Case Number: 1400594/2017 and others
(See attached schedule)

EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
	v
Mr M Williams (1)	**LCG International Ltd (1)**
Mr RC Cooper (2)	**Professional Design Works Ltd (2)**
Mr R Day (3)	**Suprema Group Ltd (3)**
Mr S Collinson (4)	
Mr M Taviner (5)	
Mr A Voysey (6)	

OPEN PRELIMINARY HEARING

Heard at: **Bristol** **On: 4 and 5 December 2017**

Before: **Employment Judge Pirani**

Appearances
For the all the Claimants: Mr A Johnston, counsel
For the First Respondent: did not attend
For the Second Respondent: did not attend
For the Third Respondent: Mr R Peebles Brown, husband of director

REASONS

Reasons were provided on 5 December 2017. Subsequently the first respondent requested written reasons on 8 December 2017.

Background and issues

1. By claim forms received at the tribunal from 7 March to 7 April 2017 the claimants in these proceedings brought claims against the respondents for:
i. failure to inform and consult: TUPE regulations
ii. unfair dismissal
iii. redundancy pay

iv. breach of contract: outstanding notice pay
v. outstanding holiday pay
vi. failure to provide particulars of employment
vii. failure to provide itemised pay statements

2. The claimants say they were dismissed either on 31 January or 1 February 2017 after receiving letters dated 30 January 2017.

3. There have been two telephone case management preliminary hearings in these cases on 3 July 2017 and 22 September 2017.

4. This Open Preliminary Hearing has been convened to determine the following issues:
i. Who employed the claimants at the point of dismissal: in other words was there a TUPE transfer either from R3 or R2 to R1 from 26 to 31 October 2016?
ii. Was it reasonably practicable for the claimants to bring their TUPE related claims in time and, if not, did they bring the claims within such further period as the tribunal considers reasonable?
iii. Were the responses presented in time and, if not, should time be extended?

Application to Adjourn

5. By an email sent on Saturday 2 December 2017 at 10.13 Mr Roman Shovgeniuk emailed the tribunal attaching a previous email sent on 30 November 2017 at 15.58 saying that he was now the sole director of R1, having recently purchased the company. Mr Shovgeniuk requested an adjournment so he may have time to prepare and defend his position. Mr Shovgeniuk also asked the tribunal to send him copies of "the full file" in relation to all these cases. Of course, all documents have been previously sent to R1.

6. The tribunal replied on the morning of 4 December 2017, saying the issue would be dealt with on the morning of the first day of the Open Preliminary Hearing. In the event, R1 made no further representation and did not attend the hearing.

7. No explanation was provided why R1 was unable to obtain legal representation or to attend in person at the hearing. The tribunal received no reply to its email.

8. Rule 47 of the Employment Tribunal Rules sets out the tribunal's options when faced with the non-attendance of a party. It states that the tribunal may dismiss or continue with the proceedings only after taking into account any information in its possession about the reasons for the party's absence, 'after any enquiries that may be practicable'.

9. R2 has been copied into correspondence on the first morning and has not replied. R1 also did not reply. R2 did not attend the two previous hearings. The application to adjourn was resisted by the claimants and R3.

10. The Tribunal Rules contain no general guidance on the factors that a tribunal or judge must consider when deciding whether to order a postponement or adjournment. However, it has

been held by the Employment Appeal Tribunal that the discretion must be exercised 'with due regard to reason, relevance and fairness', and subject to the overriding objective. This hearing has been listed for many months. The claimants have been kept out of money which they say is due to them for approximately one year. It is unclear why R1 failed even to attend today. It is not said that the hearing comes as a surprise to the new owner of R1. The tribunal was not put on notice that R1 was being sold or that there was any difficulty in attending prior to the email sent on 30 November 2017. R2 has not attended the two previous hearings.

11. I also note that pursuant to rule 2, the overriding objective includes 'avoiding delay' and 'saving expense'. Taking all this into account, I declined the application to adjourn.

Clarification of the claims

12. It was clarified at the commencement of the hearing that the claimants' primary case is that their employment transferred from R3 to R1 by way of a business transfer at some stage between 26 and 31 October 2016.

13. Because Mr Williams brought two claims, sensibly he has elected to withdraw the first of those claims issued on 7 March 2017, namely claim number 1400402/2017.

14. In addition, although all the claimants other than Mr Taviner seemingly made claims for failure to inform and consult in relation to previous TUPE transfers these are no longer pursued. In other words, the sole claim for failure to inform and consult for all claimants relates to an alleged transfer said to have occurred in October 2016.

Documents and evidence

15. I had bundle produced in accordance with my previous orders. It contains two sections: the first of pleadings, tribunal orders and correspondence, which ends at page 183, and the second of substantive documents ending at page 101.

16. I heard evidence on the preliminary issues from all the claimants. No one else attended to give evidence.

17. R2 had previously sent in a signed but undated statement from John Commander, a chartered accountant. He did not attend for cross-examination. I decided to attach little weight to it as many of the fundamental facts in this case are disputed.

18. For R2, Ms Ortega also provided a statement (see at 79) which said that the claimants were not employees of R1 but were the responsibility of R2.

