EMPLOYMENT TRIBUNALS

Claimant: **Mr B Colbourne**

Respondents: (1) **Environmental Control Coatings Limited**
(2) **Lyte Coatings Limited**

Heard at: **Bristol (by video)**

On: **15 and 16 May 2023**

Before: **Employment Judge Cuthbert**

Appearances:

For the claimant: **In person**
For respondents: **Mr D McLoughlin (Director)**

RESERVED JUDGMENT

1. The claimant's employment **did not transfer** from the first respondent to the second respondent pursuant to TUPE.

2. Accordingly, the claimant's claims against the second respondent are **dismissed in full**.

REASONS

Introduction

1. The hearing was conducted in public with the parties attending remotely by video (VHS). It was conducted in that manner by agreement, because to do so met the overriding objective, and because it was in accordance with Rule 46 of the Employment Tribunal Rules and the Presidential Guidance on remote hearings and open justice.

2. The claimant appeared in person; the respondents were represented by a

director of both respondents, David McLoughlin. I explained to the parties about various aspects of the tribunal process at various stages during the hearing, in view of neither side being legally represented.

3. The hearing was listed for two days. Reading time took up the first morning and the claimant's evidence commenced in the afternoon. The respondents' evidence was heard on the second morning, followed by oral closing submissions. I was not in a position to deliberate and give oral judgment in the time remaining. I explained to the parties that I would reserve judgment.

Background, claims and issues

Background and claims

4. The case had been subject to two previous preliminary hearings. The claimant's claims were identified in the course of those hearings as being for whistleblowing detriment, constructive unfair dismissal (ordinary and pursuant to section 103A of ERA), unauthorised deductions from wages and a failure to consult pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (**TUPE**).

5. The first preliminary hearing, on 23 September 2022, before EJ Leverton, was attended only by the claimant, as the first respondent had not submitted a response at that time and the second respondent was not yet a party to the claim. At that hearing, amongst other things, the second respondent was added to the proceedings. This was on the basis that the claimant said that he believed that the first respondent company was headed for liquidation and he asserted that a TUPE transfer of his employment may have taken place under the from the first respondent to the second respondent.

6. The claimant had applied to amend his claim as follows (emphasis added):

> *Amendment for the inclusion of TUPE transfer between Environmental Control Coatings Ltd and Lyte Coatings Limited whereby the Respondent has carried out a "relevant transfer" under TUPE Regulations. Under regulation 3, if a business or part of a business either moves to a new owner or merges with another business but continues to offer the same services and products to existing customers of the old company.*
>
> *The date at which the transfer occurred is likely 1 December 2021 whereby* ***the transfer likely included the transfer of "economic entities", being that of intellectual property, patents, clients, products, assets, staff, service contracts and contracts for Directors.*** *I claim the rights and liabilities in connection with my contract are now the responsibility of the company Lyte Coatings Limited.*

7. EJ Leverton allowed the claimant's application under Rule 34, stating as follows (emphasis added):

> *32. The potential claims against Lyte Coatings Limited depend on the application of TUPE.* ***It is unclear that TUPE applies as between the***

> ***Respondent and Lyte Coatings Limited, especially given the uncertainty as to whether relevant intellectual property rights have been transferred to the new legal entity. However, the Claimant does not know exactly which aspects of the Respondent's operations have been transferred.*** *Ultimately, this is an evidential matter that would need to be resolved at a substantive hearing.*
>
> *33. The Claimant relies on regulation 4 of TUPE, which operates so as to transfer a transferor's rights, powers, duties and liabilities to the transferee. The difficulty for him is that his contract apparently continued with the purported transferor for many months after the date of the alleged transfer: he believes that a TUPE transfer took place in around December 2021, but he appears to have remained employed by the Respondent until his resignation in May 2022. Nevertheless, if a TUPE transfer did occur, it is at least arguable that his contract transferred automatically to Lyte Coatings Limited on the date of the transfer by virtue of the principle of automatic transfer – Celtec Ltd v Astley and ors 2005 ICR 1409, ECJ; Sunley Turriff Holdings Ltd v Thomson and ors 1995 IRLR 184, EAT. There is also a possibility that a transfer was effected by a series of transactions for the purposes of regulation 4(3), in which case the Claimant will be protected by TUPE if he was employed immediately before any one of the transactions in question.*

8. Both respondents subsequently submitted responses to the claims which were accepted and both asserted that there was no TUPE transfer and denied, if there was found to be a TUPE transfer, that the claimant had been assigned to, or was part of, any organised grouping of resources/employees subject to any relevant transfer.

9. The issues to be determined at the present preliminary hearing were identified and agreed with the parties at a second preliminary hearing, again by telephone, on 15 February 2023 before EJ Cadney. The claimant also indicated at that hearing that he now relied upon an allegation of a transfer **either** on the 26 July 2021 **or** on 1 December 2021, or on **both** dates if they are regarded as a series of transactions. The specific issues to be decided were set out as follows.

Issues for the Preliminary Hearing on TUPE

10.

- 10.1 Was there a transfer of a business/undertaking or part of a business/undertaking within the meaning of Reg 3(1)(a) TUPE from the first to the second respondent;
- 10.2 if so when (including for the avoidance of doubt where that occurred by a series of transactions);
- 10.3 if so was the claimant employed by the first respondent immediately before the transfer (Reg4(1)); and
- 10.4 if so was the claimant assigned to the organised grouping of employees that was subject to the relevant transfer (Reg 4(1)).

<u>Documents and Evidence</u>

11. I was provided with a bundle of documents running to 477 pages and the following main witness statements:

    11.1 from the claimant - 22 pages
    11.2 from Mark Cusack (a director and the CEO of both respondents)- 27 pages
    11.3 from David McLoughlin (a director of both respondents) – 2 pages

12. There were also witness statements within the bundle from Giles Wilson (a director of both respondents), Di Booth (a director of the first respondent) and Wendy Ellis (a former employee of the first respondent). I explained that witness statements would be accorded less weight if a witness did not attend the hearing to be cross-examined. I also explained to the claimant that if he wished to cross examine the witnesses and challenge their evidence, the respondents could potentially call the witnesses on the second day of the hearing. The claimant said that he did not wish for the respondents to call the other witnesses.

13. I read all of the witness statements and heard oral evidence from the claimant, Mr Cusack and Mr McLoughlin. I explained to the parties that I had only read documents in the bundle which were cross-referenced/hyperlinked within the claimant's evidence or clearly identified in the respondents' witness evidence as being relevant. There was a lengthy section of Mr Cusack's witness statement which referenced documents which had been adduced by the claimant, in most cases with the comment that the respondents did not consider the particular document to be relevant but without providing a page reference, and in some cases without clearly identifying the document. I explained that I had not looked up the documents in that part of the witness statement but I could be directed during evidence to read further specific documents in the bundle if either party considered it necessary.

14. References to page numbers in square brackets in the course of these reasons [ ] are to those within the bundle (to the original internal page numbering of the bundle, not to the PDF numbering in the bundle, which unhelpfully did not match the internal numbering).

Findings of Fact

15. I have set out my findings below on the facts relevant to my decision on the issues above. I have not mentioned or made findings on matters which I did not consider to be relevant. At times during the course of the hearing I had to remind both parties of the relevant issues in the present hearing. It was very evident that these Tribunal proceedings and the particular matters in dispute on the TUPE issues were a part of a broader picture and dispute. I therefore sought to keep the focus of evidence on the specific issues which I needed to determine, as identified above, in accordance with the overriding objective.

Background, formation of ECC and employment of claimant commences

16. The first respondent, Environmental Control Coatings Ltd (**ECC**), was incorporated on 7 August 2018 with Mark Cusack as its sole director. The

company was set up with the aim of developing a range of coatings that would be used to reduce air pollution.

17. The claimant's employment with the first respondent commenced on 2 October 2018 as Chief Technical Officer. His field of expertise was in photocatalytic chemistry and nanotechnology research and development.

18. The precise terms of the claimant's employment by ECC were in dispute. Both parties had presented conflicting evidence about the terms of the claimant's employment. For the purposes of the present hearing, I did not need to make any findings as to the terms of the claimant's employment with ECC. It was **not** in dispute that the claimant was engaged by the ECC as an employee.

19. A draft business plan [448 – 470] dated February 2020 helpfully explained the basis of ECC's proposed business in more detail, including its PCO product, a business still very clearly at an early stage:

> *We have developed a robust & long lasting protective photocatalytic (PCO) coating. Our coating uses light to instantaneously decompose pollution into its less harmful constituent parts, kills bacteria, virus, mould & fungus & removes harmful Volatile Organic Compounds (VOCs) such as formaldehyde, isoprene & ammonia from the surface and air.*
>
> *It can be applied to virtually any surface, porous, non-porous & textile to combat pollution, harmful airborne chemicals & pathogens. It can give an office block the pollution cleansing of a wood or forest, whilst keeping it looking pristine and protecting it. It can make a dog bed odour free and create anti-microbial self-cleaning surfaces. Ikea is deploying this technology (our research tells us an inferior PCO to ours) to their Gunrid range of curtains being launched this year.*
>
> *We have also deployed this technology into a fan with an irradiated 'honeycomb', maximising the PCO reaction across a high surface area enhanced by turbulence within the fan. We are in the process of applying for a patent, and our prototype shows that approximately 1.5cm in length of our fan is equivalent to 1 mature tree in pollution busting (0.9kgs/year). The fan is scalable, from small in-car solutions through to external fans combatting heavy pollution. We have already secured verbally two external installations, one B2B2G the other B2G. An installation of large outdoor fans is giving a 14x3m wall the cleaning power of over 7,000 trees.*
>
> *The founders developed the IP over a number of years of scientific review, experimentation, with an acute view on the commercial need for a product like ours. Our science is not new, we are merely exploiting the observed gap between the scientific literature & societal/environmental/commercial needs. We are therefore novel in how we apply it and are applying for patents.*

20. The IP mentioned above, at the heart of the PCO product, became a significant dispute between the claimant and the first respondent during the course of 2020 and 2021, mentioned further below.

Claimant appointed as ECC director; Whylabs and start of ECC internal disputes

21. On 18 May 2020, the claimant was appointed as a director of ECC, along with Di Booth, David McLoughlin and Giles Wilson, taking the total number of directors to five. The only other employee of ECC apparent from the papers was Wendy Ellis, who was employed between 1 May 2020 and 30 June 2021.

22. Meanwhile, on 2 April 2020, a new company, Whylabs Limited (**Whylabs**), was incorporated by the claimant, providing PPE during the COVID pandemic. Mark Cusack and Di Booth were the other shareholders in Whylabs.

23. The claimant devoted a substantial amount of working time to Whylabs between around April to August 2020. Whylabs was initially successful but then the claimant and Di Booth had a falling out and refused to work with one another. Whylabs collapsed in around August 2020 and was subsequently wound up.

24. In the meantime, the claimant had significantly wound down his work and involvement with ECC. There was a proposal that the claimant's ECC salary be reduced to just 5% to reflect the amount of time he was working for Whylabs. I accept the evidence of the respondent's witnesses that the claimant carried out virtually no work for ECC from around mid-2020 onwards. This is consistent with the time devoted to Whylabs by the claimant and the subsequent falling out between the claimant and the first respondent

25. Following the collapse of Whylabs and the breakdown in relations between the claimant and Di Booth, it was evident that by the end of around summer 2020, relations had also deteriorated between the claimant and the other directors of ECC, namely Mark Cusack, David McLoughlin and Giles Wilson.

26. During his oral evidence to the Tribunal, the claimant suggested that he had been "suspended" by ECC in around September/October 2020. He said his keys were taken and his access to banking facilities suspended. There was no evidence of a suspension as such and the claimant had not mentioned this in his witness statement or in any contemporaneous documents. Mr Cusack did accept that the claimant's keys were taken from him and that his access to the first respondent's banking facilities was suspended, but the claimant was not carrying out work for ECC in any event after Whylabs.

27. This deterioration in relations broadly coincided with a dispute about the IP at the heart of ECC's business, in terms of the formula for creating the PCO product (see the business plan above). In summary the claimant asserted that he owned the relevant process/knowledge at the heart of this. Consequently, he refused to share the full details of how to create it with ECC. In short, this resulted in an impasse and the business was unable to move forwards. I accept the evidence of Mr Cusack about the effect that this had on ECC's business. He said, during cross-examination by the claimant: *"Opportunities for ECC depended on the IP*

which you stole from company – we tried to replicate your process with different chemists but we could not replicate the catalyst you made to remove CO^2. It did not warrant new contracts [i.e. new business opportunities]. The opportunities were lost and died. The only ECC 'trade secrets' are those you kept and still have".

28. David McLoughlin had, earlier in 2020 through his contacts in Siemens, generated interest within that company in ECC's potential product. Siemens provided a substantial sum of funding, £650,000 during 2020 but then withdrew the funding in December 2020 when the problems within ECC became apparent.

29. On 10 November 2020, Giles Wilson sent the claimant an email [111 – 112], accusing him of gross misconduct in respect of various alleged personal expenses issues involving the claimant's use of ECC's business account. The claimant instructed solicitors and a reply was sent to ECC, dated 2 December 2020. The precise details of that dispute are not relevant, save that relations between the claimant and ECC were clearly poorer than ever by this time.

Disputes continue into 2021

30. There were subsequent discussions in around late 2020 and early 2021 about a possible exit for the claimant from ECC, in terms of both his director role and his shareholding in ECC (in the region of 40%) but evidently no final agreement was concluded. The claimant at no stage resigned from his employment with ECC during this period in late 2020/early 2021 and nor was he dismissed. He was, however, not carrying out any duties, and had not done so since mid-2020. He was not being paid by ECC.

31. On 2 April 2021, the claimant and Giles Wilson spoke on the telephone. The claimant recorded this telephone call without Mr Wilson's knowledge. The claimant produced a transcript at [153 – 172]. Some relevant extracts of the conversation were as follows:

> [159] Claimant: *"So we spent 300,000 pounds on creating a fan with a matrix, but haven't developed the actual coating which does the work, at all".*
>
> *…*
>
> [166] Giles Wilson: *If you're interested, there are two routes that one might take, so one might end up there. One is ECC ends up closing, goes into administration or whatever else, that's one route. And then a new company has started up with whoever might be in that company. That's one route because there's no patent, there's no IP anymore in. And you know, that was the IP that you were referring to that you owned, or vedoni[1] owned, if you remember.*
>
> *…*

[1] Another company, owned by the claimant.

> *So you know, there is an argument, in my opinion, and almost starting again, so that all the past can be put behind rather than there'll be all sorts of an event from getting invested in and so on. That is a clean slate, you know, do things properly are the shareholders agreements, employment contracts, and so on. And however, that would be structured as an in shareholders, whether that begins with some investors or not, or, you know, whoever it is, that's one option, obviously, there is the option just to carry on with ECC.*

32. Mr Wilson did not give oral evidence. The claimant put selected extracts of this transcript to Mr Cusack and Mr McLoughlin and repeatedly suggested, in effect, that they demonstrated that a transfer of ECC's business was imminent and that he was offered employment in a potential new business which was vaguely alluded to by Mr Wilson. I do not agree with the claimant's characterisation of the call. Rather, I accept the characterisation of the respondents' witnesses of this call.

33. David McLoughlin said that the call between the claimant and Mr Wilson reflected the desire at that time of Mr Wilson and the other ECC directors to get the claimant back on board and back into ECC *"to produce the only product ECC had"*. The call discussed a number of options for taking ECC's business forwards, one of which may have been to form another business. Mr McLoughlin denied that the second respondent, Lyte (see below), was such a business.

34. Mr Cusack said it was a wide-ranging conversation between Mr Wilson and the claimant, throwing out lots of opportunities, but he said it was disingenuous of the claimant to have recorded and present the call in the manner he had. Mr Cusack said the call was *"one of many attempts to bring [the claimant] back into the fold and make the most of the opportunity that ECC had"*. He said to the claimant in evidence that it was a conversation *"putting out different options and paths. Four out of five of the board were trying to save ECC and you weren't with your behaviour and theft".*

35. A week later, on 9 April 2021 [173] the claimant wrote to the Board of ECC alleging various breaches of the Companies Act 2006. He complained about the lack of a board meeting, of being denied access to ECC's banking and account information and he alleged that false accounts had been filed on behalf of ECC. He said: *I believe that the Company is nearing an insolvent position as there are limited funds in the business, as there are no sales being generated and the only revenue is likely further investment. I believe that it is the intention of officers of the companies listed above to place the current businesses into Administration and then start a new company to continue trading.*

36. On 13 April 2021 [175], the claimant spoke to a potential new investor in ECC, Mark (not Mr Cusack) as the other directors continued in their attempts to save the business:

> *Subject: ECC / Yellow Collective*

> *Mark, FYI I had a call from Ben CoIboume at ECC this morning He says that the company is bankrupt and that the Directors have enriched themselves at the expense of shareholders by misusing funds He wanted to draw your attention to this if you are still considering an investment. Sounds like a shit show. Legal action appears to be underway.*

37. On 25 April 2021, Giles Wilson sent an email to the claimant, including the following [176]:

> *There have of course been meetings including a number of conversations discussing how to get hold of Ben as he never replies to any of us? Mark made an emotional plea to you to help the business by making the magic sauce as key instructions had been deliberately left out of the instructions. You kept promising to "get back to him" but never did. This has sadly resulted in the company being severely damaged by your lack of involvement. I and the other investors paid hard earned cash into ECC in the belief that we had a unique patentable product. In December you claimed that a Company you were involved with owned the IP and ECC had no right to it this is after all of us investors had been told by you that it belonged to ECC. If things don't work out I don't know if the investors will want to pursue this as if your claims in December are true then we were clearly sold a lie to hand over our cash.*
>
> *In summary you can be relieved to know that the issues you raise are not relevant, and on that front there is nothing to worry about. What is more important that as a Director you agree to have a meeting or conversation so we can discuss how the company can continue.*

38. On 14 May 2021, an ECC board meeting took place and the claimant attended. The notes were at [193 – 197] and include the following:

> *Agenda: 1. a) Ben[2] needs to confirm to the Board if he will assist the Company in manufacturing the PCO or provide the instructions to make the PCO. If Ben is unwilling to provide a reasonable solution it will be viewed as deliberately obstructing the business and continuing to damage the Company and its investors - it is expected that Ben will give an explanation for this and tender his resignation.*
>
> *…*
>
> *Giles summarised that ECC has limited funds, - ECC can't make the product so ECC has limited means to create revenue without spending more money on R&D (which ECC doesn't have). If ECC can't issue more shares ECC can't raise more capital. On this basis even if ECC agreed to Bens proposal it would not be able to fulfil it. Consequently, the Company will have to keep a close eye on the solvency of the*

[2] i.e. the claimant

> *business and if resolutions or alternative means of income is not found then steps may need to be taken to wind up the Company.*
>
> *…*
>
> *a) ECC can't make the product as Ben has taken the instructions and won't give them back.*
> *b) ECC have clients ready to sign up but ECC can't accept their orders as ECC can't make the product.*
> *c) ECC have Investors ready to invest but we can't accept because i) we can't (yet) issue more shares and ii) without the product the business is not as interesting an opportunity for those investors.*

39. The notes also record that ECC was contemplating selling its lab equipment at this point in time. Mr Cusack explained that ECC's lab (its only physical premises) was subsequently closed in January 2022 – the lease was surrendered.

40. The Tribunal bundle included a number of emails in June 2021. I was told that these emails were in the context of the claimant possibly buying out the ECC business and establishing its value at that time.

