EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102323/2017

Held in Glasgow on 23, 24 January, 13 and 16 February 2018

Employment Judge: Shona MacLean
Members: Mr Peter O'Hagan
Mr Andrew McFarlane

Mrs Amanda Tonner — Claimant
Represented by:
Mr S McCluskey
Friend

Conroy McInnes Solicitors — Respondent
Represented by:
Mr S Smith
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims are dismissed.

REASONS

Introduction

1. In the claim form sent to the Tribunal's office on 4 August 2017 the claimant complains of unfair dismissal in the way in which the redundancy was dealt with and an alleged lack of consultation. She also complains that her selection of redundancy while on maternity leave was discriminatory. The claimant also brings a complaint of associated disability discrimination in terms of Section 13 of the Equality Act 2010 on the basis that her baby was born with severe Haemophilia. The claimant argues that the respondent treated her less favourably than it treated or would treat others by selecting her for redundancy and that the difference in treatment was because of her son's disability and the fact that the respondent knew she would require to take time off to look after her son and attend hospital appointments. The claimant also

made claims in respect of a redundancy payment, notice pay and holiday pay and time off in lieu in notice

2. In response the respondent said that the claimant was made redundant because the partnership of Conroy McInnes ended. The respondent denied that the claimant had been unfairly dismissed. The claimant was offered a full-time position to work with a former partner of Conroy McInnes, Fiona McKinnon. The claimant declined the offer of full-time employment. It was denied the claimant had been discriminated against as alleged.

3. The claimant withdrew the complaint in respect of failure to pay redundancy pay which was dismissed.

4. At the start of the hearing Mr Smith explained that the respondent had only recently instructed him. However, he felt as the claimant was not legally represented it was proper to give notice that during submissions he intended to address a preliminary issue. Mr Smith explained that the respondent's primary position was that the partnership ended in April 2017. The respondent ceased trading. However, the business was split and that part of the business where the claimant worked was transferred to Ms McKinnon now trading as McKinnon & Co. The other part of the respondent's business simultaneously transferred to Conroy McInnes Limited.

5. Mr Smith confirmed that in addition to representing the respondent he also acted for Conroy McInnes Limited and McKinnon & Co. He also confirmed that Ms McKinnon, who was instructing him was also giving evidence for the respondent and would be present throughout and that Alan Conroy would be attending to give evidence during the hearing. Mr Smith did not make an application for the respondent to sist any other respondents to the proceedings.

6. Mr McCluskey, the claimant's representative was invited to discuss matters with her. In particular whether she wanted to make an application to amend the claim form to add McKinnon & Co and/or Conroy McInnes Limited as additional respondents. Mr McCluskey explained that the claimant's difficulty

was that she did not know what had happened to the respondent and as far as she believed she continued to be employed by the respondent.

7. As Mr Smith represented all potential respondents, they were all aware of the proceedings; Ms McKinnon and Mr Conroy were giving evidence; and Ms McKinnon was to be present throughout the Hearing, it was agreed that once respondent's evidence had been completed the Tribunal would be willing to consider any further application the claimant may wish to make in this regard.

8. The Tribunal reiterated the position when the evidence of Ms McKinnon and Mr Conroy concluded on 23 January 2018. The Tribunal also suggested that the claimant may wish to consider her position after she gave evidence on 13 February 2017 and before the Tribunal heard the parties' submissions on 16 February 2017. To this end the representatives agreed to exchange their written submissions before 16 February 2018. Before hearing the submissions Mr McCluskey confirmed to the Tribunal that he had discussed the matter with the claimant and despite the potential consequences of the decision she did not wish to amend the claim form to include any other respondents.

9. At the hearing for the respondent the Tribunal heard evidence from Fiona McKinnon and Alan Conroy. The claimant gave evidence on her own account. The parties provided joint productions to which the witnesses were referred during the hearing.

10. The Tribunal had to determine the following issues:

a. When was the claimant's employment terminated?
b. Who employed the claimant on that date?
c. What was the reason for the termination of the claimant's employment and was dismissal fair in terms of Section 98 of the Employment Rights Act 1996?
d. Was the claimant treated less favourably (selected for redundancy) because of her son's disability?

e. Was the claimant treated less favourably 9selected fro redundancy) because she was on maternity leave?

f. Is the claimant entitled to any further payments in respect of notice pay, holiday pay and time off in lieu?

11. The Tribunal found the following material findings in fact to have been established or agreed.

Findings in Fact

12. The respondent was partnership carrying on business as solicitors. From around July 1988 the respondent carried on business at 268 Kilmarnock Road, Shawlands (the Shawlands office) and 51 Gartcraig Road, Carntyne (the Carntyne office).

13. Alan Conroy was a partner of the respondent specialising in conveyancing. He did not undertake any litigation work. In 1998 he employed Fiona McKinnon, a solicitor specialising in litigation. She did not undertake conveyancing work. Ms McKinnon was based at the Carntyne office.

14. Mr Conroy was based at the Shawlands office along with Elizabeth Grant, a solicitor specialising in conveyancing. Ms Grant worked part-time. Also based at the Shawlands office were Diane Robertson, Cashier and three legal secretaries. Ms Robertson is Mr Conroy's sister.

15. In 2002 Ms McKinnon was appointed a partner of the respondent. She continued to be based at the Carntyne office doing litigation.

16. In 2002 Mr Conroy interviewed the claimant for the post of legal secretary at Carntyne. The claimant received a written offer for the job and began working around January 2002. The claimant worked Monday to Friday 9am to 5pm.

17. The claimant's son has Haemophilia A of which Mr Conroy and Ms McKinnon were aware. They were supportive of the claimant who required to administer medication to her son and attend hospital appointments.

18. The claimant resigned around August 2004 when her son was about to start primary school.

19. Although the claimant no longer worked for the respondent she kept in touch with Ms McKinnon with whom she had a good rapport. They stayed friends.

20. The claimant worked in the hospitality industry taking a short break from maternity leave when her daughter was born in 2005. The claimant returned to work after her maternity leave but found nightshifts increasingly difficult. She decided to look for part-time work. Ms McKinnon mentioned to the claimant that Mr Conroy was looking for a legal secretary to work part-time in the Shawlands office.

21. The claimant spoke to Mr Conroy following which she returned to work in the Shawlands office around October 2006 on Tuesdays and Thursdays from 10am to 5pm.

22. Around 2008 the claimant moved to work for Ms McKinnon in the Carntyne office. She continued to work on a Tuesday and Thursday from 10am to 5pm. Norma Stride worked Mondays, Wednesdays and Fridays until around 2012.

23. Around 2012 the claimant increased her working days to Mondays, Tuesdays and Wednesdays. It was agreed that the claimant would work 9am to 4pm. Elizabeth Docherty worked Thursdays and Fridays.

24. The claimant and Ms Docherty were permanently based at the Carntyne office. The claimant and Ms Docherty joked that they both enjoyed working for Ms McKinnon and if either left the other would work full-time.

25. The claimant continued to have a good relationship with Ms McKinnon. They and their husbands socialised outside the office.

26. In January 2016 the claimant became aware that she was expecting her third child. The claimant told Ms McKinnon that she was pregnant around February 2016. This information was given on a confidential basis as only immediate family knew and the claimant did not wish it to become public knowledge. Ms McKinnon respected the confidence.

27. Around 20 April 2016 the claimant put her MATB1 form in an envelope and left it on Ms McKinnon's desk. The claimant was aware that she was expecting a boy and there was a substantial risk that he would have Haemophilia. The claimant was also informed that there was a possibility that the baby may have Downs Syndrome. The claimant mentioned to Ms McKinnon that she intended to work up to her due date. Ms McKinnon was aware that the claimant would have further tests and was very supportive.

28. In May/June 2016 Ms McKinnon was under strain at work due to challenges in the business and her ill health. The claimant was absent from work due to ill health and was self-certifying. Ms McKinnon tried unsuccessfully to contact the claimant to find out whether she would be returning to work. Ms McKinnon spoke to Mr Conroy. Advice was sought from ACAS following which Ms McKinnon wrote to the claimant on 7 July 2016. The claimant was issued with a warning about her absence.

29. The claimant responded by e-mail sent on 13 July 2016 (production 43). The claimant said that she told Ms McKinnon on 18 April 2016 that she intended to work up to her due date, 23 August 2016. However, the consultant had suggested the claimant have an amniocentesis test at 36 weeks pregnant to test if the baby has Haemophilia A and if so it was recommended that the claimant have a planned caesarean section. The claimant also said that as she had been employed by the respondent for 26 weeks before the 15 weeks before the due date and having earned more than £112 per week eight weeks prior to the 15 weeks before the due date (15 March – 9 May 2016) and having paid sufficient National Insurance Contributions she qualified for maternity pay.

30. Ms McKinnon replied by letter dated 19 July 2016 explaining that she had no recollection of the claimant informing her of her intention to work up to her due date. However, Ms McKinnon noted the claimant's last scheduled day of work would be 17 August 2016 with 52 weeks' maternity leave and her anticipated return date would 21 August 2017. Ms McKinnon noted that this may require to be adjusted in due course and that eight weeks written notice

was required from the claimant to alter the date. Ms McKinnon also confirmed that the respondent would process statutory maternity pay and maternity leave.

31. Ms McKinnon also sought clarification whether the claimant's current absence was caused by the claimant's pregnancy or some other reason with a view to determining whether the payment should be made under the maternity leave provisions or statutory sick pay provisions. Ms McKinnon also expressed concern about communication difficulties.

32. The claimant did not return to work. The claimant was tested in July 2016. She was informed that her baby had Haemophilia A. The baby was born on 23 August 2017. The claimant told Ms McKinnon of the baby's birth by text. Ms McKinnon replied sending her congratulations.

33. On becoming aware that the claimant would be on maternity leave from August 2016 Ms McKinnon advertised for a part-time secretary to cover for maternity leave. She received no applications. Ms McKinnon had to rely on the secretarial support provided by Ms Docherty. In Ms Docherty's absence Ms McKinnon managed all the administrative matters.

34. In recent years Mr Conroy and Ms McKinnon had been discussing terminating the partnership and going their separate ways. They both practice in separate areas of law from separate offices. While Ms McKinnon occasionally attended the Shawlands office for client meetings about litigation Mr Conroy had not been in the Carntyne office for about ten years. From her friendship with Ms McKinnon, the claimant was aware of this.

35. In December 2016 Mr Conroy gave Ms McKinnon notice of termination of the partnership. While this was not unexpected Ms McKinnon had to decide whether she wished work for another firm of solicitors; establish her own business and if so whether she would operate from the Carntyne office which would involve amongst other things purchasing the property.

36. Mr Conroy and Ms McKinnon anticipated that the partnership would dissolve on 31 March 2017. Mr Conroy's intention was to incorporate a limited

company and continue to specialise in conveyancing from the Shawlands office. As Mr Conroy could not be on the lender's panel if he was a sole trader he approached Ms Grant to ensure that she would continue to work at the Shawlands office after the dissolution of the partnership. Mr Conroy also informed Ms Robertson of his intentions. He did not inform the other employees based at the Shawlands office (three legal secretaries of whom one worked full time) as he did not consider that they needed to know at this stage as they were going to be unaffected by the changes.

37. Over Christmas and New Year the claimant and Ms McKinnon exchanged personal texts. While Ms McKinnon knew that the respondent was expected to cease trading at the end of March 2017 she did not consider that for personal reasons it was appropriate to mention this to the claimant at that time.

38. Early in January 2017 Ms McKinnon decided to set up her own business and trade from the Carntyne office which she looked to purchase. She took steps to set up her own firm and made arrangements to continue to represent the respondent's litigation clients in a seamless fashion while making the necessary reimbursement to the respondent in respect of work that was undertaken before the partnership was terminated. Mr Conroy advised Ms McKinnon that he was proposing to set up a limited company which would trade from the Shawlands office.

39. Ms McKinnon considered her requirements as a sole trader for administrative support. Ms McKinnon highly regarded the claimant and Ms Docherty. While they had been accommodating and had endeavoured to provide some additional cover when the other was absent it was ineffective. Ms McKinnon felt that to make the business effective the two part-time posts had to be re-organised into a full-time post. Accordingly, either the claimant or Ms Docherty would be redundant.

40. Ms McKinnon sought advice from ACAS. She was told that as the claimant had the longest service and worked more hours she should be asked first whether she was interested in the full-time post.

41. Ms McKinnon knew that the claimant was on maternity leave and could remain on maternity leave until 21 August 2017. Ms McKinnon was aware that the claimant's period of paid maternity leave was coming to an end. Ms McKinnon asked ACAS how the claimant should be approached. Ms McKinnon was advised to let the claimant take the lead as to whether she preferred to communicate by telephone or at a meeting.

42. Ms McKinnon told Ms Docherty about the change to the business. Ms McKinnon advised Ms Docherty that she was offering the full-time position to the claimant in the first instance. If the claimant was not interested then it would be offered to Ms Docherty. Ms Docherty worked for another firm of solicitors when she did not work for the respondent.

43. Ms McKinnon texted the claimant on 2 March 2017 saying that she wished to have a chat about work and enquiring if she would prefer to do so by telephone or in person. The claimant replied shortly afterwards saying that she would come into work and proposed some time during the week beginning 13 March 2017 (production 49). The claimant was unaware of any developments with the respondent' s business and thought that this might be an opportunity to discuss taking annual leave when she stopped receiving paid maternity leave.

44. On 14 March 2017 Ms McKinnon texted the claimant asking if she could telephone later that evening and set up a meeting. The claimant agreed. During the telephone conversation Ms McKinnon said that at last she and Mr Conroy were arranging to dissolve the partnership. She said that she was starting out on her own; she wanted someone to work full-time and she wanted to offer the claimant that position. Ms McKinnon said that she knew the clamant would want to discuss that with her family and once she had done so to get back to her. If the claimant wanted more information then Ms McKinnon was happy to meet. The claimant was surprised and wanted to discuss it with her family. The claimant said that she could work in the Shawlands office. Ms McKinnon said that she expected Mr Conroy had his full staff complement but she would confirm the position.

45. On 20 March 2017 Ms McKinnon texted to the claimant saying that she was in court and would message when she was finished with a view to discussing matters (production 50A). The claimant replied asking if Ms McKinnon could email the information/options so that she could discuss the matter with her husband. Ms McKinnon tried to contact the claimant by telephone. The claimant said that her telephone was on silent because the baby had been unwell. The claimant again asked that Ms McKinnon email information/options as she needed this before making any decisions.

46. On 22 March 2017 Ms McKinnon sent an email to the claimant (production 51). The email stated:

"*Further to our recent communications I have discussed matters in more detail with Alan and as you are now aware our partnership is ending on or around 5 April 2017. Alan has confirmed his current staffing levels are being met and he is unable to continue your employment with him. I have availability for a full-time secretary, commencing 10 April 2017, failing which the firm will have no alternative but to offer you a redundancy payment in addition to resolving your holiday pay entitlement and ongoing maternity pay status. Further detailed discussions can take place and you will have an opportunity to approve settlement figures in due course as appropriate.*

I would therefore be grateful to receive a decision from you in principle before 2pm on Friday 24 March 2017 to allow matters to be progressed thereafter. Please do not hesitate to contact me if there are any matters you wish to discuss further arising from receipt of this correspondence.

Further to my telephone I am unable to access the records we had on the system for your holidays etc and if you can identify where that may be located, I will forward that to you as requested failing which I will access my staff holiday records and send you what information I have in due course. I await hearing from you."

47. On 24 March 2017 at 14:58 the claimant sent an email to Ms McKinnon as follows:

"*I am emailing to advise that as you are aware I am currently on maternity leave until 21 August 2017 and that I am not in a position to start work at such short notice on 10 April 2017."*

48. Ms McKinnon acknowledged receipt of the email and advised that she would revert with further paperwork the following week.

49. Ms McKinnon understood from the claimant's email that she was not interested in a full-time position. Accordingly, Ms McKinnon approached Ms Docherty to enquire if she would be interested in taking up the position full time.

50. On 24 March 2017 Conroy McInnes Limited (CML) was incorporated. Mr Conroy is the sole director. Mr Conroy had not been involved in any discussions with the claimant or Ms Docherty. He was aware that Ms McKinnon had spoken to ACAS and that she was going to offer the full-time position to the claimant failing which Ms Docherty. Mr Conroy understood that the claimant said that she was on maternity leave and had rejected the offer of the full-time post. It was then offered to Ms Docherty.

51. On 17 April 2017 the partnership dissolved. On 18 April 2017 Ms McKinnon started trading from the Carntyne office, which she now owned, trading as McKinnon & Co. Ms McKinnon continued the litigation practice that the respondent had operated. Ms Docherty continued to work from the Carntyne office. The files and clients based at the Carntyne office were transferred to McKinnon & Co. Mr Conroy and Ms McInnes entered into an arrangement to setting out the basis upon which work in progress relating to work done by the respondent would be reconciled.

52. CML traded from the Shawlands office. The files and clients based in the Shawlands office transferred to CML. All the employees who were permanently based at the Shawlands office became employees of CML.

53. The claimant did not receive payment of her statutory maternity pay in April 2017. She contacted Ms Robertson around 28 April 2017 and was informed that Mr Conroy had said that the claimant should not be paid her maternity pay.

54. Ms McKinnon texted the claimant on 12 May 2017 apologising for the delay. Ms McKinnon explained that she was meeting Mr Conroy the following week and that the claimant would receive paperwork including the final figures (production 50C).

55. The claimant emailed Mr Conroy on 12 May 2017 referring to her discussion with Ms Robertson (production 52A). The claimant said that she was on statutory maternity pay until 21 May 2017. Mr Conroy acknowledged the text on 15 May 2017 and said that he was meeting Ms McKinnon and one of them would get back to the claimant.

56. Ms McKinnon prepared a letter addressed to the claimant which she sent to Mr Conroy confirming that because of the partnership ending the claimant had been made redundant (production 53). The letter set out the claimant's calculation for redundancy pay and notice pay. Although the letter was prepared the claimant did not receive it.

57. In the meantime, the claimant sought advice from the CAB and ACAS. The claimant sent a grievance to Mr Conroy on 26 May 2017(production 55). The claimant complained that she had not received payments of statutory maternity pay on 16 April 2017, 3 May 2017, 10 May 2017 and 17 May 2017. She referred to the earlier email. The claimant also referred to Ms McKinnon suggesting unofficially that she had been made redundant. She had been told that his staffing needs had been taken care of and she was not in the position to unable to consider the full-time position with Ms McKinnon's new business as she was still on maternity leave when Ms McKinnon needed her to start. The claimant considered that the responsibility for her employment rested with Mr Conroy. The claimant also considered that because of her maternity situation Mr Conroy had directly discriminated against her as she was the only one who had been made redundant.

58. On 2 June 2017 a letter was sent to the claimant from Mr Conroy on headed paper of CML (production 58). The letter said that:

"*Further to your recent communications to the Firm, we are writing to confirm that arising from the end of the partnership of Conroy McInnes solicitors with effect from 17th April 2017, you have been made redundant. Your employment has been terminated on that date notwithstanding that further payments are due to you as detailed below."*

59. The letter set out the various payments which the respondent calculated as being due. The letter concluded:

"Lastly in relation to your letter dated 26 May 2017, we trust that this correspondence addresses matters for you. We can confirm that you are not the only member of staff affected by the end of the partnership. Should you wish to arrange an appointment to discuss matters personally, there should be no difficulty with you being accompanied and we would simply ask that you confirm who will be accompanying you in advance of the meeting. If there are any issues arising please do not hesitate to contact Ms McKinnon to discuss matters further with a view to finalising matters between us."

60. Ms Docherty decided not to accept the offer of full time employment. She did, however confirm that she would be willing to stay with Ms McKinnon until she found a full-time replacement. Ms McKinnon advertised for a full-time secretary in early June 2017. A full-time replacement was appointed in mid-August 2017.

61. Ms Docherty received a redundancy payment when her employment was terminated.

62. In September 2017, the claimant was provided with a statement for fitness to work indicating she was not fit to work this would be the case for 91 days (production 54).

63. On 26 October 2017 the claimant received payment of £1,654.80 in respect of her redundancy payment from CML and a payment of £1,030.87 being the balancing payment in respect of maternity pay.

Observations on Witnesses and Conflict of Evidence

64. The Tribunal found Ms McKinnon to be a credible and reliable witness who gave her evidence honestly and candidly. She was however unsettled when asked about her personal relationship with the claimant. The Tribunal's impression was that Ms McKinnon was still upset about the deterioration of their personal relationship which these proceedings had exacerbated. The Tribunal believed that Ms McKinnon had obtained employment advice about dealing with sick absence while pregnant and offering the full-time post to employees working part-time but had asked the wrong questions or misunderstood the advice given.

65. The Tribunal considered that Mr Conroy was credible and reliable. While the Tribunal appreciated that he specialised in conveyancing it considered that Mr Conroy had a cavalier attitude about the legal ramifications of the partnership dissolution which the Tribunal considered disappointing in a solicitor who had been partner in a legal firm and an employer for almost 30 years.

66. The claimant gave her evidence honestly based on her understanding and recollection of events that took place during a highly stressful and emotional time of her life. The Tribunal had no doubt that she believed all that she said. The claimant was not present when Ms McKinnon gave her evidence. The Tribunal appreciated why this was so but felt that it was unfortunate as the claimant did not hear the events described from another perspective.

67. There was conflicting evidence about how long the claimant worked in the Shawlands office when she returned in 2016. Ms McKinnon and Mr Conroy said that she worked in the Shawlands office for a few weeks before returning to the Carntyne office. Their evidence was not challenged in cross

examination. The claimant said that she worked in the Shawlands office until July 2008. There was no reference in the claim form to the claimant ever working in the Shawlands office. While the respondent submitted that this might be an attempt to improve her position the Tribunal considered that this explanation was doubtful. The Tribunal thought it was more likely that the claimant did work in Shawlands office for more than a few weeks when she returned in 2006 and the claimant's move to Carntyne office coincided with the collapse in the conveyancing market in 2008. In any event the Tribunal did not consider that much turned on this issue as the claimant was based in the Carntyne office for more than eight years before her employment terminated.

68. The claimant also said that she would work in the Shawlands office when Ms McKinnon was on holiday. This was disputed by the respondent. The Tribunal considered that it was highly unlikely that the Carntyne office would be unmanned for any length of time particularly when Ms McKinnon was on leave. The Tribunal accepted that from time to time the claimant and Ms Docherty may have been asked to help in the Shawlands office but this would a temporary arrangement.

69. There was disputed evidence about the claimant's absence before going on maternity leave. Ms McKinnon said that she been unwell following a chest infection which resulted in damaged vocal chords. Her absence had affected the business as she had to apply for hearings to be adjourned. Around June 2017 the claimant was absent from work and was self-certifying her absence. Ms McKinnon did not know for how long the claimant intended to work and the reason for her sick absence. Ms McKinnon made attempts to contact the claimant by text and telephone but received no response. Ms McKinnon spoke to Mr Conroy who asked Ms Robertson to contact ACAS for advice about maternity pay and the claimant's sick absence. This resulted in Ms McKinnon writing to the claimant about her eligibility for statutory maternity pay and issuing a warning that her absence would be monitored. The claimant said that she had already told Ms McKinnon that she intended to work up to her due date. She was upset and angry when she received the

warning. She took advice from ACAS and decided to deal with the formal warning when she returned to work. However, she did not return as following her sick absence she went onto maternity leave.

70. The Tribunal considered that in June 2017 it was likely that the respondent would be considering how to cover the claimant's maternity leave. The Tribunal's impression was that the claimant and Ms McKinnon were not communicating on a personal level which resulted in Mr Conroy and Ms Robertson becoming involved. The claimant was upset when she received the letter as she considered that she had told Ms McKinnon when she intended to start maternity leave.

71. The Tribunal thought that it was likely that the claimant did mention to Ms McKinnon that she intended to work up until her due date but Ms McKinnon did not see that MATB1 form that the claimant said that she left in an envelope. The Tribunal could understand that the respondent needed certain information from the claimant and it was reasonable to ask for this to progress the appropriate payments due to her and make arrangements to cover her absence whether on sick leave or on maternity leave. The Tribunal could also understand that the claimant was angry about receiving a warning but found it surprising that she did not appeal that decision given that she wrote to Ms McKinnon about statutory maternity pay.

72. There was disputed evidence about what was said during the telephone conversation on 14 March 2017. Ms McKinnon's evidence was that she mentioned that she wanted to offer the claimant the full-time position so that she could discuss this with her husband. The claimant's evidence was that Ms McKinnon said that she needed a full-time secretary but did not actually offer it to her. The Tribunal considered that knowing the claimant was unaware of developments and would want to discuss matters with her husband it was more likely than not that Ms McKinnon would have said that she wanted the claimant to work for her full-time particularly as that was the position.

73. There was disputed evidence about declining the full-time offer. Ms McKinnon's evidence was that she was aware that the claimant's period of paid maternity leave was coming to an end. She wanted the claimant to work for her full-time but appreciated that the claimant would need to discuss this with her husband. Ms McKinnon understood from the claimant's response that she did not want to work full-time. The post was then offered to Ms Docherty who also declined it. The claimant said that Ms McKinnon offered the job knowing that she could not accept it because of her having had a baby, who had Haemophilia. She also said that she though that she had to start on 10 April 2017 when she was still on maternity leave. That was why she refused it as she had to reply by 2pm.

74. The Tribunal considered that the claimant's evidence on this issue was equivocal. The respondent highly regarded the claimant who was a good worker. The respondent knew about the claimant's eldest son's disability and were supportive. The claimant had previously expressed an interest in working full-time before the claimant was pregnant with her third child. The respondent was also supportive of the claimant during her pregnancy when the claimant became aware that her baby might have a disability. Against this background Ms McKinnon was setting up her own business where she would be taking all the financial risk and had difficult decisions to take if the business was to succeed. She highly regarded the claimant and Ms Docherty personally and professionally but for business reasons Ms McKinnon considered that she was overstaffed and one full-time secretary should perform the work of the two part-time secretaries. The Tribunal's impression was that had either of the existing employees accepted the full-time position Ms McKinnon would have been delighted; they were good employees, there would be only one redundancy payment and no need to recruit and train a new employee. While Ms McKinnon appreciated that the claimant would need to discuss matters with her husband the Tribunal did not find that Ms McKinnon made the offer knowing that it would be refused. To the contrary she hoped that it would be accepted.

75. The Tribunal also believed that Ms McKinnon understood from the claimant's response that she was not interested in working full-time. The Tribunal noted that Ms McKinnon was asking for a decision "in principle". It considered that had Ms McKinnon thought that the claimant would have been interested in the full-time position had the start date been deferred then she would have agreed to this. The Tribunal's reasoning was that Ms McKinnon knew the claimant was on maternity leave and she wanted the claimant to work for her. It was highly likely that Ms Docherty would have help facilitate this as she agreed to help Ms McKinnon until the full-time post was filled. The Tribunal saw no reason why Ms Docherty would not have made a similar offer until the claimant returned. The Tribunal noted that when full-time working was offered, the claimant raised working part-time in the Shawlands office. In the Tribunal's view Ms McKinnon's understanding was correct; the claimant did not want to work full-time.

76. There was disputed evidence about the claimant's telephone conversation with Ms Robertson on 28 April 2017. Ms Robertson did not give evidence. Mr Conroy said that he may have said to Ms Robertson to stop paying the claimant SMP but he could not remember the specifics of it. The claimant said that during their telephone conversation Ms Robertson said that "*Fiona and Libby had TUPE'd over*". The Tribunal found the claimant's evidence on this issue unconvincing. The Tribunal's impression was that in May 2017 neither Mr Conroy or Ms McKinnon appear to have considered the implication of the Transfer of Undertaking Regulations (Protection of Employment) Regulations 2006 (as amended in 2014). It therefore considered it highly unlikely that Ms Robertson would have been so aware and discussed this with the claimant during their telephone conversation. Had they done so Tribunal considered that it was surprising that there was no reference to this in the claimant's email sent to Mr Conroy on 12 May 2017; the claimant's letter dated 26 May 2017 sent after having taken advice from the CAB; or in the claim form.

77. There was an issue about the letter dated 22 May 2017. Ms McKinnon said that she prepared this letter in discussion with Ms Robertson and sent it to Mr Conroy. Mr Conroy confirmed this and said that so far as he was aware it was

sent out. The claimant said that she did not receive it. The Tribunal had no doubt that Ms McKinnon prepared the letter and understood that it was to be sent. The Tribunal believed that the claimant did not receive the letter dated 22 May 2017 and considered that more likely than not it was not sent which is why the letter of 2 June 2017 does not refer to it and is in similar terms.

The Law

78. Section 95(1)(a) of the Employment Rights Act 1996 (the ERA) states that an employee will be treated as dismissed if his or her contract of employment is terminated by the employer with or without notice.

79. Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended in 2014) (TUPE) provides that they apply to 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". An "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.

80. The effect of a relevant transfer on contracts of employment are set out in Regulation 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.

81. Regulation 4(2) states: 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.

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

83. Regulation 4(5) states: 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.

84. Regulation 7(1) states: Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (a) (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer. Regulation 7(2) states: This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer. Regulation 7(3) states: Where paragraph (2) applies (a) paragraph (1) does not apply;

85. Section 139 of the ERA states an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (a) the fact that his employer has ceased or intends to cease (i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the

employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

Submissions

86. Mr Smith kindly agreed to provide Mr McCluskey with outline submissions the day before the Tribunal heard them so the he could discuss with the claimant the points being made particularly about the identity of the employer. Mr Smith spoke first then Mr McCluskey responded. Mr Smith was offered a right of reply. They helpfully provided the Tribunal with a copy of their written submissions of which the following is a summary.

The Respondent's Submissions

87. The Tribunal was referred to TUPE. On the facts of the case the claim is brought against the wrong party: the respondent. The response presented by the respondent's former partners states that the respondent is a partnership which ended on 17 April 2017 following a notice served under their partnership agreement. The employees, including the claimant were told that the partnership was ending.

88. From 17 April 2017, Ms McKinnon traded as McKinnon and Co. Mr Conroy was the sole director of CML.

89. For almost 20 years before, the respondent traded from two offices – one in Shawlands, where Mr Conroy was based, and one in Carntyne, where Ms McKinnon was based from 1998. Before going on maternity leave in 2016, the claimant was based at the Carntyne office and worked for Ms McKinnon for at least eight years.

90. The two offices were differentiated by the type of work they did. On 18 April 2017 the staff based in the Shawlands office working under Mr Conroy became employees of CML. In the Carntyne office Ms McKinnon began working as a sole trader under McKinnon & Co. The work carried out in

Carntyne office for the partnership, simply continued, with no interruption. There was an agreement to reconcile the fees due for the work done under the partnership which was then completed by McKinnon & Co. McKinnon & Co retained the services of Ms Docherty, who had worked for Ms McKinnon previously doing the same job as the claimant, but on different days of the week.

91. Ms McKinnon had offered a role with McKinnon & Co to the claimant in March 2017, a month before the date of the start of the new firm. Accounts differ about whether this was offered first verbally but the email exchange makes clear it was offered a few days later, and turned down.

92. The Tribunal was invited to prefer the respondent's evidence to that of the claimant in relation to the telephone call on 28 April 2017.

93. The claimant's employment continued and she received further maternity pay in May 2017 (albeit that these payments were interrupted for a period) before being informed that she was being made redundant at the end of that month. The claim form states the claimant was dismissed on 17 May 2017. In her Schedule of Loss submitted later, this is amended to 2 June 2017. However, she did not argue at any point that she was dismissed before 17 April 2017.

94. If the Tribunal accepts that the changes in the partnership which came to pass on that date could fall under the type of situation described as a "relevant transfer" in terms of the TUPE, then there are three possibilities:

a. The claimant's employment transferred to McKinnon & Co on 18 April 2017, and she was dismissed by them.
b. The claimant's employment transferred to CML on 18 April 2017, and she was dismissed by them.
c. The claimant remained an employee of the respondent throughout, and she was dismissed by it.

95. The respondent submitted that was a transfer, in terms of Regulation (1)(a), of part of an undertaking, that being the part of the respondent which consisted of client files which were based in and administered from the Carntyne office. The "economic entity" which retained its identity was the Carntyne office, Ms McKinnon and her secretarial support, which on 18 April 2017 consisted of two secretaries, Ms Docherty and the claimant. The fact that the claimant was on maternity leave is irrelevant in terms of the Regulations, whose purpose is to protect the rights of workers, and prevent transfer situation from being used as a reason to dismiss.

96. The Tribunal was referred to the EAT decision in *Cheesman v R Brewer Contracts Limited [2001] IRLR 144,* that set guidance in the form of a list of factors, which are relevant to the question whether or not there has been a transfer under TUPE. Applying these factors, the following points were submitted as determining the question that the claimant's employment transferred to McKinnon & Co:

a. The files and clients based in the Carntyne office which formed the entity transferred from the partnership overnight, without any delay;
b. Ms Docherty transferred as an employee, and the claimant did the same job as her for between eight and ten years prior to going on maternity leave;
c. The premises had transferred from Mr Conroy to Ms McKinnon in preparation for this;
d. There was a contract between Mr Conroy about Ms McKinnon about how fees for transferred files will be reconciled.

97. If this is correct, then the claimant would potentially have a claim against McKinnon & Co about the dismissal. She may also have a claim under Regulation 7(1), that her dismissal was caused by the transfer, and the new employer would also have a potential defence under Regulation 7(2), about whether the dismissal was for an "ETO" reason. But this is for another Tribunal, on another day.

98. The claimant has not sought to advance that she was transferred to CML although that was what she advanced in evidence. The main factors in favour of this analysis are:

a. The dismissal letter was from CML and from Mr Conroy, rather than McKinnon & Co and Ms McKinnon.
b. The claimant's disputed evidence that she had worked at Shawlands until 2008, and that she also attended the office when Ms McKinnon was on holiday.

99. The respondent's answer to these points is:

a. The Shawlands office processed all wages, and a calculation was being done of all the outstanding sums due to the claimant, which had a number of different elements.
b. Mr Conroy had the main responsibility for bringing the partnership to an end. He was doing so 'wearing the hat' of a former partner, not as a Director of CML.
c. The fact that the letter was on CML was a "mistake" said AC which he had not noticed before. It is submitted there was no intention to indicate to the claimant that she ever was or could be an employee of that company.
d. The claimant had chosen to write to Mr Conroy, as she regarded him as "the boss" in the respondent.
e. The respondent's uncontested evidence was that the claimant had only worked at the Shawlands office for a few weeks, out of her 14 years with the firm, and also from the same witnesses (again uncontested) said that it was her claimant's preference and wish to be based on in the Carntyne office, it saved on travel to and from her home.

100. In any event, if this is the Tribunal's conclusion the claimant has again sued the wrong legal entity, as there is not claim at present against CML.

101. The claimant might argue option that she remained the respondent's employee after 17 April 2017 in some way unallocated and not transferred to

either of the new entities, until being dismissed in May/June 2017. If there was a transfer at all, such a finding would be against the purposive approach of TUPE, which is to protect the rights of people in the claimant's situation, who are on maternity leave while there is a reorganisation within the workplace.

102. The Tribunal was referred to *Hynd v 1. Armstrong & others and 2. Bishops, Solicitors & others (2007) CSIH 16 XA158/04,*

103. If the Tribunal finds that the claimant was part of the "economic entity" that became McKinnon & Co, then this only reinforces that her remedy properly lies against them, as this would be in keeping with the aim of the TUPE, to ensure that the Claimant's rights as an employee with 13 years' service were protected.

104. This is not a factor which has been referred to by the claimant but neither would the fact that the respondents say notice was given on 22 March 2017 during the partnership, but before McKinnon & Co came into existence make any difference. The purposive interpretation which should be given to the TUPE means that the courts will look back in time to find liability against a transferee, even for events that took place before they began trading. The claimant's position is that the notice of 22 March 2017 was not effective notice, but only that of 2 June 2017 that the respondent said made little difference to whether a transfer took place.

105. If the Tribunal does not accept that there was a transfer and the claimant remained the respondent's employee then there was a fair redundancy.

106. The onus is on the respondent to show that there was a redundancy situation. The Tribunal was referred to Section 139 of the ERA. The Tribunal was also referred to *Kingwell v Elizabeth Bradley Designs Limited, EAT/0661/02:* redundancy *"can occur where there is a successful employer with plenty of work, but who, perfectly sensibly as far as commerce and economics is concerned, decides to reorganise his business because he concludes that he*

is overstaffed. Thus, even with the same amount of work and the same amount of income, the decision is taken that lesser number of employees are required to perform the same functions. That too is a redundancy situation."

107. The next question was if there was a genuine redundancy situation was the dismissal fair? The Tribunal was referred to the case of *Charles Scott and Partners v Hamilton UKEATS/0072/10.*

108. The respondent anticipated a number of criticisms of the procedure it adopted. It was accepted that there was no meeting with the claimant before she was dismissed. Ms McKinnon said that the reason for this was that, when she took the advice from ACAS, this was to the effect that she should "take the lead" from the claimant, because she was on maternity leave, as to how this was going to be done. Ms McKinnon's evidence was that she had stressed in the telephone call to the Claimant on 14 March 2017 that she wanted to meet with her, and this supported to an extent by the text messages and emails. It was an offer repeated by Mr Conroy but never taken up by the claimant.

109. Was a meeting a requirement on employers in all situations? As Lady Smith sets out *Scott (above)*, it is not within the ACAS code, and it is not strictly required as a matter of law either, it all depends on the circumstances. One case where it was found to have made no actual different to the outcome was *Ashby v JJB Sports UKEAT/0114/12***.**

110. The size of the respondent is a relevant factor here. The respondent deal with payroll and HR matters internally, but advice from Acas had been taken. Mr Conroy said he were not impressed by this. Ms McKinnon said that it was this advice that led her <u>not</u> to arrange a meeting initially with the claimant, but to initially ask to speak to her via text message, and then by telephone. Then the claimant requested an e-mail which Ms McKinnon provided. A meeting was offered on several occasions.

111. The claimant was spoken to before her dismissal, and advised what of the situation. She was offered a meeting on several occasions in March, when it was first discussed, but she asked for an email setting this the options. After that, she was offered a meeting in May (if she got letter of 22 May) a meeting was offered, then on 2 June 2017 another meeting was offered, both this time with Mr Conroy. The claimant bears greater responsibility than the respondent for the fact there was no meeting.

112. The claimant said her letter dated 26 May 2017 that she was the only person whose employment was affected by Ms McKinnon's decision to have one full-time secretary rather than two part-time secretaries. Mr Conroy sought to correct her on this but the claimant reiterated the point in the claim form. However, she now accepted in her oral evidence that Ms Docherty also lost her role with McKinnon & Co.

113. The claimant was offered the full-time role first. It was only after the claimant turned it down, that it was offered to Ms Docherty. The claimant's misconceptions having been corrected, she produced no further evidence that she was treated less favourably than any others in terms of the information she was given, or to support the motives that she has ascribed to the former partners who she worked for.

114. The Tribunal heard this motive contested strongly by Mr Conroy and Ms McKinnon; they re-employed her in the full knowledge that both her children had health problems, and one had identical condition that the new child had. They said in their evidence had resulted in the claimant having to attend hospital, but that they accommodated these. They were positive about the claimant's abilities attributes as a secretary, and Ms McKinnon was quite candid that she wanted the claimant to have the job – she had struggled for cover for her and she was aware Ms Docherty had another job. Ms McKinnon's evidence was that, if the claimant had said that she could not start until August 2017 she would have held the job open for her. That conversation never took place, because the respondent's offer to have a meeting was never taken up.

115. No claim is made in respect of the Maternity Regulations 1999. In any event Regulation 10 was complied with, as the claimant was given priority by being offered the new full-time post with McKinnon & Co in preference to and before anyone else. The wording of the Regulation is that someone in the claimant's situation should be offered a "suitable alternative" vacancy. The evidence was this was the only vacancy, at either McKinnon & Co or CML. Even if there was a breach this will not amount to a breach of Section 18 of the Equality Act 2010 (EqA) *(see Sefton Borough Council v Wainwright UKEAT/0168/140)*

116. The respondent submitted that all the evidence regarding discrimination pointed the other way, so there would be nothing to support the claimant's argument about the "reason why" the maternity regulations were breached (which is denied) being due to a discriminatory motive. This would result in a finding of unfair dismissal, but not an EqA breach.

117. If a compensatory award is due, the Tribunal will require under Polkey to consider what the prospects would have been of her being retained in employment. the Tribunal has to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

118. The Tribunal must take account here of the claimant's fit notes, which were that she was unable to work from September 2017 onwards. She also gave evidence that she would not have been able to work before then either part-time or full-time. Later in her evidence, she sought to qualify this, by saying that, if the respondents had given her a job in the Shawlands office, she would have been able to do this. But this did not fit with her evidence that she has not tried to obtain a new job, because of her health reasons. The claimant sought to blame her depression on the decisions taken by the respondents (although she admitted a previous history). At one stage she said that "it took all of me to deal with my son", that family and friends were having to visit her every day, and that the health visitor for her son had noticed a deterioration.

Taking account of all her evidence, it is submitted that the Tribunal can have little certainty about whether she would have been able to return to her old job, the new role at a later date, or any role.

119. The claimant accepted she has taken no steps to mitigate her loss, due to her health, although she expressed the intention to now start looking for a job. The evidence about her health over the past 18 months must cast doubt on this. Very little evidence was provided by the claimant about what steps she has taken to improve her health.

120. Notice was given on 22 March 2017 the claimant was told then that she going to be made redundant. As a matter of law, notice does not have to be on headed notepaper. It is accepted that there is an argument open to the claimant that "proper" notice was not received until 2 June 2017 and if the Tribunal accepts this, then a further notice payment would be due. However, it would be inconsistent for this to be due from the respondent. It would only be due by a transferee.

121. Holiday pay – this is set out in a counter-schedule of the claimant's Schedule of Loss, and is attached. The sum due by the respondent is £436.26.

122. Pay in lieu – under the Deduction from Wages (Limitation) Regulations 2014, no payment is now due. Reference was made to the IDS Handbook on Wages.

The Claimant's Submissions

123. The claimant said that she had brought her claim against the correct party as the respondent employed the claimant. The respondent made the claimant position untenable by offering an alternative position with McKinnon & Co knowing that she could not accept it due to her son's disability.

124. The respondent has been represented by Ms McKinnon, Ms Peat of McGrade & Co and Mr Smith.

125. CML was incorporated on 24 March 2017. In a letter dated 2 June 2017 the claimant was told that the partnership ended on 17 April 2017. The respondent is due money from the Law Society and CML. The respondent paid the claimant SMP up to 12 April 2017 then CML paid the remaining five unpaid weeks on 2 June 2017. CML also paid the claimant the redundancy payment in October 2017.

126. The claimant also maintained a comprehensive record of her time and dates worked and her holidays which were agreed to roll over each year. While the claimant is aware of the Working Time Regulations and the Deduction from Wages (Limitation) Regulations she believed that there is a counter argument to this.

127. The claimant was automatically unfairly dismissed because the respondent failed to comply with the Statutory Dismissal Procedures. The respondent did not set out in writing the terms and conditions and clear reason for dismissal/redundancy. IT was not carried out in the correct manner or sequence as other employees.

128. The respondent had initially refused to pay her SMP and issued a warning about her absence record while on sick leave. The claimant was on maternity leave. She was not clearly advised that the partnership was coming to an end and that she was being made redundant. The claimant was discriminated because she was on maternity leave and was the last person to know about the partnership ceasing. Ms McKinnon was wanting a decision about the full-time position within a two-day period. The respondent intended that the claimant would leave without any payment. Employees have to give eight weeks' notice if they intend to return earlier. Mr Conroy advised that the claimant should not be paid SMP. Ms Robertson said that Ms Docherty had TUPE'd over to McKinnon & Co.

129. The claimant considered that she was also an employee of the "owner of Conroy McInnes". Therefore, offering her an alternative job was a confusion

tactic to cloud the waters of the claimant's position with the respondent. Mr Conroy knew about this in December 2016 but the claimant was not told about this until March 2017 by Ms McKinnon. The claimant was placed in an untenable position by asking another employee to offer the claimant a position.

130. The claimant maintains that she has not had alternative income since the termination of her employment. The claimant worked for the respondent for over ten years and sis not get a pay rise. The birth of her child with Haemophilia was a traumatic and stressful period for the claimant. She has lost her protected rights.

131. The claimant has suffered from an increasing depression which has been significantly accredited to all aspects surrounding this case. The Tribunal was referred to the claimant's schedule of loss.

Deliberations

132. The Tribunal started by considering when the claimant's employment was terminated. The Tribunal referred to its findings.

133. It found that respondent was a partnership that had continuously employed the claimant from October 2006. On 17 April 2017 the partnership dissolved. In the Tribunal's view under common law the dissolution or major reconstruction of a partnership would normally terminate any contract of employment by operation of law.

134. The Tribunal also found that on 18 April 2017 the part of the respondent's business that operated from the Shawlands office transferred to CML and the other part of the respondent's business that operated from the Carntyne office transferred to McKinnon & Co. Under common law that transfer of an employer's business to another automatically terminates all existing contracts of employment however this rule has been superseded by TUPE.

135. The Tribunal therefore asked if there was a relevant transfer under Regulation 3 of TUPE. The Tribunal referred to *Cheesman (above)*. In the Tribunal's view on and before 17 April 2017 the claimant was a legal secretary employed by the respondent based permanently at the Carntyne office where the respondent's litigation work was undertaken by Ms McKinnon. The claimant and Ms Docherty gave administrative support to Ms McKinnon who managed them. On 18 April 2017 the respondent's litigation work consisting of client files administered at the Carntyne office was transferred to McKinnon & Co trading from the Carntyne office. Ms Docherty gave administrative support to Ms McKinnon who managed her. Mr Conroy and Ms McKinnon had a contractual arrangement about reconciling fees for work undertaken before 17 April 2017. The Tribunal concluded that on 18 April 2017 there was a transfer of part of respondent's undertaking to McKinnon & Co. Accordingly TUPE applied.

136. The Tribunal also considered that on 18 April 2017 the remaining part of the respondent's undertaking: the respondent's conveyancing work consisting of client files administered at the Shawlands office was transferred to CML.

137. The claimant was absent on maternity leave immediately before the transfer. The Tribunal therefore considered whether on returning to work the claimant would have been assigned to the Carntyne office. The Tribunal's looked at the position before immediately before the transfer. The claimant had worked for Ms McKinnon at the Carntyne office for eight years. The inference was that she was returning to the Carntyne office. There was certainly no discussion before her maternity leave that the claimant would work in the Shawlands office on her return. Before speaking to Ms McKinnon on 14 March 2017 the claimant intended to ask about taking holidays not to discuss to which office she would be returning. While the claimant mentioned during that telephone conversation working in the Shawlands office, that was after Ms McKinnon told her about the full-time position in the Carntyne office. Ms McKinnon expected that the Mr Conroy had his full compliment. The Tribunal considered that immediately before the transfer the claimant was in the same position as Ms Docherty and would have transfer to McKinnon & Co.

138. In the Tribunal's view when the respondent dissolved the claimant's employment did not end. Under TUPE the claimant's contract of employment transferred to McKinnon & Co.

139. As the claimant's employment did not terminate automatically on dissolution of the partnership on 17 April 2017 the Tribunal referred back to its findings to decide when the claimant's employment terminated.

140. During the telephone conversation on 14 March 2017 the Tribunal did not consider that Ms McKinnon gave the claimant notice of termination of her employment. At best the claimant was told that her position was at risk of redundancy. On 22 March 2017 Ms McKinnon asked for "*a decision in principle before 2pm on 24 March 2017 to allow matters to be progressed thereafter*". The claimant replied that Ms McKinnon knew that the claimant was on maternity leave until 21 August 2017 and she *"was not in a position to start work at such short notice on 10 April 2017".*

141. The claim form and the response form said that the date of termination was 17 May 2017. While the claimant was not paid four weeks' statutory maternity pay by this date the Tribunal did not consider that this was when the claimant's employment ended as non-payment of wages does not terminate employment.

142. The next communication about termination of employment received by the claimant was the letter dated 2 June 2017 which was emailed and posted to her. While this letter referred to the claimant having been given notice of termination during the telephone conversation (erroneously said as being on 13 March 2017) as indicted above the Tribunal did not consider that notice had been given during that telephone as no specific date of termination was mentioned.

143. The Tribunal acknowledged that the letter of 2 June 2017 was sent by CML. However, the letter of 26 May 2017 which was in identical terms was prepared by Ms McKinnon. The Tribunal concluded that the claimant's employment terminated on 2 June 2017 as that when she was knew that her employment

came to an end. The Tribunal considered that on 2 June 2017 the claimant was employed by McKinnon & Co. For administrative reasons the calculations of payments due to the claimant were being coordinated from the Shawlands office where Ms Robertson was and continued to be based.

144. The Tribunal considered that the claims relate to the termination of the claimant's employment and payments due at or arising on termination. The respondent was not the claimant's employer at the date of termination. These claims in the Tribunal's view ought to have been directed against McKinnon & Co.

145. In the circumstances the Tribunal considered to what extent if any if could determine the outstanding issues. The Tribunal was mindful it had been addressed on the basis of the respondent being the employer.

146. In the Tribunal's view there was no evidence before 2017 of the respondent reorganising the secretarial cover at the Carntyne office. The decision was made by Ms McKinnon in the context of part of the respondent's business transferring to her and her view that to be more efficient she needed a full-time legal secretary. The Tribunal felt that it was inappropriate in the circumstances to reach a view on the fairness or otherwise of a dismissal by McKinnon & Co.

147. The Tribunal found that the claimant was offered the full-time post first. Ms McKinnon understood that the claimant did not want to work full-time so offered the full-time post to Ms Docherty who declined it. Ms Docherty was made redundant when a full-time legal secretary was appointed. Against this background the Tribunal did not consider that there was evidence before that the claimant's dismissal was because she was on maternity leave or because of her son's disability.

148. The Tribunal considered that on termination the claimant had not received statutory notice nor had she received in full a payment in lieu. The respondent accepted that certain payments of holiday and pay were outstanding when it was dissolved. The Tribunal considered that there was force to the respondent's submission that the backdating of unlawful deductions of wages

was limited to two years under the Deduction from Wages (Limitation Regulations 2014.

149. In all the circumstances the Tribunal dismissed the claims.

Employment Judge: S MacLean
Date of Judgment: 10 April 2018
Entered in register: 13 April 2018
and copied to parties