



EMPLOYMENT TRIBUNALS

Claimant: Mr L Hodson

Respondent: Print .Inc Group Limited

AT A PRELIMINARY HEARING

Heard at: Leeds **On:** 23rd November 2023
Before: Employment Judge Lancaster

Representation

Claimant: Mr C Allen, solicitor
Respondent: Mr A Roberts, counsel

JUDGMENT

The claim of unfair dismissal is struck out.

REASONS

1. Due to lack of time on the day, this case was adjourned part-heard for a reserved decision to be given in respect of the first two preliminary issues identified for determination by Employment Judge Ayre in her order of 14th August 2023.
 - 25.1 Decide whether the claimant was employed by Awesome Merchandise Limited immediately prior to the TUPE transfer from that company to the respondent on 24 or 25 August 2022;
 - 25.2 If so, decide whether the claimant was assigned to the organised group of resources and employees that transferred from Awesome Merchandise Limited to the respondent on 24 or 25 August 2022.
2. Any decision on the further two preliminary issues identified by Employment Judge Ayre was postponed.
 - 25.3 Decide whether the claimant's employment terminated on 22 February 2023 or some other date, or is ongoing;

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25.4 Decide whether the claimant should be allowed to amend his claim.

3. Whether the Claimant's employment terminated on 22nd February 2023, as pleaded in the Response (ET3), or at the later date of 15th August 2023, as now asserted in the draft Amended Claim (ET1), or at any point in between he would not have been employed for the two years necessary to found a claim for unfair dismissal actual or constructive - unless he can rely upon a period of continuous service with a previous employer.
4. The Claimant, as an entrepreneur, founded the business of Awesome Merchandise in 2005, and initially operated as a sole trader. Awesome Merchandise Limited (AML) was incorporated on 14th October 2009¹. On 25th August 2022 AML went into administration and under a pre-pack sale was purchased by the Respondent, a company incorporated for that purpose on 12th August 2022 with, at that stage, the Claimant as the sole director and 75 per cent shareholder. All existing employees on the payroll of AML transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as from 25th August 2022. The Claimant's case is that he too transferred.
5. Applying the approach adopted in *Michael Peters Ltd v Fairfield and Michael Peters Group plc*, the burden is therefore upon the Claimant to prove:
 1. That he was employed by the transferor; and
 2. He was assigned to the part of the undertaking which transferred.
6. Apart from a bare assertion that he believes both that he was continuously employed from 14th October 2009 and that his employment transferred, the Claimant's witness statement is conspicuously lacking in any evidence actually to support his claim to have ever been an employee of AML.
7. From the oral evidence now given and from the documents, I have however been able to establish the following facts:
 - 7.1 Immediately after the incorporation of AML the Claimant's then wife and fellow director dealt with employment matters, in which context she received legal advice. All employees therefore were issued with written contracts of employment and/or statements of employment particulars as required by Part 1 of the Employment Rights Act 1996. The Claimant never had a written contract or statement of terms and conditions.
 - 7.2 The Claimant says that he was paid by AML under the PAYE scheme until about January 2018, at which point his "salary" was some £65,000 per annum. There is no documentary evidence about this.
 - 7.3 In or about 2015 or 2016 – the Claimant is imprecise about the date and there is no documentation – Awesome Merchandise LLC ("the American Company") was incorporated in the United States, a wholly owned subsidiary of AML. In November 2017 the Claimant was granted a visa to enter the United States in order to oversee the setting up of the American Company, and he took up residence in Austin, Texas – although with no permanent right to remain -from January 2028. He kept that American

¹ The date is confirmed from the Companies' House website.

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residence right up until August 2022 and shortly beyond. It does not matter in terms of establishing who, if anyone, employed him, how often or how little he flew back to the UK.

- 7.4 On moving to Austin the Claimant was removed from the payroll of AML and from then on he was paid in dollars through the American Company with a “salary” equivalent to £150,000 per annum. Again there is no documentation to support these assertions. The Claimant certainly did not however have any written contract of employment with the American Company or with AML at this time. He remained on the payroll of the American Company until it ceased trading and all its local employees were dismissed, which was not until shortly after the sale of AML in August 2022, although he had latterly taken a “salary sacrifice” and so was receiving no income from this source.
- 7.5 In September 2019 the Claimant produced an organogram which showed himself as the CEO of Awesome Merchandising with the UK Managing Director of AML (James Lyle) and the “Director for US” (his then wife, Charlotte Hodson) reporting in to him. He was certainly not however an employee of a separate Group Company, if employed at all it must have been either by AML or by the American Company, and the organogram in itself does not indicate which it might have been.
- 7.6 As the sole director of the Respondent until his father (Will Hodson) was also appointed on 24th August 2022, the Claimant oversaw the pre-pack administration sale from AML and instructed legal advisers (Lupton Fawcett Solicitors).
- 7.7 At the first board meeting of the Respondent, which can be confidently dated to the 24th August 2022 because it was at this meeting that Will Hodson was then appointed a director, and working to an agenda prepared by Lupton Fawcett, it was resolved that the Respondent should enter into an employment contract with the Claimant, described as an item on the agenda as “approval of the Company entering into a new employment contract with Luke Hodson”, who accordingly made a duly minuted declaration of interest that he was a party to that Employment Contract.
- 7.8 That Employment Contract or Service Agreement itself, also drawn up by Lupton Fawcett and necessarily acting at that time only on the instructions of the Claimant, shows a commencement date of 2022 and makes no mention of any longer period of continuous service. The contract (which has never shown an actual start date) is alleged to have commenced on 25th August 2022, though the Claimant did not begin to be paid the agreed £150,000 per annum salary until 1st September 2022.
- 7.9 The sales agreement for the purchase of the assets of AML - to which agreement the Claimant (“The Founder”) was separately identified as a party in addition to AML in administration (“The Seller”), the administrators, the Respondent (“The Buyer”) and the American Company – expressly agreed that it constituted a relevant transfer for the purposes of TUPE and acknowledged that the obligation of the Seller to provide employee information had accordingly, so far as practicable, been complied with. The Respondent Buyer also expressly agreed to offer to re-employ upon the same terms and conditions any employees of the Seller to whom the TUPE provisions did not in fact apply. The sale did not include any assets of the American Company.
- 7.10 On 25th August 2022 the Claimant on behalf of AML wrote to all employees advising them of the TUPE transfer, but did not include himself. The employee information for

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the purposes of TUPE was taken from the AML payroll. The Claimant was not, of course, then on that payroll. In an email from Chris Atkinson, the Respondent's financial director, dated 2nd September 2022 into which the Claimant was specifically copied following his having been involved in the relevant discussions, it was confirmed that he was not on the existing payroll spreadsheet "as he wasn't previously employed in the old co", and that he would therefore need to provide starter information to get him set up on the Respondent's payroll, The Claimant never took issue with that assertion as to his employment status.

- 7.11 In fact the Claimant did then provide the necessary new starter information, including a declaration to HMRC dated 5th September 2022 that this employment starting on 1st September 2022 was his first job since 6th April.
- 7.12 The ET1 was issued on 27th March 2023 claiming unfair dismissal but with a start of employment date of 25th August 2022. It was not until 26th July 2023, after the Tribunal had issued the inevitable strike-out warning for lack of continuous service, that the Claimant through his solicitors then sought to assert for the first time that he had been part of the TUPE transfer.
8. Whilst I direct myself that the mere fact that the Claimant was a director of AML or that he had a controlling shareholding, nor that he was an entrepreneur who had built the company up do not mean that he cannot also be an employee², and whilst I must not overstate the importance of a lack of any written contract³, there must be evidence of a contractual relationship. And that contractual relationship must be with the transferor, AML immediately prior to transfer.
9. On this scant evidence provided by the Claimant he has not satisfied me that he was ever in fact an employee of AML. Immediately after incorporation of the company the only indication of a possible employment relationship is the bare assertion that he was paid PAYE, but that is by no means conclusive as it may well have been simply a tax-efficient convenience. There has been no evidence as to the Claimant being subject to any conditions or to the customary incidences of employment, such as hours or place of work, holidays or fixed levels of remuneration. There is no evidence to suggest that, absent any written terms and therefore being in an entirely separate category to all acknowledged employees, he was subject to any degree of control whatsoever. Whilst after moving to America he no doubt did work for AML in his capacity as group CEO, even within his own organogram he sat outside of the UK company which had its separate Managing Director. He was not even any longer paid through that company, and there is no evidence of any inter-company agreement with respect to his remuneration. If he was an employee at this time, and there is still no actual evidence that he was, it can, in my view, only have been of the American Company.
10. At the point of transfer the Claimant was in an entirely separate category to anybody else involved in the business. He was not at risk of redundancy, as were the employees of the American subsidiary, and nor was he ever treated as transferring together with those on the payroll of AML. Instead, he was able to negotiate for the very first time a written service agreement, properly described as a new contract of employment, with the Respondent which secured his continuing to run the business,

² Cf *Clark v Clark Construction Initiatives Ltd. and anor.* [2008] ICR 635

³ Cf *Secretary of State for Business, Enterprise and Regulatory Reform v Neufield and anor.* [2009] ICR 1183

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now only existing at all in the UK, without any need to assimilate his unique position to that of the transferring employees.

11. In the circumstances it is entirely hypothetical whether my expressed provisional view that the Claimant would, by virtue of his integral importance to the UK business going forward, have been assigned to AML, is right or wrong. He has not proved that he was even an employee of the transferor AML.
12. The Claimant does not therefore have the requisite continuous service under section 108 of the Employment Rights Act 1996, and any claim for unfair dismissal - whatever the date of termination - is struck out.

EMPLOYMENT JU DGE LANCASTER

DATE 27th November 2023

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