EMPLOYMENT TRIBUNALS

Claimant: Ms Y Barron (1)

Mr A Moore (2)

Respondent: Vedamain Limited (1)

Clakim Limited (2)

HELD AT: Liverpool **ON:** 22, 23, 24, 25 & 26 November 2021

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant:
unrepresented
Respondent (1):
Ms T Hand
Respondent (2):
did not attend

JUDGMENT

The judgment of the Tribunal is that:

In relation to the first claimant

(1) The first claimant's contract of employment was not an illegal contract, and her claim is not struck out.

(2) The first claimant had a contract of employment with the second respondent until 17 December 2019 when her employment was transferred to the first respondent in accordance with regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

(3) The sole or principal reason for the first claimant's dismissal was not the transfer of employment.

(4) The first claimant was unfairly dismissed, which means that her complaint of unfair dismissal was successful.

(5) There will be an uplift of 10% to the first claimant's compensatory award because of the first respondent's failure to follow disciplinary procedures.

(6) The first claimant was not entitled to a redundancy payment.

(7) The first claimant was an affected employee in relation to the transfer of the second respondent's undertaking to the first respondent in accordance with regulations 15 and 16 of TUPE, there was a failure by the first and second respondents to comply with their duty to consult under regulations 15 and 16 of TUPE.

(8) The first claimant was dismissed in breach of her contract of employment and is entitled to notice pay.

(9) The question of remedy, (including the question of liability of the respondents in relation to the failure to consult under TUPE), will be considered at a remedy hearing listed for 1 day on a date to be confirmed.

In relation to the second claimant

(1) The second claimant's contract of employment was not an illegal contract and is not struck out.

(2) The second claimant had a contract of employment with the second respondent until 17 December 2019 when her employment was transferred to the first respondent in accordance with regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

(3) The sole or principal reason for the second claimant's dismissal was not the transfer of employment.

(4) The second claimant was unfairly dismissed, which means that her complaint of unfair dismissal was successful.

(5) There will be an uplift of 10% to the first claimant's compensatory award because of the first respondent's failure to follow disciplinary procedures.

(6) The second claimant's complaint of unfair dismissal will have the compensatory award reduced by 25% by reason of contributory fault on his part.

(7) The second claimant was not entitled to a redundancy payment.

(8) The second claimant was an affected employee in relation to the transfer of the second respondent's undertaking to the first respondent in accordance with regulations 15 and 16 of TUPE and there was a failure by the first and

second respondents to comply with its duty to consult under regulations 15 and 16 of TUPE.

(9) The second claimant was dismissed in breach of her contract of employment and is entitled to notice pay.

(10) The question of remedy, (including the question of liability of the respondents in relation to the failure to consult under TUPE), will be considered at a remedy hearing listed for 1 day on a date to be confirmed.

REASONS

Introduction

1. These claims arise from the claimants' employment by the first respondent, where they worked from 15 August 2005 (first claimant) and 26 August 2005 (second claimant) until 17 December 2019 when their employment transferred to the second respondent, and which was terminated on 29 January 2020 and 27 January 2020 respectively. The claimants were employed as an operator and manager respectively in the taxi business known as Abbey Taxis in Chester.

2. The claimants presented a claim form to the Tribunal on 16 March 2020 under case numbers 2402165/2020 and 2402179/2020 respectively following a period of early conciliation and brought complaints of ordinary unfair dismissal, automatic unfair dismissal arising from a transfer, a failure to inform and consult regarding a transfer, breach of contract and unpaid redundancy payments.

3. Regional Employment Judge Parkin (as he then was), determined on 28 April 2020 that both of these claims should be considered together because they give rise to common or related issues of fact and law.

4. The first respondent presented a response by 26 May 2020 in respect of both claimants and requested that the second respondent be added as the complaint that there was a failure to consult by them as transferee contrary to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'), was resisted and the second respondent as transferor, given that there can be joint and several liability between the parties to the transfer.

5. It was also proposed that the second claimant's claim be struck in out because the contract of employment between him and the second respondent was performed in an illegal manner. This, it submitted resulted in misrepresentations being made to HM Revenues and Customs ('HMRC') and the Department of Work and Pensions ('DWP'). It was asserted that the second claimant was aware of the illegality and participated in its execution, thereby justifying the striking out of the claim in accordance with Rule 37 by reason of the alleged illegal performance.

6. Additionally, the first respondent argued that the first claimant's complaints of unlawful deduction from wages and wrongful dismissal should be struck out in accordance with Rule 37 because the payments claimed had already been paid.

7. In addition to these preliminary matters, the first respondent denied the complaints which had been brought by both claimants and asserted that their dismissal had (essentially) arisen because of financial irregularities which both claimants had allegedly been involved in and which the first respondent discovered shortly after the transfer had taken place. It was denied that they had therefore been made redundant.

8. The second respondent was joined to the proceedings, but by the time the case management hearing took place before Employment Judge Feeney on 13 November 2020, a response had not been provided. Nobody attended this hearing on behalf of the second respondent. The case was listed for hearing, the issues were identified, and appropriate case management orders were made.

9. The second respondent was not represented at the final hearing and the hearing bundle did not include a copy of their response.

Issues

10. The issues were agreed by the parties at the preliminary hearing, (when the claimants were represented), on 13 November 2020 before Employment Judge Feeney and were not varied before the final hearing.

Preliminary issues

11. Did the second claimant participate in illegality earning a valid contract into an illegal contract?

12. If so, should second claimant's claim be struck out in accordance with Rule 37 of the ET rules as the illegal performance has turned a valid contract into an illegal contract and the claim is therefore vexatious has no reasonable prospect of success. *(Query whether that is correct and whether it is within the tribunal's jurisdiction)*

Claims

Automatic unfair dismissal under Regulation 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

13. Was there a relevant transfer in accordance with TUPE?

14. Where the claimants employees working under a contract of employment with either the transferor or the transferee either before or after the relevant transfer?

15. If so, was the sole or principal reason for the claimants' dismissal the transfer itself? Was the reason for the claimants' dismissal an economic, technical or organisational reason entailing changes in the workplace?

a) Were the changes needed to be made to the first respondent's organisational structure as the office that the claimants worked in was not fit for the purpose and the respondent intended to move operational [functions] to their head office?
b) Further, were there clear issues in respect of the way in which the claimants were used to the business operating and it was not feasible for those practices to continue?

Unfair dismissal

16. What was the reason for dismissal?

17. The first respondent asserts it was for a potentially fair reason of conduct.

18. Following ***BHS Stores Limited v Burchell*** **[1978]**:-

i) Did the first respondent genuinely believe that the claimants had committed the misconduct in question;
ii) Did the first respondent have reasonable grounds upon which to sustain that belief; and,
iii) Was the first respondent's belief the product of a reasonable investigation?

19. Was the decision to dismiss a fair sanction, in that it was within the range of reasonable responses open to the first respondent?

20. Did the first respondent follow a fair procedure?

21. If the first respondent did not follow a fair procedure would the claimants have been dismissed anyway (*applying the principles of Polkey*), and if so, to what extent and when?

22. Should any awards be reduced owing to the claimants' culpable conduct?

Redundancy pay

23. Were the claimants entitled to redundancy pay?

24. If so, how much?

Failure to inform and consult under Regulations 15 and 16 of TUPE

25. Were the claimants affected employees in relation to the relevant transfer?

26. If so, did the respondents fail in their duty to inform and consult with the appropriate representatives of any affected employees?

Wrongful dismissal and Notice Pay

27. Were the claimants dismissed in breach of their contract of employment?

28. If so, how much notice pay are they entitled to?

Remedy

29. What financial compensation is appropriate in all of the circumstances?

30. Have the claimants mitigated their loss?

31. Should any compensation be reduced in terms of ***Polkey v A E Dayton Services Limited*** **1987**, or because of the contributory fault and if so, what reductions are appropriate?

32. Are the claimants entitled to notice pay?

Evidence used

33. In support of the claimants' case, both Ms Barron and Mr Moore gave evidence.

34. Nigel Thomas (managing director), Ben Thomas (manager), Andrew Swift (contracts manager) and Joshua Hughes (booking staff manager), gave evidence in support of the first respondent's case.

