EMPLOYMENT TRIBUNALS

Claimant: **Keith Yonish**

Respondents: **(1) JetEngage Limited**
(2) Jet Media Network Limited

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **10 February 2022**

Before: **Tribunal Judge D Brannan acting as, an Employment Judge**

Representation
Claimant: Mr Paul Sangha instructed by Lyons Davidson
Respondent: Bianca Balmelli instructed by Jerome Merchant & Partners

RESERVED JUDGMENT

1. **The claim against the second respondent is struck out as it was brought out of time.**

2. **The claimant's claim of automatic unfair dismissal is dismissed.**

3. **The claimant's claim of unfair dismissal is well founded but his basic and compensatory award is reduced to nil under *Polkey*.**

4. **The claimant's claim of unlawful deduction from wages in respect of company property is well founded. The first respondent is ordered to pay the claimant £1,211 in respect of this claim.**

5. **The holiday pay claim is not determined. Directions are given regarding this separately.**

REASONS

Procedural Background

1. The first respondent dismissed the claimant on 21 April 2021. The claimant lodged his claim against the respondents on 6 August 2021. In relation to the first respondent the claim was in time because the early conciliation period through Acas took place from 25 May 2021 to 6 July 2021. In relation to the second respondent, the claim was out of time because the early conciliation period through Acas took place from 5 August 2021 to 6 August 2021.

2. The Tribunal issued standard directions on 28 September 2021 with the notice of the hearing which was to take place, and did take place before me, on 10 February 2022.

3. The respondents filed their responses in time on 16 November 2021. These raised the issue of time limits in relation to the second respondent.

4. In preparing for the hearing, the claimant did not address why it was not reasonably practicable to bring his claim against the second respondent in time. He also did not address why time should be extended for his claim against the second respondent. I heard submissions from both advocates on this point at the hearing. Mr Sangha expressed surprise that this issue had been raised, despite it being in the respondent's response. I decided as a preliminary issue that the claim against the second respondent was struck out.

5. The parties had agreed some amendments to the deadlines in the standard directions from the Tribunal. I am grateful to them for their cooperation in preparation for the hearing. The result was an agreed bundle, a witness statement of the claimant, and a witness statement of Jesper Schertiger, the director of the first respondent and a director of the second respondent. They had agreed to exchange witness statements on 21 January 2022.

6. On 9 February 2022 the respondent's current solicitor came on the record with the Tribunal. Shortly after the respondent filed additional documents for the bundle and supplementary witness statement of Mr Schertiger. The claimant's representative promptly objected by email in response before giving a more thorough reasons for objecting to the supplementary statement at 18.04. In this email the representative said that the supplementary statement had been served at 18.35 on 8 February 2022. The representative said that late admission of the supplementary statement would necessarily result in adjournment of the final hearing resulting in wasted costs and time.

7. Later that evening the respondent's representative argued in a further email why the statement should be admitted.

8. By the time of the hearing the parties had agreed that the additional documents could be added to the bundle. The argument about the supplementary statement had not been resolved. It therefore fell to me to

decide whether to admit supplementary statement. I heard submissions from both advocates on this.

9. The essence of the Mr Sangha's submission was that the claimant was unfairly prejudiced by the late service of the statement and he could not possibly respond.

10. Ms Balmelli argued that:

    (a) there were elements of Mr Yonish's statement that had not been foreshadowed in particulars of claim and needed to be responded to; and

    (b) the Tribunal needed the detail from the statement to effectively dispose of the proceedings, refusing to admit the statement would simply waste the Tribunal's time by requiring this evidence to come out orally.

11. She proposed a compromise where only specific vital paragraphs were admitted.

12. The initial witness statement of Mr Schertiger is three pages long. The supplementary statement is 11 pages. Part of the claimant's claim is of unfair dismissal where the burden rests in a number of areas on the respondent. The evidence of Mr Schertiger was therefore very important to the respondent's case. But I could not see how the hearing could go ahead fairly when the claimant had had only one business day to consider this new statement. The parties had agreed to exchange statements on 21 January 2022. It simply was not fair on the claimant for the respondent to have an extra chance at giving evidence when clearly the claimant would have no opportunity to do the same. In my view such unfairness could not be remedied during the hearing because it would require the claimant to adduce substantial oral evidence in chief under the pressure of being in a Tribunal setting while Mr Schertiger had had the benefit of preparing a written statement with the benefit of legal advice.

13. I aired the idea that the statement could be admitted and hearing adjourned, with the wasted expenses dealt with by the respondent reimbursing the claimants wasted costs. The respondent did not offer to do so and both parties were keen to proceed with the hearing if possible.

14. It would undoubtedly have made my life easier to have the respondent's case clearly set out in writing. But the overriding objective of the Tribunal is not to make my life easy. It is to deal with cases fairly and justly. The parties were both willing to proceed without the statement. There was therefore no wasted expense for them in proceeding without the statement (though it did contain a calculation of holiday pay which ultimately cannot yet be resolved). I therefore decided, using my general powers under rules 29 and 41 of The Employment Tribunals Rules of Procedure 2013 (as subsequently amended up to 6th October 2021) (the "Rules of Procedure") to exclude the statement and proceed with the hearing.

15. The final preliminary matter was adjustments for the claimant. One reason he had given for objecting to the supplementary witness statement was that he has dyslexia. The respondent does not accept this and it is not material to my

decision on excluding the statement or the substantive claims. I did however ask whether we needed to make any adjustments to the hearing for this. Mr Sangha told me that we just needed to give time to read or read out any bits of text when they claimant was being cross-examined.

16. Ms Banelli made a number of applications to strike out the claimant's claim of automatic unfair dismissal during the hearing. I refused to do so because we had the evidence available and it was therefore proportionate and in the interests of justice to decide the issue substantively on the evidence.

Issues

17. The parties agreed a list of issues at the start of the substantive hearing. This is set out below.

18. Relating to Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"):

    (a) Was there, or would there have been had the claimant not been dismissed, a relevant transfer under the TUPE?

    (b) If there was or would have been a relevant transfer under TUPE, was the claimant dismissed because of it?

    (c) If there was or would have been a relevant transfer under TUPE, was there a failure to inform and consult under TUPE?

19. Relating to unfair dismissal:

    (a) What was the reason or principal reason for dismissal a potentially fair reason? The respondent says the reason was redundancy.

    (b) If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.

    (c) If the dismissal was procedurally unfair, what is the likelihood that the claimant would have been dismissed anyway had there been a fair procedure?

20. Relating to holiday pay:

    (a) What was the claimant's accrued untaken holiday entitlement at dismissal?

    (b) What is the value of such holiday entitlement?

21. Was the respondent's retention of £1,211 in relation to equipment that the claimant has not returned an unlawful deduction from wages?

22. During the hearing, it became apparent that neither party had presented any evidence about the claimant's holiday calculations and that the representations about this had been inconsistent. It appeared that the parties were between around 5 and 10 days apart on their positions. This was during

the cross-examination of the claimant. I decided at that point that it would be impossible to determine the issue of holiday pay based only on oral evidence in the time available. To hear all the evidence required would necessarily sacrifice the time needed for more important other issues. I therefore told the parties I was no longer deciding the holiday pay claim and I would instead give directions in preparation for a further hearing on that issue (to be combined with a remedies hearing if either unfair dismissal claim were upheld). I noted that in failing to address the calculation of holiday pay, both parties had failed to assist the Tribunal as expected under rule 2 of the Rules of Procedure.

Evidence

23. I have before me the following evidence:

    (a) The agreed bundle of 494 pages with a separate index

    (b) The witness statement of the claimant

    (c) The three page witness statement of Mr Schertiger

24. There was some discussion about in what order the witnesses should be called because in the claim founded on TUPE the claimant has the burden of proof while in the ordinary unfair dismissal claim the Respondent has much of the burden of proof. I had expressed in the preliminary discussion the difficulty I had with the TUPE claim because no client had been identified. I was also conscious that with the refusal to admit the supplementary witness statement, Mr Schertinger would potentially need to be heard from after the claimant in any case because he would need to respond to points in the claimant's evidence. I therefore decided it would best assist me to hear the claimant's evidence first and then Mr Schertinger. Both parties agreed with this approach.

25. At 17.00 Mr Schertinger was still being cross-examined. At that point Mr Sangha gave a time indication that he would finish before 18.00. I was conscious this would leave no time for closing submissions. We therefore agreed that closing submissions would be made in writing (limited to 14 pages) within seven days. The parties did as agreed but I did not receive the respondent's closing submissions due to a problem with the email. I enquired after these on 21 February 2022 and received them shortly after.

Facts

26. Despite the lengthy cross-examination of the witnesses, many of the relevant facts of this case are undisputed. I set out below the relevant facts, resolving those that are disputed as I go. I do so with full consideration of the written and oral evidence, and the written submissions of the parties.

27. The first respondent was incorporated on 28 August 2018. It was a technology start-up intending to provide technology to clients so those clients could communicate and offer whatever they offer to their own users. Mr Schertiger described it as software as a service, which goes by the acronym "SAAS". That technology was based on a system called Publicam provided by JetSynthesis in India. It is perhaps best explained with reference to the

only remaining client of the first respondent. This is a church in Germany which uses the software to provide a website and app called "yesflix" to the public. This is like Netflix but specifically for Christian television. Since the first respondent wound down, JetySythesis has provided the service to the church directly. A key component of this business model was that the client of the first respondent needed to pay for the technology.

28. The respondent employed the claimant as Director of Partnerships on 22 October 2018. His role, in a nutshell, was to generate business using, as he put it, his black book of contacts in the media industry. He did not have a specific job description but did have sales targets.

29. On 20 March 2020, as the UK shut down due to the sars-cov-2 pandemic, the claimant underwent major open heart surgery. He returned to work on 6 April 2020 but had to shield due to the pandemic. He was able to work from home.

30. By the time of the claimant's dismissal, the first respondent had lost all of its SAAS customers except for the German church mentioned above.

31. On 9 April 2020 the claimant agreed to a 25% pay cut. This was agreed in order to avoid the claimant going on furlough. At that time there were three other employees. Two of them agreed to a 20% pay cut.

32. Despite the claimant's efforts, the first respondent failed to secure any new customers for its existing SAAS business but was looking at new endeavours. The claimant was involved in this development. The new endeavours involved looking for a series of joint ventures that were collectively referred to as LUEY Group. Information about this is in a document at page 465 of the bundle.

33. LUEY Group was intended to involve four main "business verticals". One would be the existing SAAS of the first respondent, using the expertise of the first respondent. Another would be what became the business of the second respondent (referred to in LUEY documentation as "Celebrity Destinations") using the expertise of "Box to Box Sports". The third was Home Entertainment which included a products called "Entertain Anywhere" and "Kino Club". The claimant was specifically mentioned as being involved with Entertain Anywhere in its promotional documentation at page 342 of the bundle. The fourth was Fashion and Lifestyle, which had a product called Iconocle. All four business would use the Publicam technology.

34. LUEY Group was never formed because of the loss of a backer, Jimmy Bach and his father, Verner Bach. It was abandoned in November or December 2020.

35. The claimant was furloughed on 30 November 2020 and until termination of his employment. Prior to this there were three incidents which he considers to be important to his claim.

36. The first is that in approximately April 2020 he was I was asked to pass details and introduce some of my close business contacts to Ray Wheeler, UK Managing Director. No reason was given for this however he provided these contacts on 29 April 2020. On approximately 28 April 2020 Mr Schertiger

hosted the weekly Zoom meeting for Kino Club team. During this meeting the claimant asked why he had been requested to pass on his close business contacts to Mr Wheeler. Mr Schertiger contacted him afterwards to say that he was surprised how defensive he was and had told the team that it was due to him feeling unwell.

37. The second incident was on 2 July 2020. The claimant sent an email to Jimmy Bach asking that his job title in an Entertain Anywhere document be changed. Mr Bach replied to the claimant saying he would change it, but also that the claimant should align with Mr Schertinger first and ccing him into the reply. Mr Schertinger then wrote to Mr Bach ccing the claimant apologising for the claimant's behaviour. He then wrote directly to the claimant saying that the correspondence with Mr Bach had been "totally unacceptable". Off the back of that email, Mr Schertinger wrote to Niharika Patel at Jet Synthesis saying that he was at the point where he needed to seriously consider dismissing the claimant. They agreed to issue a disciplinary warning to the claimant without engaging the claimant in the process at all.

38. The disciplinary letter was issued on 7 July 2020 mentioning the communications with Mr Bach and earlier correspondence on 12 June 2020. It is at page 181 of the bundle. It reiterated that internal issues should only be discussed internally. It said that a lack of corrective action could result in suspension without pay or termination of employment.

39. The claimant did not accept the disciplinary letter. The email chain from 16 July 2020 to 12 August 2020 at pages 108 to 117 of the bundle show that:

    (a) On 16 July 2020 Mr Schertiger proposed the claimant took one month of paid vacation and afterwards they revisit performance goals

    (b) On 21 July 2020 the claimant countered this with a proposal to use the holiday to work three days per week

    (c) On 22 July 2020 Mr Schertiger accepted that proposal and said he would revert later about goals and timelines

    (d) On 28 July 2020 Mr Schertiger set out his proposal which required focus on "sales", focus areas of:

        "1. Kino Club: Sales of the Kino Club services

        2. Jet Media Network: Addressing potential investors and achieve funding

        3. ICONOCLE: Close brand partnership deals and address potential investors and achieve funding

        4. ITV

        5. PEG"

    and an aim to achieve sales of £100,000 by the end of September 2020. The email concluded saying: "Based on reaching such goals within the

said timelines, we will review your performance and take a call on your future with JetEngage.

(e) The claimant responded on 31 July 2020 raising complaints about the way the process had been handled.

(f) On 7 August 2020 Mr Schertinger replied putting the claimant on paid leave throughout August starting on 10 August and proposing target be put in a "PDP" to replace the "PIP" to be agreed after 31 August 2020.

(g) On 12 August 2020 the claimant replied agreeing to this proposal but saying that any stress and anxiety was as a result of the way the respondent was treating him.

40. The PIP is the third incident which the claimant claims to be relevant to his claim. In fact no PIP or PDP was ever put in place or mentioned after the claimant returned to work on 7 September 2020.

41. During his furlough the claimant continued to communicate with Mr Schertinger. Mr Schertinger described this as a particularly difficult period because the SAAS business had lost nearly all its clients and LUEY Group had also fallen through. However he continued to investigate new options and these ultimately led to development of the second respondent. The claimant says the communications were "positive" between September 2020 and January 2021. However I think the situation clearly changed when LUEY Group fell through. I accept Mr Schertinger's evidence that from the start of furlough he was frank with the claimant about the difficulties the business faced. But I also accept the evidence of the claimant that he was still positive about future opportunities.

42. The future opportunity that came to fruition is the second respondent. There is a dispute about how it is different from the first respondent. According to the ET1 both companies specialise "in public relations and communications". The claimant conceded that he could not comment in detail on the business of the second respondent because he never worked there. However he noted that projects developed at the first respondent have ultimately been taken up by the second respondent. The prime example of this, from the claimant's point of view, was the app featuring the Brazilian footballer Vinicius Jr.

43. Mr Schertinger maintains that the business of the first and second respondents is different. This is for two reasons.

44. First, no business of the first respondent ever moved to the second respondent. The first respondent had clients for the SAAS business but the only one of these that remains, the German church, has never moved to the second respondent. No contract has been signed for an app featuring Vinicius Jr, by either respondent.

45. Second, the business model of the second respondent's service is fundamentally different. It licences rights from celebrities to use their image within an app. The second respondent provides that app direct to consumers. Revenue comes from advertising of third parties within the app. As a result, the celebrity does not need to buy a licence for any technology. Rather they get a share of the revenues that the app bearing their image generates.

46. I accept the evidence of both witnesses, but I find the distinction between the business of the first respondent and second respondent was not so clear cut when the claimant work there and when he was dismissed. This is because:

    (a) The business model of the second respondent was clearly envisaged during 2020 when its vertical within LUEY Group was designed.

    (b) The second respondent was not incorporated until 24 February 2021.

    (c) The claimant was involved in LUEY Group and, as he was working at that time for the first respondent and before incorporation of the second respondent, must have been doing so within the first respondent.

    (d) The second respondent is a joint venture – the need for a separate legal entity reflects this corporate arrangement.

    (e) Both respondents are start-ups. It is expected that they will seek out business opportunities and develop to adapt to these. The claimant was involved in doing so within the first respondent. His role was not limited to selling the SAAS. He was seeking partnerships in a broader sense.

47. I turn now to the dismissal process.

48. On 25 February 2021, Mr Schertinger spoke to the claimant and sent an email found at page 132 of the bundle. The email said:

> Hi Keith,
>
> Thank you for your time on the phone today. As I informed you on the call and as we have discussed in earlier conversations, the business of JetEngage has suffered severely as a result of the global pandemic and it has caused our business serious challenges. The likelihood of being able to offer all employees their jobs back seems more and more difficult, but we remain fully committed to seek alternatives and we will continue to do our utmost on this matter. We will unfortunately only be able to confirm a final decision on this within the next 4-6 weeks.
>
> We understand that this is a difficult situation and a time uncertainty for all employees of JetEngage, we have therefore been looking at opportunities and job openings that may be relevant in other businesses where the Jet family is involved. As per our conversation today, I've discussed your situation with Robin Shelley from Jet Media Network and agreed with him to forward you the attached job brief for a role as 'Head of Sales – Advertisement and Brand Partnerships'. The job has recently been posted and Robin is in the process of collecting CV's from potential candidates. We would hope that you will find the role of interest and should you like to apply for this job, I'm more than happy to set up a interview between you and Robin.
>
> I'm truly sorry for not being able to bring better news at this stage, but hope to hear from you soon in regards to the role within Jet Media Network.
>
> Best regards

Jesper

49. The claimant notes that the word “redundancy” does not appear in this email and he said that it was not used in the conversation on the same day. The claimant said that he was excited by the potential new role. He thought on reading the advertisement that it was his “dream” and he was pleased to have a chance to apply because it offered him a way to stay employed. However he was already aware of the role as it had been on linkedin for two weeks.

50. The claimant was put forward for an interview. This happened on 8 March 2021 with Robin Shelley, who was a founding director of the second respondent.

51. Mr Schertinger’s evidence was he gave Mr Shelley the final decision on whether to offer the claimant the new role. He said his reason for doing so was that it would undermine a leader’s effectiveness to make hiring decisions for him because if a team member is put in place which that leader does not choose, the leader can avoid responsibility for failure.

52. Mr Schertinger was reluctant to say whether he could have made the decision. He suggested that to exercise his power as a majority shareholder it would have to go through the board of directors (on which he sits). I find he could have exercised such power, and he made a management decision not to do so.

53. Mr Shelley decided not to offer the role to the claimant. Mr Schertinger told the claimant by email on 16 March 2021. The reason can be summarised as a better suited candidate having applied. Mr Schertinger was cross-examined about the claimant’s suitability with reference to the job description at page 281 of the bundle. He said specifically that the claimant did not have the following attributes:

    • A deep understanding and experience of mobile in App advertising and creative methods to maximise revenue.

    • Extensive experience of mobile advertising trading models i.e programmatic ad sales, Ad networks, Ad exchanges and or relevant agencies.

54. I note that these two areas of work would not be core to SAAS business but would be core to the second respondent’s business because its revenue stream is from its sales of advertising within the apps it produces.

55. On 17 March 2021 Mr Schertinger spoke to the claimant. His account of that call was sent by email at page 135 of the bundle where he said:

    Hi Niharika and Palak,

    As per below, I’ve now informed Keith that he won’t be offered a role in Jet Media Network. In a call with him today, I verbally informed him that his job at JetEngage will be obsolete. In respect of his situation, I agreed with him to revert after Easter (the w/c 5th April) with an official statement, in which we officially will terminate his contract based on the reasons of his job being obsolete.

> This will mean that we should prepare for an official termination mid-April, serving the Furlough Letter contractual 2 weeks' notice, aiming for his last day with us by Friday 30th April 2021.
>
> Please let me know if you have any questions or need for further details.
>
> Thank you in advance
>
> Jesper

56. Although Mr Schertinger did not use the words "redundant" or "redundancy" here, Mr Yonish's evidence was that in that call he was told that his role had been made redundant.

57. By letter dated 8 April 2021 at page 180 of the bundle Mr Schertinger terminated the claimant's employment from 21 April 2021. The letter said the reason for termination was:

> The business of JetEngage has not recovered from the impacts of the pandemic and your role has become redundant for the Company.

58. The letter also said that a final payment would be made on 21 April 2021 including furlough pay, notice pay and holiday pay. The letter also said:

> You are requested to return all company property (Laptop, iPhone, iPad incl.all chargers, accessories, sim cards and access codes / passwords) issued to you in the course of your employment with the company. We kindly request for you to return all company asset [sic] visa Royal Mail to Jesper on below mentioned address.

59. No appeal was mentioned.

60. The claimant did not return the company property. His evidence was that he could not go out to do so because he was shielding. He would also need to use some kind of tracked deliver to provide insurance against loss of the equipment.

61. Mr Yonish said in his statement that around the end of March 2021 the first respondent recruited two employees into newly created roles. He has not specified what these roles were. Furthermore he accepted under cross-examination that when he was dismissed he was the only remaining employee of the first respondent and that the two other remaining employees has resigned in March 2021. Mr Schertinger said the same.

62. Mr Schertinger also gave some detail about subsequent recruitment. The second respondent took on its first employee on 1 May 2021 after securing funding for this. Prior to this the only people working there were Mr Schertinger and Mr Shelley, both as founding directors. Further employees were taken on from 1 June 2021 when further funding was secured. From the termination of the claimant's employment until 1 May 2021 (a period of only 10 days) neither respondent had any employees. The claimant was not encouraged to apply for any other the other roles.

63. I will now look in turn at the law and concluding on the issues relating to TUPE, then unfair dismissal, and then unlawful deduction from wages.

TUPE

64. The claimant claims that there was a relevant transfer under regulation 3(1)(b)(ii) of TUPE. This states, as relevant:

> 3.— A relevant transfer
>
> (1) These Regulations apply to—
>
> ...
>
> (b) a service provision change, that is a situation in which—
>
> ...
>
> (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf;...
>
> and in which the conditions set out in paragraph (3) are satisfied.
>
> ...
>
> (2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.
>
> (3) The conditions referred to in paragraph (1)(b) are that—
>
> (a) immediately before the service provision change—
>
> (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
>
> (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
>
> (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

65. Mr Sangha submits that the focus is on the activities. He says that the activities in the first and second respondent are fundamentally the same. He basis this on the role that the claimant performed at the first respondent being fundamentally same as the role that the claimant ought to have performed at the second respondent. He then outlines how both roles are similar. He

mentions MediaCom as a "client" of both respondents, though it does not actually have a contract with either respondent.

66. I disagree. This argument entirely ignores the words other than "activities" in regulation 3(1)(b)(ii) which specify two limbs both of which need to be satisfied. These are:

    (a) activities cease to be carried out by a contractor on a client's behalf; and

    (b) [activities] are carried out instead by another person on the client's behalf.

67. The first and second respondents do carry out similar activities, in that they both operate in technology relating apps. This does necessitate sales and marketing, but any such sales and marketing is for themselves, not for an end client. (It perhaps arguable, though was not argued, that the second respondent creates the technology for the celebrity so the celebrity can get a share of the revenue for advertising in it, and therefore the sales and marketing of the specific apps could arguably be for the client.)

68. But even if the activities are fundamentally the same, looking at the first limb first, the first respondent needs to have ceased to carry out those activities on a client's behalf. The first respondent did undertake the provision of technology for clients. It has not stopped doing, or if it has, then that activity has been taken over by a company in India, not the second respondent. The first respondent did not perform sales and marketing for any client. It attempted to sell and market its own SAAS service, though it also developed the activities which have ultimately been undertaken by the second respondent. In either case, there is no client in relation to which the first respondent ceased to provide services.

69. Turning to the second limb, in the absence of a client who has stopped having activities carried out by the first respondent, it is not possible for the second respondent to start carrying out those activities instead.

70. There is no relevant transfer under regulation 3(1)(b)(ii).

71. This is unsurprising because the term that regulation 3(1)(b) explains is when there is a "service provision change". Its purpose is to cover a situation where there is a change of service provider, so that employees move with the service. No service that the first respondent ever provided to clients is now provided by the second respondent. It is difficult to see how there could be a service provision change in such circumstances.

72. The claimant has not sought to argue any other type of transfer under TUPE.

73. For these reasons, the answer to the issues relation to TUPE are:

    (a) Was there, or would there have been had the claimant not been dismissed, a relevant transfer under the TUPE? No

    (b) If there was or would have been a relevant transfer under TUPE, was the claimant dismissed because of it? Not applicable.

(c) If there was or would have been a relevant transfer under TUPE, was there a failure to inform and consult under TUPE? Not applicable.

Unfair Dismissal

74. Section 94 of the Employment Right Act 1996 ("ERA") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

75. Section 98 of the ERA provides:

> **98 General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
>
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(5)...

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

76. A redundancy situation is defined by section 139 ERA:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

77. An employee may argue that a dismissal for redundancy was unfair either because redundancy was not the real reason; or because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason) the dismissal was nevertheless unreasonable under S.98(4) ERA.

78. It is not for Tribunals to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

79. In many redundancy dismissals, the starting-point will be the familiar guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at para 18 onwards).

18. For the purposes of the present case there are only two relevant principles of law arising from that subsection. First, that it is not the

function of the Industrial Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing the employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.

19. In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

> 1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
>
> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

> 3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
>
> 4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
>
> 5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.
>
> The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.'

80. Lord Bridge gave simple guidance on this in *Polkey v AE Dayton Services Limited* [1987] UKHL 8 saying:

> In the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.

81. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and it is to these employees that an employer will apply the chosen selection criteria to determine who will be made redundant.

82. However, an employer who omits to consider the question of pooling will not necessarily be acting unreasonably. In *Wrexham Golf Co Ltd v Ingham* EAT 0190/12 the Claimant worked as club steward. The Respondent decided that, to save money, it would combine its bar and catering functions, and the club steward's duties could be divided among other staff, so the Claimant would be redundant. The Tribunal concluded that the dismissal was unfair because the Respondent had failed to consider the issue of a pool, and whether other bar staff should also have been placed at risk. On appeal the EAT noted that the word 'pool' is not found in s.98(4) ERA and held:

> ...there is no rule that there must be a pool: an employer, if he has good reason for doing so, may consider a single employee for

> redundancy … there will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool.

83. The question which the Tribunal ought to have considered was whether, given the nature of the job of, it was reasonable for the Respondent not to consider developing a wider pool of employees.

84. In relation to consultation, in *R v Gwent County Council ex-parte Bryant Crown Office* (approved in *R v British Coal Corporation, Ex Parte Price and Others* [1994] IRLR 72) it was stated by Glidewell LJ that

> It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting... Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely.

85. In *Morgan v Welsh Rugby Union* [2011] IRLR 376 the EAT held (at para 30) that the guidance provided in Williams may not be of assistance where an employer has to appoint to new roles after a reorganisation.

> Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas Williams-type selection will involve consultation and meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion.

86. The EAT further held (at para 36) that the real issue is the application of s.98(4) ERA:

> To our mind a tribunal considering this question must apply s.98(4) [ERA]. No further proposition of law is required. A tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under s.98(4).

87. In *Darlington Memorial Hospital NHS Trust v Edwards and Vincent* (EAT/678/95) HHJ Hull said:

> If these are new posts with a different job description from anything which the various applicants brought to them, then it seems to us that the employer is most certainly not under a duty to carry out something very like the exercise which he has to carry out in deciding who to select for redundancy. On the contrary, if he is to be allowed to manage his business, he must select as he thinks right. If he tells the employees that they will be allowed to apply for new jobs, as was manifestly the case here, then of course he will be required to carry out the exercise in good faith. If they are to be allowed to apply their applications must be considered properly. If the criteria are different from the old jobs so be it, that was part of the original occasion of redundancy, it was as much reorganisation as redundancy, although redundancy was the result. But to say that they are the same process and that it must be based on similar principles is quite simply, in our view, wrong. It may be, we are not going to decide this, that the duty goes beyond [good] faith, and it may be said that there is some sort of duty of care, but there it is, it is something which the employer has said he will do and he must do it. He must consider the applicants.

88. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

89. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a Polkey reduction has the following features:

> 'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'

90. I will now apply the law and fact finding above to the relevant issues relating to unfair dismissal.

<u>What was the reason or principal reason for dismissal a potentially fair reason?</u>

91. The first respondent says the reason was redundancy. This was because it intended to cease selling the SAAS business and had run out of money.

92. The primary position of the claimant is that the reason for the dismissal was the TUPE transfer. Given my findings above, that position is unsustainable. At the hearing it appeared from Mr Sangha's approach that it may be argued that the true reason for dismissal was Mr Schertinger's dislike of the claimant, which the claimant says was shown in the three incidents: passing contacts to Mr Wheeler, email with Mr Bach and PDP. Mr Sangha has not directly challenged redundancy being the reason for dismissal in the absence of a TUPE transfer. Rather he includes the three incidents as evidence of unfairness.

93. Nevertheless, I have thought quite carefully about whether there really was a redundancy situation when the claimant was dismissed. The reason for my scrutiny of this is that the claimant, who was Head of Partnerships and had no job description, was made redundant while the role of Head of Sales – Advertisement and Brand Partnerships was being recruited. If there was still a need for a "partnerships", was there in fact a cessation or reduction in the need for the work of the kind the claimant undertook. My conclusion is that the roles were in fact different, even if they did overlap to some extent. Furthermore, although the claimant was involved in development of the business that would ultimately be that of the second respondent, his role was principally selling the SAAS service, which was no longer required. Finally, at the point of termination, the funding for the new role had not been secured. For all these reasons I find redundancy to be the reason or principle reason for dismissal.

<u>If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.</u>

94. The claimant argues two criticisms in relation to this. First, a failure to consult on the redundancy. Second, a failure to consider alternative employment, principally by not giving him the opportunity to work as the Head of Sales – Marketing and Brand Partnerships.

95. The respondent argues that although there was no formal consultation, the claimant was well aware of the situation of the first respondent's business. It points to the fact that as a result of these discussions two other employees found alternative employment. In the circumstances the consultation was reasonable.

96. In relation to the alternative role, the respondent argues that the first and second respondent's are autonomous companies. The first respondent performed its duty under *Parfums Givenchy Limited v Finch* EAT 0517/09 to assist with applying for an alternative role at the second respondent. The decision not to appoint the claimant was reasonably open to the second respondent.

97. Ms Banelli submits that the issue is that Mr Schertinger failed to say "your role is redundant" to the claimant. She says this is an inappropriate position to have because the claimant knew about the redundancy situation. While I accept that Mr Schertinger made clear to the claimant that the first respondent's SAAS business was under threat, this message was clearly clouded by the optimism relating to the business which would ultimately, successfully, be undertaken by the second respondent. The claimant had

been involved in the development of that business as proposed within LUEY Group.

98. There is no evidence that the delineation of the first and second respondent's businesses was communicated to the claimant until 25 February 2021, the day he was offered the chance to apply for the new role and the day after the second respondent was incorporated.

99. It was reasonable for the second respondent to conclude that the claimant should not be appointed to the new role (or any other). That was a decision reasonably open to it. But Mr Sangha's suggestion that the claimant was set up to fail by being encouraged to apply was a fair criticism. It seems practically inconceivable that the claimant would have been appointed given Mr Schertinger's view of his competence at making sales in 2020 and view now that the claimant did not in fact have the required skills. Delegating the decision to Mr Shelley gives a veneer of impartiality, but Mr Schertinger could still exercise the final say on both firing and hiring.

100. Given this, was the procedure fair in all the circumstances given the size and administrative resources of the first respondent? I find it was not because the fact of redundancy was never communicated to the claimant until it was inevitable. There was no meaningful consultation about the redundancy of the claimant – rather there was a focus on the business which has, in fact, survived due to development of the second respondent. That is unfair.

<u>If the dismissal was procedurally unfair, what is the likelihood that the claimant would have been dismissed anyway had there been a fair procedure?</u>

101. The respondent argues two points in relation to *Polkey*. First, that this is an exceptional case where failure to warn or consult does not render the dismissal unfair. Ms Banelli cites paragraph 153 of *Polkey* as authority for this. Second, it argues that dismissal would have been the inevitable result if a fair procedure had been followed.

102. The claimant has not mentioned the first argument. In any case I reject it because the point is that the first respondent did not reject use of a fair procedure because it would make no difference. Rather the employer attempted a fair procedure that failed to inform and consult properly.

103. Turning to the second argument, the claimant primarily contends that he would not have been dismissed under a fair procedure because he would have been moved to the role at the second respondent. I reject this for the reasons set out above. The claimant's secondary argument is that the first respondent remains a continuing enterprise with one client. The claimant demonstrated significant concessions to preserve employment – e.g. his agreement to a 25% pay cut – therefore it cannot be said there is any likelihood he would have been fairly dismissed anyway.

104. The difficulty with this is that it is uncontested that the SAAS service of the first respondent is no longer being sold to new clients and the one remaining client is served directly from India. There is no role for the claimant at the first respondent. There was no role for him at the time of dismissal. The claimant

has not been able to suggest any alternative to redundancy within the first respondent.

105. It follows that I find that the claimant would inevitably have been dismissed had a fair procedure been followed. His compensatory award is consequently reduced by 100%.

Unlawful Deduction from Wages

106. Section 13 of the ERA provides:

> **13 Right not to suffer unauthorised deductions.**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
>
> (5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
>
> (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on

> account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
>
> (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

107. Ms Banelli cites clauses 7.2 and 23 of the claimant's contract as entitling the first respondent to deduct the £1,211. She notes the evidence that Mr Schertinger told the claimant on 8 April 2021 that he would need to return the company property and his oral evidence that he said the book value would be used. She notes that on 26 April 2021 the first respondent stated in writing that deduction had been made for the amounts due, enclosing a payslip showing the amount as £1,211.

108. Mr Sangha argues that there is neither a statutory provision, provision in the claimant's contract nor an agreement by the claimant for the deduction of any sum in relation to the company property. He also argues that the value of the deduction, being £1,211, has never been agreed to.

109. Clause 7.2 of the claimant's contact, found at page 63 of the respondent's bundle, says:

> 7.2 The Company shall be entitled to deduct from your salary any bonus all sums that may from time to time be owed by you to the Company. You shall be notified of any such deductions prior to their being made and your signing of these Terms and Conditions shall be your consent to such deductions being made.

110. This clause says that the first respondent can deduct from the claimant's salary any bonus. The word "any" may well be a typo. The clause would certainly make more sense if "any" were "and". But that is not the fault of the claimant. It is the bargain the claimant and first respondent struck. A nonsense first sentence means the clause cannot be read as the claimant agreeing in his contract to the deduction. I note when saying that it might be said I am employing the *contra preferentum* rule here. Ms Banelli cites *Key Recruitment UK Limited v Lear* [2008] UKEAT/0597/07 relating to construction of contracts. In that case the EAT rejected the use of the *contra preferentum* rule because there was no ambiguity in the contract. I would distinguish the present case for two reasons. First, the contract is clearly ambiguous for the reason explained above. Second, in *Key* the deduction related to a commission payment - i.e. money, not property.

111. Even if the contract could be constructed as allowing a deduction, what the claimant owes the respondent is the company's property, not a "sum". Clause 23 of the contract required the claimant to return the property. But there is no provision in the contract for the failure to return company property to be turned into a sum in respect of liquidated damages.

112. The claimant has always maintained that he is happy to return the property. He said he was unable to do so when requested because he could not leave home to post the items. He also said that he would need to use some kind of

tracked delivery so the items were insured. This all seems reasonable. In the meantime the respondent deducted £1,211 from the claimant's payment in relation to the company property. It deducted this money before it had established any money was due – its position then was that it still wanted the property. The deduction of £1,211 was an unlawful deduction of wages.

113. The claimant may well still owe the respondent return of the company property. Failure to return it is not a matter over which this Tribunal has jurisdiction, though it might have if the respondent had brought a counter claim rather than unilaterally and pre-emptively withholding the wages due.

Tribunal Judge D Brannan acting as,
an Employment Judge
Dated: 4 March 2022