Case No: 1803557/2019(V)
1803607/2019(V)

EMPLOYMENT TRIBUNALS

Claimants: Mr A Jackson
Mr J Lee

Respondent 1: Robinsons M&E Limited (in administration)
Respondent 2: Robinsons MEA Limited

HELD by CVP in Sheffield ON: 18, 19 and 20 January 2021 and 25 February 2021

BEFORE: Employment Judge Little

REPRESENTATION

Claimants: Ms N Alistari of Counsel (instructed by Harrington Law)
Respondent 1: No attendance or appearance
Respondent 2: Mr E Chibaka, Director

JUDGMENT having been sent to the parties on 4 March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are given at the request of the claimants. The request was made in their solicitor's email of 5 March 2021.
2. **Procedural history**

   Mr Jackson presented his claim to the Tribunal on 27 June 2019. Mr Lee presented his claim to the Tribunal on 2 July 2019. The two claims were subsequently consolidated. That occurred on 16 August 2019.

Initially the only respondent was the first named respondent. However on 15 August 2019 that company went into administration. In those circumstances the claims were stayed and the parties were notified of that by the Tribunal's letter of 11 September 2019.

The claimants then applied for the second respondent to be joined to the proceedings. That application was made by email on 19 September 2019. The claimant's solicitor contended that the business of the first respondent had transferred to the second respondent on 15 August 2019. It was now contended that the dismissal of both claimants by the first respondent, which occurred on 3 May 2019, had as its reason or principal reason the intended transfer, which as noted, the claimants contended occurred on 15 August 2019. Subsequently the claimants' solicitors provided an amended statement of claim which set out their case based upon the alleged transfer. The second respondent objected to the claimants' application. Nevertheless on 28 October 2019 Employment Judge Cox granted the application on the basis that she was satisfied that there were issues between the claimants and the second respondent which fell within the jurisdiction of the Tribunal and which it was in the interests of justice to have determined in the proceedings.

The proceedings as against the first respondent remain stayed and there has been no attendance or appearance for that party at this hearing.

3. **The complaints**

The complaints which the claimants now pursue against the second respondent are as follows:

- Automatically unfair dismissal pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006, Regulation 7.
- Breach of contract – six months' notice pay.

The claimants had also pursued a complaint in respect of holiday pay but their solicitor wrote to the Tribunal on 12 January 2021 indicating that that complaint was withdrawn.

4. **The issues**

The issues had been defined and agreed at a case management hearing conducted by Employment Judge Cox on 17 January 2020. The issues were discussed further at a hearing which I conducted on 30 July 2020. That hearing had, in error, been listed as a one day hearing for complete disposal of the case, whereas in January 2020 the claim had been listed for a four day hearing which should have taken place in May 2020. However the pandemic intervened and Employment Judge Wade had conducted a further case management hearing on 19 May 2020 when it was agreed that the case should be relisted for hearing by video. I took the opportunity at the July hearing to reiterate the issues as previuosly defined at Employment Judge Cox's hearing. Those issues were as follows:

<u>Unfair dismissal</u>

4.1. On what date did each claimants' employment with the first respondent commence?

4.2. Was there a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 of the undertaking of the first respondent to the second respondent on or about 15 August 2019?

4.3. Was the sole or principal reason for the claimants' dismissals by the first respondent on 3 May 2019 any such transfer?

4.4. If the claimants were dismissed, should there be any reduction for contributory conduct?

Wrongful dismissal – breach of contract

4.5. Again, was there a relevant transfer?

4.6. Did the claimants or either of them commit gross misconduct by failing to carry out their duties by not conscientiously increasing the sales pipeline and failing to win enough contracts resulting in financial loss to the first respondent?

4.7. If so, was the first respondent contractually entitled to summarily dismiss each claimant?

4.8. In so far as the Tribunal finds primary liability for the matters of complaint as against the first respondent, is the second respondent liable by virtue of the transfer and specifically Regulations 4 and 7 of the TUPE Regulations 2006?