35. Nobody attended to represent the second respondent, including Mark Williams who was the director/owner of the company. No reason was given for this non-attendance, but I was satisfied that those representing this company were aware of the final hearing date and that the case could proceed in their absence. I did not enter judgment at the beginning of the hearing given there being co-respondents and the issues relating to TUPE and joint and several liability. These decisions were made in accordance with the overriding objective under Rule 2 and that it was in the interests of justice to proceed.

36. I was referred to the related case of ***Mr J Nixon v Vedamain Limited (1) and Clakim Limited (2)*** **(Case No: 2405561/2020)** which was determined by Employment Judge Shotter on 17 and 18 May 2021. The reserved judgment and reasons were included in the agreed hearing bundle, and I was referred to it on a number of occasions during the hearing. Interestingly, Mr Williams attended this hearing on behalf of the second respondent. I confirmed that as a first tier Tribunal decision, it would not be binding upon me as I would base my decision upon the evidence that was heard by me during this hearing. However, as the case involved the same respondents and some of the background involved similar matters and an alleged dismissal which took place following the relevant transfer between the respondents, it had some relevance and should remain in the bundle. This matter is discussed in more detail below.

37. There were some additional documents produced by the first respondent on the first day of the hearing relating to the transfer. No objection was made by the claimants who had an opportunity to view the documents, apart from their expressing dismay in the delay in their production. I was willing to allow the inclusion of the documents as there was no prejudice to the claimants.

38. The claimants requested that without prejudice correspondence between the first respondent's solicitor and the claimants should be included in the hearing bundle. Ms Hand asserted that this letter was subject to privilege and could not be used as evidence during the hearing. I considered the claimants' unrepresented status and explained that this was a document where privilege was likely to be relevant. I did explain that any issues concerning the conduct of solicitors could probably be better raised with the Solicitors Regulatory Authority, if the claimants felt it was necessary to do so. I advised that I not allow the addition of this letter to the bundle at the beginning of the hearing, although it may be possible that this matter could be revisited should the evidence that I heard in the case suggested that it was appropriate to do so.

39. Both claimants were unrepresented. I explained the principles laid out in the relevant section of the Equal Treatment Bench Book concerning unrepresented parties and the application of the overriding objective under Rule 2. Additionally, the first claimant informed me that she suffered from asthma and the second claimant suffered from a back injury. I therefore agreed breaks with the parties in the usual way and urged them to ask for additional breaks as required.

The relevance and application of the judgment of Employment Judge Shotter dated 27 May 2021 in relation to the claim brought under case number: 2405561/2020

40. This claim was brought by Mr J Nixon against the first and second respondents in this case. Mr Nixon was a colleague of the first and second claimants in this case and (in summary), Employment Judge Shotter made the following judgment at this preliminary hearing:

a) That Mr Nixon was an employee for the purposes of claims brought under the ERA and TUPE; and,
b) Mr Nixon and the second respondent (Clakim Limited), participated in an illegal contract which had the consequence of Mr Nixon being unable to pursue his claims.

41. Mr Nixon was the sole claimant in this particular case. The first claimant in the case before me, Ms Barron was his former partner although it is understood that they have been separated for some time and she did not give evidence at the preliminary hearing. However, the second respondent's director Mark Williams decided to attend this preliminary hearing. Oral evidence was heard from Michael Nicholls, Stephanie Wood and the second claimant Mr Moore. Only Mr Moore gave evidence in the final hearing of the case before me on behalf of the claimants' respective cases. The first respondent called Andrew Swift, Ben Thomas, Joshua Hughes and Nigel Thomas. All of these witnesses gave evidence before me at the final hearing.

42. I have of course considered the case before me using the evidence that was included in the hearing bundle and the oral evidence of the witnesses who appeared in the final hearing of this case. The judgment of Employment Judge Shotter was included within the hearing bundle and Ms Hand asserted in final submissions that there was similar fact evidence which I could rely upon in that judgment which should be considered relevant in my consideration of the first and second claimant's claim.

Although the background in relation to both cases involve a number of similar matters and in particular the way Mr Williams ran Abbey Taxis, I noted the following matters which were of relevance to my determination of this case:

a) Neither Mr Nixon nor Mr Williams, (the absent director of the second respondent in my case), were considered to be reliable witnesses by Employment Judge Shotter.
b) EJ Shotter noted in paragraph 28 of her judgment that, *'It is apparent that [Ms Barron] worked much longer hours than those for which she was paid, however, it is not clear to me whether she received payment for the work allocated to [Mr Nixon] which he had not undertaken. The first respondent believes the objective was in part to defraud HMRC and the benefits system, and I am unable to make any findings in this regard'.*
c) In paragraph 29 of the EJ Shotter's judgment, she found *'[Mr Nixon] has or had a partner [Ms Barron] who worked as a operations controller and they have children together. I am not in a position to set out any findings of facts concerning whether [Mr Nixon] and Yvanna Barron conspired with the second respondent to keep her hours/earnings at a certain level to defraud on benefits; this is an issue best left for other agencies if relevant.'*
d) In paragraph 31, *'There is an issue whether one or all were paid £6 or £16 per hour as maintained by Alan Moore who gave shifting evidence and could not be relied upon in this matter. I have not taken Mr Houson [first respondent's representative in the Nixon claim] up on his submission that I should make findings in relation to these employees also on the basis that it was the second respondent's practice to defraud HMRC and Mr Houson argued, it must follow that [Mr Nixon's] contract was also performed illegality [sic]. The allegation concerning other employees is a serious one and it [is] inappropriate for this Tribunal to make findings of facts in relation to other employees/causal [sic] workers who are not party to these proceedings. Suffice to record that there may or may not be issues is [sic] respect of minimum wage, national insurance and tax which are not going to be dealt with in these proceedings'*
e) In paragraph 38, *'What is unclear to the Tribunal is whether Yvanna Barron carried out duties under [Mr Nixon's] name or not. Reference was made to CCTV footage taken of Yvanna Barron working as an operator on 17 December 2019 at 02-42-57 with another person. Yvanna Barron's spreadsheet detailing her log in on the day states 18.02 to 06.21 and that the last log in detail for [Mr Nixon] on the operator system before the Tribunal was 16 December 2019 when Yvanna Barron was also logged in on her laptop and second respondent's computer from 15.50 to 16.14 and 18.02 to 05.57. It is not possible to conclude, with any degree of certainty, on the balance of probabilities that [Mr Nixon], Yvanna Barron and directors of the second respondent were conspiring to defraud HMRC and/or benefits, taking into account the seriousness of the allegations and the need for [the] Tribunal to tread carefully in such cases'.*
f) In paragraph 41, *'On balance of probabilities, I accepted Alan Moore's evidence that he had no knowledge of how and the amounts the claimant was being paid as "I wasn't a director." Alan Moore also confirmed that people would log in under different names, and he logged in on the system as Mark Williams on Yvanna Barron's log in, and that people can still be*

logged in when they are not there, and I found this to have been the case of [Mr Nixon's] log in details.

g) In paragraph 42, *'On balance of probabilities, I find the intention of both [Mr Nixon] and Mr Williams was to minimise the second respondent and [Mr Nixon's] exposure to tax and national insurance contributions. I did not accept [Mr Nixon] was naïve and concluded he would have realised at the time the cash payments received over and above the salary set out in the wage slips attracted legal deductions of tax and national insurance. I find on balance of probabilities, that both [Mr Nixon] and Mr Williams intentionally failed to declare a substantial part of [Mr Nixon's] income all relating to taxicab work carried out at the request of the second respondent'.*

h) In paragraph 44, *'I concluded that Mr Williams on behalf of the second respondent and [Mr Nixon] knowingly and intentionally concocted the version of events whereby [Mr Nixon] was working as an operative in October 2019 as set out in the emails and schedule, with a view to [Mr Nixon] being transferred across under TUPE as an operative in the knowledge that he was not employed in this position immediately before the transfer, and the arrangement agreed in relation to cash payments when the claimant used his vehicle to provide taxi services at the second respondent's request, would not continue with the first respondent who may well have discovered the illegal activity for which there could be consequences for both [Mr Nixon] and/or Mr Williams and/or the second respondent in respect of the sale warranties given and exposure to HMRC tax liabilities'.*

i) In paragraph 52.4, EJ Shotter concluded that *'…the contract of employment was void as a result of illegality taking into account the substantial benefit to [Mr Nixon] and second respondent which resulted from their knowing participation in their failure to account to HMRC for tax and national insurance contributions….It is noticeable that Mr Williams conceded in oral submissions that the second respondent had failed to consult [Mr Nixon] under TUPE and it is likely had it not been for the illegality point, damages may have been payable'.*

43. While these findings were of relevance, I was primarily concerned with the evidence that I heard during the final hearing of this case but will refer to the judgment as appropriate where I felt it was persuasive in supporting a particular finding where matters were in dispute between the parties.

Findings of fact

Background

44. The second respondent company operated a business known as Abbey Taxis until 17 December 2019. This was a taxi business offering black cab and private hire taxi drivers and which operated in the Cheshire West and Chester Council and Flintshire Council areas, with operating licences being provided by both authorities. In broad terms, Abbey Taxis treated its taxi drivers as independent contractors, but employed a number of staff at its office, which was located in Foregate, Chester, including operators who would take calls and bookings from customers and allocate

drivers to the journeys requested. A manager was also based in the office, although Mr Williams was understood to have his own office on the premises with a safe.

45. The first respondent company owned a number of taxi businesses, but was primarily known for King Kabs who also operated in the Chester and Ellesmere Port areas. They also own Cosy Cabs and Circle Cabs who primarily operate in Ellesmere Port. They also operate a garage and workshop, in Mollington just outside Chester and this is where the head office for the business is located.

46. The first claimant (Ms Barron) was employed by the second respondent as an operator from 15 August 2015. She was based at the Abbey Taxis office in Foregate Street, Chester. Her payslips from the hearing bundle indicate that she worked 32 hours per week and was paid at £8.21 per hour in the final year of her employment (which was the relevant National Minimum Wage figure in 2019), which amounted to a net payment of approximately £197.17 each week net. She has childcare responsibilities and I accept that her usual working hours were busy evenings around the weekend period of each week on Thursday, Friday and Saturday and she gave convincing evidence that she enjoys working busy shifts.

47. She accepted that she was sometimes called in to cover other shifts at short notice and appeared to be acquiescent as to when she would work them. She described these situations as typically arising when other members of staff were ill or on leave and when seasonal holiday periods such as Christmas might involve busier days outside of the usual weekend period. Notice could be given to work these shifts at short notice and presumably this could particularly be the case when a colleague had called in sick.

48. Her argument was that while she was flexible in how she worked, she only worked 32 hours, per week and she would simply adjust her hours that she normally worked to ensure that her hours worked remained consistent with her contractual hours. In effect, she says that she worked flexibly rather than working overtime.

49. The second claimant (Mr Moore) was employed by the second respondent as an office manager from 26 August 2005. His duties were to be advised by the directors Mr Williams and Graham Bult. Like Ms Barron, he too was employed at the Foregate street office. His contract of employment indicated that he worked 40 hours per week and his starting salary was £32,841.64 per annum.

50. When operators were working in the office, they would access the Abbey Taxis system by sitting at a computer screen and inputting a password. Each operator had their own log in, but Ms Barron said that as shifts progressed, operators might move from screen to another which had previously been logged into by a colleague. Typically, operators would not log out and then log in using their own password, which meant that they could be using the previous operators ‘log in’. Additionally, when a person finished their shift, they would often fail to log out of their system. I found that this evidence to be credible and likely to arise given the way in which the Abbey Taxis’ office worked. Abbey Taxis relied upon the submission of time sheets when considering the hours worked by the staff in the office. It did appear to be a somewhat ‘old fashioned’ and perhaps relaxed way of operating a business, but it was a relatively small business and had been owned by the same person for many years, so I found it to be not surprising that it operated in this way.

51. I understood that the taxi business in Chester and its surrounding area was competitive with operators not only competing for customers, but also for drivers. In many ways, the names of taxi companies were an important asset as it was the name that customers would think of when they decided to call a taxi. It appears that they would not normally 'shop around' and would instead use the company name that they had used on previous occasions. It is understandable that one way to consolidate and expand your taxi business, was to take over rival companies, so that the name of that business could be acquired and consequently, its customer base. This appeared to be the reason behind Mr Thomas' discussions on behalf of the first respondent with Mr Williams on behalf of the second respondent regarding the acquisition of the latter's Abbey Taxis business.

The transfer of Abbey Taxis to King Kabs

52. The transfer of Abbey Taxis to King Kabs was contemplated by the respondents during 2019. The first meeting between Mr Thomas and Mr Williams took place in June 2019. They also raised the matter with the relevant local authority licensing teams who regulated taxis operations in their areas. The actual takeover process including the instruction of solicitors and due diligence took place from August to December 2019.

53. Mr Moore received a call from Flintshire Council in October 2019 and became aware from one of its officers that a takeover of Abbey Taxis was rumoured to be taking place. Understandably alarmed, he informed Mr Williams who arranged for them both to meet with Mr Thomas at the Shrewsbury Arms pub in Mickle Trafford on 25 October 2019. The aim was to reassure Mr Moore and encourage him no to discuss the possible takeover with Abbey Taxi staff until a later date. Mr Thomas did not provide any clear evidence concerning what was discussed and I accepted Mr Moore's evidence that no discussions took place concerning a possible role for Mr Moore. Accordingly, this did not involve any meaningful consultation with him concerning the proposed transfer.

54. Nigel Thomas asserted that he visited the Abbey Taxis premises in Foregate Street, Chester for the first time on 4 December 2019. He said that Mr Williams was given the proposed consultation letters and in turn he had asked Mr Moore as office manager to distribute them with the staff in the Chester office. He said that the letters had remained in a pile by the date of transfer and that the reason for any failure to consult with staff arose from failures by either Mr Williams and/or Mr Moore and they were not attributable to the second respondent. It was put by Ms Hand to Mr Moore that he deliberately failed to distribute the letter to 'sabotage' the proposed transfer. This was described by Mr Moore as being '*completely untrue'* and on balance I accept his evidence to be correct concerning this matter.

55. Furthermore, I accepted his evidence that the first time the employees at Abbey Taxis' office became aware of the contents of the letter dated 4 December 2019 was when Nigel Thomas and his wife Carolyn attended the premises on the day of the takeover by the first respondent on 17 December 2019. This took place at around 6pm and I understood that the transfer took place at this time because it was a relatively quieter part of the day for the taxi trade than at other times of the day. Mr

Thomas explained to me that he discovered the undistributed TUPE 'measures' letters and belatedly handed a copy to each staff member.

56. However, I find that there was no meeting between management of either respondent and any the staff prior to the takeover and the letter dated 4 December 2019 was addressed to Mr Williams and Mr Bult as directors/owners of the second respondent. The letter did seek to inform employees of Abbey Taxis of the proposed measures envisaged by the first respondent post transfer. Changes to place of work, pay date, job functions/roles, rates of pay and normal working hours were identified as possible measures to take. The letter also warned of a *'…small number of roles may be at risk of redundancy following the proposed transfer.'* Assurances were given regarding a proper consultation process being applied and that redeployment opportunities were likely to be available.

57. An issue arose about the office at Abbey Taxis being '*completely emptied*' at before the transfer took place and Mr Thomas said that when they attended the office on 17 December 2019, they *'were shocked to find the office entirely packed up, all emails deleted, work phones wiped, all paperwork gone, save for the sealed TUPE letters…'*. Mr Moore said that the Sunday before the transfer took place, Mr Williams asked him to meet the Abbey Taxis office. He says that Mr Williams told him that *'I don't think you will [still] be here in a week'.* Mr Moore accepted that he took his own personal possessions from the office and Mr Williams took some dockets and cash tins and other things belonging to the business. Mr Moore denied that there was anything untoward in his behaviour and denied that he helped dispose of 60+ bags of records including customer accounts and dockets going back to 2005. He explained that his own office was very small, and he estimated its size as being 7 feet x 7 feet square and it would not have accommodated these papers.

58. While I understand the concerns that the first respondent might have about the disposal of papers and records by Mr Williams prior to the date of transfer, I did not hear any evidence which convinced me that Mr Moore was implicated in any sinister activities with Mr Williams on this date. Mr Williams was not present at the hearing and given the findings of Employment Judge Shotter in the Nixon hearing, (as described above), he may have been reluctant to expose himself to further cross examination. However, insofar as this case is concerned, Mr Moore gave sufficiently convincing evidence to support his argument that he was simply asked to attend the office by Mr Williams, was warned about the risk of dismissal post transfer and decided to remove his own personal possessions in case there was a dispute about what was property of the business and what was his property.

59. Nigel Thomas said that Joanne Renshaw who worked at Abbey Taxis told him *'You've bought a dud'* and she also said that Ms Barron was working her partner Mr Nixon's hours. He confirmed that of the staff who had transferred over to King Kabs from Abbey Taxis, only Andy Swift remained employed. He said that he believed King Kabs had been misled throughout the whole takeover process by the second respondent and believed he was paying £1 million for a *'fully functioning business'.* However, he now believed that this was not the case.

60. He explained that due diligence had taken place prior to the takeover and the first respondent believed it had a clear understanding of staffing, what work they did, and the hours worked. However, he said on the day of the takeover on 17

December 2019, questions were quickly raised regarding Ms Barron's hours of work recorded (32 hours per week at minimum wage) and the actual hours worked. This he says, became apparent from the data records concerning the staff rotas. It was argued by Nigel Thomas that Ms Barron appeared to be working in excess of her contractual hours. He reached this conclusion because Ben Thomas discovered that Mr Nixon was recorded as working a considerable number of hours, while also working as a taxi driver at the time that he was logged into the operator system. There were understandable concerns that Ms Barron was working the hours in his place, based upon Ms Renshaw's allegation, her relationship with Mr Nixon and the limited hours recorded on her payslips. Additionally, when her log on times on the system using her name were recorded, Ben Thomas noted that these were in excess of the 32 hours. The records provided within the hearing bundle certainly indicated occasions were the log in and log out times recorded against Ms Barron's name ('Yvanna'), revealed lengthy periods of time where her account was recorded as being logged on and in excess of 32 hours per week.

61. I accepted Mr Moore's evidence that he did not say to Mrs Thomas that Ms Barron was only paid for 32 hours per week so that she could continue to claim DWP benefits. Ms Thomas did not attend the hearing to give evidence and Mr Moore's evidence is therefore preferred.

62. Although there were allegations made by the first respondent's witnesses that Jimmy Nixon, (claimant in the earlier Tribunal claim described above), was a long-term partner of Ms Barron, she denied that this remained the case. She confirmed that he was the father of her children, but they no longer lived together, although they were on good terms. While I understand Mr Taylor's reasons for being suspicious about this relationship and these concerns were shared with his colleagues, I did not hear evidence which would indicate to me on balance of probabilities that Ms Barron's relationship with Mr Nixon was inappropriate in the context of her work with Abbey Taxis.

63. It did seem that the new management jumped to conclusions concerning the perceived irregularities and it was not entirely clear why the conclusion was reached so quickly that

64. Ben Thomas was asked to look at the IT systems following the takeover and he gained the necessary authority to access the Abbey Taxis account on the 'Autocab' data management system used by many taxi firms to deal with bookings, invoices and other information. He said that he became suspicious when he noted that a significant portion of the staff recorded on the system seemed to have 'disappeared' and were no longer working at Abbey Taxis.

65. He also believed that information had been deleted although he accepted it was difficult to be certain who was responsible as it depended upon who had the necessary permissions to access and amend the Autocab account.

66. Mr Moore was informed on 17 December 2019 that he must go home. He was not subjected to a formal suspension meeting, and he was not provided with a suspension letter.

67. Ms Barron continued to work for the first respondent following the transfer for a few more days. She explained that she was not asked to work any differently to how she had worked before the transfer, and I accept that the first few days post transfer would have involved the first respondent 'finding its feet' and investigating the present position within the Abbey Taxis business. There was a suggestion that job titles and how breaks were allowed were varied, but I did not hear sufficient evidence to be able to establish whether contractual changes took place and this was not something that formed part of the list of issues.

68. I accept that she worked the evening of Wednesday 18 December (starting at 8pm rather than her usual 6pm shift start time), did not work on the Thursday and then resumed working on the evening of Friday 20 December 2019. She described this evening as being known as 'Mad Friday', which resulted from the typically busy pre-Christmas custom which not surprisingly occurred across the nighttime economy in Chester and nearby places.

69. Ms Barron had understood that she would then work the Saturday evening, which would fit within her usual working pattern, and which would of course have been another busy pre-Christmas night. However, when she arrived at the Abbey Taxis office, she found her access to her screen was blocked and she was told by Joshua Hughes who was then managing the office, informed her that she was being suspended because of possible gross misconduct. No formal suspension meeting took place, and she was not provided with a suspension letter.

Ms Barron's disciplinary process

70. Ms Barron was then invited to a disciplinary meeting and Mr Hughes was instructed to deliver this invitation letter to her at her home address on 24 January 2020. While Ms Barron said that she felt intimidated by Mr Hughes attending her house in person with a colleague from King Kabs, I did not find that this was inappropriate behaviour on the part of the first respondent and it was something that many employers would do in similar situations.

71. The letter informed Ms Barron of the allegations of gross misconduct in that she was involved in fraudulent activity. Firstly, it was alleged that she received cash in hand payments and had some of her income paid to Mr Nixon to avoid her obligations to HMRC and to avoid any impact upon her entitlement to DWP benefits. Additionally, it was alleged that she ensured Mr Nixon was 'fed' a disproportionate number of taxi jobs. Both allegations if proven, were warned to be of sufficient gravity to justify summary dismissal for gross misconduct. She was informed that Mr Thomas and James Ward would be the hearing officers and the evidence that would be used by management was included. She was advised of her right to be accompanied. I noted that no investigation meeting had taken place before the invitation to the disciplinary hearing was considered appropriate.

72. The hearing took place on 27 January 2020 at the first respondent's office in Mollington. Nigel Thomas was the hearing officer, James Ward was the note taker, (and not a hearing officer) and Ms Barron attended with Mr Moore and he was permitted to attend as her representative. The note of the meeting indicated that it commenced at 12.10pm and concluded at 1.10pm when Mr Thomas adjourned to consider his decision.

73. Ms Barron was questioned at length and challenged about why her rates of pay were different when compared with other operator colleagues. She simply responded that she never sought more money, was concerned about the solvency of the business and that Mr Williams *'looked after me, did me favours, like paying me when I had to take time off, so I didn't like to ask for more money'.* She denied that she interfered with bookings. While she denied having 'favourites' among the drivers, some were considered less reliable than others and that more reliable ones might be allocated ahead of the less reliable drivers. A clear impression from the answers which she gave, was how informal Ms Barron's working relationship was and how Mr Williams was willing to let her work flexibly. This did mean that she appeared to Mr Thomas to have a great deal of autonomy, and this was something that would have alarmed him, especially when taking into account the more structured and formal working environment that he operated within his business.

74. Following the adjournment, Mr Thomas returned at 3pm and he informed Ms Barron that she was dismissed with immediate effect. It does not appear that reasons for the dismissal were given orally to Ms Barron, but a letter was sent to her on 28 January 2020 confirming the dismissal and providing reasons. In relation to the cash in hand payments, Mr Thomas explained that as Ms Barron had *'offered no reasonable explanation for your behaviour and failed to provide any evidence to suggest that you did not accept cash in hand payments you were ultimately dismissed on the grounds of gross misconduct'.* He made a similar finding in relation to the allegation that Ms Barron had *'fed'* Mr Nixon taxi jobs. The letter confirmed that she would be paid outstanding wages and untaken annual leave. She was offered a right of appeal. Ms Barron exercised this right by letter dated 5 February 2020.

75. Her appeal raised 8 grounds and as well as procedural failure being alleged in the disciplinary processes, she alleged that Mr Thomas had already decided to dismiss Ms Barron before the disciplinary process began. She also sent a separate letter on 5 February 2020 making request to access personal data from the first respondent.

76. Caroline Thomas acknowledged the letter and explained that she would not be able to reply for a few days because of annual leave. She replied on 21 February 2020 and invited her to an appeal hearing before an *'impartial Face2Face Consultant from Peninsula'* on 27 February 2020. She repeated the grounds of appeal in her letter.

77. The appeal hearing took place on 11 March 2020. Elizabeth Cook was the hearing officer, Benjamin Thomas was notetaker and Ms Barron accompanied by Makala Allman. She disputed the truth of the allegations by the first respondent's witnesses in the disciplinary process and asserted that they had been pressurised by the first respondent. The appeal hearing commenced at 11am and concluded at 11.49am. Ms Cook then concluded the hearing and advised that she would give her decision in a consultant report.

78. The consultant report was produced on 28 March 2020. It was a detailed document and was 22 pages in length. Most of the grounds of appeal were not upheld. However, she acknowledged that a suspension letter should have been sent

to her and that she should have been paid her contractual pay during the period of her suspension, but that this had since been paid. However, Ms Cook concluded that her findings were insufficient to overturn the original decision to dismiss for gross misconduct and the decision to dismiss was upheld.

Mr Moore's disciplinary process

79. In the meantime, a similar disciplinary process had progressed in relation to Mr Moore. I heard evidence that he was invited to a meeting on 19 December 2019 at the first respondent's offices in Mollington. Initially he was offered redundancy, but while he was at the premised, Mr Taylor then changed his mind and informed him that they had suspicions about his conduct at Abbey Taxis and they would look to dismiss him. While I am unable to determine the precise words used, I do find on balance of probabilities that once the transfer had taken place and the discovery by the first respondent's owners of concerns regarding the business they had purchased, they quickly reached a conclusion that Mr Moore was too closely connected with the owners of the second respondent and desired to remove him from the Abbey Taxis business.

80. A letter was delivered to his home address on 24 January 2020 and again, I did not find that there was anything untoward in this letter being delivered by hand by Joshua Hughes and a colleague. The letter invited Mr Moore to a disciplinary meeting on 27 January 2020 and firstly alleged gross misconduct because he was responsible for making numerous cash in hand payments off the books, which exposed the first respondent to HMRC sanctions. Secondly, it was also alleged that he stole some of these cash in hand payments. He was advised of his right to be accompanied.

81. The disciplinary hearing took place on 27 January 2020 and Nigel Thomas was again the hearing officer and James Ward was the note taker. Mr Moore acknowledged that he made cash in hand payments to 3 employees but denied it was done off the books, records were kept, and this was done with the authority of the directors of the second respondent. He asserted that he checked the position with HMRC on two occasions and they agreed that the second respondent could make cash in hand payments free of tax and would pay the tax separately.

82. He also confirmed a lot of cash would come through the Abbey Taxis office and while he would carry out the banking of this money, the cash could be handled by colleagues in the office. He explained that this could involve *'£4,000 easily'* on a good week. He questioned whether the safe in Mr Williams' office could contain £20,000 at any one time. Mr Moore acknowledged during the hearing that on a few occasions he said things *'in anger'* which made allegations about the ultimate destination of the cash which passed through the office and did not make any allegations about the cash payments being used inappropriately and asserted that they were recorded on the books. He acknowledged that off the books payments could have serious tax and fraud implications for the second respondent. He said he had seen the pay as you earn ('PAYE') tax calculations being made by his colleague Graham in relation to the cash payments made to colleagues but did not scrutinise them in detail. He recalled him '*print slips off' but* believed that Graham would provide payslips online to affected employees.

83. Mr Thomas challenged Mr Moore and explained that the allegation of theft not only related to him taking cash for his own used, but also if cash did not go through the books, it was stolen from the company as it did not go into the company account. While Mr Moore acknowledged that he understood this argument, there was no evidence heard where he accepted that he had handled any of the cash with an intention to permanently deprive Abbey Taxis/the first respondent of that money.

84. Mr Thomas then asserted that when taxi drivers brought their 'settle money' as payment for using Abbey Taxis as their taxi operator, this money would be inserted into envelopes to pay staff. Mr Moore argued that these payments were given to him by Mr Williams from petty cash following a visit to the bank.

85. He said that Ms Barron's contract of employment was agreed with the directors of the second respondent, but that *'…they looked after her including extra holidays. I know they looked after including extra holidays. They still paid when she was in bereavement. Yvanna has always been very helpful as when you didn't have an operator she volunteered to come in because she cared if drivers earned money.'* He described her as being *'[v]ery, very, useful.'* When he was asked about previously saying the Ms Barron was topped up in cash, he answered that *'I misunderstood the question and answered incorrectly due to everything going on. I should've said that she was looked after with more holidays.'*

86. He also confirmed that he asked for a pay rise in relation to Ms Barron and other staff. He said he did not know why she never received her pay rise in line with other operators and *'[s]he wasn't in a position to accept one. I don't know why.'* He refused to speculate as to the reason why this might be.

87. The meeting commenced at 3.02pm and concluded at 4.19pm. A decision letter was sent to him on 31 January 2020 which found that he was dismissed on grounds of gross misconduct because of the witness statements which had been obtained during the investigation and the *'differing explanations throughout the disciplinary procedure which raises concerns about your credibility, I have preferred the evidence contained within the witness statements and upheld the above allegations against you'.* Accordingly, both allegations were considered proven, and Mr Moore was dismissed without notice. He was informed that he would receive outstanding pay and untaken holiday entitlement and he had a right of appeal.

88. Mr Moore gave notice of his appeal following receipt of this letter and made a request for personal data in a separate letter dated 5 February 2020. There were 9 grounds of appeal which denied theft and alleged that the decision to dismiss had been reached before the disciplinary hearing and that the process was a sham to avoid responsibilities under TUPE and/or redundancy.

89. Ms Thomas acknowledged the notice of appeal and sent a further letter on her return from leave on 21 February 2020 inviting him to an appeal hearing on 27 February 2020 before Ms Cook on the same basis as Ms Barron. The grounds of appeal were repeated in the letter, and he was reminded that he could be accompanied.

90. The appeal took place on 27 February 2020 and commenced at 12.05pm before Ms Cook and with Benjamin Thomas acting as note taker. Mr Moore was

unaccompanied. He disputed Ms Cook's impartiality. Ms Cook went through each ground in turn. He referred to his meeting with Nigel Thomas at the Mollington office on 19 December 2019 and his proposal redundancy transformed into a settlement package and then discussions took place between Nigel Thomas, Mr Williams and Mr Moore by telephone over how his termination payment would be calculated, followed by a withdrawal of any proposals, followed by an allegation of theft by Mr Moore. A discussion took place concerning letters between their respective solicitors concerning a possible settlement upon termination which remained inconclusive.

91. He also argued that he was being treated as a victim for the informal way in which Abbey Taxis was run by Mr Williams and that the first respondent was holding him to account for different standards. He also argued that the statements obtained in the investigation process were simply a *'character assassination'* and did not prove any guilt on his part. He also asserted that he was treated differently from other former colleagues and argued that Andrew Swift was paying free of tax payments to school escorts, had continued to do so post transfer and had not been dismissed.

92. The meeting concluded at 1.09pm and Ms Cook reserved her decision until she produced her consultant report which was completed on 23 March 2020. Like Ms Barron's report, it was detailed and ran to 22 pages in length. She found no failures under the ACAS Code of Practice, that the decision to dismiss was not preplanned, that it was reasonable to hold him responsible for the Abbey Taxis money, that the disciplinary process witness statements were reasonably obtained and that he was not treated differently from other employees. She also did not uphold the appeal ground that the disciplinary process was a sham to avoid redundancy or obligations under TUPE.

