EMPLOYMENT TRIBUNALS

Claimant: Mr M Fone

Respondents: 1. Maestro Financial Services Limited
2. Old Mutual Wealth Private Client Advisers Limited

Heard at: Manchester **On:** 1 and 2 March 2018
22 March 2018
(in Chambers)

Before: Employment Judge Whittaker

REPRESENTATION:

Claimant: Mr D Flood of Counsel
Respondents: Ms I Ferber of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed under Regulation 7(1) and Regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

2. The claimant was unfairly dismissed under sections 94, 95 and 98 of the Employment Rights Act 1996.

REASONS

1. The claimant brought claims relying on Regulation 4(7) and Regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. He also claimed that he had been unfairly (constructively) dismissed pursuant to section 95 of the Employment Rights Act 1996.

2. The claimant gave evidence on his own behalf on oath by reference to a written witness statement. The respondent called two witnesses, Niel Lingwood and Kevin Mustard. All witnesses gave evidence by reference to their witness statements and were cross examined. The Tribunal was provided with a joint bundle of documents comprising some 266 pages. Where the Tribunal referred to pages in that bundle the page references are set out in these Reasons.

3. The parties had provided the Tribunal with an estimated length of hearing of two days which proved to be woefully inadequate, and in the opinion of the Tribunal that ought to have been obvious to the representatives of both the claimant and the respondent some considerable period of time prior to the hearing, which took place on 1 and 2 March 2018. The hearing on Friday 2 March 2018 concluded late in the afternoon and there was no time for closing submissions by either party. It was agreed that closing submissions would be submitted on behalf of both parties in writing. Those written submissions were subsequently received by the Employment Tribunal. They not only made detailed references to the facts of the case but made even more detailed references, most helpfully, to the law and the relevant authorities.

4. The claimant alleged that there had been a substantial change to his working conditions which were to his material detriment and that he had therefore resigned and treated his contract of employment as having been terminated. He alleged that he had been dismissed in accordance with Regulation 4(9).

5. The claimant also alleged, pursuant to Regulation 7(1), that he had been dismissed and that he should be treated for the purposes of Part 10 of the 1996 Employment Rights Act (unfair dismissal) as having been unfairly dismissed as he alleged that the sole or principal reason for his dismissal was the transfer.

6. The claimant also alleged that he had been unfairly dismissed. The claimant alleged that he had been dismissed in accordance with section 95(1)(c) of the Employment Rights Act 1996. He alleged that he had terminated his contract of employment with the respondent, without notice, in circumstances which he alleged that he was entitled to terminate it without notice by reason of the conduct of the respondent.

7. The issues to be determined by the Tribunal were:

(a) Whether at the time of the resignation of the claimant it was proposed that there would be a substantial change in the working conditions of the claimant which would be to his material detriment at the time of the proposed transfer of his employment from the first to the second respondents.

(b) Whether, as alleged by the claimant, the sole or principal reason for his dismissal was the transfer which was about to take place between the first and second respondents.

(c) Whether or not at the time of the resignation of the claimant from his employment with the first respondent, the conduct of the claimant entitled the claimant to terminate his employment without notice.

Findings of Fact

8. The Tribunal, after considering the evidence of the witnesses and the relevant documents, made the following findings of fact:-

(1) The claimant commenced employment with the first respondent on 1 June 2001 as a Financial Consultant. In the first paragraph of his

witness statement the claimant describes the first respondent as a "small financial advisory/services practice". The claimant reported to Niel Lingwood who was the Managing Director of the first respondent. The role of the claimant was to provide financial advice to the clients of the first respondent. Initially the claimant was provided with clients by Mr Lingwood but over time the claimant, through his own efforts, attracted or sourced clients for the first respondent on his own.

(2) There was considerable discussion, debate and disagreement at the hearing on 1 and 2 March 2018 between the parties as to what were the terms of the contract of employment of the claimant as at the date of his resignation from his employment with the first respondent. The Tribunal was referred to a number of different contracts of employment and the Tribunal will now deal with these individually.

(3) The first contract of employment appeared in the bundle at pages 36B-36G. That contract is not signed either by the claimant or the first respondent. Neither is the contract dated. The contract is not referenced in an offer letter which was sent to the claimant dated 5 February 2001 (page 36A). That contract of employment makes no reference to any entitlement on the part of the claimant to a bonus. Paragraph 8 of the contract specifies the remuneration to be received by the claimant which simply refers to a salary of £25,000. By contrast the offer letter dated 5 February 2001 at page 36A indicates that "a bonus would be paid" at commission rates set out in the wording at page 36A. None of the detail of that bonus is repeated in the contract of employment, and neither is any reference to any bonus made in that contract of employment.

(4) Mr Lingwood, in his witness statement, confirms at paragraph 6 that when the claimant joined the first respondent he was working "under an offer of appointment dated 5 February 2001". That, as the Tribunal has already pointed out, makes clear reference to a bonus structure and to the fact that the bonus "would be paid". Mr Lingwood in his witness statement at paragraph 8 suggests that under the terms of the letter at page 36A that the claimant was not entitled to a bonus. He alleges that the claimant only became entitled to a bonus as a result of signing the second contract of employment which was included in the bundle at pages 37-43. Mr Lingwood points out that that contract includes a contractual entitlement to a bonus but he goes in paragraph 8 of his witness statement to allege that "which had not been the case previously". The Tribunal finds that that is not a correct statement of fact. Indeed it is a contradictory statement when Mr Lingwood confirms in paragraph 6 of his witness statement that the claimant worked under an offer of employment dated 5 February 2001. The Tribunal finds that the only reasonable interpretation of the words "would be paid" is that the claimant was contractually entitled to payment of a bonus under the terms of that letter dated 5 February 2001 and was therefore contractually entitled to a bonus from his start date, which was agreed by all parties to be 1 June 2001.

(5) The second contract is the document which appears at pages 37-43 in the bundle. This document is signed by Mr Lingwood and by the claimant on 21 December 2006. At paragraph 8 of that contract (page 38) there is reference to the fact that the claimant's salary has now increased from a starting salary of £25,000 to a salary of £33,650. Paragraph 8 of the contract of employment (page 38) goes on to confirm that, "On attainment of bonus in excess of an agreed annual target, a bonus will become payable. The level of bonus will be negotiated for a 12 month period currently 1 June to 31 May in each year". The Tribunal finds that there is no difference between the effect and meaning of the words "will become payable" which are included in paragraph 8 of the second contract and the words "would be paid" which are set out in the offer letter in February 2001 at page 36A. In the opinion of the Tribunal those words mean the same thing. The effect of those words in the opinion of the Tribunal is that the claimant was contractually entitled to payment of a bonus from his start date up to and including the date of signature of that contract, 21 December 2006.

(6) The method and reasoning behind the actual bonus which was payable to the claimant each year was not set out in the second contract of employment signed in December 2006. By then, the only information which had been set out in writing between the claimant and the first respondent about the mechanics of calculation of the bonus to which the claimant was entitled were set out in the offer letter dated 5 February 2001. That indicated that the claimant would be set an annual target of £72,000 per annum worth of commission, and that commission would be payable to the claimant on a ratio of 60%/40% of any commission which was earned over and above the £72,000 mark. That letter confirmed that the bonus would be "calculated on a quarterly basis". In effect what those words meant was that the claimant had to earn a minimum commission of £72,000 but he would not be paid any commission on any income which he generated below £72,000. That effectively acted as a threshold for entitlement to bonus. The claimant was, if he exceeded that threshold of £72,000, entitled to a bonus calculated at 60% of any income received by the first respondent over and above £72,000.

(7) The claimant produced at page 258C a schedule of the bonus which he had been entitled to and the method of calculation of that bonus on an annual basis from June 2001 to March 2017. Mr LIngwood repeated that schedule at paragraph 9 of his witness statement. He did not disagree with the content of the schedule which had been prepared by the claimant. That table showed that from 1 June 2001 to 31 May 2012, the total income of the claimant increased as a result of payment of bonus. In the first 11 years of the employment of the claimant by the first respondent his income, including bonus (when earned) shows the income of the claimant reaching a high of £43,629 in 2004/2005. The claimant's income declined in the following year and then declined further in the year 2006/2007. In each of the four years from 2008-2012 inclusive the claimant did not earn any commission at all. It was agreed

by all parties that this was as a direct impact of the banking and associated financial crisis. In each of those four years from 2008-2012 inclusive the claimant only earned his appointed salary of £35,000. However, the Tribunal notes that the income of the claimant declined from 2004-2005 and then 2005-2006 and then again from 2006-2007. In each of the four years from 2008-2012 inclusive when the claimant earned his salary only of £35,000, his income was lower than it had been in his second year of employment, 2002/2003.

(8) The claimant began his employment on 1 June 2001. His bonus was then calculated by reference to the first 12 months of his employment and then the subsequent successive periods of 12 months. In effect, therefore, the bonus year was 1 June to 31 May the following year. That is clear from the schedule at page 258C. It was agreed between the parties, however, that the bonus calculation year was changed to the calendar year, in effect January to December of each calendar year, with effect from 1 January 2012.That is reflected in the schedule at page 258C and that change was agreed by both the claimant and Mr Lingwood.

(9) In December 2012 Mr Lingwood, the Managing Director of the first respondent, stopped providing any regulatory advice to clients of the first respondent. That advice was then given by the claimant and two other financial advisers who were required to meet certain regulatory requirements in order to be approved to give financial advice by the Finance Conduct Authority. Mr Lingwood had purchased 50% of the shares of the first respondent in 1987 and the other 50% had been owned jointly with Stephen Hepburn, until Mr Lingwood purchased his 50% shareholding in 2013. Mr Lingwood was then the sole 100% shareholder of the first respondent. Shortly after that purchase Mr Lingwood began to consider his own exit options which included selling the company. Mr Lingwood explored the possibility of selling his company to Sanlam, another wealth management business, and this possibility was explored in or around 2013. Indeed the first respondent entered into a Practice Buyout Option with Sanlam for a three year period in or around 2013. However, Mr Lingwood ultimately became sceptical as to whether or not that deal was ever going to get over the line, and in the summer of 2015 began to look at alternative options and specifically selling the business to a different purchaser. Mr Lingwood began to think about this seriously in or around the summer of 2015.

(10) At all material times the first respondent remained a small Practice. It never had more than ten employed members of staff including the claimant.

(11) In December 2012, when Mr Lingwood decided to stop giving any regulatory advice. The effects of the financial crisis were still being felt and in the year June 2011 to May 2012, the claimant did not earn sufficient commission to become entitled to any bonus at all.

(12) As confirmed in the signed contract of employment at page 38 in the bundle, the specific mechanics and calculation of bonus were to be subject to “an agreed annual target”. Furthermore, the “level of bonus will be negotiated for a 12 months period”. The contract of employment did not set out any more details of the method as to how the “agreed annual target” was to be “agreed”. It was responsibly conceded by Mr Flood for and on behalf of the claimant that ultimately Mr Lingwood would at all times have had the final say on the method of calculation of bonus had there ever been a disagreement between the claimant and the respondent. As it happened no such disagreement ever occurred. From time to time, at least annually, the claimant and Mr Lingwood met and agreed the financial performance of the company, the financial performance of the claimant and ultimately the financial targets which were to be set for the following year against which the claimant would be measured for entitlement to bonus. As already indicated, one of those agreements led to the bonus year being changed to the calendar year as from the beginning of January 2012. During those discussions Mr Lingwood, quite understandably, took into account a number of factors, not only the year on year performance of the claimant. The responsibility of Mr Lingwood was also to consider the cost of employment of not only the claimant but also the other members of staff. The overall costs of running the business of the first respondent also were taken into account, including regulatory expenses and insurance. Of course ultimately Mr Lingwood was also properly entitled as the 100% shareholder of the company to consider the overall profit which was generated by the company each year.

(13) As already mentioned, the claimant did not earn any bonus at all in the four years from 1 June 2008 to 31 May 2012. He only received his salary during each of those four years in the sum of £35,000. However, just as external factors had significantly affected the overall income of the claimant in each of those four years, there were then a number of subsequent changes which ultimately substantially increased the income of the claimant as a result of the levels of commission that he was able to generate. Five of those factors were listed in the witness statement of Mr Lingwood at paragraph 13. They included a reference to the fact that at the end of 2012 Mr Lingwood had stopped providing regulatory advice himself and had begun to hand over clients to the claimant which in turn benefitted his figures and ultimately his entitlement to bonus. Not only did Mr Lingwood begin to hand over his own clients to the claimant, but due to his decision in December 2012, all new clients approaching the first respondent for financial advice were directed to the claimant and this then increased the claimant's ability to earn income and therefore to earn bonus. There were, therefore, a significant number and variation of internal and external factors which affected the claimant's ability to earn bonus from 2008 onwards.

(14) Returning to the contracts of employment issue, the third contract of employment to which the Tribunal was referred appeared, dated 6 April 2014, at page 43A in the bundle. It was accompanied by an email

exchange at pages 43AA and 43BB. In the email at page 43AA it was specified to the claimant that the company required his contract of employment "returned and signed" by 6 April 2014. Mr Lingwood openly acknowledged that the contract of employment had not been drafted by specific reference to the needs and requirements of the first respondent but had instead been compiled by reference to template versions of employment contracts which were available to him via organisations that he subscribed to. He confirms this in paragraph 14 of his witness statement. Mr Lingwood told the Tribunal that the main purpose for preparing contracts in 2014 was to tidy up the existing contracts and to make sure that they were up-to-date and legally compliant in terms of Financial Services Regulation. The Tribunal, however, was not given any indication as to how, allegedly, the existing contracts were out of date or how, allegedly, the previous contracts failed to be "legally compliant" in terms of Financial Services Regulation.

