Case Numbers: 3312557/2020
3313242/2020
3306466/2021

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr A Oguntokun**
(2) Ms F Omar

Respondents: **(1) Go Motor Retailing Limited**
(2) PSA Retail UK Limited t/a Robins & Day by PSA Retail
(3) …
(4) Mr M Worsley
(5) Mr T Pickering

JUDGMENT

Heard at: Watford (by CVP) **On:** 6 & 7 October 2022

Before: Employment Judge Emery

Appearances
For Mr Oguntokun: In person
For Ms Omar: Mr C Price (counsel)
For respondents 1, 2 & 5: Ms Pye (counsel)
For respondent 4: Mr Worsley (counsel)

PRELIMINARY HEARING RESERVED JUDGMENT

1. The claimants were employees of R2 at their respective effective dates of termination
2. The 2nd respondent shall remain a party to the proceedings
3. The 5th respondent shall remain a party to the proceedings

REASONS

The Issues

1. The issues to be determined at this open Preliminary Hearing are as set out in EJ George's Order dated 10 June 2022:

a. Whether the claimants were employees of the 1st respondent or of the 2nd respondent
b. Whether the 2nd respondent should remain a party to the proceedings
c. Whether the claim against the 5th respondent should be struck-out on the basis that it has no reasonable prospects of success
d. Whether the claims against the 2nd respondent have no reasonable prospects of success on the grounds that they were presented outside the applicable time-limit and the ET has no jurisdiction to hear them

2. There were two other issues to be addressed – clarification of the issues and consequential orders. These two issues were not addressed for lack of time, and a Case management Preliminary Hearing will be listed for them to be addressed.

Witnesses

3. I heard evidence from Ms Fathia Omar and Mr Anthony Oguntokun, the claimants. For the respondents, I heard from:
    a. Mr Tim Pickering, the 5th respondent, Company Director and Operations Director of R1 who transferred to R2 under TUPE in April 2021;
    b. Mr Worsley, the 5th respondent and General Manager of Staples Corner and the claimants line manager.
    c. Ms Pauffley, HR Business Partner and employed by the 2nd respondent at the time of the events in question.

4. I spent ½ a day reading witnesses statements and the documents referred to in the statements. This judgment does not recite all of the evidence I heard, instead it confines its findings to the evidence relevant to the issues at this hearing. The judgment incorporates quotes from my typed notes of the evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

Who was the claimants' employer?

5. The claimants argue that they were employed by R2 at the date of Mr Oguntokun's dismissal and Ms Omar's resignation. It is agreed that Ms Omar started her employment in September 2018 with Now Motor Retailing Limited (Now). It is also agreed that R1 acquired Now in May 2018 and at this time Ms Omar's employment was automatically transferred under the TUPE Regulations to R1. Ms Omar received a TUPE transfer letter saying so.

6. Mr Oguntokun's employment commenced on 28 January 2019. The only contract on file is one signed by him on 12 September 2019, stating his employer is R1 (422 35). Mr Oguntokun's position is that he was *"pushed"* into signing this, he did not check it, for example his address was wrong and he did not notice this or other discrepancies.

7. The respondents contend that R1 remained the claimants' employer until the termination of their employment. The claimants contend that their employment

transferred to R2 in January 2019, this was assumed by them and by other employees including Mr Worsley from the factors set out below.

8. In January 2019 R3 purchased R1 in a share sale. On 12 February 2019 R3 changed its name to PSA Retail UK Limited – R2 (488). R2 is the parent company of a group of companies, of which R1 was now a part.

9. Shortly after purchase an intra-group reorganisation commenced. Mr Pickering said in his evidence that in January 2019 there was an immediate start to operationally integrate R1 into R2, it was decided that R1 *"would move into"* R2. He described this as a *"big project"* with changes required to different business processes. He said that R1 was a separate business and in 2019 *"was not ready for integration"* into R2, that integration was a *"huge process"*.

