EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112781/2018

5 **Held in Glasgow on 27 August 2019**

Employment Judge C McManus

10 **Mr R Crooks**	**Claimant**
Pacifica Appliance Services Limited	**First Respondent**
Award Appliances Limited	**Second Respondent**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

- The claimant's contract of employment transferred under the Transfer
20 of Undertakings (Protection of Employment) ('TUPE') Regulations 2006 from the second to the first respondent

- The identity of the claimant's employer on 19 March 2018 was the first respondent, Pacifica Appliance Services Ltd.

25 ## REASONS

Introduction

1. This Judgment is the decision following a Preliminary Hearing ('PH') on the issues identified at the Case Management PH in this case on 12 October 2018, as set out in the Note of that PH dated 16 October 2018.

2. This issues for determination at this PH concern the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('The TUPE Regulations'), and in particular whether the purchase of the second respondent by the first respondent by way of a share sale was a relevant transfer in terms of Regulation 3(1)(a) of the TUPE Regulations.

Proceedings

3. At the outset of proceedings, the procedure to take place at this PH was explained. Ms Vikki Weston (Group HR Manager for the first respondent) confirmed that she acted for both the first and the second respondent. Ms Weston confirmed that she understood that at this PH evidence would be heard as brought by representatives and considered to be relevant to the issues for determination by the Tribunal at this PH. It was noted that the respondents' representative had made a postponement request in respect of this PH, which had been refused. Ms Weston confirmed that she would give evidence at this PH.

4. Evidence was heard on oath or affirmation from the witnesses, being the claimant and Ms Weston.

5. Reliance was placed by both parties on documents in the Claimant's Inventory of Productions, which had consecutively numbered pages. The numbers preceded by 'C' in this Judgment refer to the document number in that Inventory.

Issues

6. The issues for determination by the Tribunal at this PH were identified at the PH on 12 October 2018 as:-

   - Whether the claimant's contract of employment transferred under the TUPE Regulations 2006 from the second to the first respondent
   - To identify the claimant's employer as at the date of his resignation on 19 March 2018.

Findings in Fact

7. The following material facts are relevant to the issues for determination at this PH and were not in dispute or were found by the Tribunal to be proven:-

8. The claimant was employed by the second respondent from November 1990. He was employed as a service engineer, carrying out repairs to domestic appliances in customer's premises. The second respondent's business operated as a domestic appliance repair company. The second respondent operated out of depot premises in Scotland. The second respondent employed ten service engineers and four or five individuals employed as office and store support staff, who worked at the depot. In his role as a service engineer, the claimant would attend each working day at the depot operated by the second respondent, complete and return paperwork in respect of domestic appliance service and repair jobs completed the previous working day, obtain details of the jobs he was to attend that day, collect the parts he required for those jobs and then attend those jobs, to carry out the work on site at the various customers' houses. The second respondent was authorised to carry out the service and / or repair work for a number of manufacturers of domestic appliances, including Zanussi and Electrolux. 'Out of guarantee' repair work was also carried out for a number of additional manufactures. Work was allocated to the second respondent when a customer with a domestic appliance which needed to be repaired or serviced phoned the service phone number given to them by the manufacturer. That phone call would be allocated (by call diversion or otherwise) to the second respondent on the basis of the postcode of the customer's address. The second respondent then allocated work to the individual service engineers employed by the second respondent. That allocation was done principally by the postcode area of the customer's premises. The claimant was normally allocated work in the postcodes covering East Lothian and West Lothian. That allocation was done by the second respondent's office support staff, from the second respondent's depot.

9. As at the beginning of March 2018 the second respondent was owned by Lynn Wood (formerly known as Lynn Ward). The second respondent was then managed by the Office Manager (Linda Martin). The business of the second respondent was sold to the first respondent by Lynn Ward. That sale and

purchase was by way of sale and purchase of the entire issued share capital of the second respondent, and was in terms of the agreement which is at C47 – C127, dated 12 March 2018 ('the agreement date').

10. On 12 March 2018, Lynn Wood sent an email to all employees of the second respondent (at C128) stating:-

> "Hi. I have arranged a meeting for Tues 13th March at 9am in Glasgow for all office staff and engineers.
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> Please arrange to be there."

11. The claimant had no indication as to the purpose of this meeting. Vikki Weston understood that Lynn Wood had not wanted employees or customers to be aware of the sale and purchase prior to it being completed, so as to avoid any risk of impact of the sale on the continuing business. At this meeting on 13 March 2018, Lynn Wood informed those present that she had sold the business and that the new owners would present to the employees. Present at this meeting were all of the service engineers and support staff employed by the second respondent as at the agreement date. Following Lynn Wood's announcement, after a slight delay while an individual representing the first respondent was held up in traffic, there was a presentation on behalf of the first respondent. Present at this meeting representing the first respondent on 13 March 2018 were David Highton, James Loudon, Paul Feek and Vikki Weston. James Loudon was introduced as being the manger for Scotland. Those present were told at this meeting on 13 March 2018 that the first respondent had bought the second respondent. Information was given to the employees indicating that the first respondent also carried out work under the consumer brand '0800 Repair'.

12. On 13 March, there then followed individual meetings between representatives of the first respondent and each of the employees present. Each of those employees met individually with either David Highton and Paul Feek or with James Loudon and Vikki Weston. The claimant met with James Loudon and Vikki Weston. At this meeting, the claimant informed them that he didn't 'do drums' on his own. This referred to work on the concrete slab

inside a washing machine, and the claimant's medical problems with his back. The claimant had been absent from work with the second respondent in respect of his back problems.

13. It was the intention of the first respondent that following the agreement date, the business which had been carried out by the second respondent would be fully incorporated into the business of the first respondent. From the agreement date, steps were taken by the first respondent to instigate that full integration. From the agreement date, decisions taken in respect of the operations of the continuing business of the second respondent, and its integration into the first respondent's operations were taken by employees and / or Directors of the first respondent. That included the decision to close the depot formerly operated by the second respondent and to change the operating practices in the continuing business. For the remainder of the week following the purchase on 13 March 2018, the service engineers who had been employed by the second respondent carried out the repairs which had been booked into their diaries prior to 13 March 2018. The depot which had been operated by the second respondent in Scotland, where the support staff had been based, was closed and cleared. On 17 March 2018 the claimant and the others who had been employed by the second respondent immediately prior to the agreement date attended an Induction / Training day. The purpose of that training was to inform those employees of the procedures and process operated by the first respondent, which was changed from the way in which the business had been operated as the second respondent. Those service engineers were issued with a new registration card and were given tablet devices by the first respondent. Information on allocation of jobs was from then communicated to those service engineers individually, through the tablet devices. Training was given to those service engineers on using the tablet devices and on procedures and processes the first respondent expected them to follow, including allocation of jobs to individual service engineers through the first respondent's call centre, with notification via the tablet devices; notification of work done to be communicated via the tablet devices, including using the tablet device to take a photograph of the appliance before and after the repair; contacting a Senior Engineer in relation

to any issues with the repair; operation of a required system of the individual service engineer's attendances at recalls (i.e. where an issue arose with a repair carried out by a particular service engineer, then that should be returned to by that service engineer); the service engineers contacting the customer themselves to give them indication of when they would be arriving; parts being collected from a Royal Mail collection point rather than from the depot previously operated by the second respondent; support staff working from home rather than at the depot previously operated by the second respondent. These processes were different to the processes which had been carried out by the second respondent. The office support staff function which had been utilised by the second respondent no longer functioned in respect of business carried out by after the agreement date. That office support staff function had included phone contact with the customers, rather than that phone contact being from the service engineers themselves. The business which had been carried out by the second respondent was fully integrated into the first respondent's business after the share purchase. Rather than the service engineers travelling to the depot to collect details of their allocated jobs and the parts necessary for those jobs, allocation of jobs was made from the call centre operated by the first respondent in England and parts were collected from Royal Mail collection points. The service engineers continued to wear the uniform which they had previously been provided by the second respondent.

14. From 19 March 2018, the service engineers who had been employed by the second respondent immediately prior to the agreement date were allocated and carried out work on appliances for additional brands or retailers, which had not been work carried out by the second respondent immediately prior to the agreement date. That additional work was in relation to work required by customers in the postcode areas in respect of domestic appliances manufactured by additional manufacturers to those manufacturers serviced and repaired by the first respondent. That work was expected to be carried out by the service engineers in addition to the work on appliances made by those manufacturers in respect of which the second respondent had carried out the service and / or repair work in the particular postcode areas.

15. From week commencing 19 March 2018, work was allocated through the first respondent's systems to those service engineers who had been employed by the second respondent. The software system which had been utilised by the second respondent was sufficiently compatible with the software system utilised by the first respondent to allow the upload of jobs from the second respondent's operating software to the first respondent's operating software. This upload allowed the first respondent access to information held by the second respondent on the software system which it had operated in respect of job histories, customer complaints, et cetera. Following the agreement date, the telephone numbers called by individual customers were received (whether by call diversion or otherwise) at the first respondent's call centre in England, rather than at the depot which had been operated by the second respondent. Allocation of jobs to individual service engineers such as the claimant was then done on the basis of the customer's postcode, the allocation being carried out by individuals working from the call centre operated by the first respondent, in the same way as other business carried out by the first respondent. The customer call answering and the allocation of work to service engineers was no longer carried out at the second respondent's former depot. That depot was closed down and no support staff then worked from there. From 19 March 2018, the former employees of the second respondent were expected to carry out work for the first respondent and work which had come to the first respondent under the consumer brand '800 Repair'.

16. On 27 March 2018 the claimant was written to by the first respondent in the following terms (at C129):-

> "*Further to you resigning from your position of Engineer shortly after Award Appliances was purchased and acquired by Pacifica Appliance Services Limited on Tuesday 13/3/2018.*
>
> *As you will be aware (and was notified during your Induction Training with David Highton (Field Operations Manager) and James Loudon (Technical Services Manager) on Saturday 17/03/2018), all employment terms and conditions you currently held with Award*

Appliances transferred to ourselves, which also means that you were contractually obliged to give one months notice.

By leaving immediately after you submitted your verbal resignation on Monday 19/03/2018, and not giving us any notice: this is to inform you are in breach of your Contract terms.

Although we could pursue you through the Court for being in breach of Contract, we are prepared to offset the monies owed to you in wages against the month's notice you owe the Company.

Therefore the monies owed to you from 1st to 17th March 2018 (your Induction / Training day) plus any holiday pay due will be offset against the month's notice you owe the Company and we will waive (as a gesture of goodwill) the remaining monies by you not working your full month."

17. On 29 October 2018 the claimant received payment in the total sum of £1,358.58 from the first respondent. The confirmation of that payment made to the claimant is at C41. That document confirms that payment was made to the claimant in this sum from the account name '*Pacifica App'*, under reference '*Pacifica Payroll'*. That payment was made to the claimant by the first respondent on 29 October 2018 and was payment made to him in respect of wages earned after the agreement date and payment in respect of accrued but untaken holiday pay. Following the agreement date no bank account was operated in the name of the second respondent.

