



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4110020/2021**

**Held in Dundee on 4 April 2022**

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**Employment Judge McFatridge**

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**Brian Wilson**

**Claimant  
Represented by:  
Ms Campbell, Solicitor**

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**Suba Retail Ltd**

**1<sup>st</sup> Respondent  
Not present or  
represented**

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**HSK PVT Limited**

**2<sup>nd</sup> Respondent  
Not present or  
represented  
No ET3 lodged**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is:

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(1) That the claimant was unfairly dismissed by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent shall pay to the claimant compensation therefor in the sum of £3234.00 .

ETZ4(WR)

5 (2) The first respondent failed to comply with their obligation to inform and consult the claimant in relation to a Transfer of Undertaking in terms of Regulations 13 and 13A of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The 1<sup>st</sup> respondent shall pay to the claimant appropriate compensation therefore in the sum of £720.00 (4 weeks' pay) in terms of Regulation 15 of the said Regulations.

10 (3) The 2<sup>nd</sup> respondent failed to comply with their duty to inform and consult the claimant under Regulations 13 and 13A of the Transfer of Undertakings (Protection of Employment) Regulations 2006. They shall pay to the claimant appropriate compensation therefor in the sum of £720.00 (4 weeks' pay) in terms of Regulation 15 of the said Regulations. In addition the 2<sup>nd</sup> respondent shall also be jointly and  
15 severally liable along with the 1<sup>st</sup> respondent for payment of the sum awarded against the 1<sup>st</sup> respondent set out at (2) above, all in terms of Regulation 15(9) of the said Regulations.

20 (4) The 2<sup>nd</sup> respondent failed to give the claimant the appropriate statutory notice of termination of employment. The 2<sup>nd</sup> respondent shall pay to the claimant the sum of £1260 as damages for breach of contract (statutory notice pay)

25 (5) As at the termination of his employment the claimant was due the sum of £403.20 in respect of statutory paid leave accrued but untaken. The 2<sup>nd</sup> respondent shall pay the sum of £403.20 to the claimant in terms of regulation 14 of the working time regulations 1998.

30 (6) The claimant's other claims are dismissed.

**REASONS**

1. The claimant submitted a claim to the Tribunal in which he made various claims against the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He set out a background of having been employed at a Co-op shop in Dundee for a number of years before his employment was transferred to the 1<sup>st</sup> respondent when the 1<sup>st</sup> respondent took over the shop in or about August 2020. At that time the claimant had been on sick leave. The claimant in fact remained on sick leave until the termination of his employment. As a result of the transfer the 1<sup>st</sup> respondent became responsible for paying him contractual and statutory sick pay. This continued until around March 2021 when it simply ceased. On contacting staff in the shop he was told that the shop had been taken over by the 2<sup>nd</sup> respondents at some point in January 2021. He commenced ACAS early conciliation and contacted the 2<sup>nd</sup> respondents. He was advised that he was not employed by them. He therefore claimed that he had been unfairly dismissed. The ET1 also referred to there having been a failure to consult in terms of the TUPE Regulations in the event that a TUPE transfer had in fact taken place. The 1<sup>st</sup> respondent submitted a response in which they denied the claim. The 2<sup>nd</sup> respondent did not submit a response and had not taken part in any of the proceedings to date. The case was subject to a degree of case management. During the course of this the 1<sup>st</sup> respondent instructed solicitors who submitted Further and Better Particulars of his defence and in particular set out additional particulars of the alleged transfer. Two Preliminary Hearings took place and reference is made to the notes issued following each of these. At the second of the two Preliminary Hearings it was clarified that the claimant was claiming that he had been unfairly dismissed by the 2<sup>nd</sup> respondents and that any additional sums due to him were due by them. He clarified that the only claim proceeding against the first respondent was that he was making a claim of a failure to inform and consult under the TUPE Regulations.

2. The Hearing was fixed to take place on 4<sup>th</sup> April. At the time and place set for the Hearing the claimant was present along with his representative and a witness. There was no appearance on behalf of the 1<sup>st</sup> respondent. The

Tribunal telephoned the 1<sup>st</sup> respondent's former agent and asked for a contact number for the 1<sup>st</sup> respondent's Principal. They declined to give this on the basis of data protection. The Tribunal waited until approximately 10.20 which was some 20 minutes after the time that the Hearing was due to commence. There was still no appearance on behalf of the 1<sup>st</sup> respondent. I therefore decided to proceed with the Hearing to hear evidence from the claimant and his witness. Evidence was then led from the claimant and from his daughter Ms Ashley Wilson who was a former manageress of the store at which the claimant worked. Although the 1<sup>st</sup> respondent was not present I sought to put to the witnesses those points which had been made in the Further and Better Particulars lodged on behalf of the 1<sup>st</sup> respondent in relation to their denial of the claim. The claimant's representative had helpfully prepared and lodged a joint bundle of documents. I will refer to this below using the page numbers. There was one additional document which was lodged at the bar of the Tribunal. I admitted this document on the basis it was clearly relevant to the issue before the Tribunal and given that it was an email to and from the 2<sup>nd</sup> respondents who have not chosen so far to enter appearance in the case I considered it was in the interests of justice to allow this to be lodged. On the basis of the evidence and the productions I found the following essential factual matters relevant to the claim to be proved.

### **FINDINGS IN FACT**

3. The claimant commenced employment with the Co-op in or about January 2014. He was employed primarily as a shop assistant in the bakery department. He worked at various stores and in 2020 was working for the Co-op at their store at 38-40 Claypotts Road, Dundee. This store was managed at that time by his daughter.
4. The claimant had had a number of incidents of ill health which led to him taking time off work. In the early part of 2020 he suffered a stroke which led to him going off sick. He never in fact returned to work.

5. The Co-op operate a contractual sick pay scheme and the claimant as a longstanding employee had the maximum entitlement under this which was for around 52 weeks' pay.
- 5 6. On 18<sup>th</sup> August 2020 the Claypotts store at which the claimant worked was taken over by the 1<sup>st</sup> respondents. There was a Transfer of Undertaking from the Co-op to the 1<sup>st</sup> respondents and as a result the claimant's employment transferred to the 1<sup>st</sup> respondents by operation of the TUPE Regulations. At that point the claimant had been off sick for 25.8 weeks of sick pay. The  
10 1<sup>st</sup> respondent were advised by A and E People Support who provide HR services to the Co-op that in terms of his contractual sick pay he was entitled to a further maximum of 26.2 weeks.
7. The claimant was paid sick pay at the rate of £180 per week.  
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8. From August 2020 onwards the 1<sup>st</sup> respondent paid sick pay to the claimant on or around the beginning of each month at the rate of £180 per week.
9. The claimant continued to be unfit for work. He would obtain a Fit Note from his GP and this would be handed into the shop. His pay would be paid by direct transfer into his bank account. Although it would appear that payslips were produced at a later stage the claimant did not receive any payslip from the 1<sup>st</sup> respondents in respect of these payments at the time they were made.  
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- 25 10. At the time of the transfer to the 1<sup>st</sup> respondent there were around 11 employees in the shop. Five of these transferred to the 1<sup>st</sup> respondent including the claimant. The other 6 including the claimant's daughter remained within the Co-op Group or left prior to the transfer. Of those who  
30 transferred only one remained in the employment of the 1<sup>st</sup> respondent within a few weeks apart from the claimant. The 1<sup>st</sup> respondent operated the store on a reduced staffing level employing fewer staff to run the store and the Co-op. The Co-op had operated a policy of having 2 members of staff on duty at all times and this was not followed by the 1<sup>st</sup> respondent. As a result

although other staff were hired there were less than 10 employees employed within the store at the beginning of 2021.

