EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondents
Mrs Jonquil Shepherd	AND	James Briggs Limited (1)
		Tetrosyl Group Limited (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY	ON	2 March 2022
By Cloud Video Platform		

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr M Whittcutt, Solicitor-Advocate
For the Respondent: Mr D Rogers, Solicitor

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. There was no relevant transfer from the first respondent to the second respondent; and
2. Accordingly, the claimant's claims for automatically unfair dismissal and for failure to consult under Regulations 7(1) and 13 are hereby dismissed.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not there was a relevant transfer under the TUPE Regulations.
2. I have heard from the claimant, and from Mr James Miller on her behalf. I have heard from Mr Nicholas Bent on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

3. The claimant is Mrs Jonquil Mary Anne Shepherd who has brought a number of claims including claims for automatically unfair dismissal and for failure to consult arising from what she contends is relevant TUPE transfer. The claimant had accrued continuous service of over seven years with the first respondent James Briggs Limited until her dismissal which was said to be by reason of redundancy on 20 October 2020. At that time she was the Brand Manager of the first respondent.
4. In the background there is a slightly complicated corporate structure. The first respondent James Briggs Ltd and its sister company James Briggs (IP) Ltd (which holds intellectual property rights) were wholly-owned subsidiaries of a holding company namely James Briggs Holdings Ltd. This in turn was controlled by Endless LLP, a private equity company. A share sale agreement was completed on 27 August 2019 ("the Share Sale Agreement") under which 100% of the shareholding in James Briggs Holdings Ltd was sold to the second respondent Tetrosyl Group Limited. This in turn meant that the controlling interest in the two subsidiary companies (the first respondent and its sister company James Briggs (IP) Ltd) passed at the same time to the second respondent Tetrosyl Group Limited. The second respondent Tetrosyl Group Limited is a holding company only, with no employees and no business, and it wholly owns its subsidiary Tetrosyl Ltd, which is a manufacturing company.
5. The first respondent carries on business as a manufacturer of aerosols, solvents and consumer chemicals. Tetrosyl Ltd carries on business as a manufacturer of car care products and other related fluids. There was already a business relationship between the first respondent and Tetrosyl Ltd because the first respondent manufactured two main brands, namely Nilco and Hycote, and these two companies had a distributorship agreement between them whereby the Hycote brand was distributed by Tetrosyl Ltd. Following the Share Sale Agreement these two companies both became subsidiary companies within the same group of companies sharing the same ultimate parent Tetrosyl Group Ltd, the named second respondent.
6. Shortly after the second respondent's acquisition of James Briggs Holdings Ltd and its subsidiaries which included the first respondent, the Covid-19 pandemic took hold from March 2020. The businesses faced potential difficulties, and the Board of the second respondent investigated potential savings within its subsidiary companies. The first respondent had considerable expertise in manufacturing aerosols and solvents, which Tetrosyl Ltd lacked, whereas Tetrosyl Ltd had expertise in bulk liquid filling of other products which the first respondent lacked. There were obvious potential savings in arranging for these two companies to produce more of the items with which they had expertise.
7. In about July 2020 therefore Tetrosyl Ltd took over the marketing and distribution of the first respondent's Nilco brand. This was no more than 25% of the first respondent's business because it always been a specialist supplier of aerosols and was a contract packer for private label products, that is to say filling and producing products for customers' brands rather than its own brands. In return, the entirety of Tetrosyl Ltd's aerosol production business (including plant and equipment) was transferred from Tetrosyl Ltd to the first respondent. This integration of these aspects of the joint businesses resulted in a marginal reduction in Tetrosyl Ltd's monthly turnover, but it was considerably more beneficial for the first respondent which showed an increase in monthly turnover of approximately 44%.
8. The first respondent has just under 300 employees. It is run as a separate company with its own payroll system, its own employment contracts, and its own employee benefits which include a separate pension scheme, death in-service policy, sick pay policy and long service benefits. The first respondent's employees also have a long-standing union recognition agreement in place with the Trade Union USDAW. That is not the case for Tetrosyl Ltd's employees, and the second respondent has no employees.
9. The claimant has asserted that up to 12 employees transferred from the first respondent to Tetrosyl Ltd, but I accept Mr Bent's evidence that in fact only two employees moved from the first respondent to Tetrosyl Ltd, with one employee moving back in the opposite direction.

10. The second respondent also made alterations to its reporting lines. The second respondent has various Group Directors. The Group Finance Director of the second respondent's group of companies is Mr Nicholas Bent, from whom I have heard. He remains an employee of the first respondent. The first respondent has a number of managers who hold weekly management meetings and manage the day-to-day issues arising with the first respondent. They are responsible to the first respondent's Board of Directors. Other Group Directors are employees of Tetrosyl Ltd, and they report to their own Board of Directors. Equally those with Group roles report in turn to the holding company's Board of Directors (that of the second respondent). It has been suggested on behalf of the claimant that this was a merging of the commercial teams for each of the two respondents. It is clear that there was a change in reporting lines which assisted both subsidiary companies because support and expertise was now available for both, but I do not accept that this went as far as the existing commercial or marketing teams of the first respondent being subsumed or transferred to either Tetrosyl Ltd or (as apparently is mistakenly alleged) to the second respondent which was a holding company and had no employees.
11. Three matters affecting the employees of the first respondent which have been raised on behalf of the claimant were decided upon by Group Directors with the second respondent. These were (i) whether discretionary bonuses should or should not be paid during the financial difficulties of the pandemic, a decision which was investigated and informed by Mr Green (the second respondent's Group Chief Executive Officer); (ii) a decision as to whether and if so when a price increase resulting from raw material shortage should subsequently be reversed (as recommended by Mr Miller, but refused by the Board); and (iii) whether any savings could be made by redundancies following the product manufacturing changes between the two subsidiary companies. I accept Mr Bent's evidence that it was normal for Group Directors to discuss issues such as this which affected the subsidiary companies, particularly during the financial difficulties of the pandemic, without that meaning that the day-to-day financial management or control of the first respondent had necessarily been transferred to a different entity.
12. One of these aspects under review resulted in the claimant's position being identified as potentially redundant. This led to consultation meetings with her, and her subsequent dismissal by reason of redundancy. I accept Mr Bent's evidence that one of his task was to review and consider potential savings, and that this was subject to the consultation process, not a predetermined decision taken by Mr Green on behalf of the Group. It is clear that during the consultation process the first respondent made it clear to the claimant that: "Your role has been identified as at risk of redundancy because the JBL brands are being transferred over to Tetrosyl Ltd as part of the "post-acquisition" integration of the business". The first respondent confirmed the claimant's redundancy with effect from 20 October 2020, more than a year after the Share Sale Agreement.
13. Having established the above facts, I now apply the law.
14. The relevant regulations are the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations").
15. Regulation 3(1) provides that the Regulations apply to – (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity. (There is no suggestion in this case that there has been a service provision change under Regulation 3(1)(b)).
16. Regulation 3(2) provides that "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
17. I have been referred to and have considered the following cases, namely: Henry v London General Transport Services Ltd [2001] IRLR 132 EAT; ICAP Management Services Ltd v Berry and anor [2017] IRLR 811 QBD; Allen & Ors v Amalgamated Construction Co Ltd [2000] IRLR 119 ECJ; Brookes v Borough Care Services [1998] IRLR 636 EAT; Millam v Print Factory (London) Ltd [2007] IRLR 526 CA; Smith & Others v Jackson Lloyd Limited

and Mears Group UKEAT 0127/13; ECM (Vehicle Delivery Service) Ltd v Cox and others [1999] ICR 1162; Spijkers v Gebroeders Benedik Abattoir CV 24/85 [1986] 2 CMLR 296; Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 EAT; and North West Training and Enterprise Council Ltd v Astley and Anor [2006] UKHL 29.

18. A business transfer pursuant to the wording of Regulation 3(1)(a) requires four key elements, namely that there is (i) a transfer to another person; (ii) that there is an identified economic entity that transfers; (iii) that the economic entity is situated in the UK immediately before the transfer; and (iv) that the economic entity retains its identity after the transfer.
19. The Regulations do not normally apply to a simple share sale, because there is no change in the identity the employer in these circumstances (see for instance Henry). Even if the share sale has been arranged for the purposes of seeking to avoid the application of the Regulations, this principle still applies (see Brookes). However, whilst the Court of Appeal in Millam approved these general principles, it also emphasised that the correct question to ask is within that legal structure (of a sale of shares), whether as a matter of fact control of the business has been transferred from one employer to another. This principle was upheld in Smith & Others in which the EAT confirmed that the reality of the situation was that there had been a TUPE transfer under the Regulations despite the fact that there was a share purchase. In that case the controlling minds of the company which had been purchased by shares had been removed; the company purchased via shares was not an autonomous independent company; and it was nothing other than a trading name.
20. In Spijkers the Court made it clear that it is important to consider the following matters: (a) the type of undertaking or business concern; (b) whether assets, tangible or intangible, are transferred; (c) whether employees are taken over; (d) whether customers are transferred; and (e) the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended. These are single factors in an overall assessment which should not be considered in isolation. In addition, the facts characterising the transaction in question should be considered to determine whether the undertaking has continued and retained its identity in different hands (ECM (Vehicle Delivery Service) Ltd).
21. In Cheesman, the EAT set out principles which can be distilled as to whether there is an undertaking, and principles which can be distilled as to whether there has been a transfer. However, these lists are not exhaustive and the test to be applied in considering whether there was a transfer is broad, multifactorial, and fact sensitive. Nonetheless the guidance provided by the EAT in Cheesman with regard to the question of identifying an "economic entity" is as follows:
22. (i) There needs to be a stable economic entity, which is an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity that pursues a specific objective. There will not be such an entity if its activities are limited to performing one specific works contract. It has been held that the reference to "one specific works contract" is to be restricted to a contract for building works; (ii) in order to be such an undertaking, it must be sufficiently structured and autonomous but will not necessarily have significant tangible or intangible assets; (iii) in certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity essentially based on manpower; (iv) an organised grouping of wage-earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity; and (v) an activity is not of itself an entity; the identity of an entity emerges from other factors, such as its workforce, management of staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it."
23. There is no dispute between the parties as to the relevant case law which applies, and it is asserted on behalf of the claimant that the relevant test be applied is set out in Millam and that there are a number of evidential indications which in combination establish the control of the business, in the sense of how its day-to-day activities were run, has passed.

24. The claimant asserts that the following factors indicate following Millam that there has been a relevant TUPE transfer rather than a mere transfer of shares. I deal with each of these in turn.
25. The first is that the manufacture of the brands which the first respondent had responsibility transferred to Tetrosyl Ltd, particularly as it was confirmed during the claimant's consultation that "JBL brands are being transferred over to Tetrosyl Ltd as part of the "postacquisition" integration of the business". There clearly was a harmonisation of brands but only to the extent that the Hycote brand was moved to Tetrosyl Ltd for production. This was no more than 25% of the first respondent's production. It had little financial effect on Tetrosyl Ltd, but during the same process a significant amount of aerosol-related manufacture was moved back to the first respondent, resulting in an increase of its monthly turnover of about 44%. These changes were made for sensible business reasons to harmonise expertise. In my judgment it is not the case that the first respondent's manufacturing business authorised by any such brands was transferred to Tetrosyl Ltd.
26. Secondly it is alleged that there was a transfer of intellectual property rights. It is correct that one of the two subsidiary companies, namely James Briggs (IP) Ltd, an associated company of the first respondent, holds certain intellectual property rights. Ownership of this subsidiary company has ultimately passed to the second respondent following its purchase of the other holding company James Briggs (Holdings) Ltd. They are now under the control of the second respondent following the Share Sale Agreement. However, I have seen no evidence to the effect that there has been any transfer of any of these intellectual property rights whether to the second respondent, Tetrosyl Ltd, or otherwise. This does not assist the analysis as to whether there has been a transfer from the first respondent because none of its intellectual property rights were transferred.
27. Thirdly it is alleged that there was a transfer of the marketing production and supply of brands. This point is dealt with in the first allegation above concerning the JLP brands and the extent to which there was transfer of manufacturing between the first respondent and Tetrosyl Ltd.
28. Fourthly it is alleged that was a merging of the commercial teams between the first respondent and Tetrosyl Ltd. It is clear that there was a change in reporting lines which assisted both subsidiary companies because support and expertise were now available for both, but I do not accept that this went as far as the existing commercial or marketing teams of the first respondent being subsumed or transferred to either Tetrosyl Ltd or (as apparently is mistakenly alleged) to the second respondent which was a holding company and had no employees.
29. Fifthly it is alleged that there was a transfer of employees. I have found that the first respondent had just under 300 employees, and only two of these transferred to Tetrosyl Ltd, with one employee transferring in the opposite direction. This is insufficient to indicate that there has been a transfer of the first respondent's business.
30. Finally, it is alleged that the second respondent has continued the operations of the first respondent. It has been repeatedly argued on behalf of the respondents that the claimant is conflating or confusing ownership and control. It is of course the case that ownership of the first respondent has effectively transferred to the second respondent by reason of the Share Sale Agreement. The second respondent holds ultimate control. However, this does not mean of itself that the first respondent's business has transferred out of the first respondent's control. The first respondent business has continued, and of course it has continued under the ultimate ownership of the second respondent. This does not of itself mean that the first respondent's business has transferred to the second respondent, or elsewhere.
31. Applying Spijkers I have considered the following matters: (a) the type of undertaking or business concern - the first respondent is a manufacturing company with just under 300 employees which has increased its production and turnover following the alleged transfer by reason of exchanging certain production aspects with Tetrosyl Ltd; (b) whether assets, tangible or intangible, are transferred - apart from the transfer of the Hycote brands, no

tangible or intangible assets have been transferred from the first respondent, and it gained aerosol production capacity in return; (c) whether employees are taken over - only two of the nearly 300 employees transferred to Tetrosyl Ltd, and one transferred in the other direction, and in the meantime the first respondent maintained its own payroll, pension, paid benefits and trade union recognition; (d) whether customers are transferred – barring the potential loss of the Hycote brand (approximately 25% of the turnover) there is no suggestion that any customers were transferred, indeed turnover increased which suggests that customers increased; and (e) the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended - with the exception of the change of production and some reporting lines feeding in to the Group Board of Directors, the first respondent's business appears to have carried on very much as before the alleged transfer.

32. Given all of the above, it is obvious that there has been a change of ownership, but not the case that there has been a change in control or controlling mind the first respondent, which remains a manufacturing subsidiary company, and in my judgment it is not the case that there has been the transfer of an identified economic entity from the first respondent to either Tetrosyl Ltd or the name second respondent.
33. Accordingly, the claimant's claims for automatically unfair dismissal and for failure to consult under Regulations 7(1) and 13 are hereby dismissed.
34. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 12; a concise identification of the relevant law is at paragraphs 13 to 22; how that law has been applied to those findings in order to decide the issues is at paragraphs 23 to 33.

Employment Judge N J Roper
Dated 2 March 2022
Judgment sent to Parties on