EMPLOYMENT TRIBUNALS

Claimant:	**Mr J Hughes**
First Respondent:	**David Wood Baking Ltd**
Second Respondent:	**Oscar Mayer Ltd t/a Rowan Food**
Heard at:	**Cardiff** **On: 20 September 2022**
Before:	**Employment Judge C Sharp (sitting alone)**

Representation:

Claimant:	Mr A Johnson (Counsel)
First Respondent:	Ms R Mellor (Counsel)
Second Respondent:	Mr D Brown (Counsel)

RESERVED JUDGMENT

The Tribunal finds that:

1. The Claimant was not part of the organised grouping of resources or employees (the economic entity) that transferred from the First Respondent to the Second Respondent on 27 November 2020;

2. The Claimant was not an affected employee for claim reference 1600249/21 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended.

REASONS

Background

1. In order to avoid confusion, Mr Hughes will be referred to as the Claimant, David Wood Baking Ltd as the First Respondent and Oscar Mayer Ltd as the Second Respondent. References to the hearing bundle is in square brackets.

2. Today's hearing is a preliminary hearing in public to determine an issue affected two cases which have not been consolidated, but are affected by the decision the Tribunal will make today. The first case, 1600249/21, is a case brought by Mr Hughes against David Wood Baking Ltd and Oscar Mayer Ltd for unfair dismissal, discrimination arising from a disability, and failure to inform and consult regarding a TUPE transfer.

3. I noted at the outset that the Claimant did not plead a claim asserting that his redundancy was due to the transfer, though his evidence in his witness statement and the submissions made on his behalf do make such an assertion. I drew this to the attention of Mr Johnson who appeared on the Claimant's behalf; his position that in essence such a claim was implicit in the Claimant's case as he had said that his redundancy was not genuine, though his primary argument was that his employment transferred as he was employed on the date of the transfer by the First Respondent. This was despite the reference to the redundancy being unfair under s98 of the Employment Rights Act 1996 in the Claimant's pleaded case. Both Ms Mellor who appeared for the First Respondent and Mr Brown who appeared for the Second Respondent objected, saying that the issue was not pleaded and their clients had not been prepared to deal with an allegation that the redundancy was due to the transfer today, and accordingly had not called witnesses or evidence that they otherwise might have done (or indeed raised a defence to such a claim in their responses). They both counselled that a finding that the transfer was the reason that the Claimant was dismissed was a matter best left to the final hearing if it was to be made at all (which it should not in their view given the lack of pleading or relevant claim).

4. My position throughout the hearing was that I was aware of the concern and the positions of the parties on the issue of whether the Claimant was dismissed due to the transfer. Rather than delay the progress of today's hearing, I considered it better to simply note the dispute, leave the parties to make of it what they wished in questioning and submissions, and to determine the matter as I considered appropriate in my decision.

5. The second case, 1802761/21 is a claim brought by the Second Respondent against the First Respondent, complaining of a failure to provide accurate employee liability information under the TUPE Regulations if the Claimant found to have transferred to Second Respondent due to the relevant transfer.

6. The brief background to this situation is that the Claimant became unwell from cancer and was absent from his job as a Stores Team Member/dispatch operative in the Flint site of the First Respondent from 3 December 2019. Unfortunately, his health did not improve, and I understand he is now receiving palliative care. A joint medical expert, Professor Dae Kim, a Consultant in Otolaryngology/Head & Neck and Thyroid Surgery qualified in both medicine and dentistry based at the Royal Marsden Hospital with over 25 years' experience, has provided an undisputed medical report regarding the Claimant's health.

7. The Flint site saw redundancies proposed and on 25 September 2020, the Claimant was given notice that he was to be made redundant with his last day of employment being 27 November 2020. The Respondents' pleaded case is that after this, from October 2020 onwards, they started to and ultimately agreed to sell the Flint site from the First Respondent to the Second Respondent, though the evidence suggests discussions began earlier than October 2020. The transfer took place on 27 November 2020. The Claimant lost his job through the earlier redundancy notice and it is the position of the Respondents that he remained the employee of only the First Respondent until his employment terminated.

Legal matters

8. Given the representatives largely agreed on the key legal principles, I consider it more useful to outline both the law and the legal arguments in one section.

9. The Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended (known as the TUPE Regulations) set out the following relevant provisions:

"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; …

(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. …

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. …

(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…

7. - (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 Employment Rights Act 1996 (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer. ...

11. —(1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a relevant transfer —

(a)in writing; or

(b)by making it available to him in a readily accessible form.

(2) In this regulation and in regulation 12 "employee liability information" means—

(a)the identity and age of the employee;

(b)those particulars of employment that an employer is obliged to give to an employee pursuant to section 1 of the 1996 Act;

(c)information of any—

(i)disciplinary procedure taken against an employee;

(ii)grievance procedure taken by an employee, within the previous two years, in circumstances where a Code of Practice issued under Part IV of the Trade Union and Labour Relations Act 1992 which relates exclusively or primarily to the resolution of disputes applies;

(d)information of any court or tribunal case, claim or action—

(i)brought by an employee against the transferor, within the previous two years;

(ii)that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and

(e)information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to regulation 5(a).

(3) Employee liability information shall contain information as at a specified date not more than fourteen days before the date on which the information is notified to the transferee.

(4) The duty to provide employee liability information in paragraph (1) shall include a duty to provide employee liability information of any person who would have been employed by the transferor and assigned to the organised grouping of resources or employees that is the subject of a relevant transfer immediately before the transfer 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.

(5) Following notification of the employee liability information in accordance with this regulation, the transferor shall notify the transferee in writing of any change in the employee liability information.

(6) A notification under this regulation shall be given not less than 28 days before the relevant transfer or, if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter.

(7) A notification under this regulation may be given—

(a)in more than one instalment;

(b)indirectly, through a third party.

13.—(1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a)the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b)the legal, economic and social implications of the transfer for any affected employees;

(c)the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d)if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact."

10. I am not required to decide whether a relevant transfer took place; it did. The parties are agreed that the Flint site of the First Respondent transferred to the Second Respondent on 27 November 2020. At the outset of the hearing, I asked whether there was any dispute about what undertaking, business or part of an undertaking or business transferred from the First Respondent to the Second Respondent. The parties confirmed that there was not as the whole site and the activities carried out on that site were transferred. In short, there was a TUPE transfer and it was of a nature covered by Regulation 3(1)(a) of the TUPE Regulations, rather than a service provision change covered by Regulation 3(1)(b). More detail is given in the findings section below.

11. The dispute between the parties that I must determine today centres on whether the Claimant was a) part of the economic entity that transferred to the Second Respondent on the basis that he was still employed by the First Respondent immediately before the TUPE transfer (as his pre-existing notice ended on the day the transfer occurred); and b) was an affected employee who should have been consulted under Regulation 13.

12. In relation to the economic entity issue, the Claimant relies on the leading case of Botzen v Rotterdamsche Droogdok Maatschappij BV [1985] ECR 519, a European decision to which I must have regard:

"the … decisive criterion regarding the transfer of employees' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organizational framework within which their employment relationship took effect… An employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive No 77/187 [see now

Directive 2001/23] by reason of a transfer within the meaning of Article 1(1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned."

13. The Claimant argues that simply being on sick leave at the time of the TUPE transfer does not mean he became somehow "*detached*" from the economic entity of which he normally would be part, and relies on the case of Fairhurst Ward Abbotts Ltd v Botes Building Ltd [2004] EWCA Civ 83 at paragraph 40:

"If the [employee] was in fact employed in that part of the undertaking for the purposes of TUPE, the fact that he was away from work because he was sick would not of itself prevent the transfer from including him. A person on sick leave, like a person on holiday, on study leave or on maternity leave, remains a person employed in the undertaking, even though he is not actually at his place of work. The question is whether he was employed in the part transferred. That is a factual matter."

14. The issue that leads the Respondents to suggest that the Claimant was not part of the economic entity is the Claimant's health; there is no dispute that contractually the Claimant was part of the economic entity or that he was employed by the First Respondent on the day of the relevant transfer. They submit that if the Tribunal finds that at the time of transfer he was permanently unfit to return to work and take part in the economic activities for which the organised grouping of resources existed to pursue, the Claimant should be excluded from the economic entity and did not transfer to the Second Respondent. As Ms Mellor put it in the oral submissions, the Respondents' case lives or dies on the point of the Claimant's health; if he was permanently detached from the economic entity, his employment did not transfer to the Second Respondent; if he remained part of the entity, it did.

15. The Respondents rely on the case of BT Managed Services Ltd v Edwards [2015] IRLR 994. This was a case about a service provision change from the Employment Appeal Tribunal where the employee was only "*on the books"* of the employer while on long-term sick leave in order to receive payment from an insurance policy. HHJ Serota QC reviewed the authorities at that time and found in paragraphs 66-69:

"66. I derived the following from the authorities. In order for an employee to be assigned to a particular grouping, within the meaning of Regulation 4(3) of TUPE, something more than a mere administrative or historical connection is required. The question of whether or not an individual is "assigned" to the organised grouping of resources or employees that is subject to the relevant transfer, will generally require some level of participation or, in the case of temporary absence, an expectation of future participation in carrying-out the relevant activities on behalf of the client, which was the principal purpose of the organised grouping. Whether an employee is assigned to a particular grouping

is a question of fact that must be determined by taking into account all relevant circumstances, none of which individually can be determinative; in particular, in the case of an employee being absent through ill-health at the date of the service provision change where he might be required to work when able to do so. Mere administrative connection of an employee to the grouping subject to the service provision change in the absence of some participation in the carrying-out of the economic activity in question, although a factor to be taken into account, cannot be determinative of whether or not for TUPE purposes the employee was assigned to the grouping at the time of the service provision change. It is not necessary to determine where the employee was assigned at the time of the service provision change if he was not assigned to the organised grouping engaged in the relevant activity and subject to the service provision change.

67. I reject the submission that the ECJ in Botzen recognised that employees who might be permanently unable to work might still be assigned to the entity subject to the service provision change. Permanent inability should be distinguished from temporary inability. … The identity of an organised grouping et cetera subject to service provision change is partly defined by the work it carries out; so, almost by definition a person who plays no part in the performance of that work cannot be a member of the group and thus is not "assigned" to the grouping.

68. This case is quite unlike any other that I have seen related to a service provision change, because the Claimant's connection with the grouping subject to the transfer was a very limited administrative connection that was not based on the present or future participation in economic activity. I reject the suggestion that the universal criterion in all cases is to determine the question of whether an employee (not in work at the time of the service provision change) is assigned to a particular grouping is to be found in the answer to the question to which grouping he could be required to work if able to do so. This criterion is useful in cases where an employee is able to return to work at the time of the service provision change or is likely to be able to do so in the foreseeable future, assuming the employee has not been transferred to other work. The principle has no resonance or applicability in a case such as the present where the employee in question is permanently unable to return to work and has and can have no further involvement in the economic activity performed by the grouping and the performance of which is its purpose. There is a clear link, as I have already observed, between the identification of the organised grouping and the question of who is assigned to that grouping. If the grouping is to be defined by reference to performance of a particular economic activity, the absence of any participation in that activity will almost, by definition, exclude persons in the position of the Claimant.

69. … Mr Edwards' case is quite different to those cases where employees have not participated in economic activity at the time of a service provision

change or indeed of any TUPE transfer who are regarded as assigned to the relevant grouping provided that there are reasonable grounds for the belief they will return to work in due course or after a temporary lay-off. Similarly, in the cases of persons on long-term sick leave or maternity leave the absence of such employees might be regarded as temporary and cannot be equated with Mr Edwards' permanent absence. …"

16. The Respondents argue that as the Claimant was unlikely to ever return to work ("*very unlikely*" according to Professor Kim) as at the date of transfer and take part in the activities of the economic entity which he was likely to be assigned if he did return, he was not actually part of the organised grouping of resources or employees that did transfer.

17. Mr Johnson points out that the *Edwards* case was given permission to appeal on the basis that the decision was inconsistent with *Botzen* and *Fairhurst Ward Abbotts Ltd,* but the matter was then settled without the appeal being heard. Mr Johnson highlighted the unusual circumstances of *Edwards* and relied on the authorities cited by HHJ Serota QC in his review in the *Edwards* case stating that if the absence from the workplace was not likely to be permanent, the Tribunal should consider the position as if the Claimant returned to work and whether on his return he would have been assigned to the economic entity. The Claimant argues that in determining this issue, the Tribunal should consider the underlying protective purpose of the Directive and the TUPE Regulations (as set out in Duncan Web Offset (Maidstone) Ltd v Cooper and others [1995] IRLR 633); the Tribunal accepts that it should bear in mind that the whole purpose of the TUPE Regulations is to protect the employment of employees when a TUPE transfer takes place. The Claimant also argues that the Tribunal should consider the issue of the Claimant's health from the perspective the facts known at the time of the TUPE transfer, and not with the benefit of hindsight where the medical evidence from Professor Kim has found that it is unlikely that the Claimant would ever return to work. Mr Johnson described Professor Kim as "*retrofitting*" what happened to the Claimant in place of an assessment of the evidence that existed at the time. It would appear that there is no authority for this specific argument, but the Claimant reiterates the protective purpose of the Regulations.

18. Mr Brown relied upon paragraph 69 (as did Ms Mellor) of the *Edwards* case and highlighted that the medical evidence showed that there were no reasonable grounds to believe as at the date of transfer that the Claimant would contribute to the economic activities in the future.

19. In relation to the "*affected employees*" point, all parties rely on the case of Unison v Somerset County Council [2010] IRLR 207, particularly paragraph 21, which makes it clear that when assessing whether an employee is affected, the Tribunal should be look at whether the employee may or will be transferred or may be affected by measures taken in connection with the transfer, rather than

more tenuous links such as the impact of the closure of part of the business, as opposed to the transfer of another part (I Lab Facilities Ltd v Metcalfe [2013] IRLR 605 cited by Mr Johnson in his skeleton argument and orally by Mr Brown). Paragraph 21 of *Unison* says:

"We conclude that the 'affected employees' are those who will be or may be transferred or whose jobs are in jeopardy by reason of the proposed transfer, or who have job applications within the organisation pending at the time of transfer. We do not think that the definition extends to the whole of the workforce, nor to everyone in the workforce who might apply for a vacancy in the part transferred at some point in the future."

20. Mr Johnson makes the point that even if the Tribunal finds that the Claimant was not part of the economic entity, this does not mean he was not an affected employee, and argues that the Claimant's job was in jeopardy due to the proposed transfer (which he argues was in contemplation at a much earlier date than the Respondents accept). In fairness, no representative took the view that the answer to the question of whether the Claimant was an affected employee was solely dependent on whether he was part of the economic entity; the tests are different, but the Respondents did think that some of my potential findings dealing with the economic entity issue might affect the answer to the affected employee issue.

21. The First Respondent's written submissions were that as the Claimant was made redundant due to a redundancy exercise prior to any agreement with the Second Respondent, he was never going to be affected by the transfer; its position was that he was redundant due to financial reasons considered prior to the transfer being contemplated and was treated the same way as the other 20 people made redundant with him – it denies any connection to the transfer. Ms Mellor in her oral submissions thought that whether the Claimant was an affected employee may be a dangerous question for me to determine today in light of the Claimant's submission that his redundancy was due to the transfer, though both she and Mr Brown noted Ms Griffith's oral evidence that the position of the employees on long-term sick leave was not specifically flagged as a problem when discussing the transfer.

22. The Second Respondent's position on the issue of whether the Claimant is an affected employee orally was that if I found that the Claimant was permanently detached from the organised grouping of resources due to his ill-health, or accepted Professor's Kim's evidence that the Claimant was "*very unlikely*" to return to work as at 27 November 2020, there was no meaningful way he was affected by the transfer. Mr Brown highlighted paragraph 16 of *I Lab*:

"(5) For the avoidance of doubt, we are not to be taken as saying that there can never be an obligation to inform and consult in relation to any employee of the transferor who is not transferred. A proposed transfer may well affect such

employees if they do some work in or for the undertaking (or part) whose transfer is proposed (albeit not 'assigned' to that part): the loss of part of their work may well affect them. But that is different from saying that they are affected simply because the transfer has left the remaining part of the undertaking less viable."

The hearing

23. Due to the state funeral of HM The Queen Elizabeth II, the hearing was reduced to only take place on 20 September 2022. I am very grateful for the efforts of Counsel for the parties to ensure that the evidence and submissions were concluded within one day. I heard oral evidence from Adam Astley (site manager First Respondent), Jamie Narramore (Payroll manager First Respondent), and Sarah Griffith (Head of People and Development Second Respondent). The Claimant was not called as his evidence was unchallenged and there were no questions for him.

24. I received skeleton arguments from the parties in advance and given reading time prior to the hearing due to its reduction in length. In addition, after the oral evidence was heard, each party was given an opportunity to amplify orally their submissions.

25. I considered the contents of the hearing bundle totalling 289 pages, which included the expert report of Professor Kim which complied with the provisions of Part 35 Civil Procedure Rules. Employment Judge K Hunt had previously given permission to the parties to rely on the report. The parties did not seek for Professor Kim to give evidence orally and accordingly I treated his report as undisputed. That did not prevent the parties from highlighting specific parts and relying on specific sections or highlighting points where Professor Kim's findings were based on limited evidence.

26. Given that there will be final hearings for each case, where those tribunals will make findings about the merits of the claims themselves, I took the view that I must be cautious when finding facts to confine myself to only finding facts that I must find in order to determine the issue before me to ensure that later tribunals are not bound by a finding that I did not need to make.

Findings of fact

27. The Claimant's role at the Flint site was to be responsible for the handling of goods coming into and out of the site, managing stock level within the factory, submitting requests for restocking and liaising with lorry drivers; this is accepted by all the parties. It is the Claimant's unchallenged contention that others in similar roles were transferred to the Second Respondent due to the TUPE transfer.

28. The unchallenged activity carried out at the Flint site was food production, specifically the manufacture of frozen and fresh food products, including ready meals, for subsequent sale within retail outlets. It is also unchallenged that the organised grouping of resources necessarily included not only the factory premises itself and the equipment within it, but also the employees engaged in all stages of the production process and ancillary activities (including, most pertinently for present purposes, those involved in handling goods coming into and going out of the factory).

29. The contract of employment before the Tribunal says that the Claimant's place of work is the Flint site, subject to a temporary mobility clause. There is no dispute that his role was to work as a stores team member/dispatch operative (there being no meaningful difference between the two terms) at the Flint site, which was a role supporting the wider economic activity at that site. There is no dispute that if the Claimant was able to work at the time of the transfer on 27 November 2020, he would have formed part of the economic entity that transferred, notwithstanding his effective date of termination on the same day due to redundancy.

30. The Claimant was diagnosed with cancer on 24 October 2019 and was absent from work from 3 December 2019. The Covid-19 pandemic from March 2020 saw the introduction of shielding and furlough. The expert medical report of Professor Kim reports that the Claimant would have been well enough to return to work by June 2020 following treatment, but as he was clinically vulnerable, he was advised to shield, and his GP continued to issue fit notes saying that he was unfit for work. Unfortunately, in October 2020 the Claimant noticed a swelling in his neck at the original site of the cancer; the medical evidence shows that the cancer had returned. Due to the original cancer treatment, the pandemic and the reoccurrence of the cancer, the Claimant never returned to work from 3 December 2019 onwards. He is now receiving palliative care. There was no challenge to the Claimant's position that he intended to return to work once fit.

31. On 9 July 2020, the First Respondent sent to employees, including the Claimant who received it on that day, a letter announcing that potentially all the jobs at the Flint site were at risk of redundancy and there would be a consultation process. There is a dispute as to whether the First Respondent was seeking to sell the site as a going concern and also when the Respondents started to negotiate the sale; the Claimant says that it was prior to 4 September 2020 when due diligence documentation was provided while the Respondents pleaded that it was in October 2020. The evidence of Mr Astley was that in late September 2020 there were discussions, but no certainty of a deal; he believed that the deal was only finalised in the days before the transfer (paragraph 26 of his statement). The Claimant was on the list of employees provided as part of the due diligence pack provided in September 2020 by Mr Narramore to the Second Respondent, but he was later instructed to remove the Claimant from

the employee liability information supplied just before the transfer, along with another employee on long-term sick leave [oral evidence].

32. On 8 September 2020, the Claimant was again signed off sick by his GP until 7 December 2020 [195].

33. On 24 September 2020, the First Respondent sent to the Claimant notice of redundancy, giving him 9 weeks' notice ending on 27 November 2020. The Claimant's evidence is that he did not receive this notice until 29 September 2020, but for the purposes of today's hearing this is not relevant – the parties accept that the effective date of termination was the date stated in the letter (and consistent with s97(1)(a) Employment Rights Act 1996) of 27 November 2020.

34. The First Respondent on 25 September 2020 told the Second Respondent that it would retain two staff on long-term sick leave and make them redundant [169]:

"Just to let you know of a late change yesterday: David Wood is now retaining these 2 staff and will make them redundant at a total cost of £24k."

35. The Claimant's position is that this email shows that the Respondents were in discussion about a TUPE transfer and had agreed he and one other would be excluded. He suggests that this is evidence of a decision to make him redundant due to the TUPE transfer. Ms Griffith's oral evidence was that the issue of the two employees on long-term sick leave was not flagged as an issue and she is unable to assist why the First Respondent sent the email to her.

36. On 10 November 2020, it was announced that the First Respondent would be selling the Flint site to the Second Respondent [178]. On 26 November 2020, the First Respondent sent to the Second Respondent the employee liability information in a spreadsheet required under the TUPE Regulations, which included four employees in the same role as the Claimant (described previously as a dispatch operative). Mr Narramore's evidence was that it was sent on 23 November 2020 (a disputed date), but critically he accepts that the Claimant was not in this spreadsheet as he was removed on the instructions on those superior to Mr Narramore.

37. On 27 November 2020, the TUPE transfer from the First to the Second Respondent took place; the whole Flint site transferred. Production by the First Respondent ceased on 25 November 2020 in expectation of the transfer. The Claimant did not transfer but was made redundant.

38. Turning the critical issue of the Claimant's health, I consider that I must accept the evidence of the expert witness, Professor Kim. His evidence is based on a review of the documents provided to him by the parties and a virtual

consultation with the Claimant. He practices in a relevant field of medicine. Professor Kim has noted the limited amount of clinical evidence provided to him (which is not satisfactorily explained in my view; the Welsh NHS does keep records) and did not simply passively accept what he was given; he asked to meet the Claimant due to the limitations of what had been provided to him. Professor Kim's report complies with Part 35 of the CPR. Critically, his evidence was unchallenged. The parties agreed that he did not attend today as there were no questions for him; I was therefore surprised to hear Mr Johnson's submissions criticising Professor Kim's evidence as "*retrofitted*".

39. Professor Kim was asked direct questions by the parties, including critically his views regarding the Claimant's health as at the date of the transfer. Professor Kim in my view gave clear responses:

    [266] "*Although the precise physical or psychological condition of the claimant at 27th November 2020 is uncertain due to lack of available clinical notes, if he had not been able to return to work due to effects of illness/treatment or the need to shield up to 27th November 2020, it is very unlikely he would have been able to return to work for a considerable time after 27th November 2020 because the claimant needed to undergo further more extensive and debilitating treatment for recurrence of his cancer diagnosed earlier that month (symptom started early October and diagnosed 23/11/2020: see explanation below).*"

    [267] "*Although the relevant clinical documentation is not available, it is likely that the claimant had recently been diagnosed (symptom started early October and diagnosed 23/11/2020) with recurrence of his cancer and required further extensive treatment. The success of the latter would normally be less favourable than the initial treatment (as evidenced by his subsequent adverse clinical progress (see below*)."

    [267] "*Sadly, due to the recurrence of the claimant's cancer in October 2020, and also taking into consideration the prior reasons (physical effects from treatment and covid-shielding) for his inability to return to work up to 27th November 2020, his prospect of return to work was very unlikely in and after 27th November 2020. Currently (May 2022), Mr Hughes is receiving palliative immunotherapy treatment for persistent cancer, and it is not likely he will be able to return to work indefinitely."*

40. I accept entirely Professor Kim's evidence and find that what he is saying, based on the evidence before him and inferences drawn from his specialist knowledge including good medical practice, is that the Claimant was told on or around 23 November 2020 that his cancer had returned and medically speaking at that point, his prognosis was poor as treatment received after the initial bout tends to be less successful. This is not in my view "*retrofitting*" the evidence as suggested by Mr Johnson but is an analysis of the position as at

27 November 2020 based on the evidence before the expert witness. I also accept Professor Kim's finding that it was very unlikely that the Claimant could have returned to work at all after 23 November 2020. I accept for the avoidance of doubt that the Claimant's intentions were to fight his cancer and return to work when he was fit, but this desire is not relevant to his actual health status at the time of the transfer.

Conclusions

Was the Claimant part of the economic entity that transferred?

41. As Ms Mellor submitted, if it was not for the issue of the Claimant's health, I would be bound to find that the Claimant was part of the economic entity that transferred, despite his redundancy on the same day, as no time was placed on when the transfer concluded or his dismissal. The Claimant would have been employed immediately before the transfer in the economic entity. The question I have to determine that may break the Claimant's link to the transferring economic entity arises from his health.

42. Was the Claimant's ill-health was so poor as at the date of transfer that he had become detached from the economic entity before the transfer? I consider that I am bound by the *Edwards* case. It is a decision of the Employment Appeal Tribunal and binds all employment tribunals, whether or not I consider it to be correct. That said, it may be possible to distinguish the *Edwards* case from the Claimant's case. Having considered carefully the facts of the Claimant's case and *Edwards*, I consider the Claimant's case to be on "*all fours*" with *Edwards*. I do not consider the issue of PHI to be relevant; what is relevant is whether the Claimant's ill-health at the date of transfer was so poor that there are no reasonable grounds for a belief that he would return to work in due course.

43. I find that the Claimant's health was of such a nature that he became detached from the economic entity. First, while he seemed to have recovered from his initial bout of cancer, he was still not fit to work due to the Covid pandemic as a result of his cancer and his GP signed him off work. The obvious conclusion from the evidence before me is that it was the need to shield due to the impaired immune system following treatment. The Claimant then suffered a reoccurrence of his cancer in October 2020 and was diagnosed with this on or around 23 November 2020. I accept that it was possible that he could have recovered well, but the evidence of Professor Kim, which I accept, is that this was unlikely as later treatment tends to be less successful. As of 27 November 2020, the Claimant had been absent from work for virtually a full year. The expert medical evidence is that the Claimant was very unlikely to return to work. I do not consider that *Edwards* requires me to be certain that the Claimant could not return to work; what it requires reasonable grounds for a belief that he will. The medical evidence does not provide reasonable grounds for a belief; the Claimant I accept had such a desire, but this is not a reasonable ground for a

belief that he will be able to return. The evidence before me is that there was no reasonable grounds to believe as at 27 November 2020 the Claimant was likely to contribute to the economic activities of the organised grouping in the future, and on the contrary, as has sadly proven to be the case, it was very unlikely that he would.

44. I have noted that the Claimant asserts that his dismissal was due to the proposed transfer. I will not deal with such an argument. It was not raised in the pleadings or in the substantial case management hearing I conducted in September 2021. The Claimant has been legally represented throughout and the assertion has never been made prior to the preparations of the submissions of this hearing. It is not fair for the Respondents to be suddenly expected to deal with such a major allegation; it would also be a matter best dealt with a final merits hearings. However, I do not consider the contention to over-ride my finding that the Claimant's ill-health has permanently detached him from the economic entity.

Case reference: 1802761/21

45. There is a claim between the two Respondents where the Second Respondent has issued a claim against the First Respondent in respect of the employee liability information provided (case number 1802761/21; Regulation 11). This claim turns on whether the Claimant was a person assigned to the organised grouping of resources of employees that is the subject of a relevant transfer. Given my finding above that he was detached from the organised grouping, I consider it likely that this claim is effectively concluded. I will deal in the accompanying order with the next steps.

Was the Claimant an affected employee?

46. Turning to the issue of whether the Claimant was an affected employee, this is only relevant to the claim brought by the Claimant, not the claim between the two Respondents. I reiterate my view that whether he was part of the economic entity is not the final answer to this question. The test from *Unison* says I must consider whether the employee "*may*" or will be transferred or "*may*" be affected by measures taken in connection with the transfer. I emphasise "*may*" deliberately; it is sufficient that it is possible, though it is equally fair to point out that the tribunal must not take its consideration too far (for example, thinking about future job applicants). Tribunals tend to approach the definition on a broad basis, but cannot extend their consideration to an infinite extent.

47. I have already said that I will not deal with the issue of whether the Claimant was automatically unfairly dismissed due to his redundancy. It is not a claim before the Tribunal, not an issue in the list of issues and never foreshadowed before today.

48. I am not conflating the issue of whether the Claimant is part of the economic entity with the question of being an affected employee. I have repeatedly said that the tests are separate, but my findings about the Claimant's health are relevant to this question. As Mr Brown says, if the Claimant was very unlikely to return to work, how could he be in a meaningful sense affected by the transfer? It is an attractive argument on the face of it. However, the relevant date or time period for defining an affected employee is in my view earlier than 27 November 2020.

49. The evidence before me about when the First and Second Respondent started to negotiate is vague. I know that much of the Employee Liability Information was sent to the Second Respondent to consider in September 2020 (Mr Narramore says he sent it to the senior management team of the First Respondent on 2 September 2020; Ms Griffiths says that it was received by the Second Respondent on 4 September 2020). The Claimant was within that spreadsheet then, but later given a notice of redundancy. The First Respondent was required to provide the employee liability information to the Second Respondent by 30 October 2020 unless special circumstances applied; it has not been argued that special circumstances did apply.

50. It is clear that by 10 November 2020 the deal had been in principle agreed as this is when it is announced to the staff. On 20 November 2020 the staff were written to by the First Respondent about the TUPE transfer. The full employee liability information was sent by the First Respondent to the Second Respondent by 26 November 2020 (though Mr Narramore again prepared it a few days earlier on 23 November 2020).

51. I though reminded myself the Claimant has brought a claim of failure to consult him regarding the TUPE transfer. There is a question about his standing to bring such a claim due to the existence of employee representatives, which I am not in a position to determine today. Regulation 15 of the TUPE Regulations applies to this claim, but it arises out of Regulation 13. There is no specific date by when the employee representatives/employees must be consulted, but given the nature of the information to be given to them, it must be after the transfer has been agreed to take place. This is a period after negotiations and initial discussions; the transferor and transferee must have agreed the deal. At the latest, this must start from 10 November 2020 when the staff were informed of the sale. This would be the sensible point to start to consult. I make no findings as to whether there was a consultation; that is a matter for the final tribunal. I proceed for this decision on the basis that the consultation period is likely to be from 10 November 2020 onwards.

52. However, the Claimant's medical position was different as at 10 November 2020 up to 23 November 2020 to that as of 27 November 2020. His returned cancer had not been officially diagnosed, though I have found that it had due to the symptoms suffered in October 2020. Professor Kim was not expressly

asked about the position as of this period, but he records that the Claimant was seen by the consultant on 2 November 2020 (the notes show an earlier telephone appointment on 26 October 2020 [201]). It was this appointment that led to a biopsy and the later consultation on 23 November 2020. The medical letters show that the Claimant had an ultrasound on 11 November 2020 [203].

53. Notwithstanding this difference, the evidence is that the Claimant between 10 November 2020 and 23 November 2020 did have cancer again and I cannot find any evidential basis to find that Professor Kim's findings regarding his ability to work in the future from 27 November 2020 onwards should not apply to the likely consultation period. The Claimant had been signed off work for nearly a year, his symptoms had returned, and he was very unlikely to be able to return to work as a result. Putting the issue of his proposed redundancy to one side, the Claimant could not be affected by the transfer of an economic entity of which he had ceased to be part or the measures that may be put in place as he was very unlikely to return to the workplace and permanently detached as a result.

54. I therefore find that the Claimant was not part of the organised grouping that transferred to the Second Respondent and was not an affected employee for the purposes of the failure to consult claim before the Tribunal under case reference 1600249/21.

Employment Judge C Sharp
Dated: 21 September 2022

JUDGMENT SENT TO THE PARTIES ON 26 September 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche