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EMPLOYMENT TRIBUNALS

Claimant: **Miss F Malacu**

Respondents: **(1) Accelerate Cleaning Solutions Ltd**
(2) Capital Support Services Ltd

Heard at: **East London Hearing Centre**

On: **21 and 22 September 2019**

Before: **Employment Judge Reid**
Members: **Mr P Quinn**
Mr M Rowe

Representation

Claimant: In person
First Respondent: Mr Wilson, Counsel (instructed by DAS Law)
Second Respondent: Mr Tighlit, CEO

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The Claimant's employment transferred from the First Respondent to the Second Respondent with effect from 1st October 2017 under the Transfer of Undertakings (Protection of Employment) Regulations 2006.**

2. **The Claimant's claim for accrued holiday pay under Regulation 14(2) Working Time Regulations 1998 (due at the end of her maternity leave on 16th November 2017) therefore succeeds against the Second Respondent. She is entitled to 28 days holiday pay from the Second Respondent (subjection to any deductions the Second Respondent is obliged to make for tax or National Insurance contributions). The Claimant's claim for accrued holiday pay as against the First Respondent is dismissed.**

3. **The Claimant's claim for maternity discrimination under s18(4) Equality Act 2010 is dismissed as against both the First Respondent and the Second Respondent.**

Note: a remedy hearing was provisionally booked with the parties for 9th December 2019. Information provided by the First Respondent to the Second Respondent as part of the TUPE information process between them about the amount of the Claimant's pay can be used to calculate her holiday pay so that a remedy hearing may not be required. The Claimant and the Second Respondent are to notify the Tribunal on or before 25th November 2019 if that hearing is still needed.

REASONS

Background

1 The context of this claim is a service provision change governed by the transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'). The Second Respondent took over a contract previously held by the First Respondent in relation to cleaning at Aldgate Tower with effect from 1st October 2017, when the Claimant was on maternity leave.

2 The Claimant presented a claim on 24th January 2018 making a claim for unpaid holiday pay and pregnancy/maternity discrimination (pages 6-7). The Claimant's claim was firstly that she had not been paid her accrued holiday pay of 28 days at the end of her maternity leave which ended on 16th November 2017 and secondly that this failure amounted to pregnancy/maternity discrimination. At the hearing on 27th June 2019 the Claimant confirmed that her claim was that she was treated unfavourably in not being paid her holiday pay because she was or had been on maternity leave. The First Respondent defended her claim on the basis that her employment had transferred to the Second Respondent on 30th September 2017 under Regulation 4 of TUPE , before her holiday pay was due to be paid and so was not liable for that payment (page 16). The Second Respondent was joined as an additional respondent by order dated 1st July 2019 (page 38A) and provided a response (page 17A), attaching all the documents it said it had about her claim. The Second Respondent's case was that the Claimant had objected to the transfer before the transfer so that her employment had not transferred to it; this meant that the Second Respondent did not have any liability to pay her holiday pay. Both the respondents denied discrimination.

3 The Claimant's two claims were clearly identified in the preliminary hearing summaries at pages 23,24 and at the hearing she attended (with an interpreter) on 27th June 2019.

4 The first issue the Tribunal had to determine was whether or not the Claimant had transferred under TUPE from the First Respondent to the Second Respondent.

5 The parties were in agreement that accrued holiday pay was due to the Claimant. The issue was which respondent was liable to make that payment and why it had not been paid by whoever had that liability, on the date her right to that payment crystallised.

6 If the Claimant had objected to the transfer to the Second Respondent she would

be deemed to resign with effect from 1st October 2017 under Regulation 4(8) and her accrued holiday pay would be calculated up to that date. If she had not objected then her holiday pay would be calculated up to the end of her maternity leave on 16th November 2017. It was agreed between the parties that if calculated up to the end of her maternity leave, the relevant number of days holiday was 28 days.

7 Case management hearings were held on 16th April 2018 (page 23) (not attended by the Claimant) and on 19th July 2018 (page 21). This hearing had originally been listed for 27th June 2019 (page 38E).

8 All parties attended this hearing. The Claimant and the Second Respondent were not represented. An interpreter was arranged for the Claimant. The issues and procedure was explained to the Claimant and the Second Respondent at various stages throughout the hearing because they were not legally represented.

9 There was a one file bundle paginated to page 192. The Tribunal heard oral evidence from the Claimant (assisted by the interpreter), from Mr Morgan of the First Respondent and from Mr Tighlit of the Second Respondent. The Claimant had provided a witness statement (page 137) and Mr Morgan had provided two witness statements (pages 140 and 143). The Tribunal treated Mr Tighlit's letter to the Tribunal dated 11th September 2018 (page 17N) as his witness statement, which letter he signed at the hearing. Whether Mr Tighlit also wanted to call Ms Prisacaru of the Second Respondent (who had some dealings with the Claimant around the time of the transfer) as a witness was canvassed with Mr Tighlit on the first day of the hearing. He was advised that it was a matter for him who to call but that if he wanted to call her he needed to serve a short witness statement on all parties that evening. He did not call her as a witness.

10 The First Respondent had made an application to strike out the Claimant's claim by letter dated 16th August 2019 (page 38J). That application was heard at the outset of this hearing and the Tribunal heard oral submissions from all three parties. The Tribunal refused the application and gave oral reasons for doing so at the hearing.

11 The Claimant made an application to amend her claim at the beginning of this hearing. She wanted to include a claim about a decision made she said in around September 2016 to demote her when she had told the First Respondent that she was pregnant, which she said amounted to a further act of discrimination (in which respect she referred to page 136). The Tribunal heard oral submissions from all three parties. The Tribunal refused her application and gave oral reasons for doing so at the hearing.

12 The Tribunal heard oral submissions from all parties at the end of the hearing and due to lack of time reserved its decision.

13 At the end of his cross-examination Mr Tighlit asked whether he could take legal action (defamation) about the questions which had been put to him. He was advised that he could not.

Findings of fact

The Claimant's understanding of TUPE 2006

14 The Tribunal finds that the Claimant's ability to communicate clearly during the TUPE process was affected because English was not her first language and because her understanding of the complexities of a TUPE transfer was (understandably) limited, based on the following:

14.1 Her claim form (page 7) referred to the First Respondent being transferred to the Second Respondent

14.2 She said in her claim form that her employment had ended on 16th November 2017 consistent with not having objected to the transfer, rather than having objected to it

14.3 Her first witness statement at the 19th July 2018 hearing (page 146) referred to different dates as to when she said she had told the Second Respondent about not wanting to come back to work (para 4 – October 2017) even though when she wrote that statement she had a copy of her own 22nd September 2017 Viber message (page 139) which she says was the same date as separately notifying the Second Respondent that she objected to the transfer by letter (which letter she also brought to that hearing); she also used the language of informing the Second Respondent about a return to work or not in that witness statement, when she relies on documents (page 95) using the language of an objection to the transfer

14.4 She was unable to articulate the reason as to why either one of the Respondents should pay her holiday pay when she contacted both in December 2017 (see further findings below); she was still unable to articulate it in either of the witness statements at pages 145 or 146 ie say that she had objected to the transfer and that therefore it was for the First Respondent to pay the holiday pay.

14.5 Her 27th June 2019 witness statement (page 145) was confused (para 5) because she was saying that she had said that she was not coming back after her extended maternity leave (ie in November 2017) but also that she had told the Second Respondent this (who was not then her employer) and in relation to whom she had also objected to the transfer (meaning her employment ended at the time of the transfer and not in November 2017)

14.6 Her oral evidence at the end of cross examination was that she did not resign from the First Respondent, that they transferred her (even though her case was that she never transferred because she objected) and that she was on maternity leave at the time. When asked to clarify she said that the First Respondent had transferred her and then she hadn't accepted the Second Respondent's conditions (even though her claim

was that she never transferred because she objected).