10. Mr Pickering said that on purchase in 2019 it was envisaged that R2 would take over all of the functions of R1. This occurred, the process ending he says with R1 employees including himself being TUPE'd to R2 in April 2021. R1 is now a dormant company but has not been dissolved due to pending emissions litigation.

11. Immediately following the purchase, R2 'rebranded' R1. This involved changing the brand name of R1 from 'Go Vauxhall' to 'Robins & Day by PSA Retail'. All employees were required to 'sell' the business and its product under this brand. Uniforms were changed, with logos saying Robins & Day by PSA Retail'. The title under (for example) Mr Worsley's email footer was *"General Manager – Robins and Day Vauxhall Staples Corner & Vauxhall Hayes";* and the business addresses underneath was *"Robins & Day Vauxhall Staples Corner…"* (499).

12. Emails including the claimants were changed to "@mpsa.com", common to R2 employees. This was said in evidence by Mr Pickering to be *"… part of the integration of the IT systems"* between R1 and R2.

13. Some of R1's functions were integrated into R2 in the months after purchase. The HR function was transferred to R2 employees and was based in R2's offices. Training was organised by R2 for R1's employees and often took place at R2's premises and was run by R2 employees. This included sales training received by Ms Omar when she transferred to the role of Sales Advisor in March 2019, including training in the sale of FCA regulated products.

14. One of the earliest harmonisation projects between R1 and R2 was benefits entitlements. At end 2018 benefits were harmonised with R1 gaining R2 benefits including company sick pay, holiday entitlement, employer pension contributions, employee assistance programme; the rationale was to provide consistency across the group.

15. Whenever there were consumer related issues, including routine issues such as service plans or replacement of vehicles, these were escalated to be dealt with by R2 employees.

16. After January 2019, the claimants wage slips contain the following details across one line:

"Go Motor Retailing Ltd Tax month [no.] Robins & Day Vauxhall"

17. While no formal TUPE process had taken place, many of R1 employees, including the claimants and Mr Worsley believed and assumed that their employment had transferred to R2 in or around January 2019. See for example Mr Worsley's defence to Ms Omar's claim – he contends *"Robins & Day (the Second Respondent)…"* became his employer in December 2018. The defence states that the claimant's personnel issues were all dealt with by R2 employees (606-7).

18. In his evidence Mr Worsley accepted that during this part of employment to his resignation he believed his employer was R2. I accepted that Mr Worlsey now sees this as an error, but he also accepted that this is what he believed during his employment and when his defences to both claims were being drafted.

19. Ms Omar's evidence was that from January 2019, R1 *"disappeared"* and was *"non-existent"*. She says that everyone she was working with *"assumed"* that they were employed by PSA from thus date – *"no one told me for sure, it was just an assumption".*

20. Ms Omar's pension changed from Scottish Widows to Fidelity in the *"PSA Retirement Savings Account".* Fidelity recorded the *"employers name"* as Peugeot Citroen Automobiles UK Limited (R3 before the change of name to R2) (558).

21. The respondent's position is that benefits including pensions were harmonised across what became the parent company – the Stellantis Group. The change to Fidelity did not signify a change of employer.

22. Grievances (both claimants) and Mr Oguntokun's redundancy process was handled by R2's HR function. While checked and signed by Mr Worsley, the letters were written by HR at R2. They are letterheaded *"Robins & Day* [and in smaller letters] *by PSA Retail".* Mr Oguntokun's grievance (for example) says *"I am a Sales Advisor at Robins and Day"* (506). Responses from the business are letterheaded *"Robins & Day by PSA Retail".*

23. Mr Oguntokun's grievance outcome states that *"Robins & Day take matters of this nature extremely seriously and I would therefore like to apologise on behalf of the company…".* The grievance appeal letter says to Mr Oguntokun, *"I would like to sincerely apologise for how you have felt as an employee of Robins & Day"* (487). This letter was written by Mr Kitto, an R2 employee with the support of R2's HR team.

24. The redundancy confirmation letter to Mr Oguntokun states *"… your position at Robins & Day Staples Corner has been made redundant … Please note that when you leave the employment of PSA Retail UK Ltd ... I would like to re-emphasise that this is decision is no reflection of the hard-work and commitment you have shown to Robins & Day Staples Corner..".* Ms Pauffley characterised the reference to R2 to be *"an admin error, this should not have happened".*

25. The Staff Handbook states the following: it applies to all employees of [R2 and R1]. Much of it is common to both companies. Some is colour-coded - blue for R2 yellow for R1. The handbook at page 408 states: *"… We will be rebranding our Go Vauxhall sites to trade as Robins & Day in January 2019…. We have harmonised the handbooks … throughout the handbook, where there is reference to R&D this is applicable to both [R2 and R1] even before the official rebrand in January 2019. As an employee of [R1], we are delighted to inform you of some of these changes to your Employee Benefits as part of this, these are detailed below…".*

26. In the over 100 page handbook, the vast majority of policies are common to all group companies. The material difference is the car ownership scheme, reference to a Dealership Polices and Operating Manual which applied only to R2 employees; an opt out provision for the demonstrator vehicles scheme only applicable to R2 employees. Many of the policies common to both employers in fact refer to PSA as the employer, (for example the Personal Data and Data Security policy (363). Other policies, for example the Equality Policy, refer to "all employees" of all Group companies including R1 and R2 (345).

27. The internal HR / employee systems label both claimants as employees of R1 (569).

28. The claimants argue that the Companies House data shows that R2's activities are akin to the business they worked for, whereas R1's companies house data does not show, for example, sales of financial products undertaken by R2.

29. When their employment ended, the issue of who was their employer became an issue to the claimants; both asked HR, and they were told in writing that their employer was R1. Ms Omar's resignation letter names her employer as R1 (443).

30. In February 2021 R2 set out formal notification to employees of R1 of a proposed TUPE transfer to R2. Its rationale was set out in "Connect" note to employees, as follows:

    - *"Since 2018 the two networks [R1 and R2] have functioned as a single operation, having implemented a combined management team and organisation structure as well as harmonising employee benefits. Furthermore, since 2019 all [R1] sites have traded as Robins & Day. This proposal is intended to formally confirm a single Retail Group legal operating structure.*
    - *"This change will provide a legal framework that aligns with the management organisation and responsibilities and will further improve the harmonisation of best practice across all dealerships."*

31. The reason given for the April 2021 TUPE transfer date was that it *"aligns with the change in tax year"* (493).

32. Mr Pickering stressed in his evidence that it was a *"progressive"* process of harmonisation and it was between January and April 2021 that *"we restructured the operational structure and ten employees were TUPE'd across…"*

Application to remove Mr Pickering as a party

33. Mr Oguntokun accepted that there was nothing in his claim form about Mr Pickering, that it was a Judge at a previous hearing who picked up on Mr Pickering's involvement; his evidence was that prior to this he did not know he could name an individual in his claim. He argued that Mr Pickering should remain as a respondent because of his comments at the grievance stage, he referred to Mr Pickering characterising what he considered to be racist remarks as 'banter' - *"this is why he is added to the proceedings"*, that there was *"bias"* in his grievance outcome in comparison to other employees.

34. Mr Pickering accepted in his evidence that, for example, he found more allegations in Ms Omar's favour at grievance stage, but that this was not bias, it was as a consequence of her grievance being at a later date and him having more information then.

35. Mr Oguntokun argued that Mr Pickering had not upheld an allegation he made – that he was called a *"black bastard"*; but he subsequently accepted this remark had been made in his conclusions to another employee's grievance. Mr Oguntokun argued that there was a 'recording' evidencing that this remark was made about him which would be in evidence at the hearing; Mr Pickering could not recall this. He argues that threats to sack him were not upheld in his grievance. Other employees of a different race were similarly threatened and their grievances were upheld.

Submissions

36. Mr Price for Ms Omar contended that *Autoclenz* is relevant, the Tribunal must consider the surrounding circumstances behind the working relationship to *"glean the true agreement"* between the parties. *Uber* also requires the tribunal to investigate the surrounding circumstances; here as in *Uber* the vital issue was the level of subordination. The Tribunal should also be wary of *"carefully choreographed"* documents (per *Pimlico Plumbers*).

37. Did the 'share transfer' become a TUPE transfer - Either share transfer - or TUPE transfer - High Court - ICAP Management services Ltd v Berry & Anor 2017 - EWHC1321 (QB): paragraph 83 highlights the *"critical elements"* for a TUPE transfer are whether the parent became (i) responsible for carrying on business (ii) incurred the obligations of the employer (iii) the company has taken over the day to day running of the business; in its colloquial, *"has the party stepped into the shoes of the employer"*.

38. Mr Price argued that R2 has stepped into shoes of the employer, *"there is a lot of evidence showing this".* This is not only Ms Omar's *"reasonable belief"* she and others were employed by R2, there is a *"trail of evidence that paints the picture that R2 was the employer"*. Mr Worlsey reinforced that *"all employees had a perception that they were employees of R2"*. He is the *"General Sales Manager represented by a solicitor when he put in their GoR. The 'mistake' is not a credible excuse".*

39. The control test: All daily activities were monitored by R2, all equipment including computers were provided by R2; email addresses changed to the R2 @mpsa in January 2019; all services including customer related issues were dealt with by R2 – for example service plans, replacement of vehicles; the livery change; the company trainer; the grievance chair; letters were from R2 on its letterhead; the Covid guidance was from R2; R paid their pension; the dismissal / termination letters by R2 refer to the Cs as R2 employees; all of HR is R2. Ms Omar was expected to work at Staples Corner but could be moved elsewhere. *"This is more than a rebranding."*

40. All of this goes to the perception of all - all the evidence that at the time all the Rs witnesses were employed by R2. The claimants believed they were employed by R2. And did the witnesses and Jonas Kitto - R&D. So find that this is beyond branding, R2 stepped into shoes of R1 with total management and control. The Connect meeting notes show that all significant changes were made before this date.

41. Mr Oguntokun argued that his employer was R2 *"it was control by R2".* He referred to *Autoclenz* – that the Tribunal should consider the intention of the parties and whether the contractual documents showed the true agreement or whether they were a *"sham"*. The documents show he was clearly made redundant by R2.

42. Mr Oguntokun argued that Mr Pickering and Mr Worsley must stay in the case *"both have a case to answer in the interests of justice".*

43. Ms Pye clarified at the outset one issue which had arisen: the practical effect of R2 being added to the claim – does this mean that all claims by both claimants are now made against R2? Ms Pye accepted yes, that if R2 is held to be the employer, it is accepted that *"R2 will be properly substituted, so the claims are as they have been against R1"*.

44. Ms Pye argued that Robins & Day by PSA Retail is a trading name used by R1 and R2 and other group companies, that R2 is the Group Company. Referring to Robins & Day does not refer to R2. Ms Pye referred me to *Clark v Harney Westwood & Riegels & Ors* UKEAT 0018/20/BA, including the need to differentiate between the 'legal' employer and the 'brand'; that if there has been a change in employer the Tribunal must consider was there a change, if so when and how.

45. Ms Pye argued that there is no "novation of some kind" as asserted by the claimants:

    a. The R&D branding was to promote a customer facing image
    b. The emails etc is simply a function of a central support function, introduced in 2018. While there may be a "degree of control" as a consequence of this integration of IT functions, *"but this was for the Group - there were other entities which used same address"*.
    c. Employee did not believe their employer was R2, they believed they were employed by Robins & Day by PSA Retail, including R4. *"But this*

is not a company - this is a sweeper term to cover the retail side of business - it's not the employer".

d. Only one employer letter refers to R2 as the employer;
e. The use of Robins & Day was as the Brand, and was not an error showing a different employer.
f. Payslips, P45s, P60s show they are R1 employees
g. The handbook refers to two separate entities
h. The claimants are *"employed by R1"* and had *"no perception"* they were employed by R2.

