EMPLOYMENT TRIBUNALS

Claimant: Mr M McKenzie

Respondents:
1. Rosehill FF & E Limited
2. Rosehill Project Management Limited (in administration)

HELD AT: Manchester **ON:** 20-22 March 2018 and 23 March 2018 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Mr J Boyd, counsel
First Respondent: Mr S Lewinski, counsel
Second Respondent: Not present

JUDGMENT

The judgment of the Tribunal is that:

1. The claims against the second respondent are dismissed on withdrawal by the claimant.

2. The complaints of failure to inform and consult under the Transfer of Undertakings (Protection of Employment) Regulations 2006 against the first respondent are dismissed on withdrawal by the claimant.

3. The complaint of unfair dismissal is not well founded.

4. The complaints of breach of contract are not well founded.

5. The remedy hearing provisionally arranged for 6 July 2018 is cancelled.

REASONS

Claims and issues

1. Claims of unfair dismissal, breach of contract, failure to inform and consult pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and a claim of failure to provide a written statement of employment particulars were brought against both respondents. The second respondent had gone into administration before proceedings were begun. The proceedings against that respondent were, therefore, stayed and the claimant informed that consent of the administrators would need to be obtained if the proceedings were to continue against that respondent. By the time of the hearing, the claimant had not sought the consent of the administrators. After taking instructions, Mr Boyd, on behalf of the claimant, withdrew the complaints against the second respondent and the complaints in relation to failure to inform and consult pursuant to TUPE against the first respondent and agreed that these claims could be dismissed on withdrawal by the claimant.

2. The claims remaining against the first respondent which fell to be determined by the tribunal were complaints of unfair dismissal, breach of contract and, if another complaint was successful, the complaint of failure to provide a written statement of employment particulars.

3. The parties had not agreed a list of issue prior to the hearing. However, the respondent helpfully produced a proposed list. This was helpfully amended by Mr Lewinski after the second respondent was removed from proceedings. I suggested some amendments. For the most part, these were agreed by the representatives. Mr Lewinski considered that an issue about whether the second respondent had an economic, technical or organisational reason for the alleged dismissal entailing a change in the workforce remained relevant. I said I needed to consider this further. Having looked at the provisions of TUPE again, I remain doubtful that it would have been relevant. However, I include it in the list of issues below. In the event, because of my conclusions on other matters, it was not a live issue which needed to be decided.

4. The issues which were agreed by the parties and the judge (subject to the above caveat), were as set out in the Annex to these reasons.

5. The most significant issues to be determined can be summarised as follows:

5.1. Was there a contract between the claimant and the second respondent after 5 April 2016?

5.2. If so, was it a contract of employment?

5.3. If so, was the claimant assigned to the part of the second respondent's business which was transferred to the first respondent?

5.4. If so, was the dismissal automatically unfair under TUPE so the first respondent was liable for the unfair dismissal, any breaches of contract and the failure to provide a written statement of employment particulars?

Facts

6. The claimant and Paul Gande were shareholders of Rosehill Holdings Limited (Holdings). Holdings was the shareholder of the second respondent and Rosehill Furniture Limited (Furniture). The claimant and Paul Gande were directors for all 3 companies.

7. There were two sides of the Rosehill business – the furniture and project sides. All employees were employed by the second respondent, whether they worked in both sides of the business or only one.

8. The claimant was paid salary by the second respondent but did work for both the furniture and project sides of group businesses. I find his work was largely on the furniture side by the time Ben Etherington joined the business in October 2015. Mr Gande's evidence, which is consistent with the evidence of the respondent's witnesses, is that the claimant worked predominantly on the furniture side of the business. I prefer the evidence of Mr Gande and the respondent's witnesses to that of the claimant on this point for the reasons given in the following paragraph. Mr Gande focused more on the project side of the business.

9. Mr Gande was called to give evidence by the claimant and is a close friend of the claimant. He had no apparent motive to give evidence contrary to the claimant's interests. I accepted the evidence of the respondent's witnesses as honestly reflecting their observations at the time of the work being done by the claimant and about their knowledge of other matters. The claimant clearly had a motive for tailoring his evidence to suit his claim. Where the evidence of Mr Gande accords with that of the respondent's witnesses, but is different to the evidence of the claimant, I prefer the evidence of Mr Gande and the respondent's witnesses.

10. Some time in 2015, the claimant decided he wanted to sell his stake in the business and he had discussions with Mr Gande about selling his shares and Mr Gande becoming the sole owner of the Rosehill business.

11. In a document dated 24 August 2015, Mr Gande set out outline terms, subject to contract, by which a new company would acquire the claimant's shares. These terms included that the new company and the claimant would cooperate to structure the sale efficiently for taxation purposes. The outline terms included cash consideration for the shares, a loan to be repaid over four years and a consultancy for the claimant for four years with a payment of £10,000 per annum. The new company was also to pay for the claimant's car lease phone, private health insurance, motor insurance, motor maintenance and fuel card and make pension contributions on behalf of the claimant of £20,000 per annum. The document contained nothing about any work the claimant would be required to do for the business after the sale of his shares.

12. Solicitors drafted a share purchase agreement relating to the sale of the shares held by the claimant in Rosehill Holdings Ltd. It appears that this was drafted on 23 March 2016 and the document which was signed was the first and only draft of the

agreement, since it has draft 01 on it. It appears that the agreement was never sent back to the solicitors for amendment. Indeed, the version which was signed carried obvious parts which needed correction e.g. in the definitions section in 1.1. there is an error message in the definition of "assessment for tax". The signed copy I have been shown was witnessed by Andrew Campbell, an accountant who advised Paul Gande. The copy was also certified by Mr Campbell as a true copy of the signed original.

13. I note that Companies House did not receive notification until 11 April 2017 that the claimant had ceased to be a director of Rosehill Holdings Limited and the second respondent on 5 April 2016. The stock transfer forms for the claimant's shares and Mr Gande's shares in Rosehill Holdings Limited contained in the bundle, although dated 5 April 2016, are unsigned. From a letter dated 15 February 2018 from the claimant's solicitors to Brabners, solicitors, it appears that the claimant's name was not removed from the register of members after the date of the share purchase agreement; the claimant's solicitors, at 15 February 2018, were seeking rectification of the register to have the claimant's name removed from the register of members.

14. It appears there may potentially be litigation in other courts which involve issues relating to the transactions between the claimant, Mr Gande and the Rosehill companies. It is not necessary for the issues I need to decide that I make a finding as to whether the share purchase agreement was signed on 5 April 2016; I make no positive finding that this was the case. If this becomes an issue in any other litigation, I leave that to be decided by the appropriate court.

15. The claimant and Mr Gande proceeded on the basis that the claimant had sold his shares in Holdings in April 2016, with payments being made to the claimant from that time on.

16. Under the terms of the share purchase agreement, ENSCO 1171 Limited (which subsequently changed its name to Rosehill Furniture Group Limited) purchased the shares held by the claimant in Rosehill Holdings Limited. The consideration was stated to be the sum of £464,130: payment in cash of £167,630 and the provision of a loan facility to ENSCO 1171 Limited of £296,500. The share purchase agreement referred to a loan agreement to be made on the same date as the sale purchase agreement although, curiously, since the loan facility was given to ENSCO 1171 Limited, the definitions section defined it as an agreement between the claimant and Rosehill Holdings Limited. This perhaps was a drafting error which should have been picked up before the document was finalised. The copy of the loan facility agreement which has been produced in evidence is between the claimant and ENSCO 1171 Limited. The loan facility agreement was for £296,500.

17. The share purchase agreement contemplated the claimant entering into a service agreement with Rosehill Holdings Ltd on the same day that the share purchase agreement was signed. It did not require completion of such an agreement as a condition of completion of the share purchase agreement. No completed or even draft service agreement has been produced in evidence.

18. There is a further document dated 5 April 2016 and certified as a true copy by Mr Campbell on 28 February 2017 which is a letter from Mr Gande on behalf of Ensco

1171 Limited to the claimant and signed by Mr Gande and the claimant. This referred to the share sale and purchase agreement. Mr Gande wrote:

> "I am writing to confirm that Ensco 1171 Limited will enter into or make arrangements for Rosehill Project Management Ltd (the "Employer") to enter into an employment contract with you which will contain the following specific provisions:
>
> 1.1 You will be paid consultancy of £10,000 per annum payable in equal monthly instalments or a minimum period of four years following completion (the "consultancy period").
> 1.2 The employer will continue to pay for the Porsche Cayenne until the lease ends on 12 November 2017 for which you shall be liable to pay back £28,145 during that period for the use of the vehicle.
> 1.3 The employer will continue to pay for the vendors mobile phone, private health insurance, motor insurance and motor maintenance and to reimburse you for business expenses and mileage until the end of the vendors consultancy period.
> 1.4 During the consultancy period the purchaser will make pension contributions on behalf of the vendor of £20,000 per annum."

19. This document did not set out any obligations on the claimant in return for the various payments and benefits. It did not define the purchaser but it presumably meant the purchaser in the sale purchase agreement i.e. Ensco 1171 Limited.

20. Although this document contemplated an employment contract between the claimant and either Ensco 1171 Ltd or the second respondent being entered into, no written agreement has been produced in evidence. It appears that there was no such document.

21. When asked why the letter dated 5 April 2016 contemplated the claimant entering into an employment contract with different companies to that contemplated by the share purchase agreement, Mr Gande said he could not explain this but said that the second respondent was the only company with any money.

22. In an email dated 8 April 2016, replying to a question from a financial adviser asked to complete the paperwork for the pension contributions, the claimant said that the payments into pension were to be a company contribution and described this as "part of my share consideration exit package". In his evidence to this tribunal, the claimant said he had made a mistake in his description of the payment. However, Mr Gande agreed that the claimant had been right to describe the pension contributions as part of his share consideration exit package. I find that the claimant regarded the intended contribution to pension as part of his share consideration exit package as at 8 April 2016. This is consistent with what he wrote at the time, with Mr Gande's evidence and the original outline terms.

23. Employees in the Rosehill group were told that the claimant had left the business in April 2016. No one was told that the claimant had any kind of continuing employment or consultancy arrangement with any of the group companies.

24. The claimant attended Mr Foster's first interview for the position of Managing Director. I find, preferring the evidence of Mr Foster and Mr Gande to that of the claimant, that Mr Foster was told that the claimant had left the Rosehill business and would have no involvement in the business from that point on. I reject the evidence of the claimant that he told Mr Foster he would be taking a "back seat". If he had been taking a "back seat", rather than not being involved in the business (other than acting as a sounding board to Mr Gande in telephone calls), I consider that Mr Foster would have been made aware, as Managing Director, of what services the business could call on the claimant to perform; on the evidence of Mr Foster and Mr Gande, he was not. The claimant accepts that he had no contact with Mr Foster after the interview until Mr Foster tried to stop payments to the claimant in February 2017.

25. The claimant did not do any work at the group's business premises after April 2016. His company email address was monitored by another employee and his mail directed to appropriate people to deal with.

26. Mr Gande did not give evidence of any discussion during which they agreed who the claimant was to work for. The claimant says they agreed he would be an adviser to the second respondent for four years. I find, on a balance of probabilities, that they did not discuss who would be the claimant's employer. The documents of 5 April 2016 and prior to this vary in their identification of the intended employer in a way which suggests to me that the claimant and Mr Gande were not focused on such a detail. If there was any discussion about the claimant's future involvement with the Rosehill business, I consider it was more likely to be in terms of the claimant advising Mr Gande, without identifying in what capacity. In terms of an agreement as to what the claimant was to do, their evidence, at its best, is that they agreed the claimant should be available to discuss matters with Mr Gande as and when required. I am doubtful whether there was ever a discussion even in these terms. I consider it more likely that both the claimant and Mr Gande just assumed that they would continue talking to each other as friends and people with a stake in the business (the claimant still being owed substantial amounts for his shares, payment of which would depend on the businesses remaining viable). Had there been an intention that the claimant should be under a legal obligation to provide any particular services, I consider this would have been recorded in writing, given the context in which the agreement was said to have arisen, where other aspects of the overall share sale deal were put into writing. Mr Gande accepted in evidence that there were no fixed requirements as to what the claimant was required to do. He accepted there was no requirement setting out a minimum amount of time that the claimant was to work. Mr Gande said it was not laid out; it was "ad hoc". Mr Gande said there was an obligation on the claimant to give Mr Gande advice but he could not foresee how much this would be. Mr Gande agreed that the only aspect fixed was payment. When it was put to him that the payments of £120,000 over 4 years were just a mechanism for topping up the payment for shares, to a total of £400,000, Mr Gande replied that the agreed amount was £400,000.

27. The claimant accepted that a salary of £10,000 attracts next to no tax. Both the claimant and Mr Gande said they did not know that it was tax efficient to pay pension contributions of £20,000 per annum. I do not find it credible that, with their lengthy experience in business and as employers, the claimant and Mr Gande would not have known this. I would expect them to be familiar with the concept that payments

into a pension scheme are free of tax (subject to recent changes relating to annual and lifetime allowances).

28. I accept that the claimant and Mr Gande remained in frequent contact after 5 April 2016 and Mr Gande sought and received advice from the claimant on a variety of matters. Mr Gande said in oral evidence that he hired the claimant as an adviser to him for any potential problem that might arise. He said he had worked with the claimant for 30 years and the claimant was more like a brother. Mr Gande said he still talks to the claimant most days and uses him as a sounding board in his new business, when he needs to chat something through with someone. Mr Gande said the claimant is not employed in his new business and is not paid for the advice he gives Mr Gande.

29. I find, based on the evidence of Mr Gande and the respondent's witnesses, that the claimant was not involved in the tender process for the project side of the business after 5 April 2016. His involvement with this process ended some time earlier, with Ben Etherington dealing with this.

30. From April and May 2016, the second respondent made payments to the claimant which included £833.33 per month (equivalent to £10,000 per annum), loan repayments of £5,833.33 per month and pension contributions of £1,666,66 per month. The loan had been made to ENSCO 1171 Limited so one would have expected the repayments to come from that company. The letter dated 5 April 2016 had said the pension contributions would be paid by the purchaser i.e. ENSCO 1171 Limited. Mr Gande was in charge of the financial affairs of the Rosehill Group at this stage. It appears Mr Gande was directing all payments from the second respondent since this was the only company with any money, regardless of whether the payment was properly payable by the second respondent. Mr Gande agreed in evidence that every penny paid to the claimant for the share purchase was paid by the second respondent.

31. Payments equating to just under £10,000 per annum were made to the claimant through the second respondent's payroll from April 2016 although, given the amount paid, minimal tax was due. A P60 end of year certificate was issued to the claimant by the second respondent for the tax year ending 5 April 2017 showing total pay of £999.96 with £48 tax deducted.

32. I find, on a balance of probabilities, that the intention of the claimant and Mr Gande was that the payment of £10,000 per annum, the pension contributions and other benefits should be part of the total consideration for the sale of the claimant's shares, rather than being viewed as payment for services to be rendered after 5 April 2016. It was a tax efficient way of paying a substantial portion of the total consideration for the shares. There was an expectation that the claimant and Mr Gande would continue to have contact and Mr Gande could sound the claimant out on things but the payments and benefits were not conditional on the claimant providing any particular services. The fact that they have continued to have this relationship after the second respondent went into administration and to date, although there is no agreement between them and the claimant is not receiving any payment for this advice, supports this finding. I find, on a balance of probabilities, that advice was to be provided as an informed friend, rather than as a matter of legal obligation. The claimant clearly had an interest in knowing what was going on and

helping Mr Gande as best he could with advice, given the amount he was owed for the share sale. Had the claimant and Mr Gande been concerned to make the claimant's involvement a matter of legal obligation, I consider they would have set out the obligations in writing, as the share purchase agreement and letter of 5 April 2016 suggested they would do.

33. Mr Foster discovered the business to be in chaos shortly after he started. I accept his evidence that, when he discovered the payments being made to the claimant and asked about these, he was told by Mr Gande that these payments were part of his exit arrangements from when he sold his shares. This is consistent with what the claimant wrote in the email of 8 April 2016 and with Mr Gande's oral evidence. Mr Gande did not tell Mr Foster that the payments related to any ongoing employment relationship or consultancy agreement the claimant had with the second respondent or any other group company. The first time Mr Foster became aware that the claimant was asserting that there was an employment contract was in February 2017 when the claimant responded to notification from Mr Foster that he was intending to withdraw the phone service to the claimant and his family which the second respondent had been paying for.

34. At some point after Mr Foster became Managing Director in July 2016, Mr Gande secured investment from Mr Parr and Mr Blyth in the business. They purchased shares in the second respondent and, between them, held 60% of the shares. The remaining 40% of the shares continued to be held by Rosehill Holdings Limited, the shares in which were owned by Rosehill Furniture Group Limited (formerly ENSCO 1171 Limited). Mr Gande owned the shares in Rosehill Furniture Group Limited. I have been told that Mr Gande had acquired shares in Rosehill Furniture Group Limited in return for Rosehill Furniture Group Limited acquiring his shares in Rosehill Holdings Limited at the time the claimant sold his shares in Rosehill Holdings Limited to Rosehill Furniture Group Limited.

35. In September 2016, the business of Rosehill Furniture Limited was transferred to Rosehill Furnishings Limited, a further company formed by Mr Gande. Mr Parr and Mr Blyth owned 50% of the shares in this new company. No employees transferred to Rosehill Furnishings Limited, since those working in the furniture business had their contracts of employment with the second respondent. However, Jo Prescott and Rob Riley started working for Rosehill Furnishings Limited, who paid a fee for their services to the second respondent.

36. Mr Foster took control of the business's finances in late 2016. Due to concerns about the business's finances, in early 2017, Mr Blythe and Mr Parr asked the financial director of one of their other companies to look at the finances. They then brought in RSM Restructuring Advisory LLP (RSM). Christopher Ratten and Jeremy Woodside of RSM became the administrators when the second respondent went into administration on 28 April 2017. When RSM looked at the finances, they questioned the payments being made to the claimant.

37. Mr Foster tried to stop payments and benefits to the claimant from February 2017 but agreed to continue loan repayments and other payments and benefits after being threatened by the claimant's solicitor with the issue of a winding up petition.

38. By 10 March 2017, Mr Foster had been taking legal advice on behalf of the second respondent in relation to the payments to the claimant. The claimant's solicitor had referred to an "employment contract" in correspondence. Mr Foster did not respond that there was no employment relationship.

39. No pension contributions were made after December 2016. The last payment of £833.33 and loan repayment of £5,8333 were made in January 2017. The last payments for phones and other benefits were made in February 2017. No payments were made in March 2017.

40. On 3 April 2017, Mr Foster wrote to the claimant that there had been an "administration issue" in re-setting up the direct debit which would be rectified when Rita Boland returned to the office. After further chasing emails from the claimant, Mr Foster wrote on 13 April 2017 that he had been out of the office and would sit down with Rita to sort things out after she had a meeting with a potential new accountancy firm. It appears, in reality, that Mr Foster was stalling for time, trying to stave off the threat of a winding up petition. In evidence he said there was no money to pay the claimant. It is also apparent that, by early April, Mr Foster knew that it was likely the second respondent would go into administration and the project business would be sold by the administrators. He also knew that a new company, the directors and shareholders of which were to be Mr Parr and Mr Blyth (and, of which, he would, on 18 April, become a director), was to be formed to bid for the purchase of the assets. He could not know, with any certainty, that the bid would be successful.

41. From a document produced by the administrators, I note that there was a meeting with the bank, Mr Parr and RSM Restructuring Advisory LLP on 9 March 2017. It is recorded that Mr Parr had provided unsecured investment of around £1.5 million and had concerns around the financial viability of the second respondent. RSM were subsequently instructed by the bank to undertake an independent review of the business and reported on 10 April 2017. RSM were then formally engaged by the second respondent on 11 April 2017 to explore the potential sale of the business and assets by way of a pre-packaged administration following an Accelerated Merger and Acquisition process. The marketing process commenced on 13 April 2017. 4 interested parties came forward. The deadline for offers was 21 April 2017. The accepted offer came from the first respondent. The administrators' report records Mr Parr and Mr Blyth, described as the major creditors of the second respondent, as being the directors of the company.

42. The application to register the first respondent as a company was made on 11 April 2017 with Mr Parr and Mr Blyth as the proposed directors and shareholders. The company was formed with the intention of making an offer to purchase the business of the second respondent. The first respondent was incorporated on 12 April 2017. Mr Foster was appointed as a further director of the first respondent on 18 April 2017.

43. On 18 April 2017, Mr Foster wrote to the claimant as follows:

> "As you know, when you sold your shares in Rosehill Holdings in April 2016, it was intended that there would be a continuing consultancy arrangement put in place with Rosehill Project Management Limited (RPML). However, this was

> never formalised and it is no longer in the best interests of RPML to continue with this plan.
>
> Therefore, I am writing to confirm that any payments or benefits in relation to this planned consultancy arrangement will cease with immediate effect."

44. The letter was drafted by solicitors. The decision to send the letter was taken a few days earlier by Mr Foster and Mr Blyth, arising out of discussions with RSM and solicitors. At the time the letter was sent, Mr Foster knew that the second respondent was going into administration and a new company formed by Mr Parr and Mr Blyth had bid to purchase its business. The deadline for offers had not expired and Mr Foster did not know whether the bid from the new company would be accepted. I accept Mr Foster's evidence that he considered sending the letter was in the best interests of the second respondent; it was tying up a loose end. The second respondent could not make the payments to the claimant and the company was not getting anything out of the arrangement. He did not consider the claimant worked for the second respondent and could see no good reason to continue the payments.

45. The letter of 18 April was met with a response from the claimant's solicitor.

46. The claimant subsequently received notice, as a potential creditor, that the second respondent had gone into administration on 28 April 2017, together with information about the pre-pack sale to the first respondent. The information stated that the sale had been concluded immediately upon the appointment of the administrators on 28 April 2017.

47. Most of the employees of the second respondent, including Mr Foster, were transferred by operation of TUPE to the first respondent.

48. Jo Prescott and Rob Riley, who worked exclusively on the furniture side of the business, did not become employed by the first respondent.

49. In August 2017, the claimant received payment from the Insolvency Fund of redundancy pay based on 16 years' service and £692.31 arrears of pay, less deductions for tax and national insurance. The letter from the Insolvency Service notes that the claimant was made redundant by the second respondent on 18 April 2017. It appears from this that the Insolvency Service accepted that the claimant had been an employee of the second respondent until 18 April 2017. The claimant gave evidence that the administrators informed him that he had been made redundant and assisted him in making the claim to the Insolvency Service. I have no evidence from the administrators. I have not seen what information was given to the Insolvency Service.

Submissions

50. Mr Lewinski and Mr Boyd both produced written skeleton arguments which they supplemented with oral submissions. I do not seek to summarise these arguments but I address the principal arguments in my conclusions.

The Law

51. For a contract to be formed, there must be offer, acceptance, consideration and the intention to create legal relations.

52. Whether an individual works under a contract of employment is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

53. Only employees have the right not to be unfairly dismissed. An "employee" is defined by section 230(1) Employment Rights Act 1996 as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment" is defined as meaning a contract of service or apprenticeship.

54. The tribunal has jurisdiction under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 to consider certain complaints of breach of contract brought by an employee. The tribunal does not have jurisdiction to consider breach of contract claims brought by someone who was not an employee.

55. The Transfer of Undertakings (Protection of Employment) Regulations 2006 have, amongst other things, the effect of transferring to the transferee of a business the employment of employees employed by the transferor and assigned to the business transferred. Regulation 7(1) provides:

56. "(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer."

57. Liability for the dismissal and other employment rights will, in circumstances relevant to this case, pass to the transferor by operation of regulation 4.

58. Mr Lewinski and Mr Boyd referred me to the cases of *Kavanagh v Crystal Palace FC Ltd [2014] 139 CA* and *Spaceright Europe Ltd v Baillavoine [2012] IRLR 111 CA* as relevant to the issue of whether the transfer was the sole or principal reason for the dismissal. Given my conclusions as to the contract issue, the transfer issue did not arise. I did not consider it necessary or proportionate, to engage with the area of dispute as to whether, in the circumstances where the transfer to the first respondent was a possibility, but not a certainty, at the time of dismissal, the transfer could be said to be the sole or principal reason for the dismissal. It is not necessary, therefore, for me to say anything about the principles to be derived from these authorities.

Conclusions

59. The first issue of significance, and one which, if decided against the claimant, disposes of his whole claim, is whether, after 5 April 2016, the claimant had a contract of employment with the second respondent.

60. There was no written contract of employment. The document which the claimant's solicitors sent on 1 March 2017, in response to Mr Foster's request for a signed copy of the employment contract, was the letter of 5 April 2016. This is clearly not a contract of employment between the claimant and the second respondent. The claimant's solicitors, by their letter of 10 March 2017, were relying on this as "prima facie evidence of a contract in place and being performed" rather than as being a contract of employment. Mr Boyd, on behalf of the claimant has not sought to argue that this document, or any other document, constitutes an employment contract between the claimant and the second respondent.

61. Mr Boyd rightly points out that contracts of employment are frequently formed without there being a written document setting out the specific terms and conditions. This would be unusual, however, in a situation such as this where the employment contract is said to have come into existence in the context of transactions where other arrangements have been put in writing. It would also be unusual where other documents expressly contemplate a written employment contract being entered into; here, the share purchase agreement expressly refers to a written service agreement which should have been signed on the same date as the date of the share purchase agreement.

62. Whilst it would be unusual to have a contract of employment which was not set out in writing in such a context, it is not impossible that this should be the case.

63. I have to consider, therefore, whether there was a contract by considering whether the usual contractual ingredients are there: offer, acceptance, consideration and intention to create legal relations.

64. If there is a contract, I then have to consider whether this is a contract of employment, as opposed to some other type of contract e.g. a contract for services. This depends on applying the traditional "multifactorial" approach to that question, including considering whether there was sufficient control over the individual and whether there was mutuality of obligation.

65. In considering whether there was a contract, and, if so, a contract of employment, I must look at the picture created by the documentary evidence and the evidence of witnesses.

66. I found, on a balance of probabilities, that the intention of the claimant and Mr Gande was that the payment of £10,000 per annum, the pension contributions and other benefits was part of the total consideration for the sale of the claimant's shares, rather than being viewed as payment for services to be rendered after 5 April 2016. It was a tax efficient way of paying a substantial portion of the total consideration for the shares.

67. The earliest document, a letter dated 24 August 2015 from Mr Gande to the claimant, set out outline terms, subject to contract, by which a new company would acquire the claimant's shares. These terms included that the new company and the claimant would cooperate to structure the sale efficiently for taxation purposes. The outline terms included cash consideration for the shares, a loan to be repaid over four years and a consultancy for the claimant for four years with a payment of £10,000 per annum. The new company was also to pay for the claimant's car lease

phone, private health insurance, motor insurance, motor maintenance and fuel card and make pension contributions on behalf of the claimant of £20,000 per annum. The letter did not set out any obligations there would be on the claimant to do any work after the sale of shares. Although the transaction was stated to be conditional upon the execution of a sale and purchase agreement and obtaining of necessary approvals, it was not conditional on the claimant entering into a contract of employment. The theme of obligations from the purchaser or from the second respondent, if the purchaser arranged for a contract of employment between the claimant and the second respondent, but a lack of obligations from the claimant is continued in the letter dated 5 April 2016. The letter set out payments to be made to the claimant, and benefits to be provided under the contract to be entered into, but is silent on any obligations on the claimant.

68. The lack of any obligations on the claimant to do any work is consistent with the £10,000 per annum payment, pension contributions, and other benefits being a tax efficient way to provide part of the consideration for the sale of the claimant's shares, rather than being viewed at the time as payment for services to be rendered. This is supported by the evidence of Mr Gande in this tribunal and the email of the claimant dated 8 April 2016 in which he described the contribution to pension as "part of my share consideration exit package."

69. Although I have accepted the claimant continued to speak to Mr Gande and advise him on various matters after 5 April 2016, I have found that this was as an informed friend, used as a sounding board, rather than as a matter of legal obligation. This is supported by the fact that the claimant continues to play this role, advising Mr Gande, although Mr Gande is no longer involved in the business of the second respondent, the advice is not provided under any contractual obligation and the claimant is not paid for the advice he provides.

70. I conclude that there was no consideration in the form of services the claimant was to be obliged to provide, in return for the payments. This is sufficient to conclude, as I do, that there was no contract and no contract of employment.

71. If I had decided otherwise on the consideration point, I would have not been satisfied, on the evidence, that there had been offer and acceptance as between the second respondent and the claimant. Although documents state an intention to enter into a consultancy or employment contract, there is no consistency as to the intended contracting company. I did not accept the claimant's evidence that there had been an agreement with the second respondent. If there was any discussion with Mr Gande about the claimant giving him advice after 5 April 2016, I am not satisfied it was made clear that Mr Gande was speaking on behalf of the second respondent. It could have been on behalf of one of a number of companies or, indeed, on Mr Gande's own personal behalf. The fact that no one at the second respondent other than Mr Gande knew that the claimant's services were available to that company indicate away from an agreement with the second respondent. Indeed, there were not aware that the claimant's services were available; they were told the claimant had left the business. Mr Foster was told the claimant would play no part in the business in the future. The fact of payment by the second respondent to the claimant after 5 April 2016 is not a strong indicator of a contractual relationship between the claimant and the second respondent; the loan repayments were made to the claimant by the second respondent even though the loan had been made to

ENSCO 1171 Limited. Payment through the payroll of the second respondent is insufficient, in the light of the other circumstances, to satisfy me that the payments were made because of an employment contract between the second respondent and the claimant.

72. If I had found that there was a contract between the claimant and the second respondent, I would have concluded that it was not a contract of employment. Mutuality of obligation is wholly missing from the arrangement. I do not consider that the claimant had any legal obligation to provide advice to the second respondent. As I have previously found, the advice was provided as an informed friend, albeit one with a stake in the prosperity of the Rosehill business, rather than under a contractual obligation.

73. The element of control would not have led me to conclude there was no employment contract, if other factors had pointed to an employment contract. At the time the contract was allegedly entered into, Mr Gande was the person with effective control of the second respondent rather than Mr Foster, who became Managing Director in July 2016 i.e. after the alleged contract of employment had been formed, but who himself acted under the control of Mr Gande, until some time after Mr Blyth and Mr Parr invested in the second respondent and the interests of the majority shareholders began to diverge from those of Mr Gande. According to Mr Gande, the service was to provide advice as and when sought; the only relevant control would be Mr Gande deciding when that advice should be provided.

74. Given my conclusions that there was no contract, let alone a contract of employment between the claimant and the second respondent, the claimant's claim of unfair dismissal against the first respondent must fail. The claimant did not have the right not to be unfairly dismissed and there was no employment that could have been transferred to the first respondent by operation of TUPE, had the claimant not been dismissed.

75. The complaints of breach of contract must also fail. If there was no employment which could have been transferred under TUPE, liability for any breaches of contract by the second respondent could not pass to the first respondent. Given my conclusion that the claimant was not employed under a contract of employment, the tribunal has no jurisdiction to consider his complaints of breach of contract.

76. The complaint under section 38 Employment Act 2002 in relation to failure to provide a written statement of employment particulars is a parasitic claim which can only succeed if another complaint succeeds. In any event, the complaint would not have succeeded on its merits, since the second respondent was under no obligation to provide a statement to someone who was not an employee.

77. Given that the claimant has not succeeded in his claim of unfair dismissal, there is no award to which an uplift for failure to follow the ACAS Code of Practice on discipline and grievance could attach.

78. Although these conclusions dispose of the case, I comment briefly on what I would have found in relation to the transfer of liabilities by operation of TUPE had I found that the claimant had a contract of employment with the second respondent after 5 April 2016. I would have found that the claimant was not assigned to the

business which was transferred from the second respondent to the first respondent. The business transferred was the project management business. The claimant had no involvement in the project management business on a day to day basis. The claimant's advice to Mr Gande was not limited to the project management business; he would act as a sounding board on any matters Mr Gande wished to discuss. Mr Gande's business interests covered both the project management and furniture businesses. Since the claimant had been more involved with the furniture side of the business from, at the latest, October 2015, it is more likely that he could give more informed advice to Mr Gande about the furniture business than the project management business. Any involvement in the project management business was limited to discussing high level issues with Mr Gande. Since the claimant was not assigned to the part of the business transferred, TUPE could not apply to make his dismissal unfair and to transfer liability for his dismissal and other employment rights to the first respondent (if I had found him to be an employee of the second respondent). The complaints would, therefore, have failed, even if I had concluded that the claimant had a contract of employment with the second respondent after 5 April 2016.

79. The claimant's complaints would have failed, whether or not the transfer was the sole or principal reason for the dismissal. Given my other conclusions, I do not consider it necessary or proportionate, to engage with the area of dispute between the parties as to whether, in the circumstances where the transfer to the first respondent was a possibility, but not a certainty, at the time of dismissal, the transfer could be said to be the sole or principal reason for the dismissal.

Employment Judge Slater

Date: 23 March 2018

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
29 March 2018

FOR THE TRIBUNAL OFFICE

Annex – list of issues

1. JURISDICTION

1.1. Insofar as the Claimant was employed by any part of the Rosehill Group, did such employment end on or around 5 April 2016?

1.2. If no to 1.1, was the Claimant an employee of the Second Respondent after 5 April 2016? Did the Claimant carry out any work or perform any services for the Second Respondent after 5 April 2016?

1.3. If yes to 1.2, was the Claimant dismissed by the Second Respondent as alleged on 18 April 2017 or another date?

2. AUTOMATIC UNFAIR DISMISSAL

2.1. Was the Claimant assigned to the part of the business that transferred from the Second Respondent to the First Respondent pursuant to TUPE in April 2017?

2.2. Was the Claimant dismissed immediately prior to the transfer of the business of the Second Respondent to the First Respondent pursuant to TUPE in April 2017?

2.3. If yes to 2.1, was the transfer of the business the sole or principal reason for the alleged dismissal or was there another reason?

2.4. If the transfer of the business was the sole or principal reason for the alleged dismissal, did the Second Respondent have an economic, technical or organisational reason for the alleged dismissal entailing a change in the workforce?

2.5. If the alleged dismissal was automatically unfair, is the First Respondent liable?

2.6. If the Claimant's case is made out, how much compensation is the Claimant entitled to receive from the First Respondent? Did the Claimant take such steps as were reasonable in mitigation of any loss?

3. WRONGUL DISMISSAL/BREACH OF CONTRACT

3.1. To the extent that the Claimant is found to have been employed by the Second Respondent at the date of the alleged dismissal, was the Claimant dismissed in circumstances which breached any contract of employment?

3.2. If so, is the First Respondent liable and, if so, is it for 12 weeks' notice or the balance of a four year period (subject to the Employment Tribunal limit on the value of breach of contract claims)?

3.3. Is the First Respondent liable for arrears of pay, expenses or pension contributions and, if so, how much.

4. FAILURE TO PROVIDE SECTION 1 STATEMENT FOR WRITTEN TERMS OF EMPLOYMENT

4.1. Was there an obligation on the First Respondent or Second Respondent to give the Claimant a compliant statement of particulars of employment pursuant to section 1 of the Employment Rights Act 1996?

4.2. If yes to 5.1, did the First Respondent and/or the Second Respondent fail to provide the Claimant with a compliant statement of particulars of employment?

4.3. Is the First Respondent liable for any failure?

5. OTHER ISSUES

5.1. Should there be an uplift to reflect any failure on the part of the Second Respondent to follow the ACAS code of practice?