EMPLOYMENT TRIBUNALS

Claimant: Mr S Asante

Respondent: Greencastle MM LLP

Heard at: London Central (remotely by CVP)
On: 14 February 2023

Before: Employment Judge Heath

Representation
Claimant: In person
Respondent: Ms D Masters (Counsel)

RESERVED JUDGMENT

1. The claimant has not accumulated a sufficient period of continuous employment to qualify for the rights to complain of unfair dismissal and claim a redundancy payment.

2. The tribunal does not strike out the claim identified at paragraph 5.9(f) of the List of Issues.

REASONS

Introduction and issues

1. This Open Preliminary Hearing ("OPH") was listed by EJ Snelson at a Case Management Preliminary Hearing ("CMPH") held on 3 November 2023, to determine:

    a) *Whether the Claimant accumulated a sufficient period of continuous employment to qualify for the rights to complain of unfair dismissal and claim a redundancy payment; and*

    b) *Such application as may be notified pursuant to paragraph 3 above.*

2. By letter of 2 December 2023 the respondent's solicitors clarified that the respondent sought to strike out paragraph 5.9(f) of an agreed List of Issues ("LOI") which reads *"The claimant's appeal against his redundancy, which was lodged on 20 June 2022, remained outstanding at the point that the claim was lodged, i.e. 14 July 2022 (GOC, para 43)."* The respondent's case was that this allegation was bound to fail.

Procedure

3. EJ Snelson made a number of case management orders to prepare the matter for the OPH. Pursuant to these, I was provided with a 297 page bundle, a witness statement from the claimant and from Mr Sefton on behalf of the respondent, and skeleton arguments from the claimant and Ms Masters.

4. At the start of the hearing the claimant told me that he wished to rely on witness statements from a Mr Harrington and a Mr Smith, neither of whom would attend to give live evidence. He also wished to rely on further documents not in the bundle. Following a brief pause to take instructions, Ms Masters objected to the admission of both the witness statements and the further documents.

5. For reasons given orally I admitted the witness statements but not the further documents. In short:

    a. On 13 January 2023, when the claimant was now acting as a litigant in person, the claimant sent the respondent's solicitors copies of Mr Harrington and Mr Smith's witness statements. This was one week in advance of the date for exchange of witness statements. The respondent's solicitors pointed out that exchange of witness statements was due to be simultaneous, and indicated that they would not read the statements. On 20 January 2023, the due date for exchange, the claimant and respondent exchanged the claimant's and Mr Sefton's witness statements.

    b. I considered that the respondent's primary objection to the admission of the witness statements, namely that the respondent was potentially prejudiced as Mr Harrington and Mr Smith were not present to be cross examined, could be addressed by the respondent's inevitable submission, if the statements were admitted, that little weight should be attached to them as the makers of the statements had not attended.

    c. In respect of the further documents, the claimant indicated that he sought to include some 50 pages of largely WhatsApp messages. He said that very few of these were labelled without prejudice. He indicated that there was conversation about a separate issue around a debt claimed by the claimant from the respondent which he and colleagues were negotiating about. He also sought to add some evidence from Mr Harrington who was involved in a separate dispute with the respondent.

d. Ms Masters told me that her instructing solicitor had, pursuant to the case management orders, produced an index to the bundle on 10 January 2023 indicating to the claimant that no without prejudice documents were included. A bundle was prepared on 13 January 2023 on the basis of what was assumed to be an agreed index. On 7 February 2023 the claimant produced new documents which were added to the bundle. She objected to the further addition of documents.

e. Continuity of employment is a statutory concept and cannot be conferred by agreement between the parties. Claimant was asked to explain the relevance of the documents he proposed adducing, and in broad terms, his explanation was that they shone a light on what the parties sought to agree around a debt, and issues relating to Mr Harrington. I was not persuaded that such documents would be relevant to the issues I had to determine.

f. Additionally, the respondent had prepared for the hearing on the basis of a bundle agreed on 13 January 2023 and have not had the chance to consider or comment on further documents. While it was not possible for me to know whether the documentation claimant sought to adduce was without prejudice, it was likely that this would be an issue which arose, which could derail the timing of this hearing.

6. The claimant also said that disclosure from the respondents had not been complete. He was unable to be specific about what he said had not been disclosed, and I was unable meaningfully to deal further with this issue.

7. The claimant gave oral evidence and was cross examined by the respondent. Mr Sefton gave evidence and was cross examined by the claimant.

8. The oral evidence did not conclude until around 4:45 pm. Ms Masters favoured the parties giving closing submissions restricted to 10 minutes each on the basis that skeleton arguments had already been produced. The claimant wished to have further time to submit written closing submissions. I agreed to the claimant's approach, on the basis that the issues in this hearing were not straightforward, the claimant was a litigant in person who had been either giving evidence or cross-examining for most of the day. To oblige him to go straight into closing submissions and to restrict him to a very short window of time would not be in accordance with the overriding objective.

9. I gave directions for the exchange of written submissions and replies. I encouraged the parties to be focused and concise and not to refer to any evidence which was not put before the tribunal at the hearing. The parties provided their closing submissions and replies to the tribunal on 20 March 2023. The claimant has referred in his written submissions to matters which were not raised during the hearing, and I have not had regard to these matters in making my decision.

The facts

10. The claimant has worked for a number of years in social and digital publishing. From 2015 he worked with Mr Harrington and Mr Quinlan at a social and digital publishing business known as UNILAD. From 23 February 2019 the claimant, Mr Harrington and Mr Quinlan became employed by a company known as Wide Cells plc, which later rebranded to Iconic Labs plc.("Iconic").

11. Mr Sefton has experience in investments and fund management. He is the managing partner, sole owner and controller of Linton Capital LLP, an investor and fund management business. He is the chairman of the Greencastle Media Group ("GMM"). Linton capital LLP holds a 90% shareholding in Greencastle Acquisition Ltd (Ire) ("GAL"), which itself holds a 98% shareholding in Greencastle MM LLP, the Respondent. Mr Sefton himself holds 1% of the shares, with the remaining 1% held by Linton capital LLP. The remaining 10% of GAL's shares are held by Premier Media Broadcasting Ltd. There are three other subsidiaries of GAL.

12. Mr Sefton was the Chairman of Iconic from 24 February 2019 until he resigned on 30 December 2019. He continued to advise Iconic as a consultant on corporate and capital markets issues until February 2020. Iconic, which was established as a publicly listed company in January 2016, has numerous shareholders. Mr Sefton held a small percentage of the shares (less than 3%) which he sold on 10 January 2021.

13. At the relevant time Mr Quinlan was the CEO, Mr Harrington the CBO and the claimant the COO of Iconic. All were directors.

14. Iconic's business activity was to develop and grow business activities in-house, such as producing social media content for clients, and also to acquire social medial channels. At all times Iconic employed around eight or nine employees.

15. On 7 April 2020 Linton Capital LLP acquired a 51% stake in a digital newspaper The London Economic ("TLE") through Greencastle TLE Ltd (UK), a wholly-owned subsidiary of Greencastle Capital Limited (UK) and incorporated for the sole purpose.

16. Mr Sefton negotiated a management services agreement ("MSA") with Iconic, whereby the latter would provide various services to TLE. The terms of the agreement were set out in a document dated 14 April 2020, the schedule of which set out the nature of the management services.

17. On 8 July 2020 GAL, through the respondent, acquired the business and assets of JOE Media Limited, a UK company which was in administration. GAL also agreed to acquire Maximum Media Network Limited ("MMNL"), an Irish company trading under the JOE Media brand in Ireland, under examinership. JOE Media is a well-known social media platform in both the UK and Ireland.

18. Mr Sefton led on the negotiations to acquire JOE Media and MMNL. Mr Quinlan, Iconic's CEO, played some part in the negotiations, the claimant did not. While not pleaded, nor referred to in witness statements, it was agreed in oral evidence that Iconic provided a £1m loan to GAL, and Mr Sefton provided a guarantee for the remainder of the purchase price. It was not clear from the oral evidence whether this was in respect of both the UK and the Irish parts of the JOE Media business.

19. At some point in July 2020 another MSA was put in place between Iconic and GAL for management services as set out in a schedule to a written agreement. The management services were to be provided to "Greencastle and its Group Companies", and they included strategic and management advice in respect of growing and promoting the group, revenue generation and business development, managing the cost base of the group, managing and forcing revenue collection, managing the administration and operation of the groups websites and social media pages, and various advice and assistance relating to IT, brand development, content creation, strategic partnerships and professional service advice. Clause 10.1 of the agreement provided:

> *"In the event that two or more of Liam Harrington, John Quinlan and/or Sam Asante cease to be directors of Iconic, or more than three other directors are appointed, or that they otherwise cease to exercise day to day management over and control of Iconic then Greencastle may at its sole discretion and at any time terminate this agreement on one weeks' notice."*

20. In September 2020 the go-ahead was given by the Irish Examiner for GAL's purchase of MMNL. On 16 November 2020 GAL acquired another Irish company, LD Lovin Dublin, which published what was described as the Dublin equivalent of Timeout. Further MSAs were entered into between Iconic and GAL in respect of these acquisitions.

21. From July 2020 onwards the claimant devoted the majority of his working time at Iconic providing management services to JOE Media Limited (i.e. the UK business). This would involve him looking into costs savings, including staffing costs, and making decisions about redundancies and staff hires. JOE Media's UK business employed around 80-90 people.

22. In addition to his work on JOE Media Limited the claimant also had responsibility for Gay Star News ("GSN") an LGBTQ+ digital publisher in the UK. GSN did not provide significant revenue for Iconic and the claimant did not devote significant amounts of time to the GSN work from at least December 2020 onwards.

23. The claimant agreed in cross-examination that he did do some, but not significant work for TLE, the JOE Irish business and for other publishers. He further agreed that the iconic business was "*being operated as one business*", and that no distinctions were being made about the way business was being operated in terms of a distinct "JOE Media UK team" or a "Lovin Dublin team".

24. In the background, Iconic was having difficulties with the hedge fund that was providing funding to the business. Mr Sefton set out the essence of the difficulties in his witness statement, which was not substantially challenged by the claimant in cross-examination or closing submissions, and which I accept was accurate. Iconic was locked into a funding arrangement with its funder but wished to explore other options. The funder converted some of its loans into shares representing 20% of the then issued share capital of Iconic which it transferred into a company called OTT. Iconic wished to move towards a more conventional debt and equity financing arrangement and thought that an agreement had been reached with the funder in this regard. However, the funder later communicated that it no longer wish to proceed on this basis and insisted on being the sole provider of debt capital.

25. There was an impasse during which OTT sought to remove members of Iconic's board, including the claimant, and to replace them. An attempt to do this failed for technical reasons, but the likelihood was that, with a 20% holding, OTT would sooner or later succeed in removing members of the board.

26. I find that during early 2021, and possibly before this period, there were negotiations between Iconic and its funder to navigate these areas of disagreement. As a corporate adviser to Iconic, Mr Sefton would have played a significant role. Mr Quinlan would have taken the lead as CEO of Iconic within the company. There was a WhatsApp group called "Iconic Board" comprising of Mr Sefton, Mr Quinlan, Mr Harrington and the claimant. Screenshots of certain messages would suggest that information was shared between all group members. While I find it likely that Mr Sefton and Mr Quinlan took the lead in negotiations with the funder, Mr Sefton was sharing documents with the other group members which, it would appear, he drafted or caused to be drafted, such as agreements and action plans. The WhatsApp messages, certainly the ones in the bundle, would suggest that there was a significant element of strategising coming from Mr Sefton which he was sharing with the other group members. However, the Board members, including the claimant, were experienced business people who operated in Board level roles.