18. The first respondent, Pacifica Appliance Services Ltd is part of Pacifica Group Limited. The second respondent was purchased by the first respondent, by way of purchase of the entire issued share capital. A redacted version of the agreement for the sale and purchase of issued share capital of Award Appliances Ltd (the second respondent) is at C47 – C127. The parties to that agreement are Lynn Wood (referred to in that agreement as 'the Seller') and Pacifica Appliance Services Limited (the first respondent, referred to in that agreement as 'the Buyer'). That agreement is dated 12 March 2018 ('the

agreement date'). Agreement in terms of that document was made between those parties on that date. The terms of that agreement include:-

- at clause 2 (at C61) provisions that the entire share capital of the second respondent is bought by the first respondent.

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- at clause 15 at (C67) provisions (partly redacted) for indemnity provided to the first respondent from Lynn Wood

- at clause 16 at (C67) provisions in respect of announcements and confidentiality. Those terms specifically exclude (at clause 16.2.2) any communication (written or otherwise) or announcement made or
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sent by the first respondent after Completion, as specified in that clause, "….*confirming the change of control of the Company and the sale and purchase of the Shares by the Buyer but without disclosing the other terms of the Agreement."*

- at clause 21, (at C69), provisions in respect of further assurances
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provided to the first respondent by Lynn Wood, including, at 21.2, provisions in respect of Lynn Wood providing assistance *"…in relation to the integration of the Company and its assets into the Buyer's Group…"* ('The Buyer's Group' being defined at clause 1.1 (at C52) as:-

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"*any of the following from time to time: the Buyer, its subsidiaries and Subsidiary Undertakings and any holding company or parent undertaking of the Buyer and all other subsidiaries and Subsidiary Undertakings of any holding company or parent undertaking of the Buyer and "member of the Buyer's Group" shall be construed*
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accordingly"

- at clause 3.3 of Schedule 4, (at C94), provisions in respect of warranty provided by Lynn Wood to the first respondent as follows:-

"*3.3.1 So far as the Seller is aware, after Completion (whether*
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by reason of an existing agreement or arrangement

(including any notice served by the Company or the Seller) as a result of the acquisition of the Company by the Buyer):

3.3.1.1 no supplier of the Company will cease, or be entitled to cease, supplying it or is likely to substantially reduce its level of supplies;

3.3.1.2 no customer of the Company will cease, or be entitled to cease, to deal with it or is likely to substantially reduce its level of business;

3.3.1.3 no supplier or customer of the company will be entitled to impose materially different terms of trading from those currently enjoyed by the Company;

3.3.1.4 no senior employee of the company (other than the Seller) will leave his employment."

- at clause 5 of Schedule 4, (at C100), provisions in respect of warranty provided by Lynn Wood to the first respondent in respect of employees of the second respondent, including (particularly at 5.1.6 (at C100)) provisions in respect of disclosure of the terms of those employees' written contracts of employment.

- at clause 1 of Schedule 6, (at C114), provisions in respect of obligations on Completion ('Completion' being defined at clause 1 at C 53, as "*completion of the sale and purchase of the Shares in accordance with clause 4*" , including provisions in respect of resignation of Lynn Wood as Director of the second respondent and of the Secretary of the second respondent.

- at clause 1 of Schedule 6, (at C114 and C115), provisions in respect of the passing of control of the second respondent (being '*the Company*' on the basis of the definition of '*the Company*' set out at clause 1 at C53 as "*Award Appliances Limited, details of which are set*

out in Schedule 1") to the first respondent, including delivery to the first respondent by Lynn Wood as follows:-

"1.1.11 *an irrevocable power of attorney in the agreed form, duly executed by the Seller as a deed in favour of the Buyer (or its nominees) to enable the beneficiary (or its proxies) to exercise all voting and other rights attaching to the Shares before the transfer of the Shares is registered in the Company's register of members;*

1.1.12 a certified copy of the board minutes of the Company in respect of the board meeting held pursuant to paragraph 1.2;"

And that Lynn Wood

1.2 procure that a board meeting of the Company is held at Completion at which it shall be resolved by the directors that the following matters shall take place:

1.2.1 the transfers referred to in paragraph 1.1.1 are approved and (subject to them being appropriately stamped), registered in the Company's books and that share certificates in respect of the same be executed by the Company and delivered to the Buyer (or its nominees);

1.2.2 the persons nominated by the Buyer are appointed as directors and secretary of the Company subject to such persons consenting to such appointment and not being disqualified in law or under the articles of association of the Company from holding such offices. The appointments shall take effect at the end of the board meeting;

1.2.3 the Seller shall resign as a director of the Company and Hazel Watson shall resign as the secretary of the Company and cease to be a director or secretary (as appropriate) of the Company with effect from the end of the relevant board meeting;

> 1.2.4 *the Written Resolution and the New Articles are adopted as the new articles of association of the Company in substitution for the existing articles of association.*

- The written resolution of the second respondent (at C142) shows that new Articles of Association were adopted by the second respondent by special resolution on 12 March 2018. The terms of those Articles of Association adopted on 12 March 2018 are at C143- C165.

19. Prior to the agreement date, a due diligence process was carried out by the first respondent, which included disclosure to the first respondent of details of the second respondent's employees and their terms and conditions of employment. This information on the second respondent's employees was first provided to the first respondent on an anonymised basis. In her position as Group HR Manager, Vicky Weston had sight of the employee information provided to the first respondent by the second respondent in respect of this sale and purchase. Vicky Weston has experience in the course of her employment with the first respondent in dealing with disclosure of employee information in situations which are dealt with as being a relevant transfer in terms of the Transfer of Undertakings (Protection of Employment) Regulations, commonly known as the TUPE Regulations. The information disclosed to Ms Weston in respect of the employees of the second respondent was in line with the employee information provided by a transferor to the first respondent in a situation where the first respondent regards that transfer to be relevant transfer in terms of the TUPE Regulations.

20. Records from Companies House (at C132 and C133) show that on 12 March 2018 Hazel Watson resigned as Secretary of the second respondent, Scott Pallister and Kevin Brown were each appointed as a Director of the second respondent and Scott Pallister was appointed as Secretary of the second respondent. Records from Companies House (at C133 and C134) show that on 20 March 2018 Lynn Wood resigned as Director of the second respondent. Records from Companies House (at C139) show that on 19 October 2005, Scott Pallister, Paul Richard Feek and Kevin Brown were each appointed as

a Director of the first respondent and Scott Pallister was appointed as Secretary of the first respondent.

21. The second respondent retained its identity on and following the agreement date in that it remained a legal entity, being a company registered with Companies House, with obligations on the Directors and Secretary of that Company. The control and management of that business was operated by the first respondent following the agreement date.

22. The full integration of the business and employees of the second respondent into the first respondent was envisaged on the purchase of the second respondent by the first respondent. Following the purchase of the second respondent by the first respondent, the first respondent took over and had full control of the former business and operations of the second respondent. Following the sale and purchase of the second respondent by the first respondent, the first respondent took over complete control of the former business of the second respondent and began steps to fully integrate that business into the first respondent's operations. The employees of the second respondent were regarded by the first respondent as remaining employees of the second respondent business. Immediately following the sale and purchase of the second respondent by the first respondent, those employees continued to work under the terms and conditions of employment they had with the second respondent. Those employees continued to be employed following the sale and purchase and were not regarded by the first respondent as having had any break in continuity of service. Following the sale and purchase, the first respondent took steps to close the depot from where the second respondent business had formerly operated. That depot was closed by the first respondent. The first respondent commenced a redundancy consultation exercise with some of those individuals who had been employees of the second respondent and steps were taken to change the terms and conditions worked by those who had been employees of the second respondent to those terms and conditions normally offered by the first respondent.

23. Following the purchase of the second respondent by the first respondent, the second respondent was not a separate entity, but rather became integrated into the first respondent business. After the agreement date the second respondent was not operated as a business separate or distinct from the first respondent. In the weeks following the entire issued share purchase, the first respondent took over full management and control of what had been the second respondent's business. The first respondent entered into a redundancy consultation process with those who had been employees of the second respondent and who were affected by the closure of the depot formerly operated by the second respondent. As a result of that redundancy consultation process, the employment of those employees was either terminated purportedly by way of redundancy and with a redundancy payment, or new contract terms were offered to them as suitable alternative employment. That alternative employment was under the contract terms of the first respondent, which were different to the terms and conditions of employment which those employees had had with the second respondent. No individual who had been and employee of the second respondent as at the agreement date remained employed by the first respondent under the terms and conditions of employment which they had been party to in respect of their employment with the second respondent. Within approximately six months of this sale and purchase, all employees of the second respondent as at the agreement date who then continued to be employed by the first respondent had become employed on different contractual terms and conditions, being those offered by the first respondent rather than those which had been in place with the during their time of employment with the second respondent. That exercise included the former Office Manager manager post being marked by the first respondent as redundant. The individual who had been employed by the second respondent in that post was consulted with by the first respondent after the agreement date, on the basis of her post being affected by a redundancy situation. That individual (Linda Martin) became employed by the first respondent on new terms and conditions of employment, offered to her by the first respondent with a new post, as Suitable Alternative Employment. From that time Linda Martin no longer had responsibilities for management of what had been the second respondent's business. On the

agreement date responsibility for the day to day management of what had been the second respondent's business was taken over by the first respondent, with James Loudon having management responsibilities for operations in Scotland.

24. The claimant's contract of employment terminated prior to the first respondent commencing any consultation with him in respect of changing his contract terms from those in place with the second respondent to those offered by the first respondent. Following the agreement date, the claimant continued to be employed under the terms and conditions of employment which were in place between him and the second respondent, with the claimant's prior length of service being recognised by the first respondent and no break in the claimant's continuity of service.

25. The extract from the Pacifica Group website shown at C166 and C167 as having been the position as at 23 August 2019 (after the agreement date), gives the following description in relation to Pacifica Group:-

> *We are the U.K.'s largest providers of home appliance, gas heating, inspection, repair, replacement and refurbishment services. A clear focus on outstanding service is central to what makes Pacifica Group different. Our ultimate aim is to enhance your reputation by providing service solutions that reinforce trust and confidence in your brand.*
>
> *Founded in 2003 the Group has grown to become a major supplier to the domestic support services industry throughout the UK and Europe. With a unique blend of services, Pacifica Group is able to support customers across a wide spectrum from manufacturers and retailers, to energy providers and local authorities, through to direct domestic support.*

26. That website extract then shows there being four options, being

- 'Pacifica Appliance Services' (the first respondent) described there as follows:- "*Pacifica Appliance Services provide contracted first-line support for brown and white goods manufacturers and leading retail groups.*"

- 'Pacifica Home Services', described there as follows:- "*Pacifica Home Services supports energy providers to deliver UK wide services for heating, renewables and installation."*

- 'UK Warranty' described there as follows:- *"UK Warranty is an FCA regulated provider of end-to-end warranty solutions for corporate and affinity partners."*

- '0800 Repair' described there as follows:- "*0800 Repair, our consumer brand is a 250- strong engineer network that provides heating, maintenance and domestic appliance repair throughout the UK."*

27. This website extract shows no description of the second respondent (Award Appliances Limited). The second respondent's business, contracts and employees transferred to the first respondent under the agreement on the agreement date. The first respondent took over full control of those operations and did not then use the second respondent's name in any consumer branding. The first respondent operates under the name Pacifica Appliance Services and under the consumer brand of '800 Repair'. All calls received at the call centre operated by or on behalf of the first respondent in England are answered using the brand '0800 Repair'.

28. The extract from the Pacifica Group website shown at 167 is in respect of "Pacifica Appliance Services". This extract is in respect of work carried out by the first respondent, including work carried out by service engineers who were employed by the second respondent as at the sale and purchase of the second respondent by the first respondent. This extract states as follows:-

> *"Providing contracted first-line support for brown and white goods manufacturers, mobile phone and gadget suppliers, leading retail groups and insurance companies.*
>
> And

"Pacifica Appliance Services control and manage an employed engineer workforce in excess of 130 white goods engineers, gadget technicians and brown goods engineers.

Working primarily with manufacturers, insurance companies and retailers Pacifica Appliance Services is able to provide a service and support solution with a UK-wide coverage that enhances and consolidates the brand reputation of our partners.

Technical expertise gained over many years along with a highly effective engineer management structure has led us to become one of the biggest and most trusted appliance engineer workforces in the UK."

And

"At a glance

- *230,000 repairs per annum*
- *domestic appliance repair service*
- *TV and hi-fi repair*
- *mobile phone and gadget repair*
- *appliance refurbishment facilities*
- *in-house training Academy*
- *30,000 appliances refurbished per annum*
- *spares storage and distribution*
- *returns management*
- *in-house directly employed engineers"*

Comments on Evidence

29. I found both witnesses to be entirely credible and reliable. There was no real dispute on the facts before me which are relevant to my determination of the issues at this PH. Both witnesses sought to truthfully answer the questions

posed to them. Some questions were put to Ms Weston which she was unable to answer because she was not privy to the information asked and on those occasions she answered with that position. Neither witness sought to avoid questions put to them.

5 30. During the course of cross examination, Ms Weston sought to be allowed to give further evidence once she had spoken to an 'owner' of the first respondent, being one of the individuals named as a Director of the first respondent in the papers which were before the Tribunal. That was refused on the basis that the respondents had notice of this PH and the issues to be 10 determined, only Ms Weston was present to give evidence on behalf of the respondents and that evidence was expected from Ms Weston in respect of her knowledge of the situation as far as she was able to do so.

31. There was no dispute that following the sale and purchase of the second respondent by the first respondent, the first respondent took over complete 15 control of the former business of the second respondent and began steps to fully integrate that business into the first respondent's operations. It was not suggested before me that there was any distinction of the operations of business of the second respondent from the operations of the first respondent after the agreement date. It was not in dispute that there was full integration 20 of the business of the second respondent into the first respondent, with a full take over of management and day to day control by the first respondent. It was not in dispute that the second respondent retained its identity in terms of Regulation 3(1)(a).

32. Ms Weston's position on the terms of her letter to the claimant of 27 March 25 2018 (at C129) was that '*the contract terms had transferred to Pacifica when they became owners of Award*'. Her position was that the month's notice referred to in that letter was the claimant's notice period with the second respondent.

33. Ms Weston's position on where the payment to the claimant shown at C41 30 had come from was that the first respondent "*didn't have a bank account set up for Award Appliances*" and that the payment "*couldn't have come out of any bank account other than Pacifica".* Ms Weston did not know whether

payroll for those who had been employees of the second respondent was operated by the first respondent after the sale and purchase, because her duties do not cover payroll.

34. There was some evidence heard on matters outwith the scope of the issues for determination at this Preliminary Hearing, which for that reason were not fully explored. I have sought to make Findings in Fact only in respect of matters relevant to the issues at this Preliminary Hearing.

Relevant Law

35. The Transfer of Undertakings (Protection of Employment) ('TUPE') Regulations 2006, in particular the definition of 'a relevant transfer' in Regulation 391)(a):-

"3. A relevant transfer

(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....

(4) Subject to paragraph (1), these Regulations apply to—

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a transfer or service provision change howsoever effected notwithstanding—

(i) that the transfer of an undertaking, business or part of an undertaking or business is governed or effected by the law of a country or territory outside the United Kingdom or that the service provision change is governed or effected by the law of a country or territory outside Great Britain;

(ii) that the employment of persons employed in the undertaking, business or part transferred or, in the case of a service provision change, persons employed in the organised grouping of employees, is governed by any such law;

(c) a transfer of an undertaking, business or part of an undertaking or business … where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.....

(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.

4. Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee......

5 *(7) paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.*

(8) Subject to paragraphs (9) and (11), where an employee so objects, the 10 *relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.*

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material 15 *detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer."*

36. At the outset of proceedings, I drew both parties' representatives' attention to 20 the decisions in the following cases, which I stated may be relevant to the issues for my determination at this PH:-

Brooks and ors v Borough Care Services Ltd and anor 1998 ICR 1198, EAT

Print Factory (London) 1991 Ltd v Millam 2007 ICR 1331, CA

Jackson Lloyd Ltd and anor v Smith and ors EAT0127/13

25 *ICAP Management Services Ltd v Berry and anor* 2017 IRLR 811, QBD

37. Time was given at the conclusion of the evidence being heard to allow both representatives to review and to prepare their submissions.

Claimant's Submissions

38. The claimant's representative spoke to his written submissions. He made reference to Regulations 3 and 4 of the TUPE Regulations and to the principles relative to determination of whether there is an economic entity, as set out in *Cheeseman & ors -v- R Brewer Contracts Ltd* 2001 IRLR 144 EAT, and retention of identity as set out in *Spijkers v Gebroeders Benedik Abattoir CV and anor* 1986 2 CMLR 296, ECJ. He relied on it not being contentious in this case that the business before and after was essentially the same, on application of the *Spijkers* and *Cheeseman* tests. His submission was that the issue in this case was whether there had been a transfer 'to another person' in terms of Regulation 3(1)(a), with reference to *The Print Factory (London) 1991 Ltd -v- Millam* [2007] ICR 1331.

39. The claimant's representative submitted that the factual circumstances in the present case should be compared with the factual circumstances in *The Print Factory (London) 1991 Ltd -v- Millam*. Reliance was placed on the evidence on the respondent's intention and steps taken to integrate the businesses. Reliance was placed on no bank account being in operation in respect of the second respondent and on a payment having been made to the claimant by the first respondent in respect of the claimant's wages and holiday pay claim. Reliance was placed on there being no evidence of any payments being made by the second respondent after the sale and purchase. It was submitted that none of the evidence before the Tribunal supports a position of the second respondent being operated separately after the sale and purchase. Reliance was placed on the evidence of the employees of the second respondent, being moved to the first respondent's terms and conditions of employment within either two weeks of the sale and purchase or at latest six months of the sale and purchase. It was submitted that there are clear similarities in the facts of this case, to those in *The Print Factory (London) 1991 Ltd -v- Millam,* but, it was submitted, the facts in the present case are more clear that a relevant transfer in terms of the TUPE Regulations occurred. It was accepted that a change in legal control does not necessarily constitute a relevant transfer, but it was submitted that on application of *The Print Factory (London) 1991 Ltd -v- Millam,* the question is a matter of application of the facts.

40. The claimant's representative sought to rely on the following:-

- that the entire share capital had transferred from Lynn Wood to the first respondent (C61)

- the obligations on Lynn Wood on completion (C62)

- that aspects of the agreement in respect of indemnity (at C67), claims by employees (C96) and tax liability (C81 & C87) went beyond a simple share sale

- that the Agreement refers to a change of control of the company (at section 16 (C67)

- that the Agreement provides (at C69) "*The Seller shall …provide all such assistance as the Buyer shall reasonably require in relation to the integration of the Company and its assets into the Buyer's Group*..", going beyond a simple share sale.

- That the Agreement provides (at C94) that essentially the business will continue as before, which, it was submitted, is what occurred, except that that business was managed by and integrated into the first respondent.

- That the Agreement makes provisions in respect of employees of the second respondent (at C94) , such as disclosure of employees' particulars, warranty provided in respect of obligations towards employees, and in respect of contributions to pension scheme (all of which, it was submitted would apply as due diligence and obligations in a TUPE transfer situation).

- That the completion provisions in the Agreement (at C114) , include provisions for resignation as Director of the company from Lynn Wood and resignation of Secretary (shown as having been done in the information from Companies House); provision for delivery of a Power of Attorney; provisions in respect of a board meeting for appointment of new Directors and Secretary of the Company and new written resolution and new Articles of Association of the Company, and that the evidence from Companies House shows a complete exodus of

officeholders prior and subsequent to the sale and purchase, with substitution to individual officeholders of the first respondent, Scott Pallister and Kevin Brown.

- Companies House information showing resignation of Lynn Wood and Hazel Watson, the only officeholders of the second respondent at the point of the share sale(C133 & C144)

- Appointment on 12 March 2018, of Scott Pallister as Director and Secretary of the second respondent and Kevin Brown as Director of the second respondent.

- Scott Pallister also being Director and Secretary of the First Respondent and Kevin Brown also been Director of the First Respondent (C139).

- New Articles of Association of the second respondent with effect from the date of agreement 12/03/18 (C142).

- No evidence of the business remaining distinct or trading separately. Following the share sale (with reference to *ICAP Management Services Ltd v Berry and anor* 2017 IRLR 811, QBD)

- Evidence that it is part of the first respondent's marketing strategy that they employ service engineers in-house and not separate to their business (C170)

- Information communicated to the claimant shown at C128 and C129, which, it was submitted, were impossible to read in any other way than that the claimant's terms and conditions of employment with the second respondent transferred to the first respondent.

- Payment having been made to the claimant from the first respondent as shown at C 41.

41. Reliance was also placed by the representative on the position adopted by the first respondent in pursuing their defence of this claim, (although no evidence was heard by me on these aspects) in particular:-

- the position in the ET3, which, it was submitted, appears to accept that the first respondent is the employing entity but asserts no TUPE transfer took place.
- The position in the first respondent's completed agenda (at C33), in particular, the position that the respondent in this case is Pacifica Appliance Services Ltd and that Award Appliances Ltd should be removed from the record; reference to the claimant's previous employer at paragraph 2.6; reference to the claimant's '*previous owner/ manager*' having "*day-to-day dealings with the claimant up to the time of the share purchase on Tuesday 13/03/ 2018"* at paragraph 6.2.

42. Reliance was placed on the evidence heard by the Tribunal that the first respondent took over complete day-to-day running of the second respondent from 13 March 2018. It was submitted that the present situation goes further than a simple share sale situation. Reliance was placed on the evidence that within six months on the agreement date all former employees of the second respondent had either transferred to the first respondent's terms and conditions of employment or had left and were no longer employed by either the first respondent or the second respondent. Reliance was placed on evidence that at least four employees had agreed to accept new employment offered to them by the first respondent on new terms and conditions (but with recognition of length of service), said to have been offered as suitable alternative employment and as a consequence of a purported redundancy situation, with the estimate of that having taken place within two weeks of 13 March 2018.

43. It was submitted that each of the elements identified in *ICAP Management Services Ltd v Berry and anor* 2017 IRLR 811, QBD are distinguishable from the present situation.

44. The claimant's representative invited the Tribunal to find that there was a relevant transfer in terms of Regulation 3(1)(a) of the TUPE Regulations on 12 or 13 March 2018, and that the employer of the claimant on the relevant date was the first respondent.

Respondent's Submissions

45. The respondents' representative relied on a share transfer having taken place. Her position was that the first respondent company had bought the second respondent company by way of a share transfer to which the TUPE Regulations do not apply. Her position was that the claimant continued to be employed by the second respondent after the agreement date, under the same terms and conditions of employment. She relied on the fact of the terms and conditions of the claimant's terms of employment not having varied as at the date when the first respondent was bought by the second respondent as indicating that TUPE did not apply. Her position was that the claimant was employed by the second respondent prior to the share purchase and that that was the same employer after this share purchase, with no change to the contract of employment or its terms and conditions. Her position was that the communication at C128 and C129 does not say that the contract has transferred to the first respondent. She did not accept the claimant's representative's position in respect of that communication not being able to be read in any other way. The respondent's representative's position was that the contract had not transferred to the first respondent, but that the terms and conditions of employment which the claimant then held with the second respondent had transferred to the '*new owners'.* Her position in the communication at C128 and C129 was that the claimant was still obliged to give a month's notice under those terms and conditions, which he had brought with him to the new owners.

46. The respondents' representative relied on her evidence that all terms of employee's contract with the second respondent "*applied until they were changed*", when new contracts of employment were signed with the first respondent. She relied on her evidence that were three or four individuals who had been employees of the second respondent who changed contractual terms within three weeks of the agreement. She relied on that change have been done after having gone through a redundancy consultation process and being offered suitable alternative employment, which three employees had chosen to take on the first respondent's terms and conditions of employment,

and with the employer named as Pacifica Appliance Services Ltd, with recognition of length of service with Award.

47. Although outwith the scope of the issues for this PH, it was the respondent's representative position that if it were found that the TUPE Regulations apply, then the first respondent entered into consultation at the first opportunity, on 13 March 2018. Her position was that if the Tribunal's decision is that the TUPE Regulations apply, then there should be no claim for 13 weeks pay for failure to consult because there has been no detriment.

48. The respondents' representative asked the Tribunal to find that this was not a transfer in terms of the TUPE Regulations because the employees remained on their contract terms with Award Appliance Ltd. It was submitted that the identity of the employer at the time of the claimant's resignation was Award.

Decision

49. I applied the Findings in Fact in this case to the relevant law. This case concerns the application of Regulation 3(1)(a) of the TUPE Regulations 2006, and not the service provision change aspects of those Regulations, as set out under Regulation 3(1)(b).

50. I accepted the claimant's representative's submissions and his reliance on the facts referred to by him in his submissions on matters where evidence was heard. I accepted the claimant's representative's reliance on the decision of the Court of Appeal in *The Print Factory (London) 1991 Ltd -v- Millam*. I accepted his submissions that, on the facts in this case, there are a number of evidential indications, which in combination, establish that control of the business in the sense of how it's day-to-day activities were run, had passed from the second respondent to the first respondent, those being the matters on which evidence was heard before me which are set out in the findings in fact and relied upon by the claimant's representative in his submissions. On the findings in fact, it is clear that the day to day control of running the second respondent's business changed on the purchase by the first respondent. There were new practices, introduced to employees at a training and induction day, the operations changed from being controlled in a depot in Scotland to

customers' calls being received by the call centre operated by the first respondent in England, and work being allocated to the individual service engineers from there. The terms of the Agreement envisaged full integration of the businesses and full control of the day to day operations of the second respondent (which remained a separate company) being with the first respondent, and that was what occurred on the evidence before me. I accepted the claimant's representative's submissions that on the application of the facts in this case to the law, and in consideration of the principles in *The Print Factory (London) 1991 Ltd-v- Millam*, [2007] EWCA Civ 322, control of the business in the sense of how it's day-to-day activities were run had passed from the second respondent to the first respondent, and that that control went much further than a change in the legal control of the original corporate employer and a share sale. This is not a situation of a simple share sale, nor mere control of a subsidiary company by its parent company.

51. There are relevant material similarities in the present case to the position in *The Print Factory (London) 1991 Ltd-v- Millam*: the purchase of the second respondent by the first respondent was by way of a share sale agreement; that agreement had no effect on the length of service of the second respondent's employees following of that share sale agreement; it was the first respondent's intention to fully incorporate the business of the second respondent into its own business, and steps were taken to begin that integration process in the week following the agreement date . There was no evidence before me in respect of payroll or wages being paid by the first respondent after the agreement date. That was different to the position in *The Print Factory (London) 1991 Ltd-v- Millam*, where there was evidence before the Tribunal that after the takeover the PAYE documents showed which company had paid the wages and managed the contributory pension scheme and that the purchased company had no payroll or wages department. I accepted the claimant's representative's reliance on evidence in the present case that payment in respect of wages due to the claimant in respect of work done up to 17 March 2018 was made from the first respondent, and Ms Weston's evidence that no bank account was operated in respect of the second respondent after the agreement date. I also accepted the claimant's

representative's submissions that separation of the business of the first and second respondent would have been contrary to the position clearly envisaged in the agreement in respect of the integration of the second respondent's business, and I accepted the claimant's representative's reliance on those aspects of the agreement.

52. I considered it to be significant and attached weight to the evidence that decisions taken in respect of the operations of the continuing business of the second respondent, and its integration into the first respondent's operations were taken by employees and / or Directors of the first respondent. I considered it to be significant and attached weight to that including the decision to close the depot formerly operated by the second respondent and to change the operating practices, so much so that a training / induction day was considered to be appropriate for the former employees of the second respondent. I attached weight to the undisputed evidence that from 19 March 2018, the work carried out by those who had been employed by the second respondent merged with the first respondent's business, to the extent of the repair work by service engineers including work for manufacturers / brands not serviced or repaired by the second respondent immediately prior to the agreement date. The only evidence of any distinction of the business operations of the second respondent from the first respondent following the agreement date was that the service engineers continued to wear uniform supplied by the second respondent. I did not consider that to be material to the issues for my determination. It was accepted that there was full integration of the businesses. The steps taken in respect of this integration are such that although the mechanism which effected the sale and purchase of the second respondent by the first respondent was by way of sale and purchase of the entire issued share capital, what occurred went far beyond a simple share sale and was a relevant transfer in terms of Regulation 3(1)(a) of the TUPE Regulations 2006.

53. I took into account the analysis by the Court of Appeal in *The Print Factory (London) 1991 Ltd-v- Millam*, at paragraphs 3 and 4 and the reference there to *Brooks and ors v Borough Care Services Ltd and anor* 1998 ICR 1198, EAT and *Allen -v- Amalgamated Construction Co Ltd* [2000] ICR 436. My

conclusions in the present case are similar to the conclusions of the Employment Tribunal in *The Print Factory (London) 1991 Ltd-v- Millam*. On the basis of the evidence before me and my findings in fact I am not satisfied that the second respondent remained discrete from the first respondent after the share sale. The fact that there was a share sale agreement may have given the superficial impression that no TUPE transfer had occurred, and the situation may have been dealt with by the respondents as if there was no relevant transfer in terms of the TUPE Regulations, but the first respondent, as the buyer of the whole issued shares of the second respondent, did far more than acting as a simple shareholder or parent company of a subsidiary would have done. The first respondent took over the complete handling of the management of what had been the business of the second respondent and took actions to fully integrate the former business of the second respondent into the business of the first respondent. The first respondent took actions apart from those of a mere shareholder. Key decisions were made, particularly in respect of shutting down the depot formerly operated by the second respondent; changing the way in which work was allocated to the service engineers; changing the work allocated to the service engineers in respect of work then being expected to be carried out by them for additional manufacturers; taking steps to bring about contractual changes and to terminate the employment of employees purportedly by way of redundancy. In all the circumstances I am satisfied that on the application of the relevant law to the findings in fact there was a relevant transfer in terms of the TUPE Regulations.

54. Similarly to the position in *The Print Factory (London) 1991 Ltd-v- Millam*, this is not a situation of piercing the corporate veil.

55. Following the analysis applied in *ICAP Management Service Ltd -v- Berry and anor* 2017 IRLR 811, QBD, on the facts before me, the first respondent became responsible for carrying on the business of the second respondent, incurred the obligations of employer and took over the day-to-day running of the business. On the basis of the evidence before me in respect of how the day-to-day activities of what had been the second respondent's business was

carried on after the agreement date, as a matter of fact, the activity has been carried on by the first respondent.

56. It was not argued before me that the second respondent had not retained its identity after any transfer. There was evidence before me in the form of Companies House records that the second respondent remained a corporate entity after the date of the agreement. On the evidence before me and on application of the relevant law, as relied on by the claimant's representative, I was satisfied that there was a transfer of an economic entity which retained its identity.

57. I did not accept the respondents'' representative's submissions that TUPE did not apply because the terms of the contract of employment did not alter on the sale of the second respondent to the first respondent. The continuance of contractual terms post-transfer is an effect of a relevant transfer, on application of Regulation 4 of the TUPE Regulations. That fact is not an indication against there being a relevant transfer.

58. There was a transfer of the second respondent's business to the first respondent which was a relevant transfer in terms of Regulation 3(1)(a) of the TUPE Regulations Regulation 2006. The claimant's contract of employment transferred under the Transfer of Undertakings (Protection of Employment) ('TUPE') Regulations 2006 from the second to the first respondent. On the application of the TUPE Regulations, the identity of the claimant's employer as at 19 March 2018 was the first respondent, Pacifica Appliance Services Ltd.

59. The claimant's claims in reliance of the TUPE Regulations proceed, in addition to the other claims made by the claimant as set out in his ET1.

60. A PH will be scheduled for the purpose of case management to determine further procedure in this case. That case management PH may take place by telephone conference call if both representatives agree to that. If either representative does not agree to that case management PH taking place by telephone conference call, they should write to the Employment Tribunal

office (copied to the other party's representative) within 7 days of the date of this decision, stating the reason for their objection.

61. One of the issues for discussion at that forthcoming PH will be the position in respect of the second respondent in these proceedings. It is now noted that

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- This claim was raised against the first and second respondent
- An ET3 was lodged in respect of the first respondent
- No ET3 was lodged in respect of the second respondent
- No action appears to have been taken in respect of no ET3 defence having been lodged by the second respondent.

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C McManus
Employment Judge

12 September 2019
Date of Judgment

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Date sent to parties **17 September 2019**