> Mark Cusack to the claimant: *The business is in an increasingly distressed state, caused by you. Your withholding of the IP, whether that be in the patent, lab books you've refused to share or refusal to cook has meant we have not been able to either raise funds through investment or fulfil the projects we have been working so hard on.*
>
> *Further, your refusal to cook so these projects could continue is further driving damage into the business. You shared on our call that "these opportunities might not be where you want to take the business" makes no sense and is logically irrelevant; Why would you want to deny yourself the option? Or not build an evidence base that means you can out-license? And candidly, you do not even know the details of these opportunities, so how you can make such a judgement?*

41. At [231], the claimant said to Mr Cusack, in an email dated 21 June 2021 (emphasis added):

> *The first accountancy firm that I spoke with about the matter had a quick review of the situation and their opinion would not be very acceptable to you, as **they did not place any value on the company** due to a) current financial position, b) disputes on IP, and c) the lack of forecasts.*

42. In his evidence to the Tribunal and during cross examination of the respondent's witnesses, the claimant referred to and sought to rely upon a potential valuation of ECC of over £3 million, based on a particular share valuation mentioned in an email at this time from Mr Cusack. Mr Cusack did not accept that this was a true valuation of ECC at that time and said in cross examination: "*The values of £3.1 and £2.7 million were based on the science we paid for you to conduct and you*

kept key steps of that back so we couldn't replicate the PCO. The value of ECC evaporated with that."

The formation of Lyte – July 2021

43. On 26 July 2021, a company named 'Mcavidson Limited' was incorporated with Mark Cusack as the sole director and shareholder. The company was subsequently renamed 'Lyte Coatings Ltd' in 2022 and for ease of reference I refer to this company as **Lyte**. Mr Cusack also remained a director of ECC.

44. The Standard Industrial Classification (SIC) codes of ECC and Lyte were each as follows:

    ECC:
    SIC 20590 - Manufacture of other chemical products not elsewhere classified
    SIC 27900 - Manufacture of other electrical equipment
    SIC 72190 - Other research and experimental development on natural sciences and engineering

    Lyte:
    SIC 35300 - Steam and air conditioning supply
    SIC 72190 - Other research and experimental development on natural sciences and engineering

    There was therefore limited only commonality (SIC 72190).

45. I accept the respondents' witnesses' evidence that ECC had ceased trading by this point in time, 26 July 2021, given the various disputes summarised above – ECC was clearly in a dysfunctional state as a business.

46. Mark Cusack's evidence was that there was no transfer, on 26 July 2021 (or at all), of any tangible or intangible assets, employees between ECC and Lyte and that Lyte has never traded. The claimant did not present any positive evidence of his own to contradict Mr Cusack's evidence, and to the extent that the claimant challenged Mr Cusack's evidence in cross examination, Mr Cusack remained firm. I accept Mr Cusack's evidence to the effect that the only commonality in real terms between ECC and Lyte as at 26 July 2021 was the fact of Mr Cusack being the director of both companies and that he drew no remuneration from Lyte. This was consistent with the other available evidence set out above and below. ECC had no marketable products, no premises other than its leased lab, which was closed in early 2022.

47. On 1 December 2021, David McLoughlin and Giles Wilson were appointed as directors of Lyte. There was still no evidence of any trading by Lyte. Each also remained a director of ECC.

48. The claimant's case, in his witness statement, cross examination and closing submissions, was, in summary, that assets, clients, contractors and business operations were transferred to Lyte, along with the use of a filter design and

photocatalyst developed by the claimant, either in July 2021 or in December 2021 (when the two other directors joined Lyte) or on both occasions. There was no positive evidence before the Tribunal of this being the case.

49. David Mcloughlin said in evidence that, by 2021, ECC had no contracts or clients to transfer; he added that the claimant was asserting that the IP, on which ECC's business depended, belonged to the claimant and not to ECC. Along the same lines, Mark Cusack said that the business opportunities for ECC had been based on the product which the claimant had been paid to develop and once the claimant refused to share the details of that product, the opportunities for ECC could not be taken and so those opportunities evaporated. The product or details/know-how/trade secret as to how to create it did **not** transfer to Lyte.

50. Mr Cusack's evidence was firm during cross examination by the claimant, to the effect that Lyte did not have a product to trade with; it was a business *"waiting for a Eureka moment"*. He had met, on behalf of Lyte, with potential backers and with a university about some technology which the university *"may be looking to spin out"* but Lyte was no more than *"a vehicle circuiting in the water"*, waiting for an opportunity.

51. Mr Cusack was also asked during cross examination by the claimant about a single sentence in the ET3 [46] which said that Lyte *"operates in a similar market"* to ECC. Mr Cusack explained that the three directors of Lyte were *"looking to use technology to hopefully address climate challenge in inventive ways"*. They may potentially look to work with *"third party tech"* and partners – they had contact with various universities. He said that the most relevant part of that page [46] of the ET3 was where it said that the claimant was *"grasping at straws"*. He said that the three directors had *"something between us as a team when the opportunity comes, we will strike like a cobra; but that has yet to present itself"*.

52. Mr Cusack explained to the Tribunal that the three directors of Lyte had other full-time roles and were not employed by Lyte. Mr Cusack himself worked in a start-up business concerned with carbon-offsetting and re-forestation; Giles Wilson was an entrepreneur-in-residence at a university business school and the rest of his time was taken up as an entrepreneur and investor; and David McLoughlin ran his own company and various subsidiaries. I accept that evidence. The claimant did attempt to suggest in evidence that Mr Cusack was somehow employed by Lyte, on the basis that Mr Cusack had referred to himself in his witness statement as a *"CEO"* of both ECC and of Lyte. Mr Cusack denied that he was employed or had taken any remuneration from Lyte, and there was no evidence to the contrary before the Tribunal.

53. There was some evidence adduced by the claimant about a patent application made by ECC. An application was made by ECC to register a patent connected to the PCO process. Mr Cusack explained that this application had been started in around the end of 2020 and had involved patent lawyers. It had been a lengthy process. Some sort of change made to the patent application during 2022 which Mr Cusack explained was purely of an administrative nature. The claimant sought to suggest via his cross examination that this change made in 2022

somehow evidenced the patent application being transferred from ECC to Lyte but there was no evidence that this had occurred. Mr Cusack described the patent application, by the time of the administrative change in 2022, as being a *"dead patent with zero value"*, it had not transferred to Lyte from ECC, and the product design did not work without the claimant's input. Mr Cusack said that the directors of Lyte had no interest in following what ECC did – it was a *"worthless"* patent. Mr Cusack added that the claimant had also objected to the patent application after it had been made by ECC and ECC had neither the money nor expertise to defend it. The patent application had lapsed and was not an asset of ECC. I accept Mr Cusack's evidence – the claimant adduced nothing which undermined or discredited it.

ECC moves towards liquidation – mid 2022 onwards

54. ECC's lab closed in January 2022 and the lease for the premises was surrendered.

55. On 25 May 2022, Mark Cusack called a board meeting to close ECC, in the following terms

> *Dear All,*
>
> *I would like to call a board meeting. I have been increasingly unable to spend time on ECC without remuneration, and it is not a reasonable expectation that myself and others continue to spend time on it for free.*
>
> *The offer that one of us was going to make to buy the rest out has not been forthcoming and with very little funds left and a dwindling prospect of any more coming in it is my view that we will need to close the company. I have tried to find a resolution, but we are still stalemate and I'm now full time looking for a job.*
>
> *I don't believe we need to re-hash the past, but do what is necessary so we can all move on and our investors can reclaim their losses as appropriate.*
>
> *On the assumption that all four of you have day jobs I would like to suggest 6pm Tuesday 31st May.*
>
> *I look forward to hearing from you all.*
>
> *Mark*

56. In response, the claimant resigned the same day from ECC (and two subsidiaries), stating: *"The actions by the directors of the companies have not only breached the trust and confidence, but also a repudiatory breach of contract and I therefore consider myself constructively dismissed".* [253].

57. On 31 July 2022, draft accounts were produced for Lyte for the 2021 – 2022 financial year [417 – 427]. These stated a loss of £18,082 and that Lyte had no employees [424].

58. On 21 February 2023, the remaining directors of ECC decided to put ECC into a Creditors' Voluntary Liquidation process (**CVL**) [279].

59. On 2 March 2023, a report was prepared by the liquidators appointed to administer the CVL, F A Simms & Partners [279 – 301]. The liquidators' report included a report from the ECC directors, which said as follows:

> *[290] 2.2 The following material transactions have been entered into within the last 12 months:*
>
> *2.3 Various scientific equipment including an LEEC Drying Cabinet, Solvent Cabinet, Flammable storage unit and Silversun were sold to Keronite International Ltd for £1,080 on 4 May 2022.*
>
> *2.4 The company hired Veolia to dispose of any chemicals purchased by the company, many of these are considered hazardous and needed to be disposed of in a safe and secure manner.*
>
> *2.5 The company negotiated a deal with LV Scientific to clear the trading premises at no cost to the company. The remaining assets were of little saleable value and clearing the premises allowed the company to exit its lease early and therefore reduce the company's liabilities.*
>
> *3 Trading history*
>
> *3.1 The following information and explanations have been provided by the directors of the Company. The Firm wishes creditors to note that no inquiries have been as to whether there are any inaccuracies.*
>
> *3.2 Environmental Control Coatings Ltd (ECC) was formed on 7th August 2018, the founder was joined in the following months by two executive directors in return for significant shareholding. 100% of the share capital was allocated at this time. ECC was funded by founder cash and executive director sweat until the middle of 2019 when SEIS investments were received, at which point a laboratory was opened in Lancing, Sussex, and two investors joined the board as NEDs. Further funding was received from a Bounce Back Loan and a deal with a global engineering firm in June 2020 for a trial of our technology.*
>
> *3.3 The project for the global engineering firm was delivered using a combination of the core product, which was a photocatalytic coating (PCO) and an engineering subcontractor. The project was delivered successfully on time in full. However, market conditions were then not favourable and despite initial favourable testing results the client was unable to secure the previously assured sizable business contracts leading to an end to the project and relationship.*

3.4 During this period there was an irreconcilable dispute between two of the three executive directors[3]. Many attempts were made to navigate to an amicable solution but regrettably none was found. One of the executive directors in dispute[4] had enough shareholding that they could block a super majority, meaning the company was in deadlock. This deadlock meant that fundraising was highly problematic, whether that be loan capital or investment. To compound matters critical know-how and IP was withheld, meaning that replication of the results that were successful in the trials for the global engineering firm were unobtainable. Many attempts were made to do so, and new business was sought using an inferior product but to no avail.

3.5 Towards the end of 2021 a debt to HMRC for unpaid PAYE was discovered. This was for approximately £45k. This was unexpected and unwelcome, especially as ECC had chartered accountants on a substantial monthly retainer precisely to ensure situations like this wouldn't happen. Coupled with the bounce back loan repayments, this put the company under unbearable stress and meant despite the cost cutting exercises & considerable effort exerted by the directors over the previous 12 months, it was not enough.

3.6 By May 2022 it was clear that with no funds, no interest from investors and no end in sight to the shareholder dispute, that the company had failed. The directors therefore decided to place the company into liquidation.

4 Reasons for failure

4.1 The directors consider that the reasons why the Company failed are

4.1.1 A project with a global engineering firm ceasing after they could not provide the contracts they previously indicated they would be able to secure.

4.1.2 An irreconcilable difference between shareholders leading to the company no longer being able to function effectively.

60. At page [302] was a statement/letter from Gemma Wilde, an accountant at a firm of Chartered Accountants CBA Sadofskys, dated 13 March 2023. This letter stated:

1. Lyte Coatings Ltd was incorporated on the 26th July 2021.

2. We have drafted the company accounts to 31st July 2022 and we can confirm that deposited funds during this period were minimal. These deposits included personal loans from Mark Cusack & Giles Wilson amounting to £5,000 each.

[3] Namely the claimant and Di Booth.
[4] Namely the claimant.

3. There was no transfer of assets, either tangible or intangible from any other company on formation. Lyte Coating does not have any net assets at 31/07/2022.

4. There was no transfer of employees from any other company on formation, and Lyte Coatings still does not employ any individuals.

5. There has (sic) been no payments made to any of the directors, shareholders or any other individual during the accounting period of 2021/22.

6. The company has not generated any trading income during the 2021/2022 accounting period.

61. On 1 March 2023, David McLoughlin sent the claimant various numbered requests within the present proceedings, asking the claimant in the main to provide further details about the factual basis of his assertions that there had been a TUPE transfer between ECC and Lyte. In most cases, the claimant's response was simply *"previously disclosed"* and he did not provide any relevant factual details in response to any of the TUPE queries raised.

The Law

62. I set out as follows a summary of the relevant law for the issues in the present hearing.

TUPE – business transfers

63. The principal provisions of TUPE that are relevant to the issues in this case are as follows:

Regulation 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;

…

(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.

…

Regulation 4 - Effect of relevant transfer on contracts of employment

(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.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to 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.

Business transfers – Regulation 3

64. There is a substantial amount of case law about TUPE and the Acquired Rights Directive of the EU Council, No. 2001/23. In *Cheeseman v Brewer* [2001] IRLR 144, the EAT approved the approach set out in *Whitewater Leisure Management Limited* that it was *"quite plain that there are two questions to be asked and answered"* in determining whether there has been a business transfer, as follows:

(1) whether or not there was an identifiable business entity constituting an undertaking within the meaning of the Regulations; and,

(2) secondly, assuming such could be determined, whether or not there was a relevant transfer.

Whether an economic entity exists

65. Addressing the first of those questions, *"economic entity"* is defined in regulation 3(2) as set out above. On that definition, the EAT in *Cheeseman,* having considered relevant decisions of both the domestic courts and the ECJ, set out the following principles to assist a Tribunal in deciding **whether an economic entity exists** in a given scenario:

- *As to whether there is an undertaking, there needs to be found a stable economic entity…an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective"* (*Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* 1997 ICR 662, ECJ).

- *In order to be such an undertaking, it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible (Francisco Hernández Vidal SA v Gómez Pérez and ors* 1999 IRLR 132, ECJ, and *Sanchez Hidalgo and ors v Asociacion de Servicios Aser and ors and another case* 1999 ICR 73).

- *In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower.*

- *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.*

- *An economic 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, its operating methods and, where appropriate, the operational resources available to it (Suzen).*

Has there been a relevant transfer?

66. The next question, if an economic entity has been identified, is **whether there has been a relevant transfer in which the economic entity has retained its identity**. Here, the ECJ in *Spijkers v Gebrobroeders Benedik Abattoir C.V.* [1986] ECR 1119 (in what has been described as a *"multifactorial approach"*) said that *"it is necessary to take account of all the factual circumstances of the transaction in question"* including the following:

- the type of business or undertaking;
- the transfer or otherwise of tangible assets;
- the value of intangible assets at the date of transfer;
- whether the majority of the staff are taken over by the employer;
- the transfer or otherwise of customers;

- the degree of similarity of activities before and after the transfer; and
- the duration of any interruption in these activities.

67. The EAT in *Cheeseman* set out the following guidelines on whether there has been a transfer in which the economic entity retains its identity, with regard to the approach set out in in *Spijkers*:

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

…

- *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.*

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

- *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.*

68. The ECJ made clear that these are merely factors in an overall assessment and cannot be considered in isolation.

69. In applying the test in *Spijkers*, courts and tribunals must focus on the identity of the entity transferred rather than on the nature of the transferor's and the transferee's businesses as a whole (*Playle and ors v Churchill Insurance Group Ltd and ors* EAT 570/98*).*

70. Finally, and more generally, in *Cheeseman*, the EAT provided additional guidance including as follows:

> *The necessary factual appraisal is to be made by the National Court.*
>
> *The directive applies where, following the transfer, there is a change in the natural person responsible for the carrying on of the business who, by virtue of that fact, incurs the obligation of an employer vis−a−vis the employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred.*
>
> *The aim of the Directive is to ensure continuity of employment relationships within the economic entity irrespective of any change of ownership …. And our domestic law illustrates how readily the Courts will adopt a purposive construction to counter avoidance.*

71. The *Cheeseman* guidelines' above address the questions of whether an economic entity exists, and whether it retains its identity following a putative transfer. There are, however, two further questions arising from regulation 3(1)(a) of TUPE: namely, whether the entity is *"situated immediately before the transfer"* in the UK and whether there was a transfer *"to another person"*.

72. In many cases, the answer to the first question is self-evident and nothing more needs to be added. In answering the second question the courts have taken a purposive approach. It is established, for example, that TUPE can apply to the granting, terminating, surrendering or assigning of a lease of property where a business is intrinsically linked to such property and where as a result the business changes hands and continues to be run as essentially the same

business. TUPE can also apply to the conferring of a franchise, licence or concession.

73. In *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] IRLR 315, the ECJ restated its approach in *Landsorganisationen i Danmark v Ny Mølle Kro* [1989] ICR 330 that the Directive *"applies as soon as there is a change of the natural or legal person responsible for operating the undertaking who, consequently, enters into obligations as an employer towards the employees working in the undertaking, and it is of no importance to know whether the ownership of the undertaking has been transferred*". The first of these decisions also established that it is irrelevant that there is no contractual or other direct relationship between the transferor and the transferee, so long as the undertaking in question retains its identity.

Transfers of employment – Regulation 4

74. Where TUPE applies to a business transfer under Regulation 3, pursuant to Reg 4, by operation of law, the employment of employees who are subject to it transfers to the transferee. Balcombe LJ, in *Secretary of State for Employment v Spence and ors* [1986] ICR 651, CA said as follows of Regulation 4: *'The paragraph has two effects: first, that a relevant transfer does not terminate a contract of employment; and the second effect, commencing with the word "but", is that there is a statutory novation of the contract.'*

75. The basic rule of novation enshrined in Reg 4 means that the contract of employment of anyone employed by the transferor will be automatically transferred to the transferee, as well as all rights, powers, duties and liabilities under it, **unless**:

    75.1 the person concerned is not an 'employee' as defined by TUPE
    75.2 he or she is regarded as being employed on a contract that would not otherwise be terminated by the transfer
    75.3 he or she is not employed by the transferor 'immediately before' the transfer
    75.4 he or she is not 'assigned' to the undertaking being transferred, or
    75.5 he or she makes a valid objection to the transfer.

76. An "employee" is defined in slightly wider terms than is normally used for employment protection purposes (for example, under the Employment Rights Act 1996) as any individual who works for another person, whether under a contract of employment or apprenticeship "or otherwise" (regulation 2(1), TUPE).

77. Individuals who are not performing duties but whose contract of employment continues in force at the time of the transfer will satisfy the definition of employee. This would include an employee on unpaid leave at the relevant time (*Piscarreta Ricardo v Portimao Urbis EM SA* (C-416/16).

78. There is no definition of what is meant by *"assigned"* beyond that it is *"other than on a temporary basis"*. Whether the employee in question is *"assigned"* to the organised grouping is a factual question, taking into account a number of factors,

including the percentage of time spent working in the undertaking being transferred.

79. In *Botzen v Rotterdamsche Droogdok v Maatschappij BV* [1986] 2 CMLR 50, the ECJ held that, when deciding if an employee is transferred on the transfer of part of an undertaking, it is sufficient to establish to which part of the undertaking the employee was assigned. This was applied by the EAT in *Duncan Webb Offset Ltd v Cooper and Anr* [1995] IRLR 633, in relation to a transfer under TUPE 1981 (which is equivalent to a business transfer under TUPE). The EAT held that the tribunal was entitled to find that the employees had transferred when part of the business transferred, despite the fact that some of their duties were performed for other parts of the business. The EAT noted that it will be a question of fact for the tribunal to decide if an individual was assigned to the part transferred, and declined to give any guidance as the facts would vary from case to case.

80. The next question is whether an "employee" of the transferor but who is absent at the time of the transfer is *"assigned to the organised grouping"*. In *Fairhurst Ward Abbotts Ltd. v Botes Building Ltd and others* [2004] EWCA Civ 83 the Court of Appeal confirmed that the question is a matter of fact, which should be determined by the Tribunal by looking at where the employee would be required to work immediately before the transfer if they were able to do so.

81. Sometimes, without making any formal objection to the transfer, the transferor and the employee enter into an agreement whereby the former retains the services of the latter following the transfer such that the contract of employment between employee and transferor dies **not** terminate by reason of the transfer (*Direct Radiators Ltd v Howse and anor* EAT 130/86).

82. In *Sunley Turriff Holdings Ltd v Thomson and ors* 1995 IRLR 184, EAT set out the approach to the operation of Reg 4(1) in a case where an employee is retained by the transferor after the transfer. The EAT concluded that the operation of the 'automatic transfer of employment' rule could only be avoided in such a situation by an express agreement with the employees concerned, provided that at the time of such an agreement this was seen as being to the employees' advantage.

Closing Submissions

83. I heard oral closing submissions from both parties. The submissions, in summary, and in the order heard, were as follows.

Submissions on behalf of the respondents

84. David McLoughlin said:

    84.1 Since its inception in July 2021, Ltye had never traded. The evidence and documents showed no link between ECC and Lyte save for the three directors.
    84.2 In all of the documents submitted to the Tribunal, the claimant had offered no actual evidence to corroborate his claim that there had been a transfer.

There was no evidence of a transfer of IP, of clients, of products, of assets, of employees, or of service contracts.

84.3 He and Mr Cusack had confirmed and demonstrated that no such transfer had ever happened. The claimant relied on *"tenuous links"* to try and prove a transfer of goodwill.

84.4 The claimant tried to suggest that Mr Cusack and Mr McLoughlin had *"manipulated the transfer of unknown and intangible assets"* and that they had *"hoodwinked"* both the liquidators of ECC and the accountants of Lyte. Mr McCloughlin resented accusations of being *"called a liar"* by the claimant.

84.5 It was telling that in two years they had not made use of Lyte and the reason for that was obvious.

84.6 The claimant suggested that he had been offered a role during the recorded call with Mr Wilson in April 2021. It was obvious that there was no specific offer. It was part of a discussion on future organisation and was a wide-ranging conversation and was aimed to get the directors talking. The claimant had produced a generalised transcript of the call which was garbled and quotes he made were taken out of context. The claimant was unable to state that a role was ever offered and what he was expected to do.

84.7 Lyte was set up to allow Mr McLoughlin, Mr Wilson and Mr Cusack to work together on an undefined project and it remained undefined.

84.8 The claimant had provided many documents to the respondents and the Tribunal and had not been referred to most of them. This meant having to read through and understand the documents but they were of no value to the case. The claimant *"threw a lot of mud and hoped something would stick".*

84.9 The claimant did not conduct any cross examination which enhanced his case. He just had a pre-set list of questions and none sought to support his claim on TUPE.

84.10 He had not been suspended. He had walked away from ECC and refused to work. There was no suspension letter and suspension was not mentioned in his witness statement.

84.11 The claimant had not been employed by ECC full-time.

84.12 There were no witnesses prepared to corroborate the claimant's witness statement. The claimant's witness statement brought *"nothing other than comments"*. The respondents had three directors, an ex-employee and ex-director, all commenting in support, plus a letter from Lyte's accountants.

84.13 The claimant's claim was vexatious and malicious

84.14 The Tribunal was to determine the following issues:

84.14.1 Was there a transfer of a business or part of one? No, no there was no evidence of this, Mr McLouhglin said.

84.14.2 If so, when? There was no transfer nor any series of transactions

84.14.3 Was the claimant employed immediately before any transfer? There was no transfer and no-one corroborated this. At best, he worked no more than 5% of his time when employed by Whylabs and Gnarly[5].

84.14.4 Finally, was the claimant assigned to an organised group? There was no evidence of this. The concept of an organised grouping entailed

[5] Another business of the claimant's

an element of conscious organisation; the deliberate putting together of employees. There were no employees and even if there was a transfer, the claimant could not state what he was part of.

The claimant's closing submissions

85. The claimant said:

85.1 Lyte had acknowledged in its ET3 that it had formed new company which traded in a similar market to ECC.
85.2 It was *"likely"* that there had been a transfer of an organised group. There were the three directors. He referred to TUPE Reg 3(1)(a). The previous company had ceased trading.
85.3 Pre-liquidation – there was likely *"phoenixing".* He cited *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25. (I asked him if this was a TUPE case as I was unfamiliar with it. The claimant indicated that it was relevant[6]).
85.4 The evidence by the claimant and the respondents went *"some way"* to establish the transfer of an economic entity. There was a transfer of a going concern which did not impact on the operation and organisation of the business.
85.5 He cited TUPE Regs 3(2) and 3(1) and the case of *Stack v Ajar-Tec Ltd [2015] EWCA Civ 46*[7] and of the ECJ in *Vidal* (see legal summary above).
85.6 The second respondent relied on the directors not drawing salaries from Lyte but in response he cited *Housing Maintenance Solutions Ltd v JF McAteer & Ors* [2014] UKEAT [this is an EAT decision to the effect that a TUPE transfer occurs at the point in time when the new employer takes on responsibility for carrying on the business].
85.7 He said that the date at which the company was formed was the date of the transfer, which he said was pursuant to Regs 3(1)(a), 4(1) and 6(2)[8].
85.8 He said there was a series of transactions:
85.8.1 The first was on 26 July 2021 and the *"transfer of employment"* of Mark Cusack.
85.8.2 The second transaction was the transfer of intangible assets and knowledge and goodwill, along with Mr Cusack on 26 July 2021.
85.8.3 The third transaction was in December 2021, when David McLoughlin and Giles Wilson *"transferred"* to Lyte. He cited the case of *Alberon v FBV Bond Genoten* [2011] ICR 373 ECJ[9].
85.8.4 The final transaction was of the patents. He said he could not establish that these had moved but they *"likely transferred without consideration"*

[6] It transpired that this is a decision about company law and directors' duties and has no apparent relevance to the present issues to be determined.
[7] This is a Court of Appeal decision on employment status and has no apparent relevance to the present issues to be determined.
[8] NB – Reg 6(2) TUPE concerns trade unions and has no apparent bearing on the present claim
[9] This ECJ decision held that the Acquired Rights Directive can apply to non-contractual (as well as to contractual) employment relationships. The transferor for the purposes of the Directive is the employer who is responsible for the economic activity of the transferred entity and, in that capacity, establishes working relations with the staff. This was the non-contractual employer in that particular case. The decision did not have any apparent bearing on the present claim.

between ECC and Lyte. He cited the case of *John David Hedger v David Adams* [2015] EWHC 2540[10].

85.9 He said that he had demonstrated that he was employed under Reg 4(3) TUPE, prior to the transfer.

85.10 He then began to refer to the case of *Jhuti* and alleged breaches of the Acas Code of Practice on disciplinary procedures. I explained that these matters were not relevant to the present issues.

85.11 There had been a *"verbally binding agreement"* for him to join the new company, he said. He formed part of organised grouping of resources. He cited *Wells vs Devani* [2019] UKSC 4[11].

