Case Number: 1600819/2018

EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Lewis**
Respondent:	**Symposium Design and Print Ltd (In Administration) (R1), Symposium Print Ltd (R2), Secretary of State for Business Energy & Industrial Strategy (BEIS) (R3)**
Heard at:	**Cardiff** **On: 12 June 2019**
Before:	**Employment Judge Harfield (sitting alone)**

Representation:

Claimant:	**Mr Heard (Counsel)**
Respondent:	**Mr Soni (lay representative for R3)**
	R1 and R2 did not attend and were not represented

RESERVED JUDGMENT

It is the decision of the Employment Judge that the claimant was automatically unfairly dismissed under regulation 7(1) of The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regulations"), was wrongfully dismissed, and suffered an unlawful deduction from wages in respect of 2 days holiday pay liability for which rests with R2. It is further declared that there was a failure under regulations 13 and 13A to appoint employee representatives and to inform and consult with those representatives or directly with the claimant as an affected employee. That claim succeeds against R1 and R2 who are jointly and severally liable.

The claimant is awarded £29,013.46 compensation for unfair dismissal, and £221.54 in unpaid holiday pay, both payable by R2.

The claimant is awarded £6646.20 in a protective award payable by R1 and R2 or severally by one of them.

There is no finding against or award payable by R3. The recoupment provisions apply.

REASONS

History of these proceedings

1. By way of a claim form presented on 11 June 2018 against R1 and R2 the claimant, acting at that time as a litigant in person, brought claims of unfair dismissal and entitlement to a redundancy payment, notice pay and holiday pay. The claimant explained that he had been made redundant from R1 on 5 March 2018 and that he had been told to claim the amounts he was owed from the Redundancy Payments Office but that shortly afterwards R2 was set up and his claim for redundancy pay was rejected on the basis of TUPE. On 29 June 2018 solicitors instructed by the claimant applied for R3 to be added as a party. They also applied to amend the claim to include a claim for failure to inform and consult under Regulation 13 of the TUPE Regulations.

2. On 11 October 2018 the tribunal wrote to R1 and R2 informing them that as they had not presented a response to the claim a judgment may be issued and that whilst they are entitled to receive notice of any hearing they could only participate in any hearing to the extent permitted by the Employment Judge who hears the case. The claim against R1 was also stayed pending consent from the administrator for it to continue. That consent was granted by way of a letter of 27 November 2018. The administrators also indicated that they would not participate in the proceedings.

3. There was some administrative delay in serving the claim form on R3 who provided their response form on 23 October 2018. The response form alleged that there had been a relevant transfer under TUPE from R1 to R2 which included the claimant's contract of employment and all associated duties and liabilities and therefore responsibility did not lie with R3.

4. On 6 November 2018 R2 purported to file a response form out of time. R2 made no application for an extension of time. On 24 January 2019 a case management preliminary hearing took place by telephone with Judge S Davies. Judge Davies directed that R2's response form be rejected under Rule 18 and further directed that if R2 wished to make an application to extend time to present a response it must do so within 7 days. No such application has been made by R2. Judge Davies also granted the claimant's application to amend the claim to include the complaint of failure to inform and consult in respect of a TUPE transfer.

5. On 25 January 2019 R3 presented a response form in respect of the complaint of a failure to inform and consult. R3 applied for that part of the claim to be dismissed as against R3 on the basis that it could not be liable

for such an award under Regulation 13 of the TUPE Regulations and sections 166 and 184 of the Employment Rights Act 2006. The claimant did not object to the dismissal of that part of the claim against R3 which was confirmed in a judgment of Judge Cadney sent to the parties on 1 May 2019.

6. The matter came before me for a final hearing on 12 June 2019. R1 and R2 did not attend. I heard evidence from the claimant. I was provided with a bundle of documents to consider. Both parties made oral submissions and Mr Soni for R3 also provided some written submissions with accompanying case law.

Findings of fact

7. R1 was a commercial print house providing printing services. The claimant worked for R1 as a print estimator from 1 October 2003 until his dismissal on 5 March 2018. The claimant's job entailed working with the customer base in taking specifications and providing estimates for print jobs, negotiating terms with customers and booking in their print jobs.

8. R1 was a small business. It was run by Andrew Studley who was also the sole director and secretary [66]. His wife, Carol Studley also worked part time in the business. There were 3 print operators, Anthony Sheahan, Paul Taylor and Nick Wright, who between them provided 24 hour cover for print runs. Alexandra Mangan was the general manager. Andy Pugh worked as a studio operative undertaking the design work. Together they were a team of 8.

