolments being submitted for learners who had no knowledge of enrolling onto a course and the encouragement of falsification of learner details on enrolment forms. The letter went on to state that, as a result, careful consideration had been given to the current quality assurance and performance management systems so that the first Respondent could be assured they were robust enough to prevent this from happening in the future. Mrs Fisher stated: "*Over the coming weeks you will notice some additional quality checks taking place…".* As part of this tutors were required to submit all original assessment papers with each learner's completion paperwork to head office. Mrs Fisher noted: *"There are potentially devastating repercussions for NCC Skills in cases where any malpractice is identified, therefore, we hope that you will support all of the additional measures put in place to assure the quality of the service that we offer."* The Tribunal does not consider Mrs Fisher's statement to be an exaggeration and indeed was reflective of the first Respondent's concern that its business might be severely damaged, if not destroyed, dependent upon the stance taken by the awarding body.

33. The evidence of the Claimants is that they were not particularly concerned on a personal level by the information disclosed in this letter as they felt that they had acted properly in respect of their own learners and their assessments and that their own paperwork and marking was insufficiently robust so that they themselves would simply have to carry on as before without any need to change their practices.

34. The first Respondent communicated with its tutors predominantly through a closed online chat forum where information relevant to the tutors could be posted, responses/comments made by the tutors and indeed the Respondent's replies to them, so that all tutors had the same information at the same time. All of the tutors were well aware of this method of communication and were in the habit of checking on relevant postings on a regular basis.

35. On 25 February, the first Respondent was suspended by Ascentis arising out of the malpractice allegations. On 15 March Mrs Fisher made a posting communicating to the tutors that: *"Due to the ongoing investigation by Ascentis, we are unfortunately unable to enrol any further learners at this time. We hope to have this matter resolved shortly and will advise you as soon as we are able to start enrolling again."*

36. Mrs Fisher was asked for further information in particular as regards when Ascentis hoped to conclude their investigation to which Mrs Fisher responded: *"I wish we could provide you with more information but unfortunately, Ascentis, under the terms of their investigation process, will not share with us what they are investigating or why. They will also not commit to a definite timescale. I appreciate you will be frustrated by this, so imagine how we feel! As an organisation we are 100% confident in our systems and processes and the work that you all do, so we fully expect this situation to be resolved in the near future. In the meantime, we can only wait and I promise we will advise you as soon as we know anything."*

37. Mrs Fisher put up a further post on 30 March referring to hopefully promising progress and that the first Respondent was now in discussion with two new awarding bodies who did not see the Ascentis investigation as a barrier to working with it. The Tribunal notes responses from Mrs Hall thanking Mrs Fisher for the update and from Mr Duncan Taborda also thanking her and stating that he had no doubts that the first Respondent was doing everything possible to resolve this as soon as possible. Mrs Cavill said thank you for the update and noted that the information seemed to be more positive than previously.

38. However, Mrs Fisher put up a further post on 8 April saying that unfortunately the first Respondent did not have any news and that Ascentis appeared not to be sticking to their own deadline as to the resolution of the investigation. She said that the first Respondent had now instructed its lawyers to deal with the matter. The tutors were encouraged to get their paperwork in as soon as possible.

39. Mrs Fisher advised by a posting on 18 April that it was necessary to make a number of redundancies within the support team listing 7

management/administration employees who would continue as a much reduced team supporting the tutors.

40. On 25 April Mrs Fisher referred to having received communication from Ascentis, a forthcoming meeting the first Respondent had with its lawyers and the first Respondent being in a position to update them shortly, again expressing understanding regarding inevitable frustration and asking the tutors to *"please bear with us*". She subsequently posted that unfortunately the outcome had been negative.

41. On 27 April Ms Fisher posted a form of letter on the chat room site notifying the tutors that Ascentis had withdrawn their recognition of the first Respondent and that the first Respondent was considering legal proceedings against it, such that it had been advised that it was not appropriate to comment further at this time about the sanction imposed by Ascentis. She went on to explain that this meant that *"we must cease all delivery to learners as we cannot provide them with the qualification which they are currently studying."* She said that the first Respondent would be able to issue its own certificates for learners who had completed their vocational programs, but this did not include the English and maths awards. She went on to say that the first Respondent was currently engaging with other awarding bodies to support its delivery in the future but that: *"… there is no guarantee that will we will be able to provide you with work in the immediate future. As you are aware, our relationship is non-exclusive and as in the past there is no restriction upon you taking on other work with another organisation."* Mrs Fisher promised to keep tutors updated and said that the first Respondent would be writing to them separately about payments due to them for work carried out to date asking them to retain all paperwork and gather in any other paperwork currently with learners.

42. Given the number of queries raised, the further information promised was provided through the chatter site. In particular, the tutors were advised that the £100 completion fee would be paid to them for any assessment completed and provided by 27 April 2016. Subsequently a posting of 4 May advised the tutors of a cut-off date for all paperwork by Monday 9 May stating: *"all paperwork that is in by this date will accrue payment as previously advised. I can't see any reason why this can't be achieved as all current delivery had now ceased."* A further posting on the same date asked tutors to ensure that all the paperwork was correct and fully updated stating that the colleges would want to see the learners work at some stage and would need the records to reflect the actual progress and contact times.

43. There is no doubt that the tutors were under some time pressures in terms of now ensuring the submission of all completed assessments in a form which would satisfy, as always, Audit and Moderation. The Claimants

obviously by this point had been forced to cease to provide further teaching services to their learners and, whilst inevitably frustrated by the uncertainty, understood the first Respondent's predicament and why no further work could at this stage be provided.

44. The first Respondent collected in the assessment information provided and strove to complete a detailed internal assessment of the paperwork to ensure it was compliant. The first Respondent knew that Ascentis would not accept the assessments and on any direct submission of them grant the qualifications to the learners. The first Respondent's intention was to provide the assessments and backup paperwork directly to the colleges with whom they contracted in the hope that the colleges would then take up the issue of the granting of qualifications with Ascentis. The Respondent had in the region of 4000 individual assessment papers to check for accuracy and compliance, a task which would take a significant amount of time.

45. In the meantime, Mrs Fisher concentrated her energies on seeking an accreditation agreement with an alternative awarding body and to effectively rescue the first Respondent's business by obtaining new contracts which might enable the recruitment of new learners most likely, at best, for the start of the new academic year in September 2016. Mrs Fisher was able to post on chatter on 13 May that accreditation have been obtained with OCR to deliver functional skills and that the Respondent was now working to obtain contracts for the new academic year. Mr Young, however, wrote via chatter on 4 August to the tutors confirming that whilst the first Respondent had secured OCR as a new awarding body, unfortunately, due to the actions of Ascentis, it had been unable to obtain any new business.

46. He went on to refer to the tutors' awareness that a separate new company NCC Professional (the second Respondent) had been set up to develop an apprenticeship business. He said it had been awarded a limited number of small contracts in specific areas and had advertised positions and also invitations had been issued to some of the first Respondent's tutors to interview for possible positions. He said that if and when the business expanded it may be possible to offer interviews to more of the first Respondent's tutors, the second Respondent's business being in its infancy and not having anywhere near the same level of need for tutors as the first Respondent had had. He went on to express understanding at the tutors' frustration and was open in stating that the first Respondent had absolutely no idea if or when it would be able to secure any new business, reminding the tutors that they were employed on non-exclusive contracts and were free to take on any other employment without having to discuss it with the first Respondent.

47. On 11 October Mrs Fisher made a posting on chatter announcing that the litigation with Ascentis had been concluded and that the sanction imposed had now been removed. She said they would now work towards rebuilding the first Respondent's reputation. She went on to say: *"to all the office staff, that have managed to close off 15/16 with accuracy and provided excellent support to the colleges and learners wherever possible and to Alison Curryer who worked tirelessly with the lawyers every day to provide evidence and supporting documentation – a huge THANK YOU!".* The Claimants in these proceedings referred to that communication as providing them with an assurance that all of the assessment paperwork they had submitted had passed Audit and Moderation. It is doubtful, however, that they interpreted the communication in that way at the time given that they did not themselves anticipate any issues with the paperwork they had submitted. In any event, Tribunal is satisfied that the reference to accuracy in communication was unrelated to the individual learner assessments submitted by any of the tutors.

48. As has been referred to, following the May cut-off date there had been a substantial number of assessments for the first Respondent to check to satisfy itself that they were sufficiently compliant and demonstrably robust to submit to the colleges for them to then seek the award of qualifications from Ascentis.

49. The checking was commenced by relatively junior administrative staff but their checks needed to be signed off by Alison Curryer as the administrative staff were not qualified to audit and moderate the assessments completed by the learners. She decided that she needed to take on this task herself in addition to her ordinary responsibilities for quality and central services and worked on the checking of the assessment papers together with another manager, Frank Davison. Mr Davison however left the Respondent's business at the end of August 2016 such that Mrs Curryer had to complete all of the remaining work which took until October 2016. Out of around 4000 assessment papers submitted by the first Respondent's tutors, in the region of 390 failed audit and/or moderation and were deemed unsubmittable to the colleges with whom the first Respondent contracted. They were not regarded as being sufficiently accurate and robust for the colleges to be able in turn to submit them to Ascentis for the award of a qualification. This in turn meant that the Respondent would not be paid for those submissions. The first Respondent was vulnerable to more questions and reputational damage if the colleges received assessments which were non-compliant.

50. All of the tutors had, as has already been described, been paid in advance for these assessments on the assumption that they would pass audit and moderation. The first Respondent took the view that where assessments had been submitted by the tutors which were not ultimately found to be compliant, the tutors had effectively been overpaid and the Respondent

was entitled to seek repayment. Mrs Fisher therefore posted a message on 22 November stating that the first Respondent had finally completed the end of year reconciliation with the colleges and completed its audit compliance checks on the final assessments submitted. She went on to say: *"Unfortunately it has come to light that many of the learners could not be certificated as they did not achieve their final assessments. It appears that many of the final assessments were marked incorrectly. These learners did not receive a certificate from Ascentis and we were unable to make a funding claim from the colleges. As a result, some tutors have been overpaid for their final submissions and correspondence will be coming out shortly to request that this amount is repaid to NCC Skills. As you are aware, tutor payments is conditional on the audit and quality compliance of paperwork…. We therefore made payments in goodwill as claimed for by all tutors. This now needs to be recovered where paperwork has been found not to be compliant and consequently overpayments made."* Any tutors were then asked at the end of the message to contact Mrs Fisher directly if they had any concerns. None of the Claimants did so.

51. Mrs Fisher then wrote on 24 November 2016 to all of the tutors from whom the first Respondent was seeking a repayment including, in full, the text of the aforementioned posting made on 22 November. The letter then set out the amount of overpayment said to be due and referred to an enclosed sheet which in the case of all of the Claimants set out in a schedule the name of the learner, the name of the relevant college, the nature of the qualification, a brief statement of the reason for the repayment request and then more details of the specific marking error/non-compliance the Respondent believed it had identified. In respect of each individual assessment an overpayment of £100 was sought to be repaid. The letter referred to the Respondent's usual practice of deducting any overpayment from future earnings but stated that as the Respondent was unable to provide the Claimant's with any, work the amount requested was to be returned by a cheque payment by 9 December. The letter closed asking that anyone with concerns about how to make a payment or who would like to discuss a payment plan contact Mrs Fisher.

52. None of the Claimants responded to their letters of 24 November enclosing the schedule of "failed" assessments. They all shortly afterwards, as will be described, submitted their written resignations from their employment with the Respondent.

53. Mrs Arnold in her evidence accepted that her contractual arrangement with the first Respondent was one where there was no guarantee or obligation on the part of the first Respondent to provide her with any or any particular amount of work. She accepted that the payments made to her were conditional upon the paperwork she submitted being accurate and compliant. She had accepted the first Respondent had made deductions from her wages in the past when errors were identified. She

accepted that the first Respondent had no work to give her from around May 2016 until she resigned from her employment by letter of 29 November 2016. By then the Respondent was seeking a repayment from her of £100 in respect of a single assessment paper where the reason given for the overpayment was a failure to comply with audit requirements with a comment made that the learner signatures on the front sheet of the exam papers didn't match. Mrs Arnold said that she saw this as a slur on her integrity and implying that she had forged signatures. She came to that view without having seen the exam papers themselves or contacting Mrs Fisher. In cross-examination of her, the relevant pages of the assessment papers were put to her. On both papers the learner was required to sign after setting out her personal details. The learner was then required to sign a declaration at the bottom of the page certifying that the work submitted was her own. The signatures at the top and the bottom of the front page to the assessment paper were indeed different. The Respondent's position was that anyone from the colleges or awarding body looking at the front sheet would note what appeared to be a discrepancy and would not accept the papers and award a qualification. Mrs Arnold's position was that she knew that in every case the learner had signed off the assessment paper in front of her and therefore there could not have been any failing. She accepted that, in common with all the other Claimants, after she had resigned from her employment she received a letter from the Respondent's solicitors which amongst other things invited her to raise a grievance. She did not, again in common with the other Claimants, respond to that.

54. Finally, Mrs Arnold said that she had seen on the internet that the second Respondent was advertising for tutors to teach on apprenticeship programs but said that she did not apply or seek any further information as there were no vacancies indicated in her geographical area.

55. Mrs Arnold, again, resigned by letter of 29 November immediate effect. She gave, in what was a standard form of letter used by a number of the Claimants, 6 grounds for resignation. The first 3 grounds related to her not being able to enrol any learners since 15 March and not having any work since 27 April. The fourth and sixth ground referred to the posting on 11 October that paperwork had been completed with accuracy, yet on 22 November she had been advised that there were issues preventing learners achieving their qualifications. The claim for repayment was then disputed with the request for repayment being stated as the most important complaint contributing to a fundamental breakdown in trust and confidence.

56. Mrs Versluis received a repayment schedule maintaining that 7 assessments had failed to comply with audit requirements resulting in an overpayment of £700. Her evidence was that she did not look even at this schedule before deciding to resign using the standard form letter of

resignation already referred to, sent, in her case, to the Respondent by letter of 1 December. She said that she did not look at the schedule because she 'had had enough'. She agreed that she could have contacted the Respondent but she had not looked at any of the assessment papers and did not indeed, she said, look at them for weeks after they arrived as part of the disclosure exercise in these proceedings. She said that she had not applied for a job with the second Respondent and would have expected to have been offered a position. She said that there were none available in her geographical area. As regards the assessment papers which she had now viewed, her position was that she had made a couple of mistakes but others had been incorrectly faulted. She referred to one particular answer which she accepted was wrongly marked but maintaining that even without the mark she had awarded, the student would have passed the assessment. This was a reference to an answer where a student had incorrectly expressed 1000mm as 10m yet had been marked as giving the correct answer.

57. Another example picked up on audit was where the learner had written a form of letter without breaking a paragraph up into sentences. The Tribunal was also referred to assessment papers where there had been crossings out and the insertions of alternative answers without the learner, as was required, initialling the changes. On audit, correct answers had been criticised where a capital letter had not been used in circumstances where the options given for a correct answer had all began with a capital letter. Mrs Versluis maintained that the marking scheme did not differentiate between answers given in capital or small letters. Even accepting that Mrs Versluis was correct as regards the marking scheme, the view taken by the auditor was not on its face without basis or unsupportable such as to be classified as an example of bad faith. It was perhaps the sort of discrepancy which might have been queried and then reviewed. Another criticism arose from an exercise requiring the use of conjunctives where on moderation it was felt that credit have been given where a more appropriate conjunctive should have been used, for example, *"we went to the cinema and it was raining"* and "*it didn't take long because we were very tired*".

58. Mrs Howarth received a schedule attached to a request for a repayment of £1600 arising out of 16 findings of failure to comply with audit requirements. She said that she had not read the schedule when she received it as she knew that she had marked the papers to the best of her ability and had marked these particular papers in the way she always had marked assessment papers. She said that she was angry at being asked for the money. As regards any employment opportunity with the second Respondent, she said that she did not apply because she assumed she would be asked to take up a position if work has been available. She referred to the second Respondent offering what she said were the same English and maths courses as the first Respondent but not being invited for interview.

59. Her resignation letter was in a form slightly different from the standard form already described, albeit the letter requesting repayment was said to be the "final straw" after a period of waiting for the Respondent to secure contracts. She disputed the claim for repayment saying that her level of professionalism had been consistent throughout her whole employment.

60. In terms of the assessment papers to which Mrs Howarth was taken in cross examination, the Tribunal noted an assessment where there seemed to be a discrepancy between the two learner signatures with a crossing out of one signature not initialled. Mrs Howarth accepted an incorrect mark to have been awarded when a learner had answered that a question mark would be an appropriate punctuation mark rather than the correct answer of exclamation mark. The front of another assessment sheet seemed to indicate that one person had added the dates next to both the learner signatures and the space for the assessor signature. On other papers alterations had not been initialled albeit Mrs Howarth's position was that the changes were not major. Where the moderator had criticised the marking for accepting two answers beginning with a capital letter, Ms Howarth's position was that the mark was awardable for identifying the correct word regardless of whether or not a small or capital letter was used. When referred to further examples of a lack of initialling, Mrs Howarth said *"there is rigour and there is ridiculous"* asserting that if all changes had to be initialled the learner would be *"initialling forever*".

61. Mrs Mitchell confirmed in evidence that she had experienced deductions from her pay before she had the chance to contest them in the past. The Tribunal noted a query she made regarding deductions in May 2016 where these were looked into by the first Respondent and some of the decisions explained and others reversed or amended.

62. The Tribunal also noted that Ms Mitchell emailed Mr Young, without any evidence of any response, noting that he had been advertising for functional skills tutors and stating that she was qualified to do this work, referring as well to her having been an external examiner for OCR for the previous 8 years in circumstances where OCR was to be the relevant examining body. Mrs Mitchell resigned from her employment by letter of 30 November 2016 using the standard template form and in her case after receiving a request for repayment of £2800 together with a schedule suggesting 28 separate instances of non-compliance with audit requirements.

63. She was taken through some of the failed assessments in cross examination. On one assessment it was noted that a date had been changed and a signature crossed out but without any initialling. An example of incorrect marking was noted in a maths paper. Ms Mitchell accepted that she had made an error in marking an answer correctly when it ought to have been rounded down to the nearest thousand. When

referred to another paper where crossing out had not been initialled, she said that sometimes the learner forgets to do that. Another page of a maths assessment showed multiple crossings out without any initials, but again her view was that any learner would not be concentrating on initialling his or her answers.

64. Mrs Leighton resigned from her employment with the first Respondent by email of 30 December in which she set out the standard form of resignation used by other of the Claimants as already referred to. This was after she had been asked for a repayment of £700 relating to 7 assessments which had failed audit or moderation. She had not, however, gone through the schedule. One paper she was referred to showed an answer clearly amended but without any initialling of the change and a similar series of six answers where there had been a crossing out in each case without any initials. Mrs Leighton's view was that the answers had been correct. Another assessment paper suggested that Mrs Leighton herself had changed both the date she signed the assessment and the date of completion given by the learner which Mrs Leighton agreed might be problematical to an auditor. She disputed that the answer "mail" should not be acceptable as an appropriate word for post sent electronically. She also disputed whether marks should be lost for answers being given starting with a capital letter when the answer itself was correct.

65. It is noted that Mrs Leighton when she found herself in a situation of being provided with no work from the first Respondent, obtained temporary agency work until July when she started new employment stating that she understood that *"zero hours goes both ways"*. She said that she did not apply for any position with the second Respondent because she didn't want anything to do with the NCC group and she did not think that the apprenticeship model being pursued by the second Respondent was viable. She had not however resigned from the first Respondent's employment at that point because she still hoped that she would get some work.

66. Ms Domotor had expressed an interest in working for the second Respondent and had been invited to an interview on 5 August by letter of 26 July 2016. However, she told the Tribunal that at the beginning of August she had decided not to go to the interview. She said that she did not want to have anything to do with the NCC group and she couldn't see that the second Respondent would make the apprenticeship model work financially for itself or in terms of her own potential income. She, however, did not resign from her employment with the first Respondent at this point saying that there was still a hope that she might be provided with some work despite her early comment that she did not want to work for anyone within the NCC group.

67. With a letter from the Respondent dated 24 November, she received a schedule seeking a repayment of £400 in respect of 4 assessments which were said to have failed to comply with audit requirements. While she accepted that there was in the current circumstances no opportunity for any learner to re-sit the assessment, she considered that in the past any discrepancies might have been brought to the tutors attention and if necessary they would have been resolved by the learner re-sitting the paper, rather than the Respondent seeking to recoup any fees already paid. She was taken in cross examination to some of the assessment papers in respect of which she had been deemed to fail audit. One example, in an English assessment, was of amendments having been made to the answers which had not been initialled. Her view was that this should not have caused any learner to fail. Other examples were referred to where changes had not been initialled. One assessment paper's front sheet suggested that the learner had not dated the paper in both of the spaces provided, but Ms Domotor rejected that this was a particular problem. A maths paper had been deemed to be incorrectly marked in circumstances where a pound sign was missing from the answer and no working had been shown. Other examples were given of lack of working displayed. In another question, she accepted that she had accepted an incorrect percentage given as an answer where a straightforward and different numerical value was required.

68. As already referred to, a decision had been taken in the early part of 2016 to develop a new business through the second Respondent to provide training to apprentices. This was to focus on IT and business administration apprenticeships. The second Respondent secured OCR as its awarding body delivering apprenticeship qualifications albeit special measures were put in place to monitor the second Respondent's activities due to the difficulties the first Respondent had found itself in with its awarding body. Learner fees for instance had to be paid to OCR upfront.

69. For any learner to pass their apprenticeship training they had to undertake the vocational element of the training, but also needed to have functional skills training in English and maths. Whilst the content of the English and maths courses might have been similar to those delivered by the first Respondent under the Skills for Life initiative, it led to a different qualification. Effectively, the apprentices had to be taken to a higher level of qualification than had been typical in the basic skills training provided to the care home workers by the first Respondent. The training and assessment was to take place over a longer period, there was provision for online e-learning and exam papers were also to be submitted to the awarding body electronically. The first Respondent had delivered some functional skills training as part of a pilot in 2014/2015 involving around 20 learners but after the pilot only a very small number of learners were taught up to that level.

70. A senior management team was put in place to operate and develop the second Respondent's business consisting of a Mr Mike Speight as managing director, Alison Curryer as head of quality, Hazel Wilcox as head of sales and Sue McAndrew as the HR administrator. Ms Curryer and Ms McAndrew had previously worked for the first Respondent. Mrs Fisher did not take any day-to-day responsibility for the second Respondent's business but did seek to generate a workflow and secure funding from further education colleges for learners on apprenticeship schemes.

71. Around December 2016, however, Ms Fisher and Mr Young came to the conclusion that the reputational damage caused by the Ascentis situation had had a knock-on effect to any NCC group venture and was making it impossible to gain new business for the second Respondent despite Mrs Fisher's efforts. She in fact managed to secure only 2 contracts for the second Respondent from the College of West Anglia and from Central College, Nottingham. From September 2016 to March 2017 only six tutors were employed at any stage by the second Respondent, 12 provide vocational teaching and 5 to teach English and maths functional skills. They were used to teach indeed the functional skills element of the apprenticeship training as well as a small number of standalone functional skills learners in respect of whom some specific and geographically limited funding had been obtained. Some of the first Respondent' tutors, as has already been noted, applied for roles with the second Respondent, albeit of the original Claimants in these proceedings only Mr Duncan Taborda actually commenced providing any such services. He also provided services in the London area for the first Respondent on one small contract but resigned on 2 December 2016. He too had been requested to repay some monies to the first Respondent in respect of assessments he had submitted which had been deemed to fail audit requirements. He was offered some additional work preparing learning materials for the second Respondent for which he would not be paid but which would be taken as cancelling out his debt to the first Respondent. He declined this proposal.

72. Mrs Fisher worked hard to try, in parallel with her attempt to secure apprenticeship work for the second Respondent, to generate new work for the first Respondent's business but unfortunately was unsuccessful with the exception of one small contract in the London area in respect of which Mr Taborda was offered some work. Ultimately, Mrs Fisher came to the realisation at the end of January that her attempts to revive the first Respondent's business were futile and in January 2017 those tutors who remained in the Respondent's employment were made redundant.

Applicable law

73. In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard, the Claimants rely on Section 95(1)(c) of the

Employment Rights Act 1996 which provides that an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct. The burden is on the Claimant to show that she was dismissed.

74. The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

75. The Claimants assert there to have been a breach of the implied duty of trust and confidence. In terms of the duty of implied trust and confidence the case of **Malik v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he *"will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee".* The effect of the employer's conduct must be looked at objectively.

76. The Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493** considered the situation where an employee resigns after a series of acts by her employer. The Claimants brings their case (albeit not exclusively) on such basis.

77. Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the

employer, it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.

78. If it is shown that the employee resigned in response to a fundamental breach of contract in circumstances amounting to dismissal (and did not delay too long so as to be regarded as having affirmed the contract of employment), it is then for the employer to show that such dismissal was for a potentially fair reason. If it does so then it is for the Tribunal to be satisfied whether the dismissal for that reason was fair or unfair pursuant to Section 98(4) of the Employment Rights Act 1996.

79. The right to a redundancy payment in Section 135 of the Employment Rights Act requires the employee to be dismissed by the employer (which can include a constructive dismissal or indeed the frustration of a contract of employment) by reason of redundancy. Alternatively, a redundancy payment can be claimed based on lay-off or short time working. This, however, requires an employee to comply with technical requirements in terms of a notice of intention to claim before then resigning on notice. The Claimants did not do so and have never argued that they have any entitlement to a statutory redundancy payment on the basis of these provisions.

80. Pursuant to Regulation 3(1)(a) of TUPE: "*… 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*" constitutes circumstances where TUPE applies. The focus is on the retention of identity through a transfer of tangible or intangible assets linked to a continuation of the same or similar activities. It is necessary for the Claimants to establish each of these factors. The Tribunal is referred to and notes the guidance given in the case of **Cheeseman v Brewer Contracts Ltd [2001] IRLR 144** and the multi-factorial approach outlined by the ECJ in **Spijkers v Gebroeders Benedik Abbatoir [1986] CMLR 296**.

81. Alternatively, TUPE applies to a service provision change which, as relevant in these proceedings, is defined as a situation in which according to Regulation 3(1)(b)(iii): *"activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on its own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf*". Even if that applies additional conditions need to be satisfied which include that there must be immediately before the service provision change *"an organised grouping of employees … which has as its principal purpose the carrying out of the activities concerned on behalf of the client".*

82. Further, the client must intend that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration.

83. The Tribunal is guided by the summary of Peter Clarke HHJ in the case of **Enterprise Management Services Limited v Connect-Up Limited** [2012] IRLR 190. There he set out a recommended approach where a Tribunal's first task is to identify the activities performed by the original contractor. Next the Tribunal should consider the question whether those activities are fundamentally the same as those carried out by the new contractor. If the activities have remained fundamentally the same the Tribunal should ask itself whether before the transfer there was an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client. Following this the Tribunal should consider whether the aforementioned exceptions apply. Finally, the Tribunal must be satisfied that each individual Claimant is assigned to the organised grouping of employees.

84. The Court of Appeal in **Hunter v McCarrick [2013] ICR 235** provides authority for the proposition that the client must remain the same following any alleged service provision change.

Conclusions

85. The Tribunal looks firstly at the issue of whether the first Respondent acted in fundamental breach of the Claimants' contracts of employment. Essentially, reliance is placed by the Claimants firstly upon their not being provided with work and communication failings on the first Respondent's part in that regard and then on the first Respondent's request for repayment of fees paid to the Claimants for the learner assessments they had submitted but which had been deemed by the first Respondent to have failed to comply with audit requirements.

86. As regards the lack of provision of work, the Tribunal has not found that there was any obligation to provide the Claimants with work or any particular minimum level of work. The Claimants all accepted that their employment was on a zero hours basis and the Claimants all understood that work levels would fluctuate. They had indeed shown a great deal of patience when the first Respondent was unable to provide work due to the Ascentis suspension, but this in fact was illustrative of their appreciation that they could not insist on the first Respondent referring learners to them from which they could earn their fees.

87. The Tribunal has noted in its findings references to the Claimants being subject to targets in terms number of learners, but again none of the Claimants went so far as to say that there was any obligation in that regard. The targets were indeed aspirational but there was no expectation that any learner would complete any particular number of learner assessments in a year. The first Respondent encouraged the tutors to obtain and fulfil more work and obviously it was not ultimately cost-effective for the Respondent to train and administer tutors who did not earn any money for themselves and of course at the same time for the first Respondent. However, none of the tutors were ever disciplined regarding a lack of activity and there is no evidence of any of them complaining that the first Respondent was ever failing in any putative obligation in the number of learner referrals made. The express provisions of the Claimants' contracts of employment are inconsistent with an obligation to provide a minimum level of work and is clear from how this business activity operated that this was an accurate reflection of the expectation of both Claimants and first Respondent.

88. In failing to provide any new work from February 2016 and in circumstances where no work remained to be fulfilled after 9 May 2016, the first Respondent did not act in breach of contract. Nor did the first Respondent act in such a way as to without reasonable cause damage or destroy trust and confidence in that the reason the tutors could no longer be provided with work was a legitimate one, due to the act of Ascentis over which the first Respondent had no control albeit it did all it could in terms of changing the position taken by Ascentis, including taking legal action.

89. Furthermore, the first Respondent was open with the Claimants as to the problems it faced and the reason for the stance taken by Ascentis. Contrary to what has at times been asserted by the Claimants or some of them the Respondent did communicate clearly and effectively (not aggressively) and, whilst there were gaps in communication, whenever there was anything material to tell the tutors, the first Respondent did so

and in a timely manner. The first Respondent was also not guilty of misleading the Claimants in painting, for instance, too rosy a picture of the situation. Indeed, the situation portrayed by the first Respondent was appropriately bleak and whilst the Claimants were told of what the first Respondent was seeking to do to rectify the situation and get the business back on track, they were also reminded that they were free to take work from other sources - indeed effectively encouraged to do so.

90. There was nothing arbitrary or selective in the way the Claimants were treated by the first Respondent. For a period, the entirety of the first Respondent's activities in the provision of learning ceased. Only indeed a very small amount of additional work was ever carried out, on the evidence, by Mr Taborda to fulfil a small one-off contract but this was not work which any of the Claimants thought they ought to have been provided with, not least because of its geographical location in relation to their own homes. All of the Claimants were aware of the possibility of the second Respondent recruiting tutors in respect of its separate business and all had an opportunity to put themselves forward if they had wished. The first Respondent's or either of the Respondents failure to seek them out and offer them this work cannot amount to a breach of trust and confidence.

91. It appears that by November 2016 certainly, the Claimants were becoming more than frustrated regarding an undoubtedly lengthy period without work and with no substantial progress made towards replacing any work lost. In such circumstances, it is likely that they did turn their mind to the possibility of their entitlement to redundancy monies. However, they did not resign.

92. It is clear that their decision to resign from their employment was triggered by the first Respondent's letter to each of the Claimants requesting the repayment of sums paid to them effectively in advance for the completed learner assessments.

93. It was part of the Claimants' contractual arrangements that payment in respect of student enrolments and completed assessments was dependent and contingent upon accurate paperwork and on their passing both audit and moderation. Again, this was well known and in practice tutors did find deductions were made from subsequent payments to reflect student withdrawals and/or failures to satisfy audit. When this occurred, there was no thought on the part of the tutors that the first Respondent was doing anything illegitimate. There is evidence that tutors, including some of the Claimants, did at times challenge whether recoupments were justified in particular cases and indeed evidence that the first Respondent

was willing to look into individual queries and indeed change its mind and allow payments to be retained.

94. As regards the demands for repayment in November 2016, the Claimants were well aware from a letter sent to all staff in January 2016 that potential miss marking or non-compliance was of the utmost seriousness to the first Respondent given the whistleblowing incident and the view taken by the awarding body. The tutors were all told about the potentially "*devastating"* consequences of any marking malpractice. It was against this atmosphere that all of the tutors were aware that there would be, in respect of the last tranche of assessment papers submitted, scrutiny of all rather than a sample of papers and scrutiny against heightened concerns regarding compliance.

95. The first Respondent's concerns were genuine and certainly not exaggerated. The first Respondent indeed was uncertain as to whether or not it would receive any payment at all for the assessment papers the tutors had submitted and in respect of which the tutors themselves had been paid. Certainly, the first Respondent could not seek any payment directly from the awarding body and it was dependent upon the individual colleges with which the Respondent contracted taking up the issue directly with the awarding body seeking to persuade it to confer qualifications on the individual learners. It was obvious that the first Respondent could not risk submitting papers to the colleges which the colleges might detect contained errors or were non-compliant in any way and which might then risk being effectively being knocked back by the awarding body. There was no opportunity to correct any minor non-compliances as had been at times the case in the past.

96. The Claimants considered the request for repayment to be an attack on their individual integrity and professionalism and to an extent that is understandable in cases where some of the Claimants had had very little to no experience of their particular assessment papers being knocked back and regarded as non-compliant. However, again, the situation within the Respondent was somewhat different to before and this included an inability on the part of the Respondent to simply point out compliance issues which might be rectified with the individual learner including possibly by the learner resetting the assessment. There was no scope for that form of continuing relationship with the learner given the position taken by Ascentis. Further, there was extreme sensitivity in terms of communications to the students and particularly the employing care homes where the Respondent had to take the lead of the colleges with which it contracted.

97. Ultimately, the Claimants' argument regarding a breach of trust and confidence must flow from some form of bad faith or lack of genuineness in the requests for repayment. Effectively, can it be said that perfectly adequate assessment papers were knocked back for no good reason or on spurious grounds or to effectively deprive the Claimants of income and enrich the first Respondent. Again, the Claimants accepted that moderation and audit were was significant to the first Respondent's business and any possible ability to retender for new business after the litigation with Ascentis. Also, the Claimants had operated under a practice where they were aware that monies could be deducted from salaries if in the first Respondent's opinion audit and moderation requirements were not fulfilled. Crucially, the Tribunal has not been taken to more than a handful of assessment papers where the Claimants have raised an argument of error, whether deliberate or not, by the Respondent's management in rejecting the assessment papers as not complying with audit and moderation. Instead, the Tribunal has seen examples in respect of all of the Claimants where there were at the very least questions to answer which in this environment of heightened sensitivity with the colleges and awarding body unsurprisingly resulted in the assessment paper being deemed not suitable for being submitted for learner qualification and payment to the first Respondent. Examples include front sheets where on their face there had been an irregularity in completion in terms of who had signed and dated this important document evidencing the timing and circumstances in which the assessment had been taken. There were numerous instances where learners had failed to initial any corrections to their answers in circumstances where this was a requirement. There were instances where tutors had given marks to the learners when no marks ought to have been given.

98. This is not to say that the tutors performed terribly or unprofessionally but that, straightforwardly, in a situation where they were under a great deal of pressure in terms of time to submit the final assessments and in circumstances where there was for good reason a heightening in standards and limited scope for rectification, problematical assessments were identified. The first Respondent's counsel has taken all of the Claimants to example assessment papers of theirs and noting the Claimants' reactions to the audit failings identified by the first Respondent, the first Respondent had a genuine basis for the determinations it made audit which of course weren't challenged by any of the Claimants prior to their resigning from the first Respondent's employment.

99. Some of the Claimant saw only a small number of their submitted assessment papers rejected as not complying with audit requirements. The percentage of assessment papers rejected and in respect of which repayment was sought for some Claimants was much greater. However, in the overall context of the first Respondent finding fault with and seeking repayment for less than 10% of assessment papers out of a total of around 4000, there is no evidence of the first Respondent seeking to use

the difficult Ascentis situation as a pretext or opportunity to recover money from the Claimants. Indeed, its upfront payment to the Claimants in circumstances where it was very unclear as to whether the first Respondent would ever itself obtain payment from the contracting colleges does not indicate any desire to disadvantage any of the tutors or to reduce the first Respondent's own outlay to them.

100. In conclusion, when the Claimants resigned from their employment at the end of November/early December they did not do so in response to any fundamental breach of their contract of employment whether a breach of any express term or the implied duty of mutual trust and confidence. The Claimant were not therefore dismissed. It must follow, therefore, that there claims to entitlement to a statutory redundancy payment, notice pay and in respect of unfair dismissal must fail and are dismissed.

101. The Tribunal finally turns to the, albeit now on the basis of its earlier findings theoretical, question as to whether or not the Claimants' employment transferred to the second Respondent by virtue of TUPE such that if any liabilities had arisen, they would have fallen to have been met by the second Respondent.

102. The Tribunal has already rejected the submission that this is not a pleaded issue which is open for the Tribunal to determine. The Tribunal against the factual matrix describes to it during the case management process clearly thought that there was a potential for there to have been a TUPE transfer and therefore considered it appropriate for the second Respondent, an associated company of the first Respondent, to be joined in as a party in these proceedings. Not to do so might have had the effect of depriving the Claimants of a remedy quite arbitrarily and unjustly or have caused the need for further or separate proceedings to have been pursued. The Tribunal notes nevertheless that the Claimants throughout these proceedings have never sought to explain on what basis there might have been a TUPE transfer and, whilst the Tribunal appreciates as unrepresented parties they will inevitably have found it difficult to construct an argument addressing the far from straightforward tests to be applied in determining whether there was a relevant transfer, there has still not been any positive assertion that there was such a transfer. Indeed, the Claimants do not know whether, had their claims succeeded, it would have served their interests or not for either the first or second Respondent to have been held liable for any award. They have in their possession a set of annual accounts submitted to Companies House in respect of the second Respondent but that does not necessarily represent the financial position of the second Respondent as of now and the evidence is that neither the first nor second Respondent are as at the date of this hearing actively trading.

103. The Tribunal has however sought to apply the facts as found by it to the legal test of a relevant transfer. Dealing firstly with the possibility of a "traditional" TUPE transfer, the Claimants have established no undertaking or economic entity which has transferred to the second Respondent. Both of the Respondents operated a business providing educational services involving their employed tutors teaching students and submitting their final assessments with the aim of them achieving qualifications. Both of them delivered teaching to learners in English and maths from a low level up to potentially a level equivalent to a grade C pass at GCSE level. However, the first Respondent taught basic skills in English and maths very predominantly to employees engaged in the care home sector. They did so pursuant to contracts they obtained from colleges as part of those colleges devolving to the Respondent part of a central government funding stream they could access. The first Respondent in turn contracted with an awarding body so that learners could achieve validated qualifications which would be widely recognised.

104. The second Respondent, in fact in parallel with the first Respondent, provided English and maths teaching as well as vocational training to apprentices in various different business sectors but not, is to be noted, in the care home sector. The second Respondent provided the teaching in English and maths over an extended period when compared to the first Respondent's business model thus enabling it to progress apprentices to a higher level of qualification from a different awarding body than that typically obtained by the care home workers and indeed utilising different learning and testing materials and methods including with a strong online element.

105. Importantly, the second Respondent undertook such business before the effective closure of the first Respondent's business. This is not the more classic case, in the context of a TUPE transfer, where a company comes into being or is utilised to take over or replicate the activities already undertaken in another business.

106. Nor is there any evidence of any transfer of contracts, tangible assets or intellectual property rights from the first to the second Respondent. For the business of the second Respondent to operate, Mrs Fisher had to seek out new business quite separately from the business traditionally obtained by the first Respondent contracting with different colleges, employers and awarding body. The most that can be said is that some of the first Respondent's management and administrative staff were transferred to work in the second Respondent's business at a time when the first Respondent was effectively in a state of limbo and it was hoped that the separate business of the second Respondent might have a

greater opportunity to flourish. A handful of the first Respondent's tutors were offered tutoring work with the second Respondent but that was subject to interview, reflecting the fact that not all of the first Respondent's tutors would be sufficiently qualified and experienced to deliver the teaching required by the second Respondent. Certainly, there was no motivation on the second Respondent's part to avoid TUPE by not engaging the first Respondent's tutors. The second Respondent needed only a small number of tutors in the context of a business in its infancy and again only tutors who would be qualified to teach in a different way and at a typically higher level than had been the case in the majority of the teaching provided to the care home employees by the first Respondent.

107. There is clearly some similarity in the provision of activities by the first and second Respondent but not such as there to be any scope for finding that there has been a transfer of any economic entity which retains its identity. On the facts, there was no traditional TUPE transfer.

108. The alternative possibility is for there to have been a relevant transfer by way of a service provision change. That however involves the Tribunal in assessing whether the activities carried on by the second Respondent were fundamentally or essentially the same as those carried out by the first Respondent. On the Tribunal's findings they were not. The first Respondent provided teaching to a particular category of employed worker whereas the second Respondent provided teaching to apprentices were the provision of teaching in English and maths was a necessary adjunct to the vocational skills training undertaken as part of the apprenticeship programmes.

109. The Claimants however, even if such similarity could be found, would have to have engaged with the question of who was the client in the activities undertaken firstly by the first Respondent and then by the second Respondent. On the facts, the relevant client in this situation must be the individual colleges. It cannot be the individual learners or the care home employers – the client is the person on whose behalf the activities are carried out not those who receive a benefit from the activities. The care homes did not make any decision to change the contractor providing teaching services to their employees

110. The removal of the first Responden's accreditation with Ascentis might have caused the colleges with whom the first Respondent contracted to find an alternative service provider and one could see an argument that there might have been a relevant transfer pursuant to the service provision change limb of TUPE if another provider of educational services had stepped in, in the first Respondent's place. The Tribunal has

no evidence that this in fact occurred, but it is fundamentally clear that the second Respondent did not step in or become appointed or entirely separately contract with any of the colleges to then provide to it the services which had previously been received from the first Respondent. Again, there can have been no relevant transfer pursuant to TUPE by reason of any service provision change. Had the Claimant's complaints or any of them therefore been successful liability would have remained and rested with their (only) employer, the first Respondent.

Employment Judge Maidment

Date: 23 January 2018