19. Mr Luis Acosta, also a former director of R2, gave a statement in similar terms to that of Ms Ortega (80).

20. Mr Vladimir Pavelcik provided a statement for R1 saying it never employed the claimants whom he says were employed by R2.

21. I also had a statement from Crystal Pavelcik, a shareholder of Savoy Partners London.

22. Because many of the underlying factual issues in this case are contested I accorded little weight to the statements of witnesses who failed to attend the tribunal and were therefore unable to be cross-examined by the claimants and R3. However, I did consider the statements of R1 and R2 together with their pleaded cases, in spite of what is set out below in relation to the late submission of some of the responses.

Responses

23. As previously set out in the case management Orders respondents must make sure that the completed response or ET3 form is returned to the relevant employment tribunal office within the applicable time limit. Rule 16(1) of the Tribunal Rules stipulates that a respondent must present his or her response to the tribunal office within 28 days of the date on which the copy of the claim form was sent by the tribunal.

24. When entering the response, it is important that the respondent only use the response form provided by the tribunal or, alternatively, obtained from the Employment Tribunals Service website. A mandatory response form has been prescribed by the Secretary of State by virtue of Reg 12(1)(b) of the Tribunal Regulations for the purpose of responding to a tribunal claim. This form is known as an ET3 and must be used, subject to some minor exceptions, when presenting a response to a claim — see rule 16(1).

25. An application for an extension of time for presenting a response must:
i. be presented in writing and copied to the claimant, and
ii. set out the reasons why the extension is sought: rule 20(1).

26. If the time limit for presenting the response has already expired, the application must also be accompanied by a draft of the response which the respondent wishes to present or otherwise by an explanation of why that is not possible. If the respondent wishes to request a hearing, this must be done in the application. However, even if the respondent has requested a hearing, rule 20(3) states that an employment judge may determine the application without a hearing.

27. When considering whether to allow a response out of time, among other things, the tribunal will consider:
- the employer's explanation as to why an extension of time is required
- the balance of prejudice. Would the employer, if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted?
- the merits of the defence. If the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time — otherwise the employer might be held liable for a wrong which it had not committed.

28. On 14 August 2017 I caused a letter to be written, reminding R1 and R2 of the contents of paragraph 2 of my Order of 3 July 2017. It provided: If any of the respondents wish to make any applications to submit responses out of time they must do so by no later than 4pm on 31 July 2017 together with (a) copies of draft response forms, and (b) a written application to submit the response out of time.

29. Also by letter dated 7 September 2017, R1 and R2 were asked to comment on the claimants' application that those respondents who have presented responses out of time be prevented from taking further part in the proceedings. Replies were to be sent on before Thursday, 14 September 2017.

30. R1 was reminded of this again at the date of the last case management preliminary hearing. R2 had not responded before the last hearing and did not attend.

31. There is no issue that R3 has entered its responses to all the claims in time.

32. R2 entered responses for all the claims on 26 June 2017 which is out of time for all claims. Despite previous case management orders and letters, R2 has made no application to submit responses out of time. The tribunal has already sent a Rule 21 letter to R2 in the case of Cooper 1400510/2017.

33. R1 has submitted responses on correct forms in time for the Williams 1400594/2016 and Cooper 1400510/2017. The tribunal had granted an extension of time to submit the response in the case of Cooper to 26 April 2017.

34. R1 has failed to submit responses in time for the remainder of the claims. Similarly, R1 failed to make any applications to submit responses out of time.

Effect of Rule 21

35. Rule 21 of the Employment Tribunal Rules provides that where a response has been rejected: An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone. The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

36. In these cases the claimants initially presented their claims in the alternative and have brought claims against three respondents. I therefore determined that it was not possible to determine the claims without a hearing. In addition, there are issues relating to time limits which are jurisdictional and for which the burden rests on the claimants.

37. In any event, R1 has provided responses in time for two of the claims and R3 for all of the claims. Accordingly, there would have had to be a hearing in any event.

38. Nonetheless, for the claims in which responses have been submitted out of time and for which no extension of time was granted, both R1 and R2 will only be entitled to participate in any hearing to the extent permitted by the Judge. In any event, neither R1 nor R2 attended this hearing.

The issues in dispute re TUPE transfer

39. The clarified claim of the claimants is that there was a business transfer from R3 to R1 on or around 26-31 October 2017.

40. Position of R1: The first respondent says that the claimants have never been their direct employees. Rather, they say the claimants were third party contractors who were directly employed by the R2. In the response forms submitted, R1 says it has contracts with third party companies to provide services which are required to fulfil its business needs. In this instance, it is said the first respondent had a contract with the second respondent to provide workers for its company to fulfil specific carpentry jobs.

41. Position of R2: Ms Ortega (from R2) wrote on 26 June 2017 apparently conceding liability. She says that she purchased the second respondent under the impression that no employees were in the company. However, she says in October 2016 she was informed that Mr Williams, Mr Cooper, Mr Day, Mr Collinson, Mr Taviner and Mr Voysey were employed by Professional Design Works Ltd. She says employment is recognised from 26 October 2016 until 3 February 2017 and Professional Design Works Ltd accepts all financial liability for all outstanding pay due to them during this time. However, no outstanding monies have been paid to the claimants.