9. The claimant explained that another member of staff, Linda Wade, had been made redundant a couple of weeks or a month before the events of 5 March 2018. She had been undertaking production planning. She had not been replaced but her work had been covered by Alex Manghan and Andrew Studley. There is a redundancy payments RP19 form for Mrs Wade at [193] which shows that she took up new employment with an unrelated company in February 2018 and which fits with the claimant's recollection of events.

10. I have not heard from witnesses on behalf of R1 or R2 or the administrator of R1. I do have the Joint Administrator's Statement and Proposal at [90 to 154]. However, for reasons I come on to the content of that report may not be entirely accurate in all regards. The Joint Administrators of R1 are Graham Randall and Mark Roach of Quantuma LLP. Their report states that R1 approached Quantuma LLP at the end of February 2018 to discuss their options including refinancing and that Mr Randall met with Mr Studley on 26 February 2018. The report states that a number of urgent payments were due that week with insufficient cash to fund ongoing trading. It states that the possibility of a pre-packaged administration involving a sale of the business and assets to Mr Studley through a third party company was

explored but would not be possible as R1 had already run out of cash. Therefore the most appropriate course of action was for the major creditor, Henry Howard Cashflow Finance Ltd, to take control and appoint administrators. Mr Randall and Mr Roach were therefore appointed on 5 March 2018.

11. The primary objective of an administrator is to rescue the company as a going concern. The joint administrators report states that this was not achievable due to the level of debt, urgent payments needed and a lack of ongoing finance. The secondary objective of an administrator is to achieve a better result for creditors as a whole that would be likely to be achieved if the company were wound up (without first being in administration). The report states that this is the objective the administrators sought to achieve, which is normally by means of a sale of the business and assets as a going concern (or a more orderly sales process than in liquidation).

12. The claimant did not know at the time about the serious state of R1's finances and the appointment of administrators. He states, and I accept, that he was called without warning into a meeting on 5 March 2018 at which all the staff of R1 were present. Mr Studley called the meeting but did not speak. At the meeting was a representative from Quantuma LLP, who may have been Graham Randall, and Dan Large from ERA Solutions who were acting as agents for the administrators to assist with the employment situation. The claimant states, and I accept, that the administrators/ their agents told all the employees present that R1 was going into administration, that their employment was being terminated by reason of redundancy that day, and that they would be able to make a claim for redundancy payments from the Insolvency Service. The claimant stopped to obtain some contact details from Mr Large as Mr Large was to assist with the claims to the Insolvency Service. He states that the staff were milling around for about 30 minutes. The claimant then gathered his belongings and left. He states, and I accept, that there was at that time no mention in the claimant's presence of R2 being set up or of the prospect of staff transferring to R2.

13. This is in contradiction to the summary of that meeting provided in the Joint Administrators Proposal. That states at [108] paragraph 5.6:

> "Immediately following the appointment of the Joint Administrators on 5 March 2018, members of the Joint Administrators' staff attended the Company's site to advise employees of the Joint Administrator's appointment. Staff were briefed about the Administration and informed that a sale of the assets to Symposium Print Ltd was in the process of being completed. Staff were then informed that their employment would transfer under TUPE regulations and they were referred to the relevant contact from ERA Solutions Ltd. ERA Solutions Ltd are employment experts who have assisted the director

and the Joint Administrators in dealing with all matters relating to the employees."

14. I have heard from Mr Lewis and I accept and prefer his account of the meeting on 5 March 2018 and find that the employees, including Mr Lewis, were not told at that time that there was to be sale of assets to R2 or that their employment would transfer under TUPE. To the contrary they were told the business was ceasing and they were to be made redundant. The joint administrator's reports were written on 10 April and 12 April 2018 and are therefore not contemporaneous documents. By the time they were written the joint administrators knew that the Insolvency Service had raised the issue of TUPE and it is likely they were written with a certain degree of hindsight.

15. My finding as to the events at the employee meeting on 5 March 2018 does not, however, mean that the setting up of R2 and planning for the transfer of any assets or functions to R2 was not already in the pipeline. It is simply a finding that the claimant and his colleagues were not told about any such plans in that meeting on 5 March 2018.

