EMPLOYMENT TRIBUNALS

Claimants: Mr I Banks
Mr J Ambrozewicz

Respondents: 1. Objectif Lune Limited
2. Upland Software Inc

HELD AT: Manchester **ON:** 11 November 2022 and 17 February 2023

BEFORE: Employment Judge Leach

REPRESENTATION:

Claimants: **In person**

Respondents: **Mr Rollinson, solicitor.**

JUDGMENT having been sent to the parties on 24 February 2023 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 -PRELIMINARY HEARING

Introduction

1. The two claimants in this case claim that there was a relevant transfer for the purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") of the business that was operated by Objectif Lune Limited (that I will call "OL Limited") to Upland Software Inc (a US company that I will call "US Inc"), and they say that that transfer happened on either 7 or 10 January 2022.

2. Both claimants were employed by OL Limited at the time of the alleged transfer and complain that they were not informed or consulted about the transfer. Each claims a declaration and award of 13 weeks' pay under regulation 15(7) of TUPE.

This Hearing

3. This case was listed for a final hearing on 17 November 2022, before a Judge sitting alone. A final hearing of a case to determine liability for a failure to consult award requires a full panel. I decided to convert the hearing to a preliminary hearing, pursuant to Rule 47 of the Employment Tribunal Rules of Procedure 2013 and to determine, as a preliminary issue, whether there had been a relevant transfer. Neither party objected to this.

4. At the beginning of the hearing I made an order that the name of the respondents in Mr Banks' case should be amended to the respondents noted above. These were the names on the ACAS EC forms and were the same respondents named by Mr Ambrozewicz. On his claim form, Mr Banks had named 2 executives. Mr Banks agreed to my making the order and the respondent did not raise any objection.

5. I heard from the 2 claimants first. Both had provided well-structured witness statements with frequent and helpful references to the documents contained in an agreed bundle.

6. The respondent called Mrs Morris, an HR manager employed by a company called Upland Software UK Limited (US Limited). US Limited is part of an international group of companies that includes US Inc (the second respondent). The claimants expressed some disappointment that other witnesses had not been called. Mrs Morris was unable to provide direct factual evidence on a number of matters that were put to her in cross examination. To be clear, Mrs Morris was a credible witness and I am satisfied that the evidence she did provide was true. Her credibility was maintained by her candour when she was unable to answer some questions.

7. As it is, there is little dispute between the parties on the facts. What is in dispute is the effect or consequence of the factual circumstances, the claimants claiming that they are such as to amount to a relevant transfer; the respondents maintaining that all that happened here is that there was a share sale as a result of which the first respondent (OL Limited) became part of the Upland Software group of companies.

8. We resumed on 17 February 2023 to hear submissions. On that day, the claimants wanted to provide me with an additional document relating to the activities of an employee called Matt Irish (referenced below). I did not accept this document. However I did speak with the parties and we established that there was no factual dispute here. I established agreed facts as far as Mr Irish is concerned and they are noted below.

9. I was provided with a bundle of documents. Page references below are to this bundle.

The Preliminary Issue

10. The claimants' case is that there was a relevant transfer of the whole of the undertaking operated by OL Limited from OL Limited (therefore the transferor) to US Inc (the transferee) on a date between 7 and 10 January 2022.

11. The respondents accept that the business of OL Limited was an undertaking for the purposes of regulation 3(1)(a) of TUPE. They dispute that there was a transfer of that undertaking in January 2022. They say that there was a relevant transfer of the

undertaking of OL Limited but that was in June 2022 and that followed compliance with consultation obligations under TUPE. This hearing is not concerned with the circumstances of the transfer or alleged transfer in June. The claimants' case is that effectively this was a pretence as the relevant transfer had already occurred in January 2022.

12. That was the issue – was there a relevant transfer of the undertaking operated by OL Limited from OL Limited to US Inc on 7-10 January 2022?

Findings of Fact

13. Set out below are my findings of the facts which are relevant to the determination of the Issue.

14. Prior to 10 January 2022 OL Limited was a company within an international group of companies that I will refer to as the "OL Group". This group had a Canadian holding company or ultimate corporate owner.

15. From the extracts that I have seen of a Share Sale Agreement by which (in summary) the OL Group was bought by the US Group, it is clear that the OL Group had a complex corporate structure. According to the Share Sale Agreement there were five or so Canadian holding companies heading up the OL Group and then various subsidiaries around the world. There were also some other companies who were not (or not wholly) owned by the OL holding companies but who, through commercial arrangements traded under the name of Objectif Lune. One of the subsidiaries was OL Limited, the first respondent, and that was the company that employed the two claimants. OL Limited was a wholly owned subsidiary of one or more of the OL holding companies.

16. The OL Group as a whole was effectively bought by the US Group. The US Group also has a complex corporate group structure. It appears from the limited extracts that I have seen from that same Share Sale Agreement that the company which purchased the shares in the various holding companies was a company called Quebec Inc although the second respondent (US Inc) is also a signatory to the agreement and is referred to as the parent. US Inc is a US based company registered in the state of Delaware.

<u>The business and activities of the respondents</u>

17. I summarise these sufficiently for the purposes of this decision.

18. The first respondent is engaged in the marketing, sale and servicing of document and communications production to customer organisations.

19. Prior to the share sale the first respondent, OL Limited, had a small workforce of 20 or so employees. It worked within the wider OL Group structure and relied on that wider structure for some business support functions; HR for example. It was also dependent on the wider OL Group for the design, development and supply of the document and communications products that it marketed and sold. There was a management structure within the small workforce. Matt Irish was the General Manager based at the first respondent's Manchester office; Didier Gombett (who I will

refer to as "DG") was the Group Chief Executive of the OL Group. He and other senior executives of that wider group exercised some control and influence over OL Limited. The business and activities of the wider OL Group, I note that the name of Objectif Lune was and is well-known and reputable in the commercial areas in which it operated.

20. The second respondent's corporate Group is active in four areas or divisions. One of these divisions, and the only one relevant to these proceedings, trades in the same area as OL and is known as the DWF division.

21. As for the second respondent itself, it is a US based company. I have not received any evidence that it is directly active in the UK, as an employer or business. I note that it owns shares in registered UK companies.

The Share Sale

22. The share sale took place on 7 January 2022. Employees of OL Limited were not aware of the sale until Monday 10 January 2022. They received an email from DG timed at 2.15pm (page 73) inviting them to an online meeting later that afternoon. That meeting was not just for employees of OL Limited. Employees of the whole OL Group worldwide were invited.

23. DG was present in the online meeting as were some employees of the US Group. DG informed attendees, including the two claimants, that he remained the boss of all employees within the OL Group. One of the attendees from the US Group, called Ian Burke, told attendees that there would be a process of integrating the OL business into the US Group but that this would take time.

24. An email with a FAQ page followed (in the bundle). I note the following comments:

> *"It was great to speak to you earlier today. We are very excited to welcome you along with your valued partners and customers to Upland."*

and

> *"As promised we will maintain consistent communication with you throughout the integration process and as things develop. For now please take the time to review the following documents now that you are part of the company which are attached to this email."*

The attached documents were *Uplands Insider Trading Memo and Policy* and *Uplands Security and Compliance Memo*.

25. Another attached document (page 85) included the following phrases:

> *"Dear Objectif Lune team members*
>
> *Our legal team would like to welcome you to the Upland family. Because Upland is a public company you now have additional responsibilities that you would not have had working for a private company. One of these*

> *responsibilities is to understand and comply with our company's Insider Trading Policy. As an employee or contractor of Upland you may have access to non-public information."*

26. Understandably, the claimants points to this communication being part of the evidence that they say shows that they and other employees of the first respondent had already by that stage become employees of US Group on a date somewhere between 7 and 10 January 2022 (but probably 7 January 2022, the date of the share sale).

Sale related changes at OL Limited

27. Prior to the sale, Joanne Scott and Charles Casey were directors of the first respondent (OL Limited). They resigned their directorships on 7 January 2022. John McDonald, an Executive of the second respondent (possibly its Chief Executive) became a director of the first respondent on 7 January 2022.

28. As of 7 January 2022 the first respondent's General Manager, Matt Irish, remained in post although he was soon offered employment by the UK subsidiary of the second respondent, which he accepted. He remained based in the first respondent's Manchester offices and continued to have management responsibilities for that office and the first respondent's activities in the UK. He also continued to have responsibilities (as he had before the share sale) for an OL sales team in Canada as well as some wider European responsibilities. His reporting line changed following the share sale as he was then required to report upwards within the US Group on, for example, the sales figures of the teams he continued to manage. In short, his functions remained as they had been but his reporting lines changed.

29. In the days following the share sale, OL employees were provided with access to the IT systems of the US Group (page 94). They were required to comply with what was called an onboarding process including various screening activities and requirements to agree with an insider dealing policy. Some of the onboarding documents included the following phrase:

> *"By signing this document I agree to abide by its content as a condition of my employment and continuing employment at Upland Software UK."*

That was a reference to a UK subsidiary of the second respondent.

30. The claimants and respondents accept that the reference to "Upland Software UK" at that stage was an error, the respondents saying that there was no transfer at that stage, the claimants' position of course being that their employment had transferred to Upland Software Inc, the second respondent, rather than the UK subsidiary.

31. The HR function of the US Group uses a software package called UltiPro and following the share sale, employment related details of the first respondent's workforce were added to UltiPro. I refer to this further below.

32. I now make findings of what did not change on 7 or 10 January 2022:

(1) The first respondent continued to pay for and remain responsible for the lease of the property from which it operated.

(2) The first respondent remained as the contracting party with its customers and continued to enter into new contracts.

(3) Those individuals who had been employees of the first respondent at the point of sale continued to be paid by the first respondent. The exception here was Matt Irish (as noted above).

(4) DG continued to have management responsibility but in a new role that he had within the DWF Division of the US Group.

(5) The OL brand and brand identity continued, although in the days and weeks after 10 January 2022 some changes were made, for example to PowerPoint formats and email footers to indicate that it was now part of the US Group.

Staff Records

33. At pages 273-275 are printouts of staff records provided by the claimants. These are staff records which postdate the share sale; as such they are records from the UltiPro system. The printouts are from June 2022.

34. The claimant, Mr Banks, provided a printout of his own records from the respondent's UltiPro system. These show his start date to be 2016. Also provided was an anonymised printout of a colleague, but one who Mr Banks tells me (and I accept) has/had a longer period of employment with the first respondent than Mr Banks, but those records show a start date of 7 January 2022.

35. Mr Banks together with some other employees was uncooperative with some of the onboarding requirements, and I accept that it is likely that his information was not input to UltiPro until later in 2022. The date provided on UltiPro in relation to Mr Banks is correct. The date for his colleague is plainly incorrect – regardless of whether what happened on 7 January 2022 was a share sale or was a share sale and relevant transfer. Whichever it was, the date is incorrect if it is there to record his start date for employment purposes.

36. Mr Banks' position is that the date issue may indicate that as far as the second respondent was concerned, in January 2022 it considered those employees of the first respondent to be employees of the then second respondent. I comment on this further in my conclusions below.

37. Mr Banks' evidence (which I accept) was that the printouts were obtained on or about the same date (in June 2022).

Nicola Scott

38. Nicola Scott was employed by the first respondent as its Chief Finance Officer. As at the date of sale she continued in that position. Later in 2022 she was placed at risk of redundancy. On 21 April 2022 it was announced that Nicola Scott was joining

Upland as Senior Director Operations for DWF (announcement at page 171). There is a dispute about whether Nicola Scott's employment moved in April 2022 or later in September 2022. For reasons which are apparent in my conclusions I have decided that I do not need to make that finding of fact, it is not relevant to the determination of the preliminary issue (whether a relevant transfer occurred on 7 January 2022).

Branding

39. I have noted that there were some changes to the branding. I note that the branding email sign-off show both Upland and Objectif Lune brands (see for example the sign-off on an email from Isabele Descaries at page 143).

Isabele Descaries (ID)

40. ID was based in Canada and employed by a company within the OL Group (not the first respondent). She was responsible for some management functions of the first respondent even though was not an employee of the first respondent.

41. In January and February 2022 ID spoke with the claimant, Mr Banks, about concerns relating to the purchase. The claimant was referring to the TUPE Regulations and ID decided to pass his queries on to Mrs Morris, an HR Manager at the second respondent's UK subsidiary. The fact that this happened is neither helpful nor unhelpful to either party's case. The decision to pass on queries about UK legislation to a UK based HR professional was made because that resource was then available within the corporate group that was then in place.

DG Outburst

42. I note my findings about an outburst by DG that the claimants provided evidence about. The claimants had heard that DG had referenced a "fuck up" and that they understood that that reference was related to TUPE, and was probably his response to being told that there may had been non-compliance with the TUPE Regulations.

43. I considered this evidence and decided again, like the other matters that I have just referred to, that it did not help me in reaching my decision. There is no evidence that it did relate to the TUPE Regulations. It may, for example, have related to instances of poor communications, and I have given some examples of this already in my findings. Even if it did relate to a concern that the TUPE regulations may have applied, I am still required to consider and decide whether a relevant transfer occurred. An outburst by an executive in a meeting cannot determine or in any material way influence the findings that I make. That is a finding that I need to make having regard to the relevant facts as found, and to the applicable law.

The Law

44. Regulation 3 of TUPE provides as follows:-

> *"3. A relevant transfer*
> *(1) These regulations apply to-*
> *a. a transfer of an undertaking business or part of an undertaking or business situated immediately before the transfer in the United*

Kingdom to another person where there is a transfer of an economic entity which retains its identity ;

b. a service provision change that is a situation in which –

i. activities cease to be carried out by a person a client on his own behalf and are carried out instead by another person on their client's behalf a contractor

ii. activities cease to be carried out by a contractor on their client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (a subsequent contractor) on their client's behalf ;

iii. activities ceased to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf.

and in which the conditions set out in paragraph 3 are satisfied.

(2) In this regulation "economic entity" mans an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(2A) References in paragraph 1(b) to activities being carried out another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

(3) The conditions referred to in paragraph 1b are that-

a. Immediately before the service provision change-

i. There is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

ii. The client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration;

b. *The activities do not consist wholly or mainly of the supply of goods for the client's use.*

45. Where, as here, there is a dispute about whether there was a relevant transfer, the burden of proof is on the claimants. See **Secretary of State for Employment v. Cohen and Beaupress [1987] IRLR 169**.

Economic entity transfer – Regulation 3(1)(a)

46. It is not in dispute that the entity operated by the first respondent company, was an economic entity for the purposes of TUPE.

47. Paragraph 11 of the EAT's decision in **Cheesman v. R Brewer Contracts Limited [2001] IRLR 144 (“**Cheesman") provides guidance to determine whether an undertaking has transferred (particularly whether there has been a retention of identity).

48. **Relevant** extracts from Cheesman are below.

> *11. As for whether there has been a transfer:*
>
> *"(i) As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed."*
>
> *"(ii) In a labour intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity."*
>
> *"(iii) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation. However, whilst no authority so holds, it may, presumably, not be an error of law to consider "the decisive criterion" in (i) above in isolation; that, surely, is an aspect of its being "decisive", although, as one sees from the "inter alia" in (i) above, "the decisive criterion" is not itself said to depend on a single factor."*
>
> *"(iv) Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended."*
>
> *"(v) In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on."*
>
> *"(vi) Where an economic entity is able to function without any significant*

tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets."

"(vii) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer."

"(viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer."

"(ix) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor."

"(x) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship."

"(xi) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer."

"(xii) The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub-contractor and the start by the successor."

49. The facts set out in Cheesman are there to apply to a wide range of potential transfer scenarios. I agree with Mr Rollinson that the 2 most relevant ones in this case are iv and xi

50. The claimants rely on 2 case authorities particularly as supporting their position; both concerning relevant transfers which arose out of a purchase of shares.

51. In **Millom and others v. Print Factory London (1991) Limited [2007] EWCA Civ 322** (Print Factory) the Court of Appeal upheld a decision of an Employment Tribunal (reversing the EAT's decision following appeal) that the claimants' employment had transferred to the respondent (Print Factory) by operation of TUPE. The claimants had initially worked for a company called Fencourt Printers Limited. The shares in Fencourt were bought by a company called McCorquodale Confidential Print Limited (McCorquodale). Following this share purchase, McCorquodale sought to integrate Fencourt's business in to its own. Employees were told that the identity of their employer was not changing although were also told that McCorquodale was looking to incorporate the business in to its own.

52. Fencourt and McCorquodale both went into insolvency administration. The business of McCorquadale was purchased by Print Factory. The claimants argued that they had already transferred from Fencourt to McCorquodale and therefore transferred automatically to Print Factory.

53. The Court of Appeal's decision noted as follows:-

a. That it is well established that a change in legal control of an employing company (such as through a share sale) does not itself amount to a relevant transfer

b. Within a corporate group structure, a subsidiary's lack of independence does not demonstrate that the holding company owns the business.

c. The relevant question is whether, as a matter of fact, the business in which the claimant is employed has been transferred from one company to another.

54. In upholding the Tribunal's decision, it noted the following findings of fact and analysis from the Tribunal

d. That the intention was to incorporate the Fencourt business in to McCorquodale;

e. That, following the share purchase, "Fencourt" employees were paid by McCorquodale;

f. That the sales representative of Fencourt moved to McCorquodale who started to handle sales for Fencourt;

g. That at the point of the insolvency administration 50% of Fencourt's work was for McCorquodale.

55. The other case that the claimants have referred me to is the decision of the EAT in **Jackson Lloyd Limited and Mears Group plc v. Smith and other UKEAT/0127/13 (Mears)**

56. This case also concerned the purchase of shares. Jackson Lloyd Limited (JL) was in financial difficulties and 100% of its shares were purchased by Mears Limited (ML) a subsidiary of Mears Group plc (MG). Immediately following this share purchase, MG began a process of integrating JL into MG. The CEO of MG appointed an "integration consultant" who, from the date of purchase became the manager of JL. JL's CEO was dismissed The integration manager reported directly to the CEO of MG and was found to have been the servant of MG and neither appointed by nor the servant of JL.

57. The Tribunal found that the JL name was nothing more than a trading name from the point of share purchase. The JL name continued for existing contracts as a change in the contracting party might trigger a retendering process.

58. I note particularly paragraphs 24 to 28 of Mears in which the relevant legal principles are considered.

59. I also referred the parties to the High Court judgment in the case of **ICAP Management Services Limited v. (1)Berry and (2) BGC Services holdings LLP [2017] EWHC 1321(QBD)** (ICAP).

60. The facts of the ICAP case are complex. However the judgment includes a review of CJEU and domestic authorities concerning the application (or not) of TUPE. Paragraph 83 of the judgment succinctly summarises that review as follows:-

> *"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 the employer and (iii) has taken over the 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 in to the shoes of the employer."*

Conclusions

61. I have to decide whether there was a relevant transfer on 7 or 10 January 2022 from the first respondent to the second respondent, and I need to decide this by looking at the facts before me and as found by me.

62. First a comment about the **Mears** and **Print Factory** decisions. These decisions uphold the findings of Employment Tribunals when deciding whether or not a relevant transfer has occurred. It is clear from these and other decisions that a relevant transfer can be triggered by a share sale and actions or intentions relating to that share sale even though a share sale does not in itself constitute a relevant transfer. Such a decision does not amount to an erroneous attempt to pierce the corporate veil (see for example the **Millom** decision particularly at paragraph 7).

63. Employment Tribunals must correctly apply the relevant legal principles to their particular case, and that is what the Employment Appeal Tribunal in **Mears** and the Court of Appeal in **Print Factory** decided the Employment Tribunals had done at first instance in those cases.

64. That is what I have done in this case by reference to the regulations themselves and the case law referred to above.

65. Effectively these authorities require me to adopt a multifactorial approach. I need to apply this test as at 7/10 January 2022. I agree with Mr Rowlinson's submissions insofar as he refers me to the **Cheesman** decision at paragraph 11, that it is really paras iv and xi that are relevant factors as far as this case is concerned.

66. Looking at paragraph 11iv of **Cheesman**, assets did not transfer. A sale of shares took place and through the complex group structures of the ultimate buyer and seller, the second respondent became the owner of the shares in the first respondent. The first respondent retained the assets that it had before the transfer. The first

respondent's customers did not transfer. They became aware through communications that the first respondent and the wider OL Group had become part of the US "family", but contracts with customers remained. The activities continued as before the share sale.

67. Factors iv (in part) and xi require me to consider the position of the employees of the first respondent. The majority of the first respondent's employees were not taken over by the second respondent. As for why that was the case (relevant to factor xi) it was that the employment of those employees continued with the first respondent. The second respondent (and the second respondent at this stage is the owner of the first respondent effectively) did not, as Employment Tribunals sometimes see, refuse to accept a transfer so that it could avoid liability for an incoming workforce.

68. However, those are not the only factors that I need to consider when properly applying the multifactorial approach and I have considered others as I explain next.

69. Whilst the structure and ownership of the corporate group containing the first respondent changed on 7 January 2022, the first respondent has not at any stage been an independent autonomous entity. As I have noted in the findings of fact, it relied heavily pre and post-sale on the control and support of a group structure.

70. The changing control as of 7 January 2022 was a change in the control "upstream" in a complex group structure. The pieces on the chessboard above the first respondent changed but the day-to-day operation of the economic entity remained largely (if not wholly) the same; the economic entity remained under the ownership of the first respondent company (albeit with different shareholders).

71. The resignation of two directors and appointment of the other director was a change in the individual or individuals controlling the first respondent company, but that is the case in substantially all share purchases, and I have decided to apply little weight to the change in the control of the Board.

72. The change in the position of DG from the CEO of the parent company to a General Manager within the second respondent's DWF division is of little consequence either. The fact is that he continued to exercise management and control over the first respondent, as did MI and DC.

73. I have considered the relevance to the preliminary issue of the change in MI's employer. I have decided that it is not a factor that points in any significant way towards a relevant transfer. It is the nature of a complex corporate structure that sometimes employees working alongside each other have different employing entities, and sometimes the employing entity for a particular individual changes. That happened within the OL Group. For example, MI managed an OL Canadian sales team whilst employed by OL's UK subsidiary. DG had various management responsibilities for employees of the first respondent whilst being based in Canada and presumably contracted to work for a Canadian company. The same in relation to ID.

74. The continued involvement of MI and DG points to a continuation in the same day-to-day control arrangements even though both MI and DG were provided with wider and upward reporting responsibilities within the new corporate structure.

75. I have decided that the change in Nicola Scott's role and employer does not point to a relevant transfer as alleged. As of 7 January 2022 she continued to be employed by the first respondent carrying out her CFO function for the first respondent. Whilst her employment changed later in 2022 there is no evidence that as at 7 or 10 January 2022 this was happening or known to be happening later that year.

76. I have considered some of the communications provided to the claimants in this case, noting particularly the onboarding documentation and a reference to Upland as being the employer as well as the UltiPro records. Whilst I accept that this is some indication of a change in control and some indication of a relevant transfer, having considered these documents in the context of the evidence overall, my decision is that the wording in question is poor drafting rather than an indication of relevant transfer on 7 January 2022. It is inevitable when an announcement is made to a workforce of changes that are immediate and significant, that many employees within the workforce will be concerned and some may be suspicious. Accurate and clear communication can reduce those concerns and suspicions. There were not always accurate and clear communications in this case. However, whilst it may be appropriate to be critical of some of the communications that I have considered, I put them into that category rather than communications that support or confirm a relevant transfer on 7 or 10 January 2022.

77. As I have decided that there is no relevant transfer these claims must fail and are dismissed.

Employment Judge Leach
Date: 3 March 2023

REASONS SENT TO THE PARTIES ON
20 March 2023

FOR THE TRIBUNAL OFFICE