EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Murphy

Respondent: Sunrise Records & Entertainment Limited

HEARD AT: Cambridge: 12 March 2020

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Mr Oliver Isaacs (Counsel)
For the Respondent: Mr P Chadwick (consultant)

RESERVED JUDGMENT

1. The claimant's unfair dismissal claim against the respondent has no reasonable prospect of success, and is struck out pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. The claim is dismissed.

REASONS

BACKGROUND

1. The claimant was employed by HMV Retail Ltd ("HMV") as an assistant manager at its Stevenage store from 22 January 2009 until his dismissal with a payment in lieu of notice ("PILON") on 24 January 2019. Following completion of the early conciliation process, he brought a claim against both HMV and the above-named respondent, in which he asserted that his dismissal was unfair.

2. The claim against HMV was rejected by the tribunal in April 2019, on the basis of non-compliance with the early conciliation process in respect of (just) HMV.

3. Two preliminary hearings followed. In October 2019, today's hearing was listed for a determination in relation to the claimant's status under the TUPE 2006 Regulations (TUPE").

4. At that October 2019 preliminary hearing, a specific issue to be determined today was said to be "did the provisions of TUPE… apply to the claimant's employment with HMV retail limited?" That wording was a little nebulous (and, at that stage, the claimant's case under TUPE was still unclear).

5. However, at today's hearing, the representatives helpfully clarified and agreed the following points, and issues for determination:

    a. There had been a TUPE transfer of all HMV's staff working at the Stevenage store to the respondent (which was incorporated on 4 January 2019) on 5 February 2019.
    b. The claimant was not in fact still assigned to the undertaking which transferred at the point of transfer, because of his dismissal by HMV on 24 January 2019. (Otherwise, he would also have transferred.)
    c. The claimant should be deemed as having been assigned to that undertaking pursuant to regulation 7(1) of the TUPE regulations if the sole or principal reason for his dismissal by HMV was the transfer.
    d. In such circumstances, the dismissal would be automatically unfair.
    e. Hence the claim stood or fell on the issue of what was the sole or principal reason for the claimant's dismissal. If it was not the reason proscribed by regulation 7(1) of TUPE, the claim must be dismissed for want of reasonable prospects of success. Otherwise, the claim could proceed against the respondent as transferee.

6. The claimant had previously raised arguments at the 2019 preliminary hearings in relation to his appeal and certain pension payments. Mr Isaacs clarified that these arguments were not pursued, in the light of the content of the witness statement of Ms Breslin.

7. I was referred to various pages in a bundle comprising some 222 pages. I also heard evidence from the claimant, Caroline Bartlett (HR manager of the respondent) and Kathleen Breslin (Head of HR). Mr Butler, the 'decision maker' referred to below, did not give evidence. He left the respondent's employment some time ago.

8. All witnesses gave their evidence thoughtfully and candidly. In each case, where concessions on the facts should sensibly be made, they were made. I was particularly impressed by Ms Bartlett's evidence, which was clear and cogent.

FACTUAL FINDINGS

9. The claimant was absent from work from July 2018 and until his dismissal in January 2019. His GP reported in July 2018 that he was suffering from "low mood and emotional distress which has been precipitated by some recent life events".

10. As part of the respondent's standard procedures for dealing with absences from work, a meeting was held on 11 September 2018 between the claimant and his regional manager, Mr Butler.

11. The respondent summarised what happened at that meeting in a letter dated 1 October 2018. Amongst other things, the letter records issues which the claimant said he had with a text message sent to him from a female colleague and erstwhile friend ("B"). It also notes that the claimant had indicated he did not want to return to his role at Stevenage whilst B was still there, and instead wanted to move to another store - but not in a role which was inferior to his current assistant manager position. It was explained to him in the letter that "a return to work in the foreseeable future in some capacity was required to avoid your contract of employment being at risk". It was also confirmed to the claimant that "dismissal on grounds of ill health might be a possibility" in such circumstances- albeit it was hoped he would be able to return to work.

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19. I consider Ms Bartlett's expression of confusion and disappointment was genuinely felt.

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22. The 12 December 2018 meeting did not take place, because by an email dated 10 December 2018 the claimant appealed against the grievance outcome -and stated that due to pre-existing health appointments he could not attend the meeting on 12 December 2018 in any event.

23. As a result, by a letter dated 13 December 2018, Ms Bartlett wrote the claimant confirming details for the grievance appeal hearing (on 11 January 2019) and for the reconvened formal hearing regarding his ill health capability (on 16 January 2019). Once again, the letter made clear that the outcome of that latter meeting "could include your dismissal on grounds of capability due to your ill health".

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representatives of the 1,500-odd staff nationally affected. The first such meeting took place on 11 January 2019.

25. The claimant's appeal against the rejection of his grievance was dismissed, and that outcome was given to the claimant in writing on 16 January 2019.

26. The diarised review hearing for 16 January 2019 did not go ahead, because by an email dated 11 January 2019 the claimant indicated he had a health appointment on that day. So, by a letter dated 18 January 2019, Mr Murphy therefore wrote to the claimant re-arranging the formal health review meeting to 24 January 2019.

27. Meanwhile, consultation meetings with the administrators continued. At the 22 January 2019 meeting, it was explained that various offers had been made to purchase HMV. The administrators reported "no formal deadline in place for completion of the deal but hoping to achieve by the end of this week", and that "due diligence is ongoing with the potential buyers". The deal was not a foregone conclusion. Hence, it was also explained that if the sale "does not happen then the next pay date would be 31 January".

28. By 24 January 2018, as Ms Bartlett explained in her evidence, the claimant's grievance and grievance appeal had been concluded, his grievance had not been upheld, he was still absent from work- and had been since July 2018. He had also turned down alternative jobs, and would not still return to his current store. Nor would he engage in the mediation process.

29. At the 24 January meeting, the claimant explained that nothing had changed from his perspective, and that he was still unable to return to work at Stevenage.

30. Having heard from the claimant, the meeting was adjourned. Miss Bartlett went through the facts with Mr Butler, and discussed the case with him. She explained to me (and I accept) that they reviewed what the claimant had said, and the steps they had gone through, to see if there was any possible alternative to an ill-health dismissal. They concluded the evidence showed that there was no foreseeable return to work, and that all realistic options had (in their view) been explored.

31. She did not recall having any discussion with Mr Butler about the administration process, and the implications of it. I accept there was no such discussion (and that even if there was, it did not affect the primary reason for the dismissal). Instead, the discussion was all focused on the claimant's (in)ability to return to work.

32. As far as she was aware, Mr Butler did not have any contact with the administrators before making his decision.

33. Mr Butler informed the claimant that he was to be dismissed. The dismissal was to be with a PILON. Despite Mr Isaacs' valiant attempts to persuade me otherwise, I find there was nothing suspicious about that fact. I accept Ms Bartlett's evidence to the effect that, as a general rule, PILONs were made by HMV in cases of dismissal due

to ill health, and that there was nothing untoward about making such a payment here. In particular, I accept Ms Bartlett's evidence that the decision to make a PILON did not connote a motive on the part of HMV to get the claimant 'off the books' before any TUPE transfer.

34. Ms Bartlett was in agreement with the dismissal decision, albeit she was not the decision maker. As she said in her evidence, which was not challenged on this point, "I was happy that the evidence showed that there was no foreseeable return to work. We had explored all the options and in the light of the circumstances we agreed that Mr Murphy should be dismissed on grounds of capability due to ongoing ill health."

35. By a letter dated 28 January 2019, Mr Butler confirmed the claimant's dismissal, and the reasons for it. Mr Butler recorded the (undisputed) fact that the claimant still "did not feel able to return to your role of assistant manager in HMV Stevenage" and thought "there was nothing suitable for you available". He noted that "your representative asked whether due to the administration process there will be a possibility of alternative roles in other stores [and if it would] be possible to put this process on hold". Mr Butler continued "I advised you that we had already considered alternative roles in the region previously as part of assessing reasonable alternatives to assist your return to work. There had been none suitable then and given administration, the current recruitment freeze, and the possibility of store closures, there would be no guarantee of an alternative work".

36. Mr Butler concluded: "I considered the facts carefully, including statements from both medical professionals and yourself indicating there is no foreseeable return to work for you in the near future. Taking this into consideration, it was with regret that I advised you that it was my decision to dismiss you from HMV on grounds of capability due to ongoing ill health".

37. The claimant was informed in Mr Butler's letter of his right to appeal. He duly lodged an appeal, but it was not actioned in the light of the events which followed shortly thereafter.

38. (The claimant did not at the time of the 24 January meeting, or in his appeal, or at any time until the October 2019 preliminary hearing, assert that TUPE transfer to the respondent was the primary cause, or even *a* cause, of his dismissal. The claimant in his own evidence to me also said that the reason for his dismissal was "50/50" his ill health/TUPE (as opposed to predominantly TUPE). These points do not assist him. However, I accept Mr Isaacs' argument that it is still clearly open to me to find that the claimant was dismissed primarily for a reason which was underestimated, or was not even articulated at the time, by the claimant.)

39. At a further consultation meeting on 25 January 2019, the administrators explained that there were "primarily 2 main bidders in the frame (though a number of options)." Tuesday 29 January was given as the date targeted "to finalise a deal".

40. No material paperwork has been produced by the respondent in respect of its part in the bidding process. Mr Chadwick assured me that he had asked his client about this -both in the context of disclosure, and in response to a query from me. His instructions were that no such paperwork was available. This was perhaps somewhat surprising.

41. On 4 February 2019, the respondent was incorporated as a company. (It is part of a larger group of companies originating in Canada.) All those employees who worked in HMV's stores which were to remain open, and those in HMV's head office, then transferred to the respondent on 5 February 2019. The transferred employees included Ms Bartlett and Ms Breslin.

42. The Stevenage branch remained open. So, all of the staff still working at that branch transferred to the respondent. Some other stores were closed, and the staff who had worked in those stores were all made redundant. As Ms Breslin said without challenge in her evidence, there were no redeployment opportunities for those staff.

43. Albeit I bear in mind what is set out above at para 40, there is no sign that staff other than the claimant who might have been considered to be 'dead wood' (either at Stevenage or elsewhere) were jettisoned in the lead-up to or at the point of the TUPE transfer, whether at the behest of the administrators, the respondent, or otherwise.

MATERIAL LAW

44. So far as relevant, reg 7 of TUPE provides as follows:
"(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".

45. So, a dismissal will only be unfair for reg 7 purposes if "the transfer" is the sole or principal reason for it. The ultimate question is one of fact. See **Page v Lakeside Collection Limited t/a Lavender Hotels**[1].

46. As regards the burden of proof, see **Marshall v Game Retail Ltd**[2]. There, the EAT considered that the principles set out in **Kuzel v Roche Products Ltd**[3] should apply.

47. In **Kuzel**, the claimant asserted his dismissal was automatically unfair because it was for making protected disclosures. The EAT held that it was not correct to place the burden of proof wholly on the claimant in such circumstances. Once the claimant had produced some evidence in support of its case, the burden lay on the respondent to establish that the reason for the dismissal was not the automatically unfair reason. If

[1] UKEAT/0296/10 (19 November 2010, unreported).
[2] UKEAT/0276/13 (13 February 2015, unreported).
[3] [2008] EWCA Civ 380, [2008] IRLR 530.

it failed to do so, it was open to the tribunal to infer that the reason advanced by the claimant was the sole or principal reason.

48. An important factor which may be taken into account in deciding the reason for dismissal is its proximity to the transfer. Although proximity to the transfer is not conclusive, it is often strong evidence in the employee's favour. **Hare Wines Ltd v Kaur**[4].

49. In relation to reg 7(1) of TUPE (as amended), in cases before 31 January 2014 it was possible to argue dismissals were unfair if dismissals were 'connected with' the transfer. That is no longer the case. As the learned authors of Harvey opine, the amendment means "*some dismissals which were automatically unfair under the pre-2014 law would not be now*". They continue:

*"Perhaps one tangible example is afforded by the case law on whether a pre -transfer dismissal is automatically unfair if it takes place at a time when the ultimate transferee has not been identified. In a cohort of decisions, including … **Spaceright Europe Ltd v Baillavoine**[5]… it has been held … that under the wording in TUPE 1981 and TUPE 2006 (prior to the 2014 amendment)) a dismissal could be 'connected with' the transfer even if the transferee were not yet identified. Arguably the result would have been different if the test was whether the transfer was the 'sole or principal' reason for the dismissal.*
*A working example is **Kavanagh v Crystal Palace FC (2000) Ltd**[6]. Here Crystal Palace FC (2000) Ltd and Selhurst Park Ltd went into administration. The club was in a precarious funding position. The administrator decided to 'mothball' the club over the close season, when no matches would be played. Dismissal letters were given to 29 staff on 28 May 2010. On 7 June 2010 the sale of the club to a consortium had been agreed subject to the transfer of the Football League share. The Football League share was transferred on 19 August 2010, when the sale was completed. The EAT considered the dismissals were 'connected with' the transfer … The Court of Appeal accepted that the dismissals were 'connected with' the transfer …*
*The point of this is that the pre-transfer dismissal cases cited above (including **Kavanagh**) are predicated on the basis that the dismissals were 'connected with' the transfer. Thus in **Kavanagh** Lord Maurice Kay observed:*
"It is common ground that the principal reason for the dismissal was not "the transfer itself" because, at the effective date of termination, no agreement had been reached in relation to the transfer'.'
Under reg 7(1) of TUPE 2006 as amended, many of these cases would have therefore failed at the first hurdle because, there being no identified transferee, whilst the dismissal might have been 'connected with the transfer', the transfer could not have been the 'sole or principal reason' for the dismissal, thus relieving the employer from having to show an ETO reason".

[4] [2019] EWCA Civ 216, [2019] IRLR 555.
[5] UKEAT/0339/10 (1 February 2011, unreported) (affd [2011] EWCA Civ 1565, [2012] IRLR 111.
[6] [2013] IRLR 291; [2013] EWCA Civ 1410, [2014] IRLR 139.

APPLICATION TO FACTS

Relevance of date of incorporation

50. I deal first with Mr Chadwick's submission that the fact the respondent was not incorporated at the time of the dismissal must in principle mean that "the" transfer to the respondent (as opposed to "a" contemplated transfer to one of several interested parties, or to an entity which had yet to be incorporated) cannot have been the reason for the dismissal.

51. Mr Chadwick's argument finds support in the extract from Harvey which I have set out above.

52. Mr Isaacs submits that such an argument is flawed. He relies on the failed attempt to draw a distinction between "a" and "the" transfer in **Spaceright**. There, the Court of Appeal held (at para 43 *per* Mummery LJ) that the language of reg 7(1) "*does not require a particular transfer or transferee to be in existence or in contemplation at the time of the dismissal" in order for the dismissal to be "in connection with the transfer*". Although that decision was by reference to the pre-2014 rubric, Mr Isaacs submits that the same reasoning ought to apply to reg 7(1) as it is now drafted.

53. Although the point is academic to the outcome for the reasons given below, I tend to agree with Mr Isaacs. In the light of the purposive interpretation which is to be given to the TUPE regulations because of their EU provenance, and in any event, I find that the conclusion reached in **Spaceright** (as set out above) as regards attempting to distinguish between "a" and "the" transfer is probably also apt to apply to the revised wording of reg 7(1).

Reason for dismissal

54. I therefore turn to the sole or principle reason for the dismissal.

55. It is first for the claimant to produce some evidence to support his case, before the burden shifts to the respondent. As to this, I confess to being initially sceptical of the temporal proximity between the administration, the dismissal and the TUPE transfer. Mr Isaacs submitted that "the timing stinks". I had some sympathy with that suggestion, at first.

56. However, on closer examination I am not at all sure that the first impressions given by temporal proximity *per se* help the claimant's case get sufficiently off the ground for the purposes of the test articulated in **Kuzel**.

57. Even assuming that for this (or any other) reason the burden fell to the respondent to explain its motivation, I find that a closer analysis of the chronology and the material paperwork strongly supports the respondent's case as to why came it to the view that the claimant's employment could not continue.

58. In the light of the above factual findings, I accept that Mr Butler's 28 January 2019 letter sets out what was the reason or principal reason for the claimant's dismissal.

59. Indeed, I find that the dismissal had nothing to do with the (or a) TUPE transfer, and everything to do with the claimant's continued sickness absence, his refusal to mediate or return to the Stevenage store whilst B remained employed there, and his non-acceptance of any of the other roles which had been offered to him.

60. As noted above, the formal review meeting was due to take place some weeks before the appointment of administrators. Only the claimant's grievance, his appeal against rejection of that grievance, and his various medical appointments, meant that the process was not concluded until after that appointment. If the review meeting had taken place on 12 December 2018, I accept Ms Bartlett's evidence that the outcome would still have been the claimant's dismissal (with a PILON) for essentially the same reasons as on 24 January 2019.

61. This conclusion is reached notwithstanding the absence of paperwork to which I have referred at para 40 above, which might potentially have been more damaging to the respondent's case had the correspondence and meeting notes I have set out above, and the evidence I have heard from the respondent's witnesses, not been so compelling.

62. Of course, I did not have the benefit of hearing evidence from Mr Butler himself. As Mr Issacs submitted, that fact is relevant- albeit (as he accepted) not conclusive. But in the light of Mr Butler's correspondence with the claimant, the evidence of Ms Bartlett, and the meeting notes, together with the pre-administration chronology set out above, Mr Butler's absence does not detract from my findings above.

63. I also find that there was nothing to indicate by around 24 January 2019 that further job opportunities which might have been acceptable to the claimant were expected to become -or, as Ms Breslin explained, in fact did become- available after the transfer. On the contrary, jobs were very scarce indeed. Hence there is no mileage in any argument that the claimant's dismissal was pushed through despite obvious post-transfer redeployment opportunities, because HMV wanted to 'ditch' the claimant before and because of the transfer.

64. Finally, I should say that even if I had found the dismissal had been automatically unfair for the reasons advanced by the claimant, I think it is probably inevitable that he would have been dismissed very shortly after the TUPE transfer (remaining on SSP in the interim), in the light of the claimant's absence and his stance as set out at paras 28 & 29 above -which the claimant did not suggest in his evidence might have changed post-transfer. This would obviously have been relevant to remedy, had the claim succeeded.

65. **To conclude**: It follows that the unfair dismissal claim has no reasonable prospect of success, and ought in my judgment to be struck out.

Employment Judge Michell, Cambridge

15.3.2020

JUDGMENT SENT TO THE PARTIES ON

01 June 2020

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FOR THE SECRETARY TO THE TRIBUNALS

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it failed to do so, it was open to the tribunal to infer that the reason advanced by the claimant was the sole or principal reason.

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49. In relation to reg 7(1) of TUPE (as amended), in cases before 31 January 2014 it was possible to argue dismissals were unfair if dismissals were 'connected with' the transfer. That is no longer the case. As the learned authors of Harvey opine, the amendment means "*some dismissals which were automatically unfair under the pre-2014 law would not be now*". They continue:

*"Perhaps one tangible example is afforded by the case law on whether a pre -transfer dismissal is automatically unfair if it takes place at a time when the ultimate transferee has not been identified. In a cohort of decisions, including … **Spaceright Europe Ltd v Baillavoine**[5]… it has been held … that under the wording in TUPE 1981 and TUPE 2006 (prior to the 2014 amendment)) a dismissal could be 'connected with' the transfer even if the transferee were not yet identified. Arguably the result would have been different if the test was whether the transfer was the 'sole or principal' reason for the dismissal.*
*A working example is **Kavanagh v Crystal Palace FC (2000) Ltd**[6]. Here Crystal Palace FC (2000) Ltd and Selhurst Park Ltd went into administration. The club was in a precarious funding position. The administrator decided to 'mothball' the club over the close season, when no matches would be played. Dismissal letters were given to 29 staff on 28 May 2010. On 7 June 2010 the sale of the club to a consortium had been agreed subject to the transfer of the Football League share. The Football League share was transferred on 19 August 2010, when the sale was completed. The EAT considered the dismissals were 'connected with' the transfer … The Court of Appeal accepted that the dismissals were 'connected with' the transfer …*
*The point of this is that the pre-transfer dismissal cases cited above (including **Kavanagh**) are predicated on the basis that the dismissals were 'connected with' the transfer. Thus in **Kavanagh** Lord Maurice Kay observed:*
"It is common ground that the principal reason for the dismissal was not "the transfer itself" because, at the effective date of termination, no agreement had been reached in relation to the transfer'.'
Under reg 7(1) of TUPE 2006 as amended, many of these cases would have therefore failed at the first hurdle because, there being no identified transferee, whilst the dismissal might have been 'connected with the transfer', the transfer could not have been the 'sole or principal reason' for the dismissal, thus relieving the employer from having to show an ETO reason".

[4] [2019] EWCA Civ 216, [2019] IRLR 555.
[5] UKEAT/0339/10 (1 February 2011, unreported) (affd [2011] EWCA Civ 1565, [2012] IRLR 111.
[6] [2013] IRLR 291; [2013] EWCA Civ 1410, [2014] IRLR 139.

APPLICATION TO FACTS

Relevance of date of incorporation

50. I deal first with Mr Chadwick's submission that the fact the respondent was not incorporated at the time of the dismissal must in principle mean that "the" transfer to the respondent (as opposed to "a" contemplated transfer to one of several interested parties, or to an entity which had yet to be incorporated) cannot have been the reason for the dismissal.

51. Mr Chadwick's argument finds support in the extract from Harvey which I have set out above.

52. Mr Isaacs submits that such an argument is flawed. He relies on the failed attempt to draw a distinction between "a" and "the" transfer in **Spaceright**. There, the Court of Appeal held (at para 43 *per* Mummery LJ) that the language of reg 7(1) "*does not require a particular transfer or transferee to be in existence or in contemplation at the time of the dismissal" in order for the dismissal to be "in connection with the transfer*". Although that decision was by reference to the pre-2014 rubric, Mr Isaacs submits that the same reasoning ought to apply to reg 7(1) as it is now drafted.

53. Although the point is academic to the outcome for the reasons given below, I tend to agree with Mr Isaacs. In the light of the purposive interpretation which is to be given to the TUPE regulations because of their EU provenance, and in any event, I find that the conclusion reached in **Spaceright** (as set out above) as regards attempting to distinguish between "a" and "the" transfer is probably also apt to apply to the revised wording of reg 7(1).

Reason for dismissal

54. I therefore turn to the sole or principle reason for the dismissal.

55. It is first for the claimant to produce some evidence to support his case, before the burden shifts to the respondent. As to this, I confess to being initially sceptical of the temporal proximity between the administration, the dismissal and the TUPE transfer. Mr Isaacs submitted that "the timing stinks". I had some sympathy with that suggestion, at first.

56. However, on closer examination I am not at all sure that the first impressions given by temporal proximity *per se* help the claimant's case get sufficiently off the ground for the purposes of the test articulated in **Kuzel**.

57. Even assuming that for this (or any other) reason the burden fell to the respondent to explain its motivation, I find that a closer analysis of the chronology and the material paperwork strongly supports the respondent's case as to why came it to the view that the claimant's employment could not continue.

58. In the light of the above factual findings, I accept that Mr Butler's 28 January 2019 letter sets out what was the reason or principal reason for the claimant's dismissal.

59. Indeed, I find that the dismissal had nothing to do with the (or a) TUPE transfer, and everything to do with the claimant's continued sickness absence, his refusal to mediate or return to the Stevenage store whilst B remained employed there, and his non-acceptance of any of the other roles which had been offered to him.

60. As noted above, the formal review meeting was due to take place some weeks before the appointment of administrators. Only the claimant's grievance, his appeal against rejection of that grievance, and his various medical appointments, meant that the process was not concluded until after that appointment. If the review meeting had taken place on 12 December 2018, I accept Ms Bartlett's evidence that the outcome would still have been the claimant's dismissal (with a PILON) for essentially the same reasons as on 24 January 2019.

61. This conclusion is reached notwithstanding the absence of paperwork to which I have referred at para 40 above, which might potentially have been more damaging to the respondent's case had the correspondence and meeting notes I have set out above, and the evidence I have heard from the respondent's witnesses, not been so compelling.

62. Of course, I did not have the benefit of hearing evidence from Mr Butler himself. As Mr Issacs submitted, that fact is relevant- albeit (as he accepted) not conclusive. But in the light of Mr Butler's correspondence with the claimant, the evidence of Ms Bartlett, and the meeting notes, together with the pre-administration chronology set out above, Mr Butler's absence does not detract from my findings above.

63. I also find that there was nothing to indicate by around 24 January 2019 that further job opportunities which might have been acceptable to the claimant were expected to become -or, as Ms Breslin explained, in fact did become- available after the transfer. On the contrary, jobs were very scarce indeed. Hence there is no mileage in any argument that the claimant's dismissal was pushed through despite obvious post-transfer redeployment opportunities, because HMV wanted to 'ditch' the claimant before and because of the transfer.

64. Finally, I should say that even if I had found the dismissal had been automatically unfair for the reasons advanced by the claimant, I think it is probably inevitable that he would have been dismissed very shortly after the TUPE transfer (remaining on SSP in the interim), in the light of the claimant's absence and his stance as set out at paras 28 & 29 above -which the claimant did not suggest in his evidence might have changed post-transfer. This would obviously have been relevant to remedy, had the claim succeeded.

65. **To conclude**: It follows that the unfair dismissal claim has no reasonable prospect of success, and ought in my judgment to be struck out.

Employment Judge Michell, Cambridge

15.3.2020

JUDGMENT SENT TO THE PARTIES ON

01 June 2020

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J Moossavi

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FOR THE SECRETARY TO THE TRIBUNALS

EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Murphy

Respondent: Sunrise Records & Entertainment Limited

HEARD AT: Cambridge: 12 March 2020

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Mr Oliver Isaacs (Counsel)
For the Respondent: Mr P Chadwick (consultant)

RESERVED JUDGMENT

1. The claimant's unfair dismissal claim against the respondent has no reasonable prospect of success, and is struck out pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. The claim is dismissed.

REASONS

BACKGROUND

1. The claimant was employed by HMV Retail Ltd ("HMV") as an assistant manager at its Stevenage store from 22 January 2009 until his dismissal with a payment in lieu of notice ("PILON") on 24 January 2019. Following completion of the early conciliation process, he brought a claim against both HMV and the above-named respondent, in which he asserted that his dismissal was unfair.

2. The claim against HMV was rejected by the tribunal in April 2019, on the basis of non-compliance with the early conciliation process in respect of (just) HMV.

3. Two preliminary hearings followed. In October 2019, today's hearing was listed for a determination in relation to the claimant's status under the TUPE 2006 Regulations (TUPE").

4. At that October 2019 preliminary hearing, a specific issue to be determined today was said to be "did the provisions of TUPE… apply to the claimant's employment with HMV retail limited?" That wording was a little nebulous (and, at that stage, the claimant's case under TUPE was still unclear).

5. However, at today's hearing, the representatives helpfully clarified and agreed the following points, and issues for determination:

    a. There had been a TUPE transfer of all HMV's staff working at the Stevenage store to the respondent (which was incorporated on 4 January 2019) on 5 February 2019.
    b. The claimant was not in fact still assigned to the undertaking which transferred at the point of transfer, because of his dismissal by HMV on 24 January 2019. (Otherwise, he would also have transferred.)
    c. The claimant should be deemed as having been assigned to that undertaking pursuant to regulation 7(1) of the TUPE regulations if the sole or principal reason for his dismissal by HMV was the transfer.
    d. In such circumstances, the dismissal would be automatically unfair.
    e. Hence the claim stood or fell on the issue of what was the sole or principal reason for the claimant's dismissal. If it was not the reason proscribed by regulation 7(1) of TUPE, the claim must be dismissed for want of reasonable prospects of success. Otherwise, the claim could proceed against the respondent as transferee.

6. The claimant had previously raised arguments at the 2019 preliminary hearings in relation to his appeal and certain pension payments. Mr Isaacs clarified that these arguments were not pursued, in the light of the content of the witness statement of Ms Breslin.

7. I was referred to various pages in a bundle comprising some 222 pages. I also heard evidence from the claimant, Caroline Bartlett (HR manager of the respondent) and Kathleen Breslin (Head of HR). Mr Butler, the 'decision maker' referred to below, did not give evidence. He left the respondent's employment some time ago.

8. All witnesses gave their evidence thoughtfully and candidly. In each case, where concessions on the facts should sensibly be made, they were made. I was particularly impressed by Ms Bartlett's evidence, which was clear and cogent.

FACTUAL FINDINGS

9. The claimant was absent from work from July 2018 and until his dismissal in January 2019. His GP reported in July 2018 that he was suffering from "low mood and emotional distress which has been precipitated by some recent life events".

10. As part of the respondent's standard procedures for dealing with absences from work, a meeting was held on 11 September 2018 between the claimant and his regional manager, Mr Butler.

11. The respondent summarised what happened at that meeting in a letter dated 1 October 2018. Amongst other things, the letter records issues which the claimant said he had with a text message sent to him from a female colleague and erstwhile friend ("B"). It also notes that the claimant had indicated he did not want to return to his role at Stevenage whilst B was still there, and instead wanted to move to another store - but not in a role which was inferior to his current assistant manager position. It was explained to him in the letter that "a return to work in the foreseeable future in some capacity was required to avoid your contract of employment being at risk". It was also confirmed to the claimant that "dismissal on grounds of ill health might be a possibility" in such circumstances- albeit it was hoped he would be able to return to work.

12. The claimant was seen by occupational health on 2 October 2018. In report dated 11 October 2018, the occupational health physician opined that he did not think the claimant "will be returning to work in his current role in the near future". He also observed "the issue with him returning to his current role relates to individuals currently employed there [i.e. B]. Were they not working there then he would be able to return without any restrictions".

13. A formal review meeting was proposed by the respondent for 30 October 2018. In the invitation email dated 23 October 2018, Mr Butler explained that "the outcome of the hearing … could include your dismissal on grounds of ill health".

14. The 30 October 2018 meeting was chaired by Mr Butler. At the meeting, the claimant indicated in response to Mr Butler's query that he was not interested in mediation with B, "because at no point has she ever tried to mend our personal friendship and work relationship". Mr Butler asked him to think further about mediation, to which the claimant responded: "I will, but I don't think that my opinion will change". (In fact, at no point thereafter did the claimant change his mind as regards the potential benefits of mediation.)

15. Mr Butler was at pains to explain to the claimant that "part of the long term absence management policy is that if there is no foreseeable return to work for the employee or, in this case, there is not a suitable alternative role for you to be moved to, then one option HMV may need to consider is your dismissal for incapacity on grounds of ill health". Mr Butler also invited the claimant to consider various vacancies in other stores. He also explained to him "should you not accept one of these vacancies or mediation I will write to you outlining my decision based on the information to hand and what we have discussed today".

16. The claimant duly responded to Mr Murphy on 9 November 2019, explaining that he did not want to accept any of the alternative roles as "I have done nothing to warrant

being forced to move store and lose my job role". He also said he wanted to "re-raise my previous grievance to a formal one against [B] and her behaviour towards me in the past".

17. Ms Bartlett was tasked with dealing with the grievance. She received an email dated 15 November 2018, which set out the claimant's concerns. These included a text message sent by B, which the claimant said: "caused me to feel victimised and caused a severe step back in my mental health". He also asserted that he was "being victimised by the company by being offered demotions to stores much further away than my current store at a massive salary deduction".

18. Ms Bartlett did not uphold the grievance. In her outcome letter, amongst other things, she recorded the fact that the claimant (again) said he was not interested in mediation because if B "was forced to apologise then it 'would not be sincere'". She stated: "it is difficult to understand your negativity about mediation as it offers you a real chance to return to work in your current job but you are not prepared to even try it. I appreciate that you feel the offer of a senior sales role is not an acceptable alternative, but your refusal to even consider the mediation route seems in my opinion to be unreasonable".

19. I consider Ms Bartlett's expression of confusion and disappointment was genuinely felt.

20. Thereafter, Ms Bartlett believed it was appropriate to progress matters concerning the claimant's continued absence from work, given the logjam which his refusal to mediate with B and his rejection of all other alternative positions on offer had (as she saw it) created.

21. On 6 December 2018, Mr Butler therefore wrote to the claimant inviting him to attend a formal review hearing on 12 December 2018. He explained that the hearing could result in the claimant's "dismissal on grounds of capability due to your ill health".

22. The 12 December 2018 meeting did not take place, because by an email dated 10 December 2018 the claimant appealed against the grievance outcome -and stated that due to pre-existing health appointments he could not attend the meeting on 12 December 2018 in any event.

23. As a result, by a letter dated 13 December 2018, Ms Bartlett wrote the claimant confirming details for the grievance appeal hearing (on 11 January 2019) and for the reconvened formal hearing regarding his ill health capability (on 16 January 2019). Once again, the letter made clear that the outcome of that latter meeting "could include your dismissal on grounds of capability due to your ill health".

24. On 28 December 2018, HMV went into administration. The purpose of the administration, at least initially, was to continue with 'business as usual'. Thereafter, regular update meetings were held between the administrators and nominated

representatives of the 1,500-odd staff nationally affected. The first such meeting took place on 11 January 2019.

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*"Perhaps one tangible example is afforded by the case law on whether a pre -transfer dismissal is automatically unfair if it takes place at a time when the ultimate transferee has not been identified. In a cohort of decisions, including … **Spaceright Europe Ltd v Baillavoine**[5]… it has been held … that under the wording in TUPE 1981 and TUPE 2006 (prior to the 2014 amendment)) a dismissal could be 'connected with' the transfer even if the transferee were not yet identified. Arguably the result would have been different if the test was whether the transfer was the 'sole or principal' reason for the dismissal.*
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"It is common ground that the principal reason for the dismissal was not "the transfer itself" because, at the effective date of termination, no agreement had been reached in relation to the transfer'.'
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APPLICATION TO FACTS

Relevance of date of incorporation

50. I deal first with Mr Chadwick's submission that the fact the respondent was not incorporated at the time of the dismissal must in principle mean that "the" transfer to the respondent (as opposed to "a" contemplated transfer to one of several interested parties, or to an entity which had yet to be incorporated) cannot have been the reason for the dismissal.

51. Mr Chadwick's argument finds support in the extract from Harvey which I have set out above.

52. Mr Isaacs submits that such an argument is flawed. He relies on the failed attempt to draw a distinction between "a" and "the" transfer in **Spaceright**. There, the Court of Appeal held (at para 43 *per* Mummery LJ) that the language of reg 7(1) "*does not require a particular transfer or transferee to be in existence or in contemplation at the time of the dismissal" in order for the dismissal to be "in connection with the transfer*". Although that decision was by reference to the pre-2014 rubric, Mr Isaacs submits that the same reasoning ought to apply to reg 7(1) as it is now drafted.

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Reason for dismissal

54. I therefore turn to the sole or principle reason for the dismissal.

55. It is first for the claimant to produce some evidence to support his case, before the burden shifts to the respondent. As to this, I confess to being initially sceptical of the temporal proximity between the administration, the dismissal and the TUPE transfer. Mr Isaacs submitted that "the timing stinks". I had some sympathy with that suggestion, at first.

56. However, on closer examination I am not at all sure that the first impressions given by temporal proximity *per se* help the claimant's case get sufficiently off the ground for the purposes of the test articulated in **Kuzel**.

57. Even assuming that for this (or any other) reason the burden fell to the respondent to explain its motivation, I find that a closer analysis of the chronology and the material paperwork strongly supports the respondent's case as to why came it to the view that the claimant's employment could not continue.

58. In the light of the above factual findings, I accept that Mr Butler's 28 January 2019 letter sets out what was the reason or principal reason for the claimant's dismissal.

59. Indeed, I find that the dismissal had nothing to do with the (or a) TUPE transfer, and everything to do with the claimant's continued sickness absence, his refusal to mediate or return to the Stevenage store whilst B remained employed there, and his non-acceptance of any of the other roles which had been offered to him.

60. As noted above, the formal review meeting was due to take place some weeks before the appointment of administrators. Only the claimant's grievance, his appeal against rejection of that grievance, and his various medical appointments, meant that the process was not concluded until after that appointment. If the review meeting had taken place on 12 December 2018, I accept Ms Bartlett's evidence that the outcome would still have been the claimant's dismissal (with a PILON) for essentially the same reasons as on 24 January 2019.

61. This conclusion is reached notwithstanding the absence of paperwork to which I have referred at para 40 above, which might potentially have been more damaging to the respondent's case had the correspondence and meeting notes I have set out above, and the evidence I have heard from the respondent's witnesses, not been so compelling.

62. Of course, I did not have the benefit of hearing evidence from Mr Butler himself. As Mr Issacs submitted, that fact is relevant- albeit (as he accepted) not conclusive. But in the light of Mr Butler's correspondence with the claimant, the evidence of Ms Bartlett, and the meeting notes, together with the pre-administration chronology set out above, Mr Butler's absence does not detract from my findings above.

63. I also find that there was nothing to indicate by around 24 January 2019 that further job opportunities which might have been acceptable to the claimant were expected to become -or, as Ms Breslin explained, in fact did become- available after the transfer. On the contrary, jobs were very scarce indeed. Hence there is no mileage in any argument that the claimant's dismissal was pushed through despite obvious post-transfer redeployment opportunities, because HMV wanted to 'ditch' the claimant before and because of the transfer.

64. Finally, I should say that even if I had found the dismissal had been automatically unfair for the reasons advanced by the claimant, I think it is probably inevitable that he would have been dismissed very shortly after the TUPE transfer (remaining on SSP in the interim), in the light of the claimant's absence and his stance as set out at paras 28 & 29 above -which the claimant did not suggest in his evidence might have changed post-transfer. This would obviously have been relevant to remedy, had the claim succeeded.

65. **To conclude**: It follows that the unfair dismissal claim has no reasonable prospect of success, and ought in my judgment to be struck out.

Employment Judge Michell, Cambridge

15.3.2020

JUDGMENT SENT TO THE PARTIES ON

01 June 2020

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J Moossavi

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FOR THE SECRETARY TO THE TRIBUNALS

EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Murphy

Respondent: Sunrise Records & Entertainment Limited

HEARD AT: Cambridge: 12 March 2020

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: Mr Oliver Isaacs (Counsel)
For the Respondent: Mr P Chadwick (consultant)

RESERVED JUDGMENT

1. The claimant's unfair dismissal claim against the respondent has no reasonable prospect of success, and is struck out pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. The claim is dismissed.

REASONS

BACKGROUND

1. The claimant was employed by HMV Retail Ltd ("HMV") as an assistant manager at its Stevenage store from 22 January 2009 until his dismissal with a payment in lieu of notice ("PILON") on 24 January 2019. Following completion of the early conciliation process, he brought a claim against both HMV and the above-named respondent, in which he asserted that his dismissal was unfair.

2. The claim against HMV was rejected by the tribunal in April 2019, on the basis of non-compliance with the early conciliation process in respect of (just) HMV.

3. Two preliminary hearings followed. In October 2019, today's hearing was listed for a determination in relation to the claimant's status under the TUPE 2006 Regulations (TUPE").

4. At that October 2019 preliminary hearing, a specific issue to be determined today was said to be "did the provisions of TUPE… apply to the claimant's employment with HMV retail limited?" That wording was a little nebulous (and, at that stage, the claimant's case under TUPE was still unclear).

5. However, at today's hearing, the representatives helpfully clarified and agreed the following points, and issues for determination:

    a. There had been a TUPE transfer of all HMV's staff working at the Stevenage store to the respondent (which was incorporated on 4 January 2019) on 5 February 2019.
    b. The claimant was not in fact still assigned to the undertaking which transferred at the point of transfer, because of his dismissal by HMV on 24 January 2019. (Otherwise, he would also have transferred.)
    c. The claimant should be deemed as having been assigned to that undertaking pursuant to regulation 7(1) of the TUPE regulations if the sole or principal reason for his dismissal by HMV was the transfer.
    d. In such circumstances, the dismissal would be automatically unfair.
    e. Hence the claim stood or fell on the issue of what was the sole or principal reason for the claimant's dismissal. If it was not the reason proscribed by regulation 7(1) of TUPE, the claim must be dismissed for want of reasonable prospects of success. Otherwise, the claim could proceed against the respondent as transferee.

6. The claimant had previously raised arguments at the 2019 preliminary hearings in relation to his appeal and certain pension payments. Mr Isaacs clarified that these arguments were not pursued, in the light of the content of the witness statement of Ms Breslin.

7. I was referred to various pages in a bundle comprising some 222 pages. I also heard evidence from the claimant, Caroline Bartlett (HR manager of the respondent) and Kathleen Breslin (Head of HR). Mr Butler, the 'decision maker' referred to below, did not give evidence. He left the respondent's employment some time ago.

8. All witnesses gave their evidence thoughtfully and candidly. In each case, where concessions on the facts should sensibly be made, they were made. I was particularly impressed by Ms Bartlett's evidence, which was clear and cogent.

FACTUAL FINDINGS

9. The claimant was absent from work from July 2018 and until his dismissal in January 2019. His GP reported in July 2018 that he was suffering from "low mood and emotional distress which has been precipitated by some recent life events".

10. As part of the respondent's standard procedures for dealing with absences from work, a meeting was held on 11 September 2018 between the claimant and his regional manager, Mr Butler.

11. The respondent summarised what happened at that meeting in a letter dated 1 October 2018. Amongst other things, the letter records issues which the claimant said he had with a text message sent to him from a female colleague and erstwhile friend ("B"). It also notes that the claimant had indicated he did not want to return to his role at Stevenage whilst B was still there, and instead wanted to move to another store - but not in a role which was inferior to his current assistant manager position. It was explained to him in the letter that "a return to work in the foreseeable future in some capacity was required to avoid your contract of employment being at risk". It was also confirmed to the claimant that "dismissal on grounds of ill health might be a possibility" in such circumstances- albeit it was hoped he would be able to return to work.

12. The claimant was seen by occupational health on 2 October 2018. In report dated 11 October 2018, the occupational health physician opined that he did not think the claimant "will be returning to work in his current role in the near future". He also observed "the issue with him returning to his current role relates to individuals currently employed there [i.e. B]. Were they not working there then he would be able to return without any restrictions".

13. A formal review meeting was proposed by the respondent for 30 October 2018. In the invitation email dated 23 October 2018, Mr Butler explained that "the outcome of the hearing … could include your dismissal on grounds of ill health".

14. The 30 October 2018 meeting was chaired by Mr Butler. At the meeting, the claimant indicated in response to Mr Butler's query that he was not interested in mediation with B, "because at no point has she ever tried to mend our personal friendship and work relationship". Mr Butler asked him to think further about mediation, to which the claimant responded: "I will, but I don't think that my opinion will change". (In fact, at no point thereafter did the claimant change his mind as regards the potential benefits of mediation.)

15. Mr Butler was at pains to explain to the claimant that "part of the long term absence management policy is that if there is no foreseeable return to work for the employee or, in this case, there is not a suitable alternative role for you to be moved to, then one option HMV may need to consider is your dismissal for incapacity on grounds of ill health". Mr Butler also invited the claimant to consider various vacancies in other stores. He also explained to him "should you not accept one of these vacancies or mediation I will write to you outlining my decision based on the information to hand and what we have discussed today".

16. The claimant duly responded to Mr Murphy on 9 November 2019, explaining that he did not want to accept any of the alternative roles as "I have done nothing to warrant

being forced to move store and lose my job role". He also said he wanted to "re-raise my previous grievance to a formal one against [B] and her behaviour towards me in the past".

17. Ms Bartlett was tasked with dealing with the grievance. She received an email dated 15 November 2018, which set out the claimant's concerns. These included a text message sent by B, which the claimant said: "caused me to feel victimised and caused a severe step back in my mental health". He also asserted that he was "being victimised by the company by being offered demotions to stores much further away than my current store at a massive salary deduction".

18. Ms Bartlett did not uphold the grievance. In her outcome letter, amongst other things, she recorded the fact that the claimant (again) said he was not interested in mediation because if B "was forced to apologise then it 'would not be sincere'". She stated: "it is difficult to understand your negativity about mediation as it offers you a real chance to return to work in your current job but you are not prepared to even try it. I appreciate that you feel the offer of a senior sales role is not an acceptable alternative, but your refusal to even consider the mediation route seems in my opinion to be unreasonable".

19. I consider Ms Bartlett's expression of confusion and disappointment was genuinely felt.

20. Thereafter, Ms Bartlett believed it was appropriate to progress matters concerning the claimant's continued absence from work, given the logjam which his refusal to mediate with B and his rejection of all other alternative positions on offer had (as she saw it) created.

21. On 6 December 2018, Mr Butler therefore wrote to the claimant inviting him to attend a formal review hearing on 12 December 2018. He explained that the hearing could result in the claimant's "dismissal on grounds of capability due to your ill health".

22. The 12 December 2018 meeting did not take place, because by an email dated 10 December 2018 the claimant appealed against the grievance outcome -and stated that due to pre-existing health appointments he could not attend the meeting on 12 December 2018 in any event.

23. As a result, by a letter dated 13 December 2018, Ms Bartlett wrote the claimant confirming details for the grievance appeal hearing (on 11 January 2019) and for the reconvened formal hearing regarding his ill health capability (on 16 January 2019). Once again, the letter made clear that the outcome of that latter meeting "could include your dismissal on grounds of capability due to your ill health".

24. On 28 December 2018, HMV went into administration. The purpose of the administration, at least initially, was to continue with 'business as usual'. Thereafter, regular update meetings were held between the administrators and nominated

representatives of the 1,500-odd staff nationally affected. The first such meeting took place on 11 January 2019.

25. The claimant's appeal against the rejection of his grievance was dismissed, and that outcome was given to the claimant in writing on 16 January 2019.

26. The diarised review hearing for 16 January 2019 did not go ahead, because by an email dated 11 January 2019 the claimant indicated he had a health appointment on that day. So, by a letter dated 18 January 2019, Mr Murphy therefore wrote to the claimant re-arranging the formal health review meeting to 24 January 2019.

27. Meanwhile, consultation meetings with the administrators continued. At the 22 January 2019 meeting, it was explained that various offers had been made to purchase HMV. The administrators reported "no formal deadline in place for completion of the deal but hoping to achieve by the end of this week", and that "due diligence is ongoing with the potential buyers". The deal was not a foregone conclusion. Hence, it was also explained that if the sale "does not happen then the next pay date would be 31 January".

28. By 24 January 2018, as Ms Bartlett explained in her evidence, the claimant's grievance and grievance appeal had been concluded, his grievance had not been upheld, he was still absent from work- and had been since July 2018. He had also turned down alternative jobs, and would not still return to his current store. Nor would he engage in the mediation process.

29. At the 24 January meeting, the claimant explained that nothing had changed from his perspective, and that he was still unable to return to work at Stevenage.

30. Having heard from the claimant, the meeting was adjourned. Miss Bartlett went through the facts with Mr Butler, and discussed the case with him. She explained to me (and I accept) that they reviewed what the claimant had said, and the steps they had gone through, to see if there was any possible alternative to an ill-health dismissal. They concluded the evidence showed that there was no foreseeable return to work, and that all realistic options had (in their view) been explored.

31. She did not recall having any discussion with Mr Butler about the administration process, and the implications of it. I accept there was no such discussion (and that even if there was, it did not affect the primary reason for the dismissal). Instead, the discussion was all focused on the claimant's (in)ability to return to work.

32. As far as she was aware, Mr Butler did not have any contact with the administrators before making his decision.

33. Mr Butler informed the claimant that he was to be dismissed. The dismissal was to be with a PILON. Despite Mr Isaacs' valiant attempts to persuade me otherwise, I find there was nothing suspicious about that fact. I accept Ms Bartlett's evidence to the effect that, as a general rule, PILONs were made by HMV in cases of dismissal due

to ill health, and that there was nothing untoward about making such a payment here. In particular, I accept Ms Bartlett's evidence that the decision to make a PILON did not connote a motive on the part of HMV to get the claimant 'off the books' before any TUPE transfer.

34. Ms Bartlett was in agreement with the dismissal decision, albeit she was not the decision maker. As she said in her evidence, which was not challenged on this point, "I was happy that the evidence showed that there was no foreseeable return to work. We had explored all the options and in the light of the circumstances we agreed that Mr Murphy should be dismissed on grounds of capability due to ongoing ill health."

35. By a letter dated 28 January 2019, Mr Butler confirmed the claimant's dismissal, and the reasons for it. Mr Butler recorded the (undisputed) fact that the claimant still "did not feel able to return to your role of assistant manager in HMV Stevenage" and thought "there was nothing suitable for you available". He noted that "your representative asked whether due to the administration process there will be a possibility of alternative roles in other stores [and if it would] be possible to put this process on hold". Mr Butler continued "I advised you that we had already considered alternative roles in the region previously as part of assessing reasonable alternatives to assist your return to work. There had been none suitable then and given administration, the current recruitment freeze, and the possibility of store closures, there would be no guarantee of an alternative work".

36. Mr Butler concluded: "I considered the facts carefully, including statements from both medical professionals and yourself indicating there is no foreseeable return to work for you in the near future. Taking this into consideration, it was with regret that I advised you that it was my decision to dismiss you from HMV on grounds of capability due to ongoing ill health".

37. The claimant was informed in Mr Butler's letter of his right to appeal. He duly lodged an appeal, but it was not actioned in the light of the events which followed shortly thereafter.

38. (The claimant did not at the time of the 24 January meeting, or in his appeal, or at any time until the October 2019 preliminary hearing, assert that TUPE transfer to the respondent was the primary cause, or even *a* cause, of his dismissal. The claimant in his own evidence to me also said that the reason for his dismissal was "50/50" his ill health/TUPE (as opposed to predominantly TUPE). These points do not assist him. However, I accept Mr Isaacs' argument that it is still clearly open to me to find that the claimant was dismissed primarily for a reason which was underestimated, or was not even articulated at the time, by the claimant.)

39. At a further consultation meeting on 25 January 2019, the administrators explained that there were "primarily 2 main bidders in the frame (though a number of options)." Tuesday 29 January was given as the date targeted "to finalise a deal".

40. No material paperwork has been produced by the respondent in respect of its part in the bidding process. Mr Chadwick assured me that he had asked his client about this -both in the context of disclosure, and in response to a query from me. His instructions were that no such paperwork was available. This was perhaps somewhat surprising.

41. On 4 February 2019, the respondent was incorporated as a company. (It is part of a larger group of companies originating in Canada.) All those employees who worked in HMV's stores which were to remain open, and those in HMV's head office, then transferred to the respondent on 5 February 2019. The transferred employees included Ms Bartlett and Ms Breslin.

42. The Stevenage branch remained open. So, all of the staff still working at that branch transferred to the respondent. Some other stores were closed, and the staff who had worked in those stores were all made redundant. As Ms Breslin said without challenge in her evidence, there were no redeployment opportunities for those staff.

43. Albeit I bear in mind what is set out above at para 40, there is no sign that staff other than the claimant who might have been considered to be 'dead wood' (either at Stevenage or elsewhere) were jettisoned in the lead-up to or at the point of the TUPE transfer, whether at the behest of the administrators, the respondent, or otherwise.

MATERIAL LAW

44. So far as relevant, reg 7 of TUPE provides as follows:
"(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".

45. So, a dismissal will only be unfair for reg 7 purposes if "the transfer" is the sole or principal reason for it. The ultimate question is one of fact. See **Page v Lakeside Collection Limited t/a Lavender Hotels**[1].

46. As regards the burden of proof, see **Marshall v Game Retail Ltd**[2]. There, the EAT considered that the principles set out in **Kuzel v Roche Products Ltd**[3] should apply.

47. In **Kuzel**, the claimant asserted his dismissal was automatically unfair because it was for making protected disclosures. The EAT held that it was not correct to place the burden of proof wholly on the claimant in such circumstances. Once the claimant had produced some evidence in support of its case, the burden lay on the respondent to establish that the reason for the dismissal was not the automatically unfair reason. If

[1] UKEAT/0296/10 (19 November 2010, unreported).
[2] UKEAT/0276/13 (13 February 2015, unreported).
[3] [2008] EWCA Civ 380, [2008] IRLR 530.

it failed to do so, it was open to the tribunal to infer that the reason advanced by the claimant was the sole or principal reason.

48. An important factor which may be taken into account in deciding the reason for dismissal is its proximity to the transfer. Although proximity to the transfer is not conclusive, it is often strong evidence in the employee's favour. **Hare Wines Ltd v Kaur**[4].

49. In relation to reg 7(1) of TUPE (as amended), in cases before 31 January 2014 it was possible to argue dismissals were unfair if dismissals were 'connected with' the transfer. That is no longer the case. As the learned authors of Harvey opine, the amendment means "*some dismissals which were automatically unfair under the pre-2014 law would not be now*". They continue:

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58. In the light of the above factual findings, I accept that Mr Butler's 28 January 2019 letter sets out what was the reason or principal reason for the claimant's dismissal.

59. Indeed, I find that the dismissal had nothing to do with the (or a) TUPE transfer, and everything to do with the claimant's continued sickness absence, his refusal to mediate or return to the Stevenage store whilst B remained employed there, and his non-acceptance of any of the other roles which had been offered to him.

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