Communication about the transfer between the Claimant and Mr Morgan end of August 2017/ beginning of September 2017

15 Mr Morgan asked the Claimant (page 91) whether she wished to extend her maternity leave beyond 9 months. She replied (page 91) that she would extend it for a further 3 months and that after that she would like to work part-time and closer to where she lived. When she replied to Mr Morgan's email the Claimant did not know about the transfer of the Aldgate contract to the Second Respondent because Mr Morgan then told her about it in his next email (page 90), followed up by the letter dated 31st August 2017 (page 89) which she received subsequently. The Tribunal therefore finds the Claimant did not address the matter of the transfer and what she wanted to do at this stage about the transfer; all she was saying was that she wanted to come back part-time in a further 3 months time (ie in November 2017) in a closer location.

16 The letter dated 31st August 2017 (page 89) clearly told the Claimant that her employment would be transferring to the Second Respondent. It did not however explain to her that she had the right to object and explain that if she did object she was deemed to resign, which would have been helpful for the Claimant to know, as making clearer her two options. The Tribunal finds that to a degree this letter went over the Claimant's head and that she did not understand the implications – from her point of view she had told the First Respondent that she wanted to come back part-time and change locations so that is the matter she thought she had left with the First Respondent. She did not turn her mind to the implications of this letter and did not contact Mr Morgan with any questions about the transfer which he had suggested she do (pages 90,91). At this stage the Claimant did not understand the implications of the transfer on who was her employer and how that fitted in with a return (or non-return) at the end of maternity leave. Given English is not her first language the letter at page 89 was likely have been difficult to fully understand in a context where the Claimant had already told Mr Morgan that she wanted to come back in November 2017 and work part-time because that was the issue as she then saw it, not an issue about who was her employer.

17 The Claimant and Mr Morgan were therefore at this stage somewhat at cross purposes – the Claimant thinking the issue was about her request for part-time work in a closer location (which issue she thought had left with Mr Morgan to come back to her on) and Mr Morgan thinking that she was not voicing any objections to the upcoming change to her employer and that she could take up her request to work part-time on a closer location with the Second Respondent after the transfer, because she was due to return to work some 6 weeks after the transfer happened. The Tribunal finds based on his oral evidence that Mr Morgan in his head thought that part-time work was a matter for the Second Respondent to see if it could accommodate but he did not expressly tell the Claimant to take it up with the Second Respondent. The Claimant meanwhile took no further steps to chase up about part-time work with Mr Morgan (part-time work being the last issue she raised with him).

18 The Tribunal finds however based on her oral evidence that the Claimant understood that something she had to decide about was potential employment by the Second Respondent because she said that the reason she did not want to transfer to the Second Respondent was because their terms did not suit her, namely that any part-time

work with the Second Respondent would be night work which she could not do. This was explained in her ET1 as not agreeing to their new working conditions. Although the Claimant may not have understood all the details of how TUPE worked she understood that she had to consider whether the Second Respondent's terms about part-time working would suit her. For the Claimant however the issue was still about working part-time or not, not about who was her employer. The issue for her was also now whether or not she came back to work after her maternity leave at all, if she could not agree suitable hours/location.

19 Mr Tighlit was aware that the Claimant had extended her maternity leave (page 93, 100) and thus would be transferring, unless she objected to the transfer. The Second Respondent was aware she was on maternity leave and that her holiday was accruing and would transfer (page 87) and took the appropriate next step to invite her to a consultation meeting with it, therefore acting in line with what TUPE requires.

20 The First Respondent was due to have a one to one meeting with the Claimant (page 89). The Tribunal accepts the Claimant's oral evidence that she did not have such a meeting with Mr Cullander her then manager (whether in phone or person) because had that discussion been had and her situation explained clearly to her (including a response to her earlier request to work part-time) this situation would have been less likely to have arisen. The Claimant did not claim that this failure to hold a meeting amounted to a separate act of maternity discrimination.