46. Ms Pye argued that the share acquisition in April 2018 was not the time of significant changes: these were from January 2021 onwards: *"in 2021 there was a hive up of assets and TUPE became applicable".* The respondents did not leave the transfer of employees until too late "*they did not start the move of R1 until 2021".* Prior to this, the only change was the introduction of the centralised services.

47. The claimants did not challenge the business' view that R1 was their employer – and C2 had legal advice. It was only after the insolvency letter that the claimants applied to add R2.

48. Ms Pye accepted that if R2 is found to be the employer, she will not pursue a deposit order application in respect of R2.

49. Mr Pickering *"… was joined with no notice or early conciliation and was not part of C1's application to amend."* While it was the EJ's decision to add him, *"it is relevant that C1 did not seek to add Mr Pickering himself, which suggests that no strong case to bring, and there are no reasonable prospects of success against R5".* The claim against Mr Pickering is that he no has empathy, and that he said that abuse was in fact banter *"this does not imply an act of discrimination".*

50. Ms Pye accepted that if R2 is found to be the employer, that as Mr Pickering was its employee it will accept 'vicarious liability' for the acts of Mr Pickering, if found to be unlawful.

51. Mr Crammond argued that any suggestion Mr Worsley was not credible was *"unfair",* as was any suggestion that Mr Worsley had *"choreographed"* an argument that R1 was his employer.

52. Mr Worsley was brought into the proceedings very late, it was a shock to him and was over a year beyond the alleged events. "*He did not have to give evidence - a sign of a helpful witness".* He had no motivation to change his story, other than *"accept he made an error, he had a wrong perception"*. Mr Crammond argued that Mr Worsley *"was doing his best to assist the Tribunal".*

53. Mr Crammond accepted that the perception of employees, the reasonableness of this perception *may* be one factor in the Autoclenz mix, "*question of perception is not irrelevant, but not a weighty factor. The better question may be that if they had this perception, why did they have it?"*

54. Another issue is that if Mr Worsley is mistaken as to the identity of his employer, this is a question which goes to issues of jurisdiction in any event. It is possible that the claimants had a different employer than Mr Worsley, which is an issue which goes to his liability, as he can only be personally liable for acts of discrimination if his employer could also be liable for the same acts. A directions hearing is required to carefully consider these issues.

55. Mr Crammond piggybacked onto Ms Pye's application to strike out the claims against Mr Worsley; as just one argument an unfair dismissal claim cannot be brought against Mr Worsley.

56. On the issue of reasonable prospects of success against Mr Worlsey, Mr Crammond argued that the claim must fail because of the time bar. Given the dates of each claim, they are all well before Mr Worlsey was added as a party, both claimants had legal advice, they're "doomed to fail" on the issue of time, and hence the claim has no reasonable prospects of success.

57. Mr Price in response argued that the issue of no reasonable prospects of success to strike out the claim is a "high bar" that this will need evidence from witnesses this will need a full hearing, Mr Price accepted that time was an issue in the claim but that it had been "kicked into the long grass" to be dealt with at the final hearing. .

The law

58. I considered the cases referred to by the parties. There is a helpful summary of the relevant principles in *Clark:*

> *"52 In my judgment, the following principles, relevant to the issue of identifying whether a person, A, is employed by B or C, emerge from those authorities:*
>
> *a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law: Clifford at [7]*
>
> *b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence: Clifford at [7].*
>
> *c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties: Bearman at [22], Autoclenz at [35].*
>
> *d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how: Bearman at [22]. Was*

there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?

e. *In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed: Dynasystems at [35].”*

59. *ICAP Management services* contains the following relevant guidance on determining whether or not a TUPE transfer has occurred:

“41. Citing *Kelman v Care Services* [1995] ICR 260, Mr Goulding contends that TUPE is to be interpreted in conformity with the Directive, and construed purposively, flexibly and focusing on substance not form. He says the situation should be viewed from an employment perspective and not one conditioned by principles of property, company or insolvency law. I agree and adopt that approach hereafter.

“68. It is plain that for the regulations to apply, there has to be a change in the person who is carrying out the business and who bears responsibility as employer. That is explicit in the Directive. In Berg V Besselsen [1990] ICR 396 the CJEU held:

> “where, following a legal transfer or merger, there is a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact **incurs the obligations of an employer vis-à-vis the employees** of the undertaking, regardless of whether or not ownership of the undertaking is transferred” (my emphasis).

“69. In *CLECE SA v Martin Valor* (C-463/09) [2011] 2 C.M.L.R. 30 at [30] the Court held:

> “that the [ARD] is applicable wherever, in the context of contractual relations, there is a change in the legal or moral person who is **responsible for carrying on the undertaking and who incurs the obligations of an employer towards employees of the undertaking**”(my emphasis).

“73. The Court went on in *Brookes* to observe that the directive and the regulations:

> “could have addressed, but did not, the circumstances in which there was no transfer from a legal person to another legal person, but the shareholding membership of the legal person changed though its separate legal identity remained untouched.”

“74. It follows from that, that a change of ownership of the shares of an employer will not necessarily mean a transfer has occurred; the same body

may continue to carry out the business and bear responsibility as employer. But although a change of ownership will not necessarily result in a relevant transfer, it might do.

"75. *Brookes* was followed by the Court of Appeal in *Millam v Print Factory (London) 1991 Ltd* [2007] ICR 1331. There a parent company sold the business of its subsidiary to a third party by way of a share sale agreement. Prior to the share sale the claimant was employed by the subsidiary. The question before the court was whether there had been a TUPE transfer. Buxton LJ (with whom Wilson and Moses LJJ agreed) said this:

> "3 The question under TUPE is whether the business in which the claimant is employed has been transferred from one owner to another. That question is attended by some legal issues. **For instance, it is well established, and accepted on all sides in this case, that a change in the legal control of the original corporate employer, such as occurs on a share sale of the kind that took place in this case, does not of itself transfer the business in TUPE terms**. That was decided by the EAT in Brookes v Borough Care Services [1998] ICR 1198, a decision the correctness of which was not in issue before us. **It is also well established that the mere fact that two companies are part of the same group, or that one company is the parent of another, does not of itself mean that the one company controls the business of the other**. That is inherent in the decision of the Court of Justice in Case C-234/98 [1999] ECR I-8643 (Allen) . However, those rules as to what does not constitute a transfer under the TUPE Regulations are **merely reminders that the question is whether as a matter of fact the business in which the claimant is employed has been transferred from one company to another**." (Emphasis Added)

"77. It follows that, in share transfer cases such as the present as much as in other cases, the crucial question is whether, as a matter of fact, the "business" in which the claimant was employed has been transferred from one company to another

"78. Buxton LJ [in *Millam*] continued at paragraph 9 to deal with the facts and the significance of the new legal structure:

> "It is…correct to say that a subsidiary's lack of independence does not demonstrate that the holding company owns the business. But that observation, when adopted as crucial to the decision in this case, does not give weight to the fact that the ET found, drawing on its experience, that the arrangements in the present case were not typical, to the extent that the business was that of McCorquodale. And the same has to be said of the observations that as a matter of law Fencourt was independent from McCorquodale; and that that concludes the matter in the absence of proof that Fencourt's presence was a sham. **The legal structure is of course important, but it cannot be conclusive in deciding the issue of whether, within that legal structure, control**

of the business has been transferred as a matter of fact. That was the conclusion of the ET, and the EAT demonstrated no proper basis for displacing that conclusion" (my emphasis).

"79. Moses LJ, who agreed with Buxton LJ, identified potentially relevant features of a case where transfer had occurred:

12. The proposition that the transfer of shares in one company to another is not the same as the transfer of the business of the one to the other gives rise to the difficulty apparent in the instant case. Where, following a transfer of shares, a subsidiary is 100% owned by a parent, how can one tell whether the business has been transferred to the parent for the purposes of the TUPE Regulations? It is that, sometimes difficult, question of fact which must be resolved deploying the experience and expertise of the employment tribunal.

13. **The mere fact of control, which will follow from the relationship between parent and subsidiary, will not be sufficient to establish the transfer of the business from subsidiary to parent**. There will often be little to distinguish between the case of transfer of control on acquisition by a new parent and transfer of the business to a new parent. Faced with such difficulties, the employment tribunal, is not entitled to indulge in the industrial equivalent of a Gallic shrug/

14. **In the instant case the employment tribunal identified a number of evidential indications, which, in combination, established that control of the business, in the sense of how its day-to-day activities were run, had passed** from Fencourt to McCorquodale" (my emphasis).

"80. In *Jackson Lloyd Ltd and Mears Group plc v Smith & Ors*, UKEAT/0127/13 MG was the parent company of a subsidiary, ML. Jackson Lloyd ("JL") was a company whose business was the repair and maintenance of social housing. ML purchased all the shares in JL. Thereafter, JL's board was immediately replaced by nominees of MG, MG announced that it had acquired JL (through its subsidiary, ML) and was embarking on a programme of integration, MG's CEO appointed an "integration consultant and dismissed JL's CEO, MG imposed major change on JL without JL holding any board meetings and without reference to JL's internal mechanisms for effecting change. It was held that control was exercised by MG, not JL or ML even though to the outside world JL would appear to be autonomous and in competition with MG

"81. The EAT upheld the ET's decision that there had been a TUPE transfer. Cox J reiterated that a share transfer is not in itself a TUPE transfer, but may occasion such a transfer. Cox J said:

30. That the Tribunal understood the task required of them and applied the test correctly is in our view clear from their findings of fact and reasoned conclusions. On 1 October 2010 and upon the share purchase by ML, MG announced that it had acquired JL and that it was

embarking on a process of integration. A team of integration managers and staff arrived on site that same day. The Tribunal were in our view entitled to take into account what happened after 1 October, having regard to that clear statement of intent and the arrival of the integration team on 1 October."

"82. I accept that the question whether the transferred business has been integrated into the transferee's operation is a relevant factor, potentially a highly relevant factor. But in my judgment it is not, taken alone, the test.

"83. What, in my judgment, emerges from the CJEU cases of *Berg v Besselsen* and *CLECE SA v Martin Valor*, cited above and from the Court of Appeal's decision in *Millam* is that the critical elements of the test are whether the new party (i) has become responsible for carrying on the business, (ii) has incurred the obligations of employer and (iii) has taken over day to day running of the business. It seems to me that those elements of the test can be captured in more colloquial terms – "Has the new party stepped into the shoes of the employer?"

Conclusions

The identity of the employer

60. I concluded that R2 became the claimants employer in or immediately following January 2019. I reached this conclusion based on the analysis set out below.

61. I stress that I accept that, bar Mr Worsley, the respondents and their witnesses believed throughout the issues in this case that R1 remained the claimants employer. I also accepted that at the hearing this was the respondents' and their witnesses unanimous view. This was not a case of an employer seeking to act in an underhand way, to attempt to defend a 'sham' agreement.

62. It was clear to me that the dispute was a mixed question of law and fact, requiring a consideration of all relevant evidence. It was also clear to me that the contracts of employment were an important starting point, as they point to the claimants employer being R1. The attempt to get Mr Oguntokun to sign a contract in September 2019 with R1 as his employer reflects the understanding of the 1st and 2nd respondents as to the legal employer at this time. I also accepted that the identity of the claimants' employer was not at all apparent to them during their employment.

63. In determining that the written agreement did not reflect the actual reality of the relationship, the following evidence was relevant:

    a. as far as both R1 and R2 were concerned, they operated as a *"single operation"* from January 2019 – a combined management and organisational structure;
    b. R2 was in control of both strategic and operational decisions in the running of R1's business, including the decision to merge the companies and the process of merger;

c. Much of the integration took place immediately after merger, including IT systems, decision-making processes;
d. HR of R2 was heavily involved in all processes about the claimants;
e. R2s senior management were involved in decisions about the claimants;
f. Training on the role was undertaken by R2 from R2 premises and employees;
g. Several employees including the General Manager genuinely believed their employer was R2, in part because of the branding change; in part because of the lack of reference to R1 in any documentation part from the handbook and wage slips, and in part because of the liberal use of 'Robins & Day' and in part because of the occasional reference to R2 as the employer.

64. I noted that it is important to separate the brand from the employer, and the change of brand was a factor which led to the claimant's perception; this alone is not enough and I did not consider this to be an overriding factor in the claimants' (and Mr Worsley's perception).

65. Taking into account the *ICAP* guidance, I concluded that these factors meant that R2 became responsible for all aspects of the running of R1's business following its purchase. This was the 'integration' referred to in *Jackson Lloyd Ltd* and there was no evidence of 'seamless and consistent' acts which suggested that R1 remained the employer.

66. I concluded from this evidence that by January 2019 R2 had become responsible for carrying on the business of R2 –the combined business was in effect a "single operation" by this date.

67. I also concluded that the evidence showed R2 had incurred the obligations of the employer in early 2019. Employees including the claimants' and R4 genuinely believed they were employed by R2 in 2019 – R1 had in effect disappeared. HR of R2 wrote decision letters given to the claimants. Benefits were harmonised to those of R2; Mr Oguntokun was referred to explicitly as an employee of R2 in his redundancy confirmation letter. Senior employees believed they were employed by R2.

68. I concluded from this evidence that there was such integration between R1 and R2 that there was a blurring of any boundaries which may have existed between R1 and R2; for example operationally it was regarded as completely acceptable for Mr Kitto and employee of R2 to undertake a grievance appeal. This was, I concluded, evidence of the day to day obligations of the employer towards its employees passing to R2.

69. Letters refer to Robins & Day as the employer. I concluded that Robins & Day was seen by employees of both R1 and R2 as both a trading/brand name and as R2. R2 was the prism through which they regarded their employer. Ms Omar's evidence which I accepted was that her sales figures were reported to and analysed by R2. Robins and Day <u>was</u> R2 and <u>was</u> the employer in the eyes of all the claimants and Mr Worsley.

70. Just because employees genuinely believe their employer is R2 does not make it so. However, this genuine belief was because of the overarching control R2 had over all aspects of the claimants' employment – from the HR processes, the managers undertaking the processes, the results reporting. I concluded that the 'day to day activities' of control of the business had been passed to R2.

Whether R2 should remain a party to the proceedings

71. It follows that R2 should remain a party to the proceedings.

Whether the claim against R5 should be struck-out on the basis that it stands no reasonable prospects of success

72. The test is whether the claims stand no reasonable prospects. Mr Oguntokun points to quite clear differences in treatment between himself and employees of a different ethnicity who, he says, received a more favourable outcome having made similar allegations. This is potentially direct – i.e. not hypothetical – comparison between his treatment and others of less favourable treatment.

73. I accept that Mr Pickering can point to a potential non-discriminatory explanation for this treatment; in particular once more information was gained in investigations, his understanding changed, that Mr Oguntokun's treatment had nothing to do with his race.

74. But I also accepted that this is an issue which requires investigating in evidence, that it cannot be said that the claim stands no reasonable prospects of success.

75. The fact that the 2nd respondent has accepted it will be vicariously liable for any acts which may be found against it in these proceedings is not relevant to my determination on prospects.

Whether the claims against the 2nd respondent have no reasonable prospects of success on the grounds that they were presented outside the applicable time-limit and the ET has no jurisdiction to hear them

76. Time was not addressed at this hearing. Ms Pye accepts that the claims against R2 are as they were against R1, that at least the dismissal claims are in time. It appears accepted that time will remain an issue, but it is one that will need to be addressed following evidence at the liability hearing, including the issue of an extension to the time limits if any claims are out of time.

Case Management preliminary hearing

77. A case management hearing will be listed to address outstanding issues including to define the issues and the steps to be taken in preparation for a final hearing

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Employment Judge Emery

11 November 2022

Sent to the parties on:

1 December 2022

For the Tribunal Office: