



# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimants*

(1) Mr J Brooks  
(2) Mrs V McLaren

AND

*Respondent*

(1) K2 Thermal Imaging Limited  
t/a Halo Thermal Imaging  
(in administration)  
  
(2) Halo Imaging Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Middlesbrough

On: 13-15 March 2017

Before: Employment Judge Wade

### *Appearances*

For the Claimants: Mr A Perriman  
For the First Respondent: Mr I Dawson (Day 1 only)  
For the Second Respondent: Mr D Robinson-Young (counsel)

## JUDGMENT

- 1 The claimants' claims against the first respondent are dismissed on withdrawal before me.
- 2 The claimants' complaints against the second respondent are not well-founded and do not succeed.

## REASONS

### Introduction and Hearing

1 This is a case concerning the administration and sale of a family business in difficulties. The circumstances are very sad for the claimants, siblings in that family, who present claims of unfair dismissal said to be by reason of a transfer to the second

respondent (and if so, automatically unfair). The single liability issue for me is the principal reason for dismissal. Consequently these proceedings have incurred cost for the second respondent, the purchaser of the business out of administration. The first respondent's administrators did not consent to proceedings and there was a stay in respect of the first respondent; the claimants have not applied to the district registry for permission to proceed, and withdrew those proceedings against the first respondent before me.

### Evidence

2 The evidence that I have heard has been oral evidence from the administrator Ms Burton, and from Mr Kinneavy, present on the ground for the administration, who works subject to her supervision. I also heard from Mr Wilkinson who was the owner of the first respondent, and Mr Guerin and Mr Hall on behalf of the purchaser, the second respondent. I then heard of course from Mr Brooks and Mrs McLaren on behalf of themselves. Mr Wilkinson and Ms Burton were subject to witness orders, and I was able to discharge one order in respect of a former employee of the administrator's firm from whom it was not necessary for me to hear, given Mr Kineavy's attendance voluntarily.

3 I had a number of further witness statements, but I was able to disregard those because the parties did not consider that I would be helped by hearing from those individuals.

4 I have limited my findings to the relevant matters. I have heard a great deal more evidence than these facts relay. I indicated to the parties at the start of the hearing that I was not content to hear the single issue as a discreet preliminary issue, limiting evidence, because it was very clear from the claimants' cases that they would be asking me to make inferences about a complex chain of events including the way in which decisions were reached. Essentially they sought a finding that their dismissals were because of the transfer to the second respondent and that is sometimes a finding that is made in relation to sales by administrators. I wanted to hear that evidence fully, and for it to be tested. Having done so the necessary facts are a fraction of the material before me.

### Findings of fact

5 The second respondent was a manufacturer of helmets and cameras for the fire and safety sector. It was the phoenix out of the ashes of a family business which went into administration in 2014. The claimants are the second generation of that family business. They had previously been shareholders. Mrs McLaren was previously the managing director; Mr Brooks was the product innovator.

6 Mr Wilkinson's new company bought the business from the administrators for £30,000 in mid 2014 and the staff then employed transferred into it. That included the claimants who transferred on their then salaries. The salaries did not change over the next two years.

7 The second respondent secured some lending in late 2014 of £250,000 to support a new product: a clip-on camera for attachment to other helmets. That was launched at a show in October 2015. Sales of the heritage products continued, sales of the new product did not materialise because the price was too high, set by Mr Wilkinson and a new sales person.

8 The first respondent's overheads were typical: it had to pay salaries to eight staff; it had to pay for suppliers; it had to pay HMRC and other ancillary costs; and it had to pay down its debt from the investor. Those were the outgoings. The additional financing was secured by a debenture and covenants to a lending fund, North East Technology.

9 There was instability in the staff that were brought in in 2015 to deal with finance and sales. They left quickly. In January 2016 a new and expensive sales person was employed. In their roles the claimants did not see management accounts, but in March 2016, all was well in the relationship with Mr Wilkinson and together they were exploring the possible sale of the business to a large German competitor, or the possibility of it acting as a reseller for the products.

10 In terms of the overall health of the business, the sales to the end of May 2016 were over £500,000. On 16 May the business entered into an additional lending agreement, a facility document, which contained covenants as to profitability. Breach could result in a requirement to repay the full capital sum.

11 On the day of that facility being agreed, that is 16 May, Mr Wilkinson proposed a new contract of employment to Mr Brooks with better remuneration including a bonus scheme which anticipated achieving £1 million in sales to the year end 31 July 2016, and forecasting anticipated sales into 2016/17. Mr Brooks and Mrs McLaren had been keen to improve their remuneration.

12 On 18 May Mr Brooks sent an e-mail to the German competitor which he copied to Mrs McLaren but did not copy to Mr Wilkinson. To the uninformed and objective reader that e-mail suggested that Mr Brooks and Mrs McLaren were looking to the competitor for their own benefit and to the detriment of the second respondent.

13 On 28 May Mr Wilkinson was in further discussion with Mr Brooks about a revised sales incentive scheme and Mr Brooks had comments on his proposed new contract of employment, which also contained restrictive covenants. Mr Brooks had not yet signed it. No contract had been proposed at that stage to Mrs McLaren.

14 In June there was pressure from the lender concerning the lending covenants and the underlying profitability, and business recovery specialists were instructed. Mr Doyle, the lender's nominee director, looked at solvency and reported to the lender in relatively positive terms.

15 Also in June Mrs McLaren presented a grievance concerning her remuneration and that parts of her role were being given to others by Mr Wilkinson. There was a grievance meeting convened for 28 June using an external HR consultant, but Mr Wilkinson in the event postponed that and instead proposed redundancy to Mrs McLaren. He intended to replace her role with that of a Chief Operations Officer offering on a salary of £50,000. At that time Mr Graham in Sales was on a salary of £60,000, but due to the sales performance and a short term contract, it was not likely he was going to remain with the business for very long.

16 Mr Wilkinson suggested that Mrs McLaren take garden leave to reflect on his proposals. Mr Brooks was then certified ill with stress and presented a grievance himself around about 1 July.

17 Mrs McLaren attended a meeting on 5 July seeking clarification of her redundancy entitlement and the new role that might be available to be competed for. Mr Brooks' grievance was not progressed because he was ill, albeit there were some e-mails about it.

18 In that period Mr Wilkinson discovered the 18 May e-mail to the competitor. He took advice, considering it to be industrial espionage or similar and implicating both claimants. Despite the claimants' evidence seeking to establish the opposite, I accepted Mr Wilkinson's oral evidence that he was not aware of the email at the time (he was not copied on it), had not had a hand in drafting it, and genuinely considered it to be disloyal and contrary to the claimants' responsibilities to the first respondent.

19 On 21 July the first respondent received via the solicitors a letter demanding full repayment of the outstanding loan in the sum of £210,000, said to be payable because of breaches of the covenants of the lending facility entered into on 16 May. There was only about £40,000 of the original capital repaid by that stage.

20 On Monday, 25 July 2016 a notice of the administration was filed at court at 2:40pm in the afternoon on behalf of the lenders. That morning and by coincidence Mrs McLaren had attended the offices and had been suspended by Mr Wilkinson. Mr Brooks was sent an e-mail to the same effect also that morning. The reason for the suspensions was the email.

21 The administration that was to happen in the afternoon was entirely unknown to Mr Wilkinson when he suspended the claimants. He did know of the letter of demand, but not that the administrators were likely to be appointed or were appointed with the speed at which they were. They gained entry to the premises in the afternoon, and sought information from him.

22 By the next day they had understood that the claimants were suspended and they had been passed copies of the relevant e-mail and other e-mails that were associated with it. Mr Brooks had e-mailed a reply from his holiday seeking to deny the allegations and provide further information and explanation. That e-mail response was not given to the administrators by Mr Wilkinson.

23 At that stage there was sufficient cash in the bank to pay the July salaries on Friday, 29 July. The administrators took the decision to dismiss the claimants that week and they did not authorise payment to them of their July salaries. They did authorise those payments to other staff.

24 The administrators knew very little of the circumstances and roles of the other staff save that they were at work doing their jobs. Their rationale in dismissing the claimants was to conserve cash for the creditors and outgoings and trading at that time; they considered that the claimants would not be at work contributing. They also sought to confirm that Mr Wilkinson had taken advice about the suspensions and that was confirmed by the company's solicitors.