42. Ms Ortega seems to say the reason employees were not paid in full up to this date is that there is an ongoing discrepancy as to what is owed to them before 26 October 2016, as the former director, Caroline Peebles Brown, had transferred the employees without anyone's knowledge and paid them from her new company, Suprema Group Ltd.

43. According to Ms Ortega, on 3 February 2017 all employees were notified by the management of Professional Design Works Ltd that due to the dispute they were let go. She goes on to say it is still 'in the air' as to who is responsible for the claimant's past money owed to them as between the second and third respondents prior to 26 October 2016.

44. It is unclear on what legal basis R2 sets the cut-off date for liability as 26 October 2016.

45. Also sent by R2 are documents headed "affidavits" unsigned by solicitors. However, they appear to be signed by the claimants and written to HMRC dated 2 December 2016. It says Class Creations Ltd was sold on 8 August 2016 and became Professional Design Works

Ltd. The documents also say that at no point since 8 August 2016 has Professional Design Works Ltd paid them.

46. The tribunal wrote to R2 on 28 September 2017 asking R2 the following questions:

i. What, if any, outstanding amounts of money does R2 concede is owed to the claimants? If money is owed, R2 should set out the amounts owed for each claimant, the period to which the amount relates and the reason for the debt (e.g. outstanding wages or holiday).
ii. The legal and factual basis on which it is said that R2 is not liable for wages prior to 26 October 2016.
iii. The date on which it is conceded that the claimants TUPE transferred to R2.
iv. The date(s) on which it is said R2 first provided the tribunal with its responses to these claims.

47. Ms Ortega replied on 9 October 2017, essentially repeating what she had already written.

48. Position of R3: at the commencement of the hearing Mr Peebles Brown, representing the third respondent, clarified that he agreed the claimants transferred from R3 to R1 prior to their dismissal.

Findings of fact

49. After reading the witness statements and relevant documents, hearing the evidence and considering the submissions of the parties, I made the following relevant findings of fact.

50. The background to this case is complex and seemingly involves activities which are the subject of ongoing investigation by the Insolvency Service criminal enforcement team.

51. The claimants all began their employment with a company called Suprema Concepts Ltd in 2008.

52. Suprema Concepts Ltd operated as a furniture manufacturing business which produced cabinets, worktops and other products, primarily for the dental healthcare sector but also for other healthcare providers. The business was comprised of an office, in which the claimants produced drawings and production paperwork, a mold to produce panels, and an assembly shop to assemble furniture. The business operated from three leased industrial units on the same site in Erdington, Somerset.

53. Suprema Concepts Ltd leased equipment used by the claimants including presses, roller presses, a wood chipping machine and various saws, drills and sanders.

54. Mr Voysey was employed as operations manager. His day-to-day activities included scheduling of manufacture and installation of the products. Mr Day was a special projects manager reporting directly to the managing director. He dealt with most things except for financial matters. Mr Cooper was a furniture maker who produced and assembled furniture.

Mr Taviner was the furniture maker/workshop supervisor. Mr Collinson was a bean saw operator who cut sheet materials.

55. In total, Suprema Concepts Ltd employed about 12 people. The claimants in this case all have the benefit of household insurance protection. Accordingly, they are a subset of the total number of employees.

56. On 6 February 2012 Caroline Peebles Brown, the managing director of Class Creations Ltd, wrote to the claimants saying their employment was being transferred as part of the purchase of a going concern. It seems that their employment was TUPE transferred at this time to Class Creations Ltd. It is accepted by R3 that this was a business transfer.

57. None of the facts set out thus far it seems are controversial.

58. On 22 July 2016 Mrs Peebles Brown, still the managing director of Class Creations Ltd, entered into an agreement with LCG – London Capital Group Limited (LCG Capital) whereby the latter undertook to provide a sales mediation of the former.

59. The directors of LCG Capital were, at the material time, Vladimir Pavelcik (who was also a director of R1) and "Jose Luis Lopez" (who remains a director). Jose Luis Lopez is also known as Luis Acosta, who subsequently became a director of R2 on 22 October 2016 (see letter from The Insolvency Service at (81 – 84)).

60. LCG Capital was to find a party interested in the purchase of Class Creations Ltd within 30 days from the date of the agreement for remuneration of £15,000 (3). The address of LCG Capital is Salisbury House, London Wall.

61. In August 2016 Mrs Peebles Brown informed the claimants that she had sold the company *name* of Class Creations and was now debt free. She went on to explain that she would be running the new company as a manager, everything would remain the same and the claimants would be repaid outstanding wages which had been unpaid in May and June 2016.

62. On 8 August 2016 Class Creations Limited (now R2) was sold to new owners. "Ms Tania Ortega" was then appointed as a director at Companies House. Also on this date Mrs Peebles Brown resigned as a director.

63. Ms Ortega is known to the Official Receiver as she is a known director of some five companies in liquidation (see at 83). She has not surrendered for interview in respect of those companies and the Official Receiver has seen no evidence that she really exists. The Official Receiver observes that Ms Ortega was appointed as company director after the presentation of winding up petitions in those companies and has seen no benefit of the company from her appointment which has only resulted in the hampering of the Official Receiver's duties as liquidator (83).