5. **The evidence**

Both claimants have given evidence. The second respondent's evidence has been given by Mr E Chibaka who is that company's sole director. There was also evidence from Mr J Tahlil. Mr Tahlil was formally, with Mr Chibaka, a director of the first respondent. Unfortunately, at the time of the hearing in January 2021 Mr Tahlil was in Northern Kenya in what I was told was a rural area where there was no internet access. In those circumstances Mr Tahlil's evidence could not be taken until 25 February 2021. At that date Mr Tahlil was still apparently in Kenya but had been able to obtain internet access.

6. **Documents**

I have had before me a bundle which initially ran to some 373 pages although various additional documents have been added during the course of the hearing.

7. **Findings of fact**

7.1. On 2 March 1987 Mr Lee's employment began. His employer at that stage was a company called Robinsons Heating Limited. I have not seen any documentation about Mr Lees' employment at this date but I base my finding on Mr Lee's unchallenged evidence and also on a recital and acknowledgement in a subsequent document (a service contract dated 9 January 2018). I have also taken into account the evidence of both claimants to the effect that for much of their employment their employer was essentially a family business which did not place much importance on such types of documentation. I have also considered a solitary payslip dating from October 2016 where Mr Lee's employer was named as Robinsons M&E Limited. The origin of that company is explained in paragraph 7.3 below.

7.2. On 19 June 1989 Mr Jackson's employment began. That is documented, in the sense that I have seen a letter dated 19 May 1989 from a Mr B H Steele director of Robinsons Heating Limited. That letter states that the claimant Mr Jackson was employed as a trainee heating engineer. The starting date was to be 19 June 1989. A copy of that letter (which is one of the additional documents) is at 376.

7.3. In 2011 there was a management buyout of Robinsons Mechanical and Electrical Limited. The claimants' participated in that buyout. A new company was incorporated on 27 April 2011 and that was the first respondent, Robinsons M&E Limited. Both claimants became directors and shareholders in that new company.

7.4. In January 2018 the claimants and a fellow shareholder sold their shareholdings to a company called First Response Group Limited. That was a company owned by Mr Chibaka and Mr Tahlil, who were also it's directors.

7.5. Heads of agreement were prepared and concluded on 8 January 2018. A copy of this document is at pages 114a to 114f in the bundle. One of the agreed terms was that the claimants would enter into director's service contracts and those would contain a minimum notice period of 12 months.

7.6. Mr Lee's service contract, dated 9 January 2018 is at pages 96 to 110. The agreement is made with Robinsons M&E Limited. Clause 2 of the agreement is headed "Employment" and Clause 2.1 reads:

"The Executive (Mr Lee) shall continue to be employed as a director. The continuous employment of the Executive (taking account of his previous employment with Robinsons Mechanical and Electrical Limited) commenced on 2 March 1987."

7.7. Mr Jackson's service contract, also dated 9 January 2018, is at pages 77 to 91. It also has a Clause 2.1 which is in the same terms as above, save that the commencement date for employment is given as 19 June 1989.

7.8. Both service contracts include a clause (2.3) which provide that the employment will continue until terminated by either party giving to the other not less than six months' notice in writing to that effect. However clause 16 provided that there could be immediate termination if, for instance, the employee committed gross misconduct.

7.9. The share purchase agreement whereby First Response Holdings Limited purchased the whole of the issued share capital of a company described as Robinsons Building Services Group Limited was completed on 11 May 2018. A copy of the agreement is at pages 115 to 180. Robinsons M&E Limited was described as a subsidiary of the company just referred to. The claimants ceased to be directors of Robinsons M&E Limited.

7.10. On the same date, 11 May 2018, a deed of variation to the service agreements was signed in respect of each claimants' service agreement. The deed of variation for Mr Lee is at page 111 and for Mr Jackson at page 92. The effect was that no notice to terminate the employment could be given so as to expire sooner than 12 months from completion – that is of the share transfer agreement.

7.11. Mr Chibaka contends that he and his business partner Mr Tahlil did not get the business they had thought they were purchasing – that is in terms of its profitability and financial position. I gathered that this may be the subject of other litigation and obviously this is not an issue that I have to determine.

7.12. In any event the trading position of the first respondent deteriorated and by March 2019 the directors were seeking advice from insolvency practitioners, Silke & Co, with a view to the first respondent entering into a Company Voluntary Arrangement (CVA). There is a copy of the insolvency practitioner's report dated 13 March 2019 at page 185.

7.13. On 4 April 2019 the first respondent entered into a CVA and a copy of the proposal is at page 182.

7.14. On 1 May 2019 Mr Chibaka sent an email to the claimants inviting them to what was described as a catch up meeting. The email contained a brief agenda. A copy of the email is at page 238. The meeting date proposed was 3 May.

7.15. A meeting duly took place on 3 May 2019. Present were the claimants, Mr Tahlil, Mr Chibaka and Gillian Harrison who was the note taker. The notes are pages 243 to 248. Sales figures as set out in a document at page 239 to 242 were discussed. Mr Chibaka stated that the gross profits for the work which the claimants were undertaking was not adding up. He believed that a loss was being made. The claimants challenged the figures that were being put forward and believed that the sales record document was not accurate. The directors were also concerned about what work the claimants had in what was described as the pipeline. The claimants contended that in addition to doing their own work on Minor Works (which was their division) they also assisted colleagues in other departments. Mr Tahlil stated that having bought the business from the claimants and their former business partner the order book had not been realised. Mr Chibaka added that the figures and confidence that they had been given when they decided to proceed had not held. Mr Tahlil went on to say that the order book had never been realised and that they had not got the order book that they had been promised. The business needed to pay its creditors through the CVA but the directors were not receiving any return.

Mr Tahlil then said:

"We undertook the CVA because we want to turn around the business and fulfil our commitment. We cannot sustain your wages and the benefits that you draw from the business. There is no order book and the jobs you bring do not sustain this and so we are terminating your employment." (See page 245).

Nevertheless Mr Tahlil went on to say that the claimants had worked very hard and that the directors wanted to keep their relationship with them. It had been 'lovely' working with them, but the business was not what they had been told. Mr Chibaka went on to suggest that they could continue to work together but not in direct employment. He suggested that the claimants could be involved as consultants.

7.16. On 16 May 2019 the claimants' solicitor Mr Harrington, sent an email to Mr Chibaka. A copy appears at pages 257 to 258. Addressing the question of the claimants' dismissal, Mr Harrington said that no fair reason had been given for the dismissal and there had been no fair process of any kind. He reminded

Mr Chibaka of the notice term in the service contract as varied by the deed in May 2018. He went on to indicate that the claimants expected to be paid in lieu of that notice, together with any untaken holiday pay, reimbursement of expenses and also a statutory redundancy payment. If such payments were not paid Mr Harrington had instructions to commence Employment Tribunal proceedings. Unfair dismissal would then be claimed.

7.17. Mr Chibaka replied by his email of 25 May 2019 (page 256). He indicated that he believed that the claimants had not been unfairly dismissed and he now alleged that they had committed gross misconduct by "receiving salaries, benefits and related expenses with minimal input."

7.18. On or about 13 June 2019 Mr Chibaka purchased a company which was then known as MacCarthy Fox Limited. That company had been formed by company agents on 26 March 2019. I find that, contrary to what the claimants had initially alleged during these proceedings, Mr Chibaka had absolutely no involvement with the incorporation of that company in March 2019 and his involvement did not begin until June 2019. Mr Chibaka was appointed as the sole director of MacCarthy Fox Limited on 19 June 2019 and the other two original directors (the company formation agents, I assume) resigned. On or about 21 June 2019 the name of MacCarthy Fox Limited was changed to Robinsons MEA Limited (the second respondent).

7.19. In the meantime the financial decline of the first respondent continued. On 12 July 2019 the directors of the first respondent received advice from insolvency practitioners, Leonard Curtis Recovery Limited, that, as the company was insolvent, immediate steps should be taken to place it in administration. The first respondent had not been able to service the payments due under the CVA. The letter of advice is at page 281.

7.20. The first respondent went into administration on 15 August 2019. Mr S Williams and Mr P Deyes of Leonard Curtis were appointed joint administrators. There had been a pre-packaged sale whereby the first respondent's business and assets had been sold to the second respondent, also on 15 August 2019.

7.21. Mr Williams subsequently wrote to the creditors of the first respondent on 21 August 2019 (pages 324 to 326) informing them of the administration and the pre-packaged sale. An appendix to that letter was a document which provided further information to the creditors (pages 328 to 344). Whilst that report referred to various steps the first respondent had taken to alleviate cashflow pressures, no reference was made to the dismissal of the claimants. The report went on to note that the business and assets of the first respondent had been advertised for sale on 29 July 2019. Two expressions of third party interest had been received as a consequence but no formal offer was made by either of those parties. It was noted that an offer of £140000 for the business and assets had been received from Robinsons MEA Limited and it was pointed out that that was a connected company because Mr Chibaka was a director of both companies. The report went on to explain why a sale by means of a pre-packaged sale was considered necessary and that included what was described as mitigation of employee claims and preservation of employment for staff – it was stated "a sale would allow for the 30 staff to transfer employment to any purchaser under TUPE regulations". (Page 332). The business had

been marketed on the websites of Leonard Curtis and a firm called Charles Taylor Auctioneers from 29 July 2019. What Robinsons MEA Limited had purchased was set out in paragraph 5 of the report. That included goodwill, IT and office equipment, work in progress, other equipment, stock and vehicles. It was confirmed that the company's 30 employees had all been transferred to Robinsons MEA Limited under the TUPE regulations.

8. **The parties submissions**

8.1. <u>The claimants' submissions</u>

Ms Alistari had prepared written closing submissions and she also addressed me. It was contended that the claimants were at the material time employees of the first respondent and Ms Alistari reviewed the evidence which she submitted supported that submission.

It was also contended by the claimants that there had been a relevant transfer under the TUPE regulations as between the first and second respondents on 15 August 2019.

On the question of the reason for the claimants' dismissal, Ms Alistari submitted that the sole or principal reason was connected to the transfer. The burden was on the respondent to show the reason for dismissal. The claimants' acknowledged that at the date of their dismissals one could not speak of a particular transfer being in existence or in the contemplation of the respondent.

However I was referred to the Court of Appeal's decision in the case of **Spaceright Europe Limited v Baillavoine & Others** [2012] ICR 520 where it was held that there was no requirement for there to be a specific transfer alive in the mind of the parties for the regulations to be engaged. I was referred to a passage in the Judgment of Lord Justice Mummery where he stated

"*the natural and ordinary meaning of the language of Regulation 7(1) does not require a particular transfer or transferee to be in existence or in contemplation at the time of dismissal."*

I was also referred to the guidance given within that Judgment as to the correct approach for an employment tribunal which is,

"to look to the fact of dismissal and, as a matter of objective assessment of the evidence, to determine the reason for it and whether that reason was "connected with" the transfer. As a matter of ordinary English and of plain common sense a dismissal prior to the transfer could have been for a reason "connected with the transfer", even though that particular transfer or transferee was not known, identified or contemplated at the date of dismissal. … This approach gives straightforward effect to the words "the transfer" in Regulation 7(1), rather than requiring the substitution of the words such as "transfer" simpliciter, or "a transfer" or "any transfer". It puts the weight of the analysis instead on the breadth of the words "connected with"."

I should add that although Ms Alistari's submissions stress the "connected with" concept, Regulation 7, as it applies to the cases before me, is as amended by the Amendment Regulations in 2014. That amendment modified the provision so that there would be unfair dismissal if the sole or principal reason for the dismissal had been the transfer and it removed the reference to "or a reason

connected with the transfer …" When the Court of Appeal gave its Judgment in **Spaceright Europe** the definition still included "connected with."

The matters which Ms Alistari submitted that I should take into account in assessing the reason for dismissal included the directors considering their choice of insolvency procedure as early as February 2019, opting initially for a CVA. When it became apparent that the CVA was not going to work, Ms Alistari submitted that that development must have prompted discussions between the directors as to the future of the first respondent. Whilst Mr Tahlil did not want to be involved in any continuation of the business, Mr Chibaka had wanted to take the business further. It was around that time that the dismissals occurred and the saving of the claimants' salaries would have been recognised as making a sale of the business to a third party, or more likely its purchase by the second respondent, a more attractive proposition. Accordingly it was submitted that the reasons for the dismissal were to cut costs and facilitate or make more attractive an eventual transfer.

It was further submitted that the only reason for Mr Chibaka purchasing MacCarthy Fox Limited was to use it in the eventual transfer of the first respondent's assets into Mr Chibaka's control. It was clear that in re-naming MacCarthy Fox with a name very similar to that of the first respondent, the intention had been for Mr Chibaka to pave for the way for a seamless transfer of the first respondent to the second.

Ms Alistari contended that it was highly significant that throughout their dealings with the insolvency practitioners, neither Mr Chibaka nor Mr Tahlil had made any mention of their intention to dismiss or the fact of dismissal of the claimants. It was submitted that that was with the intention of hiding the fact that the dismissals were connected to the putative transfer.

The gross misconduct allegation was a fabricated reason for the claimants' dismissal. Ms Alistari contended that there was no economic, technical or organisational reason for the dismissals.

8.2. <u>The respondent's submissions</u>

In Mr Chibaka's oral's submissions he contended that it had been correct to dismiss the claimants because of the trading position of the first respondent at that time. There were severe cashflow problems and the claimants were not bringing in sufficient work. The claimants had not been on the payroll as of the date of the administration.

The pre-pack administration had not been premediated. The first respondent had had severe financial difficulties since at least November or December 2018 and there would have been opportunities from that date onwards to undertake a pre-pack administration. However the directors were looking at costs and the survival of the business. The claimants had not been dismissed at the time of the CVA and the directors had hoped that the claimants would be part of the strategy for the first respondent getting through. The directors had been required to provide security and contribute funds. It had been necessary for their personal credit cards to be used. There would have been an easy route to pack in the business, but the directors continued to hope that they would get through.

Mr Chibaka went on to comment on the absence of documentation to support the claimants' contention about the duration of their employment.

As the first respondent's assets were on finance there was very little to transfer.

In terms of the insolvency practitioner's knowledge of the claimants' dismissal, Mr Chibaka said that they would have been aware of headcount and that they would have known what was happening even if Mr Chibaka had not told them directly. As of 3 May 2019 there was no money in the business and the CVA payments could not be met.

9. **The relevant law**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 in Regulation 3 define a relevant transfer as including –

"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."

Regulation 4 makes provision for the effect on contracts of employment of a relevant transfer so that, where there has been a relevant transfer, the transferors' rights, powers, duties and liabilities under or in connection with the contract of employment of any person employed by the transferor shall be transferred to the transferee. Further any act before the transfer is completed in respect of employees or their contracts of employment shall be deemed to have been an act of or in relation to the transferee.

Regulation 4(3) provides

"Any reference … to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in Regulation 7(1) …"

Regulation 7(1) provides

"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."

As noted when commenting on the claimants' submissions, I instruct myself that the words "or a reason connected with the transfer" were removed by the 2014 amendment.

In these circumstances my understanding of the current law is that some of the guidance set out in **Spaceright** may no longer be good law in circumstances where there is no identifiable transferee at the time of the dismissal. Discussion in the IDS Employment Law Handbook suggests that whilst that situation would have been caught whilstever the definition included connection with the transfer, it is more difficult now to say that the transfer was the sole or principal reason. However, the learned editor of that work also records the contrary view that the 2014 amendment does not affect the rationale of the **Spaceright** judgment on the

basis that the reference in Regulation 7(1) to "the transfer" can still properly be interpreted as including "a transfer".

I further instruct myself that the approach I must adopt when applying the law to the facts is for me to scrutinise the motive for the dismissals.

10. My Conclusions

10.1. <u>The claimant's employment status and when it began</u>

The second respondent contends that both claimants only became employees with effect from 11 May 2018 on the occasion of their shareholdings in the first respondent being sold and upon the claimants ceasing to be directors of the first respondent. I find that this contention flies in the face of what is recorded in the 9 January 2019 service contract for each claimant. That is a document which was prepared with the knowledge of Mr Chibaka and Mr Tahlil, as it is provided for in the 8 January 2018 heads of terms, to which their company, First Response, was a party. As I have found, the service contracts recite and confirm employment status and commencement of employment as contended for by the claimants in these claims.

Further it is permissible and often the case, that a statutory director of a limited company will also be an employee. It follows that if the respondent's understanding was that any void left by the cessation of directorship would have to be filled by employment – which had not existed previously – then that proposition is misconceived.

It must be accepted that there is a dearth of employment contract documentation in this case and so not the clearest paper trail of the claimants' lengthy relationship with what could be described as the Robinson family of companies.

However in Mr Jackson's case there is the helpful evidence provided by the letter of appointment dated 19 May 1989. There is certainly nothing to suggest that the employment which began at that time ever ended.

As noted above, the fact that in the meantime Mr Jackson and Mr Lee secured a proprietary interest in the business and became directors does not mean that they thereby automatically ceased to be employees.

Contractual document is particularly lacking in Mr Lee's case, where there is nothing more than a solitary payslip. However as I have noted, his evidence and that of Mr Jackson on these matters was essentially not challenged and the January 2018 service contract remains a dominant factor.

On the evidence before me and acknowledging that there is less documentation than one might have hoped for, I am nevertheless satisfied that both claimants were continuously employed from the dates they give, that is to say 2 March 1987 for Mr Lee and 19 June 1989 for Mr Jackson.

It follows that their employment status gives the Tribunal jurisdiction in respect of their unfair dismissal and breach of contract complaints and that they obviously have sufficient length of service for the former complaint.

10.2. Was there a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 of the undertaking of the first respondent to the second respondent on or about 15 August 2019?

Again my understanding of the second respondent's case is that this is disputed, although it may be that they are simply disputing that the claimants transferred. I note that in Mr Chibaka's witness statement at paragraph 14 he denies that "the claimants were involved in a TUPE transfer between *(R1*) to (R2)".

Useful material is provided in the information report which the joint administrators provided to creditors immediately after the pre-pack administration. I have referred to this in my findings of fact (paragraph 7.20 supra.) There it is made clear that what was sold to the second respondent was the first respondent's business and assets. There is also, as I have noted, a specific reference to the result of the sale being that the 30 staff then employed by the first respondent at the point of sale had transferred to the purchaser under the TUPE regulations. From the description of the assets sold it is clear that the whole of the undertaking did transfer.

Accordingly I find that the statutory definition of a relevant transfer was met by the circumstances prevailing when the second respondent made its purchase on 15 August 2019.

10.3. The reason for the claimants' dismissals

In order to fix the second respondent with liability for the dismissals, it would be necessary for me to find that the transfer was the sole or principal reason – so as to trigger the transfer of liability to the second respondent, by virtue of Regulation 4 and Regulation 7.

It would be academic and therefore unnecessary for me to make any finding as to the "ordinary" unfair dismissal aspect of the claim as originally presented. In so far as the dismissal was unfair on general principles – and it is fairly obvious that it was at least procedurally unfair – that is not a liability which can pass to the second respondent.

On a fair reading of the minutes of the meeting which took place on 3 May 2019 the directors' decision to dismiss, as articulated during the course of that meeting, was that the business was in dire financial straits and the directors believed that the claimants were not pulling their weight or covering their own costs of employment.

I infer that another significant factor was the director's resentment that having purchased the business, they had not got what they expected to receive. However, set against this is the expressed desire to continue some form of business relationship with the claimants on a consultancy basis. In evidence before me, Mr Chibaka sought to distance himself from the conciliatory statements which clearly Mr Tahlil made during the course of the 3 May meeting, but again on a fair reading of the minutes it appear that both directors would have been content if the claimants had returned the next week, albeit operating as presumably self-employed or fee paid consultants.

The subsequently stated reason for dismissal

As noted, after receipt of the claimants' solicitor's letter before action, the directors position altered so that there was the allegation of gross misconduct by receiving salary with minimal input. The claimants contend that this significant change of approach was nothing more than a cynical attempt by the first respondent to avoid liability for a significant amount of notice pay by alleging that summary dismissal was lawful because of gross misconduct.

I agree that applying the label 'gross misconduct' was not apt and if I had been required to determine an ordinary unfair dismissal case as against the first respondent it is unlikely that I would have concluded there was a fair substantive reason based on conduct.

It could be suggested that seeking to embark on the gross misconduct route diminishes the respondent's credibility, however viewed in the round it seems to me that this was simply a more robust expression of the directors sentiments as expressed during the 3 May meeting, with regard to the unsustainability of paying the claimants' salaries and the implication at the time (explicit in paragraphs 9 and 10 of Mr Chibaka's witness statement) that being in receipt of the sale proceeds and deferred payments of the sale price, the claimants were in effect coasting.

The true reason for the dismissals

In line with the guidance given by the EAT in **Marshall v Game Retail Limited** EAT 0276/13 and the guidance given in the case of **Kuzel v Roche Products Limited** [2008] ICR 799, I accept Ms Alistari's contention that in a Regulation 7 case the burden of proof is on the respondent to show the reason for the dismissal. However where the reason for dismissal is disputed and on the authority of **Kuzel,** I instruct myself that the claimants in this case acquire a burden of showing *some* evidence to support their case, albeit not the burden of proving the case.

It is common ground that the first respondent was in a very difficult trading position in the first quarter of 2019 and that it had entered into a CVA on 4 April 2019. As noted, the claimants' contention is that the directors of the first respondent were planning, prior to the CVA, to transfer the business to what would become the second respondent. In Mr Lee's witness statement (and there is something similar in Mr Jackson's) at paragraph 15 reference is made to "an application was made to register the second respondent which was then called MacCarthy Fox Limited" and that this was done on 25 March 2019 " so it is clear therefor that Edgar and Jamal (*the directors*) were planning very soon after the CVA process started to have a business in place that they could transfer the business of the first respondent to". However as noted above, that is a misconception by the claimants. The directors had no involvement whatsoever in the formation ('registration') of MacCarthy Fox Limited.

On the evidence before me I am satisfied that as of 3 May 2019 the directors had no intention or plans to subsequently purchase an off the shelf company as a vehicle for purchasing the business of the first respondent. I am satisfied that what was uppermost in the directors minds as of 3 May 2019 was the survival of the first respondent's business into which they had invested heavily and the need to cut costs, particularly in respect of the claimants, who by that

stage the directors considered to be unworthy recipients of the sale proceeds and their substantial ongoing salaries.

In reaching my decision as to the reason for dismissal I have also considered what happened post-dismissal. On day 3 of this hearing Mr Chibaka produced some "Notice to Commence" documentation in respect of work for a contractor which the first respondent was to undertake. Mr Chibaka contended that those documents showed that in late June 2019 there was no intention to hold back on starting work won by the first respondent so that potentially it could instead be undertaken by the second respondent. I find that that evidence does support the position that the directors were still at that time endeavouring to save the first respondent.

The claimants further contend that their dismissals paved the way for the first respondent being a more attractive position for a third party purchaser or to be purchased, as it turned out, by the second respondent.

In the event what Mr Chibaka was able to purchase in August 2019 was a more viable business because of the absence of overheads in relation to the claimants' salaries, however I find that to be an incidental consequence of the dismissals some three months' prior to that purchase and not something which was in the minds of the directors in May 2019.

It is also significant that clearly Mr Tahlil was just as eager as Mr Chibaka that the claimants should be dismissed and yet Mr Tahlil clearly had no ongoing interest in the business being continued via a new company. In those circumstances there can be little doubt that his intention was to save the business that he *had* invested in, rather than ease the way for a new company to operate the same business when he had no interest whatsoever in that subsequently realised aim by Mr Chibaka.

The claimants make much of the director's failure to specifically inform the insolvency practitioner or the supervisor that the claimants had been dismissed. However I do not consider that that omission permits me to draw an inference that the dismissals were being purposely hidden. Accordingly that does not support the analysis that the reason for the dismissals was the transfer or a transfer.

Assuming for present purposes that **Spaceright** remains good law, I find that neither the sole nor the principal reason for the claimants' dismissals was the transfer.

10.4. <u>Ordinary unfair dismissal and the wrongful dismissal complaint</u>

As the second respondent can have no liability for ordinary unfair dismissal and as the proceedings are stayed as against the first respondent, I make no findings in respect of that aspect of the claims.

With regard to the wrongful dismissal complaint, my conclusion that the Transfer of Undertakings Regulations do not impose liability or potential liability on the second respondent has the result that this complaint cannot succeed as against the second respondent.

In conclusion I would add that to a large measure the claimants' cases have been based upon nothing more than theories as to the motivation of the

directors and also the misunderstanding as to the circumstances surrounding the formation of MacCarthy Fox Limited.

Employment Judge Little

Date 22nd March 2021