EMPLOYMENT TRIBUNALS

Claimant: Mr S Eyres

Respondent: Air Vane Compressors Limited

HELD AT: Manchester **ON:** 27 & 28 November 2016

Employment Judge Holmes

REPRESENTATION:

Claimant: Mr P Gorasia, Counsel
Respondent: Mr P Smith, Counsel

RESERVED JUDGMENT
ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant was employed by the respondent as at 29 February 2016 when his employment was terminated.

2. The claimant accordingly has qualifying service to proceed with his claim of unfair dismissal, and the respondent is the correct respondent to the other claims that he makes.

CASE MANAGEMENT ORDERS

The parties shall by **25 January 2019** agree further case management orders for the future conduct of the claims , submit them to the Tribunal for approval, and shall seek to list the claims for a hearing with an estimated length of hearing and dates to avoid. Alternatively, the parties , or either of them, may , by that date, seek a preliminary hearing for that purpose.

REASONS

1. The Tribunal convened to determine by way of preliminary hearing two issues, firstly, whether the claimant was, at the date of termination of his employment, an employee of the respondent, and secondly, if so, whether he had sufficient qualifying service to entitle him to present a complaint of unfair dismissal.

2. The procedural history of the claims is that by a claim form presented to the Tribunal on 17 May 2016 the claimant brought claims of unfair dismissal, and for arrears of pay and other payments against the respondent Air – Vane Compressors Limited ("Air – Vane"), arising out of the termination of his employment on 29 February 2016. That company responded to the claims, on 16 June 2016, in a fully pleaded response, in which it was denied that the claimant was, as at the date of termination of his employment , an employee of the respondent, it being contended that he was an employee of Excel Compressor Engineering Limited ("Excel").

3. Consequently, a preliminary hearing was held to determine the issue of the identity of claimant's employer, and whether he had qualifying service, heard by Employment Judge Howard on 19 September 2016. She determined the first issue in favour of the respondent, holding that the claimant was, as at the date of termination, employed by Excel, not Air – Vane. She dismissed his claims. That judgment was the subject of a successful appeal, and the EAT remitted the issues to a different Tribunal.

4. The respondent had conceded that the claimant's employment had transferred to the respondent on 1 July 2015, by virtue of the TUPE Regulations 2006, but asserted that, as at 31 July 2015 and by consent of both parties, the claimant's employment with the respondent had ceased and that he had reverted to his previous employment with the transferor, Excel.

5. The claimant relied upon the TUPE transfer in identifying Air Vane as the respondent to these proceedings, and denied that he had agreed that his employment reverted to Excel , his case being that it had never ceased , he being unaware of the TUPE transfer and its effect.

6. The Tribunal heard evidence from the claimant, his wife Tracey Eyres, and Kerrie Rourke, and received a written witness statement from Andrew Crone, but he was not called to be cross-examined. For the respondent from Mark Peacock, Managing Director, and Richard Coar, Operations Director gave evidence. There was an agreed bundle. Having heard the evidence, considered the documents and the submissions made, the Tribunal finds the following facts relevant to the preliminary issues.

6.1. The claimant was the owner and director of Excel Compressor Engineering Limited ('Excel') until 1 August 2014 when the ACE Group (Advanced Compressor Engineering Limited) , whose Managing Director was Mark Peacock, acquired shares in the company. This acquisition was effected by a Share Purchase and Shareholders' Agreement (in draft form only in the bundle, at pages 56 to 84 , but agreed to have been executed) between the claimant, ACE and Excel .

6.2 At the same time the claimant entered into a Service Agreement with Excel (again in draft form only in the bundle, at pages 85 to 104 of the bundle, but again, agreed to have been executed as a deed) , which contains the following provisions.

"2. TERM OF APPOINTMENT

2.1 The Appointment shall commence on the Commencement Date and shall continue , subject to the remaining terms of this agreement , until it terminates on 31 July 2019 without the need for notice.

2.2 No employment with a previous employer counts towards the Employee's period of continuous employment with the Company.

2.3 The Employee consents to the transfer of his employment under this agreement to an Associated Employer at any time during the Appointment."

and :

"4. DUTIES

4.1 The Employee shall serve the Company as Managing Director.

4.2 During the Appointme4nt the Employee shall:

(a) Act as a director of the Company and carry out the duties on behalf o any other Group Company including, if so required by the Board, acting as an officer or consultant of any such Group Company;"

and:

"7. SALARY

7.1 The Employee shall be paid a salary of £6,000 net per calendar month."

and:

"26. VARIATION

No variation or agreed termination of this agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives)."

6.3 Subsequently, though the date is not clear, but before February 2015 , following intimation of a claim against the claimant for alleged breach of warranties given leading to the first share acquisition agreement, a further agreement, a Settlement Agreement (at pages 39 to 55 of the bundle in unexecuted form) , was made between the claimant and ACE , whereby the claimant transferred a further 17 of his class B shares to ACE.

6.4 All the agreements referred to were prepared and drafted by Chadwick Lawrence , solicitors , acting for the ACE Group, and Mark Peacock.

6.5 By February 2015 ACE was the controlling shareholder of Excel, holding 67% of the shares. During this period, the claimant continued to perform the tasks of Managing Director of Excel.

6.6 Excel had operated from premises at Rhodes Street, Hyde, Cheshire, which it owned. The claimant and other Excel employees worked from that building, and it had its own bank accounts and accounting systems. During 2014 ACE changed its

bank accounts, and in early 2015 , its accounting systems, the latter then being incorporated into Air – Vane's Sage system.

6.7 By mid - 2015 staff and the business of Excel had been re-located to Air – Vane's premises at Dale Industrial Estate, Radcliffe.

6.8 On 22 June 2015, Excel employees , including Alison Lawrence and Kerrie Rourke , were notified of a proposed TUPE transfer to the respondent, which was part of the ACE Group . They were sent letters advising them of the proposed TUPE transfer, and its implications (see page 137 of the bundle). Mark Peacock signed these letters. Meetings were held with Excel employees on 24 June 2015 to which the claimant was not invited.

6.9 The claimant queried this with Mark Peacock, who told him that because he was a director with a service contract TUPE did not apply to him ,and he was not entitled to be involved in the consultation process. The claimant sought advice on the point from his solicitor, Peter Barnard , by e-mail on 24 June 2015 (see page 139k of the bundle) . He was initially unavailable , and when he could responded he explained that he was not an employment lawyer, but did ask if the claimant wanted him to ask them to assist. The claimant, however, did not pursue his query further at that stage.

6.10 The claimant proceeded on the erroneous assumption, and information from Mark Peacock, that his employment would not automatically transfer to the respondent . The respondent did too. On 24 June 2015 the claimant and Mark Peacock met, and discussed the position. The claimant mentioned his service agreement with Excel, and how this would be honoured. Mark Peacock offered the claimant the chance to become an employee of the respondent, and the terms upon which he could be so employed. These were confirmed later on 24 June 2015 Richard Coar, the Group Operations Director, sent the claimant a job offer (see pages 137A and 137B of the bundle) , the terms of which were that he would be employed as Senior Sales Manager with the respondent, at a salary of £55,000 per annum, and fully expenses company car, a Nissan Qashqai, or similar. The claimant was given until 26 June 2015 to consider and accept the offer.

6.11 On 25 June 2015 the claimant sent Mark Peacock an email (pages 138 to 139 of the bundle). He referred to the discussion the previous day, and said this:

"We both know the reason you are doing what you are with Excel , is because of the contents of my Service Contract and the implications it carries with it.

You said yesterday that you feel like 'I have you over a barrrel' - if I am honest , I feel similar for a number of reasons (I am sure I don't have to explain that to you)

That aside, I will do as you have requested , I will sign over my rights under the service contract IN FULL – subject to the following:

- *All the existing Excel staff are transferred / contracted over to Airvane as per your previous correspondence earlier this week, i.e in relation to TUPE rules etc*

- *All Excel staff are paid in full for the month of June as would normally be the case*
- *You will (as agreed yesterday) pay Barry McCluney half of the monies owed by Excel i.e £15,000 with immediate effect – this will be Excel's full and final payment to Barry McCluney*
- *Any assistance required in completing the prompt sale and transfer of the Hyde property is given without prejudice*
- *You will sign a 12 month contract with me, Steve Eyres, as per the standard, general terms of the job offer received yesterday – final terms to be agreed between MP and SE*

I know you are not happy about the last point Mark, however, there are a couple of things to consider:

- *the current contract for £294k will be gone along with all the potential headaches it brings*
- *the new contract , commencing 01.07.15 is worth £55k (initially and as discussed , I will earn it in line with the rest of the team)*
- *from the advice I have already taken , if we pursue this through the courts it could easily end up costing us £30K - £40K each*

I cannot do what you are asking, i.e writing off all my options against you / the business (which are not just limited to the service contract) without some form of guarantee."

6.12 Mark Peacock replied by email later the same day (pages 139A and 139B of the bundle) in these terms:

" As per our telephone conversation , you will sign over my (sic) *rights under the service contract IN FULL – subject to the following:*

- *All Excel staff are paid in full for the month of June as would normally be the case by Airvane subject to them agreeing new contracts*
- *I will agree to meet Barry McCluney and discuss how I can pay £15,000 been* (sic) h*alf of the loan back with a view to meeting this obligation. This will be Excel's full and final payment to Barry McCluney*
- *Any assistance required in completing the prompt sale and transfer of the Hyde property is given without prejudice*
- *You will sign a 12 month contract with you, Steve Eyres, as per the standard, general terms of the job offer received yesterday – final terms to be agreed between MP and SE*
- *the current contract for £294k will be gone along with all the potential headaches it brings*
- *the new contract , commencing 01.06.15 is worth £55k (initially and as discussed , you will earn it in line with the rest of the team)*

We will sit down tomorrow morning and finalise this with a view to all been (sic) *agreed and signed in the morning."*

6.13 Barry McCluney is the stepfather of the claimant's wife, Tracy, who had lent money to Excel, or the claimant personally, repayment of which was a priority for the claimant.

6.14 Notwithstanding this, on 1 July 2015 the employment of the claimant and all Excel employees transferred to the respondent. The claimant's belief in those circumstances was that he remained an employee of Excel.

6.15 On 7 July 2015, Chadwick Lawrence Solicitors, acting for the respondent, wrote to the claimant enclosing a draft service agreement (pages 104B to 122 of the bundle) and a settlement agreement (pages 123 to 136 of the bundle). The claimant was advised to take advice from his own independent solicitor. The latter was in the form of a settlement agreement whereby the claimant's employment by Excel would terminate by mutual agreement, on 30 June 2015.

6.16 A P45, dated 9 July 2015, with a leaving date of 30 June 2015 , was prepared by or on behalf of Excel, and the claimant agrees he was sent this (pages 236 to 238 of the bundle) . On 16 July 2015 the respondent, in a document executed by Mark Peacock, entered into a Lease Purchase agreement (pages 282 to 285 of the bundle) with Lombard for the purchase of a Nissan Quashqai motor car, of which the claimant took delivery and started to use from mid – July 2015.

6.17 Prior to this, the claimant had used his own car for business use for Excel, but had not received any expenses for this usage, an issue he had raised with Mark Peacock previously.

6.18 The settlement and service agreements were not signed. A meeting at which they were to be signed by both parties, a "completion meeting" was arranged for 31 July 2015. The letter convening this meeting, referred to as a "completion meeting" has not been produced, but there is no issue that such a meeting was proposed, and took place. At this meeting by the claimant the claimant sought proposals from Mark Peacock as to how his remuneration package was to be made up, but none were forthcoming. This was, the Tribunal accepts a short and acrimonious meeting. The claimant refused to sign the agreements. No concluded verbal agreement was made at that meeting, at the end of which the claimant said that Mark Peacock would be hearing from his solicitor. Mark Peacock did say that he had provided the claimant with a company car, and was angry about this. The claimant offered him the keys back, but he did not accept them and walked off.

6.19 Also on 31 July 2015 the claimant was paid. He was paid by the respondent, not Excel, and the amount he was paid was £3092.46, as a net sum. He discovered this by checking his bank account after leaving the meeting, and this further caused him anger and concern. A payslip , from the respondent was issued, dated 31 July 2015 (page 242 of the bundle) , which the claimant accepts he received, though precisely when and how is unclear. There is no issue, however, that the payment was made by the respondent, and that the claimant either that day, or very soon afterwards, knew that it had.

6.20 Between the end of June and the end of July 2015 the claimant had been working largely with Excel customers, who were now customers of the respondent.

6.21 From 31 July 2015 until he went on holiday on … August 2015 the claimant ….

6.22 On 5 August 2015 a payment of £2,850.00 was made to the claimant. This was to bring his July salary up to the level that he considered it should have been under his Service agreement with Excel, and which he had not agreed to vary. That payment (see page 287 of the bundle) was made from Excel's bank account.

6.23 On 28 August 2015 the claimant's next salary payment of £6,000 was made , again from the Excel bank account (see page 288 of the bundle). There appears to be no corresponding payslip from either company.

6.24 Throughout this period the claimant signed himself in correspondence as from "*Excel Compressors – Ace Group (Engineering) Limited".*

6.25 On 1 September 2015 , shortly after the claimant returned from holiday Mark Peacock sent the claimant an email asking him to attend a meeting in Huddersfield that morning. The claimant queried what this meeting was for, in an email at 8.30 a.m. in which he said this:

"During our earlier telephone conversation you said the meeting was to discuss the matter concerning Tracy contacting you before I went on holiday.

As discussed, I am not prepared to discuss this with you at this time (for the sake of clarity , this is because I have already sought legal advice)

You then went on to say you wanted to discuss what job I was doing ?

Unless I'm being advised otherwise I'm still carrying on in the same position I was before I went off on holiday i.e. Service Sales Manager and MD of Excel."

He asked what else Mark Peacock wished to discuss, and why he had been locked out of the SAGE accounting system.

6.26 Mark Peacock replied that the meeting was to discuss the claimant's role within Excel and a way forward. The claimant replied that he did not want to discuss this situation one on one with Mark Peacock , without his solicitor being present. Mark Peacock replied that he wanted to have a "catch up" with the claimant, after he had been on holiday for two weeks. The claimant replied that he was changing the reason for the meeting, and said he would not meet without his solicitor being present. This email exchange is at pages 140 to 144 of the bundle (in reverse order). This meeting did not take place.

6.27 By that time, all Excel's other employees had transferred to the respondent, it no longer operated from the Hyde premises, and , as the claimant complained to Mark Peacock, its customers had been appropriated by the respondent, or other companies in the group. Indeed he feared that Mark Peacock was going to liquidate Excel, a fear that was heightened by a discussion he had, in September 2015, with Dean Watson of Begbies Traynor , firm of accountants who had been involved in a

previous CVA of Excel, who mentioned to him the liquidation of Excel, leading him to believe that this was something that was being contemplated by Mark Peacock.

6.28 On 16 September 2015 the claimant and Mark Peacock finally met ,with Richard Coar also present taking notes (which are at pages 145 to 150 of the bundle) . There was a discussion about the future roles of Excel and the respondent company. Mark Peacock offered to write to all Excel customers, for them to be transferred back to Excel. The claimant said that Mark Peacock had stolen Excel's customers and moved them into the respondent. When the claimant was asked what he wanted , he said *"everything being put back as it was"* . He later said that the deal he wanted to was *"get Excel back on its feet and would be a standalone company"* , and that he wanted it back as it was. He went on to raise with Mark Peacock why he had been trying to liquidate it. He admitted that he had discussed this, but had decided against it.

6.29 There was further discussion about cross – charges between the companies, and when Barry McCluney would be repaid, as he had not been at that point. There was further , more general and wide – ranging discussion about the future of Excel. At one point (page 149 of the bundle) Mark Peacock said this:

"The customers were transferred to Airvane following an employment contract had been issued had been issued to SE and MP assumed SE was "Coming on board". Since the contract has not been signed by SE then MP was prepared to move both SE and customers back to Excel and believe SE is a major part of the business going forward."

6.30 The claimant received payslips, but not, he contends always his full pay, from Excel dated 30 September , 31 October, 30 November and 31 December of 2015 (pages 244 to 247 of the bundle) .

6.31 In November 2015 the claimant did not receive his full salary and no salary payments thereafter.

6.32 In January 2016 Mark Peacock instructed his , and the two companies' , solicitors , Chadwick Lawrence to write to the claimant proposing that he sold his 67 shares in Excel back to the claimant, who could then run the company as he wished, subject to repayment of loans and debts owed to the ASCE group by Excel. A letter in these terms , dated 15 January 2016, was sent to the claimant (pages 189 to 191 of the bundle). In this letter it is stated that the claimant "since the incorporation of Excel" had been and "currently remained employed as a salesman director".

6.33 That prompted a holding response for the claimant's then solicitors, Turner Parkinson, who then sent a letter before action on 5 February 2016 (pages 193 to 198 of the bundle) to the Chadwick Lawrence in which they said :

"We have been instructed by Mr Steve Eyres in connection with his employment with Excel Compressor Engineering Limited. We have also been instructed by Mr Eyres in his capacity as director of and shareholder in Excel."

In this letter they set out a number of matters which they contended amounted to grounds for the claimant to resign and claim constructive dismissal.

6.34 The claimant accepted that he had approved this letter and it was issued upon his instructions. The letter asserted that the claimant was *"employed by Excel well in advance of the share purchase and shareholder's agreement and his continuity of employment with Excel is therefore preserved so that he has the requisite service to bring a claim of constructive unfair dismissal against Excel".* The letter identified a number of alleged breaches of contract which it asserted, *"is making his position as an employee of Excel untenable"* and stated that they amounted to good grounds upon which the claimant could successfully bring a claim of constructive unfair dismissal against Excel.

6.35 By a letter of 29 February 2016 (pages 232 to 233 of the bundle) the claimant's new solicitors, AB Corporate, informed the respondent that they had been instructed in relation to the claimant's *"position as shareholder and director of Excel and an employee of Air – Vane Compressors Limited"*. The letter asserted that the claimant had transferred to the respondent in July 2015 and notified the respondent that the failure to pay the claimant's salary amounted to *"an ongoing repudiatory breach of the Air Vane service agreement"* which the claimant had accepted by resigning as a director of Excel.

6.36 A P45 from the respondent , dated 21 September 2015, showing the claimant's leaving date as 31 July 2015, was issued (pages 239 to 240 of the bundle). The claimant did appear in PAYE records of the respondent for the month of July 2015 (pages 240A to 240C of the bundle). He appears in PAYE records of Excel from 1 September 2015 (page 241A).

The Submissions.

The respondent's submissions.

7. Mr Smith had prepared a Skeleton argument. It is not proposed to rehearse the submissions again extensively here, and they will in any event become apparent during the ensuing discussion. In summary, however , it was a matter of evidence for the Employment Judge to decide, as a fact, whether the parties had agreed in late July 2015 that the claimant's employment would revert to his pre-existing service agreement with Excel. Mr Smith started by making the observation that the claimant had referred to the "no oral variation" clause in his witness evidence, but this had been picked up by his counsel. He went on to discuss the Supreme Court case of ***Rock Advertising*** . He sought to distinguish, and disapply to it employment law cases, referring to employment law cases such as ***Autoclenz*** , in favour of a more liberal approach to employment contracts, undermining the ruling in ***Rock Advertising*** which upheld, in principle, the validity of no oral variation clauses. He submitted there was clear evidence of an agreement being reached around June to early August. He referred to the evidence which he said supported a finding that there was an agreement, even if it soon broke down.

8. He went on to argue that the claimant had objected to the transfer, so that his employment with Excel in fact ended, by virtue of the provisions of reg. 4(7) of TUPE. He cited ***New ISG Ltd v Vernon [2008] IRLR 115*** in this regard, to support

an argument that the objection need not be made pre – transfer, it can be made after it.

The claimant's submissions.

9. In his closing submissions for the claimant Mr Gorasia firstly argued that there was no basis for excluding the principle confirmed in ***Rock Advertising*** to employment contracts, in general, and this contract in particular. These parties clearly intended their relationship to be governed by written agreements, they intended the terms to be binding. In relation to the "objection" issue, he submitted that ***New ISG Ltd*** showed that there had to be information before any objection could be made, and the claimant had not been given any, in fact he had been told the opposite. In relation to the estoppel argument advanced in Mr Smith's Skeleton, he disputed that any such estoppel arose on these facts, and denied the application of the doctrine in these circumstances. He cited ***Actionstrength Ltd v International Glass Engineering IN. GL.EN SpA [2003] 2 AC 541*** , referred to in Lord Sumption's judgment in ***Rock Advertising*** as illustrating how the validity of no oral variation clauses would be undermined unless there was very clear evidence that the parties intended to make agreements outside and contrary to such terms. The argument did not get of the ground on these facts.

Discussion and findings.

10. The essential factual issue before the Tribunal was this: the claimant's employment contract with Excel as at 1 July 2015 having been transferred to the respondent, did the claimant subsequently agree with the respondent that he would thereafter be employed by the respondent on different terms? That gives rise to a second, and linked, issue, namely, if so, did he thereafter cease to be an employee of the respondent, but reverted back, after a short break to Excel under a further contract, albeit one in identical terms to that upon which he had previously been employed by Excel? Both parties accepted that the burden of proof rested with the respondent to establish that an agreement had been reached between the parties such that the claimant's employment had reverted to Excel.

11. The crucial question here therefore is "was there a concluded agreement that the claimant would become an employee of the respondent on new terms from 1 July 2015" ? Clearly , no written agreement was made , the proposed service agreement between the claimant and the respondent was never signed, neither was the settlement agreement whereby his service agreement with Excel was terminated.

12. In the absence of a written agreement, therefore, the respondent , upon whom it is accepted the burden rests, relies upon an oral agreement, an agreement evidenced in part in writing and/or perhaps, an agreement to be implied by conduct. Further , in unravelling these arrangements, it is essential to bear in mind two different facets of the contractual position. The first is the identity of the employer, and the second is the package of terms upon which the claimant was employed. In relation to the former, the parties' mistaken belief as to the non – application of TUPE to the claimant's contract of employment with Excel is highly relevant. In law there was no need for the claimant to agree to become employed by the respondent, because he already was, although he did not know it. The respondent's case, however, is that for a short period in July 2015 he actually agreed to change both the identity of his employer , and also the terms upon which he was employed.

13. In reaching these conclusions, the Tribunal has been influenced by a number of factors in determining whose evidence it prefers. Firstly, it is of some significance that the respondent's detailed case on this issue needed to be elicited in the further and better grounds of resistance ordered by the Tribunal on 24 January 2018. Secondly, Mark Peacock's first witness statement, dated 25 August 2016 , and hence much closer in time to the events in question, is vague and unspecific in a number of aspects. It omits any reference whatsoever to the completion meeting of 31 July 2015 at which the claimant refused to sign the proposed agreements. Paragraph 10 of his first statement gives a less than full account of the events around that time. This omission is carried over even into his second witness statement, at paragraph 6, where he again seeks to give the impression that all that happened in early August 2015 was the claimant telephoned him a few times to say he was not happy with his new remuneration package , and that they then agreed he would transfer back to Excel. This is notwithstanding that , by the time of his second witness statement, made on 11 April 2018, Mark Peacock had seen the claimant's first witness statement, dated 25 August 2016, upon which he was cross – examined in the previous hearing before Employment Judge Howard, and in which at paragraphs 26 to 28 he makes several references to the meeting on 31 July 2015 , whereas Mark Peacock has made none. Further, this evidence was ventilated before the previous Tribunal hearing, but has not been commented upon in Mark Peacock's second witness statement. It is also of some significance too that he accepted in his second witness statement that paragraph 5 of the Further and Better Grounds of Resistance was incorrect in suggesting that the "shortfall" payment made to the claimant had been paid by the respondent , as it had in fact been paid out of the Excel bank account.

14. This was symptomatic of his evidence generally, which the Tribunal considered demonstrated a lack of concern for, or attention to, detail. The claimant in contrast, whilst not 100% accurate all the time, was far more focussed, and reliable in his recollection of important details.

15. Much weight was placed by Mr Smith for the respondent upon the email exchange of 5 June 2015 between the claimant and Mark Peacock. He put it to the claimant that Mark Peacock had agreed to meet his main demands expressed in his email , and that an agreement was "imminent". With all due respect to him, and imminent agreement is not a concluded agreement, and that is what the respondent must establish.

16. A number of factors militate against a finding that there was at this stage a concluded agreement between these parties . Firstly, leaving aside the effect of any alleged "no oral variation" clause , it is clear that these parties intended their agreements to be made in writing. Their previous dealings had been conducted that way, and there was no suggestion that this would change. Further, both refer to "sign off" or "signing", and clearly both regarded anything said or written prior to a final agreed form of draft contract as not binding. The claimant was clearly aware of the terms of, and value of, his written Service Agreement with Excel, and was clearly saying that he would not, literally , "sign these away" without a satisfactory , written, agreement in its stead.

17. Finally, there was, in any event, a major area of unagreed issues between them, namely how the claimant was to have his remuneration, slashed under the new agreement to almost half of the net value of his Excel service agreement, made

up by Mark Peacock, acting for the respondent. Whilst Mr Smith eloquently sought to play down various elements of the email exchange , as if all that remained were minor inconsequential details, this was not so. The words "final terms to be agreed between MP and SE" did not relate to minor issues, but to the far more relevant and important issue of the claimant's remuneration. This is why he followed his words in his email of 25 June 2015 with the sentence "I know you are not happy about the last point Mark, however, there are a couple of things to consider". He went on to refer to the substantial value of the service contract (then with 4 years to run) , compared with the new contract , and the potential legal costs of not reaching an agreement. In short, he was trying to soften up Mark Peacock to agree more substantial benefits in his favour . Those were never agreed, and this is what led, on 31 July 2015, to the claimant not proceeding with the new service agreement with the respondent.

18. It is right, of course, as Mr Smith submitted, that the respondent entered into the Lease Purchase Agreement in July , and paid the claimant's July salary, in the form of the lower sum based on £55,000 per annum proposed in the new contract. It is also right that a P45 was prepared and sent to the claimant from Excel, indicating that his employment with that company ceased on 30 June 2015. All that is not, the Tribunal finds, evidence of a concluded agreement. It is evidence of, as Mr Smith put it, an imminent agreement, an agreement that the respondent anticipated the parties would make, but one which they had not, in fact , at that time concluded. As Mark Peacock perhaps best put it in his first witness statement , at paragraphs 8 and 9 , this was , at most , an agreement that he "thought" had been made. It had not. This is rather acknowledged by what Mark Peacock said in the meeting of 16 September 2015 (page 149 of the bundle) where he states how he "assumed SE was "Coming on board" once the contract had been issued. He there acknowledges that this contract was never signed, and on that basis is prepared to move everything back to Excel. In short, the respondent "jumped the gun", and started to operate an agreement that had not yet been concluded. Of course, in reality the claimant had actually left Excel, but in the context of both parties' imperfect understanding this is totally consistent with the claimant never actually agreeing new terms with the respondent, and hence never having agreed to terminate his previous service agreement believed to be with Excel, but in reality then with the respondent.

19. Much was also made of the claimant wanting "everything being put back" as it was, and the respondent has sought to elevate such expressions , and those contained in the claimant's emails of 1 September 2015 as evidence of the claimant agreeing to go back to Excel, but that is not a correct analysis. As he said repeatedly, as far as he was concerned, he had never left the employment of Excel. More to the point , he had not ever agreed to become an employee of the respondent, although, unbeknownst to him, by the operation of TUPE he actually was. What the claimant wanted putting back was the customer base of Excel, and its viability as a business standing alone, without the threat of insolvency of its and his head rendering his highly favourable terms (which, be it remembered , Mark Peacock as part of the acquisition of Excel had agreed only in July 2014) worthless.

20. Nor does the Tribunal set much store by examining what work the claimant was doing in the relevant period, and for whom. The lines between Excel and the respondent were increasingly blurred, and became non – existent. Customers were being swapped between these companies at Mark Peacock's whim. The claimant's Excel contract required him to carry out duties on behalf of any Group Company. The various P45s and other documents do not take the matter further, as they are

not of themselves of any legal effect, and to the extent that they are relied upon by either party, they are at best indications of what the parties believed the position to be. The P45 from Excel, possibly the most potentially significant document, cannot have the effect of terminating the claimant's employment by Excel (though legally it was with the respondent by then) it is merely a document which was issued on the "assumption" that the claimant would enter into the new service agreement. Likewise the P45 issued after the short – lived period of allegedly agreed employment by the respondent. It cannot have the effect of terminating an employment contract that he Tribunal is quite satisfied, was never made.

21. In essence it is clear to this Tribunal that , the claimant having a valid and highly favourable service agreement with Excel which transferred automatically to the respondent on 1 July 2015, to the benefit of which he would have remained entitled as against the respondent , unless and until he agreed to vary or terminate it, the respondent has sought to construct a supervening , and brief period of employment by the respondent under a wholly new and less favourable contract, which would have the effect of rendering his previous Service Agreement of no value to him, with his employment transferring back to the (unknown) transferor under a new agreement. That is a highly artificial analysis, and one not supported by the facts.

The "no oral variation" clause.

22. All of this renders otiose the need to consider the effects of the "no oral variation" provisions of the original service agreement with Excel. As there was, the Tribunal finds no agreed purported variation, the effect of this clause does not matter. By way, however, of completeness, and out of deference to the diligent and skilful arguments of counsel, the Tribunal will , in the alternative, gives its ruling on the effect of this clause.

23. The leading , and indeed, most recent , case on this topic is ***Rock Advertising Limited v Business Exchange Centres Limited [2018] UKSC 24*** a decision of the Supreme Court, handed down on 16 May 2018. It is not an employment case, but it is a case which gives a definitive , and unanimous , ruling upon the effect of "no oral modification" (or sometimes variation/termination) clauses in contracts. The facts are not germane, but the contract at issue , a contractual licence to occupy office space, contained a clause which provided :

"This Licence sets out all of the terms as agreed between [the parties] . No other representations or terms shall apply or form part of this Licence . All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."

The essence of the judgment (Lord Sumption giving the lead judgment, and Lord Briggs delivering a concurring judgment, albeit on narrower grounds) is that such clauses are not legally objectionable, and will be upheld. That in essence, *prima facie,* disposes of any argument that clause 26 of the claimant's service agreement with Excel is of no effect.

24. Mr Smith, however, sought to distinguish ***Rock Advertising*** on the grounds that it is not an employment law case, and citing ***Qantas Cabin Crew (UK) Ltd v. Lopez [2013] IRLR 4*** and ***Autoclenz Ltd v Belcher [2011] 820*** as authority for the

proposition that a more generous approach to the treatment of employment contracts had developed in comparison with commercial contracts. He relies upon para. 45 of the judgment of the late HHJ McMullen QC , in which this more liberal approach is referred to, as is, in a quotation from an article by Alan Bogg analysing ***Autoclenz*** in which he refers to the "high judicial recognition of the need for contractual protection of vulnerable parties in the employment sphere."

25. Mr Gorasia in reply submits that there is nothing in the judgment in ***Rock Advertising*** which warrants limiting its application to commercial contracts, or excluding its application to employment contracts. Further, this is not the ***Autoclenz*** situation, these were two experienced businessmen, who chose to have their employment relationship reduced into writing. There was no reason not to give effect to their stated written terms.

26. The Tribunal agrees. Despite Mr Smith's efforts, there is no basis for this Tribunal not to apply the Supreme Court decision. Further, not only were the parties engaged in defining their respective legal rights , alongside share purchase transactions, it was the lawyers who acted for Excel, who also act for the respondent, who drew up that agreement, and presumably inserted that clause. It is a clause of mutual benefit, though it is more usually relied upon by an employer seeking to deny the effectiveness of any oral variation that the employee seeks to assert. On that basis, there is almost an argument for construing it *contra proferentem* , it lying ill in the mouth of the party which proposed such a clause, and who stood to benefit equally from it, to deny it has any effect. This argument fails.

Estoppel – Combe v Combe.

27. The respondent's alternative argument, advanced by Mr Smith is that the claimant is subject to an estoppel. This is developed in paras. 16 to 18 of his Skeleton , and is prompted perhaps by the observations of Lord Sumption in para. 16 of his judgment in ***Rock Advertising*** , where he refers to the safeguard against any potential injustice arising from the validity of no oral modification clause as lying in the various doctrines of estoppel. He goes on to say this:

"I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least , (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself :"

He goes on to cite ***Actionstrength Ltd v International Glass Engineering IN. GL.EN SpA [2003] 2 AC 541*** , a copy of which was provided to the Tribunal.

28. In essence, Mr Smith's position is that if, as we have found, the No Oral Modification clause is valid, the respondent can circumvent it by means of estoppel. To analyse the respondent's contentions, it of note that the terms of the estoppel relied upon (in the Skeleton argument) are that "through his words in the earliest days of August 2015 … or at the very east his conduct from that point onwards" he is estopped from denying that that his employment would be by to Excel, and not the respondent.

29. In support of that Mr Smith sets out the events after August 2015, in three sub – paragraphs. In submissions he also referred to the claimant :

a) choosing , accepting and using the Nissan Qashqai motor , the commitment to purchase which was made to by the respondent, to its detriment, on the basis that the claimant would make, or had made, the agreement to be employed by the respondent;

b) receiving pay from the respondent;

c) working with Excel customers

d) expressly holding himself always as the MD of Excel.

30. The respondent contends that it acted to its detriment by assuming the financial obligation of the motor car purchase, and by paying the claimant his salary for July

31. With the utmost respect to Mr Smith, there is an element of confusion here. Which contract is it being alleged the claimant is estopped from denying he made ? The new , but short – lived , one with the respondent, which brought to an end the service agreement with Excel, or the allegedly “new” contract with Excel ? The Skeleton suggests the latter, but , as the Tribunal has been at pains to point out, it considers the crucial central issue to be whether the claimant ever made the “new” contract with the respondent. If he did not, there is no issue of him then making a further, fresh agreement with Excel, so issues of estoppel do not arise.

32. Looked at that way, the matters advanced in the respondent’s Skeleton in relation to the claimant representing that he would then be employed (i.e afresh) by Excel are equally consistent with his view expressed throughout his dealings with this matter that he never ceased to be an employee of Excel.

33. For completeness, however, and to consider whether the claimant is estopped from denying the making of the new contract with the respondent, the Tribunal’s view is this. Firstly, on the facts , it is important to examine what the claimant did that could amount to any representation by conduct that he would enter into a new service agreement with the respondent. The two active things he did were to choose his new car, and its colour, and to carry out work. Being paid is not any act of his, it is entirely passive. It is artificial to say a person “accepts” their pay when it is transferred into their bank account. Where in the past, perhaps, a cheque was proffered, drawn upon a company, the act of negotiating that cheque could arguably be “acceptance” of payment from the payer. That cannot, however, be the case in these circumstances.

34. In terms of the car, the Tribunal does not consider that the claimant’s actions in choosing and using his new car did amount to any representation on his part that he would enter the new contract with the respondent. As Mr Gorasia observed, it was not even a term of the draft service agreement that the claimant would be provided with a company car. Further, the claimant was not even necessarily aware that it was the respondent, and not Excel, who made the agreement for the car. He was not concerned, he simply wanted either expenses, or the use of a company car

for the work he was doing, whichever company he was employed by, and whatever work he was doing.

35. On the facts, the Tribunal finds , however viewed, the claimant's conduct falls short of the unequivocal conduct required for estoppel generally, and to displace the effect of a No Oral Modification clause in particular.

36. Finally, however, there is a further, very compelling answer to any argument for estoppel (assuming it as a place in this context). It is, of course, an equitable doctrine, having its roots in the ***High Trees*** line of cases. As cited by Mr Smith in his Skeleton, ***Combe v Combe [1951] All E R 767*** is authority for the proposition that where one party has by his words or conduct made a promise to the other which was intended to affect the legal relations between , which has been taken as such, and acted upon, the promisor cannot thereafter be allowed to revert back to their previous legal relations, as if the promise had not been made. In discussing the ***High Trees*** principles, Denning L J said this (at p.769 H) :

*"Much as I am inclined to favour the principle in the **High Trees** case it is important that it should not be stretched too far lest it should become endangered. It does not create new causes of action where none existed. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to what has taken place between the parties."*

37. It is a maxim of equity that he who seeks equity must have "clean hands". The Court, or Tribunal, must have regard to "what has taken place between the parties". In this case that includes the claimant being misinformed as to the automatic transfer of his contract of employment with Excel to the respondent upon the TUPE transfer. Excel was in breach of its obligation under reg. 13 of TUPE to inform and consult with the claimant. Mark Peacock wore two hats, and was controlling both companies, transferor and transferee. He was the author of the consultation letters to affected staff that were sent out . The claimant only ever contemplated becoming an employee (i.e by express agreement) of the respondent because of this mistaken belief, initially communicated to him by Mark Peacock, that his employment would not transfer to the respondent, and he would thereby preserve his existing terms of employment. Far from the claimant being estopped from asserting the true contractual position, the Tribunal can see a stronger argument for the respondent being so estopped in these circumstances.

Did the claimant object to the transfer , so as to prevent his employment being transferred to the respondent ?

38. This is a further argument advanced by Mr Smith in submissions in this hearing, which relates to the effect of Reg. 4(7) of TUPE which provides as follows:

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

39. The respondents' argument is that the claimant objected to being employment being transferred to the respondent, so that it remained with Excel at all material

times This is a different argument from its primary argument, which is that there was a relevant transfer, but the claimant thereafter varied his contract of employment with the respondent, which was in force for some three weeks, and thereafter terminated that contract, and entered another , new contract with Excel.

40. This prompts consideration of the provisions of reg. 4(7). From the caselaw (see ***Hay v George Hanson (Building Contractors) Ltd [1996] IRLR 427***) it is clear that there is no requirement for an objection to be in writing, nor in any particular form of words. Objection can be by words, or conduct. In that case the EAT held that the claimant had indeed objected by his conduct, and had actually been informed that his conduct was being viewed as an objection, which he did not dispute. Further, it is clear that an objection can be made, and will be valid, if made after the transfer. That is illustrated in the decision of ***New ISG Ltd v Vernon [2008] IRLR 115*** in which it was held that, where the identity of the transferee was not known until after the transfer , employees who then objected did not lose their right to object because they had not done before the transfer. In those somewhat unique circumstances an objection was effective, although not made until after the transfer.

41. Thus it is legally possible for an objection to be found without it being in writing, or expressly being stated to be an objection, and for it to found after the transfer has actually occurred. That is thus the starting point for the respondent's proposition.

42. It is, however, an invalid one, for a number of reasons. Firstly, and most importantly, objection has been equiparated with a lack of consent to the transfer. The term "consent" must, the Tribunal considers, mean "informed consent". That is, to some degree, the corollary of the decision in ***New ISG Ltd*** cited above. The affected employees in that case could not have objected pre – transfer , because they did not know the identity of the proposed transferee. That lack of information meant they could not object until they had that information. In this case, however, the claimant did not lack information as to the identity of the transferee, he lacked information (and was positively misled by the transferor and transferee, both acting through Mark Peacock) that there was to be a transfer at all. How, in those circumstances could he have made an objection at all ? The concept of objection requires at the very least knowledge that there is something to object to, and it is common ground that the claimant did not know that there was a proposed transfer of his employment to Airvane. He therefore could not, and did not , object to it.

43. That is sufficient to dispose of this argument, but for completeness, the respondent's argument fails in another respect. The wording of reg. (7) is specific, and requires the objection being made to the employee "becoming employed by the transferee". That , of course, is entirely logical, as, given the preservation of pre-transfer terms and conditions of employment, what else could an employee object to? Nothing changes pursuant to a TUPE transfer except the identity of the employer. In this instance, to the extent that it could be said that the claimant objected at all, it was not to the change in the identity of his employer(which had in fact already changed) , but to the changes in the terms upon which he as to be employed by his employer, whoever he considered that to be.

Disposal and future conduct of the claims.

44. The Tribunal having made this ruling, it may be that no further hearing is required. It was agreed that if the Tribunal found that the claimant was at the material time employed by the respondent , and not Excel, he would have qualifying service for the purposes of presenting an unfair dismissal claim. There may still be an issue as to how many years of service he can count, in terms of his earlier period with Excel, but that would only go to quantification of the basic award by way of remedy in the unfair dismissal claim, and has not been determined by this Tribunal. If it remains in issue, it can be identified as such , and dealt with in any subsequent hearing.

45. The respondent , having been brought out of dissolution, may, or may not now wish to defend on the merits of the claims. The parties will doubtless wish to take stock. To that end the Tribunal proposes to invite them either to agree further case management orders for the future conduct of the claims and to submit them to the Tribunal for approval, and to seek to list the claims for a hearing with an estimated length of hearing and dates to avoid. Alternatively, the parties may seek a preliminary hearing for that purpose.

Employment Judge Holmes

20 December 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 December 2018

FOR THE TRIBUNAL OFFICE