16. In fact R2 was incorporated that same day on 5 March 2018 [69 and 71] with Mr Studley as the sole director and shareholder appointed on 5 March 2018 [70 and 74 -75]. I find that by the time the meeting took place with employees on 5 March 2018 a plan was already in place to set up R2 conducting, in effect, the same print business and in respect of which some assets would be sold to R2 and the employees would be dismissed by the administrator so that R2 would be set up without employee liabilities, but would have the potential to "re-engage" employees. Those employees, however, were contacted separately about that over the course of the next few days. The claimant told me, and I accept, that a few weeks after his dismissal he spoke to Andy Pugh who told him that Mr Pugh was telephoned and invited for an interview the next day (6 March 2018) and that he was asked if he wanted to work from the Wednesday (7 March 2018) onwards. That fits in with the RP19 form for Mr Pugh at [184-185] which states that he was offered employment with R2 on the 6 March 2019 by Ms Mangan and that his new job was in effect the same as his old job with R1. Similarly the RP19 form for Mr Taylor [190 - 192] states that on 6 March 2018 he was offered employment with R2 by Mr Studley and again that his job had substantively remained the same.

17. The claimant stated that to the best of his knowledge all the employees ending up working for R2 other than him. I accept that is likely to be the case with the possible exception of Mr Sheahan [86 – 87 and187 – 189] whose position I am unable to resolve on the evidence before me, and which I do not need to resolve for the purposes of this judgment. Certainly the Redundancy Payments Form RP18 at [85 to 88] confirms that Ms

Mangan, Mr Pugh, Mrs Studley, Mr Taylor, Mr Wright and Mr Studley had gone on to work for R2. It states that the sale was complete on 7 March 2018 which included the sale of plant and machinery, work in progress and customer lists. The claimant told me that to the best of his knowledge no one additional had been employed to undertake his role of print estimator and he suspects that his work was subsumed into the roles of Mr Studley and Ms Mangan in the same way that Mrs Wade's had been previously.

18. The fact that the setting up of R2 was pre-planned including the transfer to R2 of staff and assets is also supported by the Joint Administrators' Proposal. For example, at paragraph 2.4 [93] it states:

> "Prior to Administration, the proposed Joint Administrators gathered information on the Company to ensure that they were in a position to consent to act as Joint Administrators and to formulate an initial strategy for pursing achievement of an Administration objective. In addition, it was considered advantageous to take steps to negotiate with interested parties with a view to agreeing a sale in principle that could be completed shortly after the Joint Administrator's appointment…"

Further paragraph 2.9 at [94] confirms that Gordon Brothers Europe Ltd were instructed on 27 February 2018 (that is 6 days before the employee meeting) to value R1's assets and "to provide advice in respect of the offer received by the Company for its assets from the purchaser."

Paragraph 5.2 at [107] goes on to state that the assets of R1 were sold to R2 shortly after the appointment of the joint administrators on 7 March 2018 following that appraisal of the assets. The rationale for the asset sale to R2 is stated in part to be that:

> "A sale of the assets would enable Mr Studley to transfer the members of staff to the new company under TUPE regulations. This would eradicate the employees claims as creditors that would otherwise be valid should they not be transferred, thereby reducing the Company's liabilities."
>
> "No other buyer was identifies and the agents advised the Joint Administrators that selling the asset to Symposium Ltd would generate a higher return to the administration than it would if the assets were sold on a break up basis."

19. I also note at paragraph 5.9 of the Joint Administrators' Proposals [108] that R2 was granted a license to occupy by the property by the administrators. Again this suggests R2 was being facilitated as a going concern.

20. The Claimant was not offered employment with R2 and in accordance with the advice he had been given pursued a claim for a redundancy payment and other sums owed to the Insolvency Service. On 21 May 2018 he was told that he was not entitled to the payments [168 – 171] on the basis that there had been a TUPE transfer to R2. That decision was repeated in subsequent correspondence with Mr Large at [171 – 172] where the Insolvency Service also noted that R2 was using the goodwill of R1 by virtue of the similar name and was using the same phone number.

21. The claimant lives in Llanelli. He states that he has worked in the printing business for 40 years and since his dismissal has discovered that there are no jobs available in the printing industry in Wales. He states that his skillset and experience solely relate to the printing industry and therefore it is difficult to seek employment in a different trade. He states that he has claimed Job Seekers Allowance whilst looking for employment, the details of which are in his Schedule of Loss. He has otherwise survived on savings and then by claiming a small supplementary pension to tide him over until state pension age. No evidence was put before me as to the claimant's efforts to look for alternative employment. The claimant had a contractual entitlement to 12 weeks notice. He was not given notice of his dismissal or paid in lieu. The claimant had accrued but untaken holiday of 2 days at the date of his dismissal. He was not paid for this on dismissal.

The law

22. The TUPE Regulations provide at regulation 3(1)(a) that they apply to:

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

23. Under regulation 3(2) "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.

24. Under regulation 4(1):

> "… 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."

25. Regulation 4(2) provides that 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 that organized grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee."

26. Regulation 4(3) states:

> "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), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions."

27. Under regulation 7(1):

> "Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer."

28. Regulation 7(2) and 7(3) further provides that where the sole or principal reason for the dismissal 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 then regulation 7(1) will not apply. The reason for dismissal will then be deemed to be either for redundancy under section 98(2) (c) of the Employment Rights Act 1996 ("ERA 96") or a dismissal for otherwise to be for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. However, the ordinary principles of unfair dismissal under section 98(4) ERA 96 will still apply.

29. Regulation 7(4) states that regulation 7 applies irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be transferred.

30. Regulation 8 is concerned with insolvency. In particular regulation 8(4) disapplies regulations 4 and 7 to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision or an insolvency practitioner.

31 Under regulation 13 there is a duty, in summary form, to inform appropriate employee representatives of the fact that the transfer is to take place, the date or proposed date, the reasons for the transfer, the legal, economic and social implications of the transfer for any affected employees, the measures the employer envisages he will take in relation to any affected employees in connection with the transfer. That informing of employee representatives must take place long enough before a relevant transfer so to enable the employer to consult the representatives. The appropriate employee representatives will be the representatives of a recognised trade union, or appointed employee representatives. Under regulation 13(11) if an employer has invited affected employees to elect representatives and they fail to do so within a reasonable time, then the employer must give the information directly to employees. Under regulation 13(9) if there are special circumstances which render it not reasonably practicable for an employer to perform any of the duties under paragraphs 13(2) to 13(7) the employer shall take all such steps towards performing that duty as are reasonable practicable in the circumstances.

32. Alternatively, under Regulation 13A if an employer employs fewer than 10 employees and there are no appropriate representatives in place and the employer has not invited any of the affected employees to elect representatives the employer may comply with Regulation 13 by treating each of the affected employees as if they were an appropriate representative.

34. Regulation 15 provides that where an employer has failed to comply with a requirement of regulation 13 a complaint may be presented to an employment tribunal. Where the failure relates to representatives of a trade union or to appointed employee representatives it must be presented by the trade union or by any affected employee representative. Where the failure relates to the election of employee representatives or in any other case, it can be brought by any affected employees. Under regulation 15(7) and (8) where a tribunal finds a complaint against a transferee or transferor well found it must make a declaration and may order the award of appropriate compensation to the descriptions of affected employees specified in the

award. Under regulation 16(2) "appropriate compensation" means such sum not exceeding 13 weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

35. Section 94 ERA 96 provides an employee with the right not to be unfairly dismissed by his employer. Under section 98 redundancy the employer must show the reason for dismissal was a fair one (redundancy is a potentially fair reason for dismissal) and thereafter whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employers' undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

Decision on liability

36. The claimant and R3 were in agreement that there was a relevant transfer for the purposes of the TUPE Regulations which completed on 7 March 2019. I would in any event find that there was. Looking at all the evidence in the round, and applying the principles set out in the case of *Cheesman and others v R Brewer Contracts Ltd* [2001] IRLR 144 (referred to by R3) there was the transfer of an economic entity which retained its identity. There was an organised group of resources with the objective of pursuing the economic activity of printing which passed from R1 to R2. This is demonstrated by the same assets, same premises, largely the same experienced staff, the same management, and fundamentally the same central business activity being pursued.

37. The transferor, R1, was in administration at the time of the transfer. Administration is not insolvency proceedings instituted with a view to the liquidation of the company and therefore the transfer was not exempt from the application of either regulation 4 or regulation 7 of the TUPE Regulations under regulation 8(7). This was confirmed by the *Court of Appeal in Key2Law (Surrey) v De'Antiquis* [2012] IRLR 212. The Court of Appeal also endorsed an "absolute approach" such that administration proceedings can never be considered to be insolvency proceedings with a view to the liquidation of the assets of the company, irrespective of the facts and circumstances of the particular case. Both the claimant and R3 were also agreed on this point. It follows that both regulation 4 and regulation 7 of the TUPE Regulations are potentially engaged in this case.