93. She did uphold the allegation that payments had not been while Mr Moore was suspended in relation to his wages but that these payments had since been paid and that it was reasonable for the disciplinary hearing invitation letter to be delivered in the way that it was. However, she said that the partial upholding of the appeal was insufficient to undermine the decision to dismiss. Accordingly, Mr Moore remained dismissed for the reasons given by Mr Thomas in his dismissal letter.

<u>Final conclusions regarding the witness evidence</u>

94. I felt that Ms Barron although appearing to be somewhat disorganised in how she managed home and work commitments, I found that her evidence was largely credible and reliable. She had worked for Abbey Taxis for manty years, had grown up with family in the taxi trade and a great deal of trust was placed in her by Mr Moore and the owners of Abbey Taxis. This also meant that she was permitted to work flexibly.

95. To some extent, it is understandable that the first respondent's owners had concerns about her hours of work and pay and rumours about undeclared hours and wages with the purpose of ensuring her benefits were not affected. However, I have not heard evidence which would persuade me to make any findings concerning these matters. It may be a matter which is investigated by appropriate agencies such as the DWP or HMRC, but it appeared to me that Ms Barron worked her contractual hours and received the pay as indicated on the payslips. While she may

have been flexible in how she worked, I accepted that she had not pushed for pay rises that she was perhaps entitled to, that she would take (or would expect to take), time in lieu if working more than her usual contracted hours in a single week and that the undisciplined logging on and off when using the Abbey Taxis' computers was poor management. I do not find that it amounts to clear evidence of fraud within the business insofar as it relates to Ms Barron and her treatment in the matters being considered in this case. In this respect, I would broadly agree with the findings which were made by Employment Judge Shotter in her consideration of Ms Barron's contract and working practices in her judgment in the Nixon case.

96. Mr Moore was not found to have given particularly reliable evidence by Employment Shotter during the claim which she heard brought by Mr Nixon. However, I have based my consideration of Mr Moore's credibility and reliability from the evidence that he gave in this hearing. I believe that he was relatively close to Mr Williams as manager of the Abbey Taxis Chester office and would have been aware of many issues and practices that took place within the business. However, once he became aware of the proposed transfer, I found that on balance of probabilities, his primary concern was how the transfer would impact upon his role and he understandably became anxious and raised matters with Mr Williams and shortly before the transfer took place, he was worried about his future following the transfer. His closeness to Mr Williams was perhaps ultimately a reason for suspicions by the second respondent's owners, but I found that Mr Moore was primarily focused upon being able to retain his job and felt vulnerable as a potentially superfluous manager post transfer. On balance of probabilities, I did not hear evidence in this case which indicated that Mr Moore was actively involved in any financial irregularities, although he clearly managed an office which was very informal and had weak systems in place, as a great deal of trust was placed in members of staff. While this may have brought into question his competence and potential issues relating to retraining, as with Ms Barron, I found this to be a product of the way in which the owners of Abbey Taxis had operated the business.

97. Mr Thomas gave me the clear impression that he felt cheated by the second respondent by the way in which the transfer had taken place. Abbey Taxis did not appear to him, to be the business which he thought that he had bought. This quickly became clear to him on the day of the takeover. I accepted his evidence that in principle he needed to keep all of the staff at Abbey Taxis post transfer and that there were fewer employees working in the office than he had initially thought. I make no findings about the quality of the due diligence that took place when Mr Thomas and his wife when they decided to proceed with the takeover, but they appear to have placed a great deal of trust in Mr Williams and were no doubt shocked to discover on the day of the transfer to discover that the consultation 'measures letters' had not been distributed to staff.

98. Mr Thomas was no doubt on 'red alert' from this point and understandably wanted to ensure that he quickly got the Abbey Taxis business onto a proper footing in terms of governance and working practices. However, this also meant that he was quick to jump to conclusions and especially insofar as he considered the future of Ms Barron and Mr Moore in the business. Accordingly, very quickly following the transfer, he concluded that they were tainted by their long service at Abbey Taxis and their apparent connections with Mr Williams and of course, Mr Nixon. These perhaps understandable biases were not addressed and suggested to me that he

had closed his mind concerning the activities of the claimants before disciplinary processes concluded.

99. Insofar as the other witnesses were concerned, I found that their evidence was broadly credible and reliable, but apart from parts of the witness evidence of Ben Thomas relating to his enquiries into the Abbey Taxis IT systems, their evidence did not significantly contribute to my deliberation in this case.

The Law

Illegality of contract

100. Employment Judge Shotter explained the relevant case law in her judgment concerning illegality on an otherwise lawful contract and the key issues are provided in this section below.

101. In ***Holman v Johnson*** **1775 1 Cowp 341, Court of King's Bench,** Lord Mansfield identified the public policy principle that *'…no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act'.* The reason for this principle is that the courts must not be seen to condone or assist an illegal or immoral act. Accordingly, a general principle is that a claim which relied on the claimant's own participation in an illegality would be unenforceable.

102. However, in the considerably more recent case of ***Patel v Mirza*** **2017 AC 467 SC,** the Supreme held that where illegality was an issue, the focus should be whether the relief claimed should be granted and the *illegality* does not determine by itself whether the contract is void or unenforceable. While it would be contrary to the public interest to enforce a claim that would harm the integrity of the legal system, it is necessary for a court or tribunal to consider:

a) the underlying purpose of the law that had been breached, and whether that purpose would be enhanced by the claim being refused;
b) any other relevant public policy which might be affected by the denial of the claim;
c) whether the denial of the claim would be a proportionate response to the illegality, (bearing in mind that punishment is a matter of the criminal courts);
d) its centrality to the contract;
e) whether it was intentional; and,
f) whether there was a marked disparity in the parties' respective culpability.

103. In the Supreme Court case of ***Stoffel and Co v Grondona*** **2020 UKSC 42, SC**, a negligence claim brought against a firm of solicitors was considered and the application of ***Patel v Mirza*** was reviewed with a particular focus on three necessary considerations:

a) whether the underlying purpose of the illegality would be enhanced by denying the claim;
b) whether denying the claim might have an impact on public policies; and,

c) whether denying the claim would be a proportionate response to the illegality.

The Supreme Court explained in ***Stoffel*** that a court should first of all identify the policy considerations of points a) and b) at a *general level,* (but not evaluate them), and then determine whether enforcing a claim tainted by illegality would be inconsistent with those policies or, where the policies compete, where the overall balance lies. If it concludes that the claim should not be barred by illegality, there is no need to consider proportionality, (which should only be considered if the balancing of policies suggests a denial of the claim

Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE')

104. Regulation 3(1), provides that a relevant transfer is a transfer of an undertaking, business or part of an undertaking or business to another person where there is a transfer of an economic entity which retains its identity.

105. A relevant transfer can also involve a service provision change as described in regulation 3(2) where:

a) activities cease to be carried out by a person ('a client') on his own behalf and are carried out instead by another person on the client's behalf ('a contractor');
b) activities cease to be carried out on a contractor'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 (known as a 'subsequent contractor') on the client's behalf; or
c) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf) and are carried out instead by the client on his own behalf.

a), b) and c) are commonly known respectively as 'outsourcing', 'secondary outsourcing' and 'insourcing', respectively.

106. To be covered by TUPE, a service provision change is required by regulation 3(3) to have immediately before the transfer, an organised grouping of employees situated in Great Britain who have as their principle purpose the carrying out of the activities concerned on behalf of the client. In addition, that the client intends that the activities in question will immediately following the service provision change be carried out by the transferee, (unless it involves a single specific event or task of short term duration). Finally, that the activities concerned do not involve wholly or mainly the supply of goods for the client's use.

107. For the avoidance of doubt, the person transferring their business, is known as 'the transferor' and the person receiving the business following the transfer is known as 'the transferee'.

108. Regulation 4 provides (in essence), that the effect of the transfer is that (subject to a successful objection by an affected employee), affected employees' contract of employment will transfer from the transferor to transferee with their existing terms and conditions intact.

109. Regulation 7(1) provides that whether before or after a relevant transfer, an employee is dismissed, they are treated as being unfairly dismissed in accordance with Part X of the Employment Rights Act 1996 ('ERA') if the sole or principal reason is connected with the transfer. The exception to this provision is described in regulations 7(2) and (3) where a transferee can show that the sole or principal reason for the dismissal is an economic, technical or organisational reason (often called an 'ETO reason'), entailing changes in the workforce of the transferor or transferee before or after the transfer. Section 104 of the ERA (assertion of a statutory right) deals with complaints of unfair dismissal relating to TUPE.

110. Regulation 13 provides that long enough before a relevant transfer, to enable the employer to consult with appropriate representatives of affected employees, the employer should inform them of the proposed transfer, the proposed date, the reasons for it, the legal, economic and social implications for affected employees, the measures that the transferor and the transferee envisages taking post transfer concerning affected employees. The transferee is expected to provide the relevant information to the transferor at such a time to enable the transferor to perform their duties under this provision.

111. Regulation 15 provides that where there has been a failure to inform or consult, affected employees may bring a complaint to the Tribunal. Where a failure under regulation 13 is found in respect of a transferee, it shall make a declaration and may order that it pays appropriate compensation to affected employees specified in the award. It may make a similar order in respect of similar failures by a transferor, or alternatively against the transferee, should it accept the transferor's argument that responsibility for the failure rests with the transferee.

112. Regulation 15(9) provides that the transferee shall also be jointly and severally liable with the transferor in respect of compensation ordered to be paid concerning a failure on the part of the transferor.

Unfair dismissal (Employment Rights Act 1996 ('ERA'))

113. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to capability is a potentially fair reason falling within section 98(2).

114. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

115. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially

> fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

116. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

117. In Polkey v Dayton Services Ltd [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.

118. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. Mr Holloway referred to the case of Sainsbury's Supermarkets Ltd v P J Hitt [2002] EWCA Civ. 1588 in relation to this particular matter.

119. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects, then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:

> (a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?
>
> (b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?
>
> (c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

Redundancy payments

120. Section 139 of the ERA provides that an employee who is dismissed shall be taken to be dismissed reason of redundancy if the dismissal is wholly or mainly attributable to the employer ceasing or intending to cease carrying out business where the employee was employed by them, business in the employee's place of employment, or that the need for employees to carry out work of a particular kind in a place where the employee is employed has ceased or diminished or is expected to cease or diminish.

121. Section 135 of the ERA provides that an employee with 2 years' service is entitled to a redundancy payment if made redundant. If the employer fails to pay a redundancy payment to which an employee is entitled, they may bring a Tribunal complaint in accordance with section 163 of the ERA. However, the employee is not entitled to receive both a basic award for unfair dismissal and a redundancy payment, if both complaints are successful.

Breach of contract

122. The Tribunal has jurisdiction to hear breach of contract claims under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 under regulation 3, where the claim arises or is outstanding on the termination of the employee's employment. If successful, the remedy for breach of contract will typically be in respect of unpaid notice pay.

Discussion

Illegality of contract involving the second claimant, (Mr Moore)

123. While I understand the reasons why the first respondent identified this matter as an issue relating to the claim brought by Mr Moore, I was unable to conclude that there was an illegality of contract. Unlike Mr Nixon's contract considered by Employment Judge Shotter and referred to above, I did not hear evidence which convinced me that Mr Moore had colluded with Mr Williams to agree a contract which ensured he could deliberately avoid liability for tax or other improper purposes. Mr Nixon clearly occupied an unusual role in his relationship with Mr Williams and at Abbey Taxis more generally, but I am unable to find evidence that the practices which existed in his contract, applied equally to Mr Moore (or indeed with Ms Barron).

124. Accordingly, because of these findings, it is not appropriate that the second claimant's claim be struck out in accordance with Rule 37 of the Tribunal's Rules of Procedure.

Automatic unfair dismissal under TUPE

125. I accept that there was a relevant transfer in accordance with TUPE when the second respondent's Abbey Taxis business was transferred as a complete undertaking to the first respondent on 17 December 2019 at 6pm. this involved the

transfer of the Abbey Taxis' employees from the second respondent transferor to the first respondent transferee.

126. I also accept that the claimants were employees working under a contract of employment with the transferor before this relevant transfer and for the transferee after the relevant transfer on 17 December 2019.

127. This case is primarily about the dismissal of the claimants which took place shortly after the date of the relevant transfer in January 2020. It is therefore reasonable to consider whether the sole or principle reason for the claimants' dismissal was the transfer. It is fair to say that but for the relevant transfer, it is likely that both claimants would have remained in employment and from the evidence that I heard, it was likely that they would have continued to work in their roles for Abbey Taxis to the present day.

128. However, taking into account my findings of fact above, I do accept that prior to the takeover, it was likely that both claimants would have remained in employment by the first respondent. It may have involved changes to the nature of their roles or working location, but I accepted Mr Thomas' evidence that it was hard to recruit staff into these roles.

129. Had the claimants resigned, these changes might have been argued to be justified as being economic, technical or organisational reason entailing changes in the workplace. Examples were given of these 'ETO' reasons in the agreed list of issues being that changes needed to be made because the Foregate Street office was not fit for the purpose, operational functions needed to be moved to the first respondent's Mollington office and that business practices needed to be changed. These were reasonable arguments based upon the evidence that I heard from Mr Thomas and other witnesses during the hearing, but this is all hypothetical and I need to consider what the principal reason was for the claimants' dismissal.

130. What I concluded was that the principal reason for the claimants' dismissal, was the belief reached by Mr and Mrs Thomas shortly following the transfer, that both Mr Moore and Ms Barron had been involved in financial irregularities relating to the operation of Abbey Taxis. Although this related to their work prior to the transfer taking place and discoveries made by the first respondent, the belief arose from the *discoveries* which were made because of the transfer, rather than *because of the transfer itself.*

131. On this basis, I am unable to conclude that the principal reason for either claimant's dismissal was because of the transfer and accordingly this complaint must fail.

Unfair dismissal

132. There is no dispute that both claimants were dismissed by the first respondent following the transfer of their contracts of employment to their employment. The first respondent asserts that the dismissals were both for the potentially fair reason of conduct.

133. Following the principles discussed in The Law section above identified in the case of ***BHS Stores Limited v Burchell*** **[1978]**, I do accept that the first respondent genuinely believe that the claimants had committed the misconduct in question. This is based upon the convincing evidence given by Mr Thomas and the conclusions that he reached once he became aware of a number of concerns when he attended the Abbey Taxis premises immediately following the transfer at 6pm on 17 December 2019.

134. However, as I discussed in the findings of fact above, I am unable to conclude that Mr Thomas as representing the first respondent in the disciplinary processes against each claimant had reasonable grounds upon which to sustain that belief. This belief was based upon his perception of casual or poor practices within Abbey Taxis, Mr Moore's perceived connection with Mr Williams, management in the office appearing to be causal and the relaxed way in which Ms Barron worked. While understandable concerns about the future management of Abbey Taxis were identified, I do feel that Mr Thomas jumped to conclusions about misconduct and perhaps this was exacerbated by a perception of powerlessness in how he could resolve matters with Mr Williams. As such, he quickly reached a position where he felt that he needed to 'clear the decks' of the long-standing employees. Additionally, it appears that he did place too much reliance on gossip from other people working at Abbey Taxis, rather than await the outcome of a proper investigation process.

135. Accordingly, this belief does not appear to arise from a reasonable investigation into either claimant, but a casual consideration immediately following the transfer. Indeed, initially, it appeared that prior to the disciplinary action against Mr Moore, there was an attempt to arrange an agreed redundancy on 19 December 2019. Ultimately, I must conclude that Mr Thomas closed his mind to the possibility of other ways of dealing with the claimants and it the belief of conduct as a reason for the dismissal was not reached as a product of a reasonable investigation.

