



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr J Coles and 27 Others AND

Respondent

Vibe Marketing Group Limited (1)
Mr David Duncan Williams (2)
Mr Peter Robert Masters (3)
Sunday Independent News Limited (4)
Independent Media Limited (5)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 17 and 18 September 2018

EMPLOYMENT JUDGE N J Roper

Representation

For Mr Coles and 25 other Claimants:	Mr J Arnold of Counsel
For Claimant Mrs A Routley:	In person
For Claimant Ms L Addey:	Did not attend
For the First Respondent:	Did not attend
For the Second Respondent:	Did not attend
For the Third Respondent:	In person
For the Fourth Respondent:	Mr N Moore of Counsel
For the Fifth Respondent:	Did not attend

**Cases Numbered 1400481/2018 and 26 Others
And Case Number 1400662/2018**

RESERVED JUDGMENT

The judgment of the tribunal is that:

- 1 The correct name of the first respondent is Vibe Marketing Group Ltd and the record is amended accordingly; and**
- 2 There was a relevant TUPE transfer from the first respondent to the second respondent on 16 January 2018; and**
- 3 The third, fourth and fifth respondents are all dismissed from these proceedings.**

REASONS

1. This is the judgment following a Preliminary Hearing to determine the correct respondent to the claimants' claims to include whether or not there was a relevant transfer under the TUPE Regulations.
2. I have heard from Mr Arnold of Counsel on behalf of 26 of the claimants. Another claimant Mrs Routley appeared in person. The 28th claimant Laura Addy was not represented by Mr Arnold and did not attend. The first respondent has recently changed its name to Vibe Marketing Group Ltd, and the record is amended accordingly. The first respondent did not attend, and neither did the second respondent Mr David Duncan Williams. The third respondent Mr Peter Robert Masters appeared in person, and the fourth respondent was represented by Mr Moore of Counsel. The fifth respondent did not attend.
3. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to such factual and legal submissions as were made by and on behalf of the respective parties.
4. By way of general background this is a group claim brought by 28 employees following their dismissals by reason of redundancy from a newspaper business which controlled (i) the Cornish based Sunday Independent and (ii) other newspaper titles in and around East Devon and Dorset known as the View From titles. On 4 January 2018 all of the claimants except Mrs Routley were given notice of dismissal. They may have been dismissed summarily on that date, but equally they may have been given notice of dismissal and/or sent home on gardening leave. That point was not listed to be determined today. Mrs Routley's claim is different in that she alone was given notice of dismissal on 18 December 2017.
5. By a group claim form presented on 5 February 2018 all of the Claimants (except Mrs Routley) have brought complaints of unfair dismissal under sections 94 and 98(4) of the Employment Rights Act 1996 ("the Act"), entitlement to statutory redundancy entitlement, for breach of contract in respect of their notice pay, for unlawful deductions from wages, for failure to consult on a TUPE transfer, and for protective awards following lack of collective consultation on the redundancies.
6. Mrs Routley's claim under reference 1400662/2018 was issued on 19 February 2018 claiming unfair dismissal and other payments, and named View From Newspapers Limited and the Sunday Independent Limited as respondents (although they are the same company, for which see further below) and referred to the second respondent Mr Williams, who entered a response personally against that claim.
7. The first respondent is a limited company with company number 10724859 which was incorporated on 13 April 2017. It has changed its name repeatedly. On 13 April 2017 it changed its name to SI (Cornwall) Ltd. On 30 May 2017 it changed its name to The Sunday Independent Limited. On 16 January 2018 it changed its name to View From Newspapers Limited. On 16 March 2018 it changed its name to West Country Media Holdings Limited. Finally, on 8 August 2018 it changed its name to Vibe Marketing Group Limited. Until 16 January 2018 the third respondent Mr Peter Robert Masters was the

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- sole shareholder of the first respondent, and on that date the second respondent Mr David Duncan Williams became the sole shareholder.
8. The history of this matter is complicated, and essentially involves two separate newspaper businesses. The first is The Sunday Independent, which is a Sunday newspaper based in Cornwall. The second relates to other West Country titles based in Dorset which covered Dorset and South Somerset, including Pullman's View, and various View From titles. This second part of the business is referred to in this judgment as the View From business.
 9. In early 2017 the Sunday Independent and the View From businesses were separate. On 13 April 2017 the third respondent Mr Peter Robert Masters formed the first respondent which at that stage was named S.I.Cornwall Limited (registered company number 10724859). He was the sole shareholder and director. Through that limited company he purchased the business and title of the Sunday Independent, which business at that stage was in administration. The purchase included all assets and liabilities of the Sunday Independent business, and this included the intellectual property and all employees. As noted above, the first respondent then changed its name to The Sunday Independent Limited on 30 May 2017.
 10. Meanwhile the separate View From business based in Dorset was also in administration, and owned by Capital Media Newspapers Limited (in Administration). On 14 July 2017 the first respondent also purchased the View From business from that company's administrators, which were effectively the titles being Pulman's View and the other View From titles. Following these two acquisitions, the first respondent continued to operate its Sunday Independent business from Cornwall and the View From business from Lyme Regis in Dorset. They remained as separate businesses.
 11. All of the claimants were employed in the View From business and on 14 July 2017 the claimants' employment therefore transferred from Capital Media Newspapers Limited (in Administration) to the first respondent (then called the Sunday Independent Limited).
 12. Subsequently, and with the exception of Mrs Routley (who had already been dismissed on 18 December 2017), on 4 January 2018 the first respondent dismissed all of its employees by reason of redundancy. I make no findings as to whether they were dismissed summarily on 4 January 2018, or alternatively given notice of dismissal or sent home on gardening leave pending consideration of their futures. That point will be determined at the full main hearing of their claims.
 13. The potential closure of the first respondent's business was announced at this stage, and the third respondent says that he was involved in discussions about the potential purchase of both aspects of the first respondent's business (the Sunday Independent and the View From titles), and so was the second respondent Mr David Duncan Williams.
 14. On 15 January 2018 the fourth respondent, (namely The Sunday Independent News Limited) purchased the Sunday Independent assets of the first respondent, but not the View From business. The relevant asset purchase agreement defined the business which was purchased as "the publication of a Sunday Newspaper under the business name the Sunday Independent", and which specifically excluded the View From business (for whom all of the claimants had worked).
 15. On 16 January 2018 therefore the first respondent only owned the View From business. A number of events and transactions then followed, all of which took place on 16 January 2018. In the first place the first respondent changed its name to View From Newspapers Limited, and the third respondent Mr Masters sold his entire shareholding in that company (the first respondent) to the second respondent Mr Williams. The entire shareholding was in fact one ordinary share of £1.00. The third respondent Mr Masters then resigned as a director, and the second respondent Mr Williams became the sole director of the first respondent. The second respondent Mr Williams, who now owned and controlled the first respondent, transferred the Intellectual Property in the first respondent to his personal ownership.
 16. That finding of fact, namely that the second respondent Mr Williams transferred the Intellectual Property in the first respondent to his personal ownership on 16 January 2018, is an important finding of fact, and is made for the following reasons. I have seen a

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- deed which was prepared and dated 16 January 2018. I have not seen an executed copy of this agreement which may be a draft, but nonetheless it had been prepared. Effectively it was a deed of purchase of the goodwill in the business of the first respondent (then called View From Newspapers Limited) which defined the goodwill as “the customer and supplier database and all other intellectual property in the Business Name and the Titles.” The business name and titles were defined as “View From Newspapers” and “Pulman’s Weekly News Series”.
17. This is consistent with other documents which indicate that the second respondent Mr Williams held the intellectual property and other business rights in the View From business for himself, and that the first respondent company was no more than a shell, and that the third respondent Mr Masters was by this stage no longer involved in the business. For example, on 31 January 2018 the second respondent Mr Williams sent an email from “Williams Publishing” to the effect that he was the “Proprietor, View From Newspapers Limited”. An undated blog or posting from @ViewNewsUK shows that the second respondent Mr Williams had personally posted an item referring to himself as “a News Media professional”, and explaining the positive news “We’re Back!” with the comment that “View News were now partners with The Vibe Marketing to offer digital advertising solutions to all our clients”. The second respondent Mr Williams also gave an interview to Hold The Front Page which is a blog and resource for journalists. The heading reported “Media director says he has struck a deal to buy View From series” and in the interview he made it clear that the View From titles would be getting new advertisement bookings and long-term investment had been pledged by Vibe Marketing. Furthermore, by email dated 6 September 2018 to Mrs Routley, under cover of which Mr Williams the second respondent disclosed the share sale agreement dated 16 January 2018 referred to above, Mr Williams conceded that on 16 January 2018 “I transferred all brand IP’s into my name as an individual apart from Etchd Creative”.
 18. Finally, in his own grounds of resistance to these proceedings, Mr Williams the second respondent states: “I set up a crowdfund and was able to buy the newspaper titles from the then owner Peter Robert Masters. The skills I had learnt at Weymouth College would be used to upgrade the portfolio of print titles to offer increased profile to advertisers and readers ...”
 19. The second respondent Mr Williams was not present today. It is not clear the extent to which the second respondent has approached customers and potential advertisers and/or has published or tried to publish any of the titles. There may well have been a temporary cessation of the business pending resolution of this dispute. However, it is clear that even before the end of January 2018 the second respondent Mr Williams was holding himself out as the proprietor of the business, and that after 16 January 2018 there were no tangible assets in the View From business which could be said to have been left in or owned by the first respondent limited company.
 20. As noted above, on 16 March 2018 the first respondent then changed its name to West Country Media Holdings Limited. Finally, on 8 August 2018 it changed its name to Vibe Marketing Group Limited. Nonetheless there is no evidence to suggest that any aspects of the View From business, including intellectual property, goodwill, titles, or advertising contacts, had been transferred back to the first respondent limited company.
 21. Having established the above facts, I now apply the law.
 22. The relevant regulations are the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“the Regulations”).
 23. Regulation 3(1) provides that the Regulations apply to – (a) 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; (b) a service provision change ...
 24. Regulation 3(2) provides that “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

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25. Under Regulation 3(6) a relevant transfer (a) may be affected by a series of two or more transactions; and (b) may take place whether or not any property is transferred to the transferee by the transferor.
26. Regulation 4(1) provides that: Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
27. Regulation 4(2) provides that: Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer – (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to the organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
28. Regulation 4(3) provides that: Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1)...
29. Regulation 7(1) provides that: Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is – (a) the transfer itself; or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. The effect of Regulations 7(2) and (3) is that where there is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer, the automatically unfair dismissal provisions of regulation 7(1) do not apply, but rather the dismissal is treated as a redundancy dismissal which is potentially fair under section 98 of the 1996 Act.
30. Regulation 13 requires both the transferor and the transferee to consult with employees ahead of a relevant transfer. Regulation 13(2) sets out the information which must be the subject of that consultation. Regulation 16(3) allows appropriate compensation of up to 13 weeks' pay to be ordered following a failure to consult.
31. I have been referred to and have considered the following cases, namely: Henry v London General Transport Services Ltd [2001] IRLR 132 EAT; Brooks v Borough Care Services [1998] IRLR 636 EAT; Millam v Print Factory (London) Ltd [2007] IRLR 526 CA; Smith & Others v Jackson Lloyd Limited and Mears Group UKEAT 0127/13; ECM (Vehicle Delivery Service) Ltd v Cox and others [1999] ICR 1162; Spijkers v Gebroeders Benedik Abattoir CV 24/85 [1986] 2 CMLR 296; Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 EAT and Colino Siguenza v Auntamiento de Valladolid and others (7 August 2018) c-472/16.
32. The Regulations do not normally apply to a simple share sale, because there is no change in the identity the employer in these circumstances (see for instance Henry). Even if the share sale has been arranged for the purposes of seeking to avoid the application of the Regulations, this principle still applies (see Brookes). However, whilst the Court of Appeal in Millam approved these general principles, it also emphasised that the correct question to ask is within that legal structure (of a sale of shares), whether as a matter of fact control of the business has been transferred from one employer to another. This principle was upheld in Smith & Others in which the EAT confirmed that the reality of the situation was that there had been a TUPE transfer under the Regulations despite the fact that there was a share purchase. In that case the controlling minds of the company which had been purchased by shares had been removed; the company purchased via

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- shares was not an autonomous independent company; and it was nothing other than a trading name.
33. In Spijkers the Court made it clear that it is important to consider the following matters: (a) the type of undertaking or business concern; (b) whether assets, tangible or intangible, are transferred; (c) whether employees are taken over; (d) whether customers are transferred; and (e) the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended. These are single factors in an overall assessment which should not be considered in isolation. In addition, the facts characterising the transaction in question should be considered to determine whether the undertaking has continued and retained its identity in different hands (ECM (Vehicle Delivery Service) Ltd).
 34. In Cheesman, the EAT set out principles which can be distilled as to whether there is an undertaking, and principles which can be distilled as to whether there has been a transfer. However, these lists are not exhaustive and the test to be applied in considering whether there was a transfer is broad, multifactorial, and fact sensitive.
 35. In this case I find that there was a distinct undertaking. This was the business of the View From newspapers. This was a stable economic entity whose activity was not limited to performing one specific works contract and there was an organised grouping of persons and of assets which enabled or facilitated the exercise of an economic activity pursuing a specific objective. It had tangible and intangible assets. The tangible assets included a customer list of reliable potential advertisers, and the intangible assets included goodwill in the names of the newspapers, and the value of the historical connection to approach those customers for advertising business. In addition, there was an organised grouping of wage earners specifically and permanently assigned to this economic activity, and this included all of the claimants.
 36. I also find that there was a relevant transfer. I find that on 16 January 2018 the economic activity in question, namely the business of the View From newspaper titles, was transferred to the second respondent Mr David Duncan Williams personally. Although there was a transfer of the ownership of the one share in the first respondent, for the reasons set out in paragraphs 15 to 19 of the findings of fact above, I find that the effect of the transactions on or about 16 January 2018 was that the first respondent became a shell company, and that the View From business had effectively transferred to the personal ownership of the second respondent Mr David Duncan Williams. At that stage the first respondent limited company was nothing more than a trading name. The employees had all been given notice of dismissal on 4 January 2018; the third respondent Mr Masters (who had been the controlling mind) was no longer a director and was no longer involved; the assets of the first respondent company had been sold, namely the Sunday Independent business which had been purchased by the fourth respondent, and the goodwill and Intellectual Property in the View From business which had been transferred to the second respondent personally.
 37. Accordingly I find that on 16 January 2018 (and pursuant to Regulation 4(2)) all of the rights, powers, duties and liabilities under or in connection with all of the claimants' contracts transferred to Mr Williams the second respondent.
 38. There may have been a cessation of the View From business following these events, but applying Colina Siquenza (where TUPE applied despite there having been a cessation of activities for at least five months), I do not find that this defeats the relevant transfer to the second respondent Mr Williams. It seems that the second respondent Mr Williams may have been awaiting the outcome of these proceedings before proceeding further with the View From business, but equally there is clear evidence both from his pleaded case and other contemporaneous documents that he intends to continue with the View From business and is publicising the fact that he has done so. To find in the circumstances that there was no relevant transfer to him under the Regulations would be to defeat the purpose of the Regulations which is to protect those employees who found themselves dismissed where this was arguably because of the transfer.
 39. During these proceedings the claimants consented to the third fourth and fifth respondents being dismissed from these proceedings and I make that order.

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40. The remaining respondents are therefore the first respondent in connection with both the claims for unlawful deductions/breach of contract relating to pension payments (which remain with the first respondent by virtue of Regulation 10); and any potential claims that the first respondent failed to consult with the claimants in connection with the prospective transfer to the second respondent. The second respondent is the correct respondent to all of the claimants' remaining claims (which for the avoidance of doubt includes joint and several liability for the failure to consult with the claimants in connection with the prospective transfer to the second respondent).
41. Further case management orders have also now been made which appear in a separate order of today's date.
42. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 20; a concise identification of the relevant law is at paragraphs 22 to 34 how that law has been applied to those findings in order to decide the issues is at paragraphs 35 to 40.

Employment Judge N J Roper
Dated 18 September 2018

Judgment sent to Parties on