27. On 19 January 2021 Mr Sefton shared with the Iconic Board by WhatsApp various documents, including one file "IL GMG Action Plan". This action plan was headed "*Plan for resolving ABO situation. Needs to be finalised by Friday 29 January as too distracting for management and publicity is bad for business"*.

28. The plan was summarised with two options. Option A was "*settlement with ABO/OTT*" and option B was "*transition to Greencastle Media Group ("GMG")*". Option B was set out in some detail.

29. Option B was set out under six headings. The first was "PR battle", and set out that a Regulatory News Services ("RNS" - a regulatory and financial communications channel for companies) announcement would have to be made. A plan would need to be made for the administration of Iconic.

There would need to be a "*clear up*" of Iconic and it would be "*critical that no contractual or other restrictions on transfer of personnel*". A final offer would need to be prepared to negotiate a settlement. And a final decision would need to be made on 29 January 2021.

30. The action plan also contained a "*Cleanup schedule*" which had a number of items on it with text in red against the items indicating whether they had been done, were in progress, or to be done. Contracts (presumably employment contracts) for members of Iconic staff were "*underway*", "*New GMG employment and consultancy agreements*" were "*to be done*". There was an item "*Doc between Iconic and GMG saying that Iconic holds the lease on trust in consideration for GMG paying for it, and we need to seek assignment of it*"; against this was "*DS – done*". Another item was "*Assign lease*" against which was "*Underway – Matt*". A further item was "*Clone of email files*" against which was "*Done – Matt*" and a further entry "*Matt to get GMG emails for everyone*" against which was "*Matt – should be in place Monday*".. There were other entries confirming that Iconic has no interest in intellectual property in the Greencastle Media businesses including "TLE and JOE".

31. I find that at this point the action plan set out the reality of the situation in that Iconic was seeking to settle matters with its funders but also strategising a Plan B in the event that no settlement was reached. In terms of the Plan B it is clear that active steps were being taken to put in place arrangements to pivot in that direction swiftly should no settlement be reached.

32. No agreement was reached with the funder. Option B, which had been planned, was put into place. On 30 January 2021 Mr Sefton messaged the Board members that he was drafting resignation letters for Mr Quinlan, Harrington and the claimant. He made a suggestion about drafting mutual release agreements for those individuals which will "*make it impossible for ABO to use Iconic to come after anyone*". Mr Sefton also provided drafts of resignation letters for the three Board members which either he or the solicitors DLA Piper had drafted. He also provided a draft RNS announcement relating to the board members leaving.

33. On 31 January 2021 the claimant emailed Ms Lewis, a non-executive director of Iconic, a letter in which he resigned from the office of director of Iconic with effect from 1 February 2021. He also resigned by further letter of 31 January 2021 as a director, officer and employee of Iconic with immediate effect. In this letter he also withdrew his consent to the deferral of accrued and unpaid salary, fees and other expenses and demanded payment of the same. Mr Harrington and Mr Quinlan also resigned as directors and employees of Iconic on 31 January 2021.

34. On 1 February 2021 at 7 am two RNS announcements were made by Iconic. The first was an "*Update on EHGOF, OTT Holdings and ABO and Changes to the Board*". This was a lengthy document setting out the history of the dispute between Iconic and its funders and the inability of the

parties to settle their differences. It set out the attempts by OTT to remove Mr Harrington, the claimant and Ms Lewis from the board. The announcement also noted specifically that Mr Harrington and the claimant "*would prefer to resign immediately and spend their time more productively elsewhere and do not wish to be associated with EHGOF, OTT Holdings or ABO*". A last effort to settle would be made, failing which "*the executive directors could all resign with Katherine Lewis agreeing to remain in place for a short period of time in order to effect an appointment of replacement directors and ensure that such a transition was orderly*". The announcement set out that the "*Board unanimously agreed with this approach*". The announcement set out that Mr Quinlan, Mr Harrington and the claimant resigned with immediate effect on 31 January 2021.