(15) There was no reference to any entitlement to bonus in this third contract of employment. The contract referred to "salary" at £40,000 (page 43B), and it referred to an annual review of salary from time to time (page 38). It reviewed to a review of salary. However, the contract was silent on the issue of bonus. Understandably the claimant (page 43BB) pointed this out to Mr Lingwood and indicated that having looked at this third contract of employment that any reference to bonus structure "seems to be omitted". Mr Lingwood replied by an email on 2 April – 43BB – indicating that he "will look at the contract for the bonus structure aspect".

(16) The Tribunal was not provided with any evidence at all that despite the issue having been raised by the claimant with Mr Lingwood that there was any subsequent clarification discussed with the claimant, or perhaps more importantly issued to the claimant in writing, prior to the issue of the fourth contract of employment. The third contract of employment, therefore, issued to the claimant in 2014 was never signed by the claimant and was, in the opinion of the Tribunal, never accepted by him as his contract of employment or reflecting the terms of his employment with the first respondent. The claimant therefore continued to be employed under the terms of the second contract of employment signed in December 2006.

(17) One year went by until April 2015, in fact exactly one year because on 6 April 2015 a further contract of employment was sent to the claimant (page 44). This contract contained various clauses which were obviously irrelevant to the employment of the claimant. Again the conclusion of the Tribunal was that Mr Lingwood had used various precedents at his disposal without considering the individual circumstances of the claimant. For example, the contract referred to a probationary period which was clearly inappropriate, bearing in mind that the claimant had now been working for the first respondent for almost 14 years. It also made reference to the requirement for a satisfactory reference which was equally completely inappropriate.

Insofar as bonus is concerned there was a significant change of emphasis in the working of this contract at page 5.3 (page 46). The wording of that clause read:

"You are entitled to a bonus payment, paid annually as outlined in the Bonus Schedule attached. This Bonus Schedule will be reviewed from time to time at the company's discretion without affecting the other terms of your employment."

(18) The schedule of bonus referred to appeared at page 56 in the bundle. In line with previous arrangements, it confirmed that certain financial thresholds had to be met before bonus was payable and that different percentages of commission were "payable to" the claimant by reference to different financial thresholds. That schedule, in the opinion of the Tribunal, the first respondent to pay a bonus to the claimant. The words at page 56 "payable to" suggested an obligation on the part of and reflected the words of the signed contract of employment in 2006 (page 38) which clearly stated that "a bonus will become payable". Paragraph 5.3 of that draft contract furthermore made it clear, in the opinion of the Tribunal, that there was no change to the entitlement to the receipt and payment of a bonus. The words at paragraph 5.3 saying "you are entitled to a bonus payment" in the opinion of the Tribunal made that clear. Paragraph 5.3 goes on to say that the bonus schedule will be reviewed from time to time at the company's discretion. In the opinion of the Tribunal the use of the word "discretion" simply reflected the position which was acknowledged by Mr Flood for and on behalf of the claimant, which was namely that in the event of an impasse between the claimant and the respondent about the level of bonus and the thresholds and percentages which would be appropriate year by year, ultimately Mr Lingwood had the final say. In the opinion of the Tribunal the use of the word "discretion" did nothing more than reflect that ultimate entitlement on the part of Mr Lingwood to have the final say. The use of that phrase did not, in the opinion of the Tribunal, reflect any overriding and complete discretion on the part of Mr Lingwood as to whether or not a bonus scheme was in place and whether or not, subject to achievement of agreed or set targets, a bonus was payable. If targets were set and those targets were met then a bonus was payable by the first respondent to the claimant and the claimant was entitled to receive that bonus year on year.

(19) The claimant at paragraph 21 of his witness statement indicated that his interpretation of the words "will be reviewed from time to time at the company's discretion" suggested an entitlement on Maestro's side to chop and change his bonus entitlement. The claimant alleges in his statement that in his belief the respondent company was not entitled to do that. In fact the Tribunal finds that the company was entitled to do exactly that but only by reference to annual targets negotiated for a 12 month period. This was reflected by the acknowledgement that ultimately Mr Lingwood always had the final say, even though he had never had to use it. Ultimately, however, the company was entitled to vary the bonus scheme year on year. As Mr Lingwood indicated in his

witness statement, he had to consider a wide range of different factors, including financial factors, in order to decide what he felt was an appropriate level of bonus scheme year on year for the claimant. The Tribunal does not accept that the claimant's interpretation of that wording is a fair, reasoned or objective interpretation of the words used for the reasons expressed above.

(20) Nevertheless, the Tribunal accepts that that was the interpretation of the claimant and he therefore, once again, refused to sign the contract of employment. It remained unsigned. Mr Lingwood confirms this at paragraph 20 of his witness statement.

(21) Despite the fact that the contract issued to the claimant in April 2015 went unsigned, the relationship between the claimant and Mr Lingwood continued as before. They met from time to time, at least annually, to discuss the bonus structure and bonus thresholds for the coming year and it was never necessary for Mr Lingwood to exercise his "final say" as ultimately, year on year, it was possible for the claimant and Mr Lingwood to reach agreement as to what they both believed was a fair and reasonable bonus structure. This included the bonus structure which was attached to the contract issued to the claimant in April 2015. That bonus structure was included in the bundle at page 58.

(22) The claimant alleged at paragraph 24 of his witness statement that he asked Mr Lingwood for a meeting to discuss the contract and "all the concerns that I had with its content". The Tribunal found no evidence at all, other than the statement of the claimant, to substantiate that allegation. In contrast, in 2014, the claimant had raised his concerns in writing. There was no such evidence relating to the contract issued in April 2015. The Tribunal found that to be troubling. On balance the Tribunal believed that if the claimant had raised those concerns with Mr Lingwood and had wanted a meeting that he would have done so as he had done before in writing, and that if a request for a meeting had fallen on deaf ears then again the claimant would have raised that in writing. On balance, therefore, the Tribunal did not find that the claimant asked for a meeting with Mr Lingwood to discuss the contract. The Tribunal finds that in effect Mr Lingwood and the claimant paid little or no attention to the terms of the proposed contract of employment as they continued to work harmoniously and the first respondent continued to pay bonus to the claimant in accordance with the bonus structure which had been discussed and agreed between them as had always been the case.

(23) At the beginning of 2016 Mr Lingwood began to concentrate more and more on his exit strategy for the company and his own retirement. The proposed sale of the company to Sanlam did not appear to be going anywhere, but the alternative proposal of a sale to a separate company which had been established by a former employee of the first respondent appeared to Mr Lingwood to be much more promising. Early in 2016 the negotiations were still at a very early stage but they had progressed to the prospective purchaser beginning to carry out

due diligence on the financial affairs and structure of the first respondent.

(24) Referring back to the Bonus Schedule at page 258C, it was clear to Mr Lingwood that as a result of the factors which he specifically listed in paragraph 13 of his witness statement, that the ability of the claimant to meet and even considerably exceed the financial threshold for the payment of bonus had led to considerable increases in the overall remuneration of the claimant. This was particularly the case in the calendar year January to December 2015 when the overall bonus of the claimant rose to almost £31,000, increasing his overall income to over £70,000. This meant that the claimant's income had doubled by comparison to his income between June 2011 and June 2012. In just over three years this represented a very significant increase in the income of the claimant. The Tribunal finds that Mr Lingwood was well aware of this increase and was aware of some of the reasons for it as set out in paragraph 13 of his witness statement. The level of bonus earned by the claimant in 2012 had doubled in three years from just under £15,000 to just over £30,000 by December 2015. By the end of 2015 Mr Lingwood was well aware of ongoing progress with regard to the possible sale of his company and the Tribunal finds, as Mr Lingwood stated in his witness statement at paragraph 24, that aware of the significant increases in the value of the bonus which the claimant had earned, that there was a possibility of the need to make some changes to the remuneration structure of the claimant if the sale did not go ahead.

(25) The claimant, understandably, was not made aware of the detail of the ongoing discussions for the sale of the company. In broad terms, however, the claimant was aware of the potential sale of the company as this had been made well known to him when the draft contract was issued in 2014. Indeed at page 43BB Mr Lingwood replies to the claimant with the words “I did say that the business sale issue would be issue by way of a side letter”. The issue of a side letter was irrelevant to the issues to be determined by the Tribunal but reference is made by the Tribunal to that email only to demonstrate that the claimant was aware of the proposed sale of the first respondent, certainly as at April 2014. In early 2016 that was nearly two years later. The Tribunal finds that Mr Lingwood did say to the claimant that if the sale did not proceed that there may be a need to make some changes to his remuneration package. After all Mr Lingwood was well aware of the level of bonus which had been paid to the claimant in the year ending December 2015. Mr Lingwood pointed out that the increased level of business which was being managed by the claimant equally required an increased level of support staff behind the scenes. Mr Lingwood was keen to ensure that his support staff were fairly remunerated for the essential support which they provided to the claimant and the first respondent company and to the clients of the respondent company which enabled the claimant to generate his bonus.

(26) Mr Lingwood was also concerned about his own income. He had stopped providing regulatory advice in December 2012 and therefore did not have his own bank of clients. Mr Lingwood recognised that he would benefit financially if the company could be sold but he equally began to recognise that if the sale did not go ahead that his own personal income had not risen for 5/6 years. The Tribunal accepts that the thoughts of Mr Lingwood at that stage were that if the sale of the first respondent went ahead then he would have his exit strategy but that if it did not proceed, as had been the case with Sanlam, that he would need to focus more clearly on the overall financial circumstances of the company and all the members of staff including himself and the support staff, not only the claimant.

(27) As the Tribunal has already indicated, the contract issued to the claimant in April 2015 went unsigned and effectively ignored by both the claimant and the first respondent. The blank signature page appears at page 55.

(28) Following a recent pattern the claimant was then issued with a fifth contract of employment again issued on 6 April, but this time issued in 2016. At paragraph of his witness statement Mr Lingwood conceded that although this had been prepared as a draft in April 2016 that he could not remember whether it had even been shown to the claimant or not. In any event it was never signed (page 68).

(29) The wording in that contract by reference to bonus (paragraph 5.3 at page 59) reflected identical wording in the contract issued to the claimant in 2015 (page 46). The Tribunal has already made its findings of fact about the interpretation of that wording. The Tribunal does not find that the contract dated 6 April 2016 ever became the contract of employment between the claimant and the first respondent.

Conclusion

9. In summary, therefore, the conclusion of the Tribunal with regard to the contractual terms of the claimant is that the terms of the contract of employment of the claimant at all material times were in the contract of employment signed by the claimant on 21 December 2006 and included in the bundle at pages 38-43 inclusive. The contractual terms governing the payment/entitlement of the claimant to a bonus were at all material times, therefore, the words in paragraph 8 of that contract of employment set out at page 38 of the bundle which reads:-

> "On attaining of business in excess of an agreed annual target, a bonus will become payable. The level of bonus will be negotiated for a 12 month period currently 1 June to 31 May in any year."

10. Prospects for the sale of the first respondent continued to be positive in early 2016 and progressed to the due diligence process. In August 2016 Mr Lingwood met with the claimant and other members of staff to announce his proposal to retire and the proposed sale of the first respondent to the second respondent who had now, in principle, agreed to purchase the first respondent.

11. A meeting took place with the staff and Mr Lingwood on 10 August 2016 but the claimant was unable to attend due to the fact that he was on holiday. On his return, Mr Lingwood provided the claimant with a copy of notes which were relevant to that meeting. A copy of those notes appeared in the bundle at pages 69A-69B.

12. The claimant at paragraph 33 of his witness statement refers to a meeting in October 2016. The claimant provided no evidence at all to indicate why he had stated the meeting took place in October. By contrast, at paragraph 37 of his witness statement, Mr Lingwood was specific in indicating that the meeting in question had taken place on 21 September 2016. The meeting was not a meeting as such; it was a presentation by three of the senior representatives of the second respondent about the sale and about the second respondent in order to enable the staff to understand and receive an overview of the organisation and some of the support and benefits on offer. It was also an opportunity for members of staff to ask questions and raise any queries or concerns. The claimant alleged in paragraph 33 of his witness statement that this was a meeting which was only for the "admin team" of the first respondent.

13. In cross examination Mr Lingwood was very clear in denying that it was an invitation only to the admin team. He was adamant that the reason why the claimant did not attend that meeting was because he had chosen not to do so, not because he had been excluded or because the invitation had not been offered to him. The Tribunal believed that this was an area of significance in its decision making process. The claimant subsequently failed to attend two other functions which were organised by the second respondent, and his explanations for failing to attend each of those two functions were in the opinion of the Tribunal either indicative of the lack of interest on the part of the claimant (April 2017) or, in connection with a Christmas party, evasive, uncooperative and untrue. The Tribunal will deal with the other two incidents separately in its findings of fact. However, the explanations which were offered by the claimant in respect of those two later meetings directly relating to the second respondent was, in the opinion of the Tribunal, properly relevant to the disagreement between the claimant and Mr Lingwood as to why the claimant did not attend the meeting on 21 September 2016. The claimant offered the explanation that he was excluded because he was not part of the admin team, whereas Mr Lingwood was adamant that the claimant was invited but simply chose not to attend.

14. On the balance of probabilities the Tribunal prefers the evidence of Mr Lingwood to the evidence of the claimant. There was no evidence to the Tribunal at all to indicate that the meeting was only for the admin team of the respondent company. The Tribunal took into account the fact that the respondent company was very small and at all times had less than ten employees. The first respondent was being purchased as a whole. It was not just the admin team that was being purchased. It was the whole commercial enterprise of the first respondent which was being purchased. The Tribunal therefore finds that the claimant was invited to that meeting. The Tribunal finds that the meeting took place on 21 September 2016 as indicated by Mr Lingwood and not October 2016 (without a specific date being given) as alleged by the claimant. The Tribunal finds that the claimant was invited, was aware of the meeting and yet chose not to attend.

15. The Tribunal was also persuaded by the evidence of Mr Lingwood which he gave under cross examination. He confirmed that one of the three financial advisers who were employed by the first respondent as at September 2016 (including the

claimant) announced their resignation on 9 September 2016. This was a date which very clearly stuck in the mind of Mr Lingwood because Mr Lingwood then went away on holiday to Turkey on 12 September. The resignation of one of the three financial advisers was an issue of significant concern to Mr Lingwood because the company relied on the financial advisers to provide the regulatory advice to clients and at the time when positive progress was being made in connection with the potential sale of the first respondent suddenly one of the three financial advisers had resigned. Mr Lingwood clearly remembered returning from Turkey the day before the presentation on 21 September 2016. He remembers the other financial adviser indicating that he was leaving almost immediately. Mr Lingwood remembers specifically that he was particularly embarrassed that none of the financial advisers attended the presentation on 21 September 2016. This clear and specific recollections on the part of the Mr Lingwood contributed to the decision of the Tribunal to prefer the evidence of Mr Lingwood to the evidence of the claimant about the reasons for the non attendance of the claimant at the presentation.

16. Furthermore, it was put to Mr Lingwood that he had instructed the claimant not to attend. Mr Lingwood firmly denied this. The claimant had not suggested in his witness statement that he had been instructed by Mr Lingwood or indeed by anyone else not to attend. This suggestion, therefore, on behalf of the claimant was put as an alternative reason as to why the claimant did not attend the meeting, but it was done for the first time in cross examination of Mr Lingwood but not as part of the claimant's evidence or as part of his witness statement. The Tribunal rejected this evidence of the claimant.

17. As none of the financial advisers were in attendance at the meeting the slide which referred specifically to financial advisers (page 111) was removed from the presentation. However, after the meeting a full copy of the presentation slides was given to the claimant and page 111 was added back, as clearly it was relevant not only to the claimant but also to his colleague as a financial adviser.

18. The claimant was provided with a copy of the slides, including page 111, by email from Mr Lingwood dated 5 October 2016 (page 73). The Tribunal finds that the reference to “admin staff” in that email is not a reference to admin staff because they were the only ones invited. The Tribunal finds that the reference to “admin staff” is a reference to the fact that it was only the admin staff who were present at the meeting despite the fact that the invitation had been to all the members of staff. The Tribunal finds, therefore, that by the end of September 2016 the claimant, having been provided with page 111, was aware of the bonus scheme and structure which it was proposed would operate if he became an employee of the second respondent. This proposed structure indicated that changes would be made to the percentages under which the claimant had previously been entitled to commission, and the performance issues which would be measured in order to enable the claimant to generate commission. Under the terms of his contract of employment with the first respondent, the bonus structure was more simple and straightforward. The claimant was entitled to commission on income earned once he exceeded different financial thresholds. Those were the only criteria which applied to the bonus structure of the claimant. It was now being proposed that the performance measures would be different. The claimant would not only be entitled to bonus on the basis of income generated but his bonus entitlement would also be measured against quality, servicing and funds on the AUM matrix. A worked example was provided at the foot of page 111.

19. At page 112 in the bundle, a copy of page 111 was included which had on it a number of handwritten annotations which were in the handwriting of the claimant. This demonstrated that the claimant had safely received the document and that he had given some thought as to how the bonus structure which was being proposed would translate into money being earned by the claimant as bonus.

20. It was hoped at the time that the sale of the first respondent to the second respondent could be concluded by December 2016 but this was postponed to April 2017. The staff of the first respondent, including the claimant, were invited to the Christmas party which was being held by the second respondent. All members of staff attended that party with the exception of the claimant and the other financial adviser, David Fraser-Clarke. Mr Fraser-Clarke failed to attend due to personal reasons which were well understood by all concerned.

21. The claimant was asked in cross examination why he failed to attend the Christmas party. He gave a series of answers which at times were bewildering to the Tribunal. It was put to the claimant by counsel for the first respondent that the claimant had never intended to go. He denied that. His initial explanation to the Tribunal was that he did not go because it was his partner's Christmas party. However, when asked to provide further details he withdrew that as an honest explanation of the reason why he failed to attend. His second explanation was that he simply did not want to go because of the location, which was in Chester. He then, however, returned to the initial explanation, which was that the reason why he had not attended was because his partner had her own Christmas party. He then offered as an explanation the fact that as a result of his partner not attending her own Christmas party that she would then be unfit to look after the children. The Tribunal found it impossible to understand how the condition of his partner would affect his ability to look after the children if he did not attend the party. The explanations provided by the claimant simply began to be incomprehensible. It was then put to the claimant that the party was not just a party but that it was an obvious opportunity to get together with members of the second respondent and a "get to know" opportunity. He was again, therefore, asked to clarify why he did not attend. He then offered a further explanation, which was that he believed that there would be other opportunities to meet the staff of the second respondent and so he simply decided not to go. However, the claimant then expanded further by indicating that his reason for not attending was that he "doesn't like Christmas".

22. The performance of the claimant in giving this evidence was extremely troubling for the Tribunal. The question put to him as to why he did not attend was a simple and straightforward one. It did not require any thought on behalf of the claimant. It must have been obvious to him at the time that the question was first put to him what his explanation was. Ultimately the Tribunal was not left with any satisfactory explanation whatsoever from the claimant as to why he did not attend. The explanations given in connection with his wife's Christmas party were completely unbelievable and lacked any credibility whatsoever. Furthermore, the final conclusion offered by the claimant that he "doesn't like Christmas" equally, in the opinion of the Tribunal, made no sense. The fact that the party took place at Christmas had nothing to do with Christmas itself as a celebration. The party was, in the opinion of the Tribunal, obviously an opportunity for social interaction with representatives of the second respondent and indeed with the staff of the first respondent.

23. The Tribunal ultimately, therefore, was unable to accept any of the evidence which was put forward by the claimant as being at all credible. The Tribunal was therefore left without any satisfactory explanation as to why the claimant had not attended a function which was, in the opinion of the Tribunal, obviously an opportunity to meet and mix with people who the claimant may be working alongside in a few months' time. The claimant was unable to offer any credible or plausible explanation as to why he chose not to attend a function of that nature.

24. The Tribunal also found it revealing that the claimant made absolutely no reference to the party or to his non attendance or reasons for non attendance in his witness statement at all. The event simply did not feature in the witness statement of the claimant at all.

25. The Tribunal accepted the evidence of the claimant in paragraphs 35, 36 and 37 of his witness statement. The sale of the first respondent to the second respondent was clearly proceeding and it was obviously anticipated that the employment of the claimant would transfer from the first respondent to the second respondent. Steps were therefore being taken to inform and integrate the claimant in the processes and procedures of the second respondent.

26. As confirmed by Mr Lingwood at paragraph 45 of his witness statement, it was never the intention of Mr Lingwood that his business would immediately be absorbed into the business of the second respondent without him effectively retaining the office of the first respondent in Cheadle Hulme and it being allowed, for whatever period of time, to operate effectively as a satellite office of the second respondent. It was at all times anticipated that Mr Lingwood would continue to have very significant influence, if not even autonomy, over some of the major business decisions of that satellite office, if the first respondent was indeed sold to the second respondent. Mr Lingwood confirmed on oath that following the sale that was exactly what had happened. The Cheadle Hulme office had been retained and had continued to operate as a satellite office of the second respondent under the authority and significant influence of Mr Lingwood.

27. It was agreed between Mr Lingwood and the claimant that in early March 2017 the claimant was asked to complete and finalise a pipeline report which had been requested by the second respondent. The pipeline report was a checklist of requirements to be provided so as to ensure that any financial adviser employed by the second respondent had attained the required standards to enable authorisation with the FCA for employment as a financial adviser. This information was provided by the claimant as requested.

28. On 16 March the claimant received an email (page 129) from Mr Lingwood confirming that Kevin Mustard, an HR Business Partner with the second respondent, would be visiting the first respondent's offices in Cheadle Hulme on 23 March in order to undertake one-to-one meetings with all staff of the first respondent. However, it was not only Mr Mustard who attended. Billy Jack, the Operations Director of the second respondent, also attended with Mr Mustard. The Tribunal finds that the meetings were primarily conducted by Mr Jack assisted and advised by Mr Mustard in his capacity as HR Business Partner. Mr Jack met with the staff including the claimant. Mr Jack and Mr Mustard held a one-to-one individual meeting with the claimant. It was agreed by the claimant and Mr Mustard that at that meeting the

claimant was given assurances that his existing terms and conditions of employment would be protected under TUPE but that as an employee of the second respondent there would be additional benefits available to him. This would include death in service benefit, medical cover and income protection. It was suggested to the claimant that he would also benefit from additional pension arrangements, but the claimant indicated that this was not of interest as he invested for pension through a scheme of which his wife was a member.

29. The detail for those meetings and the timing of them was set out in an email at page 129A indicating that the meeting with the claimant would last for 30 minutes from 11:20 until 11:50. Subsequent to that meeting the claimant was provided with page 129B attached to an email at page 130. Mr Mustard confirmed that page 129B was a comparative analysis of the terms and conditions of employment with the first respondent by comparison to employment with the second respondent. There was reference to an "incentive plan". No other details other than the title of the incentive scheme were provided. However, in the email at page 130 Mr Mustard confirmed that he would go back to the claimant with a "comparative analysis of earnings" between the bonus/incentive scheme available to the claimant under the first respondent by comparison to that which would be available to the claimant under employment with the second respondent. The claimant was provided with the contact details for Mr Mustard and was invited to "feel free to raise questions as we are going along".

30. Furthermore, the claimant was, along with all other members of staff, provided with a guidance note of transferring employment to the second respondent. A copy was included in the bundle at pages 113-117. In paragraph 1 on page 113 that document confirms that terms of conditions of employment and continuity of service are preserved and transfer at the same time. The document also confirms at paragraph 4 that there are no plans to change terms and conditions which are protected under the TUPE regulations.

31. Mr Mustard made contemporaneous handwritten notes at the time of the meeting between himself and the claimant with Mr Jack. His handwritten notes were submitted to the Tribunal at page 134 and a typed written version was presented at page 134A. The Tribunal accepted these as an accurate record of the note of discussions which took place. In his witness statement Mr Mustard confirmed (paragraph 19) that the claimant struck him as being negative about the proposed sale of the first respondent company. Mr Mustard made a note to that effect in his contemporaneous record. He noted that the claimant was "not happy with the sale". Indeed the level of negativity displayed by the claimant was such that it not only persuaded Mr Mustard that he should make a note about this, but he also mentioned it to Mr Lingwood after the meeting as an issue of concern. Mr Mustard's note confirms that Mr Lingwood was to speak to the claimant by way of reassurance that he, Mr Lingwood, would be available for further questions from the claimant.

32. The Tribunal finds that this negativity was an issue for Mr Mustard because the three financial advisers who had been employed by the first respondent at the time that negotiations for the sale of the first respondent had first been opened. However, by March 2017 the claimant was the only financial adviser from the first respondent who was going to transfer to the second transfer. This negativity was therefore a concern which Mr Mustard discussed with Mr Lingwood.

33. The next meaningful communication with the claimant to provide him with any further details of the bonus/incentive scheme which would apply to him if he employment transferred to the second respondent was provided in the letter dated 20 April at pages 154/155 but that letter was not received by the claimant until the late afternoon of Monday 24 April, which Sarah Waring and possibly Mr Mustard then intended to discuss with the claimant the following day, Tuesday 25 April.

34. The claimant had a number of significant concerns about what was proposed in that letter. Firstly he noted that the letter indicated that "the business have the ability to change the terms of all incentive plans". However, the letter went on to tell the claimant that his total cash compensation would remain similar in his first year of transfer. The claimant in paragraph 64 of his witness statement indicates that it was immediately clear to him that the bonus/commission scheme was going to be "very different" to the scheme that had operated with the first respondent. However, although the claimant appears in his witness statement to express some surprise at being informed of that, the claimant had in fact been given notice of the outline structure of the incentive scheme of the second respondent many months ago in September 2016 when, after failing to attend the presentation, the claimant was sent a copy of the presentation slides and in particular was sent a copy of page 111. Furthermore the claimant, at page 112, had clearly not only received that document but had in his own handwriting begun to make various calculations as to how he believed that different scheme would compensate him by way of bonus/commission by comparison to the scheme which had operated with the first respondent. Furthermore, at the one-to-one meeting which had taken place with the claimant on 23 March in Cheadle Hulme, the claimant had equally been aware that the bonus/commission structure of the second respondent was very different to the structure of the first respondent, and that had prompted the claimant to ask for some financial comparisons in order that he could compare earnings under one scheme with likely earnings under another scheme. The Tribunal does not accept the apparent surprise which is expressed by the claimant in paragraph 64 of his witness statement about the structure of the second respondent's bonus/'commission scheme.

35. The claimant also alleges at the conclusion of paragraph 66 that there was no explanation for his salary being increased to £50,000. The Tribunal does not accept that. The content of the letter began by indicating that the second respondent wanted to ensure that he total cash compensation which the claimant would receive in his first year would be similar to that which he had earned with the first respondent, and one element of that was to increase his salary. In the opinion of the Tribunal it was self evident that the increase in salary was part of that offer/guarantee which was being put to the claimant.

36. However, understandably the claimant had concerns about the six bullet points at the foot of that letter. The claimant indicated in paragraph 66 of his witness statement that he found some of the terms in the letter incredibly confusing not least the terminology which was not familiar to him. The Tribunal finds the concerns of the claimant perfectly understandable.

37. A copy of the letter which was received by the claimant appears at pages 149-150 and includes a significant number of handwritten annotations by the claimant. It

is clear from any reading of those annotations that the claimant has a significant number of issues which he requires explaining and clarifying to him.

38. In the opinion of the Tribunal Mr Lingwood gave very clear evidence about the way in which clients of the first respondent could and would be transferred to the claimant after the transfer to the second respondent went ahead. Mr Lingwood had stopped providing regulatory advice as long ago as December 2012, and that in itself had facilitated the transfer of clients to the claimant which had then formed part of his income which had then contributed to the level of his bonus. It was clearly understood by March 2017 that if, as anticipated, the sale of the first respondent went ahead, that as the claimant was the only financial adviser who it was proposed would be transferring to the second respondent, that there was a significant bank of clients who had been managed by the two other financial advisers who would need to be allocated a financial adviser after the transfer. In anticipation of that transfer, arrangements were made for the transfer of some clients even before the anticipated sale of the first respondent. This is clear from an email dated 8 February 2017 (page 137) where Mr Lingwood is already reallocating clients to the claimant. There is a further discussion between the claimant and Mr Lingwood in an email dated 30 March (pages 136/137) in which the names of other clients are raised specifically by the claimant.

39. The Tribunal accepted the evidence of Mr Lingwood when he very clearly indicated that prior to the date of the sale of his company that it was entirely up to him which clients he chose to transfer to the claimant. It was the role of Mr Lingwood to segment and dispute his client bank and to smooth the way for the transfer of those clients to the second respondent. It was in his best interests and Mr Lingwood believed that it was equally in the best interests of the claimant for the transfer of those clients to the second respondent to be a success. Mr Lingwood clearly explained that he knew his clients and that it was his decision and his decision only to decide which clients would be allocated to which financial advisers. One of the obvious factors was the personality of the advisers in question. It was important for these to be a good match with the clients in question. Mr Lingwood clearly indicated that the choice of allocation of client to specific financial adviser would be his choice. He told the Tribunal that the second respondent was not telling him how his clients should be redistributed or who they should be redistributed to. Mr Lingwood confirmed that the Regional Director of the second respondent gave that responsibility to Mr Lingwood and to Mr Lingwood alone. However, there was no rush to transfer clients before the transfer. In effect there was no need to do that although, as already indicated above, some clients were transferred. The claimant himself raised the potential transfer of certain clients and Mr Lingwood told the Tribunal that he was happy to agree to those transfers and that there was no issue about that at all. There was a real benefit in continuity if as many clients as possible of the first respondent could be transferred to the responsibility of the claimant following the sale of the first respondent. The claimant would already have done some work for some of the clients or he may already have known the clients, or the claimant may have been known to the clients. In those circumstances there was an obvious benefit of continuity and element of comfort for each client. Mr Lingwood would be able to explain that the transfer was being made to the claimant who had been with the company for 15 years.

40. Mr Lingwood indicated very clearly that that element of continuity was an essential factor. He had to make sure that his clients were properly looked after and it was obviously in his best interests to ensure that the business continued to be as successful if not more successful following the sale. Mr Lingwood agreed that the claimant would have gone into a pool of 14 advisers including advisers who were already employed by the second respondent but Mr Lingwood was very clear, and the Tribunal accepted his evidence, that it was his choice and his alone as to who the clients would have been allocated to had the claimant transferred his employment to the second respondent. Furthermore Mr Lingwood told the Tribunal, and the Tribunal accepted this, that in effect the claimant would have had his own first choice. This would have substantially "improved his lot" in the words of Mr Lingwood. When the claimant had indicated that in effect he could take on no more clients or effectively he did not want certain clients to be transferred to him, then the residue of clients of the first respondent would then be split by the senior representatives of the second respondent among their existing financial advisers. However, the Tribunal accepted from Mr Lingwood that there was a real opportunity for the claimant to in effect hand pick the clients that he wanted to be transferred to him and to hand pick as many of those clients as he wanted to, to add to his own client back, so long as the number and nature of those clients was consistent with the proper level of service being provided to those clients following any transfer to the claimant. This represented a significant opportunity for the claimant to increase his client bank and to increase the financial value of the funds under his management and supervision, and to substantially increase the volume of income which was generated from those clients. Income generated would remain a significant part of the commission/bonus structure of the claimant had his employment transferred to the second respondent, and the evidence of Mr Lingwood was that he claimant was in effect being given an opportunity to hand pick those clients to a limited extent prior to the sale of the company and to a much greater extent after the sale of the company.

41. The one-to-one meeting having taken place with the claimant on 23 March and the claimant having requested details of financial comparisons on the value of the different bonus/incentive schemes, the claimant wrote to Mr Mustard in an email on 31 March saying:

> "Hi Kevin, just a quick note to ask whether any comparable figures have been calculated yet between current structure and OMWPCA."

42. There was no indication in that email of any concern about delay or any indication from the claimant that he required or was requesting that information within any particular timetable. Mr Mustard replied in an email dated 10 April 2017 (page 142) indicating that he had "just this minute" been sent some information from their internal Management Information team which Mr Mustard need to discuss with that team the following morning. Mr Mustard then promised that either or Sarah Waring would come back to the claimant with the intention to discuss "your incentive plan questions" over the next week. The claimant did not reply to that email to indicate that there was any difficulty with the timescale which was proposed or that he had any concerns about the timescale within which the information was being provided.

43. The claimant alleged in paragraph 61 of his statement that he had raised his concerns with Mr Lingwood. However, there was no written evidence to confirm that that was the case. The claimant had not, for example, demonstrated his concerns by sending an email to Mr Lingwood. In any event in paragraph 61 of his statement the claimant appears to indicate that he was satisfied with the explanations given by Mr Lingwood that the claimant would be able to speak to Mr Mustard face to face the following week.

44. The next development was that Mr Mustard sent Mr Lingwood (not the claimant) a copy of a detailed two page letter (pages 143b-143C) where it was proposed that the claimant should now be offered a guaranteed bonus for the first year after the date of any transfer. That email was sent to Mr Lingwood on 13 April which was a Thursday. The email goes on to suggest that Mr Mustard would like to discuss the content of that letter with the claimant on Wednesday, which would be Wednesday 19 April.

45. There is then evidence of internal communications within the second respondent between Sarah Waring and Mr Mustard on 19 and 20 April in which the proposal to meet with the claimant is discussed further. This exchange of emails does not involve the claimant.

46. A further draft letter intended to be read by the claimant is dated 20 April but it was never sent to the claimant. That letter appeared at pages 146-147 in the bundle. That draft letter was amended and sent to Mr Lingwood. A slightly amended version of that letter, intended for the claimant, is sent by Sarah Waring to Mr Lingwood on 21 April by email at 13:58 (page 151A). The proposed meeting on Wednesday 19 April has not taken place. That email is dated 21 April which is a Friday. That email now suggests that the discussions with the claimant should take place on Tuesday, which would be Tuesday 25 April. None of the various draft letters are sent to the claimant until he receives the letter at pages 149/150, dated 30 April, by email on 24 April 2017 at 9:31. Mr Lingwood purports to send that email to the claimant by email on 21 April (page 153). The email begins by saying, “Please find attached a letter for yourself”. However, that attachment was not actually attached. The claimant makes that clear at page 152. Mr Lingwood apologises and re-sends the email on 24 April at page 152. Mr Lingwood has confirmed to the claimant (page 153 on 21 April) that Sarah Waring and possibly Mr Mustard are coming to talk through that letter with the claimant.

47. The following day, Tuesday 25 April, the claimant met, as planned, with Sarah Waring and Kevin Mustard. The claimant was then handed document 157 which had been amended by comparison to the previous versions of that document which had been given to the claimant. However, the Tribunal does not find that the changes were of any great significance. They simply amended, as the claimant indicates in paragraph 74 of his witness statement, the title of the bonus/commission scheme which would apply to the claimant post transfer.

48. At the meeting, but not prior to it, the claimant was handed a copy of the document at pages 158-162. This is headed “OMW private client advisers financial adviser incentive scheme terms”. On any reading of that document it comprises a lot of information in fairly small typing and it was being presented to the claimant for the very first time.

49. In his witness statement the claimant goes into considerable detail about the discussions which took place at Cheadle Hulme on 25 April. He describes that meeting as lasting "nearly an hour". It was not put to him in cross examination that this estimate was wrong. He continues to describe his thoughts on the content of that meeting in paragraphs 76-91 inclusive. This is a very detailed description of the meeting which the Tribunal finds lasted for approximately an hour. The respondent submitted no witness statement from Sarah Waring. By contrast the witness statement of Mr Mustard covers the meeting on 25 April very briefly indeed. Indeed, at best, it is described only in paragraphs 30/31/32 which comprise of only 15 lines. The Tribunal does not accept that as an accurate or comprehensive record of a meeting which lasted one hour. The Tribunal prefers the evidence of the claimant in his witness statement to the evidence of Mr Mustard as to the content of the letter and the depth of the issues which were discussed. That is, however, with one significant and important caveat, and that relates to the comments attributed to Mr Mustard at the end of the meeting which the Tribunal will deal with below.

50. The Tribunal accepts the picture painted by the claimant in the paragraphs of his witness statement identified above. At paragraph 77 of his statement the claimant indicates that Sarah Waring indicated that the second respondent was not able to provide comparative figures in respect of the AUM matrix. This was indeed the very clear evidence of Mr Mustard when he discussed that with the Tribunal under cross examination. He confirmed that his expertise was in HR and that it was certainly not possible for him to provide calculations or information for comparison. He subsequently requested that information but he was told that it was not available and not possible to provide the comparisons. That was therefore consistent with what Sarah Waring told the claimant during the course of this meeting.

51. The claimant in September 2016 had been sent page 111 which was the final page of the presentation which was made to the staff which the claimant did not attend on 21 September 2016. The annotations at page 112 (a copy of page 111) were annotations which the claimant added to a copy of that document which he had with him at the meeting on 25 April 2017. The claimant confirms at paragraph 79 that he made those calculations in order to attempt in his own mind to generate a comparison between the two bonus/commission schemes. The claimant, however, made a number of assumptions in that thought process and which he has included in his witness statement which do not comply with the facts as found by the Tribunal. The claimant in paragraph 81 suggests that there is a simple illustration which is that if he generated fee income of £200,000 that he "would" receive an income of £95,000. That was a historical comparison which did not take account of what Mr Lingwood had clearly said to the claimant would be a re-assessment of the financial thresholds used to calculate his bonus if the sale did not proceed. The claimant here was assuming that his bonus entitlement and thresholds would remain as it was in April 2017 but Mr Lingwood, as found by the Tribunal, had clearly said to the claimant that he would be reviewing the threshold. The claimant was therefore using a comparison threshold which did not meet the facts. It would only have been appropriate for the claimant to say that he would have received that income of £95,000 if, moving forward into future years, the financial thresholds for the calculation of his bonus had remained unchanged. Mr Lingwood, however, had indicated to the claimant that that was unlikely to be the case. Furthermore, the claimant was using a comparison figure of £73,750 but that in itself was in excess of every year that the claimant had worked for the first respondent with the exception of

the final year. Again Mr Lingwood had indicated that if the sale of the company did not proceed that the whole financial picture of the company would need to be reassessed and that that would include what Mr Lingwood felt was a fair and reasonable bonus structure for the claimant, which taking into account the factors which Mr Lingwood outlined in his witness statement, was almost inevitably going to lead to lower thresholds being imposed if necessary.

52. Furthermore, in paragraph 82 the claimant indicated that his thought process was that it was clear to him that he "would not therefore be earning the same as I had in previous years with Maestro". However, the claimant was failing to take into account that there was a very real likelihood that his earnings with the first respondent would not have been at the same level if the sale of the company did not proceed. In paragraph 83 of his statement the claimant indicates that he very clearly told Ms Waring and Mr Mustard that he could not possibly be expected to agree to his employment transferring without confirmation that his remuneration package "would not be affected". That was not a term of his contract of employment. He did not have a guarantee that his remuneration package would not be affected. The bonus scheme under which he was operating as part of his contract of employment (page 38) guaranteed that a bonus "will become payable" but it also went on to indicate that he level of bonus would be negotiated year on year. There was therefore never any guarantee in the terms and conditions of employment of the claimant that his remuneration package year on year would not be affected.

53. The thinking of the claimant was, in the opinion of the Tribunal, confusing because in paragraph 83 the claimant goes on to say that he made it "very clear" that whilst the amount of his bonus may vary the way it was calculated and paid had been "the same throughout my employment". That may well have been the case, but as the Tribunal has made clear a number of times, Mr Lingwood had already made it clear that should the sale of the first respondent not proceed that he would be looking, on the basis of a number of factors, to reconsider the amount of the bonus which was due and payable to the claimant. He may or may not have been able to do that for the calendar year 2017 but he would certainly be in a position to do that moving into the calendar year 2018, and as was recognised on behalf of the claimant, Mr Lingwood at all times had retained the final say. The fact that the thresholds which at that time applied to the claimant in 2017 had been in place since 2012 did not in any way affect the ability of the first respondent to change those thresholds.

54. In summary the claimant was entitled to a bonus but he was not entitled to a fixed amount of any bonus. What the claimant was being told by Ms Waring as he confirms in paragraph 84 was that it was indeed a variable incentive plan. The claimant was entitled to a bonus. The amount of that bonus was, however, variable as was clearly demonstrated by the table produced by the claimant at page 258C.

55. At paragraph 87 of his witness statement, the claimant confirms that his impression was that he was getting nowhere and so would have to go away and think. The conclusion of the Tribunal is that the claimant was, however, himself mistaken as to his contractual terms relating to his bonus. He was not entitled to any minimum level of bonus. He was not entitled any fixed amount of bonus. He was entitled to have a bonus scheme in place. He was entitled to hold discussions with

Mr Lingwood about what the financial thresholds for the calculation of that bonus might be.

56. There was significant and complete disagreement between the claimant and Mr Mustard about what it was alleged Mr Mustard said as alleged by the claimant at paragraph 90 of his witness statement. There was also significant disagreement about what was alleged against Mr Mustard in paragraph 87 of the claimant's witness statement. Whilst the claimant obviously himself believed that he was getting nowhere, and said that he would need to go away and think about it, he said that Mr Mustard told him that there was "no time for him to do that". Mr Mustard in cross examination said that he "denied that absolutely". He equally denied having said to the claimant that he had had four weeks to think about it and that that had been plenty of time to ask any questions or to relay any concerns. Mr Mustard denied adamantly that any of that was true at all. He said very clearly indeed that it was not what he would say. He said that the tone of what was attributed to him was dismissive and that as an HR professional that was simply not what he would do. The Tribunal also reflected on the fact that the information which the claimant had been given had only been supplied to him very recently and as a fact, therefore, it was simply not true that the claimant had been given four weeks to think about it.

57. At paragraph 90 of the claimant's witness statement it was alleged that Mr Mustard told the claimant that he either had to agree to the terms or that he would be finished that Friday. Again Mr Mustard strenuously denied saying that. He said that the first time that he had ever understood that the claimant was suggesting that that was said was when he had read the claimant's witness statement only a week prior to the Tribunal hearing. Despite orders for the timely exchange of witness statements and without asking for any extension or variation to the timing of Orders which had been made by the Tribunal, it became clear that witness statements had only been exchanged a very short period of time prior to the hearing on 1 and 2 March, a situation which was entirely inappropriate. Mr Mustard denied making those remarks and said that they did not and could not reflect his views at the time. Mr Mustard said that as the claimant was the only financial adviser who was proposing to transfer to the second respondent, that the second respondent very much wanted him on board. They had prepared a unique and guaranteed deal for the claimant and that that was something which, as far as Mr Mustard was concerned, the company had never ever done for anybody else. The company genuinely saw the value of Mr Mustard and the company was equally aware of the high regard and value that Mr Lingwood had for the claimant. Mr Lingwood said that the claimant did indeed ask "what happens now" and Mr Mustard said that he told him that in effect if he did not accept the terms which were offered to him that he "would be resigning from the company on Friday". Mr Mustard was adamant that no part of the meeting was confrontational and that no part of it was uncomfortable. The tone as described by the claimant in paragraph 90 was, in the opinion of Mr Mustard, completely inaccurate. Mr Mustard agreed that the claimant had asked what "happens now" and that the response of Mr Mustard was that the claimant "faced a fork in the road".

58. The Tribunal therefore had to consider the very different versions of the meeting described by the claimant and by Mr Mustard. The Tribunal considered the letter of resignation of the claimant which was dated 28 April at page 193. The claimant does not make any reference in that letter to the alleged tone of the comments which he subsequently, many many months later, chose to attribute to Mr

Mustard in his witness statement for the first time. The Tribunal found it troubling that those comments had not been earlier attributed to Mr Mustard bearing in mind that it was being alleged that Mr Mustard had behaved in a confrontational and aggressive manner towards the claimant.

59. The Tribunal also examined emails which were subsequently exchanged between the claimant and Mr Mustard prior to the letter of resignation. Again in those emails there was no reference made to this aggressive stance on the part of Mr Mustard described in paragraph 90 of the claimant's witness statement. Again the Tribunal found that to be difficult to understand. There was no criticism voiced by the claimant of Mr Mustard about that meeting in relation to those alleged comments at all. On balance, therefore, the Tribunal believed the evidence of Mr Mustard in preference to the evidence of the claimant. The Tribunal does not find that Mr Mustard spoke to the claimant in the manner alleged, either in paragraph 87 or in paragraph 90 of his witness statement. In contrast the Tribunal finds that the meeting ended with a promise by Mr Mustard to look at the claw back provisions in the letter and that Mr Mustard left on the basis that he believed a deal could still be struck with the claimant. However, the Tribunal has recognised the words and phrases used by Mr Mustard by reference to a fork in the road and the suggested resignation of the claimant.

60. Subsequent to the meeting on 25 April there was an exchange of emails between the parties on 26 April (pages 166-167). As already indicated, the Tribunal has taken account of the tone of those emails by comparison to the tone of the remarks attributed to Mr Mustard. Indeed the email at page 166 addressed to the claimant begins “Good to see you again yesterday morning”. The claw back provisions have now been amended in a manner which Mr Mustard believed satisfied the concerns expressed by the claimant during the meeting on 25 April. However, in the email dated 26 April Mr Mustard once again seeks to assert that the contractual terms of the claimant by reference to his entitlement to bonus are the words inserted in the contracts of employment in 2015 at page 46 and 2016 at page 59. The Tribunal finds that that is a mistake on the part of Mr Mustard because the actual terms of his contract of employment were reflected in the signed 2006 contract at page 38. There is no evidence available to the Tribunal to indicate that that contract of employment was ever provided to the second respondent. The Tribunal believes that this is due to confusion on the part of Mr Lingwood as to what he believed was the effective contract of employment governing the terms and conditions of employment of the claimant as at 2017. He believed that the contracts of employment issued in 2014/2015/2016 were the effective terms and conditions when the Tribunal has found that they were not.

61. There is then a further exchange of emails between the parties at pages 171-175 although they should be read as pages 175-171. They are dated 26 and 27 April. Again the Tribunal has, as already indicated, taken note of the tone of those emails, in particular the emails sent by the claimant in contrast to the manner in which he alleges that Mr Mustard behaved towards him at the conclusion of the meeting on 25 April. The tone of the emails at page 172 is, in the opinion of the Tribunal, particularly illustrative. They are cordial and friendly emails and the Tribunal finds it impossible to believe that if Mr Mustard had spoken to the claimant in the manner alleged that he would have then only a few days later have then written to

Mr Mustard without making any reference at all to those remarks and written to Mr Mustard in the tone reflected in those emails.

62. Mr Mustard in his witness statement at paragraph 32 refers to an email at page 183 dated 27 April at 5.30pm. That again is cordial and professional. The response from Mr Mustard on 27 April at 7.35pm invites the claimant to let him know if "you need any further information".

63. The next communication, however, is the letter of resignation which was sent by the claimant to the respondents headed "Notice of objection to transfer" and which was dated 28 April. The claimant clearly indicates that he objects to his employment being transferred. He refers to the manner in which he has been treated, the absence of proper communication, engagement and meaningful consultation. He does, however, make it clear that his "primary reason" is that the proposed transfer will entail a substantial change to his working conditions to his material detriment. Clearly that language has been selected from the relevant legislation and the letter has no doubt been written with the benefit of legal support and advice. The claimant complains about being provided with information "at the eleventh hour this week" and that that information was only a matter of days before the proposed transfer. The claimant goes on to suggest that his drop in income is likely to be in excess of £20,000 per year. However, as the Tribunal has indicated a number of times, Mr Lingwood had indicated to the claimant that moving forward if the company was not sold, that there would be very likely to be changes to the bonus structure which applied to the claimant and the claimant, once again, appears to be comparing his past earnings to future earnings without taking into account the fact that his future earnings with the first respondent were not guaranteed and were subject to discussion and negotiation and ultimately, if agreement could not be reached, Mr Lingwood had the final say as to what the bonus structure of the claimant would be.

64. There was a great deal of discussion during the hearing on 1 and 2 March as to the failure on the part of the second respondent to provide appropriate and sufficient financial information to the claimant to enable him to prepare a comparison of pre and post transfer earnings. In the opinion of the Tribunal, a great deal of that discussion was unnecessary. The simple fact is that as at the date of the resignation/objection to transfer of the claimant, the information which the claimant had requested as to his likely level of earnings under the AUM transfer scheme had not been provided. The evidence of the respondents was that Mr Mustard had been told that that information could not be supplied. It had been requested of the Management Information department of the second respondent and it was that department which had told Mr Mustard that they did not have the information and that on any basis it was not possible for any calculations to be prepared and submitted to the claimant. As at the date of his resignation, therefore, that information was not available to the claimant and Mr Mustard explained to the Tribunal why that was.

65. There was also a great deal of discussion about pages 94-98 in the bundle. This was described to the Tribunal as a list of funds which would earn the claimant a bonus if he was able to persuade/advise his existing clients to transfer into those funds. They were the funds which were actively recommended and approved by the second respondent. The claimant in evidence indicated that at the time that he

resigned his employment he did not understand what was meant by these pages. He agreed that he did not ask for specific clarification of what those pages meant, but the Tribunal accepted that he certainly asked for figures to be prepared and produced by the respondent company as to how this matrix of funds might realistically generate him a bonus. As already indicated above, the Tribunal has found that that information was never made available to the claimant on the basis that the respondents told the Tribunal that they did not have that information available. The claimant was specifically asked by the Tribunal what he understood of pages 94-98 even as at March 2018, and asked whether he understood it. The claimant replied very clearly that he did not. He said that the first time that he did fully understand the matrix was after the bundle of documents was put together in connection with the claim that he was pursuing at the Tribunal. It was only then that the claimant admitted that he had looked at it more carefully.

66. In the opinion of the Tribunal there was very clear confusion and misunderstanding on the part of the claimant as to what the meaning of this matrix was or what the effect of that matrix would be on his ability to earn bonus. The claimant accepted that some of his clients would already be investing in some of those funds which were preferred by the second respondent, but the claimant told the Tribunal that without a detailed knowledge of the funds in question and without a detailed knowledge of how he would be able to advise clients that there was an identifiable benefit in transferring from their existing funds into the funds preferred by the second respondent, that he was unable to have any idea as to what the value of any funds invested might be that would be transferred from one fund to another. He had no idea what charges were made by those fund managers and that was another element which clearly he would need to take into account in discussions with clients about potential transfers. Pages 94-98 had in effect been presented to the claimant on the basis that it was expected that he would understand it simply because, quite understandably, those who prepared pages 94-98 were representatives of the second respondent and they clearly understood the business of the second respondent. The claimant did not. The Tribunal finds that as at the date of his resignation the claimant was confused about the meaning and effect of pages 94-98 and had not been given any reliable estimate or information from the second respondent as to how that element of his bonus, transfer of funds to the AUM matrix, would realistically enable the claimant to achieve bonus following transfer of his employment to the second respondent.

67. Mr Lingwood, following the resignation of the claimant, prepared pages 258 and 258A and he refers to those documents in paragraphs 64 and 65 of his witness statement. These documents, in the opinion of Mr Lingwood, demonstrate that in the years 2015 and 2016 the claimant would have earned either roughly the same or slightly more under the bonus scheme of the second respondent by comparison to the bonus scheme of the first respondent. However, those figures in the opinion of the Tribunal obviously make a significant number of assumptions. In respect of the AUM matrix it is assumed in 2015 that this would comprise £18,948 of his bonus and that in 2016 it would have comprised £21,893 of his bonus. It was never explained to the Tribunal how those figures had been arrived at, and in the absence of any detailed explanation the Tribunal was unable to find that those figures were accurate. At paragraphs 64 and 65 of his witness statement Mr Lingwood simply indicates that what he has prepared at page 258 is something which he has "attempted to estimate". There is no indication that these are figures which are in any way

accurate or which the Tribunal should rely upon. Indeed Mr Lingwood says in paragraph 65 of his statement that it is "impossible to predict the future". The Tribunal acknowledges that, not only in respect of the calculations which Mr Lingwood was doing in order to prepare page 258 but also in respect of what the bonus of the claimant might have been had the first respondent not been sold to the second respondent. In paragraph 65 Mr Lingwood acknowledges that he has used projections and that he has made estimates. However, the Tribunal acknowledges that similarly in order to compare and contrast pre and post transfer earnings the claimant engaged in exactly the same exercise of estimate and projections. Neither Mr Lingwood nor the claimant nor the second respondent at any time engaged in an exercise of exchange of estimates and projections, accompanied by explanations, in order to seek to explain to the claimant and the claimant to explain to the first and second respondents the basis of their various and different projections and estimates.

68. The figures included at pages 258 and 258A which Mr Lingwood used to calculate the AUM element of what he believed would be the claimant's bonus were never explained to the Tribunal or justified by reference to any figures or accounts or documents from the first respondent at all. The Tribunal was simply invited to accept that these were accurate figures without any attempt by the first or second respondent to justify those figures by reference to any other documents, most importantly the records of investment portfolios, which were maintained by the first respondent by reference to the funds identified at pages 94-98. The Tribunal has found as a fact that had his employment transferred to the second respondent the claimant would have had genuine and real access to the whole portfolio of clients of the first respondent, particularly bearing in mind that the other two financial advisers were not proposing to transfer.

