Case Number 1302828/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs G Coughlan		**(1) EIC Limited (In Administration)** **(2) CarillionAmey Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 6, 7, 10 & 12 April 2017
18 & 19 September 2017
(With the Parties)
20 September 2017
(Panel only)

EMPLOYMENT JUDGE GASKELL **MEMBERS:** Mrs LA Evans
Ms WA Stewart

Representation
For the Claimant: **Mr S Jackson (Solicitor)**
For Respondent (1): **No Appearance**
(2): **Ms K Moss (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

Claims Against the 1st Respondent

1 The claimant's claim against the 1st respondent pursuant to Regulation 15 of the Transfer of Undertakings (Protection of Employment Regulations) 2006 is not well-founded and is dismissed.

Claims Against the 2nd Respondent

2 The claimant was not, at any material time, an employee of the 2nd respondent; the claimant was not dismissed by the 2nd respondent; her claim for unfair dismissal pursuant to Sections 94 and 99 of the Employment Rights Act 1996 against the 2nd respondent is not well-founded and is dismissed.

3 The 2nd respondent did not at any material time subject the claimant to detriment contrary to Section 47C of the Employment Rights Act

1996; the claimant's complaint pursuant to Section 48 of that Act is not well-founded and is dismissed.

4 The 2nd respondent did not, at any material time, act towards the claimant in contravention of Sections 18 and 39 of the Equality Act 2010. The claimant's complaint of pregnancy and maternity discrimination, pursuant to Section 120 of that Act, is dismissed.

5 The 2nd respondent had no liability to the claimant pursuant to Regulations 13 or 14 of the Transfer of Undertakings (Protection of Employment Regulations) 2006: the claimant's claim against the 2nd respondent pursuant to Regulation 15 is not well-founded and is dismissed.

6 The claimant's claims against the 2nd respondent for unpaid maternity pay; holiday pay; and notice pay is not well-founded and is dismissed.

7 The claimant's claim against the 2nd respondent for breach of contract (including wrongful dismissal) is dismissed.

Order for Costs

8 Pursuant to Rules 74 – 78 and 84 of the Employment Tribunals Rules of Procedure 2013, the claimant is ordered to pay to the respondent the sum of £4320 in respect of the respondent's costs of, and occasioned by, the necessity for the hearing of these claims to be adjourned part-heard from 12 April 2017 until 18 September 2017.

REASONS

Introduction

1 The claimant in this case is Mrs Gina Coughlan: she commenced employment with the 1st respondent on 17 February 2015; the date and circumstances of the termination of her employment are matters in dispute to be determined by the tribunal.

2 On 16 June 2016, the 1st respondent entered administration. The following day the administrators wrote to the claimant informing her that her employment was terminated (essentially by reason of redundancy).

3 It is common ground between the parties that, following the administration, there was a relevant transfer of part of the 1st respondent's undertaking to the 2nd respondent pursuant to Regulation 3 of the Transfer of Undertakings (Protection of Employment Regulations 2006 (TUPE).

4 It is the claimant's case that, as an employee of the 1st respondent, she was eligible to transfer to the 2nd respondent pursuant to Regulation 4 TUPE; and

that accordingly, her employment continued with the 2nd respondent. On 2 September 2016, the claimant purported to resign that employment.

The Claims

5 By a claim form presented to the tribunal on 4 November 2016, the claimant brings the following claims: -

(a) A failure to inform and consult pursuant to Regulation 13 TUPE: this claim is brought against both the 1st and 2nd respondents; but the claimant's case is that as she was an eligible transferee her remedy lies against the 2nd respondent.
(b) Against the 2nd respondent, unlawful deduction of wages and breach of contract in respect of pay and benefits during the period of her maternity leave. The claimant here is concerned with the period from 16 June 2016 to 2 September 2016.
(c) Against the 2nd respondent, wrongful dismissal: the claimant claims that she was constructively dismissed; and claims for a three-month notice period following her resignation on 2 September 2016.
(d) Against the 2nd respondent, the claimant claims unfavourable treatment: including dismissal; on the grounds of having taken maternity leave - Section 18 Equality Act 2010 (EqA).
(e) Against the 2nd respondent, the claimant claims the claimant claims unfair dismissal: applying Section 99 of the Employment Rights Act 1996 (ERA).

6 The 1st respondent has taken no part in the proceedings.

7 The 2nd respondent's principal case is that the claimant was never an employee eligible to transfer: she did not transfer; she did not become an employee of the 2nd respondent; and on that basis alone all claims against the 2nd respondent must fail.

8 In the event that the tribunal finds that the claimant was an eligible transferring employee, the 2nd respondent's case is: -

(a) That the claimant was not treated unfavourably because of her having taken maternity leave.
(b) That the claimant was not constructively dismissed: the respondent did not act in fundamental breach of the claimant's employment contract such as to justify her resignation.
(c) Accordingly, the claimant was not unfairly dismissed: but, in the event that the tribunal finds that she was unfairly dismissed, the dismissal was not because of her having taken maternity leave; and she is not time-served to bring a claim for unfair dismissal otherwise.

(d) That the provisions of Regulation 13(9) TUPE apply in this case: there were special circumstances preventing either the 1st or 2nd respondent from complying with the duties to inform and consult. The 2nd respondent makes this case on its own behalf; and submits that the same applies to the 1st respondent. (Since, if the claimant was an eligible transferee, the 2nd respondent recognises that any liability incurred by the 1st respondent would also transfer.)
(e) The 2nd respondent concedes that, if the claimant was a transferring employee, then it is liable for unpaid maternity pay and holiday pay.

The Issues

9 In readiness for the hearing the parties most helpfully prepared a draft list of issues. Having now heard the evidence and submissions we are able to refine and possibly simplify this as follows: -

(a) We must firstly decide whether the claimant was an eligible transferring employee on 16 June 2016.
(b) If she was not, then all claims against the 2nd respondent must fail and we are left to consider the Regulation 13 TUPE claim against the 1st respondent only.
(c) If the claimant was an eligible transferee the issues are as follows: -

    (i) Between the date of the transfer and the claimant's resignation was she treated unfavourably because she was on maternity leave?
    (ii) During that same period, did the respondent act in fundamental breach of the claimant's employment contract entitling her to resign in response? Did the respondent act in that way because the claimant was on maternity leave? Did the claimant resign in response?
    (iii) Did the 2nd respondent breach its obligations under Regulation 13 TUPE?

The Evidence

10 The claimant provided a detailed witness statement in addition to which she answered extensive supplementary questions; she was cross-examined and answered questions from the panel. The claimant called one witness: Mr Stephen McDonald who was Head of Facilities Management at the 1st respondent until his retirement on 31 March 2016; approximately one month after the commencement of the claimant's maternity leave and three months before the 2nd respondent's administration.

11 The claimant also provided, and indicated a wish to rely on, statements of evidence of Mr James Gripton who was Commercial Finance Manager of the 1st

respondent until its administration; and Ms Philippa Cole who was Head of HR at the 1st respondent from 1 June 2015 until she was dismissed by the administrators on 30 June 2016. At the outset of the trial, Mr Jackson indicated that he did not intend to call Mr Gripton and Ms Cole to give evidence: he asked the tribunal to take account of their written statements. Ms Moss indicated that the respondent had been asked to agree those statements; and had made clear that the statements were not agreed. Both statements contained controversial material. We found it surprising that Mr Jackson maintained his position that the witnesses would not be called; and not made available for cross examination. This was the claimant's position despite the tribunal's offer to assist if necessary by the issue of witness summonses. Mr Jackson offered no explanation for the reluctance/refusal to call the witnesses; and, in those circumstances, the tribunal is unable to take account of the content of the statements; and declines to do so.

12 The claimant did not even provide a witness statement for Mr Nick Barton who was Head of Facilities Management at the 1st respondent at the time of the administration; and who was then employed by the 2nd respondent for a period after the transfer. Despite her decision not to call Mr Barton as a witness, and not to provide a witness statement from him, the claimant nevertheless wished the tribunal to take statements made by Mr Barton in emails as primary evidence of the truth of their contents. Whilst we have clearly taken account of the content of emails, we cannot accept them as unassailable evidence as to the truth of their contents: but must consider them alongside other evidence and the oral evidence we have heard from the witnesses who did attend.

13 The 2nd respondent called three witnesses: Mr Dominic Patrick Keigher - Operations Director of the 2nd respondent since September 2014; Mr David John Nicholson - Head of Employee Relations at the 2nd respondent since June 2015; and Mrs Tracey Jane Edwards - HR Business Partner with the 2nd respondent since 2013.

14 We were also provided with an agreed trial bundle of documents running to more than 400 pages: we have considered those documents from within the bundle to which we were referred by the parties during the hearing.

15 The claimant's evidence was remarkable more for what it omitted than for what it included. Crucially, she repeatedly asserted that from February 2015 until the commencement of her maternity leave in February 2016, whilst working for the 1st respondent, she was wholly working on the 1st respondent's contract with the 2nd respondent to provide facilities management services to the Ministry of Defence (MoD). But, her witness statement, and her oral evidence, were significantly lacking in detail to support these assertions. The claimant provided no evidence as to her itinerary; she provided no documents which would demonstrate that 100% (as she alleged) of the working time was applied to that contract; no details of her contacts within the 2nd respondent; and no details of

her contacts with the MoD. The claimant explained that she was unable to provide such detail because she had been absent from the workplace since 29 February 2016 and had to return her computer to the 1st respondent's administrators following the administration. We did not find this explanation persuasive: much of the detail we would have expected would have been available from memory; other detail from documents which will would expect the claimant to have in her possession (job descriptions; appraisals; key performance targets; etc.); Alternatively, the claimant could have made specific requests for disclosure of such documents (and, if necessary, orders for disclosure) against either/both respondents and/or the MoD.

16 Mr McDonald's evidence was similarly lacking in detail; detail which, in our judgment he could reasonably be expected to provide (itineraries contact lists etc.). And, in any event, his knowledge of the 1st respondent's operation of the contract with the 2nd respondent was out of date: as he had retired three months before the administration.

17 The claimant's outright refusal, without explanation or good reason, to call Mr Gripton and Ms Cole to give evidence and expose them to cross examination, also cast doubt on the overall credibility of her case in so far as it related to her deployment or otherwise to the 1st respondent's contract with the 2nd respondent.

18 We found the evidence given by Mr Keigher; Mr Nicholson; and Mrs Edwards to be clear; compelling; and consistent. Their evidence was consistent with contemporaneous documents. We found the three of them to be reliable witnesses: Mrs Edwards was a particularly impressive witness.

19 Based on our assessment of the witnesses; and consideration of available documents, we have made findings as to the facts.

The Facts

20 The 2nd respondent is part of a group of companies involved in construction; maintenance; and facilities management. The group has many public-sector contracts. The 2nd respondent itself had a contract to provide hard facilities services (planned and reactive maintenance) at sites owned by the MoD. The 2nd respondent outsourced four of eight service delivery areas relevant to the MoD contract to the 1st respondent. The outsourcing contracts commenced in late 2014/early 2015. In April 2016, the 1st respondent withdrew from one of the service delivery areas because its performance had been unsatisfactory; the 1st respondent was then left working on three service delivery areas (hereafter the MoD contract).

21 In addition, the 1st respondent had facilities management contracts with other large organisations including: a separate contract with Carillion Plc; and

contracts with Tesco Plc; Aldi; Barclay Homes; and the University of Law. (It is the 2nd respondent's case that there were many more contracts: those named are the ones of which the claimant was aware.)

22 The claimant was employed by the 1st respondent as an Account Director from 17 February 2015. It is common ground that she worked on the MoD contract. The claimant's contract of employment with the 1st respondent makes no reference to the MoD (or any other specific) contract; likewise, the letter offering employment to the claimant. In evidence, the claimant and Mr McDonald accepted that she could have been required to work on any contract operated by the 1st respondent; and she could have been required to work on more than one contract at any time. The claimant and Mr McDonald both conceded that when the 1st respondent lost the contract on one of the four service delivery areas (this occurred after the claimant commenced maternity leave and after Mr McDonald's retirement), there would have been a significant reduction in the managerial workload required for the MoD contract; and, it was likely some other work would be assigned to managerial staff replace this.

23 The claimant's position in this regard is to be contrasted with the contractual documentation of several other managers whose contracts with the 1st respondent and related documents made specific reference to employment on the MoD contract.

24 The contracts of some other managers assigned them to a specific place of work including MoD establishments. The claimant's contract was silent as to her place of work: she often worked from home; and sometimes from the 1st respondent's head office. Other time was spent visiting client establishments – including those of the MoD.

25 Within the bundle, there is an Organisation Chart showing the claimant at the apex of the 1st respondent's MoD contract organisation. The 2nd respondent does not accept this as evidence that she was assigned wholly, or even mainly, to the MoD contract: but simply, that she worked on the contract in a senior position.

26 Mr Keigher's evidence was that he had contact with the claimant in the context of her professional duties; but that the extent of such contract did not indicate to him that she was assigned full-time to the MoD contract. The 2nd respondent produced only a handful of emails as evidence of the claimant's involvement in that contract. The 2nd respondent insists that no other emails could be found: the claimant's case is that other emails must have been available but were not disclosed.

27 On the afternoon of 16 June 2016, the 1st respondent went into administration: it was evident to the 2nd respondent that the 1st respondent would

no longer perform its obligations under the MoD contract; the 2nd respondent became aware of the situation at 4pm that day; and during the course of the evening, managers of varying seniority were called in to meetings to make decisions as to how the 2nd respondent's obligations to the MoD should be delivered. The decision, taken at approximately midnight, was that the work would be brought back in-house and delivered by the 2nd respondent direct to the MoD. The 2nd respondent acknowledged its obligation to accept the transfer of the 1st respondent's employees who were assigned to the MoD contract. The decision had to be implemented immediately; the 2nd respondent received hardly any assistance from the administrators; and had next to no information about the employees who were to transfer. The 2nd respondent's HR department spent the next two months determining whether claims by former employees of the 1st respondent to have been assigned to the MoD contract were correct or not.

28 Both Mr Nicholson and Mrs Edwards described a situation of near chaos and impossible workloads. Amongst other things evidencing this situation were emails contained in the bundle being sent very early in the morning (before 5am in one case) right through until very late (after midnight) at night. Teams of agency HR workers were brought in to help with the task. The 2nd respondent commenced by interviewing employees who attended for work on 17 June 2016 at the nine MoD sites where the 1st respondent had employees located; they obtained information from those employees about themselves and about others they worked with (supervisors, managers and so on). There was considerable urgency about the task; some of the employees were weekly paid and the 2nd respondent wished to ensure that they were paid that week. The process followed by the HR team was to identify potential transferees; and then to engage with them on a one-to-one basis to establish whether they were assigned to the MoD contract and therefore eligible to transfer. In the event all the 1st respondent's *operational* employees engaged on the contract did transfer; but none of the management team.

29 Although Mr Barton was not an eligible transferee (and apparently did not claim to be one), he was offered temporary employment by the 2nd respondent to assist them in identifying and tracing eligible transferees.

30 Various lists were generated showing employees who were on the 1st respondent's payroll and may or may not have been eligible to transfer. Two of these lists assumed considerable importance to the claimant: what we refer to as the List 1 is an electronic document which was emailed to the 2nd respondent by Mr Gripton some-time on 17 June 2016; this listed the 1st respondent's staff who, according to Mr Gripton, were employed on the MoD contract. What we refer to as List 2 exists in paper form only: Mr Barton provided that list to Mr Michael Burgess - HR Director of the 2nd respondent who in turn handed it to Mr Nicholson and he to Mrs Edwards. It is not known who created this list; the claimant's name does not appear on it.

31 We accept Mrs Edwards evidence that she worked principally from List 2 in seeking to identify and contact transferring employees. She did access List 1 electronically to update it as to information she had obtained whilst working from List 2. In other words, she updated the electronic copy in respect of employees who may have already left the business; or who, for whatever reason, were not to transfer. Mrs Edwards explained, and again we accept, that, at no stage, did she scrutinise List 1 and investigate the names which appeared on that list but which did not appear on List 2.

32 Mr Jackson expended considerable time and energy seeking to establish that List 2 was an amended version of List 1 with the names of some of the employees having been removed. We are satisfied (and the 2nd respondent does not dispute) that this is most likely to be the case: it is not known who created the amended list or why some names were removed. The respondent's case is that these two lists were among many - compiled by different individuals and for different purposes. The respondent's case is that the presence or absence of any individual's name on or from any of these lists is wholly irrelevant to the question of whether an employee was an eligible transferee. Some individuals, whose names were absent from the lists, did in fact transfer; other individuals, whose names were present on the lists, did not in fact transfer.

33 On 18 June 2016, the claimant received a letter from the administrators informing her that because of the administration they were terminating her employment with effect from 16 June 2016: they advised that her P45 would be dispatched as soon as possible; the letter provided information to the claimant as to making claims for payment under the Redundancy Payment Service; the claimant took no action to question or query her dismissal.

34 The claimant's evidence was that she was expecting to be paid her maternity pay on 29 June 2016: no payment was received; and she promptly contacted Mr Barton. The claimant met Mr Barton on 5 July 2016: we find that the principal purpose of this meeting effectively related to Mr Barton's role with the 1st respondent and/or the administrators; the purpose was for the claimant to return her laptop and other property remaining in her possession belonging to the 1st respondent. However, the claimant did discuss with Mr Barton the status of her employment with the 2nd respondent: the claimant's evidence was that Mr Barton expressed the opinion that the claimant's employment should clearly have transferred to the 2nd respondent; and he advised her to send Mr Nicholson her bank details; without raising any suggestion that there was any doubt about the transfer.

35 Perhaps contrary to the advice the claimant claims to have been given by Mr Barton, later the same day, Mr Barton emailed Mr Nicholson and Mrs

Edwards alerting them to the possibility that the claimant would be pursuing the right to transfer her employment - he did not express any opinion.

36 On 6 July 2016, the claimant emailed Mr Nicholson with her bank details: the email contained no information regarding her employment with the 1st respondent; or the basis upon which she might claim that her employment transferred to the 2nd respondent. Later the same day Mr Barton emailed the claimant: the contents of this email became significant to the way the claimant's case was formulated and presented; it read as follows: -

> *"Hi Gina*
> *I received feedback from Dave last night that you need to contact the administrators as you were not on the list CarillionAmey sent to the administrators on 24th June.*
> *Regards*
> *Nick Barton"*

37 The claimant responded as follows: -

> *"Hi Nick*
> *Thanks for coming back to me.*
> *Can you confirm what this list is please as I have spoken to the administrators who tell me they did not provide CA with a list.*
> *Many thanks,*
> *Gina"*

38 It should be immediately noted that the claimant mis-read Mr Barton's email: he had spoken of a list provided by *CarillionAmey* to the administrators; the claimant's response enquired about a list provided by the administrators to *CarillionAmey*; this misunderstanding was to cause confusion.

39 The email from Mr Barton appears to have been the basis for the repeated assertion by Mr Jackson during the course of the hearing that the claimant had been told that the reason why her employment did not transfer from the 1st respondent to the 2nd respondent was her absence from a list. (Of course, Mr Barton's email says no such thing.) Ironically, the only list which passed between *CarillionAmey* and the administrators on 24 June 2016 was sent by Mr Nicholson to the administrators - and the claimant's name was on it. The indication at that stage was that the claimant was to be a transferring employee.

40 The claimant received no response to her email of the 6 July 2017 providing Mr Nicholson with her bank details: she chased him by emails dated 12 and 18 July 2017; and again on 14 and 22 August 2017. The claimant made it clear that the lack of certainty as to the status of her employment was causing her some distress. In the meantime, it does appear that Mr Nicholson was

investigating the claimant's position: he received a report from Mr Barton on 18 July 2016; contrary to what the claimant says that Mr Barton had said to her, he reported to Mr Nicholson that it had been stressed to the claimant that she should not assume she was eligible to transfer. (At the hearing, Mr Nicholson acknowledged that his lack of any response to the claimant's emails was unacceptable: he explained that this was a particularly busy time for all of the HR officials employed by the 2nd respondent; and that, during August, he was away from the office for a short period on holiday.)

41 On 24 August 2016, still having received no response from Mr Nicholson, the claimant emailed Mrs Edwards: she asked her to confirm the 2nd respondent's position by no later than Friday 26 August 2016. Mrs Edwards responded suggesting that they should speak on the telephone; and asking for a copy of the claimant's contract with the 1st respondent. (At the hearing, the 2nd respondent acknowledged that the contract had already been provided via Mr Barton; but Mrs Edwards stated that she was not conscious of having seen it.)

42 The contract was duly provided: Mrs Edwards noted that there was nothing specific within it to confirm that the claimant was solely or even mainly assigned to the MoD contract. On 30 August 2016, Mrs Edwards emailed the claimant: her email read as follows: -

> *"Hello Gina,*
> *Thank you for emailing me a copy of your contract last week.*
> *Unfortunately there is nothing to state in the contract that you were wholly and mainly assigned to the MoD contract which EIC had. Do you have any evidence of this please? If so, could you please scan and email this to me so that further consideration may be given to your query.*
> *Kind regards,*
> *Tracey"*

43 On 2 September 2016, the claimant responded in the following terms: -

> *"Dear Tracey*
>
> *In relation to being wholly and mainly assigned to the MOD contract which EIC had, I am astounded by your query. The fact is all I did was the MoD contract (and I believe CarillionAmey knows that or should know that). I do not believe that my colleagues have been asked for evidence to prove they were wholly and mainly assigned to the MoD contract which EIC had or that their contracts were materially different from mine. It seems I am yet again being treated differently from my colleagues.*
>
> *My email initially sent to David was either not received or, as seems more likely, ignored by him. Given his subsequent holiday auto response email I*

gave him the benefit of the doubt and forwarded my email to you. You have chosen not to respond to it other than to demand evidence from me before you will consider 'my query' further.

I am afraid that the way I have been treated during my maternity leave and the continued failure to pay my maternity benefits has led to the point where I feel discriminated against and have lost trust and confidence in CarillionAmey as my employer.

I have also not previously received notice from EIC or from CarillionAmey, of the date of the end of my maternity leave. I therefore submit this email as notice of (a) the immediate ending of my maternity leave and my intention to return to work as of 2 September 2016 and (b) my resignation with effect from 2 September 2016 which shall be the last day of my employment with CarillionAmey. You will appreciate that I consider this situation to be one of constructive dismissal.

Regards,
Gina"

44 On 7 September 2016, Mrs Edwards responded to the claimant's email as follows: -

"Hello Gina,

I am sorry that you were astounded by my query but I was simply trying to gather more facts regarding your employment, in particular whether you were 'assigned' to the MoD contract whilst working for EIC as we had not arrived at a conclusion regarding your eligibility to transfer.

In normal TUPE situations we (the transferee) are provided with a list of employees who in the transferor (EIC in this case) believes are wholly and mainly assigned to the work, contract etc which is transferring in advance of the TUPE transfer so that we can carry out our due diligence. Unfortunately, as EIC went into administration we did not have this information and therefore had to compile a list of employees who turned up for work on 17 June 2016, the day after the administration of EIC was announced. The operatives who worked on the MoD contract were well-known to CarillionAmey (CA) employees as they were at sites covered by the contract on a daily basis. other employees of EIC who worked in Head Office or Support were not visible to CA and therefore those who turned up at CA sites post the administration of EIC were challenged regarding their employment so that we could ascertain whether they were mainly assigned to the MoD contract or not. As part of this process, we asked these employees to provide CA with copies of their employment contracts

and any other supporting information they may have to support their claim that they were mainly assigned to the MoD contract. The evidence produced included copies of their terms and conditions, offer letter confirming their work location within the contract, pay slips etc.

To my knowledge, you contacted my colleague David Nicholson, in the first instance via email on 7th July 2016. I was not aware of you or any correspondence between you and David until you emailed me on 24th August 2016, as you received an out of office reply notifying you that he was on leave. I am not aware of any other contact you have made with the Company. As we have not concluded the matter I would be grateful if you could email me your offer/appointment letter from EIC or any other supporting information you may have to support you being mainly assigned to the MoD contract. I don't feel that you have been discriminated in any way, I am simply trying to follow a due diligence process.

During our previous conversation you confirmed that you had received a letter from the Administrators of EIC which provided you with details for claiming redundancy but you stated that you have not initiated this process as you believe you had the right to transfer to CA. Given that we have not confirmed your eligibility to transfer to CA, your resignation is not applicable. However, I would urge you to send any other relevant information you have so that I may look into your issue further.

Kind regards,

Tracey"

45 There was no further meaningful communication between the parties: the claimant did not supply any further information regarding her actual duties when working for the 1st respondent; the 2nd respondent has proceeded on the basis that the claimant was never employed by it; and that her employment with the 1st respondent terminated with the administrator's letter of 18 June 2016. The position that the claimant's employment did not transfer has been maintained by the 2nd respondent throughout the hearing.

The Law

46 **The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)**

Regulation 3: A Relevant Transfer

(1) These Regulations apply to—

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

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied.

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

(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

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

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.
(4) Subject to paragraph (1), these Regulations apply to—

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;
(b) a transfer or service provision change howsoever effected notwithstanding—

(i) that the transfer of an undertaking, business or part of an undertaking or business is governed or effected by the law of a country or territory outside the United Kingdom or that the service provision change is governed or effected by the law of a country or territory outside Great Britain;
(ii) that the employment of persons employed in the undertaking, business or part transferred or, in the case of a service provision change, persons employed in the organised grouping of employees, is governed by any such law;

(c) a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.

(5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer.

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and
(b) may take place whether or not any property is transferred to the transferee by the transferor.

Regulation 4: Effect of Relevant Transfer on Contracts of Employment

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

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

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

(5) Paragraph (4) does not prevent a variation of the contract of employment if—

(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or
(b) the terms of that contract permit the employer to make such a variation.

(5A) In paragraph (5), the expression “changes in the workforce” includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).

(5B) Paragraph (4) does not apply in respect of a variation of the contract of employment in so far as it varies a term or condition incorporated from a collective agreement, provided that—

(a) the variation of the contract takes effect on a date more than one year after the date of the transfer; and
(b) following that variation, the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation.

(5C) Paragraphs (5) and (5B) do not affect any rule of law as to whether a contract of employment is effectively varied.

(6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to Regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

Regulation 13: Duty to Inform and Consult Representatives

(1) In this regulation and regulations 13A, 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.

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;
(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and
(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

(10) Where—

(a) the employer has invited any of the affected employee to elect employee representatives; and
(b) the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time,
the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer.

Regulation 14: Election of Employee Representatives

(1) The requirements for the election of employee representatives under regulation 13(3) are that—

(a) the employer shall make such arrangements as are reasonably practicable to ensure that the election is fair;
(b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all affected employees having regard to the number and classes of those employees;
(c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;

(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under regulation 13 to be completed;
(e) the candidates for election as employee representatives are affected employees on the date of the election;
(f) no affected employee is unreasonably excluded from standing for election;
(g) all affected employees on the date of the election are entitled to vote for employee representatives;
(h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;

(i) the election is conducted so as to secure that—
(i) so far as is reasonably practicable, those voting do so in secret; and
(ii) the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of paragraph (1) has been held, one of those elected ceases to act as an employee representative and as a result any affected employees are no longer represented, those employees shall elect another representative by an election satisfying the requirements of paragraph (1)(a), (e), (f) and (i).

Regulation 15: Failure to Inform or Consult

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;
(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
(c) in the case of failure relating to representatives of a trade union, by the trade union; and
(d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

47 **Decided Cases: TUPE**

Botzen -v- Rotterdamsche Droogdok Maatschappij BV 186/83 **[1985] ECR 519 (ECJ)**

Whether, for the purposes of Regulations 3 and 4 TUPE, an employee is a person *assigned to the organised grouping of resources or employees* that is subject to the relevant transfer is entirely a question of fact: there is no formula to determine this issue; and it does not depend solely on the proportion of an individual employee's time spent on that part of the business which is the subject of the transfer.

London Borough of Hillingdon -v- Gormanley **UKEAT/0169/14 (EAT)**
CPL Distribution Limited -v- Todd **[2003] IRLR 28 (CA)**
Skillbase Services -v- King **[2004] All ER (D) Feb 04 (EAT)**
Williams -v- Advance Cleaning Services Limited **UKEAT/0838/04 (EAT)**

These were all examples of cases where an employee devoted substantial amounts of time to that part of the business which was the subject of a relevant transfer, but the employee also devoted time to other parts of the business; and, crucially, could be required to do so under their contract of employment. In these cases, the employees were found not to have been eligible transferees at the time of the transfer.

Lab Facilities Limited -v- Metcalfe **UKEAT/0441/10 (EAT**

An employee who is not eligible to transfer is not an "affected employee" for the purposes of Information and Consultation (Regulations 13 - 15 TUPE).

Bakers Union -v- Clarks of Hove Limited **[1978] IRLR 366 (CA)**

Regulation 13(9) is only engaged in truly exceptional circumstances: the desire to maintain confidentiality particularly in cases of financial difficulty or insolvency is not sufficient.

48 **The Equality Act 2010 (EqA)**

Section 18: Pregnancy and Maternity Discrimination: Work Cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(*a*) an employment tribunal;

49 **Employment Rights Act 1996 (ERA)**

Section 13: Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Section 47C: Leave for family and domestic reasons

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—

(a) pregnancy, childbirth or maternity,
(b) ordinary, compulsory or additional maternity leave,

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 99: Leave for family reasons

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.

(2) In this section “prescribed” means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,
(b) ordinary, compulsory or additional maternity leave.

50 **Maternity and Parental Leave Etc Regulations 1999 (MAPLE)**

Regulation 19: Protection from detriment

(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee—

(a) is pregnant;
(b) has given birth to a child;
(d) took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;

Regulation20: Unfair dismissal

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3),

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

(a) the pregnancy of the employee;
(b) the fact that the employee has given birth to a child;
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;

51 **Decided Cases: Pregnancy/Maternity Discrimination**

O'Neill -v- Governors of St Thomas More RCVA **[1996] IRLR 372 (EAT)**

A religious education teacher who was dismissed after it became known that she had become pregnant by a Roman Catholic priest was dismissed on grounds of pregnancy. The factors surrounding the pregnancy - the paternity of the child; publicity of that fact; and the consequent untenability of the appellant's position as a religious education teacher; were all causally related to the fact that she was pregnant. Her pregnancy precipitated and permeated the decision to dismiss: therefore, it was not possible to say the ground for dismissal was anything other than pregnancy. To draw a distinction between pregnancy *per se* and pregnancy in the circumstances of the case was legally erroneous.

R (on the application of E) -v- Governing Body of JFS **[2009] UKSC 15 (SC)**

The "but for" test should not be used to determine whether discrimination has been proved, unless the factual criteria applied by the respondent are inherently discriminatory.

Interserve Limited -v- Tuleikyte **[2017] IRLR 615 (EAT)**

When considering allegations of unfavourable treatment because of absence on maternity leave under Section 18(4) EqA, the correct legal test is the "reasons why" approach; it is not a "criterion" test.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Shamoon -v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

Employment tribunals can usefully commence their enquiry by asking why the claimant was treated in a particular way: was it for a prescribed reason? Or was it for some other reason?
If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Amnesty International -v- Ahmed **[2009] IRLR 884 (EAT)**

The fact that [a protected characteristic] is part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Johal -v- Commission for Equality and Human Rights **[2010] All ER (D) 23 (Sep) (EAT)**

Where an employee on maternity leave was deprived of the opportunity to apply for promotion due to an administrative error, it was the administrative error and not the fact of the maternity leave which was the reason for the treatment. Maternity leave was the occasion for the treatment complained of; it was not the reason for the treatment.

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Fecitt -v- NHS Manchester **[2012] IRLR 64 (CA)**

If detriment is identified the burden of proof is on the respondent to prove on the balance of probabilities that the detriment complained of did not arise because of the protected characteristic of maternity leave.

The Claimant's Case

52 The claimant's case against the 2nd respondent can be summarised as follows: -

(a) The 2nd respondent did not readily acknowledge her as an eligible transferee - but effectively required her to establish her position: she claims this was done in a way which had not applied to her colleagues; that it amounted to unfavourable treatment; and it was done to her because she was on maternity leave.
(b) Further, or in the alternative, the way the respondent treated her in the period between the transfer and the date of her resignation amounted to a fundamental breach of the employment contract in response to which she resigned. This was a constructive dismissal: and the reason for the respondent's multiple breaches of contract was because she was on maternity leave. Thus, the resulting constructive dismissal was automatically unfair.
(c) In any event the way she was treated was detrimental because she was on maternity leave.
(d) The failure to pay the claimant's maternity pay between the date of transfer and the date of resignation was an unlawful deduction from wages.

53 Liability of the 2nd respondent for any of these claims is dependent upon the claimant having been an employee eligible to transfer.

The Respondent's Case

54 Having now had the opportunity to consider the evidence provided by the claimant, the 2nd respondent does not accept that, at the time of the transfer, the claimant was *assigned to the organised grouping of resources or employees* which was the subject of the transfer. Accordingly, the respondent's cases that it never assumed any liability to the claimant under EqA; ERA; MAPLE; or otherwise.

55 If it is found that the claimant was an eligible transferee, and that, as a matter of law, her employment transferred to the 2nd respondent on the transfer on 2 June 2016, the 2nd respondent acknowledges liability for payment of maternity pay for the period 3 June 2016 to 2 September 2016.

56 The 2nd respondent does not however acknowledge any unfavourable or detrimental treatment: the claimant was asked to provide evidence of her assignment to the MoD contract in the same way as other comparable colleagues had been. And no decision as to her eligibility had been reached before her purported resignation on 2 September 2016.

57 To the extent that it could be said to be unfavourable treatment that the 2nd respondent did not contact the claimant to confirm or regularise her position any sooner than it did, this was because she was absent from the workplace; and her name did not appear on List 2. The reason for her absence from List 2 is unknown: but the 2nd respondent's case is that it is absurd to suggest that her name was deleted from that list because she was on maternity leave.

58 The 2nd respondent argues that it was entitled to properly consider the claimant's position before confirming or rejecting her transferability. It is ironic that the claimant chose to resign almost immediately that Mrs Edwards was clearly demonstrating an intention to resolve the matter as quickly as possible. In the circumstances, the 2nd respondent denies any breach of the employment contract.

Discussion

59 The claims against the 2nd respondent depend totally on a finding that the claimant was assigned to the MoD contract and was therefore eligible to transfer: should this not be the case, then all claims against the 2nd respondent must fail. We have therefore considered this position first: -

(a) The burden is on the claimant to prove, on the balance of probabilities, that she was assigned to the MoD contract: we are struck by the dearth of evidence which she has been able to provide in this regard. She relies on assertions from herself and Mr McDonald together with written assertions from Mrs Cole and Mr Gripton (who she declined to call to give oral evidence and submit to cross examination); she provides absolutely no detail as to her daily routines and activities in the months/weeks prior to her maternity leave; she was unable to produce any diaries, minutes of meetings, contact lists, performance targets, and the like; she was unable to provide names of contacts within the 2nd respondent or the MoD or even of names of operatives from the 1st respondent who may have been able to provide evidence as to her level of activity on the MoD contract.
(b) The claimant attempted to explain the absence of evidence by the fact that her laptop had been returned to the 1st respondent via Mr Barton on 5 July 2016. In our judgement, this explanation does not bear scrutiny: much of the information we would have expected could have been provided from memory; or her solicitors (who made many and searching enquiries regarding the Lists) could have made some simple enquiries to produce relevant documents.

60 In our judgement, the claimant has simply failed to discharge the burden of proof which is upon her to show that she was assigned to the MoD contract. In

the circumstances, we find that her employment did not transfer; and, accordingly, there can be no liability towards her from the 2nd respondent.

61 This finding is sufficient to dispose of the case against the 2nd respondent in its entirety. But, we have nevertheless gone on to consider the questions of discriminatory treatment and/or fundamental breach of contract.

62 No question arises regarding the lists: the presence or absence of the name of any individual from any list was wholly irrelevant to the question of whether any employee was eligible to transfer.

63 At the time of the claimant's purported resignation, Mrs Edwards was actively considering her claim to be an eligible transferee: she was entitled to consider the position; and the evidence adduced at trial shows that the claimant's managerial colleagues were required to produce evidence in the same way as the claimant. Those who were not asked for such evidence were those whose contractual documents clearly demonstrated an assignment to the MoD contract.

64 In our judgement therefore, the claimant was not treated unfavourably or detrimentally. Any delay in contacting her to enable her position to be considered arose principally because she was absent from the workplace; and she did not contact the 2nd respondent until early July. It is true that she was absent because she was on maternity leave; but this does not establish that her maternity leave was the reason for any delay.

65 Because we have found that the claimant was not an eligible transferee, she was not an "*affected employee*"; and neither respondent had any duty to inform or consult her under TUPE. It should be noted that there is no claim against the 1st respondent for failure to consult prior to her redundancy.

66 In any event, regarding any claim against the 1st respondent, even if the claimant was an "*affected employee*", the obligation to inform and consult relates to the transfer - this means specifically the transfer to the 2nd respondent. At the time of the administration, the 1st respondent could not predict the 2nd respondent's decision; accordingly, there was no transfer in view and nothing about which employees could be consulted. In our judgement, Regulation 13(9) TUPE is fully engaged.

Conclusions

67 Accordingly, and for these reasons, we dismiss the claims against both respondents.

COSTS APPLICATION

68 After we had heard closing submissions on liability, Ms Moss invited us to consider a discrete costs application relating to costs incurred by the adjournment of the hearing part-heard from 12 April 2017 to 18 September 2017.

69 Because this was a discrete application, we agreed to hear submissions and to decide the application after we had determined issues of liability. For the avoidance of doubt, we make clear that, whereas generally there is no requirement for direct causation between a party's unreasonable or otherwise reprehensible conduct and costs incurred, in the circumstances of this application we have only considered costs relating to findings of unreasonable conduct in turn leading to the adjournment. There is no obstacle to either party now making a more general costs application if it is thought appropriate.

The Law on Costs

70 **The Employment Tribunals Rules of Procedure 2013**

Rule 74: Definitions

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;
(b) is an advocate or solicitor in Scotland; or
(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Rule 75: Costs orders and preparation time orders

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party's preparation time while not legally represented. “Preparation time” means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

Rule 76: When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Rule 77: Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

Rule 78: The amount of a costs order

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;
(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;
(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Rule 80: When a wasted costs order may be made

(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

Rule 81: Effect of a wasted costs order

A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

Rule 82: Procedure

A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

Rule 83: Allowances

Where the Tribunal makes a costs, preparation time, or wasted costs order, it may also make an order that the paying party (or, where a wasted costs order is made, the representative) pay to the Secretary of State, in whole or in part, any allowances (other than allowances paid to members of the Tribunal) paid by the Secretary of State under section 5(2) or (3) of the Employment Tribunals Act to any person for the purposes of, or in connection with, that person's attendance at the Tribunal.

Rule 84: Ability to pay

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

71 **DECIDED CASES: COSTS AND PREPARATION TIME ORDERS**

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Gee –v- Shell UK Ltd. **[2003] IRLR 82 (CA)**

An award of costs in the employment tribunal is the exception rather than the rule. Costs are compensatory not punative.

Salinas –v- Bear Stearns International Holdings Inc. & another
[2005] ICR 1117 (EAT)

The reason why costs orders are not made in the vast majority of employment tribunal cases is that the high hurdle has to be overcome for a costs order to be made has not, in fact, been overcome.

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Monaghan –v- Close Thornton Solicitors **UKEAT/0003/01**
Beat –v- Devon County Council & another **UKEAT/0534/05**
Lewald-Jezierska –v- Solicitors in Law Ltd. & others **UKEAT/0165/06**

The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive, unreasonable or misconceived to the making of a costs order without first considering whether it should exercise its discretion, to do so.

Yerrakalva –v- Barnsley MBC **UKEAT/0231/10**

There is no general rule that withdrawing a claim is tantamount to an admission that it is misconceived. There is no requirement for a direct causative link between the unreasonable conduct and the costs incurred but there should be some connection.

Dyer –v- Secretary of State for Employment **UKEAT/0183/83**

Whether conduct is unreasonable is a matter of fact for the tribunal to decide. Unreasonableness has its ordinary meaning.

McPherson –v- BNP Paribas **[2004] ICR 1398**

The late withdrawal of proceedings is not of itself evidence of unreasonable conduct. The claimant's conduct overall must be considered. But a late withdrawal is a factor in a case where the claimant might reasonably have been expected to withdraw earlier.

Keskar –v- Governors of All Saints Church of England School
[1991] ICR 493

A tribunal is entitled to take account of whether a claimant ought to have known his claim had no reasonable prospect of success.

Kaur –v- John Brierley Ltd. **UKEAT/0783/00**

An award of costs against the claimant was upheld in a case where the claimant had failed, despite several requests, to properly set out her claim. She proceeded with the claim only to withdraw at the commencement of the trial.

Vaughan –v- Lewisham LBC (No 2) **[2013] IRLR 713 (EAT)**

There is no requirement for the receiving party to have written a costs warning letter. It is not wrong in principle for an employment tribunal to make an award of costs against a party which that party is unable to pay immediately in circumstances where the tribunal considers that the party may be able to meet the liability in due course.

72 **DECIDED CASES: WASTED COSTS ORDERS**

Ridehalgh –v- Horsefield **[1994] 3 All ER 848 (CA)**
Mitchells Solicitors –vFunkwerk Information Technologies York Ltd **UKEAT/0541/07 (EAT)**
Medcalf –v- Weatherill **[2002] UKHL 27 (HL)**

The definition of wasted costs in [Rule 80] is the same as that set out in Section 51(7) of the Supreme Court Act 1981 which applies in the civil courts.

In ***Ridehalgh*** the Court of Appeal set out a three-stage test that should be followed when a wasted costs order is being considered:-

(a) Did the representative act improperly unreasonably or negligently?
(b) If so, did that conduct result in the party in curling unnecessary costs?
(c) If so, is it just to order the representative to compensate the party for the whole or part of those costs?

The court further considered a type of conduct, which triggers the potential liability for a wasted costs order :-

(a) **Improper conduct:** This includes but is not limited to behaviour which would result in disbarment striking off suspension from practice or other serious professional penalty.
(b) **Unreasonable conduct:** This describes conduct that is designed to harass the other side (in a vexatious manner) rather than progress the case.
(c) **Negligent conduct:** This should be considered in an un-technical way as a failure to act with the competence reasonably expected of ordinary members of the legal profession.

The court provided the following general guidance:-

(a) The wasted costs jurisdiction should be exercised with great caution, and as a last resort.
(b) A wasted costs order should only be made if the court or tribunal is satisfied that the conduct of the impugned representative can properly be

characterised as improper unreasonable or negligent.

(c) A legal representative solicitor or counsel should not be held to have acted improperly unreasonably or negligently, simply because they have acted for a party who pursues a hopeless case.

(d) A tribunal can only make a wasted costs order in such a case, if it is shown that the legal representative has presented a case, which they consider is bound to fail and, in doing so, they have failed in their duty to the court and the proceedings amount to an abuse of process.

(e) The tribunal must, when deciding whether to make a wasted costs order, take into account that unless the client waives privilege the confidence between client and representative is likely to prevent the representative from explaining why they have pursued their client's case as they have.

(f) It must be shown that the representative's conduct that is complained of has caused the incurrence of unnecessary costs.

(g) The court or tribunal must exercise its discretion at two stages. First, when considering whether the application is justified and proportionate in the circumstances of the case if it decides that it is it must then conduct a hearing to decide whether the requirements for an order have been met. If it decides that they have been it must then decide whether or not to make an order exercising its discretion.

The Basis of the Application

73 The application centres around the claimant's decision in advance of the trial to purportedly accept the evidence of Mrs Edwards without the need for her to attend for cross examination.

74 With the trial scheduled to commence on Thursday 6 April 2017, with a time allocation of 5 days to Wednesday 12 April 2017, on 21 February 2017, the 2nd respondent made an application to the court to postpone the trial because of the none availability of Mrs Edwards. the reason for the request was that, on 17 February 2017, Mrs Edwards had been told that she needed surgery on her leg; and the operation had been scheduled for 4 April 2017. After the operation, she was told it would be necessary to keep her leg elevated for two weeks; she would be immobile other than using crutches for a further two weeks; and she would not be able to drive for four to six weeks. Mrs Edwards lives in Cardiff; the trial was scheduled for hearing in Birmingham.

75 Upon consideration of the adjournment application, Employment Judge Dimbylow ordered that the respondent should serve an advance copy of Mrs Edwards' witness statement and the claimant should indicate whether the statement could be agreed; and, if not, why not.

76 The witness statement was duly provided on 23 March 2017: and, on 28 March 2017, the claimant's solicitor indicated in writing that the claimant did not

wish to cross examine Mrs Edwards.

77 The 2nd respondent was surprised and concerned by this response; and asked for clarification as to whether Mrs Edwards evidence was agreed by the claimant; or whether it was to be the subject of challenge.

78 By an email dated 29 March 2017, the claimant's solicitors confirmed that the statement was agreed. The solicitors had made clear that the claimant did not wish the hearing to be postponed.

79 In the light of the correspondence from the claimant's solicitors, on 30 March 2017, Employment Judge Gaskell directed that Mrs Edwards' evidence could be taken as read; and the outstanding application for a postponement was therefore refused.

80 Out of an abundance of caution, on the first day of the trial, Ms Moss raised the issue again: she was concerned that agreement of Mrs Edwards' evidence was entirely inconsistent with the claimant's claim. Mr Jackson was asked to confirm that the evidence was agreed; and would not be subject to challenge; his response was that Mrs Edwards evidence was not agreed; but that he would challenge it by reference to documents within the bundle and the cross-examination of other witnesses.

81 Unsurprisingly, this position was not acceptable to Ms Moss: if the claimant intended to challenge Mrs Edwards' evidence, she was entitled to the opportunity to be cross-examined and to deal with the challenge.

82 Mr Jackson was still resistant to the possibility of any postponement of the trial: he was adamant that his cross examination of Mrs Edwards would be brief and could be confined to one or two points. On this basis, arrangements were made for Mrs Edwards to give evidence by conference call on Wednesday 12 April 2017.

83 It was necessary for the 2nd respondent to courier a copy of the trial bundle to Mrs Edwards' home and Mr Jackson agreed to provide an advance copy of the questions he wished to ask her in cross-examination. However, when this advance copy was provided, it was clear that the cross-examination would be far from brief; it was highly complex; it included reference to many pages from the bundle; and was not limited to one or two points as previously suggested.

84 The tribunal started the hearing on Thursday 6 April 2017; continuing into Friday 7 April 2017; and Monday 10 April 2017. By then all witnesses had been heard other than Mrs Edwards; the tribunal did not sit on Tuesday 11 April 2017; but resumed on Wednesday 12 April 2017; in the hope that Mrs Edwards' evidence could be heard.

85 When the tribunal had sight of the complexity of Mr Jackson's proposed cross examination we determined that this was not suitable for cross-examination by conference call. Accordingly, the hearing was then adjourned until 18 September 2017. Mrs Edwards attended on that day and gave evidence from 10:45am until 3:10pm.

86 The 2nd respondent's case is that costs were incurred by the adjournment which would have been avoided if the case had been postponed at the outset to date were Mrs Edwards would be fit to attend. The application was for those costs which they say were incurred because of the claimant's unreasonable insistence that Mrs Edwards' evidence could be agreed when very obviously it could not.

87 The application was for a costs order against the claimant; or, in the alternative, a wasted costs order against her solicitors.

88 When addressing us in the presence of the claimant, Mr Jackson made clear that his resistance to an adjournment had always been on specific instruction from the claimant. He was at pains to remind us that professional privilege had not been waived and we could not enquire as to the advice he had given. This being the position, we find at the outset that this is not a proper case for the making of a Wasted Costs Order.

89 Having said that, we do find that the attitude of the claimant to the proper request for a postponement because of Mrs Edwards' need for surgery was wholly unreasonable. In our judgement, it was clear that it was not possible for the claimant to pursue her case and at the same time purport to agree Mrs Edwards evidence. On this basis, we find that, to the extent that costs were incurred by the 2nd respondent by the hearing going part-heard, those costs should be paid by the claimant subject only to any consideration of her ability to pay. Having found the claimant's conduct to be unreasonable, we find that it is in the interests of justice to make the order for costs because she had every opportunity to reflect on the position; her position was always untenable; and the matter was compounded by the original insistence that the cross-examination would be sufficiently straightforward to be conducted by conference call; when in fact it was highly complex; and required the attendance of the witness.

90 We raised with the claimant the provisions of Rule 84: making clear that, if she wished us to take account of her ability to pay, we would require full details of the financial circumstances. The claimant's response was that she did not wish to provide such details; and did not ask us to take account of her ability to pay.

The Amount of the Costs Order

91 We were provided with a costs schedule totalling £8286: this included VAT on both solicitors and counsel's fees; it was soon established that the 2nd respondent was registered for VAT purposes and such VAT would be re-claimed as input tax.

92 At the outset of the resumed hearing on 18 September 2017, Ms Moss placed before us a considerable quantity of documentation going to the issue of remedy. It was clear from the schedule that much time had been spent in collating and considering this documentation; clearly this was unrelated to the reason for the adjournment. Costs claimed in respect of remedy preparations have been disallowed at this stage.

93 Removing those items which we consider to be related to remedy and those which we consider to be excessive from the solicitor's fees, we allow £1320 against a claim of £3405.

94 So far as counsel's fees are concerned: there is a brief fee of £2500 which Ms Moss confirmed was essentially a reading fee following the extended adjournment; together with her refresher fee for appearing on 19 September 2017. In our judgement, £500 of the reading fee must be attributable to the remedy issues: accordingly, we allow counsel's fees of £3000 against a claim of £3500.

95 The total costs allowed therefore is £4320.

Employment Judge Gaskell
21 December 2017