35. The second RNS announcement concerned the service of notices of termination of the MSAs between Iconic and Greencastle Capital in respect of the JOE Media and TLE businesses. The notice pointed out that the MSA "*represent the most significant proportion of the Company's revenues to date*".

36. The claimant was offered employment with the respondent from 1 February 2021, and by agreement was appointed interim CEO of the JOE Media UK business. Mr Quinlan, Mr Harrington and some, but not all, Iconic employees were also offered employment by the respondent. Mr Quinlan, additionally, took up a position on the Board of GAL. The claimant accepted that the former Iconic employees merged into JOE Media and did not remain a discrete team.

37. Some of the employees of Iconic who were employed in the Joe Media business were provided written contracts of employment. The claimant, Mr Harrington and Mr Quinlan were not. The claimant and the respondent have litigation in the High Court around these issues, and there has been without prejudice discussion surrounding the issues. This has not made it easy for me to find facts when I am, for understandable reasons, not being presented with the whole picture.

38. New directors were appointed to the Iconic Board and Iconic continued in business until its administration.

39. The claimant took up the role of interim CEO of the JOE Media UK business. The day-to-day work that he carried out with that business would have been much the same as he had carried out for them under the MSA when he was employed by Iconic. However, he would no longer have been carrying out any work for GSN as this was an Iconic asset that remained with Iconic. He would also no longer have any work that he would have carried out as part of his COO role for Iconic, for example, in strategic discussions around funding (albeit that Mr Quinlan as CEO would have led on this).

40. I have not found it easy to determine whether the claimant would have had any additional duties as interim CEO when employed by the respondent

which he would not have had when providing services to JOE Media under the MSA.

41. It is clear from the pleadings that from February 2021 onwards there were significant difficulties between the claimant and Mr Sefton. These are matters which will be determined at the final hearing.

42. The claimant was made redundant, and he lodged an appeal against his redundancy on 20 June 2022. Mr Sefton emailed the claimant asking for further information and offering a meeting on 13 July 2022. He asked what the claimant wanted to achieve from an appeal. The claimant lodged his claim on 14 July 2022, and the claimant replied to Mr Sefton's email on 15 August 2022.

The law

Continuity of employment and TUPE

43. Part XIV, Chapter 1 of the Employment Rights Act 1996 ("ERA") contains provisions relating to continuous employment. The section 218 ERA provides:

> *(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.*
>
> *(2) If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another—*
>
> > *(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and*
> >
> > *(b) the transfer does not break the continuity of the period of employment.*
>
> *…*
>
> *(6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer—*
>
> > *(a) the employee's period of employment at that time counts as a period of employment with the second employer, and*
> >
> > *(b) the change of employer does not break the continuity of the period of employment.*

44. Section 231 ERA provides:

For the purposes of this Act any two employers shall be treated as associated if—

> *(a) one is a company of which the other (directly or indirectly) has control, or*
>
> *(b) both are companies of which a third person (directly or indirectly) has control;*

and 'associated employer' shall be construed accordingly.

45. For the purposes of this section “control” means legal control by the majority of votes attaching to shares, rather than by *de facto* control (*Secretary of State for Employment v Newbold* [1981] IRLR 305).

46. Section 235 ERA includes the following definition:

'successor', in relation to the employer of an employee, means (subject to subsection (2)) a person who in consequence of a change occurring (whether by virtue of a sale or other disposition or by operation of law) in the ownership of the undertaking, or of the part of the undertaking, for the purposes of which the employee was employed, has become the owner of the undertaking or part.

(2) The definition of 'successor' in subsection (1) has effect (subject to the necessary modifications) in relation to a case where—

> *(a) the person by whom an undertaking or part of an undertaking is owned immediately before a change is one of the persons by whom (whether as partners, trustees or otherwise) it is owned immediately after the change, or*
>
> *(b) the persons by whom an undertaking or part of an undertaking is owned immediately before a change (whether as partners, trustees or otherwise) include the persons by whom, or include one or more of the persons by whom, it is owned immediately after the change,*

as it has effect where the previous owner and the new owner are wholly different persons.

47. Regulation 3 of Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) provides:

(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 the client's behalf ("a contractor");

(ii) activities cease to be carried out by a 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 another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease 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" means 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 instead by 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 (1)(b) 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; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

48. Regulation 4 of TUPE provides:

> *4(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*
>
> *…*
>
> *(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.*

49. When considering whether or not there has been a transfer under Regulation 3(1)(a) of TUPE (sometimes referred to as a business transfer) the ECJ in *Spijkers v Gebroeders Benedik Abattoir CV*: 24\85 [1986] 2 CMLR 296 has held that in order to establish whether or not a transfer has taken place envisages the case in which the business, or part of a business, in question retains its identity.

50. The EAT in *Cheesman and others v Brewer Contracts Ltd* [2001] IRLR 144 gave further guidance of factors to be taken into account when deciding whether there was an undertaking, and if so, whether it had transferred. In terms of whether there was an undertaking, these include:

    a. There needs to be a stable economic entity whose activities is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective;

    b. The undertaking must be sufficiently structured and autonomous, but will not necessarily have significant tangible or intangible assets;

    c. In certain sectors the assets are often reduced to their most basic and the activity is essentially based on manpower;

d. An organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors, amount to economic entity;

e. An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, is operating methods and the operational resources available to it.

51. As to whether there has been a transfer, the *Cheeseman* guidance includes:

a. The decisive criteria for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated … by the fact that its operation is actually continued or resumed; …

b. In considering whether the conditions for a transfer are met, it is necessary to consider all the factors characterising the transaction in question, but each as a single factor and none is to be considered in isolation;

c. Amongst the matters 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;

d. Account has to be taken 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;

e. Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction … cannot logically depend on the transfer of such assets;

f. Even where the assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer; …

g. The absence of any contractual link between the 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 direct contractual relationship;

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

52. In terms of service provision change under Regulation 3(1)(b), an organised grouping of employees requires a deliberate putting together of a group of employees for the purposes of relevant client work (*Amaryllis Ltd v McLeod* UKEAT0273/14/RN, *London Care Ltd v Henry* UKEAT/0219/17/DA and *Eddie Stobart v Moreman* [2012] ICR 919.

53. In order for regulation 4 to operate, the employee must be employed by the transferor at the moment of transfer (*Secretary of State for Employment v Spence and ors* 1986 ICR 651).

Striking out/deposit

54. Rule 37 of the ET Rules provides:-

> *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> (a) *that it is scandalous or vexatious or has no reasonable prospect of success;*

55. In *Mechkarov v Citibank NA* [2016] ICR 1121 the EAT summarised the principles that emerge from the authorities in dealing with applications for strike out of discrimination claims:

> *"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."*

56. The guidance in *Mechkarov* followed from a line of authorities including *Anyanwu v South Bank Students' Union* [2001] IRLR 305 and *Eszias v North Glamorgan NHS Trust* [2007] IRLR 603. *Chandok v Tirkey* [2015] ICR 527 shows that there is not a "*blanket ban on strikeout application succeeding in discrimination claims*". They may be struck out in appropriate circumstances, such as a time-barred jurisdiction where no evidence is advanced that it would be just and equitable to extend time, or where the claim is no more than an assertion of the difference in treatment and a differencing protected characteristic. *Eszias* also made clear that a dispute of fact also covers disputes over reasons why events occurred, including why a decision-maker acted as they did, even when there is no dispute as to what the decision maker did.

57. In *Ahir v British Airways plc* [2017] EWCA 1392 the Court of Appeal held that tribunal's should "*not be deterred from striking out claims, discrimination claims, which involve a dispute of fact if they are satisfied*

that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger in reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context".

58. Rule 39 ET Rules provides: -

> *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
>
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

59. In the case of *Hemdam v Ishmail* [2017] IRLR 228 the Court of Appeal gave guidance to tribunals on the approach to deposit orders. The guidance included:-

    a. The test for ordering a deposit is different to that for striking out under Rule 37(1)(a).

    b. The purpose of the order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and creating a risk of cost. It is not to make access to justice difficult or to effect a strike out through the back door.

    c. When determining whether to make a deposit order a tribunal is given a broad discretion, is not restricted to considering purely legal questions, and is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and reach a provisional view as to the credibility of the assertions being put forward.

    d. Before making a deposit order there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence.

    e. A mini trial on the facts is not appropriate.

Conclusions

Continuity of employment

60. While not clear from the pleadings, the claimant appears to be seeking to establish continuity of employment by asserting either a TUPE transfer,

arguing that the respondent was an associated employer or a successor employer.

TUPE

Business Transfer under Regulation 3(1)(a)

61. For regulation 3(1)(a) to apply it must be established that there was an "economic entity" which transferred and "retains its identity".

62. I do not find that there was an economic entity within Iconic relating to JOE Media. The claimant conceded in cross examination that there was no specific JOE Media team within Iconic, which effectively operated as one business. Additionally, while he spent a significant amount of his time latterly while employed by Iconic working on the JOE Media UK business, he was the COO and a statutory director of Iconic. He would have had duties and responsibilities in that regard, and he agreed in cross examination that he did at least some work relating to Iconic's own business with GSN and on the other MSAs relating to the Irish business.

63. In terms of the *Cheeseman* criteria, it cannot be said that there was an organised group of persons and/or assets enabling or facilitating the exercise of an economic activity which pursued a specific objective. There was no sufficiently structured and autonomous JOE Media UK entity and there did not appear to be organised grouping of wage earners (although this can be just one wage earner) specifically and permanently assigned to a common task.

64. As to whether there was a transfer, the decisive *Cheeseman* criterion is whether the entity in question retains its identity. In this regard, the evidence shows that the former Iconic employees dissipated and merged into the respondent business. There was no "Iconic team" within the respondent from 1 February 2021 onwards.

65. I do not consider the above decisive criteria in isolation, however. One point of contention between the parties had been whether a lease of the business premises at 5 Hardwick Street was transferred. A "Fee Deferral Agreement" dated 25 January 2021 was in the bundle. Pursuant to the terms of this agreement iconic had entered into a lease relating to JOE Media's London premises at 5 Hardwick Street, but that it was the intention of the parties that the lease be assigned to Greencastle at the earliest opportunity. Mr Sefton's evidence was that when the asset purchase of JOE Media UK had been carried out, the lease of JOE Media's offices were mistakenly put in Iconic name by an error prone Iconic employee. This agreement was entered into to correct that error, according to Mr Sefton.

66. This was an issue which was not covered in the witness statements, and making sense of the competing evidence which only emerged during cross examination has been very difficult. Applying a bit of common sense, it

seems highly unlikely in the context of a dispute with Iconic's funders that it would be possible to effect a transfer of an asset like a lease.

67. As for the emails, I note that the **Cleanup Schedule of the Plan for resolving ABO situation** referred to the fact that a "clone of email files" had been done. When those Iconic employees who went to work for the Greencastle group began working there, they had new Greencastle email addresses. The cloning of email files is more suggestive of the information within the Iconic emails being copied than, essentially, for the same email accounts simply being renamed Greencastle emails. Either way, this is not something which assists in determining whether or not there was a transfer.

68. In the circumstances, I find that there was not an economic identity retained its identity following a transfer.

Service Provision Change under regulation 3(1)(b)(i)

69. This regulation does not apply as this is not a situation where a client ceases to carry out activities on his own behalf with a contractor carrying out them out instead. This is simply nothing like the factual scenario in this case.

Service Provision Change under regulation 3(1)(b)(ii)

70. Again, this regulation does not apply as the factual scenario there is nothing like a contractor ceasing to carry out activities on a client's behalf with the activities subsequently being carried out instead by another contractor.

Service Provision Change under regulation 3(1)(b)(iii)

71. The closest factual scenario would be a situation where a client is taking activities back in-house under this regulation.

72. For this regulation to apply there must have been "*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*".

73. *Eddie Stobart* made clear that to satisfy this regulation there must have been a grouping of employees (again, this can just mean one employee) organised by the employer for the principal purpose of carrying out the relevant activities for a particular client. As set out above, I have found that the claimant carried out multiple activities while employed by Iconic, albeit that he devoted the majority of his time latterly to providing services to JOE Media under the relevant MSA. I therefore do not find that there was a transfer under this regulation.

Effect of Regulation 4

74. Even if there was a transfer to the respondent, the factors set out above would strongly suggest that the claimant was not assigned to any entity

that transferred. Regulation 4(3) requires that the employee is assigned to the organised grouping of resources or employees that is subject to a relevant transfer. The evidence does not support this.

75. Additionally the employee must be assigned to the organised grouping of resources or employees that is subject to the relevant transfer who is "*so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1)*" (dismissal because of the relevant transfer).

76. Looking at the facts, the mechanism by which the claimant's employment changed from Iconic to the respondent (to put things neutrally) appears as follows:-

    a. Clause 10.1 of the Iconic and GAL MSA provided that in the event of two or more of Mr Harrington, Mr Quinlan and the claimant ceasing to be directors of Iconic, then Greencastle may terminate the agreement on one week's notice.

    b. The claimant resigned as a director, officer and employee of Iconic with immediate effect on 31 January 2021. This resignation, together with other Board members would have allowed Greencastle to terminate the MSA.

    c. One of the RSNs of 1 February 2021 set out that that Iconic "has today received notices of termination" of the MSA.

77. In essence, the resignation of the claimant and other members of the board triggered the termination of the MSA, and this termination would have allowed GAL and the respondent to find other ways of doing the work previously carried out under the MSA. This was affected by employing the claimant and others to do it.

78. The fact that the claimant's termination of employment was effectively a condition precedent of the termination of the MSA means that he cannot have been employed by any putative transferor immediately before any notional transfer to the respondent. In the circumstances the claimant's employment would not transfer under regulation 4 unless he had been dismissed because of a relevant transfer.

79. The explanation which best fits the facts mechanism whereby the claimant ceased being employed by Iconic and began working for the respondent is that he resigned and was offered fresh employment. While I consider that a lot of the strategising was led by Mr Sefton, the claimant is an experienced businessman who has operated at a high level in business. The strategy appears to have been shared, and a decision was taken by the claimant to resign in circumstances where it is likely that at some stage he would have been removed as a director. I therefore find that he was not dismissed because of a relevant transfer.

TUPE conclusions

80. As I understood it, TUPE was the route by which the claimant sought to establish continuity of employment under section 218(2) ERA. I find that he is unable to do this.

Associated Employment

81. The question of whether employers are associated employers revolves entirely around the question of legal control. The evidence was that when the claimant went from the employment of Iconic to the respondent, neither the respondent nor Mr Sefton had a 51% shareholding in Iconic. The evidence was that Mr Sefton had held a 3% holding which he had sold in January 2021. It follows that Iconic and the respondent were not associated employers, and the claimant is unable to establish continuity of employment through section 218(6) ERA.

Successor employer

82. I have not been able to understand how any case has been put on this basis. I the circumstances I do not find that the respondent was a successor employer.

Overall conclusion on continuity of employment

83. I can find no way of the claimant being able to establish continuity of employment from Iconic to the respondent.

Strikeout

84. I can see some force in the respondent's suggestion that following Mr Sefton's email of 24 June 2022 "the ball was in the claimant's court". However, the reason why people do things can be complex and is best determined in context. There are numerous other detriments which the respondent does not seek to strike out and I consider it best if this allegation of detrimental treatment is considered alongside the others. There may be some background which potentially sheds light on this allegation, and I can see no real advantage in terms of time or cost saved in striking this allegation out or making it subject to a deposit.

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Employment Judge **Heath**

7 April 2023_____

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

11/04/2023

FOR EMPLOYMENT TRIBUNALS