69. At paragraph 61 of his witness statement Mr Lingwood gave evidence, which the Tribunal accepted, of the level of funds. The claimant as at the date of resignation was managing approximately £15million of a total funds under management of £82million. There was, therefore, on those figures approximately a further £67million worth of client funds which the claimant would have "his pick of" post sale. The distribution, and in effect the gift, of those funds was in the hands of Mr Lingwood both before and after the date of the proposed transfer. Any estimates or projections, therefore, which were carried out by the claimant needed to reflect the fact that the amount of income generating funds which would be at the disposal of the claimant post transfer could very significantly increase at the behest and gift of Mr Lingwood by comparison to the amount of funds under the claimant's management in 2015, which was the year which the claimant used for his own estimates and projections for use of comparison to the value of his bonus pre and post transfer.

70. The Tribunal accepted the content of paragraph 61 of the witness statement of Mr Lingwood about this transfer of funds to the claimant. Equally the Tribunal accepted the content of paragraph 62 of the witness statement of Mr Lingwood which was that from day one immediately after the transfer another £10million worth of funds under management would have come under the control and supervision of the claimant, generating at least a further £50,000 in income from day one of his employment with the second respondent. The claimant had received confirmation of

this switch of funds and remuneration in an email from Mr Lingwood to the claimant on 3 April 2017 (page 136).

71. Finally, and in conclusion, in cross examination the claimant was asked about his interpretation of his contractual bonus entitlement as expressed in paragraph 8 of his 2006 contract of employment at page 38 in the bundle. He was asked to acknowledge that the wording of that clause meant that the claimant was "entitled to a bonus payment". The claimant agreed that he was entitled to a payment of a bonus. He was then asked specifically whether he agreed that there was a discretion on the part of Mr Lingwood as to how that was calculated. The claimant responded to that question by saying "yes that is what it says – yes". The interpretation of the Tribunal agreed with the interpretation of the claimant. The contractual terms of the bonus to which the claimant was entitled prior to any transfer was that the claimant was entitled to payment of a bonus but that the amount of that bonus, year on year, was at the discretion of the employer at the start of each year, initially, in 2006, a year which would be calculated from 1 June to 31 May in each year. Subsequently that was changed, as agreed, to a calendar year basis of assessment.

The Law

Transfer of Undertakings (Protection of Employment) Regulations 2006

72. The claimant brings a claim relying on regulation 4(7) and regulation 4(9) of the above Regulations.

73. A Transfer of Undertaking (regulation 4(1)) 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.

74. Regulation 4(2) provides that on completion of a relevant transfer all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred to the transferee.

75. Regulation 4(7) provides that regulation 4 (paragraphs 1 and 2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities in connection with it of an employee who informs the transferor or the transferee that he objects to being employed by the transferee.

76. Regulation 4(9) goes on to provide that where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under regulation 4(1), such an employee may treat the contract of employment as having been terminated and the employee shall be treated for any purpose as having been dismissed by the employer.

77. The claimant alleged that there had been a substantial change to his working conditions which were to his material detriment and that he had therefore resigned and treated his contract of employment as having been terminated. He therefore alleged that he had been dismissed in accordance with regulation 4(9).

78. Pursuant to Regulation 7(1) the claimant alleged that having been dismissed he should be treated for the purposes of Part 10 of the 1996 Employment Rights Act (Unfair Dismissal) as having been unfairly dismissed as he alleged that the sole or principal reason for his dismissal was the transfer or a reason connected with the transfer.

79. The Tribunal was referred to a number of authorities by both counsel for the claimant and counsel for the respondent. There was some duplication in that both counsels referred to the case of **Tapere**, **Setinsoy** and **Abellio**. The full case references are included in the index to the claimant's bundle of authorities. In additiion counsel for the respondent referred the Tribunal to the case of **Nationwide Building Society v Benn & others [2010] IRLR 922**. The Tribunal carefully considered the extracts of legislation and case reports which were provided, as referenced above, by counsel for the claimant and counsel for the respondent.

80. The Employment Appeal Tribunal in **Tapere [2009] IRLR 972** considered the meaning and required interpretation of regulation 4(9) of the 2006 Regulations. The EAT directed that an Employment Tribunal considering a contract of employment needed to remember that the contract falls to be construed at the time that it was entered into. The parties are making an agreement at a point in time and whilst circumstances may need to be considered when construing the words of an agreement in order to ascertain the intention of the parties, it must be the circumstances pertaining immediately before and at the time of the agreement and not later circumstances which fall to be construed by the Tribunal. Where there are practical impediments, and a clause in the employment contract cannot be implemented after the TUPE transfer which precisely the same benefits and obligations, equivalent benefits and obligations can be substituted, so long as neither benefit nor burden is increased or enlarged (the concept of "substantial equivalence"). Where there is a contractual term which can be continued without practical difficulty, the benefits and obligations remain the same after the TUPE transfer. In such cases there is no need to consider "substantial equivalence".

81. The EAT in **Tapere** also offered guidance as to the interpretation of a change in working conditions. The EAT said:

> "Whether or not there is a change in working conditions will be a simple question of fact. Whether or not it is a change of substance will also be a question of fact and the Employment Tribunal will need to consider the nature as well as the degree of the change in order to decide whether it is substantial. In the sense that the employee will not be the arbitrator of whether the change is substantial, it might be said that the approach is objective, but the character of the change is likely to be the most important

> aspect of determining whether the change is substantial. It is not necessary to consider whether the perspective should be objective or subjective. In considering whether there is a material detriment to the employee, what has to be considered is the impact of the proposed change from the employee's point of view. It is not an issue to be objectively determined.
>
> In the present case, the Employment Tribunal had erred in considering that the issue of material detriment should be 'objectively determined'. It had erred in comparing the employee's position with that of the employer and deciding which of the two was more reasonable. The questions that ought to have been asked were whether the employee regarded those factors (the change in working conditions) as detrimental and, if so, whether that was a reasonable position for the employee to adopt."

82. The Tribunal was also reminded in **Tapere** that it was essential to distinguish between "a substantial change in working conditions" on the one hand and whether that change was "to the material detriment" of the employee on the other hand.

83. At paragraph 21 of the Judgment in **Tapere**, the EAT was referred to the approach that it should take when considering the question of "detriment". It is essential when considering the question of detriment to consider that issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, then that ought to suffice.

84. At paragraphs 44-46 inclusive of the Judgment in **Tapere** the EAT gives further guidance on interpretation. When considering "a substantial change in working conditions" this requires consideration of two concepts. Firstly, what does Parliament mean by "working conditions"? The EAT comments that it is important not to interpret that phrase literally and limit it to the conditions under which an employee works. The EAT comments that Parliament in the opinion of the EAT did not intend working conditions in regulation 4(9) to be confined to a physical state of affairs as might be the case if the matter were being looked at from the point of health and safety or environmental conditions. The EAT goes on to refer to the case of Merckx and states that the potential for an adverse effect on commission should be included as "working conditions" and goes to say that it follows that the phrase "working conditions" applies to contractual terms and conditions as well as physical conditions.

85. When considering a change in working conditions the Tribunal is reminded that this is a "simple question of fact". Whether or not it is a change of substance will also be a question of fact, and the Employment Tribunal will need to consider the nature as well as the degree of the change in order to decide whether it is substantial. In the sense that the employee will not be the arbitrator of whether change is substantial, it might be said that the approach is objective. However, the EAT makes it clear that "the character of the change is likely to be the most important aspect in determining whether the change is substantial". The EAT refers to a decision of the ECJ which regarded a change as being "substantial" because it

was a change in remuneration. The EAT reminds the Tribunal that "the judgment must be on the nature of the change".

86. At paragraph 52 of the Judgment the EAT comments:

> "It will be noticed immediately that 'detriment' is not qualified by any objective. How then are Employment Tribunals to approach the phrase 'material detriment' in regulation 4(9). It seems to us probable that Parliament's addition of the adjective [material] was a recognition of Lord Hope's analysis at paragraph 35 of Shamoon v Royal Ulster Constabulary that the use of the phrase 'detriment' (even without adjectival qualification) involved the use of materiality. We recognise, of course, that the context in Shamoon was one of discrimination but the applicable field in which that alleged discrimination had to be considered was that of employment. Moreover, although 'material' is added to the rubric of the Directive, we do not think that the addition is at all at odds with the meaning of the Directive, so long as the purpose of the adjective is regarded as an emphasis that the trivial or fanciful cannot be accepted as 'detriment'."

87. At paragraph 53 the Tribunal are reminded that it is an error to regard the issue of whether or not there was a material detriment as being one which needs to be "objectively determined". The Tribunal is reminded that the competing arguments of the employee and the employer are not to be weighed up against each other. There must be no weighing of the competing contentions in relation to the changes which are made by an employer, by weighing up the value of the competing arguments of the employer and the employee. That must not take place. It is not a question of looking at the employee's position and then comparing it with that of the employer deciding which of the two was more reasonable. That is an approach which the Employment Tribunal must avoid.

88. At paragraph 54, by contrast, the Tribunal is reminded that what has to be considered is the impact of the proposed change from the employee's point of view. The question to be asked is whether the employee in question regards the impact of the proposed changes as detrimental and, if so, whether that was a reasonable position for the employee to adopt?

89. The Tribunal then went on to consider guidance again issued by the EAT in the case of **Setinsoy**. Here the EAT reminds the Tribunal that whether or not there has been a substantial change in working conditions was a question of fact and assessment for the Employment Tribunal to determine.

90. Further guidance as to the correct manner in which to consider the phrase "working conditions" was given by the EAT at paragraphs 25-27 of the Judgment. Whether or not a transfer involves or would involve a substantial change in working conditions is an evaluation which the Tribunal is required to carry out and based on factual assessment. This may include consideration of the contractual terms. The

Tribunal is required to consider the disadvantage suffered by the employee by the substantial change in working conditions.

91. Counsel for the respondent referred the Tribunal to the case of **Nationwide Building Society v Benn 2010 IRLR 922.** A great deal of that judgment related to the interpretation of and application of regulation 13(6) which was irrelevant to the claims of the claimant in this case. The Tribunal was urged by counsel for the respondent to consider, compare and contrast the facts of that case with the facts which were found by the Tribunal relating to the claims of Mr Fone. The Tribunal reminded itself that it should be very slow indeed to regard observations made about the facts in one case as being relevant to the facts of a case in another unless they are almost identical in every way.

92. The Tribunal was urged by counsel for the respondent to find that a passage at paragraph 20 of the Judgment was directly relevant to the circumstances of the claimant. The passage reads:

"It will be a matter for individual claimants who resigned (post transfer) to provide evidence, if they wish to refute the evidence of the respondent, that their earnings could be substantially equivalent."

93. Mr Fone resigned before the transfer. Whilst the Tribunal was prepared to accept that the claim of Mr Fone was brought against a background of what he perceived to be a substantial change in the bonus structure which applied up to and including the date of a potential transfer with a bonus structure which would apply post transfer, the Tribunal reminded itself that Mr Fone resigned prior to the transfer and he was not therefore in the position that the claimants in the **Nationwide** case were. They had transferred and they brought claims on the basis that they could demonstrate that there was a significant difference between the money they earned pre transfer and the money they earned post transfer. Such comparison was understandably thought to be a matter of fact as the claimants in that case were alleging, as a fact, that their earnings had been substantially affected. So far as Mr Fone is concerned, he never transferred and he did not have a period of employment which he could compare pre and post transfer. The Tribunal declined therefore to consider that the passage at paragraph 20 was of direct relevance to the circumstances of the claimant. The Tribunal reminded itself that it had to consider the facts of the claimant and it had to consider whether or not the claimant had proved facts which enabled the Tribunal to conclude that there had been "a substantial change in working conditions to the material detriment" of Mr Fone.

94. Under regulation 7(1) of the 2006 TUPE Regulations, a dismissal is automatically unfair if its sole or principal reason is a reason connected with the transfer of the business, which is not an economic, technical or organisational reason entailing changes in the workforce. This is commonly referred to as an "ETO" reason.

95. Although an ETO reason had been pleaded by the respondent, counsel for the claimant in his submissions pointed out that no evidence had been put to the Tribunal to substantiate such a conclusion. However, most helpfully, at paragraphs 49 and 50 of her submissions, counsel for the respondent confirmed that the respondents were not, at the conclusion of the evidence, attempting "to argue that the new bonus structure was an economic, technical or organisation reason entailing changes in the workforce". This therefore removed any obligation or responsibility on the part of the Tribunal to consider an ETO and to consider whether or not, if the Tribunal concluded that the claimant had been dismissed, whether that dismissal was on the grounds of redundancy or on the grounds of "some other substantial reason" pursuant to section 98 of the Employment Rights Act 1996. Counsel acknowledged in her submissions (paragraph 49) that if the claimant is able to prove that the new bonus structure was a substantial change in his working conditions to his material detriment, that it was accepted by the respondent that his resignation is deemed as a dismissal under regulation 4(9).

Law on Constructive Dismissal

96. Adopting the words of paragraph 5 of the submissions of counsel for the respondent, the legal test for establishing a constructive dismissal is well known and only requires a summary. The claimant's employer must have breached a term (or terms) of his employment contract. This can be an express or implied term. The breach identified must have been fundamental and the claimant must demonstrate that he has resigned in response to that breach. Equally counsel for the claimant, beginning at paragraph 17 of his submissions, provided further guidance on the well recognised principles relating to constructive dismissal. He provided a quote from Harvey. He provided a reference to **Western Excavating v Sharp** which is authority for the fact that the breach of the implied term of trust and confidence can amount to a repudiatory breach. He also reminded the Tribunal that a breach of contract may either be an actual breach or an anticipatory breach. The well recognised passage in **Malik** was also quoted:

> "The employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee."