Viber message from the Claimant to Ms Prisacaru (Second Respondent) 22nd September 2017 (page 139)

21 The Claimant said she got her copy of this message used in this claim from the Second Respondent in December 2017, consistent with this being the only relevant document the Second Respondent (or she) had at this time – see findings below.

22 The Claimant contacted Ms Prisacaru to say she would not be attending the Second Respondent's consultation meeting she had been invited to and to tell her that she would not be coming back to work after her maternity leave because she wanted to do some studying. This message did not constitute an objection to the transfer of her employment to the Second Respondent but was the Claimant simply saying she would not be coming back when her maternity leave ended in November 2017 and that she would therefore give notice in writing to that effect. Telling this only to Ms Prisacaru showed some understanding that it was the Second Respondent's employment the Claimant would otherwise be coming back to in November 2017. The Claimant knew at this point that the First Respondent was still her employer but did not also tell the First Respondent what her decision was, inconsistent with thinking that she was somehow staying with the First Respondent or planning to do so.

23 This message however was mis-read by the Second Respondent as meaning that she was resigning with immediate effect or that because she was resigning the upcoming transfer became irrelevant. This mischaracterisation of what the Claimant was saying or the effect of it is evident from the later letter from the Second Respondent at page 108 in July 2018 which refers to a resignation on 22nd September 2017 and misses the point that she was resigning to the wrong employer if resigning on that date. It also missed the point that if the Claimant was in fact objecting to the transfer, her employment would end on the

date of the transfer and 22nd September 2017 would not be the relevant date.

Creation of the Claimant's letter of objection dated 22nd September 2017 (her version page 95, Second Respondent's version page 19K)

24 The Claimant said in her oral evidence that the letter at page 95 was a letter she drafted and wrote on 22nd September 2017 on her laptop with her sister helping out with the English. She said that when it was written she printed out two copies, signed both and posted one to the Second Respondent that day and kept the other copy herself. This letter was produced by the Claimant at the preliminary hearing on 19th July 2018 (page 26). The letter was produced only at that hearing despite the previous order that documents be disclosed by 16th May 2018, some two months previously (page 24). The Claimant said that she no longer had her laptop so could not produce evidence of when the letter was created. When she produced it at the July 2018 hearing she at the same time produced a witness statement (page 146) which made no mention of this letter and gave a conflicting account of having told the Respondent in October 2017 that she would not come back to work.

25 Mr Tighlit said in his oral evidence that he had a copy of the letter sent by the Claimant at page 95 plus the one at page 19K. Page 19K was not an identical copy of what the Claimant said she had posted because there are spacing errors in both sentences of the Second Respondent's version and it does not have the Claimant's physical signature on it but instead a copy of her signature obtained from another document. If the Claimant was right that she had posted the Second Respondent page 95, that is the only document the Second Respondent would have produced a copy of because Mr Tighlit said that all documents had been produced (page 19L) and said in his oral evidence (and at page 19L) that the Second Respondent keeps physical files of documents.

26 If the Claimant was right that she had drafted the letter on her laptop and posted it to the Second Respondent then there would have been no second version (ie with the spacing errors) producible by the Second Respondent because it was the Second Respondent's case that it was a document it had never had on its system. If the Claimant said that page 95 was the only version which was created by her and then posted then the Second Respondent could not have another version. The Second Respondent also had a copy of page 95 in its files but it still did not explain why it had a second different version of a document said to have been created entirely by the Claimant on her laptop and then posted.

27 Neither the Claimant nor Mr Tighlit could explain these discrepancies in their oral evidence.

28 The Tribunal therefore finds that because the Second Respondent had a different version of the letter, the draft of that letter must have come initially from the Second Respondent whether it was sent to the Claimant to complete (and she removed the spacing errors) or whether she was told by Ms Prisacaru (or someone else from the Second Respondent) on the phone that this was the wording needed, taking into account the wording appears to be standard wording in a template format which could be signed and dated by any possible transferring employee on any transfer as it is generic wording which does not refer to the specific transfer. The language also mirrors the language at

page 96 and page 104 used by the Second Respondent, using the phrase 'TUPE over' which was not a phrase the First Respondent had been using in its communications with the Claimant. It also used the phrase '1-2-1 consultation meeting', more like a phrase a manager or HR professional would use and a phrase used by the Second Respondent (page 17N). The language also does not reflect the language the Claimant used in her Viber message (page 139) because that talks about sending a letter 'giving notice', consistent with what she is talking about being about not coming back from maternity leave, in the way envisaged in the First Respondent's policy, page 42, by giving notice.

29 Taking the above findings of fact into account the Tribunal finds therefore that the circumstances of the creation of the letter were not that as presented by the Claimant and the Second Respondent, namely that it was her letter she wrote on her own laptop at home around 22nd September 2017 and which she sent to the Second Respondent before the transfer. The issue as to how the document was created is relevant to the issue of when it was sent (see findings of fact below).

When the Claimant's letter of objection was sent to the Second Respondent

30 The Claimant made no reference to the letter, a key document, in her ET1 (page 7) saying that she had relevant emails but not saying there was a letter.

31 The Claimant said that she had posted her letter to the Second Respondent on 22nd September 2017. The Second Respondent said it had received it on 25th September 2017 and referred to its acknowledgement letter at page 19L to this effect (which letter is replicated at page 96). The letter at page 19L is undated and unsigned and does not say how it was sent to her eg with her home address on it or to her email address. The reliability of the acknowledgement letter is affected by the reliability issues on the Claimant's letter which preceded it.

32 For the Claimant the issue in September 2017 was whether she could work part-time or not and if she could not get suitable part-time hours she would not return to work in November 2017; the issue for the Claimant was not particularly who her employer was at any given time.

33 The Claimant raised the non-payment of her accrued holiday pay on 4th December 2017 (page 102) with the First Respondent's HR team who referred her on to the Second Respondent (page 101) saying it was the Second Respondent's responsibility to pay it. The Claimant then contacted the Second Respondent (page 138 para 7) who she said informed her that because she had not come back to work with the Second Respondent the First Respondent had to pay the accrued holiday. This was not an accurate because it was not the coming back to work after maternity leave which mattered, it was whether or not she had transferred before her employment ended which mattered. Referring the Claimant back to the First Respondent was consistent with the Second Respondent's mischaracterisation of what the Claimant had said in her Viber message on 22nd September 2017 – see findings below. Taking into account the subsequent email at page 104 from the Second Respondent explaining its position, the Tribunal finds that this was in fact the initial explanation the Second Respondent gave to the Claimant because that email does not refer to the objection letter she was later said to have sent around 22nd September 2017, consistent with the Second Respondent not initially grasping that the issue of the Claimant's entitlement to accrued holiday from the Second Respondent did

not hang on whether she returned from maternity leave but on whether she had transferred to them before the end of her maternity leave.

34 The First Respondent then sent a further email (page 100) explaining that her accrued holiday information had been provided to the Second Respondent as part of the transfer process (page 100). The Claimant was faced with both employers denying responsibility for her accrued holiday pay, each saying it was the other's responsibility. The Claimant was in a difficult situation.

35 The Claimant took it up again with the Second Respondent (page 104) on 5th December 2019. This time the Claimant was saying that she had now been told by the First Respondent she had transferred. The Claimant appeared to be unclear herself as to whether she had transferred or not and did not say she had sent a letter objecting to the transfer to the Second Respondent which she says now she had kept a copy of. Although the situation was confusing and she was being bounced between the two employers, she did not say to either of them that she had not transferred to the Second Respondent and did not produce her letter at page 95 which she was later able to produce. She made it clear in this email to the Second Respondent that her maternity leave finished in November 2017, consistent with having transferred and inconsistent with not having transferred.

36 The Second Respondent sent a reply to the Claimant on 20th December 2017 (page 104) some 15 days later. The Tribunal finds that the Second Respondent accessed the Claimant's 22nd September Viber message (page 139) on 4th December 2017 (top page 139) because this message was accessed on 4th December 2017 from Ms Prisacaru's phone, the Claimant saved as 'Florina Aldgate Tower' in her phone. The Tribunal finds based on his oral evidence that although the email at page 104 was sent from the generic HR email address it was sent with Mr Tighlit's approval and knowledge when it was sent.

37 The Tribunal find the email at page 104 to be a considered, drafted email sent after the Second Respondent had considered its situation and looked at its records including picking up the Viber message from Ms Prisacaru's phone. It had identified that Viber message on 4th December 2017. It knew the Claimant was saying that her maternity leave finished in November 2017 and therefore knew that to address that issue, it would need to explain to the Claimant how it was that that date was not relevant, because she had objected to the transfer and never transferred.

38 The reply email at page 104 however made no mention of having received a letter of objection from the Claimant on 25th September 2017. It only referred to the Viber message and not to either of the two letters at pages 95 (or 17K) and 96 which the Second Respondent said existed and said had been sent before the transfer and in its files. Producing these letters or at least referring to them were an obvious way to address the problem which had now arisen about the Claimant's holiday pay. The simple answer to the Claimant's query would have been to remind her of the letter she was said to have sent before the transfer, objecting to it. The Viber message is referred to but that was not an objection to employment by the Second Respondent but was the Claimant simply saying she would not come back after maternity leave and was resigning which meant attending the consultation meeting pointless. The email also showed (3rd bullet point) that the Second Respondent wrongly thought that because it thought the Claimant had

resigned in the Viber message (she hadn't, at most she had said she would give notice of resignation), it followed that she had not transferred (4th bullet point). Alternatively the Second Respondent was conflating a resignation (in the Claimant's case meaning not coming back at the end of maternity leave) with an objection to the transfer.

39 If the Claimant had sent the letter at page 95 before the transfer, for practical reasons it is likely that the Second Respondent would then also have told the First Respondent because it meant one less employee to inherit and such a communication would have been consistent with the previous co-operation about transferring employees generally. If she had sent the letter, although things were confusing, she would also be likely to have told the First Respondent about the letter and about objecting because she would in practice want them to know this. An effect of objecting was also that it reduced the holiday pay amount because it would then be calculated up to the transfer date and not the return to work date, some 6 weeks later, and it was therefore not in the Claimant's interests to object and reduce that holiday pay.

40 The Second Respondent's subsequent email on 21st December 2017 (page 156) again failed to refer to the receipt of an objection letter before the transfer and/or attach a copy of the Claimant's letter it now says it always had or its own acknowledgement letter. That email also (3rd paragraph) said that because the Claimant had remained employed till 30th September 2017 this meant that any costs should be met by the First Respondent which entirely missed the issue of the transfer, again consistent with a wrong understanding of what had in fact happened when the Claimant said she would 'give notice'. The second sentence in para 3 did not follow from the first sentence in a TUPE context, without also identifying an objection to the transfer. This email was said to be a setting out of the Second Respondent's legal position but it still made no mention of the Claimant's objection letter or its acknowledgment of it.

41 Taking into account the above findings of fact and giving greater weight to the contemporaneous dated and timed emails showing what the parties were actually doing (or thought they were doing) and saying at the time, the Tribunal therefore finds that the Second Respondent did not have the Claimant's letter of objection when it sent the emails dated 20th and 21st December 2017 about her holiday pay. It follows that it also had not at this point created the undated letter of acknowledgement.

42 The Claimant's letter of objection at page 95 was therefore not sent to the Second Respondent before the transfer, with the effect that her employment transferred to the Second Respondent together with the accrued holiday pay entitlement. She had not objected to the transfer of her employment to the Second Respondent who is therefore liable to pay her the 28 days holiday pay accrued during her maternity leave up until it ended on 16th November 2017.

43 The First Respondent was therefore correct to assume as it did in December 2017 that the Claimant had not objected to the transfer and that it was not therefore responsible for her accrued holiday pay when her maternity leave subsequently ended after the transfer.

<u>Maternity discrimination</u>

44 Not being paid her accrued holiday pay at the end of her maternity leave

amounted to unfavourable treatment of the Claimant by the Second Respondent.

45 The non-payment of the Claimant's holiday pay when her employment ended was the only act complained of in her claim form as amounting to unlawful discrimination. This claim arose entirely after the transfer because the amount became payable when her employment terminated at the end of the Claimant's maternity leave, when she chose not to return to work.

The First Respondent

46 Taking the above findings of fact into account the Claimant's employment transferred to the Second Respondent with effect from 1st October 2017. No act of pregnancy or maternity discrimination by the First Respondent was claimed to have occurred before that transfer so that no liability for any such discrimination transferred to the Second Respondent under Regulation 4(2). More specifically, no act or omission by the First Respondent prior to the transfer about that holiday pay transferred to the Second Respondent under Regulation 4(2) because the First Respondent did nothing about her accruing holiday pay except to tell the Second Respondent about it.

47 The Claimant criticised the First Respondent for problems with the date of and late issue of her P45 (which gave her problems with student finance) (page 145,146) and at the hearing because the First Respondent had not invited her for a consultation meeting. She also criticised the Respondent for the way it handled her pregnancy notification documents (page 145). These were not acts she complained of in her claim which was solely about the holiday pay accrued on termination and ultimately payable by the Second Respondent.

The Second Respondent

48 Taking into account the above findings of fact, the Second Respondent wrongly thought at the time of transfer that the Claimant had objected to the transfer, thinking that the Viber message was sufficient to be an objection to the transfer when it was not or wrongly thought that by saying she would be resigning the transfer became irrelevant. Alternatively it wrongly thought that she had resigned before the transfer. It could not have been a resignation as it was made to the wrong employer. The Second Respondent's non-payment of the Claimant's holiday pay at the time it was due was therefore not connected to her having been on maternity leave but because it (wrongly) thought it was not liable to make that payment.

49 Whilst the Claimant's claim arose at the end of her maternity leave in terms of at a particular period of time, it arose in a context of a TUPE transfer occurring shortly before the end of maternity leave and in a situation where neither the Claimant nor the Second Respondent were clear about what they were doing at the time about her employment and the effect of a transfer, at a time when she was reviewing her options about coming back part time and deciding whether to come back at all. The Claimant viewed the Second Respondent as someone who had not employed her during her maternity leave (when the holiday pay accrued) and was thus in her view not relevant, which added to the confusion.

Relevant law

Working Time Regulations 1998

50 Regulation 14(2) of the Working Time Regulations 1998 provides for the payment of accrued but untaken leave at the end of employment.

TUPE 2006

51 Regulation 4(7) of TUPE 2006 provides that the automatic transfer principles in Regulation 4(1) and 4(2) do not apply where the employee informs either the transferor or the transferee that he/she objects to becoming employed by the transferee. The reference to 'becoming' means that the objection must be communicated before the transfer.

52 Regulation 4(2) provides that if the employee does transfer then all pre-existing duties and liabilities of the transferor and any pre-transfer acts or omissions by the transferor, transfer to the transferee.

Equality Act 2010

Pregnancy and maternity discrimination

53 S18(4) Equality Act 2010 provides that maternity discrimination occurs when A treats B unfavourably because she is exercising or seeking to exercise or has exercised or sought to exercise the right to ordinary or additional maternity leave. There is no requirement to show a comparator. The treatment must be unfavourable, as described in *Trustees of Swansea University Pension Scheme and Swansea University v Williams UKEAT/0415/ 14.*

54 The treatment must be 'because' she is exercising or seeking to exercise the rights. The determination of whether treatment is 'because' of something requires the Tribunal to consider the conscious or sub-conscious motivation of the alleged discriminator. This element will be established if the Tribunal finds that the taking of maternity leave formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (*Nagarajan v London Regional Transport [1999] IRLR 572*).

Burden of proof

55 S 136 Equality Act 2010 provides that 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 unless A shows that A did not contravene the provision.

56 This provision requires a claimant to prove facts consistent with her claims: if the claimant does this then the burden of proof shifts to the relevant respondent to prove that it did not, in fact, commit the unlawful act in question (*Igen v Wong [2005] IRLR 258*). The respondent's explanation at this stage must be supported by cogent evidence showing

that the claimant's treatment was in no sense whatsoever because of, in the Claimant's case, her taking maternity leave. A claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in s136 (*Efobi v Royal Mail Group Ltd [2019] IRLR 352*) (at this stage leaving out the employer's explanation). If the employee does this then the onus is on the employer to give an explanation for the treatment which is not tainted by discrimination.

The drawing of inferences in discrimination claims

57 The Tribunal has to decide whether and what inferences it should draw from the primary facts. The Tribunal have borne in mind that discrimination may be unconscious. The task of the Tribunal is to look at the facts as a whole to see if a protected characteristic (in this case maternity leave) played a part (*Anya v University of Oxford* [2001] IRLR 377). The Tribunal has considered the guidance in *Law Society v* Bahl [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799). In particular, unreasonable behaviour is not of itself evidence of discrimination though a tribunal may infer discrimination from unexplained unreasonable behaviour (*Madarassy v Nomura International plc [2007] IRLR 246).*

Reasons

Accrued holiday pay claim – the Second Respondent

58 Taking the above findings of fact into account, the Claimant had not before the transfer objected to the transfer of her employment to the Second Respondent which is therefore liable to pay her the 28 days holiday pay accrued during her maternity leave up until it ended on 16th November 2017.

Maternity discrimination

The First Respondent

59 Taking the above findings of fact into account the First Respondent did not discriminate against the Claimant because she was exercising or had exercised the right to maternity leave. It did not pay her the accrued holiday pay on termination of her employment because the First Respondent believed (correctly, it turned out) that it was no longer her employer and that it was not liable to make that payment.

The Second Respondent

60 Taking the above findings of fact into account the Second Respondent did not discriminate against the Claimant when it failed to pay her for her accrued holiday when it fell due at the end of her maternity leave when her employment terminated. The Second Respondent had misunderstood and mischaracterised the Claimant's actions in September 2017 telling it that she was 'resigning' but in the context of otherwise TUPE compliant behaviour by the Second Respondent and knowing from the First Respondent that she was transferring on maternity leave with holiday accruing during that leave, the fact that the Claimant had taken maternity leave did not form part of the reason why it failed to pay her accrued holiday pay. The Second Respondent had wrongly thought it

was not liable to make that payment and in terms of timing it happened at the end of the Claimant's maternity leave but it does not follow that it was the taking of maternity leave which formed part of the reason why it failed to make the payment. The reason for the way the Second Respondent treated the Claimant when her accrued holiday became payable at the end of her maternity leave was it then misunderstanding of how the Claimant's situation fitted within the transfer process; the misunderstanding or mischaracterisation was not consciously or subconsciously because the Claimant was on maternity leave and her maternity leave did not form part of the reason. The Second Respondent had not understood that she had not objected to the transfer before the transfer and had therefore transferred to it, and this is why it did not pay her accrued holiday pay when it fell due.

Employment Judge Reid

14 October 2019