



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr R Woodall

Rico Logistics Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING

HELD AT Birmingham **ON** 11th and 12th February 2021

EMPLOYMENT JUDGE A Richardson

Representation

For the Claimant: in person

For the Respondent: Mr B Uduje, Counsel

JUDGMENT

The judgment of the Tribunal is that

- (1) There was a transfer of an undertaking pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended from Woods (Haulage) Limited in administration to the Respondent on about 12th February 2019.
- (2) The Claimant was assigned to that part of the business of Woods (Haulage) Limited in administration which transferred to the Respondent.
- (3) Regulation 8(7) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 has no application in this case.

REASONS

The Issues

1. The issues to be determined are:
 - a. Whether the claimant has sufficient continuing service with the respondent to bring an unfair dismissal claim/ redundancy payment claim which shall include:
 - i. whether there was a TUPE transfer;
 - ii. if so, whether the claimant was assigned to the relevant part of the undertaking;
 - iii. whether regulation 8 (7) of TUPE applied?

Proceedings and evidence

2. The proceedings were conducted by the parties attending by video conference (CVP) with video access afforded to the public. It was conducted in that manner because a face-to-face hearing was not desirable in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, as amended.

3. I heard evidence from the claimant, Mr S Sharma, Global CEO of the respondent company, and Mr S Prosser who was the respondent's Group Financial Director at the relevant time. I was provided with an agreed bundle of documents exhibited as R1. The claimant relied on his response to the respondent's grounds of resistance as his witness statement and produced a further one page statement at the commencement of the hearing which was accepted into evidence.

Findings of Fact

4. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents.

5. I found generally that the witnesses were honest in their evidence and that the claimant admitted to misleading the Secretary of State in making his application for, and accepting, a redundancy payment. I found Mr Prosser's ascertainable caution to avoid saying anything that could be considered

detrimental to the respondent's case, detracted from his credibility as a witness. Mr Sharma was very a self assured, eloquent witness but at times I preferred the claimant's evidence to Mr Sharma's evidence as being closer to the truth. I did not accept any witness's evidence in its entirety. They all made their contribution to the truth.

6. My findings of fact relevant to the issues which have been determined are as follows.

6.1 The claimant was the managing director of Woods (Haulage) Limited (Woods), a family owned company based at Coleshill. The claimant's father was the majority shareholder. The claimant, a minority shareholder, was employed as managing director and his sister was the financial manager.

6.2 As the managing director, the claimant's remit was broad. He attended board meetings, and no doubt, from time to time, shareholders meetings. It is inevitable that he liaised with family members on the financial aspects of the business. He was responsible for the direction and strategy of the storage and haulage operation. Some 30 staff were employed in the business overall. The claimant was responsible for finding business, negotiation of contracts both for haulage and storage, maintenance of contracts, managing suppliers, setting and maintaining budgets, cashflow management, liaison with banks and lenders. Overall he was responsible for the operation of the business at the Coleshill site. He was assisted in the warehouse by Mr Brett Cartwright as warehouse manager. The claimant had no job description in his role as Managing Director. He did what he needed to do to run a successful business - which the family company was, up to about 2017..

6.3 In about late 2017 the respondent, an international logistics business (Rico), and Woods entered into discussions with a view to Rico purchasing the shares of Woods. The claimant's father wished to realise some cash from the sale of the business for his retirement.

6.4 Mr Sharma built a personal, friendly relationship with the claimant in the course of negotiations. Rico discovered during the course of those discussions that Woods was not as financially secure as had been initially expected. In about June 2018 the Respondent made an investment of £100,000 in Woods and acquired the option to purchase, at a future date to be agreed, the remaining shares at £275,000.

6.5 It was Rico's stated intention to assist the claimant in bringing Woods back to profitability before Rico would exercise the option to purchase the shares in Woods. The claimant alleged that after the signing of the purchase agreement Mr Sharma and Mr Prosser stated that they effectively controlled the business and would be involved in any major decision. That was disputed by Rico who claimed that they had merely 'assisted' Woods to try to achieve profitability and the claimant alone had remained in control of Woods. The claimant's contention is supported to an extent by Rico's conduct in December 2018 when The Pallet Network (TPN) suddenly and potentially catastrophically, withdrew its services from Woods. Rico was using Woods' storage facility as an overflow storage facility for some of its clients. They had £100,000 invested in the business and so it is understandable that they would act to protect their interest in Woods.

6.6 Rico immediately engaged an alternative pallet network supplier, Palletforce, to step in to fill the void left by TPN, maintaining the service to Woods' (and therefore to some of its own) customers.

6.7 Because Rico knew that Woods was financially precarious, Rico arranged direct with Palletforce for a delivery service and instead of billing Woods for the Palletforce service, it billed Woods' client's direct and paid Palletforce direct. Effectively Woods introduced and moved over its customers, such as Amtico, to Rico but still operationally serviced the contracts, picking up goods and organising transport. This continued during late December, January 2019 and up to the date of administration on 12th February 2020. The Woods' business shrank considerably turning over approximately £150,000 per month. The claimant had a hands-on role in keeping the organisation operational during January and February 2019 until the date the company entered into administration.

6.8 In February 2019 TPN filed a statutory demand which tipped Woods into administration on 12th February 2019. The administrators took control of the Woods' premises on 12th February 2019. The administrator issued redundancy letters to all staff including the claimant but the claimant was subsequently told by the administrator that he was to remain on site to assist with the transfer of clients and staff to Rico.

6.9 The claimant wanted to secure as much of Woods' business as possible to transfer to Rico to secure the jobs of the Woods' warehouse staff and drivers. There were discussions between the claimant and Mr Prosser for that purpose prior to the day of administration, although there was little documentary evidence

of what those discussions had been or what had been envisaged or agreed between them. We are left mostly with conflicting oral testimony apart from some emails.

6.10 A significant client of Woods was Redhead International, part of the DB Schenker organisation (Redhead). Rico particularly wished to secure the transfer of Woods' contract with Redhead.

6.11 On 12th February 2019 at 08.01am, Mr Prosser emailed the claimant to say:

"Hi Richard,

I think the plan for today will be that I meet with Keith and Sanj in Langley and then agree the plan.

Are you in the building today ... or have the administrators secured it?

Do the administrators want to talk to us at all (Keith mentioned they did) or are they looking for us to do it independently of them?

Regards"

The reference to 'Keith' is to Rico's Keith Whitehead who was subsequently installed at the Woods' premises to represent Rico in the transfer of Woods' staff and customers, particularly Redhead, to Rico.

6.12 At 08.23am The claimant responded to Mr Prosser:

"We are in but under administrators control.

If you want to secure Redhead then there will need to be a meeting today. Just spoken to Sam who suggested you might send Keith up as a "Director" for a meet today.

Richard"

6.13 Mr Prosser and the claimant met the administrators to discuss Rico taking over Woods in administration for a zero payment pre-pack which would facilitate the collection of Woods' debts to ease the process of administration.

6.14 There was a meeting on 12th February 2019 at Woods premises as suggested to Mr Prosser by the claimant, to arrange the transfer of the Redhead contract to Rico. Mr Prosser also met the landlord of Woods' premises.

6.15 Mr Whitehead, with a small team, was installed at Woods' premises and worked with the claimant to ensure continuity of service for any transferring customers and to ensure that stock was not confiscated by the administrators, for example the NCR stock Rico stored at Woods as an overflow from their own premises.

6.16 At the meeting on 12th February between the claimant and Mr Prosser, the transfer of a Woods warehouse manager, Brett Cartwright, warehouse operatives and drivers were discussed. The claimant was tasked with securing the warehousing facility and staff and the drivers. That task was accomplished. About 12 members of Woods' staff and drivers, excluding the claimant, were transferred to Woods, officially on 14th February 2019. I find that the transfer commenced on 12th February and completed by 14th February 2019.

6.17 At the meeting on 12th February the claimant asked Mr Prosser whether he was now working for Rico as this had not been the subject of any formal conversation. It is the claimant's evidence that Mr Prosser said '*yes of course you are*' and it is Mr Prosser's evidence that he did have a discussion with the claimant about offering him a job, but that he, personally, did not actually offer the claimant a job as he didn't have the authority to do so. Only Mr Sharma had the authority to offer the claimant employment. Nevertheless, between 12th - 14th February 2019 the claimant worked exclusively on the task of bringing across clients to Rico with the knowledge and acquiescence of Mr Prosser and Mr Sharma.

6.18 The Woods' contract with Redhead was secured for Rico. On 13th February 2019 at 13.47 the claimant emailed using his '@woodall-group.com' email address, a Mr Whiting, a senior manager at Redhead confirming: "*as discussed, we are in a position to restart as Rico on Thursday 14th March at 06.00.*" Mr Whiting responded to the claimant, copied to Mr Whitehead and Mr Prosser, thanking the Claimant for his time and effort in recovering the position so quickly and confirming what he hoped would be a positive move to Rico.

6.19 A string of emails dated 14th February 2019 between 7.34 am and 9.32am between the claimant on his @woodall email address and Mr Prosser, Mr Whitehead, Mr Sharma, and a Mr Horton at Rico show that the claimant, Mr Whitehead and Mr Prosser were working to identify and secure the clients who could come across to Rico; Mr Prosser was concerned to ensure that Palletforce were kept informed of the level of work they could expect following the transfer of business from Woods to Rico.

6.20 On 14th February 2019 at 09.14 Mr Prosser emailed the claimant copied to Mr Sharma, Mr Whitehead and another to say: "*Hi Richard, you shouldn't really be using your Woodalls email I will get an email address set up this morning...*"

I have copied in Jon Horton who will co-ordinate from a billing side with his team... but Monday afternoon seems like a good plan to run through things in Langley.” Langley was the Respondent’s premises.

6.21 Between 12th and 14th February 2019 the claimant was fully engaged in the process of transferring as many customers as possible to Rico. That was not disputed by Rico. He was instructed by Rico to bring clients across and settle them in. The claimant oversaw the arrangements and was fully involved in securing the transfer of client business from Woods to Rico where possible.

6.22 Once former clients of Woods had transferred, they were serviced by Rico who had created a Haulage Division for that purpose. This new Haulage Division comprised solely Woods’ business. The clients who transferred to Rico on 12th -14th February included significant contracts such as Redhead but also smaller contracts in value including DS Smith, Masso, Chimbali, City Gear Boxes, Solar Ceramics and a haulage contract for NCR – in total about fifteen Woods’ clients transferred to Rico; Redhead was by far the largest contract in value terms.

6.23 The claimant continued working for Rico based at Coleshill using Woods’ systems although he was given an Rico email address. There was no gap in his and his warehouse staff and drivers’ service to Woods’ customers who transferred to the Haulage Division although the claimant had received no formal job offer and no job description. He continued to work as normally as possible during this period.

6.24 During the week commencing 18th February 2019, Mr Sharma and the claimant met to discuss his employment. Mr Sharma told the claimant to settle in and that he would be provided with a contract of employment for the new Haulage Division. Rico did not have a haulage division prior to the creation of the Haulage Division. Mr Sharma informed the claimant that he was not subject to the TUPE provisions and that he should take independent legal advice. He advised the claimant not to sign the contract unless he was satisfied that TUPE did not apply. The claimant, relieved to have work and not wanting to cause any ripples with his new employer, signed the contract.

6.25 On 25th February 2019 the claimant was sent a letter from Rico’s HR department signed by the Head of Human Resources, Ms T Jump, confirming that his employment with Woods’ had transferred to Rico with effect from 14th February 2019. The respondent’s evidence during the course of the proceedings

was that this letter had been sent in error. The claimant however had accepted it at face value and although there were opportunities for Ms Jump to withdraw the letter, the claimant was never informed the letter was a 'mistake'.

6.26 On 11th March 2019 the claimant was sent a letter from the Rico HR Department, offering him employment and confirming the recent discussions between him and Mr Sharma. Attached was a document entitled "Senior Manager's Agreement – Terms and conditions of Employment". The job title was 'General Manager – Haulage Division' and it referred to "indicative duties" set out separately in a job description. No job description was provided. The commencement date of the claimant's employment was stated as 14th February 2019. The claimant was appointed General Manager of the newly created Haulage Division within Rico.

6.27 The respondent alleges that at the meeting Mr Sharma told the claimant that he had 'created' a new job for the claimant and had said to the claimant that after having settled in and learned what Rico did in terms of warehousing and the various divisions in the business, the claimant would be appointed Northern Regional Director; the northern region would include Birmingham, Manchester, Leeds and eventually Scotland. This role would be located within a subsidiary of Rico, Circle Express run by Mr Tom Ryan, the CEO.

6.28 The Claimant disputed that Circle Express and his role as Northern Regional Director was mentioned at all by Mr Sharma at this meeting in February 2019; he pointed out that there is no mention of Circle Express in the offer letter or the contract sent to him appointing him General Manager of the Haulage Division. The claimant alleged that Circle Express had been referred to for the first time in about May/June 2019 and not before. At this point, in May /June 2019, the claimant asserted he was asked to include Circle Express and an appointment as Regional Northern Director within his role. The claimant claimed that initially the Haulage Division and Circle Express were treated as two separate entities.

6.29 I preferred the evidence of the claimant. He has been consistent and clear on when Circle Express was first mentioned and his position is supported by the lack of any documentary evidence to the contrary, particularly as the offer letter of 25th March 2019 makes no mention of Circle Express. Furthermore, perusal of two Linked In profiles correspond with the claimant's chronology. There was no documentary evidence of the claimant's involvement with Circle Express until about August 2019. In August 2019 the claimant was given a 3

month probation assessment with Mr Ryan which again supports the claimant's contention that he was not given wider duties to include Circle Express until about May 2019. There is documentary evidence that the claimant was using the email sign-off of both 'Head of Haulage Division' and 'Northern Regional Director' in August 2019 but not before which supports his contention that initially they were separate roles and that the Northern Regional role was not mentioned until May/June 2019. I find therefore that the claimant worked exclusively as General Manager, Haulage Division during February, March, April 2019 until discussions were commenced in about May, June 2019 concerning his transition to the role of Northern Region Director.

6.30 In April 2019 Rico entered into a licence to occupy Woods' former premises at Coleshill as overflow storage. From the email correspondence between the claimant and Mr Ryan of Circle Express in August 2019, it can be deduced that the Haulage Division operation based at Woods' former premises at Coleshill did not vacate those premises and relocate to Rico's newly acquired site at Minworth until August 2019. The Licence to Occupy between Rico and the landlord shows the licence could be terminated at the earliest 30th August 2019. It is apparent that is what occurred.

6.31 To conclude the chronology relevant to the issues, the claimant was dismissed in November 2019.

Submissions

7. I was provided with written submissions by the respondent and I heard oral submissions from both parties. I have retained a detailed note although not necessarily a verbatim note, of the submissions and I have read and taken them into account.

8. The respondent's submissions were in essence:

- a. There was a TUPE transfer of some services previously performed by Woods (Haulage) Limited to the respondent;
- b. However, the claimant was not assigned to those contract/services immediately before the transfer, accordingly Regulation 4 of TUPE was not engaged.
- c. In the circumstances, Regulation 8(7) of TUPE does not apply.

The claimant's submissions were in essence that he ran Rico's Haulage Division which comprised only Woods' business after the administration, doing largely the same work that he had done as the Managing Director of Woods prior to Woods going into administration. He contended therefore that TUPE 2006 applied and that he had transferred as part of an economic undertaking which had retained its identity after the transfer.

The Law

9. The relevant law is:

Transfer of Undertaking (Protection of Employment) Regulations 2006

3. A relevant transfer

3.—(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

(b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

- (i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
 - (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
- (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

4. 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.

(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—

- (a) the transfer itself; or
 - (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.
- (5) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is—
- (a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or
 - (b) a reason unconnected with the transfer.

8. Insolvency

(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy, proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.

Conclusions

10. I refer first to the transfer of the former Woods' employees, about whom there is little disagreement, save that the respondent submits that the Woods' employees who transferred were exclusively assigned to the Redhead contract. The claimant disputed that assertion and said that the drivers, Mr Cartwright and the other warehouse operatives did indeed service the Redhead contract but also they processed and dealt with the contracts of other customers.

11. It was accepted by Rico in the course of proceedings that more than the Redhead contract had transferred; it appeared that Mr Sharma and Mr Prosser did not actually know how many clients had transferred to Rico. The claimant's assertion that about 15 clients were taken across to Rico was not disputed to any material degree.

12. The number of contracts which went across Woods to Rico undermines the assertion that these employees of Woods were assigned exclusively to the Redhead contract, despite the Redhead contract being the most valuable contract. In any event, Rico either actively encouraged or at the very least acquiesced in the claimant's efforts to bring across as many clients as he could persuade.

13. I find that this body of 15 clients, mainly small in value, but including the significant contract of Redhead, was capable of forming and did form an economic entity, although being only part of the former Woods' haulage and storage business. Because there were other large contracts held by Woods prior to the administration, such as Amtico who took their business away in January 2019, I find it highly unlikely that the transferring warehouse and haulage staff, a total of about 12 people, worked exclusively or even mostly, on the Redhead contract. I find it likely that Mr Cartwright as warehouse manager, and the other staff also worked on the management, administration and delivery of a storage and haulage service to other clients, and not exclusively for Redhead. The business was too small to be so compartmentalised as the respondent suggests.

14. After the transfer, that economic unit comprising a significant proportion of Woods' warehouse staff and the drivers together with assets such as the trucks, remained at Woods' premises/storage facilities at Coleshill and were used by Rico to form their newly created Haulage Division. The warehouse staff and drivers came across, continuing in their same roles within the Haulage Division working on Woods' former clients. Their willingness to transfer was confirmed by the claimant in email correspondence to Mr Prosser.

15. I find the part of the business of Woods which transferred to Rico was an economic entity which retained its identity in the Haulage Division.

16. There was therefore a relevant transfer from Woods to Rico with the TUPE Regulations under Regulation 3. There was no dispute about the warehouse staff and drivers contracts who transferred to Rico under Regulation 4 of the TUPE Regulations.

17. The question is whether the claimant transferred to Rico when Woods went into administration along with the warehouse staff and drivers. The respondent also submitted that Mr Cartwright and the warehouse staff who transferred were assigned solely to the Redhead contract and that the claimant was not. I have already rejected that contention.

18. Rico submitted that the claimant as Managing Director of Woods, had a much wider remit than merely the Redhead contract and few lower value contracts which they accept did transfer to the Haulage Division.

19. It was submitted that the claimant attended board meetings and shareholder meetings in Woods. He was responsible for profit and loss

management; the preparation of statutory accounts, management of accounts, management of human resources and health and safety, management of senior managers, managing the warehousing and associated contracts, managing suppliers and payments; management of banks, lending facilities and factoring. The respondent submitted therefore that the claimant, as Managing Director of Woods, was not assigned to the economic entity of the Redhead contract that transferred across to form the Haulage Division within Rico.

20. As a list of responsibilities for the Managing Director of a company such as Woods, I find that it is generally likely to be an accurate job description of the claimant as the most senior operational manager in the business. To what degree the claimant was responsible for management and publication of statutory accounts is not possible to determine as there was little evidence relating to the role of his sister who was purportedly head of finance in the Woods business, although apparently not the finance director.

21. The claimant submitted that what he did in the Haulage Division after transfer, was exactly what he was doing in Woods before the administration. He submitted that Rico's senior management team structure would in another business be akin to a board of directors and that his role as head of a division within Rico, in this case the Haulage Division, corresponded to a divisional managing director in another business, such as Mr Ryan in Circle Express, reporting to the global CEO.

22. The claimant draws a like-for-like comparison between his role as the managing director of Woods' and his role as general manager of the Haulage Division for which Rico did not provide a job description. The claimant's description of his role within the Haulage Division included:

- Undertaking divisional strategy
- Managing and leading the sales strategy and sales team
- Managing the team
- Customer and account management
- P&L management
- Dealing with the Treasury team at Rico to ensure divisional funding and
- payment of suppliers
- Overseeing of invoicing for Division customers
- Budgeting and forecasting
- Managing on-site IT
- Facilities management
- Managing operation systems

- On-site HR responsibilities

23. I accept this as an accurate description of what the claimant did in the Haulage division. It is not too far from the job description applied by the respondent to the claimant in his role as Managing Director of Woods. The core element of finding customers, maintaining customers and delivering a good service to customers are common features of both, without a business would quickly fail. The claimant's evidence of his role within the Haulage Division on a day to day basis was not challenged by the respondent in any material way. Rico had after all failed to give the claimant a job description and so he carried on running that surviving part of the Woods' business but within in the Haulage Division with little interference from Rico.

24. I take into account that in 2019 as the fortunes of Woods declined, and the respondent invested in the business, it is highly unlikely that the claimant spent a significant proportion of his time in board meetings and share holders' meetings and was unlikely to have spent considerable time in discussions with banks on lending facilities or the preparation for statutory accounts. In any event attending board meetings is unlikely to have taken up a significant percentage of the claimant's working hours.

25. The claimant was working to return the Woods' business to profitability. It was a family business with a very modest number of warehouse and haulage staff. The claimant says he was hands on in his management style. That was not disputed by the respondent and in fact it was that very attribute of being hands on that Rico relied on to bring across the Redhead and other contracts across to Rico. The claimant's hands on style, once TPN withdrew its services in December 2018, continued in January 2019 until the day Wood's went into administration. He was then central and instrumental in stabilising the business prior to administration and thereafter enabling a transfer of that part of the Woods' business to Rico. Rico were no doubt appreciative of the claimant's efforts in achieving that transfer. Once the Woods' contracts were transferred, the claimant continued to work as the General Manager of the Haulage Division supported by Mr Cartwright in the same way that Mr Cartwright had supported the claimant when Woods was still in business.

26. Standing back and looking at the evidence and the conduct of the parties, taking an overall assessment on the balance of probabilities, I accept find that there was no material functional change in the core of the claimant's role as General Manager in the Haulage Division and in his former position as Managing

Director of Woods, other than the relationships were, as he stated, after the transfer with other parties (in this case other Rico managers – he reported to Mr Sharma) rather than outside lenders. The fact that the claimant reported to Mr Sharma is insufficient to differentiate sufficiently the day to day tasks the claimant performed in the Haulage Division from the majority of his role at Woods.

27. In summary I find that the claimant was assigned to the relevant part of Woods which transferred as an economic entity and that he was part of the organised grouping of employees who transferred, under Regulation 3 of the TUPE Regulations 2006. The transfer occurred immediately after Wood's went into administration and as soon as the claimant commenced working to transfer business across to General Haulage, which was on 12th or 13th February 2019.

28. By law the claimant transferred on the same terms and conditions of engagement; the contract provided to the claimant on 25th March 2019 and the fact that he was paid more after the transfer, has no relevancy to the fact of a legal transfer of his employment under TUPE Regulations. Nor is it relevant that Mr Sharma told the claimant not to sign the senior manager's contract unless the claimant agreed that TUPE did not apply. The parties, as they know, cannot lawfully agree to contract out of the TUPE Regulations.

29. With regard to Regulation 8(7), a pre-pack insolvency sale is a sale organised prior to an administration of an insolvent company, with an expectation that, once appointed, the administrator will promptly implement the sale. The purpose of pre-pack administration is not to liquidate the assets of the company but to ensure sale of the business as a going concern. Although the claimant stated that he and Mr Prosser had met the administrators to discuss Rico taking over Woods in administration for a zero payment pre-pack which would facilitate the collection of Woods' debts to ease the process of administration there was no evidence of a pre-pack agreement or any other arrangement. There was no evidence of what was actually agreed with the administrator or how long they remained in the Woods' premises. Mr Sharma's evidence was clear that the respondent bought no goodwill and no assets from the administrators and yet there was clearly a transfer of part of the Woods' former haulage/storage business as a going concern to Rico. In the circumstances Regulation 8(7) has no application to an administration intended to preserve the business: **OTG Ltd v Barke [2011] IRLR 272, [2011] ICR 781, EAT and Key2Law (Surrey) LLP v De'Antiquis [2011] EWCA Civ 1567.**

30. Finally, the claimant conceded during his evidence that he had applied for and been paid redundancy and other sums despite claiming in these proceedings that he had been TUPE'd to the respondent's employment on about 14th February 2019. I heard no evidence as to when this application to the redundancy payments office was made, nor when the claimant received a redundancy payment from the redundancy payment office. I heard evidence that other members of Woods' staff who TUPE'd to the respondent had also made successful redundancy payment applications despite transferring to the respondent under the TUPE Regulations 2006 immediately after Woods went into administration. I put the parties on notice that I shall send a copy of this judgment to the Insolvency Service for the recoupment of any redundancy payments as appropriate.

Employment Judge Richardson
Signed on 15th March 2021