97. Bearing in mind that the claimant had resigned prior to the date of the proposed transfer of his employment to the second respondent, counsel for the claimant referred to the Court of Appeal decision in **Harrison v Norwest Holst Group Administration Limited [1985] IRLR 240**. The Court of Appeal in that case confirmed that a breach of contract can be an anticipatory repudiatory breach. Where an employer makes a statement that it will not perform its contractual obligations, the employee, may at his election, choose to treat himself as discharged from his obligations under the contract forthwith, but must communicate that fact to the employer timeously and unequivocally.

98. Counsel for the claimant also made reference to the authority in Industrial Rubber Products v Gillon [1977] IRLR 389 which confirmed that pay is almost always and easily recognised as a fundamental term of a contract of employment, and that even a small unilateral reduction in a basic rate of pay, even if made for good reasons, would be likely to amount to a fundamental breach of contract, which, if accepted, would amount to constructive dismissal.

99. The Tribunal considered only briefly the authorities to which it was referred in connection with the law on constructive dismissal, agreeing and approving of the sentiment of both counsel for the claimant and the respondent that the principles were well established and well recognised. In essence what the Tribunal has to consider, objectively, is whether the conduct complained of by Mr Fone was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. That test does not require a Tribunal to make a factual finding as to what was the actual intention of the employer. In fact the employer's subjective intention is irrelevant. If an employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of.

Judgment

100. The Tribunal began, therefore, by considering whether or not the claimant had been dismissed pursuant to regulation 7(1) of the TUPE Regulations. The claimant alleged that he had been dismissed and that the sole or principal reason for his dismissal was the transfer of the business of the first respondent to the second respondent at the end of April 2017. Alternatively the claimant alleged that the sole or principal reason for his dismissal was a reason connected with that transfer.

101. For the claimant to succeed in a claim of unfair dismissal he clearly needed to establish that he had been dismissed. There was no dismissal of the claimant by the respondent other than a dismissal as alleged by the claimant in accordance with regulation 4(9) of the TUPE Regulations. The claimant alleged that he had been dismissed (and therefore unfairly dismissed) because a relevant transfer of his employment to the second respondent would involve a substantial change in his working conditions to his material detriment, and that on that basis he had resigned and pursuant to regulation 4(9) he was, as a result of that resignation, treating his contract of employment as having been terminated and treating himself as having been dismissed by his employer, the first respondent.

102. The Tribunal firstly therefore considered whether the proposed transfer of the employment of the claimant from employment by the first respondent to employment by the second respondent, which was to take place on Friday 28 April 2017, would involve a substantial change in working conditions to the material detriment of the claimant.

103. The Tribunal considered the relevant authorities to which it had been referred and to which it has made reference above. The Tribunal reminded itself that the phrase "working conditions" was a phrase which should be interpreted widely and that there was authority for a proposed change which would have adverse effect on commission payments amounting to a change in working conditions.

104. The Tribunal found that the terms of the contract of employment as at April 2017 were reflected by the offer letter dated 5 February 2001 at page 36A in the bundle, which although it was dated 5 February 2001 related to the employment of the claimant by the first respondent which did not actually begin until 1 June 2001. In addition to that offer letter the Tribunal found as a fact that the relevant contract of employment governing the employment relationship between the claimant and the first respondent as at April 2017 was the contract of employment which appeared in the bundle beginning at page 36B and which was then signed by the claimant and by the first respondent on 21 December 2016. The Tribunal rejected any suggestion that any subsequent draft contracts of employment which were submitted to the claimant ever became the terms and conditions of employment reflecting the employment relationship between the claimant and the first respondent.

105. The relevant working conditions which the claimant alleged were substantially changed to his material detriment were the terms and conditions which related to his entitlement to a bonus. As the Tribunal has already referred to in its findings of fact, page 36A confirmed that "a bonus would be paid" and that the claimant would have a target which was by reference to an annual value of commission earned by the claimant. In December 2006 the relevant terms of employment were reflected in the signed contract of employment at paragraph 8 (page 38). These have already been quoted by the Tribunal but it serves a useful purpose to quote them again here, and they read:

> "On attainment of business in excess of an agreed annual target, a bonus will become payable. The level of bonus will be negotiated for a 12 month period currently 1 June to 31 May in any year."

106. The Tribunal finds that certain parts of each of those two documents are of particular relevance. At page 36A it is made clear to the claimant that a bonus "would be paid". There is a reference to the value of any bonus being measured against an annual target of commission earned. So far as the 2006 contract of employment is concerned, it is made clear that a bonus "will" become payable. There is clear reference to the fact that the level of bonus "will" be negotiated. Furthermore, there is clear reference to the fact that it will be negotiated "for a 12 month period" and there is reference to the measurement of bonus being "in any year".

107. The conclusion of the Tribunal therefore is that these words and phrases used by the first respondent amounted to a written obligation on the part of the first respondent to establish an annual bonus structure for the claimant. It obliged the respondent to agree that bonus structure on a year by year basis although the reference period of that year by year measurement and year by year commitment could be changed by agreement or ultimately by the first respondent. The written terms obliged the first respondent to negotiate with the claimant about what the bonus structure and bonus targets would be for the following year although, as acknowledged by counsel for the claimant, if agreement could not be reached, then the final say about the level of those targets lay with the first respondent.

108. Furthermore, it is the decision of the Tribunal that the bonus structure was a bonus structure which was to be calculated by reference to an annual target of commission/income earned on the accounts and investments which were, from time to time, being managed by the claimant for and on behalf of clients of the first

respondent. The fact that the bonus would be calculated on that basis and on that basis alone was clearly set out in the offer letter dated 5 February 2001, and reflected the bonus structure which was then discussed and agreed between the claimant and the first respondent year on year on year between 2001 up to and including the year 2017. It is important for the Tribunal to record that as at the date of the proposed transfer, April 2017, the bonus structure of the claimant was by then already set and agreed for the calendar year of 2017 between the claimant and the first respondent. For that calendar year the level of bonus payable to the claimant was set by reference to annual targets which related only to the commission/income earned by the claimant in respect of the funds and clients managed by the claimant for the first respondent. No other measurement of the performance of the claimant or performance of the funds/clients under his management was at any time relevant to the calculation of bonus or entitlement of the claimant to bonus whilst the claimant was in the employment of the first respondent.

109. Those were, therefore, the terms of the contract of employment between the claimant and the first respondent as at the date of the proposed transfer of the claimant's employment to the second respondent on Friday 28 April 2017.

110. Regulation 4(1) of the TUPE Regulations makes it clear that the terms of any contract of employment which exist prior to the date of any transfer shall have effect after the transfer as if originally made between the person so employed and the transferee. Furthermore, by operation of regulation 4(2) the first respondent's rights, powers, duties and liabilities under its contract of employment with the claimant "shall" transfer at the moment of transfer to the second respondent, which in this case was to be Friday 28 April 2017.

111. The Tribunal finds therefore that the working conditions for the purpose of regulation 4(9) were the bonus/commission structure which was established between the claimant and the first respondent in 2001 and then clarified and reaffirmed in 2006 as a result of the offer letter and the signed 2006 contract of employment.

112. The Tribunal therefore had to consider whether or not it was proposed that there would be a substantial change to those working conditions which would be to the material detriment of the claimant if his employment transferred to the second respondent.

113. The Tribunal reminded itself that in order to decide whether any change was substantial it had to consider the facts from the perspective of the claimant and that it did not require any objective or reasonable measurement by the Tribunal other than a requirement on the part of the Tribunal to consider whether the perspective and opinion of the claimant was a reasonable perspective. The Tribunal finds that the changes which were proposed to the bonus/commission structure of the claimant were indeed substantial, even very substantial. The bonus/commission structure which was proposed by the second respondent involved very considerable changes indeed. As already referred to, these were set out at pages 111 and 112 of the bundle. The second respondent made it very clear indeed that they were no longer prepared to pay the claimant a bonus by reference to the annual income/commission targets which had been set and agreed between the claimant and the first respondent to operate throughout the calendar year 2017. Instead it was proposed that from the date of the proposed transfer that the way in which the claimant would

become entitled to commission would very substantially change and would, as set out in the words of page 111 and 112, be very significantly different to those which the claimant had enjoyed for almost 16 years between June 2001 and April 2017.

114. Furthermore, the second respondent went on to clarify the extent of the changes which would be made to the bonus structure of the claimant in a letter signed by Kevin Mustard on behalf of the second respondent and dated 26 April 2017 and included in the bundle at pages 168-170. It indicated that payment of bonus would be subject to various terms and conditions, and there are six specific bullet points outlined at the foot of page 168 and at the very top of page 169. Those changes in the opinion of the Tribunal made significant changes to the bonus structure, and on that basis the Tribunal was fully satisfied that there were therefore going to be substantial changes to the working conditions of the claimant in relation to his entitlement to bonus.

115. The Tribunal then had to consider whether or not those changes were to the material detriment of the claimant. The Tribunal reminded itself that the word "material" did not really add a great deal to the word "detriment". It was the responsibility of the Tribunal to consider the question of detriment from the point of view of the claimant and then to consider, once again, whether his opinion was a reasonable one to hold. In the opinion of the Tribunal the proposed changes were indeed to the material detriment of the claimant, because they introduced very significant levels of uncertainty into a picture which had obvious certainty from the perspective of the claimant in his existing arrangement with the first respondent. He enjoyed the benefit of a simple and straightforward bonus structure. It was set by reference to annual targets in relation to income/commission earned. That was the only target. It was simple, clear and easy to understand and easy to measure. It also meant that the claimant had to focus on that single performance measure in order to achieve bonus. By contrast the proposed changes which were going to be imposed by the second respondent introduced very considerable elements of uncertainty. They included the six bullet points of measurement at the foot of page 168 and at the top of page 169. They introduced uncertainty as to the ability of the claimant to earn commission against certain of the bonus elements set out at pages 111/112. That included what element of commission the claimant may or may not be able to earn by reference to the value of funds which would be into the preferred funds of the second respondent. The Tribunal has made it clear in its findings of fact that it was completely unable to rely upon any of the information or facts or calculations or figures which were submitted either by the first or second respondent about that. In short, the Tribunal concludes that what was actually submitted was nothing more than guesswork without any figures or justified calculations to support them. Indeed Mr Lingwood in his evidence admitted as such. That obviously therefore created a significant area of uncertainty for the claimant.

116. The Tribunal of course has to take into account the fact that in order to cover what it saw as obvious areas of uncertainty, the second respondent offered the claimant a guaranteed bonus of £30,000 for the first year of his employment. In the opinion of the Tribunal the second respondent offered this bonus because the second respondent was unable to produce which were justified by proper facts and figures, and it therefore sought to address those obviously inconsistencies and uncertainties by offering the claimant a guaranteed bonus of £30,000. It was made clear to the claimant that he could not earn less than that and that if he performed in

excess of the bonus structure which would be introduced by the second respondent that he could in fact earn more than that.

117. The guarantee of £30,000 was a significant offer and a significant sum of money. As the Tribunal has indicated in its findings of fact, if the sale to the second respondent has not gone ahead then Mr Lingwood might then, for sound business reasons and following an appropriate process of consultation with the claimant, have been able to breach the existing terms of the contract of employment of the claimant prior to the end of 2017 by imposing, if necessary, changes on the bonus structure which had been agreed for the year 2017 with the claimant. A contract of employment is never set in stone. Even if to impose changes on that bonus structure might have amounted to a breach of contract on the part of the first respondent, it would always have been open to Mr Lingwood to justify that breach by reference to the relevant working conditions and even potentially the significant level of bonus which the claimant might ultimately have earned at the end of 2017 by contrast to other relevant factors affecting the overall performance of the business. Those may have included the overall level of profit which Mr Lingwood felt was appropriate as his personal income and, as Mr Lingwood told the Tribunal, would also have included the direct costs associated with the behind the scenes operation which was necessary to support he business efforts of the claimant and in order to ensure that all members of staff were fairly and properly remunerated, not just the claimant. There was therefore in the opinion of the Tribunal a real air of uncertainty as to what the level of income of the claimant would have been for the year 2017 if the transfer to the second respondent has not gone ahead. The claimant however in the opinion of the Tribunal proceeded to consider the offer of a guaranteed bonus against a background of a view that he would, come what may, have been able to earn bonus/commission in the year 2017 on the basis of the contract terms which existed between himself and the first respondent immediately before the transfer. In the opinion of the Tribunal that was a comparison which ignored the possibility, for sound business reasons, of the first respondent changing those terms if the transfer had not gone ahead.

118. In the opinion of the Tribunal the new bonus structure proposed by the second respondent was not to the material detriment of the claimant so far as the value or amount of his bonus was concerned, but was to his material detriment as a result of the significant and real levels of uncertainty which it would have introduced for the claimant by comparison to the level of certainty and clarity which he enjoyed as a result of the terms of his contract with the first respondent as at and immediately before the date of the proposed transfer. That real and obvious air of uncertainty was reflected by the terms of the new bonus structure as at pages 111/112 and the letter at page 168 which introduced a significant number of different levels and reasons of measurement which were completely absent from the terms and conditions of employment with the first respondent. It was that air of significant uncertainty which was to the material detriment of the claimant.

119. The Tribunal does not accept that the changes were financially to the material detriment of the claimant. There was in the opinion of the Tribunal no satisfactory evidence produced either by the claimant or by either of the respondents which could paint a sufficiently accurate picture of what the level of bonus would have been if the transfer had not gone ahead. The terms of his bonus structure may have been changed by the first respondent. The claimant may or may not, if his employment

had transferred, have earned more or less under the new bonus structure. The Tribunal found all the evidence which was submitted to it to be inadequate. It lacked any reliable facts or figures or calculations.

120. By contract the claimant was entitled to have his existing terms and conditions transferred to the second respondent. Those would have continued to provide him with clarity and certainty. The second respondent acknowledged that they were not proposing to put forward an economic or technical or organisational reason justifying the changes to the claimant's bonus structure which were proposed to the claimant. This was by comparison to the position of the first respondent who had outlined what may have turned out to be persuasive business reasons for making changes during the calendar year of 2017 had the transfer not gone ahead. However, the simple fact of the matter was that the transfer was going ahead and of course it did go ahead. Had the employment of the claimant transferred to the respondent then the bonus structure that he had enjoyed for almost 16 years with the first respondent was to be scrapped and it was made very clear that in its place was going to be imposed a very different bonus structure which introduced real and significant areas of doubt and uncertainty for the claimant. In the opinion of the Tribunal, that view of uncertainty which was held by the claimant was a perfectly reasonable opinion for the claimant to hold.

121. In summary, therefore, the Tribunal concluded that the proposed changes to the bonus/commission structure which existed between the claimant and the first respondent which were to have been imposed by the second respondent as at the date of transfer amounted to substantial changes to the working conditions of the claimant which were to his material detriment.

122. Pursuant to regulation 4(9) the claimant had treated those changes as amounting to circumstances which entitled him to treat his contract of employment as having been terminated. Regulation 4(9) then entitled the claimant to a conclusion that in those circumstances he must be treated by the Tribunal "for any purpose as having been dismissed by the employer". Of course the employer was the first respondent even though the changes were to be made by the second respondent. The Tribunal was therefore satisfied that pursuant to regulation 4(9) the claimant had been dismissed.

123. The Tribunal therefore went on to consider whether or not that dismissal, pursuant to regulation 7(1) was an unfair dismissal.

124. The Tribunal considered whether or not the changes which were proposed by the second respondent were changes because of the transfer itself. The Tribunal was not persuaded that those changes were implemented because of the transfer itself. The transfer itself did not affect the decision making of the second respondent. The Tribunal was however readily satisfied that the changes proposed by the second respondent were for a reason connected with the transfer, and that that was the sole or principal reason for the changes which were proposed by the second respondent and which amounted to a dismissal by the first respondent. The reasons why the second respondent proposed to make such significant changes to the bonus structure were simply because the claimant was expected to fit in with the bonus/commission structure which applied to all other financial advisers who were employed by the second respondent. They therefore expected that the claimant

would be required to fit in and that he would not be entitled to maintain and protect the terms of his contract of employment which existed between himself and the first respondent. Furthermore, in the opinion of the Tribunal the second respondent and indeed the first respondent were mistaken as to what were the terms of the contract of employment between the first respondent and the claimant. The respondents both believed that there was an entitlement on their part, by way of an overall discretion, to change the bonus structure of the claimant at any time. That was a significant and fundamental mistake on the part of the respondents.

125. The finding of the Tribunal is that the bonus structure of the claimant was fixed by reference to an annual year, and it was fixed by reference to financial targets. The first respondent, if the transfer had not gone ahead, may well have been able to argue that there were sound business reasons for making changes to that bonus structure if the claimant had remained an employee of the first respondent. However, that speculation was largely irrelevant. The second respondent did not seek to put forward any sound business reasons which may amount to an economic or technical or organisational reason justifying those changes. In the opinion of the Tribunal the two reasons why the changes were implemented have already been set out above, namely a requirement for the claimant to fit in with the bonus structure of the second respondent and to align himself to the structure which applied to other financial advisers, and at the same time a fundamental misunderstanding of the terms of the contract of employment between the claimant and the first respondent as at the date of the proposed transfer, 28 April 2017.

126. It is appropriate for the Tribunal to recognise that what was suggested were proposed changes which may amount to an anticipatory breach as opposed to an actual breach on the part of the first respondent who, as at the date of the resignation of the claimant, was of course the employer of the claimant. However, the Tribunal reminded itself of the decision of **Harrison v Norwest Holst Group Administration Limited** (referred to above) where the Court of Appeal confirmed that a breach of contract can be an anticipatory repudiatory breach. In the opinion of the Tribunal Mr Mustard had made clear immediately before 28 April that the claimant had "faced a fork in the road" and that when the claimant had asked what happens now if he was unwilling to accept the changes to his bonus structure, that Mr Mustard had told the claimant that "he would be resigning from the company on Friday". That Friday was 28 April 2017. In the opinion of the Tribunal, therefore, the words used by Mr Mustard and as found by the Tribunal amounted to the clearest possible indication that the claimant did not have the option of his existing terms and conditions transferring to the second respondent despite his right to do so under regulation 4(2) of the TUPE Regulations.

127. In summary, therefore, the claimant was unfairly dismissed on the basis that there was a proposed and anticipatory substantial change to his working conditions which would have been to the material detriment of the claimant as a result of the substantial and real uncertainty which would be created for the claimant under the new bonus structure which would be imposed by the second respondent. On that basis the Tribunal concludes that pursuant to regulation 7(1) the claimant was unfairly dismissed as the reason for making those substantial changes to the contract of employment of the claimant was a reason which was connected with the transfer which was to take place on 28 April 2017 between the first and second respondents.

128. The Tribunal also considered whether or not the claimant had been dismissed. The claimant argued that he had been, to use common parlance, constructively dismissed under section 95 of the Employment Rights Act 1996. The Tribunal therefore had to consider whether or not there had been a breach, anticipatory or otherwise, which was a fundamental breach of an express or implied term of his contract of employment.

129. The Tribunal was satisfied that there had been a fundamental breach of that term of his contract of employment which entitled the claimant to a set bonus structure during his employment with the first respondent. That bonus structure related only to annual targets relating to the income/commission generated by the claimant, and which were to be discussed between the claimant and the first respondent. In the opinion of the Tribunal that clause was a fundamental term of the contract of employment, and indeed it is widely recognised that clauses in contracts of employment which relate to pay/remuneration are almost always fundamental terms of a contract of employment. After all, it is always one of the main concerns of any employee when he is considering taking up or leaving employment. As the Tribunal has clearly already recorded in this Judgment, there was to be a very significant change in that bonus/commission structure which would have created a real and proper air of uncertainty for the claimant.

130. The second respondent did not put forward any substantial business reasons or any economic or technical or organisation reason which would have justified those changes. In the opinion of the Tribunal, therefore, the proposed changes amounted to an anticipatory breach of the contract of employment of the claimant with the first respondent. That was a fundamental breach of an express and fundamental term of the claimant's contract of employment. There is no doubt that the claimant resigned promptly in response to that breach and in response to the comment made by Mr Mustard that "if you refuse to accept the change" that Mr Mustard would in fact regard the claimant as having resigned, although the legal basis for that proposition would, to say the least, be extremely questionable. The Tribunal was satisfied therefore that on that basis as a result of that fundamental change the claimant had been entitled to resign and consider himself dismissed pursuant to section 95(1)(c) of the Employment Rights Act 1996.

131. The Tribunal also considered the second proposition which was put forward by the claimant which was that he had been constructively dismissed as a result of a failure to follow any reasonable or proper procedure which was relevant to the proposed changes in the terms and conditions of employment of the claimant relating to his bonus structure. The judgment of the Tribunal is that the consultation process was grossly inadequate and as argued on behalf of the claimant, that those failures amounted to a breach of the fundamental implied term of trust and confidence which must exist between an employer and an employee. In the opinion of the Tribunal there was almost an assumption on the part of both the first and second respondents that the claimant would perfectly happily become an employee of the second respondent. It was in the opinion of the Tribunal extraordinary that there were quite extensive negotiations and discussions between the first respondent and the second respondent about what the bonus structure and financial arrangements would be in relation to the claimant if his employment transferred, but that those discussions did not then transfer into consultation and discussion with the

claimant. Of course the primary responsibility is to consult with the claimant, the employee.

132. The only meaningful discussions which took place with the claimant occurred during the meeting on Tuesday 25 April when the transfer was to take place on Friday 28 April, some three days later. At that meeting the claimant made obvious his concerns and his uncertainty about what the effect of the proposed changes to his bonus/commission structure would be. The claimant did not receive any satisfactory explanations. Had consultation begun with the claimant in the same detail that no doubt discussions and consultation between the first respondent and second respondent had begun months and months earlier, then it may have been possible to address the concerns of the claimant, but in fact by 25 April those concerns on the part of the claimant were real and obvious, and it was in effect put to the claimant that the information that he had was all the information that he was going to get and that in effect the obligation was on him to make a decision on the basis of the information available to him. The Tribunal finds that the information was grossly inadequate and that the timescale of the consultation with the claimant was equally inadequate. Consultation and discussion with the claimant should have started months earlier. The second respondent was able to produce the outline of the bonus structure (page 111) as far back as September 2016, but there was then an almost complete absence of discussion and consultation with the claimant between then and the very end of April 2017. There was every opportunity for proper and reasonable consultation with the claimant, and of course the overwhelming obligation for that consultation was on the shoulders of the first respondent. The discussion and consultation process with the claimant, either with the second respondent or primarily with the first respondent, was so inadequate that in the opinion of the Tribunal it was not the reasonable or proper consultation process of a reasonable employer. That failure to properly inform and consult with the claimant was, in the opinion of the Tribunal, a fundamental breach of the implied term of trust and confidence. The claimant alluded to that breach in his letter of resignation. The Tribunal finds, therefore, that that was a second and cumulative reason for there being a fundamental breach of the terms of the contract of employment between the claimant and the first respondent, both express and implied, and that the claimant was therefore entitled to resign and to consider himself dismissed in accordance with section 95(1)(c) of the Employment Rights Act 1996.

133. The Tribunal obviously had an obligation to then consider section 98 and in particular section 98(4). The Tribunal carefully considered the written provisions of that section. The Tribunal took into account the size and administrative resources available to the first respondent. Of course it is already recognised in this Judgment that the respondent was as small firm. It did not have any particular HR capabilities. However, it was in detailed negotiations with the second respondent, and the Tribunal finds that it must have been obvious to the first respondent that the TUPE Regulations would apply to the proposed sale of the first respondent to the second respondent. There was of course a fundamental misunderstanding about what were the terms of the written contract between the claimant and the first respondent. The Tribunal considered, therefore, whether or not the first respondent had acted reasonably or unreasonably for failing to properly or reasonably consult with the claimant, and reminded itself that its decision must be considered in accordance with equity and the substantial merits of the case. The Tribunal was not presented with any argument or reasons as to why it had not been possible, allegedly, to properly or

fairly and reasonably consult with the claimant. As the Tribunal has already indicated, the proposed changes were well known to the first and second respondents as far back as September 2016. That presented an opportunity of over six months in which to fully and properly consult with the claimant. There was in the opinion of the Tribunal no reason whatsoever why a proper consultation process could not and should not have been implemented by the first respondent. The Tribunal was therefore satisfied that applying the specific provisions of section 98(4) that the "constructive" dismissal of the claimant was an unfair dismissal for two specific fundamental breaches of the contract of employment of the claimant, one of an express term and one of a fundamental implied term of his contract of employment.

Remedy

134. At the Remedy Hearing the Tribunal will consider what the decision of the claimant would have been if there had been no suggestion of a breach of the express or implied terms of his contract of employment, and if in fact the employment of the claimant had transferred to the second respondent with the benefit of his existing contract of employment and specifically with the benefit of his existing bonus structure. The Tribunal will consider the implications of the fact that the terms of that existing bonus structure would have expired at the end of 2017.

135. As a result of the findings of fact of the Tribunal, it would have been open to the second respondent to have consulted properly and reasonably with the claimant from the beginning of May 2017 if his employment had transferred about the changes which would then be proposed to his bonus structure. In the opinion of the Tribunal it will be relevant to consider whether or not the proposals of the respondent to take effect as from the beginning of January 2018 would have been the very proposals that the second respondent put to the claimant in April 2017 and then to consider what the reaction of the claimant to those proposals would have been, assuming that a fair and reasonable consultation process took place between the second respondent and the claimant.

136. It will, the Tribunal believes, also be relevant for the Tribunal to take into account the failure on the part of the claimant to participate in a number of functions which were organised by the second respondent for the employees of the first respondent, including the claimant. The Tribunal found as a fact that the claimant chose not to attend the presentation in September 2016 and has commented in detail on the inadequacy of the evidence presented by the claimant in connection with his failure to attend the Christmas party. In the opinion of the Tribunal, therefore, it will be proper for the Tribunal to speculate as to how long the employment of the claimant would have lasted if the second respondent had recognised the terms of the contract of employment of the claimant and recognised his existing bonus structure and recognised that up to and including the end of December 2017.

137. Clearly the respondents had offered a fixed financial package to the claimant if his employment transferred, and in the opinion of the Tribunal it will be relevant to reflect on that financial package when assessing any losses claimed by the claimant as a Compensatory Award.

138. For the avoidance of any doubt the Tribunal is open to and receptive to any relevant arguments or propositions in connection with remedy which any of the parties wish to present to the Tribunal at the remedy hearing. The above issues are offered to the parties by the Tribunal in order to avoid any suggestion that the parties were not given advance notice that the Tribunal will at least be considering the application of the principles/issues to which it has referred above.

Employment Judge Whittaker

Date: 15 May 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE