Reserved Judgment

THE EMPLOYMENT TRIBUNALS

Claimants	**Respondents**
(1) Ms D Moore	(1) 57a Logistics Ltd (In liquidation)
(2) Ms O Buryakova	(2) Rush Courier Services Ltd
(3) Mr S Peet	
(4) Mr R Maynard	

Heard at: London Central **On**: 4, 5, 8 & 9 January 2018

Before: Employment Judge Pearl

Representation:

First & Second Claimants: In person
Third & Fourth Claimants: Mr N Moore (Counsel)
First Respondent: Mr E Carnell (Director)
Second Respondent: Mrs M Peckham (Consultant)

JUDGMENT

The Judgment of the Tribunal is:

1 There was a transfer of undertaking from the First to the Second Respondent on 17 October 2016.
2 The employees were dismissed by letter dated 2 November 2016 from the Second Respondent.
3 The First Respondent breached its duty to inform and consult the Claimants under regulation 13.

REASONS

1 These claims arise out of the collapse of the First Respondent's business, which occurred in the circumstances set out below. The four Claimants claim, among other matters, unfair dismissal and also for wages. At a second case

management preliminary hearing on 22 September 2017, it was agreed that certain issues would be decided at this hearing. Taking the matter generally, the tribunal must decide, first, whether the Claimants were dismissed by the First Respondent and, if so, when. Second, whether they were dismissed by the Second Respondent and, if so, when. Third, if neither of the dismissals apply, did they resign and, if so, when? Fourth, did their employment transfer to the Second Respondent pursuant to regulation 13(1)(a) of the Transfer of Undertaking (Protection of Employment) Regulations 2006? If so, when was the transfer and was there, sixth, a failure to consult under regulation 13?

2 In resolving these issues I have heard from Mr Peet, Mr Maynard, Ms Moore and Ms Buryakova; and from Mr Massey and Mr Carnell. I have studied a bundle that exceeds 600 pages.

3 By way of preface to my factual findings, I will set out my assessment of the accuracy and reliability of the witnesses' evidence. In my view the four Claimants have given evidence with notable precision and care. I have been unable to identify any significant or relevant matters of fact where their recollection has fallen into error or should not be accepted. Of the two Respondents, I regard Mr Massey as having given more cogent evidence than Mr Carnell. Mr Carnell was passionate at times and has clearly been personally affected by the events in question. However, his various statements, in pleadings, documents and written and oral evidence are frequently contradictory or lack internal consistency. Some of the key points about which he has testified are irreconcilable with the more reliable evidence from elsewhere and, at times, I had difficulty knowing what to make of the evidence I was hearing from him. My conclusion is that his personal involvement in the unfortunate events that led to, and followed the insolvency of his company, has got in the way of his ability accurately to recall what happened. I accept that he has tried to assist the tribunal as best he can, but for reasons that I will set out below, I have ended up having to treat his evidence with very considerable care.

Facts

4 Mr Carnell started the First Respondent ("57a") in 2004 as a courier firm and the courier business was sold to the Second Respondent ("Rush") in 2012. This left the business of passport and visa services and this was conducted under the trading name 'Visa Swift'. It organised business and travel visas for business and leisure purposes. I am satisfied that this was a business that generated considerable turnover and was capable of producing significant profit. About 80% of the business was with travel management companies and 20% with members of the public. The business by 2016 employed six people and also engaged about 10 self-employed couriers.

5 By the end of 2015 there were financial difficulties being experienced and these are set out in paragraph 7 of Mr Carnell's statement. The business required liquidity at all times and this was because 57a had to pay the visa fees to embassies and the like, 'upfront'. These disbursements would be met when the client paid and, of course, a fee was charged for the service. By 2016, Mr Carnell says in his statement that the business was facing "extreme cash-flow issues." He

points to various contributory factors. There had been difficulty in paying the salaries of the employees. Unusually, the employees had themselves dipped into their own pockets in order to pay visa fees. Mr Carnell points to additional difficulties in reconciling billing and states that by the autumn of 2016, collection had become "impossible." There was also a large problem with bank funding. It is not necessary to investigate this in detail and I need only give an overall summary. There were two banks involved, Lloyds, which held the company overdraft, and HSBC which had entered into a Confidential Invoice Discounting arrangement with the company. This is an alternative to factoring the debt. I have not seen the terms of the arrangement but, in broad narrative terms, it seems that the bank was collecting invoice debt from customers and, initially sending 80% to 57a. However, by some point after the summer of 2016, it was, under the terms of the agreement, remitting nothing to the company. Mr Carnell told me that there were three debentures in place, two for HSBC and the third for Lloyds, and these were fixed and floating charges. There were also large debts owed to HMRC for tax and VAT and Mr Carnell has told me that he managed to negotiate time to pay on five occasions. Nevertheless, the position by October 2016 was very bleak. I am told that the ultimate statement of affairs after the liquidation shows total indebtedness of over £800,000.

6 In evidence Mr Carnell told me that it is his belief that 57a was still solvent by October 2016, but I am bound to comment that this seems to be unrealistic. He describes sending a large billing file to HSBC some months before this and they took the entire value, namely £13,000. He was having to fund the business with his own money. The facts, as they have emerged during the hearing, suggest that the company was unable to function and pay debts as they arose.

7 Mr Carnell has, in my view, been a little coy in his witness statement about setting out the full picture. He notes that in August 2016 he approached Mr Massey and Rush for a loan of £2,000 to cover the fees for the lodging of visas on a particular day. Mr Massey and Mr Carnell have known each other for some time and Mr Massey also refers to this loan. He adds that "such was the serious nature of the First Respondent's financial difficulties it could not continue [to] operate as a business … It needed further funds…" He says that the situation was "quite perilous" and in order to obtain some security for the money that was being advanced to 57a, he agreed that all payments would be processed through Rush. Again, I am far from sure that this is the full picture as opposed to a contracted summary of what happened. The reality is that about two weeks before the alleged transfer on 17 October 2016, a credit card machine was provided to 57a by Rush. As I understand the evidence, this meant that Rush was obtaining certain of the revenues payable to 57a. Indeed, Mr Massey states in his statement, "in effect, we were acting as a bank and invoiced their customers direct, it was sort of a factoring arrangement … As the First Respondent's bank had also ceased to support it, any money paid by its customers into its account for these applications would have been retained by the bank and not refunded to Rush …" It was put to Mr Carnell that the purpose of the agreement was to keep assets out of the scope of the bank's facility and Mr Carnell was unable to disagree. He said that it was to try to keep the business alive.

8 This was not the only problem by October 2016. Electricity bills had not been paid and all concerned realised that there was a real prospect of an imminent disconnection. As will be seen, the electricity was cut off on 19 October. In any event, by the week before this it was evident to Mr Carnell that new premises were required and Mr Massey made available some unoccupied office space that he had in Wells Street. Mr Massey also says that by mid-October he was interested in acquiring the business of 57a, although he is adamant that no transfer actually took place, as alleged by the Claimants.

9 Turning to the evidence of the Claimants, there is ample corroboration of what I have set out above. Mr Peet had worked as an employee for the company and Mr Carnell in two tranches, from 1997 to 2005 and from 2008. He processed visa applications but in time came to acquire a more managerial role and was seen as a senior employee in the business. He relates, as I find, that from late 2015 salaries were paid late and payslips were not always given out and that these problems worsened in 2016. Payments to subcontractors were also delayed. It is clear that all of the staff of 57a were loyal and Mr Peet relates how they would lend money to the company so that visa applications could be lodged. Some of these loans to the company, which ran into thousands of pounds, were repaid and some were not. By August 2016 Mr Peet notes that Mr Carnell was trying to save costs and was proposing a reduction in wages for the employees. Mr Peet rejected this proposal. By early September he describes a chaotic situation in the office and he was then told that the bank had stopped supporting the company. As this meant that some visa applications were not being lodged, there were increasing client complaints and, as Mr Carnell told me, confidence in the company began to ebb. Contractors were leaving because of non-payment. Further detail is set out in paragraphs 11 to 15 of Mr Peet's statement. This is consistent with all the other evidence I have received and confirms my view that by the end of September the company was facing collapse.

10 It was on 12 October 2016 that Mr Carnell told Mr Peet that Mr Carnell and Mr Massey had made a deal. At this point Mr Peet had not been paid for six weeks and had received no payslips since June. I find his evidence about the conversation to be credible and reliable, indeed when cross-examined Mr Carnell accepted almost all of it. Mr Peet was told that wages, and also financing the lodging fees and credit control, would all be covered by Rush. However, Rush would have no say in the day-to-day running of the business. The office would have to move.

11 On Friday 14 October Mr Carnell told him that the move would take place on Monday the 17th. Some of the staff would have to go to Wells Street on that day but others, including Mr Peet, had to stay at the existing office to carry out work there. I should note that at the existing location (Petersham House) a part of the building was occupied by ATPI which was a significant customer of the Respondent. The details of their relationship are irrelevant, but Mr Peet states that ATPI knew nothing on the Friday about the imminent move of office. He also says that they had, by this date, already informed 57a that they would not be renewing their contract. I have no reason to doubt this. Whatever the relationship by this point between these two concerns, and regardless of whether any future business might have been expected from ATPI, the cutting off of electricity on 19 October

would probably have severed the relationship for good. Unable to operate their business from that day, ATPI had immediately to move premises.

12 Ms Moore had been employed since 2013 by the First Respondent and was Office Manager. Mr Carnell told her on 14 October that things were not going well, which came as no surprise. She also rejected a proposed £5,000 salary cut. She was told that there would be an office move on Monday and she informed the staff. Mr Maynard is very experienced in this industry. He had also been employed from 2013 and his expertise was such that Mr Carnell had dubbed him "Visa Bob". He also notes the erratic payment of wages and the cessation of payslips over certain periods from September 2015. He was caused financial difficulty in September 2016 and received no pay due on 6 October. He also confirms that staff supported the business financially and he notes in passing that very little information about the true position of the company was divulged. He was on leave on 13 and 14 October, but received a telephone call from Ms Moore later that afternoon and told to report to Wells Street on Monday. Ms Buryakova's evidence is to similar effect and she was also told on the Friday that Rush would be paying her wages from that point on. None of the employees say that they were told about Tupe or the effects of a transfer of undertaking.

13 Mr Carnell says in his witness statement that between 10 and 14 October inclusive he spoke to all the staff individually and told them "there was a potential for a Tupe transfer and we would be moving premises." In my view, only the second part of this sentence is likely to be true. It is improbable that Tupe would have been mentioned or that the employees have forgotten to mention this (a point that would have strengthened their claims.)

14 The arrangements that had been reached as between the two Respondents were only oral and it is my finding that they would not have wished to reduce any of it to writing. Nor did Mr Carnell tell Mr Massey everything that the latter might wish to know. For example, it was conceded in evidence that he had not told him that wages had periodically not been paid to staff or that they had put their own funds into the business. The case which is advanced on behalf of both Respondents is that there was no transfer of the undertaking to Rush on 17 October, but that they envisaged a potential transfer at a later point in time, after the business had been demonstrated to be viable and profitable. They disagree about the timescale. Mr Massey in his statement says that it could have been six months or longer and that he was looking for a period of "sustained financial viability" and repayment of debts. Mr Carnell states that the transfer would have to take place after about a month of demonstrable good trading. It is far from easy to make factual findings about what was in each man's mind at that time. What I do find established on the evidence is that Mr Carnell was desperate to save the business and was prepared to take almost any step that would enable the company to try to continue trading.

15 The office accommodation at Wells Street that was made available from 17 October was a room that had been used as a control room. It housed computer equipment and would get hot. Air conditioning was necessary. When the staff arrived, they were extremely unhappy about the condition of the room. Mr Carnell, and Mr Massey to a lesser extent, challenge the sincerity of their evidence, but I

see no reason to doubt what they told me. They cooperated in the move, as I find, because they were being told that it would help the company out of its difficulties. With monies outstanding to them, they had no reason to sabotage the project. In any event, they turned up and, where possible, carried on working. The visa business was their livelihood and it is evident that they had always worked with Mr Carnell as a close-knit team.

16 Mr Maynard struck me as a dedicated employee and a straightforward witness, and I can conceive of no reason to conclude that he has exaggerated his evidence. "The office in which I was required to work was in a filthy state and appeared to be no more than a reassembled cleared out stockroom … The IT/work equipment was not fully up and running and there were inadequate working areas to process passport and visa applications, effectively making it a very difficult and hazardous environment to work in … wires were visible across the floors and all over the office from computer servers and machines. There was poor lighting and air conditioning, filthy carpeting and no access to a fire exit." His breathing worsened, but he carried on working by visiting the Angolan embassy before returning to Wells Street. Ms Moore arrived during the afternoon, was concerned about his health and sent him home, but Mr Maynard went home via the Chinese Lodgement Centre to hand in additional fees. When he saw his GP the next day he was signed off for five days. The view was that his asthma had been triggered by the working conditions.

17 Ms Moore corroborates all of this. She then states that she was overwhelmed by the working conditions she discovered and the heat coming from the two servers. She then met with Mr Massey and Ms Stock, who she understood to have an HR function. I accept that she was asked to supply her P45 so that Rush could draw up a new contract the next day. Ms Moore asked why this was but received no reply. She relates that she then began to feel ill and called her GP for an appointment the next morning. She also asked Mr Carnell to attend and she wanted him to explain the situation to the staff; and she states that none of the employees at the premises knew what was going on.

18 Ms Buryakova met Mr Massey at the premises during the morning. She also states that she was horrified by the poor working conditions and she describes much the same as the other witnesses. She took photographs which I have seen. When Mr Carnell arrived late in the afternoon she and another employee asked him who the employer was. "Mr Carnell, pointing out at Mr Massey, replied that Mr Massey, director of the Second Respondent was our new employer. The Respondents also advised that we would be getting our new employment contracts very soon. When we asked who would be paying our outstanding wages neither the First nor the Second Respondent replied." I have no basis for casting doubt on this account and Mr Massey is silent in his statement as to what was said in conversations on 17 October. Ms Buryakova was unwell during that evening and the next day and, in her case, anxiety appears to be the problem. She had a panic attack on the way to work on the 18th and after the events that I relate below, went to her GP and was that day diagnosed with an upper respiratory tract infection.

19 Having arrived at work the next day, 18 October, she went back to Ms Moore's home and used her phone to tape a conversation that Ms Moore had with Mr Carnell. The transcript at page 294 omits some of the conversation, but it is very helpful. I should add that Mr Carnell did not know that he was being recorded. Ms Moore says at the outset of the extract that she had signed no contract with Mr Massey and nor had anybody else. Mr Carnell observed that there was no business to pay people their wages to keep people in a job. Ms Moore said that they were voluntary workers because nobody had been paid the full salary since August. Mr Carnell appears to accept that and said: "I can understand that. And that is why the business has been put into the hands of a company that can fund it. And get the applications flowing through." Ms Moore then said that they had not received the paperwork "to say you have been Tupe'd over" and this appears to be a direct response to being told that the business had been put into the hands of the Second Respondent. In response Mr Carnell addressed the consultation aspect and he started to suggest that if there were under 15 employees, consultation might be abbreviated, although he did not develop this. He immediately said "… the process of informing staff often there is not a huge amount of time that's involved in these things. The fact is that the notification does come through a verbal form of saying look this is the model that we are going to operate this is the transfer of employment …" During the course of his evidence the meaning of this was considered and he faintly suggested that this could relate to some transfer of undertaking later on in time. In my view, this is not what he was talking about, as it seems irrational to suggest that any future transfer would require to be effected in a rush. I find that he was clearly referring to conversations with staff during the preceding week, not least because he has asserted in the litigation that that was when the consultation took place. The inference I draw from this telephone call is that he was telling Ms Moore, in terms, that the business had been transferred to Rush. She ended the conversation in the extract on an adversarial note by saying that the staff could now go to ACAS and her point was that they had not been told in writing that the transfer had taken place. This confirms my view that she understood that this was what Mr Carnell was telling her, namely that a transfer had taken place.

20 On Tuesday 18 October, Mr Peet carried on work at Petersham House. Ms Moore was there and they both say that Mr Pumphrey-Stipp, head of finance and IT, related to them what Mr Massey had just told him on the telephone. This was that anyone who did not turn up for work would have no job to go to. Mr Peet went off to embassies in relation to work and then went to Wells Street where he found Mr Carnell. Much of this conversation (paragraph 23 of Mr Peet's statement) is accepted and I draw attention to: "he told me that under TUPE regulations he only had to tell staff at the earliest opportunity which he said was Friday 14th October."

21 He was then introduced to Mr Massey who told him that the move had to happen quickly because of the threat of electricity being cut off. He then asked: "if I knew that the Second Respondent were our new employers and, because of what Mr Carnell had just confirmed regarding TUPE, I said yes." Again, and taking into account the accuracy on points of detail of the remainder of his statement, I find that these were the words that were spoken. Mr Peet then questioned the ownership of the company and mentioned that the employees

might be looking at the legal position, whereupon Mr Massey said words to the effect of the following: if you want to talk like a courtroom barrister, you could get out now. He then said that the Second Respondent would be paying wages from 17 October onwards but would not be responsible for previous wage debt.

22 Mr Peet discovered at Petersham House the next morning that the electricity had been disconnected. ATPI, he notes, were furious and were already packing up. His anxiety levels were very high and he says that he was shaking and he went straight off to his GP. It is not disputed that at some previous time he had been involved in a road traffic accident, suffered PTSD and was at this time undergoing CBT therapy. He was, therefore, vulnerable in that regard and the GP now prescribed antidepressants and sleeping tablets. I accept his evidence that they had never been prescribed at any stage before. He went to his own therapist on 20 October.

23 Ms Moore corresponded with Mr Carnell by text message. On 20 October she said that people needed to know if they had been transferred or made redundant. The response, page 315, was: "everyone was Tupe over on same salary and benefits.. everyone turned up for work on Monday.."

24 Mr Peet wrote to him on the same day and I note his second paragraph: "the lack of clear communication regarding the TUPE transfer, the subsequent absence of staff, plus seeing the electricity and phones cut off in Petersham House resulting in ATPI immediately packing their equipment away, triggered a significant anxiety attack I had not anticipated." One of the points to be taken from this is that he plainly thought there had been, or at the very least he was being told that there had been, a transfer of undertaking. On the same day he wrote to Mr Massey and apologised for not being able to come to work. From this email at page 305 I can infer that he thought that Mr Massey was his employer.

25 Mr Maynard wrote to Mr Massey on 21 October and also alleged that there had been a transfer of the business and that it was subject to the regulations. He explained about his health and also the wages that he was owed and he referred to his change of workplace and employer.

26 On 24 October, 57a, at Mr Carnell's direction, raised P45s for all four employees and they received them two or three days later. In each case the leaving date was specified to be 14 October 2016. Again, the suggestion emerged in cross examination that these might have been prepared for a future and potential transfer of undertaking. This strikes me as being implausible, since they were sent to the employees. I shall return to the matter in my conclusions.

27 Ms Buryakova sent a letter of grievance addressed to both Mr Carnell and Mr Massey at Wells Street on 24 October and she also referred to "my purported transfer of employment from Visa Swift Ltd to Rush Couriers Services Ltd." She set out various complaints that I do not need to further detail here.

28 After a follow-up email from Mr Maynard, Mr Massey on behalf of Rush, responded to the employees on 2 November and the terms of the letters are identical. He wished to set out what had transpired between 57a and Rush and

he maintained that 57a was still their employer. He referred to financial assistance that his company was giving to 57a. "As part of the conditions attached … Rush Courier Services required the Visa Swift business to be conducted from its own premises at Wells Street, all of this having been concluded at very short notice. Therefore, in order to protect its interests, Rush will be temporarily invoicing customers directly for these services … The ultimate intention, providing there was a business would have been for Rush Courier Services to acquire the goodwill and assets of 57a … which would then at that point give rise to a TUPE transfer …" He denied that there had been a transfer of undertaking.

29 Both Mr Peet and Ms Moore wrote again to point out that they were being told inconsistent things about the transfer. On 11 November 2016 these employees were sent by Mr Carnell letters that were also in identical terms. He alleged that the absence of the employees was as a result of "collective staff action" which had affected the business. He said this meant that "the proposed transfer of the business, along with the transfer of employees under TUPE can no longer take place …" He stated that the P45s were prepared in advance of completion of the transaction and because of "group sickness" the business had, as I read the letter, been outsourced. As to the history in October, he stated that employees had been notified in the previous week of "a potential TUPE transfer" and that on Monday morning Rush had required P45s "before any transfer could be effected." A little further on he stated that P45s were required for a full transfer to occur and that he asked for them to be raised in preparation. These are, in themselves, difficult passages to reconcile, in my view. In any event, the letter ended by inviting the employees to a meeting on 15 November in order to discuss what were described as key issues.

30 On 16 November Mr Carnell was asking accountants to prepare his P45 because Rush required it to add him to their payroll. In a further email to accountants the next day he suggested that the employees were technically still his staff. Also on 17 November Mr Peet wrote with a comprehensive chronology of events that suggested that a transfer had taken place and that this was what the staff have been told. I also ought to note that Mr Wrench, who had been a senior employee at 57a, was employed by Rush and that his start date in the contract of employment is specified as 14 October 2016.

31 In a letter sent to Ms Buryakova's local authority on 30 May 2017 (page 408) Mr Carnell stated that she and Mr Peet had been dismissed from 57a in October 2016; and, that she had been required to transfer location and "TUPE across to a new company." She had been consulted properly, he said, and after one day at the new location went on long-term sick and the company could not operate. These, again, are statements that cannot be reconciled with some other positions taken by Mr Carnell in correspondence.

32 Turning to the oral evidence, Mr Carnell was in evident difficulty in explaining his position concerning a transfer or in reconciling various contradictory statements that he had made. He resorted to some degree of euphemism. For example, when asked about his having said on the telephone that the business had been put into the hands of a company that could fund it, he said: "we were in

a support structure of another company which could help us fund the actions where our salvation lay." However, when, a few minutes later it was suggested that it appears that he had told Ms Moore that everybody had been transferred over to Rush, he conceded that this was the case, but went on to say that it was not correct. He maintained that in earlier discussions he had told the employees of the *potential* for a transfer of undertaking, but in the context of everything that I have heard I am satisfied that this is inaccurate and that he has been compelled to rationalise matters after the event. The consultation that he said took place the week before, he had to say related to the future potential transfer but, in my view, this is untenable. He was taken to the ET3 presented in the case of Ms Buryakova at page 118. This says that on 12 October he explained the Tupe process to her and that Rush was the chosen intended partner. Further, transfer "was planned for the following Monday" and that all staff were told that "… As from the transfer date Monday 17th it was envisaged to effect a full TUPE transfer of staff and contracts on this day." "On the day of transfer" both Mr Massey and he answered all questions from staff. In my view, Mr Carnell was unable to give a satisfactory explanation as to why he said this. A little later on in the cross examination he came close to making an admission about transfer when he told me that the intention had been to effect a transfer on 17 October. I am bound to note that he then immediately switched to suggesting the transfer was for the future. When he was asked about page 408 he said that the requirement from Ms Buryakova to transfer across was only a matter of intent. None of this is really explicable. As to the letter that he wrote on 11 November, he maintained that a reasonable employee should have understood that s/he was still employed by his company. It is far from clear, in my judgement, that a reasonable employee could come to that conclusion but, in any event, what the letter does not state is that 57a remained the employer. In a situation of such contradiction, when he knew what the employees were saying about transfer, this is a notable omission.

33 A feature of his evidence throughout has been that he blames the employees for leaving work at some stage during the week and he has occasionally accused them of planning to bring the business down by fabricating illness and staying away. I therefore record further findings as follows. First, there is no evidence that any of these illnesses were not genuine. Second, ATPI had given notice to end their agreement before these events and Mr Carnell accepted that this was a significant loss of custom and had nothing to do with the employees. Third, his accountants have been the target of considerable criticism by him and he says that they were "pivotal in the business going down." This was nothing to do with the employees. Fourth, because there had been no allocations, he was approaching insolvency in October, in his view. These factors are merely taken from his own oral evidence. There are, additionally, the financial and commercial reasons that explain the demise of 57a. He also told me that "small cash jobs" in relation to the visa business are still carried out by Rush.

34 Mr Massey was adamant that he did not know the financial predicament of the employees in advance or how badly they had been treated. Nevertheless, he thought that the business looked a wonderful opportunity "on paper." He also says that he did not know the true level of indebtedness in the company and he believed that the business was merely facing a cash flow problem. When viewed against the background as a totality, I am reluctant to accept this as accurate,

since the provision of credit card facilities indicates that he must have known that Mr Carnell had exhausted his available lines of credit. Rush was agreeing to pay the wages of all the staff, which also suggests that Mr Massey must have realised the parlous state of the finances of 57a.

Submissions

35 I am grateful to all parties for the oral submissions and, additionally, to Mrs Peckham for her comprehensive opening note which summarises the law.

Conclusions

36 It is agreed on all sides that I am faced with a factual question: was there a transfer of the undertaking to the Second Respondent? Mr Moore contends for an informal transfer that was deliberately carried out without any documentary trail. The Second Respondent's stance is that it stepped in to help an ailing concern, was interested in seeing whether it might take on a viable business in due course, but was party to no transfer of undertaking.

37 When I step back from the detail, it becomes apparent that the Claimants' case for a transfer is a strong one. 57a was effectively finished by early October. It could not pay its debts, had lost an important customer in ATPI, was losing other customers as it could not (in a competitive market) provide services as it would wish, had been forced to borrow from employees to fund daily operating costs, had stopped paying wages in full or, possibly, at all; and could not look to its bankers or any other lending institution. It was in severe difficulties with HMRC. There would have been every reason to liquidate the company, but Mr Carnell had an irrepressible belief that all would come good. The agent of this financial redemption was to be Rush, with whom he struck a "deal" as it was termed in conversations with employees.

38 That agreement goes beyond the limited provision of support and it has led both Respondents into circumlocution when giving evidence. Mr Massey suggested that the invoicing arrangement was "temporary", but this cannot be correct. It was only temporary in the sense that it could be ended by a subsequent liquidation. For as long as 57a traded, it was the only arrangement possible. But the agreement, in my view, went a long way beyond invoicing arrangements or even the provision of office premises. There was a wholesale handing over of control to Rush, even though Mr Carnell would be directing day to day operations. The evidence that this was what was intended is quite clear:-

38.1 Rush had in mind a need for P45s from the outset, ie 17 October, if not earlier. I agree with Mr Moore that the issue of P45s is an administrative step that is likely to be taken in many transfer situations; and that it is hard to see why they would otherwise be required here. The suggestion from Mr Carnell that it was to abide the event in case there was a future transfer is not credible and is also contradicted by Rush.

38.2 Ms Buryakova was told by both Respondents on the 17th that Mr Massey was the new employer.

38.3 Mr Carnell said as much to Ms Moore in the taped telephone call of the 18th: see paragraph 19 above.

38.4 Mr Carnell intimated the same to Mr Peet on the same day. Shortly thereafter, Mr Massey confirmed he was the new employer, in terms. The 'court room barrister' remark, no doubt spoken in frustration, was nevertheless the response of an employer, not a bystander.

38.5 Also on the 18th, Mr Massey wanted the staff to be told there would be no job if they did not attend the premises. He was acting as employer.

38.6 Mr Carnell thereafter wrote in a text message that everyone had been transferred over: paragraph 23 above.

38.7 This is what the employees believed they were being told.

38.8 It is what Mr Carnell told a local authority in May 2017 and repeated in the ET3 to Ms Buryakova's claim.

39 The relevant legal principles are as follows. Although the Directive 2011/23/EC is to a considerable extent enacted in the TUPE Regulations of 2006 I set out both.

Article A1(1) of the Directive provides that:

> ***"(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.***
>
> ***(b) Subject to(a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancilliary"***.

Regulation 3(1) of the 2006 Regulations provides that the Regulations apply to:

> ***(a) "Transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity"***.

Regulation 3(2) provides that:

> ***In this Regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancilliary"***.

The European Court of Justice has often repeated the view that the Directive is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue work for the new employer on the same conditions as those agreed with the transferor. It is a purpose of the Directive to

ensure that the relationship continues unchanged for the transferee, see for example **Astley v Celtec Limited** [2005] IRLR 647, ECJ at paragraph 26 to 29. In **Spijkers** [1986] ECR 1119, 1128, the ECJ in a classic pronouncement held that:

> **"The decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question retains its identity".**

The Court stated:

> ***"In order to determine whether those conditions are met, it is necessary to consider all the facts characterised in the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings or movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any for which those activities were suspended. It should be noted however that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation"***.

It is for the Employment Tribunal to make the necessary factual appraisal in order to establish whether or not there is a transfer. Similar language was used in **Astley v Celtec** supra. One slight variation in the language is that, at paragraph 35, the Court held that:

> ***"It follows that the decisive criterion for establishing whether there is a transfer… is whether a new employer continues or resumes the operation of the unit in question, retaining its identity"***.

This is a reformulation of the word in **Spijkers** that I have cited but does not in any sense change the meaning of the guidance in that 1986 case.

I also note **Allen v Amalgamated Construction Co Limited** [2000] IRLR 119, decided in a different context. Having cited the Acquired Rights Directive, Article 1(1), and its reference to a transferee or a transferor as any natural or legal person, the ECJ continued as follows in paragraph 16:

> ***"The Directive is therefore applicable where, following the legal transfer or merger, there is a change in the natural or legal person responsible for carrying on the business who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred … It is thus clear that the Directive is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group …"***

40 Mr Moore has, therefore, submitted with good reason that there was a transfer to Rush of an economic entity that retained its identity, with a grouping of assets and employees. The economic activity remained the same. Existing visa applications were taken straight over and the existing clients would still fall to be serviced. He says the move was 'seamless' and I agree this was the intent. On the crucial question of fact I conclude, on the evidence, that 57a was transferring

its business to Rush, not least because that was the only way it could continue to operate. It was the intention of both parties and the employees were told this. Only later was it expedient for Mr Massey (and, on occasions, Mr Carnell) to distance himself from what had actually occurred by maintaining that the support he provided was limited and stopped short of a transfer. Mr Moore submits that the subsequent confirmation that Mr Carnell and Mr Wrench began employment with Rush from 17 October supports the claims. I agree.

41 Mrs Peckham has made contrary submissions, contending that Rush only provided ad hoc support to 57a and lacked control of the visa business. She has suggested I consult **Print Factory (London) 1991 Limited v Millam [2006] IRLR 923 (EAT)** and [2007] IRLR 526 (Court of Appeal). That case concerned the employer being sold to a company by a share sale agreement in 1999. I do not find that it bears on this situation. [1]

42 I have, for the reasons I have set out, concluded on the evidence that there was a transfer of the undertaking to Rush and that this occurred on 17 October 2016.

43 As to dismissal, between them the parties have pointed to five potential dates. Mr Moore makes a simple submission that, although the 2 November letter from Rush did not expressly dismiss the employees, it necessarily had that effect, because it denied that Rush was the employer. It denied the very status of employer, or that there was an employment relationship with these employees. That employment relationship had arisen by statutory implication because of the transfer. In this situation, I consider it artificial to hold that an express termination of an existing contract must be communicated to an employee before a dismissal arises. Where the employer is denying that it is or ever was the employer, the only sensible construction to be put on its stance is that is terminating the contract. Denying that there is even a contract to terminate is, in my view, at least as clear, if not clearer, than an express termination of an acknowledged contractual relationship. I would, therefore, adopt Mr Moore's reasoning and hold that these employees were dismissed on 2 November 2016. They were confused and left in doubt by the situation the two companies had created, and some medical certificates were subsequently sent to one or both companies, but that is an immaterial fact in my view.

[1] For completeness, Mr Millam was told that the identity of his employer was not changing but he was also given the contradictory information that his employment had been continued under TUPE. The employer and the purchasing company were separate companies with separate registrations. The purchasing company paid the employees' wages. At first instance the tribunal concluded that the share sale agreement superficially suggested there had been no transfer, but the purchasing company had done far more than a simple shareholder would have done following a simple sale. It had in particular handled a significant element of the management of the employer and it was not merely a shareholder. It was therefore a TUPE transfer. This was overturned in the EAT principally because it was held that the tribunal had pierced the corporate veil. This was in turn overruled by the Court of Appeal and Buxton LJ noted at paragraph 7 that the issue of piercing the corporate veil did not arise. He stated that no judicial effort was required to render the purchaser liable for what was done by the vendor because the employment tribunal found that purchaser was performing the activity in the first place."

44 As to regulations 13 and 13A, there is a plain breach of the regulation which provides that there must be consultation with the employees individually (assuming that 13A applies), because Mr Carnell did not inform them of the "fact that the transfer is to take place" or the various implications referred to in regulation 13. There has been no consideration of the "special circumstances" defence in regulation 15(2) during the hearing. I have not considered whether it is being advanced and observe that there may be some difficulty in doing so, in light of my finding that nothing was said about a transfer, or Tupe, on or before 14 October.

45 I would ask the parties to inform the tribunal within 14 days of the date of promulgation how they wish to proceed. In the case of Ms Moore and Ms Buryakova, they need not write if they inform Mr Moore's instructing solicitors that they agree with their proposals.

Employment Judge Pearl on 12 January 2018