- 5 11. During this period although the 1<sup>st</sup> respondent paid money into the claimant's bank account every month there was never any correspondence or contact between the claimant and the 1<sup>st</sup> respondent's management.
- 10 12. On one occasion the claimant had occasion to be in the shop and was introduced to Mr Veravuka who is the Director and principal owner of the 1<sup>st</sup> respondent. That was the only time the claimant ever met any representative of management of the 1<sup>st</sup> respondent.
- 15 13. At some point in January 2021 the 1<sup>st</sup> respondent transferred the business run from the store to the 2<sup>nd</sup> respondent. From the time of this transfer the 2<sup>nd</sup> respondent operated the store. The transfer to the 2<sup>nd</sup> respondent was a Transfer of Undertaking in terms of the TUPE Regulations. As a result of this there was a statutory transfer under TUPE of the claimant's employment from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent. This took place at some point in January 2021. The claimant was not advised of this transfer at the time.
- 20 There was absolutely no correspondence between the 1<sup>st</sup> respondent and the claimant at this time. The 1<sup>st</sup> respondent did not provide the claimant with any of the information which the claimant is entitled to in terms of Regulation 13 and 13A of the TUPE Regulations. There was no attempt to elect employee representatives to consult although it would appear that at the time
- 25 of the transfer there were less than 10 employees and so Regulation 13A would have meant that any such information should have been provided direct to the claimant.
- 30 14. There was absolutely no contact between the 2<sup>nd</sup> respondent and the claimant at all regarding the transfer. The 2<sup>nd</sup> respondent did not provide the claimant with any of the information to which he was entitled under Regulation 13 and 13A of the TUPE Regulations.

15. In or around March 2021 the claimant noticed that no payment had been made into his bank account of the sick pay which he was expecting to be paid in around the start of the month as usual. The claimant tried to telephone Mr Veravuka of the 1<sup>st</sup> respondent in order to discuss the issue. He was  
5 unable to get through to Mr Veravuka. The claimant went in to the shop and spoke to someone called Melanie who was an employee he knew, being the only employee who still worked there who had been employed there whilst it was run by the Co-op. She told him that the new boss was a Mr Nadim and gave the claimant Mr Nadim's telephone number. The claimant contacted  
10 Mr Nadim and Mr Nadim told him that Mr Nadim had not signed anything about the transfer and that he should speak to Mr Veravuka about any payments he was due. The claimant eventually succeeded in getting hold of Mr Veravuka. Mr Veravuka told him that he would be attending to the payment and that it would be in his bank account by 2.30. The final payment  
15 of sick pay was paid into the claimant's bank account on or about 5<sup>th</sup> March 2021.
16. As it happened by that point the claimant had been paid the balance of the 26.2 weeks sick pay which he was due. After that, whilst the claimant  
20 remained an employee of the second respondent he was not entitled to either statutory or contractual sick pay so long as he remained off work due to ill health.
17. The claimant was unsure of his position and tried to discuss matters with  
25 Mr Veravuka but Mr Veravuka would not answer the telephone to him. He also tried to contact Mr Nadim. Neither would answer him. The claimant then sought legal advice and early conciliation was commenced through ACAS on 27<sup>th</sup> April 2021.
- 30 18. On 26<sup>th</sup> May 2021 the claimant's then solicitors wrote to the 2<sup>nd</sup> respondent by email. The email was lodged (J56). The letter stated:

Dear Sirs

“Our client Brian Wilson

5 I write to advise that I am instructed on behalf of Mr Wilson in relation to his employment with HSK PVT Limited. I have lodged an ACAS early conciliation notification and have instructions to initiate Tribunal proceedings should this matter not be resolved.

10 Mr Wilson was employed by the Co-op then transferred to Suba Retail Ltd in August 2020. We believe that there has been a further transfer in January 2021. Mr Wilson continued to receive pay but has not received pay for April and May 2021. Our client’s daughter has continued to produce sick lines on behalf of Mr Wilson. We hope that his matter can be dealt with without further proceedings.

15 We would advise you to contact a solicitor in relation to this. If you do not have a solicitor already Blackadders Solicitors may be able to provide assistance. We would be obliged if you could confirm receipt of this correspondence.”

20 19. The 2<sup>nd</sup> respondents replied to this email at 16:01 the same date stating:

“We never got him transferred and will not get him anyway. He has never been working with us. Thanks.”

25 20. The claimant remained in receipt of a Fit Note from his GP up until the date of the Tribunal in April 2022. During 2021 the claimant’s daughter would copy his Fit Notes as they were provided and send them by email to both 1<sup>st</sup> and 2<sup>nd</sup> respondents. The claimant at no time received any acknowledgement from them. The claimant ceased sending fit notes around December 2021  
30 since they appeared to be being ignored.

21. The claimant considered that he remained unfit to do heavy work during 2021 but that there may have been a possibility that he would be able to do part time work on a checkout. The claimant never applied for any jobs up to the



date of the Tribunal. The claimant sought at various times through his solicitor to engage with the 1<sup>st</sup> and 2<sup>nd</sup> respondents without success. The claimant was concerned that although he had never been formally dismissed the 2<sup>nd</sup> respondent had made it clear to him that they did not consider that he was employed by them. The claimant was concerned that being in this limbo situation would cause him difficulty with him not being credited the appropriate number of National Insurance contributions.

### Observations on the Evidence

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22. I was satisfied that both the claimant and his daughter were truthful witnesses who were honestly attempting to assist the Tribunal by giving truthful answers to the questions they were asked. The difficulty in this case was that due to the failure of either of the respondents to properly engage with the claimant and his legal team it was very difficult to obtain clear information about what had taken place here. It was not helped by the fact that the claimant was a witness who did not have a particularly clear recollection of facts. I appreciate that this may have been due to the fact he had suffered a stroke in 2020. Much of his recollection was unclear and he frankly said he had no knowledge of specific dates etc. Ms Wilson, the claimant's daughter, was a much better witness who had a clear recollection and was able to give detailed evidence about what had happened during the transfer from the Co-op to the 1<sup>st</sup> respondents but since she had remained in the employment of Co-op after that working at a different store, her evidence about what had happened after that was limited. Her evidence was that although there had been around 11 employees at the store when the Co-op was there there would most certainly have been less than 10 in January 2021 when the second transfer to the 2<sup>nd</sup> respondent took place.

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23. The claimant's evidence in relation to whether he would have been able to return to work with the 2<sup>nd</sup> respondent was somewhat equivocal. On the one hand he indicated that whilst he would not have been able to do heavy work he would have been able to do light work such as working on a checkout albeit part time. On the other hand when I asked him whether he had in fact

applied for any other jobs he said that he had not on the basis that he had been receiving a Fit Note from his GP for the whole period from March 2020 up to the date of the Hearing. It therefore appeared to me that whilst there was some chance that the claimant would have been able to return to work on light duties this was a possibility which should be discounted to take account of the fact that it may well have been the case that the claimant would not in fact ever have been fit enough to return to work even doing light duties.

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10 24. With regard to the date the second transfer took place the 1<sup>st</sup> respondents had, during the time they were represented indicated that this had taken place on 17<sup>th</sup> January 2021. I was not able to verify this date from either of the 2 witnesses who gave evidence at the Hearing. The only evidence which could be given was that the transfer had taken place some time in January.

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20 25. With regard to the amount of sick pay which the claimant was entitled to before his entitlement ran out the claimant was unable to be of any assistance during his own evidence. I accepted the evidence of his daughter that the claimant was entitled to 52 weeks. The claimant's daughter also spoke of having discussed the matter with the Co-op HR Department. When the respondents Further Particulars set out at page 29 were put to her she accepted that the position as set out by the 1<sup>st</sup> respondent's representative was correct and I therefore accepted that this was the actual position. Although the 1<sup>st</sup> respondent in his pleadings refers to various emails from the Co-op's HR Department none of these emails were in fact ever lodged.

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30 26. What was absolutely clear to me from the evidence was that although the 1<sup>st</sup> respondent had paid the claimant the sick pay to which he was entitled there had been a complete failure by the 1<sup>st</sup> respondent to comply with his duties to inform and consult the claimant about the transfer to the 2<sup>nd</sup> respondent.

27. With regard to the 2<sup>nd</sup> respondents there had been a complete refusal to engage with the claimant and to accept that as a matter of law the claimant's

employment had transferred to them. Although neither the 1<sup>st</sup> or 2<sup>nd</sup> respondent were represented at the Hearing I did take steps to put whatever points could relevantly be said in their favour to the witnesses but there is no doubt that I would have had a much clearer picture of events had either of these parties turned up.

### **The Issues**

28. In her ET1 claim form the claimant ticked the box “Making a claim of unfair dismissal” and also stated he was owed notice pay, holiday pay and arrears of pay. The statement of claim attached set out the background and then set out the claims under the heading “Unfair Dismissal”. There was no specific reference to making a claim under Regulation 15 of the TUPE Regulations although in paragraph 16 there is a reference to there being no discussion or consultation with the claimant by either respondent. As noted above the case was subject to a degree of case management and there is no doubt that by the time of the 2<sup>nd</sup> Preliminary Hearing the parties were proceeding on the basis that there was a claim under the TUPE Regulations directed against the 1<sup>st</sup> respondent albeit that all other claims would require to be made against the 2<sup>nd</sup> respondent given that the claimant now accepted there had been a transfer of his employment to the 2<sup>nd</sup> respondent.

29. While it is arguable that a formal application to amend may have been required in order to clarify matters I came to the conclusion, having raised the matter with the claimant’s agent, that this was not in fact necessary. It appeared to me that the paper apart to the ET1 adduced sufficient facts so as to make it clear that such a claim was being made.

30. It appears to me that even if I am wrong in this then the terms of Employment Judge Macleod’s note clearly indicate that the matter was raised at the time of the second preliminary hearing and indeed the reason for fixing a Hearing was because the claimant wished to pursue the matter of a claim of a failure to inform and consult against the 1<sup>st</sup> respondent. If the claimant had not wished to do this the matter could have been dealt with administratively

without a Hearing given that the 2<sup>nd</sup> respondents had not sought to defend the claim against them. It appeared to me that the respondent had provided the claimant with no details of the transfer at the time. It is unsurprising that the ET1 was somewhat sparse in its reference to TUPE and in the event that the 1<sup>st</sup> respondent's representative had objected at the time on the basis that there was no such claim being made then I have no doubt that the amendment would have been allowed given that any delay in making it was entirely down to the action (or inaction) of the 1<sup>st</sup> respondent. I was therefore satisfied that there was a claim of a failure to inform and consult under TUPE directed against the 1<sup>st</sup> respondent. It was also clear to me that there was a claim of unfair dismissal. The claimant's position was that there had been no formal words of dismissal spoken but that the conduct of the 2<sup>nd</sup> respondent coupled with the very clear terms of the email of 26<sup>th</sup> May 2021 meant that there was an inescapable inference that the claimant had been dismissed from his employment by 26<sup>th</sup> May 2021 at the very latest. I should say for the purpose of clarification that the claimant's representative did not seek to make a claim of automatic unfair dismissal on the basis that the reason for dismissal was the transfer or associated with the transfer. I considered this sensible given that the 2<sup>nd</sup> respondents have entirely failed to engage and the claimant has absolutely no information whatsoever as to the reason for the dismissal.

31. The claimant referred to a claim of holiday pay. There was also a claim for notice pay.

32. Although the 1<sup>st</sup> respondent's agent had not raised the issue I also decided that I should consider the issue of time bar. If the date of transfer was in fact 17 January then the claim of a failure to consult would have required to be lodged (or at least early conciliation started) no later than 16 April. Early conciliation was not started until after this. There was therefore a possibility this claim was time barred. In addition, given the uncertainty regarding the date of dismissal (if such a dismissal had taken place) then I required to consider whether any time bar issue arose in respect of the other claims. I

did so on the basis that any tribunal must be satisfied that it has jurisdiction to hear the issues before it.

### **Discussion and Decision**

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33. I considered it appropriate to consider the issue of time bar both in relation to the claim of a failure to consult under TUPE and also in respect of the unfair dismissal and other claims.

10 34. As far as the unfair dismissal claim was concerned I note that the claimant was being paid sick pay up until 5<sup>th</sup> March 2021. In the absence of any overt words of dismissal it appeared to be clear that his employment was continuing at least up until then and therefore the claim was submitted in time. I appreciate that payment was apparently being made by the 1<sup>st</sup>  
15 respondent rather than the 2<sup>nd</sup> respondent who had by this time taken over as his employer but I did not consider this to be material given that I had no knowledge of whatever private arrangements had been made between the 1<sup>st</sup> and 2<sup>nd</sup> respondents in relation to this. For the purpose of calculating compensation I consider that the effective date of termination of employment  
20 was 26 May which was the date the 2<sup>nd</sup> respondent unequivocally stated that they did not employ the claimant.

25 35. With regard to the claim under TUPE the relevant time limit is contained in Regulation 15(12). The time limit runs for the period of 3 months beginning with the date on which the relevant transfer was completed. The difficulty in this case is that I had very little to go on in relation to the date of the transfer. The respondents' representative in their submission said this had happened on 17<sup>th</sup> January. In the absence of any information from them and in the absence of the 1<sup>st</sup> respondent I was not prepared to make any factual finding  
30 that this was the case. I preferred to go on the evidence of the witnesses I heard which was that so far as they understood matters the transfer had happened some time in January. Early conciliation was commenced on 27<sup>th</sup> April. Essentially this means that if the transfer took place after 28<sup>th</sup> January then the claim was in time. Given that the matter had not been raised by the

respondents' representatives at the Preliminary Hearing I considered that on the balance of probabilities the likelihood was that the date of transfer was in fact after 28<sup>th</sup> January and this claim had been submitted in time. If it had not and I was wrong in this then I accepted the argument of the claimant's representative that it had not been reasonably practicable for the claimant to submit the claim within 3 months of 17<sup>th</sup> January. The claimant had taken steps to find out the correct position from the respondents neither of whom had complied with their legal duty to provide him with information at the time. They had refused to engage with him. He did not have clear information as to the date. In those circumstances it is unsurprising that he could not lodge his claim in time. I was satisfied that he had taken all reasonable steps to lodge the claim as soon as it became clear to those representing him that the respondents were alleging there had been a transfer.

36. Having established the claims which were being made and that the claims were in time I shall now deal with each of the claims in turn.

### **Claim of Failure to Consult**

37. On the basis of the evidence I had no hesitation in finding that there had been a relevant transfer between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent in January 2021. As a result of this the claimant's employment was automatically transferred to the 2<sup>nd</sup> respondent by operation of statute. It is not possible for parties to contract out of the Transfer of Undertakings Regulations and despite the terms of the 2<sup>nd</sup> respondent's email of 26<sup>th</sup> May it is clear that from at least the end of January 2021 the claimant was employed by the 2<sup>nd</sup> respondent. The TUPE Regulations also impose various obligations on both the transferor and the transferee employer where a relevant transfer takes place. In this case the 1<sup>st</sup> respondent was the transferor and the 2<sup>nd</sup> respondent was the transferee.

38. Regulation 13 provides that there is a duty to inform and consult representatives where there is to be a transfer and employees may be

affected by this. The principal duty is set out in Regulation 13(2). This states:

5 “Long enough before a relevant transfer to enable the employer and affected employees to consult the appropriate representatives of any affected employees the employer shall inform those representatives of -

10 (a) the fact that the transfer is to take place, the proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

15 (c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact, and

20 (d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages no  
25 measures will be so taken, that fact.

30 39. Regulation 13A provides that if at the time the employer is required to give information under regulation 13(2) the employer employs fewer than 10 employees and there are no appropriate representatives where the employer has not invited any of the affected employees to elect employee representatives. In that case the employer may comply with regulation 13 by performing any duty which relates to appropriate representatives if each of the affected employees were an appropriate representative.

40. In this case there was a total failure by both the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent to provide the information to the claimant about the transfer which they were required to provide by law. I had proceeded on the basis that there were less than 10 employees and therefore their duty was to provide this information to the claimant directly as if he were a representative. In the event that this was not the case then the respondents would still have been in breach of their duties since there were no representatives in place nor any attempt to elect representatives.
41. Regulation 15 provides that where there has been a failure to inform or consult the Tribunal shall order the transferor or transferee, if applicable, to pay the complainant the amount of compensation which it finds is due to him. In terms of regulation 16. The compensation means such sum not exceeding 13 weeks pay for the employee in question as the Tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.
42. In this case the failure on the part of each respondent was total. There is no doubt that this had a serious effect on the claimant given that the claimant was left completely in the dark about what was happening to his employment. He did not know whether he continued to be employed or not. Matters were compounded by the fact that it is clear that the legitimate attempts by himself and his solicitor to obtain information were ignored by the 1<sup>st</sup> respondents until proceedings were raised and completely ignored throughout the whole process by the 2<sup>nd</sup> respondents. In the circumstances I consider that it is appropriate to award the claimant compensation from the 1<sup>st</sup> respondent in the sum of 4 weeks' pay (£720) and also to make an award that the 2<sup>nd</sup> respondent pay 4 weeks pay also. The total compensation payable is therefore 8 weeks pay. 4 weeks pay is payable by the 1<sup>st</sup> respondent but in terms of the Regulations the 2<sup>nd</sup> respondent is jointly and severally responsible for ensuring that this is paid.
43. During submissions the claimant's representative also sought to advance the case that there had been a failure by the 1<sup>st</sup> respondent to provide the



2<sup>nd</sup> respondent with employee liability information in terms of regulation 12. I did not find that I had sufficient information before me to make a finding that this was the case and accordingly this claim does not succeed.

5 **Unfair Dismissal**

44. As noted above the claimant's employment transferred to the 2<sup>nd</sup> respondent under the TUPE Regulations. The claimant was off work sick but continued to be employed. As such he was entitled to various rights including the right to return to work should his health improve. He was also entitled to be credited with National Insurance contributions and to accrue paid annual leave. It is clear that at some point the 2<sup>nd</sup> respondent decided that they did not employ him. Since they have not entered the process it is not possible to determine exactly when this was but it is clear that by 26<sup>th</sup> May at the latest he had been dismissed from their employment.

45. There was no claim of automatic unfair dismissal. The matter therefore requires to be dealt with in terms of section 98 of the Employment Rights Act 1996. This requires the employer to show the reason or, if more than one, the principal reason for the dismissal and (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding a position which the employee held.

46. In this case the employer has not shown any reason for the dismissal and the dismissal was therefore unfair.

47. With regard to compensation the claimant is entitled to both a basic award and a compensatory award. With regard to the basic award this is calculated on the basis of the claimant's length of service which is deemed to continue from the date the claimant commenced employment with the Co-op (January 2014). Assuming the date of dismissal to be 26<sup>th</sup> May the claimant had 7 full years' service as at the date of dismissal during all of which he was over the

age of 41 years. He is therefore entitled to a basic award equivalent to 10.5 weeks' pay (£1890).

5 48. With regard to the compensatory award the claimant's representative lodged a Schedule of Loss seeking past loss of earnings of £4320 up to October 2021 and 6 months future loss of earnings. I do not consider it appropriate to make an award of this amount. It was clear to me that whilst the claimant expressed a willingness to return to work during light duties such as on a checkout and working part time there was certainly a chance that this would not have been possible due to his health. I noted from his evidence that the claimant had returned to work after previous lengthy periods of fairly serious ill health and I accepted that there was at least some possibility that had matters proceeded as they ought to have done and the claimant remained in contact with the 2<sup>nd</sup> respondents there was at least a possibility he would have returned to work at some stage. On the other hand the fact of the matter is that the claimant has not taken any steps to mitigate his loss by applying for light checkout duties since the problem with his employment arose in March 2021. I consider that had the claimant taken reasonable steps to obtain such employment then he would have been able to obtain this fairly readily given the current employment situation in Dundee. At the end of the day, had there been no issue regarding the claimant's health, I would have considered it appropriate to make an award of 3 months pay to take account of the length of time it would have taken him to obtain another job. Given the issue of the claimant's health I would consider it appropriate to discount this to take account of the fairly high chance that the claimant would not have been fit to return to work in any event. I would therefore restrict the compensatory award relating to wage loss to 1 month's pay amounting to £720. In addition to this the claimant has lost the statutory rights which accrue after 2 years employment and I consider it appropriate to award a sum of £400 in respect of this. This brings out a total compensatory award of £1120.

49. It is clear that there was a complete failure by the respondents to follow the terms of the ACAS Code in respect of the claimant's dismissal. I consider it

appropriate to award an uplift of 20% to take account of this so that the total compensatory award is £1344. The total compensation for unfair dismissal is therefore £3234 (1890+1344).

5 50. The claimant had been employed for 7 full years and was therefore entitled to 7 weeks statutory notice of termination of employment. He did not receive this. I consider that the respondents were therefore in breach of contract by failing to give him any notice. The respondent shall pay the claimant £1260 as compensation therefor (7 weeks' pay).

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51. The claimant was entitled to paid accrued annual leave under the Working Time Regulations whilst he was off sick. It is unclear what the contractual position was and I was not referred to any documentation regarding any contractual entitlement to holiday leave which would have accrued over and above his statutory entitlement under the Working Time Regulations.

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52. I was also not given any information about the holiday year. It is clear that the claimant was off sick from March 2020 onwards and was unable to take leave to which he was entitled because of this. I consider that in this case however I am only entitled to look at leave lost during the current leave year. The statutory extension provided where an employee has been unable to take leave due to the Covid pandemic did not appear to me to be applicable in this case.

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25 53. I had no evidence as to what the holiday year was. I can only assume that it is likely that it would have been the calendar year.

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54. The claimant was entitled to 5.6 weeks paid annual leave each year. Taking the date of dismissal as 26<sup>th</sup> May then the claimant would have accrued 2.24 weeks annual leave for the period to 26<sup>th</sup> May 2021. This amounts to £403.20. The claimant is entitled to this amount in terms of regulation 15 of the Working Time Regulations. This sum requires to be paid by the 2<sup>nd</sup> respondent.

55. The claimant also submitted a claim in respect of any sick pay which he was due. On the basis of the evidence I find that he had exhausted his sick pay entitlement by 5<sup>th</sup> March 2021 and that therefore no further sums were due in respect of this.

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56. Insofar as any of the awards made are subject to the Recoupment Regulations the evidence I heard was that the claimant was not in receipt of any benefits to which Recoupment Regulations would apply and therefore there is no prescribed element.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**I McFatridge**  
**08 April 2022**  
**08 April 2022**