



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Simon Waterfall

v

**1 AP Drinks Ltd
2 Windfall Logistics Ltd
3 Wellness Capital Ltd**

PRELIMINARY HEARING

Heard at: Watford (by CVP)
On: 22 and 23 November 2023
Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: Mr Benjamin Udujie (counsel)
For the First/Third Respondent: Mr Tim Welch (counsel)
For the Second Respondent: Mr Tim Sheppard (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's contract of employment was transferred from Soda Folk Ltd to AP Drinks Ltd (now Wellness Capital Ltd) on 19 January 2023 pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006.
2. The claimant's effective date of termination of his contract of employment was 19 January 2023.
3. The claimant's claims against the second respondent are dismissed.

REASONS

Introduction

1. This public preliminary hearing was ordered by Employment Judge Quill on 22 August 2023 to determine the following issues:

- “1. Did the claimant’s contract of employment transfer to any of the respondents because of TUPE? If so, when?
2. What was the effective date of termination.
3. Were any of the complaints brought out of time, and should time be extended.
4. Should any of the complaints be dismissed as a result of the decisions on the preliminary issues.”

The evidence

2. I had witness statements and heard evidence from:
 - 2.1 The claimant.
 - 2.2 Mr Angelos Panayiotou (x 2 statements)
One statement for R1/R3 (as director and shareholder).
One statement for R2 (as director and majority shareholder)
3. I had a bundle running to 320 pages.
4. I had written closing submissions from Mr Sheppard and Mr Welch.

The law

5. TUPE Regulation 3(1)(a) provides:-
 - “(1) These regulations apply to-
 - (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;”
6. As per the IDS Employment Law handbook “Transfer of Undertakings” at 1.7:
 - “1.7 Breaking regulation 3(1)(a) down, there are four questions that must be answered in the affirmative in order for there to be a “business transfer” under the provision:
 - Was there a transfer “to another person”?
 - Did an “economic entity” transfer?
 - Did the economic entity “retain its identity” after the transfer? And
 - Was that entity “situated immediately before the transfer in the United Kingdom”?
7. “Economic entity” is defined by Regulation 3(2) as:
 - “an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary”.

8. As per the IDS Handbook at 1.32:

“The Cheesman guidelines. In Cheesman and others v R Brewer Contracts Ltd [2001] IRLR 144, EAT the EAT set out the following guidelines for tribunals when determining the question of whether there is an “economic entity” in existence:

- There needs to be a stable economic entity, which is an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity that pursues a specific objective. There will not be such an entity if its activity is limited to performing one specific works contract. It has been held that the reference to “one specific works contract” is to be restricted to a contract for building works.
- In order to be such an undertaking, it must be sufficiently structured and autonomous but will not necessarily have significant tangible or intangible assets.
- 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; and
- An activity is not of itself 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.”

9. Concerning the issue of when an economic entity retains its identity, as per the IDS handbook at 1.48:

“Introduction – the Spijkers test.

“In its view, “it is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern”. This “will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer with the same economic or similar activity”. Furthermore, in order to decide whether such retention of identity has occurred, “it is necessary to take account of all the factual circumstances of the transaction in question”, including :

- The type of business or undertaking
- The transfer or otherwise of tangible assets such as buildings and stocks
- The value of intangible assets at the date of transfer
- Whether the majority of the staff are taken over by the new 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.

However, the ECJ continued, the above are merely factors in the overall assessment and “cannot therefore be considered in isolation”. This suggests that no single factor is decisive and that not all the “criteria” listed above need to be satisfied in order for the acquired rights directive – and thus Regulation 3(1)(a) – to apply.”

10. Further, Cheesman guidelines are relevant to the identity question. These have been cited to me and are set out in the IDS Handbook at 1.50. I do not quote them all but indicate that I have taken them into account. In particular:

- 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.”

11. Dealing with interruption of activities as per the IDS Handbook at 1.56:

“Another relevant factor with regard to retention of identity mentioned by the ECJ in Spijkers... was “the duration of any interruption in [the] activities”.

12. Further, at 1.58:

“However, as the EAT pointed out in Gardner Merchant Ltd v Ryan and others EAT 1337/95, if a transfer of an undertaking is to occur despite a temporary cessation of activity, it is paramount that the business carried on after such cessation is the same as that which was carried on before.”

13. In addition, Mr Udujie submitted that minor changes in the way in which activities are carried out might not change the essential identity of the entity being transferred (Porter and another v Queens Medical Centre (Nottingham University Hospital) [1993] IRL:R 486, QBD and that an economic entity can retain its entity when it is subsumed post transfer by the transferee.

14. Regulation 4(1) TUPE preserves the contract of any employee who, on the occurrence of a relevant transfer, is “employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer”.

15. In this context, Mr Welch has cited to me an extract from the case of Botzen v Rotterdamsche Droogdok Maatschappij BV 198 83 [1985] ECR 519, [1986] 2 CMLR 50. He has submitted that:

“The Botzen test requires consideration of the contractual duties of employees and their role in the organisational framework of the putative transferor (London Borough of Hillingdon v Gormanley UK EAT/0169/14) where an employee’s time is divided between different activities within a business it points firmly away from assignment to a particular organised grouping:”

16. He then goes on to cite two cases, namely Skillbase Services Ltd v King [2004] All ER and Williams v Advance Cleaning Services Ltd & Engineering and Railway Solutions Ltd (in Liquidation) UK EAT/0938/04.
17. Lastly, both Mr Sheppard and Mr Welch have cited to me the case of Michael Peters Ltd v Fairfield and Michael Peters Group Plc [1995] IRLR 190 that it would be wrong for a tribunal faced with two connected companies to pierce the corporate veil and regard them in reality as a single economic entity.

The facts

18. The claimant was employed by Soda Folk Ltd on 2 September 2019 as Managing Director. Soda Folk Ltd manufactured, sold and distributed soft drinks. Soda Folk Ltd had two employees, the claimant and Ms Liz Jackson, Head of Consumer Service, who reported to the board.
19. Soda Folk Ltd had no premises. The claimant and Ms Jackson worked from home online. Soda Folk Ltd's business model was to outsource most functions.
20. Soda Folk Ltd was organised as follows:
 - 20.1 The products were manufactured by Hereford Contract Canning Ltd.
 - 20.2 The products were marketed by Socialgram.
 - 20.3 The products were sold by three sales representative companies.
 - 20.3.1 Brand ID sold to retail premises.
 - 20.3.2 Expert Exports sold internationally.
 - 20.3.3 Windfall Brands (Windfall Drinks Co Ltd) sold to all other outlets.
 - 20.4 Generally, the sales representative companies arranged sales with the contract between Soda Folk Ltd and the purchaser. However, on occasions, Windfall Brands would purchase stock from Soda Folk Ltd direct and then sell it on to Holland & Barratt and a wholesaler, ABRA.
 - 20.5 Most accounts and operation functions were done by AFP.
 - 20.6 The products were distributed by Boughey Distribution.
21. The claimant and Ms Jackson managed the day to day running of the business, essentially coordinating the different elements of the business. The claimant described himself as the key person responsible for delivering against the business plan and ensuring the various sub contractors were performing their contracts properly. He describes his role as follows:

- 21.1 Delivering against the broader strategy, for example new products being developed, new customers being onboarded correctly, financial reporting and sales tracking against budget, deliveries being delivered accurately and on time etc.
- 21.2 Reporting weekly key performance indicators and following up and actioning any issues, for example outstanding invoices being chased, payments made in accordance with cash flow, planned gross profit margins being achieved, production forecast planned against sales being achieved and reporting financial plans to the board to ensure the business had sufficient cash revenues.
- 22 Ms Jackson would manage projects such as new product initiatives, corporate social responsibility application and customer reviews.
- 23 In late 2022 Soda Folk Ltd lost a major investor. I had no evidence as to the impact this had on Soda Folk Ltd.'s operation and how it was performing financially at the time. However, a decision was made for Soda Folk Ltd to cease trading on 16 December 2022.
- 24 At that time there was, understandably, uncertainty as to the claimant's position. It is clear to me that he assumed he would be made redundant and, in order to claim on an insurance policy relating to a skiing holiday, he requested a document confirming his redundancy. However, it is clear to me and I find that the claimant was not made redundant at that time.
- 25 On 5 January 2023 the claimant appointed administrators for Soda Folk Ltd. The claimant's evidence is that on the same date he was informed by the administrator that Soda Folk Ltd was looking for buyers and that it was likely that he would be transferred pursuant to the TUPE Regulations. The claimant struck me as a palpably honest individual and I have no hesitation in accepting that evidence.
- 26 Around the same time, Soda Folk Ltd appointed a sales agent, Axia.
- 27 Between 5 and 15 January 2023 the claimant was asked by Axia to provide information for inclusion in a "Prepack sale" to potential buyers.
- 28 Around the middle of December 2022 Mr Panayiotou became aware that Soda Folk had ceased trading and on 8 January 2023 he was told that Soda Folk Ltd had been placed into administration.
- 29 The first respondent is the same legal entity as the third respondent. The first respondent changed its name to the third respondent on 17 March 2023. Consequently, the relevant respondent in this action remaining is Wellness Capital Ltd. As of 19 January 2023 Mr Panayiotou and Mr Adam Pritchard were directors and each was a 50% shareholder in AP Drinks Ltd.
- 30 The second respondent, Windfall Logistics Ltd, was incorporated on 20 March 2007. Mr Panayiotou and Mr Michael Sears were the directors of the company. Mr Panayiotou was the majority shareholder (75%) and Mr

Sears' company, The Windfall Drinks Company Ltd (trading as Windfall Brands), owed the other 25 %of the shares.

- 31 The second respondent had 14 staff, it purchased products and then sold them on to an established customer base making a small margin in the process. From April 2021 until October 2022 Windfall Logistics Ltd was selling Soda Folk Ltd products.
- 32 On 9 January 2023 Mr Panayiotou was introduced to the selling agents of Soda Folk Ltd, namely Axia. Mr Panayiotou was asked to sign a non-disclosure agreement and an email exchange concerning Mr Pritchard confirms that he was acting on behalf of AP Drinks Ltd at the time. Mr Panayiotou was provided with information concerning the shelf life of existing stock, a list of intangible assets, a copy of trade marks etc.
- 33 Mr Panayiotou says that after the list of the intellectual property was sent to him on 13 January he made an offer to the selling agent which was accepted. It is AP Drinks Ltd's case that this was a sale of assets and not a TUPE transfer.
- 34 I have the undated sales agreement. The claimant told me that he was told on 16 January 2023 that Soda Folk Ltd had been sold. The claimant also told me that he was informed by the administrators via telephone that they believed he ought to have transferred to the new company under TUPE. Again, I have no reason to doubt what the claimant has told me. I accept that the claimant was not told by the administrators that his employment was being terminated. It is due to this exchange that the claimant has timed his TUPE transfer as of 16 January 2023.
- 35 In actual fact, Mr Panayiotou told me that the agreement was finalised on 19 January 2023 and I have no reason to doubt him.
- 36 As will become apparent, the second respondent purchased the existing stock and some ingredients/packaging from Soda Folk Ltd. The reason that the second respondent purchased ingredients/packaging was that the second respondent was erroneously informed that the stock and ingredients/packaging were all stored together. After the sale it transpired that the finished stock was being held by the existing distributor, Boughey Distribution but that the ingredients/packaging were located with the manufacturer, Hereford Contract Canning Ltd. In his oral evidence Mr Panayiotou told me that the reason the second respondent purchased the stock was that it had the capacity to store it. The ingredients/packaging were sold to AP Drinks Ltd in about March/April 2023.
- 37 I have a copy of the undated agreement for the sale and purchase of certain assets of Soda Folk Ltd (in administration). Under the "operative provisions" section 3, the following is recorded:

"3 Sale and purchase of the assets

3.1 The Vendor shall sell and assign to AP, and AP shall purchase, such right, title and interest as the Vendor may have (if any) in and to the AP assets with effect from the completion date.

3.2 The Vendor shall sell to Windfall, and Windfall shall purchase, such right, title and interest as the Vendor may have (if any) in and to the Windfall assets with effect from the completion date.”

38 In the “Interpretation” section 1 of the agreement the following definitions are set out:

“The AP Assets means the Goodwill, the Name, the Vendor’s Intellectual Property, the content, the Domain Name(s), the Social Media Accounts, the Databases and the Commercial Records but excluding (for the avoidance of doubt) the Windfall Assets and the Retained Assets.

The Business the business of canned soft drinks supplier as carried on by the Vendor prior to the date it entered administration.

The Commercial Records VAT Records, the buying, production, promotional, sales and other commercial information used in the Business in relation to the Assets.

The Company Records the books of account and statutory documents executed by the Vendor, security documents executed by the Vendor, documents relating to the appointment of the Administrators and all records created for or in the course of the insolvency of the Vendor either by the Administrators their partners or staff or by any other person including he officers or employees of the Vendor.

The Content means the textual, visual and audio-visual content contained on the Website(s) at the sate of this Agreement, including all photographs, images, artwork, graphics, designs, drawings, logos, story content, blog content, text, typographical arrangements, and videos, in which the Vendor owns the Intellectual Property, at the date of this Agreement.

The Databases means the Vendors databases containing the details of its business-to-consumer and business-to-business customers.

The Domain Name(s) means (a) the domain names listed in Schedule 4 to this agreement, and (b) all domain names relating to the Business or Vendors Intellectual Property which the Vendor owns or uses at the date of this Agreement.

The Equipment all equipment and fixtures & fittings used by the Vendor in the Business.

The Goodwill the goodwill of the Vendor in connection with the Business, the Name and the Vendor’s Intellectual Property together with the rights for the Purchaser to represent itself as carrying on the Business in succession to the Vendor.

Intellectual Property all rights in or in relation to any and all patents, utility models, trade and service marks, rights in designs, get-up, trade,

business and domain names, copyrights, topography rights (whether registered or not and any applications to register or rights to apply for registration or renewals or extensions of any of the foregoing), right to sue for passing off, rights in inventions, Know-How, trade secrets and other confidential information, rights in databases and all other intellectual property rights of a similar or corresponding character (whether registered or not and any applications to register or rights to apply for registration or renewals or extensions of any of the foregoing) which may now or in the future subsist in any part of the world and any rights to receive any remuneration in respect of such rights.

The Name means the right to use and exploit the name “Soda Folk” and any derivation thereof, following completion.

The Retained Assets all assets not expressly sold to the purchaser pursuant to the terms of this Agreement including (but without limitation) the Company Records, the Debts, the Equipment, the Property, any other business of the Vendor and asset used by the Vendor or in which it has an interest in relation to any other business, all accepted bills or notes, cash in hand or at bank, insurance claims and any tax refunds of whatever nature due to the Vendor.

The Windfall Assets means the stock, but excluding (for the avoidance of doubt) the AP Assets and the Retained Assets.

The Stock means all finished goods, stock in trade, raw materials, consumables and spare parts owned by the Vendor in connection with the Business including without limitation the items listed in schedule 1 hereto.”

- 39 Clause 9.1 of the Agreement allowed the purchaser access to the company records and entitled the purchaser to take and retain copies of the same “in order properly to carry on the business following completion”.
- 40 Clause 11.3.2 refers to the purchaser relying on its own opinion “for purchasing the business and the assets”.
- 41 The equipment consisted of five items of computer equipment and a Chevrolet truck motor vehicle.
- 42 Also on 19 January 2023 the claimant was told by the administrator that his employment was terminated. A letter appears to have been sent by email to the claimant which states:

“You should therefore regard your contract of employment terminated with effect from 5 January 2023.”
- 43 I find that prior to that the claimant had not been informed that his contract of employment had been terminated and consequently the effective date of termination of his contract of employment was 19 January 2023.
- 44 Following the execution of the agreement the claimant was requested by Mr Panayiotou to provide information concerning what Soda Folk Ltd had done before they had purchased it and it was agreed that the claimant would be

paid a consultancy fee of £800 plus travelling expense for two days work on 24 and 26 January 2023.

- 45 Also on 25 January 2023 the claimant provided documents and invoices to Mr Panayiotou and Mr Pritchard.
- 46 Sixty days after his dismissal the claimant made a claim on income protection insurance. I place little or no reliance on the fact that the claimant remitted consultancy invoices and was not asserting that he had been TUPE transferred to AP Drinks Ltd at the time. In my judgment, the whole purpose of warning and consultation when a TUPE transfer is taking place is so that employees know where they stand. In the absence of such consultation it is understandable that an employee will react to the events as they are presented to him at the time.
- 47 On 25 January 2023 the claimant was asked to give access to Soda Folk's social media by Ms Rachel Giddings. The claimant thought she was acting as marketing and business development for the second respondent, which is hardly surprising as that is how she is described on the emails that she was using. However, Mr Panayiotou was adamant that she would have been acting on behalf of AP Drinks Ltd. Ms Giddings worked for both the second respondent and AP Drinks Ltd to promote the product through social media posts. The claimant has produced a number of undated social media posts made at around this time, one of which refers to an international food and drink event on 20 to 22 March 2023. It is hardly surprising that the second respondent was promoting the product as it had purchased the large amount of stock that it needed to sell. However, Mr Panayiotou told me that Wellness Capital Ltd took steps in generating these posts in order to maintain the value of the intellectual property that it had purchased and "make sure the brand didn't die in the eyes of the consumer".
- 48 Wellness Capital Ltd went about raising further funds and developing new flavours. Wellness Capital Ltd started producing soft drinks around July 2023. Mr Panayiotou told me that the stock that had been purchased by the second respondent had been sufficient to maintain supplies to whoever wanted to purchase it between January 2023 and production beginning in July 2023. The second respondent was selling to existing customers of Soda Folk Ltd as I was told that many contracts needed to be renegotiated due to a reluctance on the part of some purchasers to deal with a brand that had gone into administration.
- 49 Wellness Capital Ltd outsourced the production of the soft drinks to Hereford Contract Canning Ltd.
- 50 Wellness Capital Ltd outsourced the distribution to the second respondent.
- 51 Wellness Capital Ltd outsourced sales to Windfall Brands.
- 52 Windfall Capital Ltd outsourced the marketing to Ms Rachel Giddings.

- 53 The accounts/operations were undertaken in house by Mr Panayiotou and Mr Pritchard.

Conclusions

- 54 I find that on 19 August 2023 there was a transfer of AP assets from Soda Folk Ltd to AP Drinks Ltd/Wellness Capital Ltd.
- 55 I find that Soda Folk Ltd was an organised grouping of resources which had the objective of pursuing an economic activity.
- 56 I find that the central activity was the manufacture, sale and supply of soft drinks.
- 57 I find that the economic activity was achieved by outsourcing manufacture, marketing, sales, accounts and distribution.
- 58 I find that it was a stable economic entity which was structured and autonomous.
- 59 The only parts of Soda Folk Ltd's business that was not transferred to AP Drinks Ltd/Wellness Capital Ltd consisted of the retained assets and the windfall assets. The retained assets constituted five items of computer equipment and a vehicle. I find that these were peripheral aspects to the business. The windfall assets constituted primarily stock. The ingredients appear to have been acquired by the second respondent almost as an error and were quickly sold on to AP Drinks Ltd/Wellness Capital Ltd.
- 60 I find that simply purchasing some stock and ingredients did not represent the transfer of an economic entity to the second respondent. In his closing submissions Mr Udujie accepted that there had been no transfer to the second respondent. Accordingly, I find that there was no TUPE transfer of the claimant's contract of employment to the second respondent and consequently the claim must be dismissed against it.
- 61 I find that no tangible assets were transferred to AP Drinks Ltd/Wellness Capital Ltd. That the ingredients were not acquired by it appears to have been almost an error. Further, whilst no tangible company records were transferred, AP Drinks Ltd/Wellness Capital Ltd had access to the information and could make copies.
- 62 I find that the operation of manufacturing, selling and distributing soft drinks was continued from 19 January 2023. Alternatively, I find that it was resumed in or around July 2023. Whilst AP Drinks Ltd/Wellness Capital Ltd may not have manufactured and sold in its own right stock until July 2023, I find that it was nevertheless active in marketing the product from the date of acquisition with social media posts. I find that there was therefore no cessation in economic activity in that active marketing was taking place.
- 63 I find that in July 2023 Wellness Capital Ltd resumed the operation of the economic entity transferred. It outsourced the manufacture, marketing, sales and distribution of the product, just as Soda Folk Ltd had done. The

manufacturer was the same as for Soda Folk Ltd. The fact that the marketing, sales and distribution entities changes, in my judgment, is immaterial. The business of the economic entity was outsourcing certain tasks and that is what was resumed. The accounts and finance operations which hitherto had been outsourced were now done in-house by Wellness Capital Ltd. The same tasks would have needed to be done; they were just being done in-house.

- 64 I had little information as to Soda Folk Ltd's customer base compared with Wellness Capital Ltd's customer base. However reference was made by Mr Panayiotou to having to renegotiate certain contracts with Sainsburys in particular which would indicate a continuing relationship with existing customers, albeit that I acknowledge there is probably a limited pool of such customers.
- 65 I find that the claimant was assigned to the economic entity that transferred. The whole of Soda Folk Ltd's business was transferred to AP Drinks Ltd/Wellness Capital Ltd. Nothing was left. In no sense can the claimant have been assigned to the stock/ingredients/packaging or computers/car. In my judgment the fact that he was dealing with different sub-contractors to those adopted by Wellness Capital Ltd is immaterial.
- 66 Consequently, in my judgement, the claimant was transferred to AP Drinks Ltd/Wellness Capital Ltd on 19 January 2023.
- 67 By agreement, no time issues arise.

Employment Judge Alliot

Date: 19/12/2023

Sent to the parties on:

15/1/2024.

For the Tribunal Office

N Gotecha