



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mrs L Walsh

**Respondents:**

1. Fleet Commercials Ltd
2. Loumogg Ltd (dissolved)

**Heard at:** Liverpool

**On: 14 February 2020**

**Before:** Employment Judge Shotter (sitting alone)

**Appearances**

For the claimant: In person  
For the first respondent: Ian France, director

## JUDGMENT

The JUDGMENT of the Tribunal is:

1. There was a transfer from the second respondent to the first respondent on the 8 April 2019 under the Transfer of Undertakings (Protection of Employment) Regulations 2006.
2. All remaining claims in the case will be determined at a final hearing before an Employment Judge sitting alone at the Employment Tribunals **3<sup>rd</sup> Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L22BX on 29 May 2020** starting at 10 am or as soon as possible afterwards, with an estimated length of 3-hours. The parties will confirm within 7 days of receiving this judgment with whether the listing allocation causes them difficulties, and if so, cogent reasons and supporting evidence will be provided as to why the hearing cannot proceed.

## REASONS

### Preamble

3. This is an open preliminary hearing following an earlier preliminary hearing held on 5 November 2019 at which case management orders were made to assist the parties prepare to deal with the issue of whether a TUPE transfer had taken place between the first and second and third respondent, and is so, the date of transfer.
4. In a claim form received by the Tribunal on 2 June 2019 following ACAS early conciliation that took place between the 8 May and 17 June 2019, the claimant claims unlawful deduction of wages, accrued unpaid holidays and one week's notice pay totalling £1355.72.
5. A response was received from the first respondent only, the second did not enter an appearance and is a dissolved company.
6. The first respondent defended the claim on the basis that the claimant did not work for it and was not an employee of the second respondent but worked for 2029 Ltd with the second respondent being invoiced for her services. It was alleged Ian France, the director of the first respondent, introduced himself as a prospective purchaser of the second respondent and not 2029 Ltd, to the claimant on 5 April 2019 and the transfer from the second to first respondent took place on 17 April 2019. A counterclaim was made for a payment made to the claimant in error in the sum of £1256.92.
7. The Tribunal heard oral evidence from the claimant and Carl Haslam, a previous employee of the first respondent, which it found to be credible and honest. It also heard from Ian France, who did not provide a written statement, who in contrast, found to be an inaccurate historian preferring the more credible evidence given by the claimant and Carl Haslam which was largely supported by the contemporaneous evidence. It is particularly notable that Ian France confirmed during the liability hearing that at the 5 April 2019 meeting the claimant and Carl Haslam were told he going to be the "new boss" on 8 April 2019 in direct contrast to the Response in which it was described Ian France had introduced himself as a prospective purchaser. The Tribunal accepted the evidence of the claimant and Carl Haslam that they understood Ian France was "the gaffer" and the previous owner, Neil Marsh, thanked them for all their hard work before saying goodbye.
8. Ian France produced a signed undated statement from Kim Finney, a director of Capital Bookkeeping, the contents of which were disputed by the claimant save for Kim Finney's observation that the HMRC had incorrectly calculated the claimant's tax and national insurance contributions, which the claimant agreed

was the case as the April 2019 payment had not been taken into account. Kim Finney's description of herself as an independent and self-employed bookkeeper was disputed by the claimant on the basis that she had been a company director of the second respondent. A search on Companies House revealed that Kim Finney had been appointed company director until her resignation on 28 February 2019. As Kim Finney was not called to give evidence the claimant was unable to cross-examine her on her independence, she continued to work for the first respondent and her statement that Ian France and William Kenyon took over the business of the first respondent on 17 April 2019 and Ian France had been brought in to "babysit" the company at the beginning of April was not accepted by the claimant. Given the conflicts in the evidence and the inability of the claimant to cross-examine Kim Finney on the key points raised in her evidence, the Tribunal has given it very little weight. It is notable that as the second respondent's bookkeeper, Kim Finney makes not mention of Ian France's belief that the claimant was employed and paid her salary by 2029 Ltd. It is marked that when Kim Feeney raises the issue of the HMRC tax calculation and the incorrect figures used; she does not say the HMRC have raised tax against the wrong employer, and instead of the first respondent being shown as employer, it should have been 2029 Ltd. The Tribunal infers from this omission Kim Feeney was unaware 2029 Ltd was the employer throughout, as alleged by Ian France. It is notable Kim Feeney was in correspondence with the claimant when she was offered the position of senior administrator by the first respondent and it is clear the employer was the second respondent.

9. Finally, Ian France confirmed that the claimant was employed by 2029 Ltd immediately before the transfer from the second to first respondent, as were all the staff including the technicians and they did not transfer under TUPE on the basis that they were agency workers. The Tribunal found this evidence was not credible, and preferred that of the claimant that she was an employee of the second respondent in accordance with an offer letter referred to below. It also preferred the evidence of Mr Haslam that he was never an agency worker, but an employee of the first respondent having transferred from the second respondent under TUPE. The Tribunal concluded that Ian France used every possible unmeritorious argument to avoid the consequences of TUPE in order to save money following the transfer.
10. The preliminary hearing minute of 5 November 2019 sets out a number of matters confirmed by the parties at the time relevant to this preliminary hearing. The concessions were the starting point for the Tribunal's findings of facts. The concessions were as follows:
  - 7.1 The second respondent contracted with Asda relating to the maintenance and repair of the supermarket lorries. The contract had existed in excess of 10 years, initially with Eye Commercial who ran the business from the same premises, then following a transfer to the second respondent in September/October 2018.

7.2 The second respondent employed technicians who carried out work on the Iveco lorries, and four women in the office who dealt with warranties, maintenance bookings and invoices. A number of technicians continued working for the first respondent.

7.3 A meeting took place on 5 April 2018 and what was said at that meeting is key to whether Mr France, on behalf of the first respondent, indicated he was to “take over the business” on 8 April and whether on the facts he had taken responsibility for the business on that date?

7.4 The claimant says she was employed by the first respondent for “about” 2-weeks from 8 April 2020. It is not disputed the claimant worked for the first respondent, Ian France submitting the claimant was an agency worker employed by 2029 Ltd at the time.

7.5 The claimant’s last payslip was in the sum of £1256.92 (the respondent’s counterclaim) in the name of the first respondent. Ian France, on behalf of the first respondent, maintains this was paid in error.

7.6 Mr Marsh, the managing director of the second respondent, physically left the business on 5 April 2019 and was never seen again in the business. Ian France maintains he was babysitting while Mr Marsh was on holiday.

7.7 The claimant gave notice of resignation to Ian France and the first respondent. And not Mr Marsh or the second respondent.

7.8 Mr France confirmed he took over from the second respondent premises at units 14-15 Haydock Cross, Kibuck Lane, Haydock and paid a bond of £2000 to the freeholders to retain the lease on the premises. The lease was about to be put into the name of the first respondent; Ian France confirmed the lease was still outstanding.

### Issues

8 The agreed issues were set out in the Case Management Order sent to the parties on 14 November 2019, namely,

5.1 Was there a transfer to another person or company?

5.2 Did an economic entity transfer?

5.3 Did the economic identity retain its identity after the transfer?

5.4 Was that entity situated immediately before the transfer in the United Kingdom.

5.5. The Tribunal has also included the issue of whether the claimant was employed by the second respondent immediately before the transfer to the first respondent, as a fifth issue, to assist the parties for the final hearing, this was agreed with the parties and oral submissions were heard from both.

- 9 The Tribunal was referred to two bundles of documents marked “C” and “R” which it read beforehand and took into account. Having considered the oral and written evidence and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has made the following findings of the relevant facts.

### Facts

- 10 The second respondent was in the business of maintaining and repairing Iveco lorries. It had contracted with Asda to supply the maintenance and repair of the Iveco supermarket lorries from leased premises at units 14-15 Haydock Cross, Kibuck Lane, Haydock. The contract had existed in excess of 10 years, initially entered with Eye Commercials who ran the business from the same premises, then following a transfer to the second respondent in September/October 2018.
- 11 The second respondent employed a number of technicians and one agency worker who carried out the repair and maintenance work on Asda’s Iveco lorries, including Carl Haslam, a senior employee technician. Four employees in the office dealing with the paperwork side of the business, including with warranties, maintenance bookings and invoices, including the claimant.
- 12 The claimant was a candidate put forward to the second respondent for the vacancy of senior administrator by an employment agency, Morgan Turner Group Ltd. There is no reference to an employment agency 2029 Ltd, and the Tribunal preferred the claimant’s submission that two employment agencies were not involved and it made no sense that 2029 Ltd employed her when the Morgan Turner Group placed her as a candidate for the vacancy.
- 13 On the 6 December 2018 Kim Feeney via Capital Booking offered the claimant “the job” as Senior Administrator” enclosing an offer letter of the same date from the second respondent. The letter confirmed the claimant’s employment was to commence on 2 January 2019, at a salary of £21,000 per annum, 20 days holiday per year plus statutory holidays, the holiday year running January to December and that an employment contract “will be issued to you within the next 6-weeks. The employment contract or a statement of terms and condition of employment required to be issued in accordance with section 1 of the Employment Rights Act 1996 as amended (“the ERA”) were never issued to the claimant throughout her employment and this may be a relevant matter to take into account at the next hearing.

- 14 The claimant was issued with payslips that showed 2029 Ltd which she queried and was told that payroll was outsourced to a bureau. In the first respondent's bundle of documents Ian France referred the Tribunal to a number of emails exchanged between the claimant and Kim Feeney which make it clear salary of staff, including overtime, was dealt with and there was no suggestion 2029 Ltd was the employer. The Tribunal was also referred to invoices from 2029 Ltd to the second respondent showing gross pay of varying amounts of £44,858.32 and £47,576.70 which Ian France relied upon as evidence 2029 Ltd was the employer. The Tribunal did not accept this proposition, and it was satisfied the invoices directly related to the re-payment of salary costs from the second respondent 2029 Ltd paid out as a payroll provider, and they were not agency fees with 2029 Ltd being the employer and charging staff out to the second respondent.
- 15 From the 2 January 2019 the claimant was employed by the second respondent in the position of senior administrator.

#### 5 April 2019 meeting

- 16 A meeting took place on 5 April 2018 attended by Neil Marsh, Ian France, the claimant and Karl Haslam in their capacity as senior employees, in addition to other people. It is not disputed at the meeting Neil March introduced Ian France as the person who had bought the second respondent, and from the 8 April 2019 he would take over as managing director. Karl Haslam's recollection of that meeting was he understood Ian France was the boss from that point. It was made clear to both that (a) Neil Marsh had sold the business, (b) Ian France was the new owner and managing director and (c) Neil Marsh said his goodbye's and thanked the claimant and Karl Haslam for all their hard work. As a parting gift he said that £100/150 had been left on a fuel card. In the past it was "touch and go" whether the fuel card could successfully be used to purchase fuel, and it regularly needed topping up.
- 17 Ian France relies on the fact that due to an error in the paperwork at the solicitors the asset sale could not be completed, and therefore he did not take over as anticipated on the 8 April 2019. When asked about the Asda contract, Ian France's response was confusing in that he said the contract remained with the second respondent until late May 2019 and yet the work continued to be carried out without a break by technicians including Carl Haslam and the contract with Asda has continued to date, albeit the contracting party had changed from the second respondent to the first.

#### 8 April 2019 TUPE transfer

- 18 From the 8 April 2019 Ian France ran the business. He was the "boss" and apart from this, nothing changed. The business of repairing and maintenance of vehicles for Asda continued and the same staff employed by the second respondent continued to carry out their duties, including the claimant who was unhappy with the situation. Ian France cross-examined both the claimant and Carl Haslam

maintaining he had informed both on an unspecified time and date, that the sale on 8 April 2019 was delayed due to problems with the paperwork, which was denied. The Tribunal preferred the evidence of the claimant that she was told nothing, and that of Carl Haslam that he was told “the legal stuff was getting sorted and not to worry.” In short, Carl Haslam had no reason to believe that Ian France had not taken over the business, and his employment had transferred as a result.

- 19 There is an issue whether Ian France held a NatWest card in his name for the second respondent which he used for the payment of fuel on the 10 April 2019. The claimant was adamant that she had seen him use the card, Ian France disputed this and offered to show the Tribunal his bank cards, which was not relevant given we were many months down the line. The Tribunal took the view that given the uncontroversial evidence fuel needed to be purchased, and the claimant’s undisputed evidence that the fuel card could no longer be used by 12 April 2019 as it had been revoked and Neil Marsh was no longer involved in the business, it concluded Ian France paid for the fuel on his card. In accordance with the evidence of Carl Haslam Ian France also paid for fuel by cash, a further indication that he was not merely “babysitting” but taking a pivotal part in running the business including employing three new members of staff to work in the office and he instructed staff on their duties, for example, informing the claimant that there was no need for her to carry out the planning of vehicle bookings as this could be done by computer.
- 20 The claimant was not happy with the changes and she met, having drafted her resignation, with Ian France informing him of this on the 11 April 2019 five days prior to when Ian France concedes a transfer took place. It is notable the claimant did not discuss her resignation with Neil Marsh and the reason for this is was she believed Ian France was the “boss”. She was not told by Ian France that her employer was 2029 Ltd and the resignation should be addressed to that company. Ian France asked the claimant to send the written resignation to him, which she did on the 12 April 2019 referring to their conversation the day before, the fact she was “off now till 24 April, if you so wish I will stay to the end...and finish on 30 April 2019.” The claimant received no response, and her case is that she was employed until 30 April 2019 the date when a number of other employees resigned after receiving their pay at the end of April 2019. It is notable since the transfer there has been a haemorrhaging of employees, the last resignations being in November 2019.
- 21 Having heard the oral evidence and considered the contemporaneous documentation the Tribunal concluded the claimant was employed in the undertaking immediately before the transfer. Whether or not her contract ended on the 24 April 2019 when her notice period expired or 30 April 2019 is an issue for the liability hearing and remedy. It is undisputed the claimant’s salary was paid by the first respondent at the end of April 2019 and not 2029 Ltd.
- 22 The “legal stuff” was completed on 17/18 April 2019 upon the return from holiday of Neil Marsh two days before. It is notable that on Ian France’s account he was

“babysitting” the business and yet confirmed Neil Marsh come nowhere near the business on his return. The Tribunal concluded on the evidence before it Ian France was running the second respondent business in its entirety and without any reference to Neil Marsh on the basis that the deal had been done and all that was necessary to complete the asset sale was completion of the legal paperwork. In the respondent’s bundle there exists a form TM01 – termination of appointment of director reflecting Neil Marsh, who had been appointed director on 8 February 2019 resigned 17 April 2019 on the same date when Ian France and William Kenyon were appointed.

- 23 After the claimant’s resignation took effect, Ian France issued a memo to all employees on 10 May 2019 informing them that “I legally acquired the Assets of the business on April 18, 2019 this means I only bought the fixtures, fittings and goodwill of the previous company Loumogg. Your employment was with 2029 a separate company to Loumogg, and all entitlement to holidays etc were held with themselves. Yourselves are now employed by Fleet Commercial and a new contract of employment will be provided forthwith, but I have no responsibility to honour any previous holidays or back pay. Your new holiday will come into effect from 31 March 2019, any holidays taken from this date will come off this year’s holiday entitlement... I know you won’t be happy.” The Tribunal concluded that the memo was further evidence of the first respondent’s attempt to avoid the consequences of a TUPE transfer using unmeritorious arguments to circumvent the protection of the Acquired Rights Directive enjoyed by employees of the first respondent following a transfer from the second respondent.
- 24 Mr Marsh, the managing director of the second respondent, left the business on 5 April 2019. The second respondent was dissolved on the 22 October 2019, Neil Marsh remained the director until dissolution.
- 25 Ian France personally took over from the second respondent premises at units 14-15 Haydock Cross, Kibuck Lane, Haydock and paid a bond of £2000 to the freeholders to retain the lease on the premises. The lease is yet to be put into the name of the first respondent.

#### Law

- 26 The provisions of **TUPE** are Regulation 3(1)(a), Regulation 3(2) and Regulation 3(6):

**“(1) These 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;**

...



(2) In this regulation “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.

...

(6) A relevant transfer -

(a) may be effected 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.”

27 The provisions in **TUPE** were passed in order to implement the **Acquired Rights Directive**, Council Directive 2001/23/EC. It is well established that they are to be interpreted in accordance with jurisprudence developed under that Directive and its predecessor, Directive 77/187/EC. The requirement under regulation 3(1)(a) that there should be a transfer of “an economic entity which retains its identity” can be found in the pivotal case of Spijkers v Gebroeders Benedik Abattoir CV: ECJ 24/85 [1986] 2 CMLR 296 which lay down guidance for the Tribunal to consider (a) the type of undertaking or business concerned; (b) whether assets tangible or intangible, are transferred, (c) whether the employees were taken over, (d) whether customers were transferred and 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. The Tribunal should take a holistic approach when assessing the guidance set out in Spijkers not one single factor should be taken in isolation, which the Tribunal has done as set out in the facts above.

28 Further guidance was given by the EAT in Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 referred to as the “Cheesman principles” which do not purport to be an exclusive list of factors. Paragraph 11 of the decision sets out:

(1) As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is continued or resumed. In relation to Lourmogg Ltd the Tribunal found it had retained its identity after the transfer and the business operation continued without break.

(2) In a labour-intensive sector, it is to be recognised that an entity can maintain its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-

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

- (3) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation - Vidal paragraph 29; Sanchez Hidalgo paragraph 29; Allen paragraph 26. However, whilst no authority so holds, it may, presumably, not be an error of law to consider "the decisive criterion" in (i) above in isolation; that, surely, is an aspect of its being "decisive", although, as one sees from the "inter alia" in (i) above, "the decisive criterion" is not itself said to depend on a single factor.
- (4) Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended.
- (5) In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on.
- (6) Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets.
- (7) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer.
- (8) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer.
- (9) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor.
- (10) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship.

- (11) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.
- (12) The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub-contractor and the start by the successor. In relation to Lourmogg Ltd the work carried out on behalf of Asda continued without interruption or change.

52 The Tribunal handed to the parties prior to hearing oral evidence two cases relevant to the issues; Commercial Motors (Wales) Ltd v Mr M Howley Appeal No. UKEAT/0491/11/ZT and the Court of Appeal judgment in Housing Maintenance Solutions Ltd v McAteer [2015] I.C.R. 87.

Conclusion: applying the law to the facts

- 53 The Tribunal's stating point is that the directive and consequent regulations are to be interpreted in such a manner so as to preserve employment for the affected employees. The Tribunal is required to take a holistic approach and carry out a multi-factorial test having first identified the economic entity in question, which it has done, before going on and decide whether that economic entity transferred.
- 54 In Celtec Ltd v Astley and ors [2005] ICR 1409, ECJ, the European Court ruled that the 'date of a transfer' in Article 3(1) of the Acquired Rights Directive is a particular point in time that cannot be postponed to another date at the will of the transferor or transferee. Both the choice of the word 'date' and the requirement for legal certainty indicated that the transfer must be identified at a particular point in the transfer process and not in relation to the length of time over which that process extends. The date in question, the Court continued, is that on which responsibility as employer for carrying on the business of the undertaking moves from the transferor to the transferee.
- 55 Amongst the matters thus falling for consideration under the "Cheeseman principles" is the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended. In relation to Lourmogg Ltd the tangible assets were eventually transferred to the first respondent after a short delay, the lease was transferred to Ian France pending a further transfer to the first respondent, the activities carried on as before, the Asda contract continued to be worked on by employees previously employed by the second respondent in the same way it had been before the transfer.

- 56 The Court of Appeal in Housing Maintenance established an undertaking was transferred when the transferee assumed responsibility for carrying on the business, *Celtec Ltd v Astley (C-478/03) EU:C:2005:321, [2005] E.C.R. I-4389, [2005] 5 WLUK 696, Celtec Ltd v Astley [2006] UKHL 29, [2006] 1 W.L.R. 2420, [2006] 6 WLUK 460* and *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S (324/86) EU:C:1988:72, [1988] E.C.R. 739, [1988] 2 WLUK 108* followed. The treatment by a transferee of employees employed in the undertaking as his employees did not determine the date of transfer. It was the date of the transfer of the undertaking which determined when responsibility for employees employed in it transferred. Further, it was clear from *Landsorganisationen i Danmark v Ny Molle Kro (C287/86) EU:C:1987:573, [1987] E.C.R. 5465, [1987] 12 WLUK 217* that there could be a transfer of a business at a time when no employees were working and no activities were carried out, *Ny Molle Kro* applied. What was relevant was whether and when there was “change in the legal or natural person ... responsible for carrying on the business and who by virtue of that fact incurs the obligation of an employer vis-a-vis employees of the undertaking” (see paras 40-43 of judgment. The ECJ and House of Lords in *Celtec* referred to the assumption of responsibility by the transferee as employer for the transferor’s previous employees by reason of the operation of TUPE. That assumption of responsibility “occurred on the date of the transfer of the undertaking, not vice versa.”
- 57 In Commercial Motors, a case whose facts are similar to those in *Lourmogg Ltd*, the EAT held where an employee had been dismissed before completion of the sale of his employer’s business, there was nevertheless an effective transfer of his contract of employment under the Transfer of Undertakings (Protection of Employment) Regulations 2006 reg.3(1)(a) because the new employer was in control of the business at the time of transfer. In that case the appellant employer (W) appealed against various findings of an employment tribunal in relation to a transfer of its business following the dismissal of the respondent employee (H). H had worked for a commercial vehicle repairer (N). Negotiations took place for the sale of N to W, with completion of the sale agreement being conditional on financial matters and property arrangements. N and W did not give the employees any advance information about the transfer. H was dismissed on February 2, 2009, at which time the first condition had been fulfilled, but completion of the property matters did not take place until March 2009. H brought proceedings for unfair dismissal against W. The employment tribunal (i) held that, as at February 2, 2009, there had been a transfer of undertakings within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006 reg.3(1)(a). The EAT held dismissing the appeal, W had taken over responsibility for staff wages from February 2, 2009. The fact that completion had not taken place at that date was irrelevant to whether there had been valid transfer for the purposes of reg.3(1)(a) of the Regulations, given that W as transferee had taken on the responsibility of running the business by that time, *Wheeler v Patel [1987] I.C.R. 631, [1987] 3 WLUK 18* considered (see

paras 16-18, 21 of judgment). In relation to Lourmogg Ltd the Tribunal found Ian France had taken over responsibility for carrying on the business and incurring the obligation of an employer on behalf of the first respondent on 8 April 2019 and at that date there had been a TUPE transfer.

- 58 In conclusion, the Tribunal on the evidence before it as set out in the findings of fact, on the balance of probabilities concluded that as at 8 April 2019 Ian France, acting on behalf of the first respondent, had taken on the responsibility as employer for carrying out the undertaking previously carried out by the second respondent in its entirety. In Landsorgainsationen I Danmark v Ny Molle Kro [1989] IRLR 37 it was held ownership of the business is less important than whether there has been a change in the legal person responsible, and the Tribunal took the view that by 8 April 2019 Ian France on behalf of the first respondent had taken over legal responsibility and the fact that he was not registered in Companies House as a director or person with significant control does not undermine the position.
- 59 With reference to the first agreed issue, namely was there a transfer to another person or company, the Tribunal found that there was a transfer from the second respondent to the first respondent, Ian France having taken over legal responsibility from the 8 April 2019 of the business undertaken by the second respondent including dealing with and paying for employee's salaries when those employees continued to service the Asda contract in the same premises, using the same machinery and in the words of the claimant "as far as the staff were concerned it was business as usual and nothing had changed" with the exception of Ian France taking control.
- 60 With reference to the second issue, namely, did an economic entity transfer, the Tribunal found that it did for the reasons set out above.
- 61 With reference to the third and fourth issue, namely, did the economic identity retain its identity after the transfer, the Tribunal found that it did. The entity was situated immediately before the transfer in the United Kingdom.
- 62 With reference to the fifth issue, namely, was the claimant employed by the second respondent immediately before the transfer to the first respondent, the Tribunal found that she was. On the respondent's case at its highest, had the Tribunal accepted the transfer took place on the 17 or 18 April 2019, the claimant would still have been employed as she was on holiday and "working her notice."
- 63 In conclusion, there was an effective transfer of the claimant's contract of employment under the Transfer of Undertakings (Protection of Employment) Regulations 2006 reg.3(1)(a) because the new employer, the first respondent, was in control of the business at the time of transfer on the 8 April 2019.

**RESERVED**

**Case Numbers: 2406017/2019  
2406343/2019  
2413528/2019**

64 The liability and remedy hearing case management orders were agreed with the parties and are attached in a separate case management order.

26.2.20 \_\_\_\_\_  
**Employment Judge Shotter**

Reserved judgment & reasons  
sent to the parties on:

28 February 2020

For the Tribunal: