



EMPLOYMENT TRIBUNALS

Claimants:

1. Mr P Addyman-Yates
2. Mr P Baranowski
3. Mr J Gunnee
4. Mr P Atkinson
5. Mr D Goulder
6. Mr D Wayman
7. Mr G Tamas
8. Mr T Hibbitt
9. Mr D Moar
10. Mr J Robinson

Respondents:

1. Rock and Bone Ltd (in voluntary liquidation)
2. Secretary of State for Business, Energy and Industrial Strategy
3. LaRock Ltd
4. LaRock Construction Ltd
5. Mr D Lawrence

Heard at: Leeds **On:** 10 October 2019

Before: Employment Judge Davies

Representation

Claimants:	Fourth and Sixth Claimants:	Did not attend
	Remaining Claimants:	In person.
Respondents:	First Respondent:	Did not attend
	Second Respondent:	Mr Soni (representative)
	Third to Fifth Respondents:	Mr D Lawrence

RESERVED JUDGMENT

1. The unfair dismissal claim brought by Mr Robinson is dismissed on withdrawal by him.
2. The Claimants were all dismissed by reason of redundancy by the First Respondent with effect from 21 February 2019.
3. There was no transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 to the Third, Fourth or Fifth Respondent.
4. It is declared that each Claimant is entitled to a statutory redundancy payment.

**Case Numbers: 1802009/2019, 1802011/2019, 1802018/2019, 1802038/2019,
1802088/2019, 1802109/2019, 1802261/2019, 1802992/2019, 1803023/2019,
1803459/2019**

5. The claims for unauthorised deduction from wages, holiday pay and notice pay against the First and/or Second Respondents succeed in principle, but the amounts remain to be determined.
6. The unfair dismissal claim brought by the Eighth Claimant against the First Respondent succeeds but no additional compensation will be payable to him.
7. The claims against the Third, Fourth and Fifth Respondents are dismissed.

REASONS

Introduction

- 1.1 This was a hearing to determine claims for redundancy payments, unauthorised deductions from wages, notice pay, holiday pay, and (in two cases) unfair dismissal brought by 10 former employees of the First Respondent, Rock and Bone Ltd.
- 1.2 Mr Atkinson and Mr Wayman had notified the Tribunal in advance that they would not be able to attend the hearing. The remaining Claimants attended in person and represented themselves. The Second Respondent, the Secretary of State for Business, Energy and Industrial Strategy, was represented by Mr Soni. The Secretary of State is liable to make appropriate payments to the Claimants if their employment did not transfer to the Third, Fourth or Fifth Respondent. It refused to make such payments because it took the view that there had been a relevant transfer. Mr Soni confirmed that if there was no relevant transfer, the Second Respondent did not dispute its liability in principle to make appropriate payments in accordance with the Employment Rights Act 1996. The Third and Fourth Respondents are companies owned by the Fifth Respondent, Mr Lawrence. He represented himself and the Third and Fourth Respondent. The First Respondent is a former company of Mr Lawrence's, now in liquidation. It was not represented at the hearing.
- 1.3 I was provided with an agreed file of documents. I had witness statements from all the Claimants except Mr Atkinson. However, other witnesses were able to give evidence about Mr Atkinson's position. I heard oral evidence from all the Claimants who attended the hearing. Mr Lawrence also produced a written witness statement and gave oral evidence.

The issues

- 2.1 The issues for determination at the hearing were identified by Employment Judge Lancaster in an order dated 28 August 2019. In essence they were:
 - 2.1.1 Were any of the Claimants dismissed by the First Respondent?
 - 2.1.2 If so, what was the reason for that dismissal (noting the presumption of redundancy under s 163(2) Employment Rights Act 1996)?
 - 2.1.3 Was there a transfer of undertaking from the First Respondent to the Third, Fourth or Fifth Respondent within the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")?
 - 2.1.4 If so, on what date?
 - 2.1.5 Which employees transferred under Regulation 4 of the TUPE Regulations?
 - 2.1.6 What was the effect of TUPE Regulation 8?

The Facts

- 3.1 The First Respondent is a company (now in voluntary liquidation) of which Mr Lawrence was the director. Its business was designing, manufacturing and installing high-end bespoke furniture for high net-worth clients. Its clients were mainly residential and mainly based within the M25. Its design and manufacturing workshop was in a business park near Knaresborough. The Fourth Respondent is a company owned by Mr Lawrence. It played no part in the events that follow.
- 3.2 The First Respondent business occupied five units at the business park near Knaresborough. Mr Wayman was its Financial Controller. Mr Robinson was its Technical Director. He was responsible for all aspects of the design process, from the conceptual design, through the creation of design drawings to sell the product to the client, to the creation of production designs for the workshop. Mr Goulder was one of two employees working in design and reporting to Mr Robinson. Six of the Claimants worked primarily in the workshop, although occasionally they might go to client sites to help with the installation process. Mr Moar was a machinist who would machine any wood components. Mr Gunnee operated the CNC machine, machining MDF components. Mr Tamas used the veneering machine to carry out high quality veneering work. Mr Addyman-Yates, Mr Baranowski and Mr Atkinson made the furniture. Mr Hibbitt was the Installation Manager and was responsible for overseeing the installation of the bespoke furniture at the clients' premises. They were all highly skilled and long-standing employees.
- 3.3 The company owned a number of expensive, specialist machines, including the CNC machine, the veneer press and the guillotine. Mr Lawrence estimated that there were around 30 machines. A small number of those were not owned by the company, but were in fact owned by the landlord of the premises.
- 3.4 Towards the end of 2018 there was a decline in business. There were evidently some rent arrears and Mr Lawrence was in ongoing discussions with the landlord. By 22 January 2019 some employees, including Mr Moar, were laid off. Mr Moar took his tools home that day and did not return to the premises.
- 3.5 Matters came to a head on 15 February 2019 when the landlord served a Commercial Rent Arrears Recovery Agreement on the company to distrain its assets. At that stage the rent arrears were £27,000. All the machines owned by the company were subsequently auctioned (in July 2019) and the proceeds were retained by the landlord.
- 3.6 Mr Lawrence realised at that stage that the company could not continue trading. He spoke to his business partner and on Thursday 21 February 2019 instructed Insolvency Practitioners to place the company into Creditors Voluntary Liquidation.
- 3.7 At about 4:30 pm on 21 February 2019 Mr Lawrence told Mr Gunnee, Mr Tamas, Mr Atkinson and Mr Addyman-Yates that they were being made redundant with immediate effect. A number of them had tools on the premises, and Mr Addyman-Yates asked if they could come in the next day to collect their belongings. That was agreed. Mr Baranowski was not at work that day. He was told the same information by telephone. Mr Lawrence also told Mr Wayman on 21 February 2019 that he was being made redundant with immediate effect. He asked him to help on

**Case Numbers: 1802009/2019, 1802011/2019, 1802018/2019, 1802038/2019,
1802088/2019, 1802109/2019, 1802261/2019, 1802992/2019, 1803023/2019,
1803459/2019**

a voluntary basis with providing information to the liquidators about finances and personnel issues. Mr Wayman agreed to do so out of loyalty for an employer for whom he had worked for nine years. He did so until 1 March 2019.

- 3.8 Mr Wayman telephoned Mr Moar on 21 February 2019 to tell him that he was being made redundant and a letter confirming that was sent to him the following day. Mr Lawrence and Mr Wayman told Mr Robinson that he was being made redundant with immediate effect. There was some suggestion that Mr Lawrence was hoping to start a new venture, but no information about the nature of the venture. Mr Robinson was invited to help on a voluntary basis for a week or so. Mr Lawrence then telephoned Mr Goulder and told him that he was being made redundant with immediate effect.
- 3.9 Mr Lawrence telephoned Mr Hibbitt on Friday, 22 February 2019 to tell him that he was being made redundant with effect from the previous day. He said that he did not have any other worked for him.
- 3.10 On 22 February 2019 Mr Addyman-Yates, Mr Gunnee, Mr Atkinson and Mr Tamas attended the premises to collect their tools. By that time Mr Lawrence had had a conversation with the landlord and had agreed with him that he would carry out some work at the premises to convert the five units occupied by the First Respondent business back into smaller units that the landlord could let. Mr Lawrence said that he would use some of his former employees to do the work and the landlord agreed to provide money to enable that to be done. The agreement was that Mr Lawrence and his operatives would occupy a much smaller space at the back of the premises to enable them to carry out the works and would not be charged rent for doing so. When Mr Addyman-Yates and the others came to collect their belongings on 22 February 2019, Mr Lawrence asked them if they wanted to work on this refit of the premises. At that stage he was not in a position to agree to pay them and asked them to work on a voluntary basis while he tried to sort that out. The four of them agreed to do so. They spent the rest of that day tidying up and collecting their belongings. They returned on Monday, 25 February 2019 and started work on the substantial demolition and refitting project.
- 3.11 Mr Lawrence had another company, LaRock Ltd, the Third Respondent. That had been a dormant company for some time, but Mr Lawrence decided to use it for the purposes of the refitting project. By Friday of the first week, 1 March 2019, that arrangement was in place. The four operatives who had agreed to work on a voluntary basis were in fact paid for their time by the Third Respondent. There was no dispute that they were employed by that company with effect from 25 February 2019.
- 3.12 Meanwhile, on 24 February 2019 Mr Robinson emailed Mr Lawrence and Mr Wayman. He had been speaking to Mr Goulder and others, and he asked some questions about when the First Respondent had become insolvent and also about the suggestion that they come to work the following week on a voluntary basis. He asked questions such as whether they would be paid and whether they would be insured. Mr Goulder and Mr Robinson came to the premises on Monday, 25 February 2019 and were given a letter by Mr Wayman. That answered their questions about the insolvency and redundancy situation. It said that Mr Lawrence was trying to set up a new business, which it was hoped would be able to offer

**Case Numbers: 1802009/2019, 1802011/2019, 1802018/2019, 1802038/2019,
1802088/2019, 1802109/2019, 1802261/2019, 1802992/2019, 1803023/2019,
1803459/2019**

employment to some former employees of the First Respondent. The week commencing 25 February 2019 was a transitional week in which the First Respondent's affairs were being put in order and opportunities for the proposed new business were being sought. Mr Lawrence had asked for volunteers to assist with that. Anyone who chose to attend the office must do so on a voluntary basis without pay. Mr Wayman said that the proposed new business would trade under the name the Third Respondent but he did not say what business the company would do. When he gave evidence, Mr Robinson confirmed that he understood that the work he was being invited to help with in the week commencing 25 February 2019 was demolition work for the purposes of the refit. Mr Robinson did not take up that offer, but he subsequently agreed to carry out some freelance work for the Third Respondent. I return to that below.

- 3.13 Mr Goulder agreed to start working on a voluntary basis and helped with the demolition until about mid-March. Then he started doing some design work, which was essentially drawing layouts and other designs for the refit of the premises. He, too, was then taken on by the Third Respondent, was paid by that company and became its employee.
- 3.14 Mr Baranowski spoke to Mr Wayman by phone on 1 March 2019 and was also taken on by the Third Respondent with effect from Monday, 4 March 2019 to work on the demolition and refit. Mr Wayman himself was taken on by the Third Respondent from 4 March 2019 onwards.
- 3.15 Mr Hibbitt and Mr Moar were not offered work with the Third Respondent. As I understand it, two or three other former employees of the First Respondent, who are not Claimants in these proceedings, were also given work with the Third Respondent.
- 3.16 So, by 4 March 2019, 10 or 11 of the First Respondent's former employees were working for the Third Respondent at the Knaresborough premises. To begin with, the employees were all paid at the rate at which they had been paid by the First Respondent. That was Mr Lawrence's decision. He said that he was aware that his former workforce had mortgages and bills to pay. He was trying to do what he could for them and the only opportunity he could identify was work on the demolition and refit project. I accepted that as genuine evidence.
- 3.17 I heard evidence about the nature of the work done by the Third Respondent's employees. I was quite satisfied that to begin with it was almost exclusively labouring and demolition work on the refit project. That work remained ongoing until the date of the Tribunal hearing, by which stage it was almost completed. The Third Respondent did not have the specialist machinery that the First Respondent had. All of the machines owned by the First Respondent were removed and sold. That left approximately 5 machines that were owned by the landlord but had been used by the First Respondent. They were basic machines and were used by the Third Respondent.
- 3.18 There were two outstanding projects of the First Respondent that were 85 to 90% complete on 21 February 2019. The evidence suggested that those projects remained incomplete.

Case Numbers: 1802009/2019, 1802011/2019, 1802018/2019, 1802038/2019, 1802088/2019, 1802109/2019, 1802261/2019, 1802992/2019, 1803023/2019, 1803459/2019

- 3.19 Undoubtedly, Mr Lawrence wanted to build up a new business and once things had stabilised he started trying to do so. I heard evidence about three projects or potential projects. None of them involved the design or manufacture of high-end bespoke furniture for residential premises. One was for work at an amusement park. Mr Robinson spent time in March and April measuring and drawing up site surveys. That was different work for him. He did it on a freelance basis and invoiced the Third Respondent. That project did not come to anything. The second project was for a commercial client in London that was not a former client of the First Respondent. The work was for the design and production of an outdoor bar. Mr Robinson also worked on that project. It did come to fruition. The manufacture of the product was outsourced. It was not made of wood or MDF. Mr Robinson's involvement had finished by the end of April 2019. The third project was at a local hotel. It involved the design and production of some furniture for the reception area of the premises. It was not high-end furniture of the kind previously designed and manufactured by the First Respondent, but was described as cabinetry. Mr Goulder had some involvement from April onwards in designing the items and other operatives were involved in producing and installing them in subsequent months.
- 3.20 Mr Lawrence gave evidence that around the end of April 2019 he had resolved issues so as to enable him to use the First Respondent's name for marketing purposes. The Third Respondent launched a website in summer 2019 including that name and marketing itself as a company designing and producing bespoke furniture. Mr Lawrence agreed that he was trying to grow such a business, but his evidence was that this was not the same as the business of the First Respondent. In particular, any manufacturing would be subcontracted out because the Third Respondent did not have the ability to manufacture such items. I accept that evidence.
- 3.21 By the time of the hearing before me, a substantial proportion of the Third Respondent's work was still the refit of the Knaresborough premises. However, the other side of the business had grown. There was some design and construction work, accounting for perhaps 40% to 50% of the business. However, the design and construction work was different from that carried out by the First Respondent. The Third Respondent does not manufacture high-end furniture and its client base is primarily commercial.

Legal Principles

- 4.1 The TUPE Regulations apply to relevant transfers of undertakings as defined in Regulation 3. In this case, the question is whether there was a transfer of an undertaking, business or part of an undertaking or business to another person involving the transfer of an economic entity that retained its identity: Regulation 3(1)(a). An "economic entity" is an organised grouping of resources that has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. A relevant transfer may be effected by two or more transactions and may take place whether or not any property is transferred by the transferor to the transferee.
- 4.2 In his helpful submissions on behalf of the Second Respondent, Mr Soni referred to the well-established principles for determining whether there has been a relevant transfer as articulated by the EAT in *Cheesman v R Brewer Contracts Ltd*

**Case Numbers: 1802009/2019, 1802011/2019, 1802018/2019, 1802038/2019,
1802088/2019, 1802109/2019, 1802261/2019, 1802992/2019, 1803023/2019,
1803459/2019**

[2001] IRLR 144. The Tribunal must take into account all the relevant facts and circumstances. In order for there to be an undertaking:

- 4.2.1 there needs to be a stable economic entity, i.e. an organised grouping of persons and assets enabling or facilitating the exercise of an economic activity which pursues a specific objective;
 - 4.2.2 the entity must be sufficiently structured and autonomous but need not necessarily have significant assets, tangible or intangible;
 - 4.2.3 in some sectors the assets are often reduced to their most basic and the activity is essentially based on manpower;
 - 4.2.4 an activity of itself is not an entity – the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.
- 4.3 As to whether there has been a transfer, the decisive criterion is whether the entity in question retains its identity as indicated, among other things, by the fact that its operation is actually continued or resumed. In a labour-intensive sector an entity is capable of maintaining its identity where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of the number and skills, of the employees specially assigned by its predecessor to do that task. The Tribunal must not consider any single factor in isolation, but must consider all the factors characterising the transaction in question. That includes the type of undertaking; whether or not its tangible assets are transferred; the value of its intangible assets at the time of the transfer; whether or not the majority of its employees are taken over by the new company; whether or not its customers are transferred; the degree of similarity between the activities carried on before and after the transfer; and the period, if any, in which they are suspended. Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer.
- 4.4 I do not need to deal in detail with the provisions of the Employment Rights Act 1996 dealing with unauthorised deductions from wages, unfair dismissal and redundancy payments, which were not in dispute before me.

Application of the law to the facts

- 5.1 Applying those principles to the findings of fact above, I deal with the issues in turn.
- 5.2 Starting with the first and second issues, as set out in the findings of fact above, each of the Claimants was expressly dismissed on 21 or 22 February 2019, with effect from the close of business on 21 February 2019. Each was told that the reason for dismissal was redundancy and I find that it was. There was no evidence to rebut that presumption, but in any event the requirement of the First Respondent for employees to do the work the Claimants were doing had ceased.
- 5.3 That brings me to the question whether there was a TUPE transfer to the Third, Fourth or Fifth Respondent. I find that there was not. The Fourth Respondent played no part in events. Further, there was no suggestion that any of the Claimants was employed personally by Mr Lawrence at any time. The only potential transfer was therefore to the Third Respondent.
- 5.4 Applying the principles set out in *Cheesman v Brewer* I have concluded that there was no transfer of an economic entity that retained its identity. The economic entity

Case Numbers: 1802009/2019, 1802011/2019, 1802018/2019, 1802038/2019, 1802088/2019, 1802109/2019, 1802261/2019, 1802992/2019, 1803023/2019, 1803459/2019

that was the First Respondent ceased to exist. A new economic entity was established that was fundamentally different. It is now somewhat more similar, but that is the way it has developed over time, and it is still significantly different in any event.

- 5.5 The previous entity was a business with around 15 staff operating from five units in the business park near Knaresborough. It had substantial assets in the form of expensive specialist machines. Its designers designed high-end, bespoke furniture for the homes of high net-worth individuals and its skilled workforce produced and installed that furniture using the specialist machinery.
- 5.6 Factors pointing towards a transfer include (1) the fact that a substantial proportion of the workforce was, immediately or very shortly after 21 February 2019, employed by another of Mr Lawrence's companies; (2) the fact that the new business operated out of part of the same premises; (3) the fact that as time went on the new business marketed itself as a producer of bespoke furniture and relied on the name of the former business in doing so; and (4) the fact that the business now involves a significant element of furniture/cabinetry design and manufacture.
- 5.7 However, there are significant factors suggesting that there was no transfer. First, although the employees who started working for the Third Respondent had worked for the First Respondent, they were not doing the same work. To begin with, they were all doing basic demolition and labouring. As time went on they took on other elements, but their work was still substantially different. The skilled workshop operatives were not doing the specialist work they had done before. Even when they were doing cabinetry or construction work, it was more basic joinery rather than the specialist work they had done previously. In addition, the majority of their time was still spent on the demolition and labouring. Likewise, although Mr Goulder started doing some design work, he was not designing high-end bespoke furniture. He was designing layouts for the premises and then some much more basic furniture/cabinetry.
- 5.8 Secondly, the Third Respondent operated out of only a very small part of its former premises, and it did so in order to facilitate the refit of those premises. It did not pay rent and it did not have any tenancy agreement.
- 5.9 Thirdly, the key tangible assets of the First Respondent, namely its specialist machinery, did not transfer. They were sold to pay the rent arrears. The Third Respondent does not have or use such machinery. It has use of the basic machines owned by the landlord.
- 5.10 Fourthly, the customers of the First Respondent did not transfer to the Third Respondent. Indeed, the only customer to begin with was the landlord. When the Third Respondent sought to develop the other side of the business, it targeted commercial rather than residential customers.
- 5.11 Fifthly, and fundamentally, looking at all the relevant facts, the operation of the First Respondent did not continue or resume at any point. There was and remains no operation designing, manufacturing and installing high end bespoke furniture for high net-worth residential customers. There was initially an interim business taking advantage of an opportunity provided by the landlord of the premises to enable a number of former employees to be given work. Over time, the nature of the operation has changed, but it still cannot be said in any sense that the previous operation has resumed.

**Case Numbers: 1802009/2019, 1802011/2019, 1802018/2019, 1802038/2019,
1802088/2019, 1802109/2019, 1802261/2019, 1802992/2019, 1803023/2019,
1803459/2019**

5.12 Therefore, there was no relevant transfer. The remaining issues do not fall for consideration in those circumstances.

Employment Judge Davies

28 November 2019

RESERVED JUDGMENT & REASONS SENT TO
THE PARTIES ON

4 December 2019