85.12 His final point was that he said he was asked to attend meetings throughout the period that the respondents said he was not working. He referred to *Ibrahim v Maidstone and Tunbridge Wells NHS Trust* 2300321/2020. (I explained to the claimant that Employment Tribunal decisions, as this evidently was, are not binding on other Employment Tribunals[12]).

86. I asked the claimant to provide a copy of his submissions in writing, as the majority of the cases he had cited were not familiar authorities. Both parties sent in copies of submissions in writing after the end of the hearing. I only took into account the oral submissions made, summarised above, save to check the names and references of the various cases cited by the claimant during his oral submissions, namely those set out above. Most of those cases were of no apparent relevance to the issues.

Conclusions

87. My conclusions on the issues are as follows.

Was there a transfer of a business/undertaking or part of a business/undertaking within the meaning of Reg 3(1)(a) TUPE from the first to the second respondent;

88. ECC **was** an economic entity having existed and traded (albeit to a limited extent) since around 2018. It was, however, clearly a dysfunctional business for much of that time, hamstrung by internal disputes. The full details of the disputes are beyond the scope of the present hearing. It was, however, evident that ECC was in a bad way by the middle of 2021, when the claimant claims that there was a transfer, or the first in a series of transfers, of ECC's business to Lyte.

89. By July 2021, the only employee of ECC was the claimant himself, and he had not carried out any work for ECC since around the middle of 2020. There was no evidence that ECC had any customers or clients at this point in time. It had no marketable products, because of the IP dispute, and attempts to replicate the formula for the PCO without the claimant had failed. It still had a leased lab

[10] This is a decision of the High Court (Chancery Division) on directors' duties and has no bearing on the present claim.
[11] This is a Supreme Court decision on contractual interpretation (not in an employment context) and has no bearing on the present claim.
[12] In any event this Employment Tribunal decision concerned a right to pay during suspension, did not involve TUPE and shed no light on the issues in the present hearing

premises but that was not producing any product. This was the extent of the business entity which was ECC from the middle of 2021 until the end of 2021.

90. The claimant referred to his belief or suspicion that there had been a transfer of intangible assets from ECC to Lyte but he did not identify with any specificity what any intangible assets consisted of. He suggested that there had been a transfer of *"goodwill"* from ECC to Lyte, without consideration. Goodwill is a type of intangible asset and its value derives from factors such as a business' name (for example a trading name), its reputation, a loyal customer base, a record of good customer service, a record of good employee relations, and the like. The House of Lords in *IRC v Muller and Co's Margarine Limited* [1901] AC 217 said: *"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start".*

91. There was no evidence before the Tribunal that ECC had any goodwill in 2021. It was a relatively new business, it had no loyal customers, no good reputation (it was riven by in-fighting and one potential investor in 2021 referred to it as a *"shit show"*), and no reputable product. It **had** evidently had considerable potential in its early days, but that had *"evaporated"* by the middle of 2021, to use Mr Cusack's apt expression.

92. Having examined the business entity which was ECC, the next question is whether there was a transfer of that business entity to Lyte, following which that entity retained its identity?

93. There was no positive evidence before the Tribunal of **any** of the following having transferred from ECC to Lyte:

    93.1 Customers/clients - there were none in 2021.
    93.2 Contracts – there was no evidence of any ECC contracts in existence in 2021 or having transferred.
    93.3 Employees - Mr Cusack was not employed by Lyte, for the avoidance of doubt
    93.4 Intellectual property – the only relevant IP was the formula/process for producing the PCO and I accepted the respondents' evidence that this was known only to the claimant. It could not therefore have transferred from ECC to Lyte.
    93.5 Premises – the ECC lab did not transfer.
    93.6 Products – there was no viable ECC product to transfer.
    93.7 Equipment – the only reference to ECC's equipment in evidence was a small amount of lab equipment which was sold by ECC, not transferred to Lyte.
    93.8 Stock – there was no evidence of any ECC stock in existence in 2021 or transferred to Lyte.
    93.9 Goodwill – ECC had no evident goodwill in 2021.

94. Nor was there any basis from which it was possible to *infer* a transfer. The only commonality was the three directors of ECC being the directors of Lyte and one

basic entry in the SIC codes. The isolated phrase in the ET3 about common markets for ECC and Lyte did not reflect the reality.

95. Were those three individuals carrying out on behalf of Lyte any of the same business activities that they had undertaken on behalf of ECC? The claimant referred on several occasions to "phoenxing", by which he meant he believed that ECC was going to be liquidated and then the same business in effect would resurface, potentially unlawfully, in the guise of Lyte. There was no evidence, by the time of the present hearing in May 2023, nearly two years after Lyte was formed, of any continuation of ECC's business, or any attempt to do so. There were a few vague allusions by Giles Wilson during the recorded call in April 2021 to the possibility of continuing ECC's business in a new form of some kind but these appeared to be predicated on the claimant's involvement, which was not forthcoming, and no new business of the sort possibly envisaged actually came into being.

96. The evidence from the liquidators and the accountants did not indicate any continuation or transfer as between ECC and Lyte. The three relevant directors were actively and fully engaged in other business activities outside of both ECC and Lyte. I accepted the respondents' evidence that Lyte represented a vehicle to take advantage of a future potential opportunity, but that opportunity had not yet arisen. There was plainly no continuation by Lyte of the business activities of ECC (limited that they were during its relatively short existence).

97. On the first issue, I therefore find that there was **no transfer of a business or undertaking from ECC to Lyte**.

If so when (including for the avoidance of doubt where that occurred by a series of transactions)?

98. The second issue falls away. There was no transfer of a business on 26 July 2021, 1 December 2021 or at all.

If so was the claimant employed by the first respondent immediately before the transfer (Reg4(1))?

99. This issue is academic in view of the absence of any transfer. In the absence of a dismissal or resignation, I **would** have found that the claimant was employed by ECC on the relevant dates that he asserted in 2021.

If so was the claimant assigned to the organised grouping of employees that was subject to the relevant transfer (Reg 4(1))?

100. This issue is also academic for the same reason, namely the absence of a transfer. It is doubtful whether the claimant could have been assigned to ECC's business (such that it was) on the relevant dates in 2021. He had been absent since the middle of 2020, and he was alleged to have withheld his knowledge/IP from the production of the PCO product which was at the heart of ECC's business, and he appeared to have actively deterred a potential investor in ECC via a phone call. However, in the absence of any transfer of an organised

grouping, it cannot be determined in the abstract whether or not the claimant was attached to the same.

Finding on TUPE

101. Given that there was no TUPE transfer of the claimant's employment from the first respondent to the second respondent, for the reasons set out above, **the claimant's claims against the second respondent fail and accordingly are dismissed in full.**

102. Further directions will follow in respect of the claimant's claims against the first respondent, mindful that it is in the process of being wound up via a CVL.

Employment Judge Cuthbert
Date: 25 May 2023

Judgment sent to the parties: 12 June 2023

For the Tribunal Office