38. I find that the claimant was dismissed by or on behalf of the administrators of R1 in the meeting on 5 March 2018. The administrators had been appointed by that stage and I accept the claimant's account that it was the

administrators, or someone on their behalf (rather that Mr Studley) who told the claimant and his colleagues that they were being dismissed and that it was because R1 had gone into administration.

39. The claimant was therefore dismissed by the administrators of R1 on 5 March 2018, before the relevant transfer had completed. What I have to determine is whether the sole or principal reason for that dismissal was the transfer under Regulation 7(1). The claimant's primary submission is that it was not and that the claimant was dismissed simply because he was redundant. R3's submission is whilst it could be said the claimant's role was potentially considered redundant by R2, the transfer was the sole or principal reason for the dismissal.

40. It was the administrators of R1 who dismissed the claimant and therefore what matters is what the administrators' reasons were. I have not had the benefit of evidence from the administrators or indeed Mr Studley or anyone else on behalf of R2. I do have the benefit of the Joint Administrators Report, albeit I have found that the account it contains of the meeting with employees on 5 March 2018 is not accurate where it states that the employees of R1 were told they would be transferring under TUPE to R2. As set out above, I find that the employees at that meeting were told they were being dismissed and were entitled to redundancy payments from the Insolvency Service.

41. Based on all the evidence before me, I find that prior to the transfer of assets by the administrator to R2 on the 7 March 2018 negotiations had taken place and there was a firm plan or agreement in principle in place between the administrators and Mr Studley. Mr Studley had approached the administrators towards the end of February 2018. He met with them on 26 February 2018 [106] and on 27 February 2018 Gordon Brothers Europe Ltd were instructed to carry out a valuation of R1's assets explained at paragraph 2.9 of [94]. That paragraph makes clear that by then Mr Studley had already made an offer to purchase the assets. Importantly, paragraph 2.4 of [93] also makes clear that prior to the administration (therefore prior to 5 March 2018) there had been a negotiation with Mr Studley with a view to agreeing a sale in principle that could be completed shortly after the joint administrators' appointment. That is, of course, what did actually happen.

42. It is clear that the agreement in principle was centered upon Mr Studley incorporating R2 and purchasing the assets of R1. However, I find that the discussions and the plan between Mr Studley and the administrators incorporated more than that. I find it is likely that there was a discussion about the employees and a decision reached that they would be dismissed by the administrators upon appointment. I further find it is likely that was because Mr Studley wished to set up R2 with a clean slate with incurring employee liabilities and the ability to select which staff he wished to re-

engage. The administrators' interests of course lay with R1 and R1's creditors and not with the detail of how R2 would be functioning. It therefore does not necessarily follow that the administrators were involved in detailed deliberations about who R2 would or would not re-engage in due course. However, I find it is likely that the plan that was in place between the administrators and Mr Studley was, in effect, to facilitate the passage to R2 of the core business of R1 as a going concern but where Mr Studley had reduced liabilities and the capacity to make changes including who he would employ. As such I find there must have been discussions about the administrators dismissing the employees to, in the anticipation of the parties at that time, allow Mr Studley to set up R2 without taking on employee liabilities and that must have been part of the wider in principle agreement or plan that was reached.

43. Whilst, as I have said, it was not a matter of interest to the administrators as to how R2 would function on a day to day basis. It, however, was a matter of interest to the administrators, and in their view in the interests of the creditors of R1, that the deal go through and therefore in their interests to dismiss the employees before the transfer if that would support the wider deal going through with Mr Studley. As paragraphs 4.1, 4,2 and 4.4 of the Statement of Joint Administrators' Proposals at [106] and [107] make clear, the objective of achieving a better result for creditors as a whole than would be likely to be achieved if the company were wound up is normally achieved by means of a sale of the business and assets as a going concern. Paragraph 5.2 at [107] also explains that there were no other potential buyers identified for the assets, and that the administrators had been advised that selling the assets to R2 would generate a higher return to the administration than if the assets were sold on a break-up basis.

44. My conclusions are also supported by the chronology and speed at which events happened. Mr Studley had approached the administrators at the outset with the proposal of an asset purchase. R2 was incorporated in a name very similar to R1 on the day of the administration. That must have been pre-planned and I do not accept in the circumstances that would have happened without the knowledge of the administrators. The employees who were re-engaged were contacted very quickly after their dismissals, in the next few days (indeed the form RP18 at [88] completed by the administrators on 27 March 2018 potentially records offers of new employment being made on 5 March 2018 itself), and they restarted work pretty much straight away. The administrators granted a license to R2 to continue to use the premises. All of this suggests that the wider in principle agreement that was in place with the administrators was for there to be a speedy transfer of the core business to R2 unencumbered by employee liabilities and that it is likely the administrators were also aware that R2 was likely to re-engage at least some former employees as they would be important to keep the business functioning. Ultimately Mr Studley need to

have a viable business going forward in order to be able to buy the assets from the administrators of R1 and there was therefore again a mutual interest between Mr Studley and the administrators in that regard.

45. In light of these conclusions, I therefore do find that at least the principal reason for the dismissal of the claimant by the administrators was the transfer. In short, it was part of the wider plan that was in place with Mr Studley to transfer the core business of R1 to R2 as, in effect, a going concern but leaving Mr Studley with reduced liabilities and the ability to decide who he would re-engage and therefore included the dismissal of the employees by the administrator. The wider plan was more than just an asset sale. In *Michael Peters Ltd v Farnfield and Michael Peters Group plc* [1990] IRLR 190 the Employment Appeal Tribunal (concerned with similar but not identical provisions under the Transfer of Undertakings (Protection of Employment) Regulations 1981) found that dismissal by reason of a transfer by an appointed insolvency practitioner can include the situation where in order to achieve the transfer it was deemed necessary to reduce the number of staff employed.

46. In reaching that conclusion I have taken into account the parlous financial state of R1. It is clear from the Joint Administrators Proposals that R1 was unable to meet its liabilities including its wage bill and that urgent action was needed. For example, paragraph 2.3 of the Statement of Joint Administrators' Propoals at [104] states that a pre-pack administration with Mr Studley was discussed and rejected because it would take too long when R1 had run out of cash and was unable to meet payments, including wages. However, for the reasons set out above, I do not find on the facts that the administrators here made an independent decision to dismiss the claimant and his colleagues because they could not pay them and therefore had to shut down R1. Whilst a formal pre-pack arrangement may have been rejected, I have found that there was in reality a more informal, in principle agreement reached with Mr Studley. The financial situation may have been a subsidiary reason for the dismissals and their timing. However, it does not mean that the principal reason was not the transfer.

47. The dismissal of the claimant will therefore be automatically unfair under Regulation 7(1) unless the sole or principal reason for the dismissal was also an economic, technical or organisational reason ("ETO reason") entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer under Regulation 7(2).

48. The claimant's secondary submission was that if the sole or principal reason for the claimant's dismissal was the transfer that section 7(2) would apply on the basis that R2 needed to make changes to the make up of the company, and the numbers of staff employed by the company resulting in the claimant being in a redundancy situation. The claimant pointed to the

fact that R1 had previously taken steps to reduce the headcount by making Mrs Wade redundant and her work being absorbed by existing employees, and the claimant's belief that he was not re-engaged by R2 because of a desire to reduce the headcount, avoid the cost of employing the claimant, and again absorb his work amongst the remaining employees.

49. I did not hear from R2 but I accept it is likely that Mr Studley had such considerations in mind and as I have said I accept that the decision of the administrators to dismiss was part of the deal reached with Mr Studley so that he could, in theory, set up R2 without taking on liability for R1's employees and start afresh in deciding who he would employ. Albeit I accept the administrators may not have know the exact details of Mr Studley's plans.

50. However, does not follow that was an ETO reason. It is important to bear in mind that it is only the reason of the employer who effected the dismissal that is taken into account. In *Spaceright Europe Ltd v Baillavoine and another* [2012] IRLR 111 Lord Justice Mummery said:

> "47. I agree with the ET and the EAT that the claimant was not dismissed for an ETO reason. For an ETO reason to be available there must be an intention to change the workforce and to continue to conduct the business, as distinct from the purpose of selling it. It is not available in the case of dismissing an employee to enable the administrators to make the business of the company a more attractive proposition to prospective transferees of a going concern."

51. I find that applies here. What was operative in the mind of the administrators, as I have found, in dismissing the claimant and his colleagues was facilitating, as part of the in principle agreement reached with Mr Studley, the transfer of the business as, in effect, a going concern but unencumbered by employment liabilities. It was, in effect, making the business a more attractive proposition to Mr Studley as in *Spaceright* to secure the best deal for the creditors. That is not an ETO reason.

52. It follows that I find that the claimant was automatically unfairly dismissed within the meaning of regulation 7(1).

53. The claimant was assigned to the organised grouping of employees that was subject to the relevant transfer, or he would have been so employed if he had not been dismissed under regulation 7(1) within the meaning of regulation 4(3). Therefore under regulation 4(1) and 4(2) responsibility for the claimant's contract of employment and the liabilities following from his dismissal transferred to R2.

54. I should add that even if I had found that under regulation 7(2) an ETO reason applied, I would have in any event have found that the claimant was unfairly dismissed under the standard principles of unfair dismissal. There was no warning, no consultation and no fair selection method adopted. The claimant would still have fallen within the ambit of regulation 4(3) as he was still dismissed in circumstances described in regulation 7(1) and therefore regulations 4(1) and 4(2) would still apply and the overall outcome would have remained the same.

55. The claimant was not given notice of the termination of his employment and he was wrongfully dismissed. The claimant was also not paid in respect of 2 days accrued but untaken pay outstanding at his dismissal. Again liability for these sums rests with R2.

56. Turning to the protective award. I find that there was failure under regulations 13 and 13A to appoint employee representatives and to consult with them or to consult directly with affected employees as a micro business under regulation 13A. The claimant was an affected employee. As there was no recognised trade union or elected representatives the claimant was able to bring a claim as an individually affected employee and I find that his claim is well-founded.

Remedy

Unfair Dismissal – Basic Award

57. I award the claimant the basic award claimed in his schedule of loss [181 - 183] at **£10,269.00.**

Unfair Dismissal – Compensatory Award

58. The claimant claims his loss of earnings to the date of the tribunal hearing and for 12 weeks future losses. I have no evidence before me as to attempts by the claimant to mitigate his losses. I am simply told that he has worked his whole career in the printing trade and there are no opportunities within that industry within Wales. I have been provided with no documentation evidencing job searches undertaken by the claimant. I do not accept that the claimant has no transferrable skills or that he has taken reasonable steps to mitigate his losses. His job involved providing printing estimates and negotiating terms and in my view these would provide transferable skills to other administrative based roles. In my view the claimant should have been able to find employment within 6 months of his dismissal. He was earning £28,800 gross per year and I accept that he would not, immediately at least, be able to earn at that level but anticipate that his earnings in new employment would start at approximately £18,000 gross a year or around £15,775 net (£303.37 a week). I consider that over

time in new employment his earning potential would quickly improve and I decline to award further future losses from September 2019 onwards.

59. I therefore award the claimant:

(a) 26 weeks full losses at £436.15 net a week = £11,339.90

(b) 40 weeks partial losses to trial. £436.15 - £303.37 = £132.78 a week x 40 = £5311.20

(c) 12 weeks future partial loss at £132.78 a week = £1593.36

(d) loss of statutory rights = £500

(e) compensatory award total = £**18,744.46 (net).**

Wrongful Dismissal

60. I make no award of compensation for wrongful dismissal as the claimant's notice period of 12 weeks has been compensated for in full in the unfair dismissal compensatory award calculation.

Holiday Pay

61. I award two days outstanding pay in the gross sum of **£221.54** payable by R2**.** The claimant is responsible for the payment of tax and national insurance contributions on this element unless deducted at source by R2.

Failure to inform and consult

62. In respect of the failure to inform and consult under the TUPE regulations the complaints against both the first respondent and the second respondent are well founded under regulation 15(7) and 15(8) and I make declarations to that effect. Pursuant to regulation 15(9) R2 is jointly and severally liable with R1. No mitigation has been put forward by R1 or R2. Therefore pursuant to regulation 16(3) R1 and R2 or one of them shall pay to the claimant a protective award of 13 weeks pay namely **£6646.20.** For the sake of clarity I record that the protective award claim was previously dismissed against R3.

Recoupment

63. The recoupment regulations apply. For the purpose of regulation 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996:

The Prescribed Element is £18,244.46

The Prescribed Period is 28 May 2018 to 12 June 2019
The total monetary award is £35,881.20
The excess of the total monetary award over the Prescribed Element is £17,636.72

Employment Judge Harfield
Dated: 14 June 2019

JUDGMENT SENT TO THE PARTIES ON

……16 June 2019…….

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS