EMPLOYMENT TRIBUNALS

Claimant: Mr Worthington

First Respondent: Appscatter Limited (in creditors' liquidation)

Second Respondent: Airnow Apps Limited

Heard at London Central (by CVP) **On**: 13 September 2023

Before Employment Judge Shukla (sitting alone)

Representation
Claimant: In person
First Respondent: No appearance
Second Respondent: No appearance

RESERVED JUDGMENT

1. The complaint of breach of contract in relation to unpaid salary, commission, expenses, holiday pay, notice pay, and pension contributions is well-founded.

2. Liability for the breach of contract has transferred from the first respondent to the second respondent under regulations 4 and 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

3. The second respondent is ordered to pay the claimant £11,670 as damages for breach of contract. This figure has been calculated using gross figures to reflect likely tax liabilities.

4. The complaint of failure to comply with regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is well-founded. I award £7,423 to the claimant as appropriate compensation for this failure. The first and second respondents are jointly and severally liable to pay this compensation.

REASONS

Background

5. The Claimant commenced proceedings against the first respondent. The second respondent was joined by EJ J S Burns in a case management order on 3 July

2023 (CMO). Neither the first nor the second respondent have filed an ET3, nor attended the hearing on 3 July 2023, nor the hearing on13 September 2023.

6. EJ J S Burns handed down a judgment on 3 July 2023, dismissing the claimant's claim for unfair dismissal and a redundancy payment, as the claimant did not have the requisite 2 years' service to make these claims. EJ J S Burns gave directions for the claimant's remaining claims. The schedule to the CMO states as follows:

> The Claimant claims that
>
> (i) the undertaking in which he was employed as a sales director was transferred from the First to the Second Respondent on or about 11/11/22
>
> (ii) that he was then dismissed without notice or prior consultation and with monies due to him . . ., on or about 15/11/22; and
>
> (iii) that by virtue of the TUPE regulations the Second Respondent is liable, alternatively jointly and severally liable with the First Respondent to him in this regard.

Findings of fact

7. The claimant began employment with the first respondent on 1 January 2021. The letterhead of the claimant's contract of employment ("the contract") states "Airnow". The first respondent was a tech company, which provided app-related products (eg products that analysed app metadata). The first respondent's business involved various products, including Mighty Signal, AppMonsta, Airnow Data, and LabCave. Approximately 50 people worked for the first respondent, about half of whom were employees, and half were contractors. There was no recognised trade union. The first respondent worked out of "WeWork" premises at Bishopsgate, and there was also remote working.

8. The claimant's job title under his contract was "Data Partnerships Manager" and his contract stated the claimant "may be required to undertaken other duties": clause 2. The claimant had a client-facing role. The claimant's normal place of work was specified as "at home or the London office": clause 3 of contract. The claimant's starting salary was £47,500 plus commissions. This was increased to £52,500 in July 2021, after the claimant had completed his probation. In August 2022, the first respondent agreed with the claimant to increase his salary to £55,000, to take effect in September 2022.

9. In addition, the claimant was entitled under his contract to:

   a. 25 days' holiday a year (excluding bank holidays);
   b. one month's notice of termination of contract; and
   c. expenses incurred in the course of his employment.

   The first respondent operated a pension scheme.

10. The second respondent was incorporated at Companies House on 11 November 2022. Philip Marcella is the only director listed at Companies House for the second respondent.

11. On 15 November 2022 the first respondent sent the following email to its employees (email from Philip Marcella, job title "Group CEO: Airnow plc"):

> Dear Team
>
> There has been a lot happening so an update is in order.
>
> With poor market conditions in the first 3 quarters of 2022 and the unsettled geopolitical climate we have been unable to re-list on the stock market. The delay on the listing has also resulted in a delay in closing our current funding round, which in turn means a delay in the launch of the unified platform and a gap in the funds required to support all product operations.
>
> Regretfully this means that we have to react to reflect our funding realities and restructure where necessary. With the restructure there are some unwelcome changes starting with cutting back on staff and contractors.
>
> Those of you employed by AppScatter LTD that will be leaving, will be initially informed by your manager and then you will receive a letter from Quantuma (who will be taking over as the administrators). The letter will include details and instructions on what happens next.
>
> Those of you employed by AppScatter LTD who are to remain in the group, will receive new employment contracts with a newly registered company called Airnow Apps Ltd [ie the second respondent]. The new employment contract will act as a continuous service from your original employment contract and will honour the same terms of employment.
>
> Those who are employed or contracted by a different entity that will also be leaving, will be informed by your line manager. Gabrielle will follow up with an official letter of termination and offboarding.
>
> AirNow Data has formally been closed due to a continued year of loss making and customers are shortly to be informed.
>
> MightySignal and AppMonsta will continue as will AirNow CyberSecurity and AirNow Media however, AirNow Media will be placed into a CVA (Company Voluntary Arrangement) so that historic creditors can be managed by a 3rd party while we look to build the business back up.
>
> Finally, LabCave remains unchanged.
>
> I know this may be an upsetting and worrying time for some of you and we regret that it has come to this. We do thank you for your service and continued loyalty and support to the business.

12. Also on 15 November 2022, shortly after the above email was sent, the claimant's line manager spoke to the claimant and terminated the claimant's employment

with immediate effect. About 12 employees and contractors lost their jobs. Other employees and contractors were transferred to the second respondent. Products were also transferred from the first respondent to the second respondent, including Mighty Signal, AppMonsta, and LabCave. The clients for these products have moved across from the first respondent to the second respondent. The claimant estimates that 80% to 90% of the work done currently by the second respondent was done before by the first respondent. The new respondent hired some new people in October 2023.

13. Before his dismissal, the claimant spent 60/70% of his time on the AppMonsta and Mighty Signal products, which were transferred to the second respondent, and continue in operation. The balance of the claimant's time (ie around 30/40%) was spent on the Airnow Data product, which was closed around the time of the transfer.

14. The claimant was not paid for November 2022, nor was he paid the pay increase due to come into effect in September 2022. The claimant has also discovered that, although employer and employee pensions contributions were shown on his payslips from May 2022 to October 2022, in fact no employer and employee contributions were made to his pension by the first respondent for those months. The claimant's pension provider is pursuing this matter with the Pensions Regulator.

15. The amounts owing to the claimant under his contract of employment, as at 15 November 2022, the date of termination of his employment, are shown in the table below. The figures for unpaid salary, holiday pay and commission are gross amounts.

Item	Total
Employee pension payments deducted on claimant's payslips, and not contributed to his pension: May 2022 - £273 June 2022 - £349.05 July 2022 - 222.39 August 2022 - £233.03 September 2022 - £246.88 October 2022 - £244.85	£1569.20
Employer pension contributions stated on payslips but not paid into claimant's pension: May 2022 - £273 June 2022 - £349.05 July 2022 - 222.39 August - £233.03 September - £246.88 October - £244.85	£1,569.20
Expenses	£79.80
November 2022 pay: 1st-15th November 11 working days x £211.54	£2326.94

Employer contribution for pension for November 2022	£122.43
Notice pay of 1 month, based on salary of £55,000	£4,584
Pay increase payments for September and October 2022	£416.16
Pay increase payment for November 2022	£104.04
11 days' accrued holiday: £211.54 x 11 @ 1/260th of pay according to contract	£2326.94
Commission: University of Notre Dam (Signed before redundancy) 8% of $12,000 £810	£810
Total	**£13,909 (rounded to nearest pound)**

16. The claimant received a letter from Quantuma, dated 28 November 2022, addressed "To all known creditors". This letter said as follows:

> "The directors of the [first respondent], having regard to its financial position, have decided to commence Liquidation proceedings in order that the Company should be wound up voluntarily."

Insolvency practitioners were appointed to liquidate the first respondent on 8 December 2022. The claimant has not received any sums from the insolvency practitioners.

17. As stated above, the first and second respondent did not file ET3s, nor did they attend the hearing. I find on the balance of probabilities that the transfer of employees and products from the first respondent to the second respondent occurred between 15 November 2022 (the date of Philip Marcella's email), and on or before 7 December 2022. I base that finding on (a) the email dated 15 November 2022 from Philip Marcella to the first respondent's employees, saying that products and employees would be transferred to the newly registered second respondent; and (b) the lack of any evidence indicating the decision to transfer was taken by the liquidators after their appointment on 8 December 2022. Accordingly, I find the decision to transfer was taken and implemented before the appointment of the liquidators.

18. The claimant has received payments from the Insolvency Service (letters dated 19 and 21 April 2023), relating to "former employer – AppScatter Limited", as set out in the table below.

Item	Gross	Net
Pay between 1-15 November 2022	£1386.71	£1030.08
2.45 days' holiday pay	£281.11	£220.20
Failure to give contractual notice	£571	£417.32

Total	**£2239 (sum rounded to nearest pound)**	**£1668 (sum rounded to nearest pound)**

The letters from the Insolvency Service contain a link to guidance explaining that if the claimant is owed more than the maximum the Insolvency Service can pay, the claimant can register as a creditor in the insolvency for any outstanding money he is owed. The claimant was out of work for 4 or 5 months, following his dismissal.

Legal framework – TUPE regulations

19. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (the regulations) provide protections where there has been a "relevant transfer". The definition of "relevant transfer" includes "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": reg 3(1)(a), 2(1). "Economic entity" is defined as "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary": reg 3(2). "Transferor" and "transferee" are to be construed in accordance with the definition of "relevant transfer": reg 2(1).

Transfer of liabilities under regulation 4

20. A relevant transfer does not operate to terminate the contract of employment of any person employed by the transfer 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: reg 4(1).

21. Without prejudice to para (1), but subject to para (6), and regulations 8 and 15(9), on the completion of a relevant transfer, all the transferor's rights, powers, duties and liabilities under or in connection with any such contract are transferred by virtue of regulation 4 to the transferee: reg 4(2)(a). Any act or omission before the transfer is completed, 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: reg 4(2)(b).

22. Regulation 4(3) provides that:

> 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).

23. See also the following passage in a judgment of the European Court of Justice in **P Bork International A/S (In Liquidation) v Foreningen af Arbejdsledere i Danmark** [1989] IRLR 41, at paras 17-18.

> 'The question of whether or not a contract of employment or employment relationship exists [at the date of transfer] must be assessed under national law, subject, however, to the observance of the mandatory rules of the Directive concerning the protection of workers against dismissal by reason of a transfer.
>
> It follows that workers employed by the undertaking whose contract of employment or employment relationship has been terminated with effect on a date before that of the transfer, in breach of art 4(1) of the Directive, must be considered as still employed by the undertaking on the date of the transfer with the consequence, in particular, that the obligations of an employer towards them are fully transferred from the transferor to the transferee in accordance with art 3(1) of the Directive.

24. Regulation 7(1) provides that where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the Employment Rights Act 1996 as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

25. Regulation 8 limits or excludes the effect of regulations 4 and 7(1) when the assets of the transferor are under the supervision of an insolvency practitioner: see in particular reg 8(1), 8(6), and 8(7). Regulation 8(6) refers to "insolvency proceedings which have been opened", and regulation 8(7) refers to "insolvency proceedings which have been instituted"; both refer to assets of the transferor being "under the supervision of an insolvency practitioner".

Duties to inform and consult

26. Regulation 13 imposes duties on employers to inform and consult representatives of affected employees about relevant transfers. Information must be given long enough before a relevant transfer to enable consultation to take place: reg 13(2). An "affected employee" is any employee of the transferor or transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of the relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with the transfer: reg 13(1).

27. An affected employee may bring a complaint against an employer for breach of regulation 13: reg 15(1). Where the tribunal considers a complaint against a transferor under regulation 13(1) well-founded, it may order appropriate compensation to affected employees: reg 15(8)(a). "Appropriate compensation" means such sum not exceeding 13 weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with its duty: reg 16(3). Sections 220-228 of the Employment Rights Act 1996 apply for the purposes of calculating the amount of a week's pay: reg 16(4). The statutory cap applicable to weekly compensation in November 2022 was £571. The transferee is jointly and severally liable with the transferor in respect of compensation payable under reg 15(8)(a): reg 15(9).

Conclusions

Breach of contract

28. The first respondent's failure to pay the claimant the sums set out in the table above constitutes a breach of the claimant's contract. In calculating the loss caused to the claimant by this breach, I have deducted the sums the claimant has recovered from the Insolvency Service. I set out below the compensation the claimant is entitled to for the breach of contract. This compensation is assessed on a gross basis, to reflect likely tax liabilities.

Sums owing to claimant at 15 November 2022	£13,909
Sums received by claimant from Insolvency Service	(£2239)
Loss to claimant caused by breach of contract	**£11,670**

Transfer of liabilities for breach of contract from first respondent to second respondent

29. For the reasons set out below, I find that the first respondent's liabilities to the claimant for the breach of contract transferred to the second respondent, by reason of regulations 4 and 7.

30. The effect of the regulations set out above is that there is a transfer of liabilities, in connection with the claimant's contract of employment, from the first respondent to the second respondent, if the following conditions are met:

    a. There was a relevant transfer from the first respondent to the second respondent.
    b. The sole or principal cause of the claimant's dismissal was the relevant transfer.
    c. But for that dismissal, the claimant would have been employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer.
    d. The relevant transfer occurred at a time when the assets of the transferor were not under the supervision of an insolvency practitioner.

    I shall consider these conditions in turn.

    (a) Relevant transfer from the first respondent to the second respondent

31. The definition of "relevant transfer" includes "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": reg 3(1)(a), 2(1). "Economic entity" is defined as "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary": reg 3(2).

32. In **Cheesman and ors v R Brewer Contracts Ltd** [2001] IRLR 144, the EAT set out guidelines when determining the question of whether there is an "economic entity" in existence, including that there needs to be a stable economic entity, which is an organised grouping of persons and of assets enabling (or facilitating)

the exercise of an economic activity that pursues a specific objective. The EAT stated the following principles apply to the "retention of identity" issue.

- The decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, among other things, by the fact that its operation is actually continued or resumed.
- In determining whether the conditions for the 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.
- Among the matters 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 were suspended.
- In determining whether there has been a transfer, account must be taken of, among other things, 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.
- 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.

33. I find there was a relevant transfer from the first respondent to the second respondent, for the following reasons. First, there was the transfer of an "economic entity" in this case. As set out above, "economic entity" is defined as "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary": reg 3(2). In this case, there was an organised grouping of resources which had the objective of pursuing an economic activity. Employees and contractors of the first respondent worked for the first respondent in producing and managing distinctive app-related products, such as Mighty Signal, AppMonsta, Airnow Data, and LabCave.

34. Second, the economic entity transferred from the first respondent to the second respondent retained its identity. Applying the multi-factorial approach set out in the Cheesman case, I rely on the following factors:

    a. The bulk of the employees working for the first respondent were transferred to the second respondent.
    b. The first respondent's products such as Mighty Signal, AppMonsta and LabCave were transferred to the second respondent, and continue to be offered under those names by the second respondent.
    c. Clients of those products were transferred from the first respondent to the second respondent.
    d. Approximately 80-90% of the business currently done by the second respondent was done by the first respondent. There is accordingly a strong similarity of activity between the first and second respondent.

35. I note also that Philip Marcella's email of 15 November 2022 acknowledged there would be continuity of employment for employees transferred.

b. The sole or principal cause of the claimant's dismissal was the relevant transfer.

36. I find that the sole or principal cause of the claimant's dismissal was the relevant transfer. That finding is for the following reasons.
    a. The claimant was dismissed on the same day that the transfer was announced.
    b. On a balance of probabilities, the reason for the claimant's dismissal (along with the dismissal of other employees) was to allow the transfer to proceed.
    c. Philip Marcella's email of 15 November 2022 stated the following:

> With poor market conditions in the first 3 quarters of 2022 and the unsettled geopolitical climate we have been unable to re-list on the stock market. The delay on the listing has also resulted in a delay in closing our current funding round, which in turn means a delay in the launch of the unified platform and a gap in the funds required to support all product operations.
>
> Regretfully this means that we have to react to reflect our funding realities and restructure where necessary.

However, the first respondent did not present any evidence to the tribunal about what the funding difficulties were, what the gap in funds was, or why and how those funding difficulties led to the claimant's dismissal.

c. But for that dismissal, the claimant would have been employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer.

37. The issue of assignment is a question of fact to be determined considering all the relevant circumstances. The EAT held in **Kavanagh v Coral Racing Ltd and anor** EAT 231/97 that it was not necessary for an employee to be employed full time or even substantially full time in the part transferred so long as he or she can properly be regarded as assigned to that part.

38. I find that the claimant was assigned to the organised grouping of resources or employees that was subject to the transfer. That finding is based on the operation of regulations 7(1) and 4(3), which require the position of the claimant to be considered *as if he had not been dismissed*. In this case, if the claimant had not been dismissed, the claimant would have been assigned to the part that transferred. There was no other business for the claimant to be assigned to, given that the rest of the first respondent's business was being liquidated: cf **Buchanan-Smith v Schleicher and Co International Ltd EAT** 1105/94, [1996] ICR 613, (once rest of business had closed down, applicant was necessarily assigned to part that transferred, because there was no other part for her to be assigned).

39. If I am wrong about that, I find that the claimant was assigned to the organised grouping of resources or employees that was the subject of the transfer, on the basis that the bulk of the claimant's time (about 60/70%) was spent on products which were transferred to the second respondent, namely Mighty Signal and AppMonsta.

d. The relevant transfer occurred at a time when the assets of the transferor were not under the supervision of an insolvency practitioner.

40. As set out above, I find that the relevant transfer took place before the assets of the transferor were under the supervision of an insolvency practitioner. Therefore the provisions of regulation 8 do not apply to this transfer.

Conclusions on transfer of liability for breach of contract

41. For the reasons set out above, I find that the first respondent's liability for breach of contract has transferred to the second respondent.

42. If am wrong about the analysis set out above, I find that the first respondent's liability for breach of contract has transferred to the second respondent for the following reasons. I find the first respondent's termination of the contract without notice, and failure to pay the other sums set out above, constituted a fundamental breach of the contract of employment with the claimant. However, I am not satisfied the claimant accepted this fundamental breach. The respondents did not file an ET3, attend the hearing, or make any submissions to the effect that the claimant accepted the respondent's breach. This finding means the contract of employment came to an end after a one-month notice period (measured from November 15, 2022), and therefore was subsisting at the time of transfer. See **Society General, London Branch v Geys,** [2012] UKSC 63. The first respondent's liabilities for breach of the contract of employment therefore transferred to the second respondent.

Failure to inform and consult

43. I find the claimant is an affected employee within the meaning of regulation 13(1).

44. There was a clear and serious breach of the requirements to inform and consult representatives of affected employees. The respondents made no attempt to carry out these duties, and the claimant was informed about the relevant transfer on the same day that he was dismissed. In light of the seriousness of this breach, I find it just and equitable to award the maximum amount of 13 weeks' pay as appropriate compensation. This amount is £7,423 (13 x £571).

45. The first and second respondents are jointly and severally liable to pay the appropriate compensation for breach of regulation 13, by reason of regulation 15(9).

Employment Judge Shukla
28/11/2023

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
28/11/2023

FOR THE TRIBUNALS