136. This does indeed appear to involve issues where a new owner of a business should have explored possible options concerning the future management of the business and it may well have been necessary to consider some disciplinary action of the claimants or some form of capability process to consider ways in which the claimants could operate in a way which is consistent with the first respondent's more rigorous management systems.

137. Accordingly, as the disciplinary action was ill judged, the decision to dismiss either claimant was not a fair sanction, and it was not within the range of reasonable responses open to the first respondent.

138. The first respondent did not follow a fair procedure insofar as the disciplinary procedure was concerned, taking into account the ACAS Guide on Discipline and Grievances at Work. This applies to both claimants and the first respondent failed to properly carry out meetings to suspend them and provide letters explaining the basis of that suspension and the disciplinary process to be applied. An investigation did not properly take place before deciding to proceed to a disciplinary hearing. The remainder of the process was reasonably carried out in terms of invitations to the disciplinary hearing, the management of the disciplinary hearing, the appeal hearing and subsequent letters for these hearings. I do accept that the appointment of the

external appeal officer was reasonable and appropriate given that Mr Thomas heard the disciplinary hearings and it was difficult to appoint an appropriate internal candidate as he was the most senior manager within the first respondent company and I do not criticise the approach taken. However, I do find it is appropriate to uplift the claimants' compensatory awards by 10% due to the procedural irregularities in relation to the complaints of unfair dismissal.

139. While the first respondent did not follow a fair procedure, I did consider whether the claimants would have been dismissed in any event, (*and thereby applying the principles of Polkey)*. I did not consider that this would be the case, given the shortcomings I identified and the absence of evidence provided in this hearing to suggest that a fair procedure would have resulted in a dismissal of both claimants on grounds of conduct in any event. Accordingly, no award for *Polkey* is made.

140. I also considered whether any awards should be reduced owing to the claimants' culpable conduct? In relation to Mr Moore however, I would acknowledge that he was a manager and effectively ran the Foregate Street office. Insofar as his complaint of unfair dismissal was concerned, I do appreciate that there was an expectation that he would have managed the office in a competent way and it was clearly the case that the office was not managed sufficiently competently prior to the takeover. It may have worked insofar it secured the loyalty of those working there, it was as I described a rather casual way of running a workplace. There did also appear to be a lack of cooperation and defensiveness with Mr Thomas and colleagues once the transfer took place, which is not helpful to his position. On this basis, I do find that it is appropriate to impose a deduction for contributory fault in relation to Mr Moore's compensatory award of 25%.

141. For the avoidance of doubt however, I make no such reduction for Ms Barron, as there was no clear contributory fault on her part.

142. Insofar as the second respondent is concerned and for the avoidance of doubt, I would confirm that as the dismissals arose from the first respondent's employment post transfer. Accordingly, the second respondent played no part as an employer in relation to these complaints.

143. Finally, I would confirm that I reminded myself that in determining this complaint, I must not *'step into the shoes'* of Mr Thomas and substitute my opinions for his. My findings are based upon what was reasonable to him as the dismissing officer.

Redundancy pay

144. The claimants were in principle entitled to redundancy pay by reason of their lengthy service with the second respondent and this service transferred over to the first respondent by reason of a relevant transfer under TUPE.

145. However, I accepted Mr Thomas' evidence that he commenced the transfer with a view that all of the second respondent's employees would remain employed, even if some changes might be required concerning their duties and place of work. Although there was some discussion made on 19 December 2019 concerning

redundancy and in particular, with Mr Moore, the reason for the two dismissals was caused by a belief of gross misconduct and not redundancy.

146. However, by reason of their successful complaint of unfair dismissal, the claimant's entitlement to a basic award, means that they will in effect recover amounts at remedy, equivalent to an award for statutory redundancy.

Failure to inform and consult under Regulations 15 and 16 of TUPE

147. As already discussed, the claimants were affected employees in relation to the relevant transfer.

148. There was a failure by the respondents in their duty to inform and consult with the appropriate representatives of any affected employees, as the very basic consultation letter dated 4 December 2019 was not distributed to the affected employees, until *after* the transfer took place when the first respondent discovered the undistributed letters and immediately distributed them to those staff remaining in the workplace.

149. As I have already found, I do not place the blame for this failure upon Mr Moore, but I do hold Mr Williams (and therefore the second respondent), responsible for this failure.

150. However, I do find that the transferee first respondent failed to take all steps that were reasonable in those circumstances to press the transferor to comply with the duty to inform and consult, even thought there time for them to take this action before the relevant transfer took place on 17 December 2019.

151. Accordingly, both the second respondent transferor and the first respondent transferee failed in their duty to inform and consult and are ordered to pay appropriate compensation to the affected employees (the claimants) named in these proceedings at a sum to be determined at the remedy hearing. Further submissions concerning the liability of each respondent (transferor and transferee) and the extent to which joint and several liability arises, will be heard by the respondents at the remedy hearing before a determination is made.

Wrongful dismissal and Notice Pay

152. The claimants were summarily dismissed without notice and in breach of their contract of employment. This was not reasonable for the reasons given above in the findings of fact as there was insufficient evidence of any gross misconduct at the time the decision was made to dismiss them. Accordingly, they were wrongfully dismissed and are entitled to notice pay at an amount to be calculated at the remedy hearing.

Remedy

153. The case will now proceed to a remedy hearing (listed for 1 day), on a date to be confirmed by the Tribunal in due course, when I will consider the level of financial compensation which is appropriate in all of the circumstances. This will include

consideration of whether the claimants have mitigated their loss and they will be expected to provide evidence of their search for alternative employment following their dismissal.

Case management order for the Remedy Hearing

154. The parties are therefore ordered to discuss with each other, possible case management orders to be made to ensure that the case is prepared for the remedy hearing. They should then notify the Tribunal with the proposed case management orders (agreed if possible), **within 14 days of the date that the judgment is sent to the parties.**

Conclusion

155. In summary, my findings in this case are as follows:

In relation to the first claimant

156. The first claimant's contract of employment was not an illegal contract and her claim is not struck out.

157. The first claimant had a contract of employment with the second respondent until 17 December 2019 when her employment was transferred to the first respondent in accordance with regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

158. The sole or principal reason for the first claimant's dismissal was not the transfer of employment.

159. The first claimant was unfairly dismissed, which means that her complaint of unfair dismissal was successful.

160. There will be an uplift of 10% to the first claimant's compensatory award because of the first respondent's failure to follow disciplinary procedures.

161. The first claimant was not entitled to a redundancy payment.

162. The first claimant was an affected employee in relation to the transfer of the second respondent's undertaking to the first respondent in accordance with regulations 15 and 16 of TUPE, there was a failure by the first and second respondents to comply with their duty to consult under regulations 15 and 16 of TUPE.

163. The first claimant was dismissed in breach of her contract of employment and is entitled to notice pay.

164. The question of remedy, (including the question of liability of the respondents in relation to the failure to consult under TUPE), will be considered at a remedy hearing listed for 1 day on a date to be confirmed.

In relation to the second claimant

165. The second claimant's contract of employment was not an illegal contract and is not struck out

166. The second claimant had a contract of employment with the second respondent until 17 December 2019 when her employment was transferred to the first respondent in accordance with regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

167. The sole or principal reason for the second claimant's dismissal was not the transfer of employment.

168. The second claimant was unfairly dismissed, which means that her complaint of unfair dismissal was successful.

169. The second claimant's complaint of unfair dismissal will have the compensatory award reduced by 25% by reason of contributory fault on his part.

170. The second claimant was not entitled to a redundancy payment.

171. The second claimant was an affected employee in relation to the transfer of the second respondent's undertaking to the first respondent in accordance with regulations 15 and 16 of TUPE and there was a failure by the first and second respondents to comply with its duty to consult under regulations 15 and 16 of TUPE.

172. The second claimant was dismissed in breach of her contract of employment and is entitled to notice pay.

173. The question of remedy, (including the question of liability of the respondents in relation to the failure to consult under TUPE), will be considered at a remedy hearing listed for 1 day on a date to be confirmed.

Employment Judge Johnson

Date 19 January 2022

JUDGMENT SENT TO THE PARTIES ON
20 January 2022

FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.