



EMPLOYMENT TRIBUNALS

Claimants:

- (1) Mr W O'Carroll
- (2) Mr R Indriks
- (3) Mr A Fitzpatrick
- (4) Mr A Morgan
- (5) Mr R Watson
- (6) Mr K Charnock
- (7) Mr A Thompson
- (8) Mr C Hill

Respondents:

- (1) Will Nixon Construction Group Limited (In Voluntary Liquidation)
- (2) Will Nixon Construction Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Manchester (in private; by CVP) **On:** 17 May 2021

Before: Employment Judge Holmes (sitting alone)

Representatives:

For the claimants: All save Mr Fitzpatrick , in person
Mr Fitzpatrick – Mr B Diaz, Solicitor

For the respondents: Not in attendance

JUDGMENT ON PRELIMINARY HEARING

IT IS THE JUDGMENT OF THE TRIBUNAL THAT:

1. The claimants O'Carroll, Indriks, Fitzpatrick and Hill were employed at all material times by the first respondent , and their contracts of employment were not transferred to the second respondent. The first respondent is accordingly the correct respondent to their claims.
2. The claimants Morgan, Watson, Charnock and Thompson were employed by the second respondent, their contracts of employment having been transferred to the

second respondent on or before 10 March 2020. The second respondent is accordingly the correct respondent to their claims.

3. The claim by Mr C Hill in case no. 2408530/2020 against the second respondent is dismissed.
4. The claim by Mr Watson in case no 2405424/2020 against the first respondent is dismissed.
5. The claims by Mr Fitzpatrick against the second respondent (added by way of amendment at the hearing on 11 March 2021) are dismissed.
6. The claims by Mr Morgan against the first respondent (added by way of amendment at the hearing on 11 March 2021) are dismissed.

CASE MANAGEMENT ORDERS

1. The name of the first respondent be amended to Will Nixon Construction Group (In Voluntary Liquidation).
2. The stay upon proceedings against the first respondent be lifted.
3. Unless the second respondent in case nos.

2403577/2020 (Mr A Morgan)

2405424/2020 (Mr R Watson)

2405428/2020(Mr K Charnock) and

2406070/2020 (Mr A Thompson)

shows cause in writing, or requests a hearing, by **25 June 2021** the Tribunal proposes to strike out the responses to each of these claims as having no reasonable prospects of success, pursuant to rule 37(1) of the Tribunal's rules of procedure.

REASONS

- (1) This was a preliminary hearing for case management purposes to establish: (a) whether there was a TUPE transfer in accordance with regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 from Will Nixon Construction Group Limited (in Administration) to Will Nixon Construction Limited, and b) the identity of the correct respondent for each claimant.
- (2) The "Code V" in the heading indicates that this was a remote hearing by Cloud Video Platform (CVP) in which the parties participated.

- (3) The claimants all were employed by the first respondent, Will Nixon Construction Group Limited, prior to the first respondent entering administration on 26 February 2020. On 23 January 2020 Will Nixon Groundworks and Civils Limited became known as the second respondent, Will Nixon Construction Limited and remains active.
- (4) Each of the eight claimants has brought claims to the Tribunal. The Administrator appointed on behalf of the first respondent has not entered a response but has asserted that the second respondent is liable for any claims as a result of a TUPE transfer (or transfers) of all of the claimants' contracts of employment to the second respondent. The second respondent, in responses to the claims made against it, denies liability on the grounds that those claimants employed by the second respondent were only employed by it from 17 February 2020. Reference is made to these claimants having new contracts, and the responses are silent as to the effects of any TUPE transfers.
- (5) This hearing was therefore listed to resolve these preliminary issues. For Mr Fitzpatrick, Mr Dias had submitted a bundle, a witness statement from Mr Fitzpatrick, and a bundle of payslips. All other claimants appeared in person.
- (6) Neither respondent has submitted any evidence for this hearing, and no one attended it for either respondent. Whilst it may be expected that the administrator would not participate any further, the second respondent, managed by Will Nixon, is still trading, but has not participated or provided any evidence, despite having maintained in its responses that all the claimants who have made claims against it (except for Mr Hill, whom it says was never employed by it) were not employed by it until 17 February 2020. The implication, though not expressly stated, is that there either was no TUPE transfer, and/or that the second respondent, for some unexplained reason, is not liable for any claims in respect of the claimants' prior employment by the first respondent.
- (7) There was thus very little evidence before the Tribunal. Apart from Mr Fitzpatrick, none of the claimants had made witness statements, and his statement does not really address the TUPE issues. This is not a criticism, as these are matters which the second respondent particularly needed to address.
- (8) Mr Diaz, however, for Mr Fitzpatrick, had prepared a hearing bundle. In it, at pages 44 to 54 is the Administrator's Report to Creditors. This is undated (other related documents bear the date of 7 September 2020) but covers the period from appointment on 26 February 2020 to 25 August 2020.
- (9) In that report (page 45 of the bundle) the Administrator notes that a key asset at the time of his appointment was its ongoing contracts. There had been 12 of these, but after termination of many of them, only 3 remained of interest to any potential purchaser.
- (10) The Administrator then records how he had marketed the business for sale, and how in due course the second respondent, under the control of Will Nixon, made an offer, which after it was revised, was then accepted. A Sale and Purchase Agreement was drawn up, and completion took place on 10 March 2020.

- (11) The Report goes on (page 46 of the bundle) to refer to the position of the company's former employees, which is described as a contentious matter. It records how, in the weeks prior to the Administration some employees had left voluntarily, and some had transferred to "connected" companies, namely the second respondent, and Nixon Haulage Contractors Limited, which has not featured in these claims at all. Whilst the Administrator records how it "appeared there had been a transfer of employment under TUPE regulations to these connected companies", he decided to leave it to the employees to make claims from the RPS, who could then make a decision.
- (12) This accords with information that was provided to Mr Fitzpatrick's solicitors on 29 September 2020.

The claims made by the claimants.

- (13) The claimants claim variously against the two respondents. Mr W O'Carroll, Mr R Indriks, Mr A Fitzpatrick and Mr Hill originally claimed only against the first respondent ("Group"). Mr A Morgan, Mr K Charnock and Mr A Thompson only claimed against the second respondent ("Construction"), and Mr R Watson and Mr Hill alone claimed against both. At the hearing on 11 March 2021, however, Construction was added as a respondent to Mr Fitzpatrick's, and Group to Mr Morgan's, claims. Mr Hill brought a second claim against Group.
- (14) Having perused the claim forms, and checked with the claimants in the hearing, the dates of their dismissals were as follows:

Mr W O'Carroll	- 31 January 2020
Mr R Indriks	- 31 January 2020
Mr A Fitzpatrick	- 11 February 2020
Mr A Morgan	- 17 March 2020
Mr R Watson	- 17 March 2020
Mr K Charnock	- 17 March 2020
Mr A Thompson	- 20 March 2020
Mr C Hill	- 21 February 2020

Group 1 : those dismissed post - 10 March 2020.

- (15) Thus, if there was any TUPE transfer arising upon the sale of the business, it must have been after 10 March 2020. Those dismissed after that date, i.e Messrs. Morgan, Watson, Charnock and Thompson were employed by Construction at the date of their dismissals, and the Tribunal is satisfied, on a balance of probabilities, that there was a transfer of undertaking from the first to the second respondent on or about 10 March 2020, or even earlier, whereby the contracts of employment of these employees, and any liabilities arising thereunder, transferred to the second respondent, which is the correct respondent to their claims. Whilst Mr Watson has claimed against both respondents, from the date of his dismissal, his claims lie must against the second, and not the first respondent.

- (16) Whilst the terms of reference for this preliminary hearing are limited to the two stated issues, the second respondent may care to consider the ramifications of these findings. In its responses to the claims made against it has accepted that relevant claimants had been previously employed by Group, and then started (as it were) fresh employment with Construction. Reference is made to new contracts. The second respondent's responses do not address the issue of transfer. If, however, as the Tribunal has found, there was a relevant transfer, then that automatically operated to transfer the employees' existing contracts of employment to the second respondent, regardless of whether they then signed any "new" contracts. The second respondent accordingly inherited the liabilities under the relevant contracts with the transferor, and the claimants' continuity of employment was preserved. On this basis, unless the second respondent can advance some cogent case as to why it is not liable as the transferee of the contracts of employment of the four claimants who were transferred to it, it has no reasonable prospects of successfully defending the claims made against it, and the Employment Judge proposes to strike out its responses to these four claims. The second respondent should seek urgent advice, if it is to seek to dispute this position.

Group 2: those dismissed pre – 10 March 2020.

- (16) The position in relation to this group is less clear cut. All four were dismissed (or resigned) before the Administration. Whilst the Administrator's Report suggests that "a number" of employees were transferred to either the second respondent or another connected company, pre – Administration, even as late as 25 February 2020, there is no evidence that these four claimants were so transferred.
- (17) Mr O'Carroll, for instance, was dismissed on 31 January 2020. He submitted his claim form to the Tribunal on 12 February 2020, before the Administration commenced. It is therefore most unlikely that his employment was transferred to the second respondent, or any other company. Further, no response was received to his claim so it is not open to the first respondent, in any event, to dispute his claims.
- (18) Likewise, Mr Indricks, who was unsure which company was his employer, but this was clarified at the hearing on 16 December 2020 to have been the first respondent, was dismissed on 31 January 2020. He was only employed for two weeks. There is no evidence to support a finding that his employment was transferred to another connected company, and it is unlikely that it did. In his case too, no response was received, and it is not open to the first respondent to dispute his claims.
- (19) That leaves Mr Fitzpatrick and Mr Hill. The former was dismissed on 11 February 2020, the latter on 21 February 2020. In fact Mr Fitzpatrick was informed of his dismissal on 5 February 2020, as he confirms in his witness statement, and the letter telling him that his employment will end on 11 February 2020 is at page 36 of the bundle. There is nothing in that letter which suggests any transfer of his employment, and therefore no evidence that his employment was transferred. No response was received (technically due by 3 June 2020, but the proceedings were stayed on 6 May 2020).

- (20) Finally, in the case of Mr Hill, his position is slightly different. He has brought two claims. The first , presented on 24 June 2020, was against Construction. A response was received to that claim, in which it was asserted that the claimant had never been employed by that company, but by Group. It was asserted that he had resigned from that employment (a copy resignation letter was produced dated 21 February 2020, resigning with immediate effect) .
- (21) The claimant then, on 30 July 2020, presented his claim against Group (accepted from 31 July 2020) . He therefore had two claims proceeding before the Tribunal. This was raised with him by letter from the Tribunal of 8 September 2020, in which he was asked which respondent he was proceeding against. In his reply of 16 September 2020 , the claimant stated that he was employed by Group, but was then informed he would be transferring to Construction. He wrote in similar vein on 8 October 2020.
- (22) Unfortunately Mr Hill does not give any dates in his communications with the Tribunal. His resignation on 21 February 2020 was with immediate effect, and it therefore looks like he resigned before his employment was transferred. Certainly it is the view of the second respondent that he never became its employee.
- (23) In the absence of anything else, there is no evidence of an actual transfer, pre – Administration, taking place. Again, therefore, the correct and sole respondent to his claims is Group.

Further conduct of the claims.

- (23) An important development has occurred in relation to the claims against the first respondent. It is no longer in Administration, but on 27 January 2021 went into voluntary liquidation. That means that no consent is required for the continuation of claims against it. The stay can therefore be lifted.
- (24) Those claimants who have provided sufficient information will now receive rule 21 judgments, against the appropriate respondent to their claims, in those cases where there has been no response.
- (25) In cases where the second respondent has entered a response, the Employment Judge proposes to strike out those responses as having no reasonable prospects of success, unless the second respondent shows cause, or requests a hearing, as to why this should not be done.
- (26) Only one claimant, Mr Fitzgerald, makes a claim for a protective award. There is, however, no evidence , in his witness statement, or anywhere else, of the proposal to dismiss as redundant more than 20 workers at one establishment. Mr Diaz is to attend to this.
- (27) Finally, Mr Hill's claim, against the first respondent, presented as it was on 31 July 2020, is out of time, except for the claim for a redundancy payment, where

the time limit is 6 months. If he is to pursue his other claims, a hearing will have to be held as to why it was not reasonably practicable for him to have brought his other claims in time. The Tribunal will communicate separately with this claimant in respect of his claims.

Employment Judge Holmes

DATE : 20 May 2021

JUDGMENT AND ORDERS SENT
TO THE PARTIES ON
24 May 2021

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.