25 Meanwhile the agent of the administrators was preparing information for the sale as a going concern of the second respondent. Mr Wilkinson did not have sight of the advert or the information that had been prepared, but he did submit a bid by the end of that week of some £36,000 or thereabouts. That was very promptly rejected.

26 Mr Wilkinson did not take any part in the decision to dismiss the claimants. When Mr Brooks rang on Monday, 1 August to ask why his salary had not been paid he was told by Mr Wilkinson that he did not know and Mr Wilkinson had hung up. Mr Wilkinson did not know what decision had been taken at that stage. Mr Brooks later spoke to Mr Kinneavy who told him that he had been dismissed. Letters confirming that position for both Mr Brooks and Mrs McLaren were received by them the next day.

27 The advert went out the following week and a late purchaser emerged, the second respondent, or the group which had incorporated it for the purpose. By that time Mr Wilkinson thought that he had had a higher offer accepted by the agents, but that was not to be the case.

28 The second respondent made an offer of some £60,000 in very short order and the sale was completed on 9 August. All six employees that remained employed who had not had their employment terminated by the administrator transferred with the business as a going concern to the second respondent.

### The Law

29 As to the law, see the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended):

#### **Effect of relevant transfer on contracts of employment**

##### **4.—**

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(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.....

#### **Dismissal of employee because of relevant transfer**

##### **7.—**

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is the transfer.

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

(a) paragraph (1) shall not apply;

(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

30 I reminded myself that the reason for a dismissal is usually described thus: the facts known or beliefs held which cause the employer to dismiss the employee (see Abernethy v Mott, Hay and Anderson [1974] ICR 323. See also Royal Mail Group Ltd v Jhuti (EAT) [2016] ICR 1043 paras 29 to 32.

31 The authorities provided to me by the representatives or noted myself included:

Marshall v Game Retail UKEAT/0276/13;

Lister v Forth Dry Dock & Engineering Co Limited [1989] IRLR 161;

Kuzel v Roche Products [2008] EWCA Civ 380;

Honeycombe 78 Limited v Cummins & Others [1999] EAT/199;

Spaceright Europe Limited v Ballavoine & Others [2011] EWC Civ 1565;

Amacus & Others v Dynamex Friction [2008] EWCA Civ 381.

#### Discussion, further findings and conclusions

32 The critical issue for me is to determine a set of facts known or beliefs held which caused the dismissal of the claimants by the respondent, and hence the principal or sole reason. That has been acknowledged in different formulations in the cases but is essentially the same question. It is the pivotal issue between the claimants and the second respondent.

33 I have indicated that the chronology in this case is unique in my experience. This judgment is therefore highly fact sensitive. It is very common for there to be sales out of administration, and for there to be two or more transactions amounting to a transfer; it is also common for there to be wholesale dismissals of workforces by administrators. This is none of those.

34 Mr Wilkinson, when in charge of the first respondent (that is up to 2.40pm on 25 July 2016) was actively considering dismissal of the claimants because of the allegations arising out of the May e-mail. Prior to that he had been considering dismissal by way of redundancy for Mrs McLaren, but not for Mr Brooks.

35 I am very clear in my findings that he did not take the decision to dismiss the claimants or influence it in any way at all; he simply provided information to the administrators in circumstances which were difficult and uncharted for him: a compulsory administration over which he had no control and during which he could not frustrate the administrators' control. I have reached these conclusions not least because of the lack of confidence held by the administrators and their agents in Mr Wilkinson, and the consequent rejection of his offer, but also because of the clear chronology. His influence, on his own evidence and supported by the evidence of the administrators, was zero, in the circumstances he faced.

36 Mr Kinneavy, who was subject to Ms Burton's supervision of course, did take advice from the first respondent's solicitors and he took his decision with approval from Ms Burton. His knowledge when he took that dismissal decision was very limited. He knew that the claimants had not been physically present in the business for a month or so, he knew his duty was to conserve cash for the creditors and ongoing trading; he knew of the allegations, but not Mr Brooks' explanation. He was a partially informed observer when he read that May e-mail.

37 The administration report which was in the bundle at page 143 said this about the dismissal of the claimants:-

"Upon the joint administrators appointment two employees had already been suspended from their duties due to allegations of corporate espionage. This led to the joint administrators implementing the redundancy of the two employees who were given immediate notice of the termination of their employment and assisted with making claims to the Redundancy Payment Service for their entitlement to wage arrears, accrued holiday pay, redundancy pay and pay in lieu of notice. These redundancies were made on purely economic grounds. As a direct consequence of the joint administrators' appointment implementing redundancies resulted in a payroll saving of £5,489 on the July 2016 salaries".

38 The Tribunal has a difficult task. The 2006 regulations provide that liability transfers to a second respondent purchaser in these circumstances if the sole or principal reason for the dismissal is the transfer.

39 I have found that the decision was taken at the very latest on 29 July, when the payroll instruction was sent. The advert for sale of the business had not gone out, but nevertheless the first bids from connected parties (Mr Wilkinson and others) were starting to come in. The eventual transferee, the second respondent, or any potential transferee, had no bearing, or influence over the dismissals, or the administrators, at all.

40 An employer, the first respondent at this time, can always decide at any time that its need for employees to do work of a particular kind has ceased or diminished. In these circumstances Mr Kinneavy decided with approval from his supervisor the administrator, that this distressed business at that point in time, that is by the end of that first week with the pay run looming, had no need of employees to carry out work of the kind the claimants were employed to do, during an administration which would have, or was expected to have, an uncertain outcome.

41 That is the classic definition of redundancy with which the representatives will be familiar. It is often the case that administrations result in redundancy. It is very often the case that administrations and administrators carry out redundancies in what some might observe would be brutal fashion, without regard to what otherwise would be needed in terms of fair procedures. That very often happens because of the financial constraints that administrators work under, and the duties to creditors that they have to observe. For those and other reasons the Insolvency Fund is there to protect those affected in that way. It cannot of course address the brutality and distress that happens in these situations but it is there to help alleviate the financial burdens.

42 I have made findings that Mr Wilkinson was contemplating dismissal, that of itself a very unusual set of facts, but in this case more than any other I have seen, the administration was an unwelcome watershed. Mr Wilkinson had no knowledge of it, it was unexpected, and what had gone on before on my findings was largely history. There is no evidence that any purchaser, let alone this purchaser (the second

respondent) sought the dismissal of the claimants or any other staff prior to the sale. In fact the reverse is true in relation to other employees who had not been dismissed and were transferred, despite the purchaser's sense that fewer employees might ultimately be needed. Any changes took place some months later and indeed one employee, having resigned, was persuaded to come back.

43 The only reason that there was a removal of the claimants' names from a transfer schedule, was because the names had appeared in error in the first place, and the second respondent had been told that dismissals had taken place when they first sought information on staffing around 5 August.

44 I suspect that had all members of staff been dismissed by the administrators for redundancy in that first week resulting in a fire sale, rather than a short period of trading and the sale of a going concern, the claimants would not have brought these complaints. It no doubt strikes them as fundamentally unjust, with some force, that the administrators' decision that the business no longer required them was influenced by the strained circumstances, but also by the fact that they were not present when others were.

45 Sadly that does not diminish the fact that the principal reason was the decision that they were not required by the administrator to trade through the business at the time that it was subject to the administration. I appreciate they may not agree with the administrator deciding that they were not required, but it was the administrator's decision to take, given the circumstances in which the administration had arisen. Their roles were head of innovation and customer services; they had not been present for some weeks; the administrator's conclusion that its need for employees to do that work had been extinguished or reduced was rational, if harsh.

46 On these further findings and conclusions there is no transfer of liabilities from the first respondent to the second respondent in respect of the contracts of employment of either of the claimants and their claims are dismissed.

47 I have already indicated dismissal in respect of the first respondent, given the withdrawal before me of those claims, for sound reasons given the administrators' report.

EMPLOYMENT JUDGE JM WADE

JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON  
31 March 2017

JUDGMENT SENT TO THE PARTIES ON  
10 April 2017

AND ENTERED IN THE REGISTER  
M M Richardson  
FOR THE TRIBUNAL