64. 12 August 2016 was the last date on which the claimants were paid by Class Creations Limited (now R2).

65. On 16 August 2016 there was purportedly an agreement between R1 and Class Creations Ltd (4A-T). The agreement is headed Business Asset Sale agreement. In essence, the document provides that the parties agree that assets shall be transferred to the purchaser, namely R1. Completion is said to take place at such other place, time or date as may be agreed between the purchaser and the vendor (4I). Consideration was said to be for £196,000. Ms Tania Ortega signed as vendor of Class Creations Limited (4T).

66. I pause to note that, bearing in mind the financial difficulties Class Creations found itself in, together with the fact that the premises and equipment were leased, it is not credible that its assets were worth anywhere near the £196,000 purportedly paid.

67. On 17 August 2016 the claimants' employment transferred from Class Creations Limited (now R2) to R3 (see at 5 and 6).

68. It then seems that on 5 September 2016 Class Creations Ltd changed its name to Professional Design Works Ltd, namely R2 (see at 83). On 9 September 2016 there was a presentation of a winding-up petition by the Secretary of State for Business, Energy and Industrial Strategy against LCG Capital (81-85).

69. Luis Acosta (a.k.a. Jose Luis Lopez) was appointed as a director of R2 on 22 October 2016.

70. Throughout this time both the claimants and Mrs Peebles Brown (by then R3) remained on the same site carrying on business relatively usually without any input from R2.

71. Then on 26 October 2016 Vladimir Pavelcik (R1) and Luis Acosta (R2) attended at the factory premises at 12 Suprema Park, Edington and effectively evicted Mrs Peebles Brown from those premises. On the same day the claimants were ordered to leave the premises.

72. On Thursday, 27 October 2016 the staff, including the claimants, were instructed to stay at home until Monday 31 October. After coming in on Monday 31 October 2016 the staff were sent home on Wednesday.

73. Mr Voysey received a request from Vladimir Pavelcik on 27 October 2016 (R1) to return to the factory premises to provide assistance with understanding the customer order and invoicing situation.

74. Also on 27 October 2017 there was a purported agreement between R1 and R2 for R2 to provide workers for a fee to R1 (7-8).

75. Again, I pause to note that there is no evidence before me of any sums ever having been paid by R1 to R2 under this agreement. It is the evidence of the claimants, which I have no reason whatsoever to doubt, that there was no record kept of the hours that they worked from this period onwards.

76. Mrs Peebles Brown wrote to HMRC on 28 October 2016, confirming that R3 had been forced from the factory premises and had lost control of its company computers and payroll (9). HMRC replied to R3 confirming the closure of the PAYE scheme for R3 (10).

77. When the claimants returned to work on 31 October 2016 they were asked to fill out their details on paperwork which was headed R1.

78. Then the claimants were sent home on Wednesday, 2 November and told to come back on Friday 4 November. On their return the claimants were introduced to Crystal Pavelcik of Savoy Partners London Limited. The sole director of Savoy Partners London Limited is Crystal Marie Pavelcik, Vladimir Pavelcik's wife. Mr Pavelcik was himself formerly the sole director of this company.

79. On 7 November 2016 R1 produced a letter for all customers formally of Class Creations informing them that R1 was now undertaking manufacturing "on behalf of Class Creations" (11). The letter went on to say that production was "running uninterruptedly at full speed" and contact information had been amended. Emails of employees, including that of Mr Voysey, changed to LCG industries email address.

80. The letter said: *"It is with pleasure to announce that LCG INTERNATIONAL LIMITED is trading as LCG INDUSTRIES, and has replaced the manufacturing on behalf of Class Creations. LCG INTERNATIONAL LIMITED is trading as LCG INDUSTRIES and is the sole owner and manufacturer of the entire healthcare cabinet & furniture manufacturing plant in Somerset, this ownership includes all of the assets, which have been acquired in an asset sale from Class Creations to LCG INTERNATIONAL LIMITED. LCG INDUSTIRES production is running uninterruptedly at full speed. Representation from your designers remain the same, however their contact information has changed…".*

81. Mr Pavelcik, the then director of R1, emailed Mr Day on 8 November 2016 forwarding him an email to an NHS customer (12). The email to the customer explained that R1 was the sole owner of the entire production facility, along with all the assets, machinery, the entire stock, et cetera. The email also went on to say that R1 had purchased all of the debts of the entire customer base from Class Creations Ltd, previously owned by Caroline Peebles Brown.

82. On 11 November 2016 LCG Capital was placed into compulsory liquidation following the presentation of a winding up petition by the Secretary of State for business, energy and industrial strategy on 9 September 2016. Named directors of LCG Capital included Mr Pavelcik (81).

83. Also on 11 November 2016 Crystal Pavelcik sent a Text message to Ben Sharland, a another customer, saying (99): *"… we have come to an agreement with class new management to assist in the clean up of caroline's mess and to take all employees TUPE into LCG. Vlad has short forms that are needed by each employee for their bank info so that monies can be deposited into the accounts. I will return next week with the proper contracts as the ones we were prepared this week were not preferred by employees…"*

84. From November 2016 onwards R1 transferred money directly into some of the claimants' bank accounts on about six occasions. In addition, R1 later asserted that the claimants were paid in cash by R1 on several documented occasions (36).

85. R1 also sent a letter to what were described as employees of Class Creations and Suprema Group on 18 November 2016. It explained that the intention of R1 was to "attempt to employ the entire team that is in place, and TUPE over if possible to LCG industries" (14). The employees were asked to forward P60s and previous employment contracts so R1 would be able to put their "obligations under TUPE into effect" (14).

86. On 26 November 2016 the Insolvency Service issued a statement saying that LCG Capital approached distressed companies on the premise that it was able to find a purchaser for the company by way of a share sale agreement. The effect of those purchases was negligible in all known cases, with the client companies all ending up in compulsory liquidation shortly after reported takeover. The statement goes on to say, "After that time the new owners failed to deliver up book and records, assets have not been accounted for and the new owner companies and their directors failed to cooperate with the Official Receiver in the liquidation process" (86).

87. In late November or early December 2016 there was a Team meeting at which it was suggested that the claimants were employed by Professional Design Works Limited (R2) (16-25).

88. Following the meeting, the claimants (and the other former employees of Class Creations/Suprema) wrote to Vladimir Pavelcik (R1), Crystal Pavelcik and Luis Acosta (R2) requesting, based on what they had been told at the meeting, that their contracts be TUPE'd over to Professional Design Works Limited (R2). They explained that the contracts should have been provided within a month of the date of sale and went on to express concerns about their tax implications (15).

89. R1 wrote to the employees again on 2 December 2016 saying they were currently employed by Suprema Group Limited (26). The letter went on to say that in theory therefore the employer should be Class Creations which was now re-named Professional Design Works Ltd. According to the letter the current management of Professional Design Works Ltd notified HMRC of the situation and was awaiting their instructions on changing back the employment to Professional Design Works Ltd.

90. Mr Williams wrote again to R1 in December 2016 saying he was unsure whom he worked for (27). In the letter Mr Williams explained that on 26 October 2016 Mrs Peebles Brown was asked to leave the premises as she was told she was working unlawfully using R1's premises, staff and machinery. The letter went on to say that Mr Williams was now being paid by R1 and he had never been paid by R2. He also pointed out that he had not had a payslip since the sale of Class Creations in August 2016.

91. R1 replied to Mr Williams on 3 January 2017 (36-37) saying (answers not in bold): *"**I only have verbal contract with you (LCG) and you have transferred money into my bank account on six occasions since November 14th, 2016.** This is correct, also should be noted*

you have been paid cash on several documented occasions. ***A percentage of my pay is being paid, but I have had no payslips and my tax and National Insurance are not being paid****… Do* (sic) *to the fact that your registered employer(s) are Suprema Concepts and Professional Design Works formerly Class Creations our company LCG is not liable to pay your contributions. This is the legal responsibility of your registered employer, which in this case is Professional Design Works. As per agreement with Professional Design Works, LCG Industries is simply contracting your working services from Professional Design Works Limited, until all is legally restored between you and your employers and registration is put in proper order…"*

92. Mr Voysey emailed Luis Acosta (R2) on 16 January 2017 seeking information as to the status of the claimants and the payment of outstanding wages.

93. On 22 January 2017 Mr Pavelcik informed the claimants that they would be paid all outstanding monies owed on 31 January 2017. The claimants were also asked to sign a declaration to HMRC to confirm they understood they were employed by R3 (see at 30-35).

94. On 30 January 2017 (47-52) Luis Acosta (from R2 and seemingly acting as an agent for R1) wrote letters to the claimants dismissing them saying: *"As you are aware in November Professional Design Works had started to make attempts to recover your employment back from Suprema Group, and calculate the monies outstanding to you, however after endless months of dealing with our solicitors and partners nothing has been accomplished as anticipated. Professional Design Works has restructured its core business and was prepared to make your employment redundant, however we were stopped by the facts of the situation.…Under the terms of the redundancy act your contracts are still with Suprema group and salaries you have earned have been paid under the contract you had with that company, your statutory rights are protected by the government legislation and you are entitled to seek redundancy pay from your employer, Suprema Group. You are therefore to be made redundant with immediate effect.*

Professional Design Works regrets that we cannot assist you any further with past issues of your employment as you are still registered with HMRC as Suprema Group employees…"

95. Subsequently, the claimants attempted to seek advice about their employment situation. They approached, among others, their local MP and the Citizen's Advice Bureau. By this time they were confused about who their employer was as they had received conflicting information. In the event, the claimants, although not all the employees concerned, were able to obtain legal advice via their house insurance.

96. Mr Cooper, Mr Day Mr Collinson Mr Taviner and Mr Voysey commenced early conciliation on 14 February 2017. Mr Cooper then presented his ET1 on 24 March 2017 Mr Day, Mr Collinson and Mr Williams presented claims on 7 April 2017. Mr Taviner on 8 April 2017 and Mr Voysey on 12 April 2017.

97. On 26 July 2017 the Companies Court at the High Court of Justice adjourned a public examination hearing generally with liberty to restore in respect of Mr Lopez Acosta and issued a warrant for his arrest so that he can fulfil his statutory duties as a director of LCG Capital (84).

98. In a letter dated 2 August 2017 from the Insolvency Service to Mr and Mrs Peebles Brown it was explained that the Official Receiver is concerned that LCG Capital has accepted deposits without providing a genuine or beneficial service to its customers, such as the Peebles Browns. These concerns were said to echo the Insolvency Service's publication dated 25 November 2016 (83).

Outline of Relevant Law

(i) TUPE transfer (business transfer)

99. Regulation 3(1)(a) provides that TUPE will apply where there is 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'.

100. Breaking Reg 3(1)(a) down, four questions must be answered in the affirmative in order to identify a 'business transfer' under that provision:

- was there a transfer 'to another person'?
- did an 'economic entity' transfer?
- did the economic entity 'retain its identity' after the transfer? and
- was that entity 'situated immediately before the transfer in the United Kingdom'?

101. Regulation 3(6)(a) provides that a relevant transfer may be effected by a series of two or more transactions. This reflects a number of decisions of the ECJ, such as that in *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S 1988 IRLR 315, ECJ*.

102. The EAT's main guidance on the 'retention of identity' issue was laid down in 2000, in the case of *Cheesman and ors v R Brewer Contracts Ltd*.

103. It stated that the following principles apply:

- the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, among other things, by the fact that its operation is actually continued or resumed
- in a labour-intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-

intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity

- in considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question, but each is a single factor and none is to be considered in isolation
- among the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they were suspended
- in determining whether or not there has been a transfer, account has to be taken, among other things, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on
- where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets
- even where assets are owned and are required to run the undertaking the fact that they do not pass does not preclude a transfer
- more broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor
- the absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but is certainly not conclusive as there is no need for any such direct contractual relationship
- when no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer; and
- the fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one subcontractor and the start by the successor.

104. Since the focus must be on the transferring entity's identity, the question of how that entity is defined is clearly an important one.

105. Generally, the Acquired Rights Directive and TUPE apply automatically if there is a relevant transfer, whether or not the parties want them to. However, the parties' views as to whether the Regulations apply may be taken into account by an employment tribunal in some circumstances.

106. A transfer of assets does not usually constitute a TUPE transaction, but it may do depending on what was agreed and what transferred. In deciding whether there has been a 'sale of a business' under TUPE, with consequent transfer of staff, an Employment Tribunal will consider not just what any sale agreement says on paper, but the realities of

the situation. A Tribunal will consider what is happening to staff, assets, customer lists, existing contracts, equipment, 'know how' and so forth. No one of these is decisive in itself but all are relevant. The Tribunal will decide whether overall there appears to be continuity of a business entity.

(ii) Time limits for the TUPE related claims

107. As set out above, the claimants pursue claims for failure to inform or consult in accordance with regulation 15 of TUPE 2006. Reg 15(12) TUPE provides that any claim under Reg 15(1) must be brought before the end of the period of three months beginning with the date on which the relevant transfer is completed, or within such further period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented within this time frame.

108. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. 'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — *Porter v Bandridge Ltd 1978 ICR 943, CA*.

109. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.

110. In other words, the escape clause will only come to the claimant's aid if the tribunal decides that the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances. In *University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12* the EAT emphasised that this limb of S.111(2)(b) ERA does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired.

111. In *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* explained it in the following words: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

112. A claimant's complete ignorance of his or her right to claim unfair dismissal may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable.

113. A claimant's confusion as to his or her rights may excuse a late claim in certain circumstances.

114. However, where the claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay.

115. It is not enough for a claimant to say that he or she did not know the true facts at the time of the dismissal. The claimant must also show that his or her ignorance was reasonable and that he or she could not reasonably have been expected to find out what the true situation was during the limitation period. Ignorance of the true facts must actually be the cause of the delay.

116. The EAT in *Cambridge and Peterborough NHS Foundation Trust v Crouchman 2009 ICR 1306, EAT*, helpfully distilled the relevant principles governing the exercise of a tribunal's discretion under S.111(2)(b) ERA in circumstances where the claimant initially believes that he or she has no viable claim, but changes his or her mind when presented with new information after expiry of the primary time limit. In that case, a tribunal's decision to accept an unfair dismissal claim out of time was upheld where an appeal outcome letter, which had been received after the primary time limit, contained crucial new facts which genuinely and reasonably led the claimant to change his mind and believe that he had a viable claim. In reaching its conclusion, the EAT held that the core principles to be applied to this type of case were as follows:

- ignorance of a fact which is 'crucial' or 'fundamental' to a claim will, in principle, be a circumstance rendering it impracticable for a claimant to present that claim
- a fact will be 'crucial' or 'fundamental' if it is such that, when the claimant learns of it, his or her state of mind genuinely and reasonably changes from one where he or she does not believe that he or she has grounds for the claim to one where he or she believes that the claim is 'viable'
- ignorance of a fact will not render it 'not reasonably practicable' to present a claim unless, first, the ignorance is reasonable and, secondly, the change of belief in light of that new knowledge is also reasonable
- whether the 'belatedly learnt' crucial fact is true is not relevant. What matters is whether the information about the fact has genuinely and reasonably produced the change of belief

Conclusions

117. Turning to my conclusions, I deal first with who employed the claimants at the point of dismissal, namely at the point the claimants received the letter dated 30 January 2017. In other words, was there a TUPE transfer from R3 to R1 from 26 to 31 October 2016, as the claimants contend or were they employed by R2 as a result of a previous TUPE transfer.

118. I am persuaded that the service purportedly provided by LCG Capital Group Limited to Caroline Peebles Brown in relation to finding a party interested in the purchase of Class Creations Limited was a effectively a sham.

119. I note that in a letter to Mrs Peebles Brown from the Insolvency Service dated 2 August 2017 it was explained that the Official Receiver was concerned that LCG Capital has accepted deposits without providing a genuine or beneficial service to its customers such as Mrs Peebles Brown. Further, it is said that no attempt to rescue the businesses in financial distress have been attempted or made (83).

120. In reality, it was Mr Pavelcik's intention to assume control of the company himself. No "arm's length" purchase was ever within Mr Pavelcik's contemplation.

121. Also noteworthy is that almost immediately following the sale of Class Creations Limited on 8 August 2016, a further transaction was entered into between Class Creations Limited and R1, a company of which Mr Pavelcik was the sole director, whereby all of the business assets of Class Creations Limited were 'sold' to R1. The combined effect of the two transactions was that Mr Pavelcik transferred all of Class Creation Limited's assets to himself.

122. As I have already found, because the machinery and premises of the entity were leased it is not credible that the business was worth the £196,000 purportedly paid. Also surprising is the fact that what is said to be sale agreement failed to set out in detail what assets were said to be transferred.

123. I am also persuaded that Mrs Peebles Brown was somehow duped into believing that she was selling the company name (because of the value associated with the same) such that she could continue trading as she had done previously. There is no other sensible explanation as to why she transferred the employees of the business over to R3 and sought to carry on trading, which is what occurred between 17 August 2016 and the events of 26 October 2016. Mrs Peebles Brown's subsequent conduct after 26 October 2016 in terms of her dealings with HMRC and others is consistent with this version of events.

124. As I have found, between 17 August 2016 and 26 October 2016, R3 carried out the furniture manufacturing business previously carried out by Class Creations Limited from the same factory premises at 12 Suprema Park, Edington.

125. The company that acquired R2 was not an arms-length purchaser because on 22 October 2016 Luis Acosta (a.k.a. Jose Luis Lopez, director of LCG-London Capital Group Limited) was appointed as a director of R2. It was then on 26 October 2016 that Mr Pavelcik (R1) and Luis Acosta (R2) attended at the factory premises at 12 Suprema Park, Edington and evicted R3 from those premises, thereby taking de facto control of the furniture manufacturing business.

126. It seems to me that R1 subsequently carried on the business of the manufacture and sale of furniture from 12 Suprema Park between 31 October 2016 and the end of January 2017.

In that period, the individuals who were engaged in the manufacture and sale of furniture were the same individuals (including the claimants) who had previously carried out those activities for Suprema Group Limited.

127. Of course, the sticking point, in terms of alleged TUPE transfer to R1 is the purported agreement between R1 and R2, dated 27 October 2016, whereby R2 agreed to provide workers for a fee to R1.

128. R1 and R2 say this agreement shows the claimants were employed by R2, whereas the claimants and R3 say that this agreement was no more than a sham.

129. It is the claimants' case that, given the nature of the connection between Mr Acosta and Mr Pavelcik, the clear intention behind the agreement was to seek to engineer a situation whereby R1 took over the business of furniture manufacture without acquiring the associated liability of the transfer of the employees – effectively to take the benefit of the business without the encumbrance.

130. The copy of the Asset transfer agreement that has been produced would appear to be incomplete. There is no evidence before me that any of the sums referred to within the agreement actually transferred from R1 to R2. Having agreed to find a buyer for Class Creations Limited, what has effectively occurred is that Mr Pavelcik has assumed control of the company's assets himself. The price of sale is unrealistic and the agreement fails to set out the precise assets which are said to have transferred. Further, if R2 really was to provide employment services to R1 then the claimants would have been asked for details of hours worked and jobs done, which they were not. It is of particular note that there is no apparent benefit to R2 in the purported arrangement – the combined effect of the agreements (4A – 4T and 7/8) is to assign all of the benefit of the purchase of the business to R1 but to leave the largest single liability with R2.

131. Following the 31 October 2016 the claimants were repeatedly told that the intention was that they would become employees of R1 once issues in relation to their past employment had been resolved. Whilst repeated reference was made to R2 attempting to sort out the position, there is in fact no evidence that anything meaningful was actually done in this regard.

132. Taking all this into account, I have concluded that the purported business assets sale agreement did not represent the reality of what occurred.

133. Turning then to the application of the TUPE regulations. It does not seem to be in dispute that prior to the purported transfer there was a business entity. The entity in question was the business of the manufacture and sale of furniture which, immediately prior to 26 October 2016, was undertaken by R3, and which, prior to 17 August 2016, had been undertaken by Class Creations Limited from the factory premises at 12 Suprema Park, Edington.

134. Applying the considerations set out by the EAT in ***Cheesman***, there was an organised grouping of persons and assets which enabled that business to be carried out. The nature of the manufacturing work, in particular, was labour-intensive. The workforce plainly amounted to an organised grouping of persons which enabled the exercise of the economic activity of manufacturing and selling furniture. It included individuals specifically involved in the manufacture of the furniture, others involved in the design and selling of the furniture and those involved in their management.

135. Moreover, the business had established operating methods, including the manner in which its workforce was organised and the roles assigned to individuals within that workforce.

136. Following the events of 26 October 2016, the business retained its identity and, save for two very brief hiatuses, its operation continued as it had prior to that date. Indeed, R1 itself (in its letter to customers of 7 November 2016) referred to *"production ... running uninterruptedly"*. Moreover, the individuals who were involved in every aspect of the business, from design to production to sales, remained the same. To outside observers, the business simply continued to operate as it always had done, albeit under new management and a different company name.

137. All of the tangible and intangible assets of the furniture manufacturing business were effectively transferred to R1, both by way of the agreements in August 2016 and by its de facto taking of control of the premises. At the time that R1 took control of the premises, all of the workforce that had previously been employed by R3 were retained and continued in their previous roles. The activities carried out by R1 were, to all intents and purposes, identical to those that had previously been carried out by R3. At the point at which R1 took possession of the factory premises, it de facto took over all of R3's existing customers. Indeed, it made a point of writing the letter to those customers (11).

138. The claimants had no legal relationship with R2. There is no evidence at all of R2 (or indeed R1) having kept the records which would ostensibly have been necessary under the terms of that agreement between R1 and R2 in order to ensure that appropriate payment was made. R1 seems to concede that it paid wages directly to the claimants both by bank transfer and in cash.

139. Taking all the surrounding circumstances into account, there plainly was a contractual link between Mrs Peebles Brown and Mr Pavelcik. It was as a direct result of that contractual link that Mr Pavelcik took control of the furniture manufacturing business. The furniture manufacturing business could not have been continued without R3's workforce. Even if Mr Pavelcik's goal was to achieve short-term financial gain, the continuance of the furniture manufacturing business (for whatever period) was necessary in order to achieve this.

140. In effect, I agree that the practical reality of this case is that R1 assumed control of the furniture manufacturing business, including its workforce, from 26 October 2016 and that there was a TUPE transfer to R1 on or shortly after that date.

141. Time limits: Turning next to the issue of time limits and, in particular, whether the claimants have been able to establish both that it was not reasonably practicable for them to bring their TUPE related claims in time and whether they brought those claims within such time as is reasonable.

142. The claimants have clearly established that throughout the period from 26 October 2016 to the termination of their employment (and indeed beyond) there was obfuscation on the part of R1 and R2 as to whether or not there had been a TUPE transfer at all. Even within the letters sent to the claimants on 30 January 2017 by R2, they were being told that no transfer had in fact taken place and their contracts actually remained with R3.

143. They were given mixed messages in the period following 26 October 2016 and were led to believe that their employment would transfer to R1 but had not done so yet (see, for example, 14 and 99). The claimants were subsequently told that their employer should be R2, but in fact remained R3 (see, for example, at 15 and 26) and that they needed to sign "affidavits" in order to seek to transfer their employment to R2. The confusion continued even after the termination of their employment, as is apparent from the letter, dated 8 February 2017, written by Robin Day setting out the chronology of events (60 – 62).

144. Although the claimants made some attempts take advice about their employment status these initially proved to be unfruitful. Also of relevance is that the limitation period of three months from the date transfer had already expired prior to the date their employment terminating. Even at this stage, it remained unclear to the claimants whether, in fact, any transfer had taken place and to which potential employer. This confusion, which was caused by the respondents, directly lead to the delay in issuing claims about the TUPE transfer.

145. Taking all this into account I am satisfied that it was not reasonably practicable for the claimants to have brought their claims within the initial three month period. Reasonable and understandable ignorance of what had happened to their employment was the cause of the delay.

146. Next, I must determine whether the claims in respect of a failure to inform and consult were presented within a reasonable further period. The claims were all presented, taking into account early conciliation, within three months from the date of dismissal. It was reasonable for the claimants to take advice both in relation to whether or not there had been a TUPE transfer and, more particularly for present purposes, upon the claims which they might properly bring arising out of the same.

147. I note that following their dismissals the claimants were not idle, but took active steps in order to seek to establish their rights. That included, among other things, consulting the Citizens Advice Bureau and local MPs (the latter is evidenced by a text message at 100).

148. Once they had identified that they might have the benefit of legal expenses insurance, all the claimants acted promptly in seeking to obtain the benefit of advice under that insurance.

149. Taking all this into account time I am satisfied that the claimants' claims under Regulation 15 of TUPE were all presented within a reasonable further period within the meaning of Regulation 15(12), such that the Tribunal has jurisdiction to hear the complaints.

Employment Judge Pirani
22 December 2017

Reasons sent to the parties on: 3 January 2018

For the Tribunal:

Case no.	Claimant
1400402/2017	Mr M Williams
1400510/2017	Mr RC Cooper
1400594/2017	Mr M Williams
1400595/2017	Mr R Day
1400596/2017	Mr S Collinson
1400613/2017	Mr M Taviner
1400627/2017	Mr A Voysey