Case Number: 2201696/2020 **(V)**

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr V De Marchi	**v**	**(1) London United Busways Limited**
		(2) Abellio London Limited

Heard at: London Central (by video) **On**: 20 & 21 April 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Ms L. Price (of Counsel)

For the First Respondent: Mr R. Bailey (of Counsel)

For the Second Respondent: Ms S. Cummings (of Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The Claimant was dismissed by the First Respondent on 8 November 2019.

2. The Claimant's claim for unfair dismissal and all other issues in the case, including remedy, shall be determined at a final hearing to be listed by the Tribunal on a first available date. Time estimate – 2 days. The parties must write to the Tribunal giving their dates to avoid for June – September 2021.

REASONS

Introduction

1. As Mr Bailey aptly observed in his closing submissions this case completes "the triangle" of the West London bus garages TUPE transfer cases, the first of which was *Abellio London Ltd (formerly London Travel Ltd) v Musse and ors 2012 IRLR 360, EAT*, followed by *Cetinsoy and ors v London United Busways Ltd EAT 0042/14*.

2. As evident from the names of the two cases, each of the Respondents in these proceedings was a party to one of the two earlier cases. In *Musse* the transfer was from the Westbourne Park garage to the Battersea garage operated by the Second Respondent and in *Cetinsoy* from the Westbourne Park garage to the Stamford Brook garage operated by the First Respondent. The transferor in both cases was CentreWest, a now defunct bus company.

3. In this case the transfer, which all parties accept was a "relevant transfer" for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2016 ("**TUPE**"), was from the First Respondent's Stamford Brook garage to the Second Respondent's Battersea garage.

4. As in the two previous cases, the central issue in this case is whether the transfer involved a "*substantial change in working conditions to the material detriment*" of the Claimant within the meaning of Regulation 4(9) of TUPE. The length of the journey to the new place of work in the two earlier cases and this case (in this case there are other factors related to the inconvenience of the journey) was claimed to be such "substantial change".

5. In *Musse* and *Cetinsoy* the employment tribunals, on the facts of those cases, came to opposite conclusions, and their decisions were upheld on appeal by the EAT, as the decisions that on the facts were open to the tribunals to make. In *Musse* it was found that the length of the journey was

a substantial change to the material detriment of the claimants and in *Cetinsoy* that it was not a substantial change or material detriment.

6. While, in my judgment, the exact length of the legs of this "TUPE triangle" are not determinative, for the sake of completeness, I shall add that according to my internet research the distance between:

    a. the Westbourne Park garage and the Battersea garage is 4.5 miles (as the crow flies) or 6 miles (driving distance),

    b. the Westbourne Park garage and the Stamford Brook garage – 2.9 miles (as the crow flies) or 4.3 miles (driving distance), and

    c. the Stamford Brook garage and the Battersea garage 4.8 miles (as the crow flies) or 6.7 miles (driving distance).

    So, technically, this transfer would be the "hypotenuse" of the "TUPE triangle".

7. In all three cases, in addition to the "substantial change" issue, there was the issue whether the change of the work location to the transferee's garage was a repudiatory breach of the claimants' contracts. In the present case (as in the other two cases), it was accepted by the Respondents that requiring the Claimant to change his place of work to the transferee's garage was a breach of contract. The issue was whether in all the circumstances the breach was repudiatory, and if so, whether it was accepted by the Claimant as brining his contract of employment to an end. In the two earlier cases, the tribunals reached opposite conclusions on this issue, which the EAT upheld, albeit in *Centisoy* expressing some reservations on the correctness of the approach adopted by the tribunal and in *Musse* finding that the Tribunal had failed to properly address the issue of resignation in relation to one of the claimants.

8. In this case, in addition to the issues that are common with those in *Musse* and *Centisoy*, there is a further issue, which has not been dealt with in the earlier two cases, namely the legal consequence of a TUPE transferring employee, where the transfer involves or would involve "*a substantial change in working conditions to [his] material detriment*", objecting to

becoming employed by the transferee but not treating his contract of employment as having been terminated under Regulation 4(9) of TUPE.

Background and Issues

9. By a claim form presented on 23 March 2020, the Claimant brought a claim for unfair dismissal against the First and the Second Respondents. He claims that he was unfairly dismissed by objecting to the transfer of his contract of employment under TUPE from the First to the Second Respondent and that his objection was on the grounds that the transfer would involve a substantial change to his working conditions to his material detriment, and therefore, he should be treated as having been dismissed pursuant to Regulation 4(9) TUPE.

10. In the alternative, he claims that he was unfairly dismissed by the First Respondent contrary to s.94(1) Employment Rights Act 1996 ("ERA"), and in the further alternative, that he was unfairly dismissed by the Second Respondent. He gives alternative effective dates of termination and asks the tribunal to determine which of those is the correct date.

11. The Claimant does not bring a separate breach of contract claim against either of the Respondents.

12. Both Respondents accept that there was "a relevant transfer" under Regulation 3 of TUPE, however aver that the Claimant's employment terminated by operation of law under Regulation 4(8) TUPE and therefore he shall not be treated, for any purpose, as having been dismissed.

13. The First Respondent denies breaching the Claimant's contract and avers that, if it did, it was not a fundamental breach, the Claimant did not resign in response, and that the Claimant affirmed the contact by not promptly resigning.

14. In the alternative, the First Respondent pleads that the dismissal was for some other substantial reason, namely the pending TUPE transfer and the Claimant's refusal to transfer. It denies that the transfer entailed any changes to the Claimant's material detriment.

15. Finally, the First Respondent avers that if it is found that the Claimant's employment did transfer to the Second Respondent, any claims the

Claimant might have against the First Respondent will have transferred to the Second Respondent.

16. The Second Respondent avers that the Claimant's contract of employment did not transfer under TUPE because the Claimant objected to the transfer in exercise of his right under Regulation 4(7) TUPE. It denies that the transfer involved a substantial change in the Claimant's working conditions to his material detriment.

17. In the alternative, the Second Respondent claims that the Claimant employment came to an end by the First Respondent's communication to the Claimant a day before the transfer and therefore any liability for his dismissal remained with the First Respondent.

18. Further and in the alternative, the Second Respondent avers that if the Claimant's employment did transfer to the Second Respondent, he would have been dismissed by reason of his conduct, namely a prolonged unauthorised absence from work and a failure to engage with the Second Respondent in respect of his employment, and in the circumstance the dismissal would have been fair.

19. The Claimant was represented by Ms Price, the First Respondent by Mr Bailey, and the Second Respondent by Ms Cummings. I am grateful to all of them for their cogent and helpful submissions and assistance to the tribunal.

20. Four witnesses gave sworn evidence to the tribunal and were cross-examined: for the Claimant, the Claimant himself and Mr John Reid, his former trade union representative; for the First Respondent, Ms Kelly Rahman, the First Respondent's General Manager; and for the Second Respondent, Ms Debbie McDonnell, the Second Respondent's HR Manager. Due to technical problems with a video link, Mr Reid gave his evidence last and via an audio link. That was agreed with the parties.

21. I was referred to a bundle of documents of 309 pages the parties introduced in evidence. There was also a supplemental bundle of 11 pages, but the documents in that supplemental bundle did not appear relevant to the issues I needed to determine at the hearing.

22. The Claimant and the First Respondent prepared their alternative lists of issued. The Second Respondent accepted the First Respondent's list of issues. The lists of issues were similar with one notable difference, which was the first issue I needed to deal with at the start of the hearing.

23. The issue was whether the Claimant's claim included a complaint of constructive unfair dismissal against the First Respondent, and if it did not, whether the Claimant should be allowed to amend his claim form to include that complaint.

24. On behalf of the Claimant, Ms Price submitted that the Claimant's ET1 did contain a claim for constructive unfair dismissal in paragraph 21, which read: "*The Claimant claims that he was unfairly dismissed by the First Respondent contrary to s.94(1) Employment Rights Act 1996 ("ERA").*" Therefore, there was no need to make any amendment.

25. In the alternative, she applied to amend the claim form to include such a claim on the basis that it would be a minor amendment and purely a "re-labelling" exercise, because the Claimant relies on the same facts as in relation to his claim for unfair dismissal under TUPE. Therefore, she argued, there should be no prejudice to the First Respondent in allowing such amendment as the constructive dismissal claim was based on the same facts known to the Respondents, and which the First Respondent's ET3 specifically deals with in paragraph 28.

26. With respect to the time of the application, Ms Price submitted that there had been no case management hearing in this case and no applications had been made earlier by the First Respondent to clarify the Claimant's claims. Therefore, there were no prior reasons for the Claimant to seek an amendment, as he proceeded on the basis that his claim for constructive unfair dismissal was included in his pleaded case.

27. Mr Bailey, on behalf of the First Respondent, argued that the Claimant's ET1 did not contain a proper pleaded claim for constructive unfair dismissal because it lacked the three necessary elements of such a claim, namely the alleged repudiatory breach, resignation in response to it and the causal link between the two.

28. He pointed out that the Claimant's claim was framed by reference to his objection to the transfer under Regulation 4(7) and the alleged substantial change to his material detriment under Regulation 4(9), which the Claimant claims amounted to his dismissal. Regulation 4(11) reserved the right for the Claimant to bring a constructive dismissal claim, but he does not do that on his pleaded case.

29. With respect to the application to amend, Mr Bailey argued that it was simply not the Claimant's case that he had resigned in response to the alleged repudiatory breach. On the contrary, in his witness statement he clearly says that he did not, and his actions following the transfer were also such as to demonstrate that he continued to regard himself as not having resigned.

30. Further, Mr Bailey submitted, the Claimant's list of issues contained two alleged conduct upon which the constructive dismissal claim was being advanced: "*[r]equiring the claimant to change his work place to the Battersea garage*" and "*[r]equiring the claimant to move to less favourable terms and conditions*". The latter could not be said to be a breach because the First Respondent was under no obligation to offer any alternative terms. With respect to the former, the Claimant's evidence is that he did not resign and that was what he had communicated to the First Respondent, which was acknowledged. Therefore, Mr Bailey argued, to advance his constructive dismissal claim he needed to state when and how he had resigned in acceptance of the alleged repudiatory breach.

31. Having considered the Claimant's claim form and the parties' representations, I decided that his pleaded case did include a claim for constructive dismissal against the First Respondent. Paragraph 21 of his ET clearly states that he claims he was unfairly dismissed contrary to s. 94(1) ERA, which section gives an employee with the qualifying service the right not to be unfairly dismissed, whether such dismissal is express or constructive.

32. Further, in paragraph 24 of ET1 the Claimant claims that he was dismissed pursuant to Regulation 4(9) TUPE, which, in my view, is analogous to constructive dismissal, albeit on the facts there might be a

difference between “substantial change” and “repudiatory breach”. Finally, his constructive dismissal claim relies on the same facts as his Reg 4(9) dismissal claim, and the First Respondent pleaded its defence in relation to both claims (see paragraphs 28 – 31 of the Grounds of Resistance).

33. The fact that the Claimant’s evidence might go against his constructive dismissal claim, in my judgment, should not be taken as him not advancing such a claim. It is up to the Claimant what evidence he wishes to adduce in support of his claim and if the adduced evidence undermine his claim, so be it.

34. Therefore, it appeared to me that the ET1 did contain a complaint of constructive dismissal, albeit not fully pleaded and perhaps further confused by the Claimant’s lists of issues, by the inclusion of the additional ground (“unfavourable terms”) and by framing it as a breach of the implied term of trust and confidence.

35. However, if I were wrong on this and an amendment was required, I found that the Claimant should be allowed to amend his claim to include a complaint of constructive dismissal based on the grounds as pleaded in the ET1 in relation to his Reg 4(9) dismissal claim. In my judgment, this would be a minor amendment, essentially putting an additional label on the pleaded facts. The amendment could not cause any undue hardship or injustice to the First Respondent. It pleaded its defence covering both claims. As to the timing of the amendment, in my view, it was not unreasonable for the Claimant to proceed on the basis that his ET1 contained the constructive dismissal claim. There was no case management hearing to clarify the issues. The First Respondent did not raise this issue before the hearing with the Claimant. Therefore, the first day of the final hearing was the first opportunity for the Claimant to make the application.

36. However, as Mr Bailey correctly stated, the First Respondent was entitled to know what the Claimant alleges the repudiatory breach was and when did he resign in response to it.

37. Ms Price confirmed that the only ground relied upon for the Claimant’s constructive dismissal claim was the change of his workplace and that the

alleged repudiatory breach was accepted as terminating the Claimant's contract by his email of 8 November 2019 at 15:24.

38. With that change it was agreed that the First Respondent's list of issues should be adopted. The list contained 9 issues:

(1) How did C's employment come to an end ? (It is not in dispute that C is no longer employed by R1 or R2).

(a) Dismissal by R1 [*with the agreed change, including constructive dismissal*]

(b) Dismissal by R2

(c) Termination pursuant to Reg 4(8)

(d) Resignation in reliance on Reg 4(9)

(e) Resignation simpliciter?

(2) In so far as he was dismissed by R1 or R2 was that dismissal fair or unfair?

(3) If C treated his contract of employment as terminated pursuant to Reg 4(9), would the transfer have involved a substantial change in working conditions to C's material detriment ?

(4) If the answer to (3) is yes, do those matters amount to an ETO reason entailing changes in the workforce having regard to Reg 7 and, in particular, Reg 7(3A)?

(5) If so, was the dismissal for redundancy pursuant to Reg 7(3)(b0(i) or for some other substantial reason pursuant to Reg 7(3)(b)(ii) ?

(6) Was the dismissal fair for either of those reasons having regard to S.98(4) ERA ?

(7) If the dismissal is regarded as having been by reason of redundancy pursuant to Reg 7(3)(b)(i) was C offered suitable alternative employment such as to disentitle him to a redundancy payment ?

(8) Did C inform R1 or R2 that he objected to becoming employed by R2 pursuant to Reg 4(7) ?

(9) Does any liability rest with R1 or R2 ?

39. On further discussion with the parties, it was agreed that the first issue needed to be determined as a preliminary issue, as it was central to the entire matter and depending on my decision on it, might dispose of the entire proceedings. Given that the case was listed for two days it was unlikely that there would be enough time to deal with the remaining issues, and if following my decision on the first issues, they remain "live", the case would need to be listed for a further hearing.

Findings of Fact

40. The Claimant was employed as a bus driver by the First Respondent from 7 January 2003. He commenced his employment at the First Respondent's Shepherds Bush garage, and in August 2003 moved to the

Stamford Brook garage, which is approximately a 15-minute walk from his home. He walked to and from work. He does not own a car.

41. The Claimant's contract of employment contained the following term in relation to his place of work (**my emphasis**):

> 16. ***You must be prepared to work at any of our garages****. When you have passed your PCV driving test you will be allocated to work at a garage, the location of which depends upon our recruitment needs at that time.* ***After a period of time you may apply for a transfer to a garage closer to your home. Such transfer requests are dealt with in order of receipt, and will usually be agreed if vacancies exist in the garage to which you wish to transfer and if you can be replaced in your own garage****. On transferring you will be subject to the pay and conditions of the new garage and staff generally take up a position on the junior rota in the receiving garage.*

42. The First Respondent operates 8 garages across London, some are considerable distance away from the Stamford Brook garage.

43. For approximately the last 4 years of his employment with the First Respondent the Claimant drove a bus on the route 27. He worked 5 days a week, typically starting between 4.30pm and 5.15pm and finishing between 1.30am and 2am.

44. Transport for London (TfL) frequently re-tender bus routes. As a result of one of such re-tendering exercises in 2019, the First Respondent lost the contract for operating the route 27 to the Second Respondent. That was announced to all staff of the First Respondent on 25 March 2019.

45. It was accepted by the First and the Second Respondent that the transfer of the contact would be "a relevant transfer" for the purposes of TUPE and that all drivers (53 day drivers and 6 night drivers) assigned to the route 27 would transfer under TUPE to the Second Respondent, unless they object. In preparing for the transfer, the First and the Second Respondent applied the TfL TUPE Guidelines of January 2016, which is a non-legally binding "best practice" guidance for transport operators on TUPE transfers.

46. In July 2019, the First Respondent engaged in TUPE consultations with its recognised trade union, Unite the Union. In appears that initially the union disputed that TUPE would apply, however, shortly thereafter accepted that it would.

47. In or around June - July 2019, the Claimant learned that his route was going to transfer to the Second Respondent and would be operated out of the Second Respondent's Battersea garage.

48. During August 2019, the First Respondent held "drop-in" meetings with affected drivers to discuss the transfer and explain options available to them. The options were:

    (i) to transfer with the route to the Second Respondent, which would require moving from Stamford Brook to Battersea, or

    (ii) to object to the transfer and sign a new contract with the First Respondent, which would give them the option, subject to availability, to stay at Stamford Brook or move to another garage of the First Respondent (the drivers were requested to give their two preferred locations), but they had to agree to increase their maximum Time On Duty ("TOD") from 9 hours to 10 hours, or

    (iii) if they did not wish to transfer or accept employment with the First Respondent on the new terms, they could resign.

49. The "drop-in" meetings were arranged for 12, 14, 19 and 21 August 2019, and the drivers were invited to attend the meetings alone or with a workplace colleague or a trade union representative.

50. On 16 August 2019, the Claimant together with his union representative, Mr John Reid, attended a meeting with Ms Rahman. The meeting was arranged to discuss the Claimant's grievance unconnected with the TUPE transfer. However, Ms Rahman used that opportunity to also tell the Claimant about the transfer and the three options available to him.

51. At the meeting, having explained the three options, Ms Rahman asked the Claimant if he had any questions and he said that he did not. She gave him a letter explaining the three options and a preference form, which she asked the Claimant to fill in and return by 6 September 2019. The Claimant asked whether redundancy was an option and Ms Rahman said that it was not.

52. Mr Reid, being a representative of the RMT Trade Union, which the Claimant was a member of, but which was not recognised by the First Respondent for the purposes of collective bargaining or TUPE consultations, did not wish to discuss the options at the meeting. His view was that these matters lied outside his role at the meeting, and the meeting itself had been arranged to discuss the Claimant's grievance and it was not a "drop-in" meeting to discuss the TUPE transfer.

53. On 19 August 2019, the Second Respondent wrote to the affected drivers explaining that with effect from 9 November 2019 their contracts would transfer to the Second Respondent under TUPE on the existing terms, including with its letter a FAQs document, which, *inter alia*, contained the following FAQs:

> ***Will I work in the same way as I do now for my current company?***
> *Your work activities will remain the same, however the individual duty times will differ and your new base will be the Battersea Depot. You will be given light running route training and a full depot induction.*
>
> ***What will happen to my staff pass?***
> *You will continue to receive the benefits of the TfL staff pass. London United and Abellio will write to TfL to notify them of your transfer to Abellio and your pass will carry over with your transfer — the same will go for your nominee pass if you have one*.

54. The Claimant saw the Second Respondent's letter and the FAQs document on the announcement wall in the Stamford Brook garage.

55. On 21 August 2019, Ms Rahman wrote to the Claimant reminding him of the three options and asking him to return the preference form by 6 September 2019. The letter said that if the preference form were not received by that date, the First Respondent would assume that the Claimant wished to transfer to the Second Respondent with the route. The preference form, the First Respondent's proposed new contract, with changes highlighted, the Second Respondent's welcome letter and its "measures" letter were included with the letter.

56. On 5 September 2019, the Claimant emailed his trade union representatives his draft response to the First Respondent on the three options. The essence of his position was that the transfer was not suitable for him because of the additional travel time to the Battersea garage, the

proposed new contract was not in his interest to sign because of the increase in the TOD, no guarantee of a minimum work and a reduction in the paid meal break time, resignation was not an option either - "*definitely no*". Therefore, his view was that the only option left for him was redundancy, which he wished to formally request.

57. On 6 September 2019, the Claimant sent an email to Ms Rahman essentially on the same terms as in his draft to his union representatives. The letter read (***my emphasis***):

> *"Tupe option, going with the route 27 to Abellio and keeping my original contract.* ***this is not an option for me because it will disrupt my life****, over 1 hour longer traveling to work and an extra hour returning from work, this will add to fatigue and tiredness extending my working day by at least 2 hours, that is at least 10 hours per week, i have been at Stamford brook garage for 18 years and i live 15 minutes walk away,* ***the reason for my original application was for the locality of the job, there fore i reject this option of Tupe as unsuitable for me****.*
> *…*
>
> ***not signing the contract does not mean I agree to Tupe, I do not agree to Tupe as stated above***
> *after a lot of consideration the conclusion that i have come to is*
>
> *1)* ***Tupe with the 27 route is not suitable for me****.*
>
> *2) It is not in my best interests to sign the new contract.*
>
> *3)* ***Resignation is not an option definitely no****.*
>
> *4) I stand on my original contract there fore the only option left for me is redundancy.*
>
> *5) I Vittorino De Marchi hereby formally request redundancy."*

58. On 10 September 2019, Ms Rahman responded to the Claimant saying that she wanted to arrange a meeting with him to discuss his letter and asking if he wished his union representative to attend.

59. There was some confusion with arranging a meeting because there were other meetings planned to discuss the Claimant's grievance and his safety concerns related to a particular bus model he was required to drive. These were separate matters unconnected with the TUPE transfer.

60. On 4 October 2019, Ms Knight, HR Business Partner of the First Respondent, wrote to the Claimant explaining the three options available

to him and reiterating that redundancy was not one of them because his job did "*not cease to exist*." The letter went on to say (***my emphasis***):

*If you do not wish to transfer to Abellio or accept alternative employment with RATP Dev London, **you can object to the transfer**. **This will have the effect of ending your employment with the company on 9 November 2019**. You will not be treated as having been dismissed and will not be entitled to any payments in respect of notice pay or redundancy pay. The only payment you will be entitled to is in respect of accrued salary and accrued untaken holiday.*

I note that you had objected all the options available as you had assumed that redundancy applies. The company would therefore like to give you another opportunity to tell us what you prefer to do. Please can you put a written memo to your staff manager or General Manager by Wednesday 9 October 2019 confirming which option you prefer:

1. You can retain your terms and conditions by transferring with the route to Abellio on 9 November 2019
2. Subject to vacancies available, you can accept alternative employment with London United on an understanding that this will require you to accept new terms and conditions (increase in TOD to 10 hours) but with preserved continuity of employment and pay. Please note alternative employment will be based on garage and rota availability.
3. If you do not wish to transfer to Abellio or accept alternative employment with RATP Dev, you can formally object to the transfer and your employment will end on 9 November 2019.

***If we do not receive a written memo by this date we will assume that your employment ends with London United on 8 November 2019 by virtue of your previous objection**.*

61. On 4 October 2019, the Claimant went on a self-certified sick leave until 6 October 2019 due to stress, which he says was caused by the First Respondent's letter of 4 October 2019.

62. On 8 October 2019, the Claimant emailed Ms Knight. His email was largely in relation to his grievance, safety concerns and what he perceived as the company ignoring his requests and not answering his questions. However, in that email he again stated that he could not accept the transfer ("*i gave you reasons that i can not except (sic) TUPE*").

63. There were further attempts to arrange a meeting with the Claimant. On 11 October 2019, the Claimant emailed Ms Knight saying that he did not wish to have a meeting with Ms Rahman. There were further email

exchanges with the Claimant to arrange a meeting with Ms Knight upon her return from holidays.

64. In the course of that correspondence, on 23 October 2019, the Claimant wrote to Ms Knight and Mrs Biddle (the First Respondent's Staff Manager) stating again that he had not accepted the TUPE transfer ("*also I would like to remind you that I have not excepted (sic) your proposal of Tupe and gave you the reasons why it's not suitable for me*") and that he did not wish to enter into the new contract with the First Respondent, but that should be taken as him agreeing to transfer under TUPE to the Second Respondent ("*not agreeing does not constitute agreeing to Tupe*"). He said that in the circumstances he considered that redundancy was "*fair*" and that he would accept it.

65. On 5 November 2019, the Claimant eventually met with Ms Knight. He was accompanied by Mr Reid. At the meeting, the three options were discussed, and the Claimant was told again that redundancy was not available. On the same day, following the meeting, Ms Knight wrote to the Claimant confirming the discussion and the available options. The letter stated (***my emphasis***):

"As you do not wish to accept the alternative employment or resign from your current employment, your employment will transfer with the route 27 to Abellio on 9 November 2019. ***Please note that this means that 8 November 2019 will be your last day of employment with London United.*** *Please note that Abellio will be informed that you will be transferring with the route."*

66. On 06 November 2019, the Claimant self-certified himself as being off sick from 7 November 2011 due to anxiety.

67. On 7 November 2019, Ms Knight sent the Claimant a further letter by email, in which she appears to have changed the First Respondent's position on the Claimant's employment status as follows (***my emphasis***):

"You objected to transfer in writing on 6 September 2019 despite further correspondence and our meeting you stance remains the same. ***Under the TUPE Regulations to object to the transfer means that your employment will end on the transfer date by reason of your objection. You would not be treated to have been dismissed and would have no right to notice pay or redundancy pay. In effect, it is like an immediate resignation****.*

I hope that this makes the position clear and I would like to take the opportunity to thank you for your service at the Company."

68. On 8 November 2019, Mrs Biddle sent the Claimant a letter referring to Ms Knight's email of 7 November 2019 and confirming that his employment would end on that day, 8 November 2019 by reason of his resignation (***my emphasis***).

"*I write following the letter sent to you from Ngoma Knight, HR Business Partner dated 7th November regarding your employment with the company.* ***I can confirm, as stated in the letter, that your employment will end today, 8th November 2019 by way of reason of immediate resignation****.*
Your final payment will be made on Friday 15th November 2019. Your P45 will be sent to you in due course and you will be paid the following amounts:
(a) All pay up to and including the effective date of termination of your ! employment
(b) Accrued holiday pay of 2 days."

69. On 8 November 2019 at 13:54, the Claimant replied to Ms Knight by email stating that he had not resigned and did not wish to resign. He also reiterated that TUPE was not suitable for him and that he did not wish to sign the new contract for the reasons he had stated before.

70. On 8 November 2019 at 14:11, Ms Knight replied as follows (***my emphasis***):

"*Thank you for your email. I note that you have confirmed that you have not resigned and you do not wish to accept the alternative employment we have offered you. I have therefore informed Abellio that you will be transferring with the route tomorrow.* ***Please note that this now closes this matter****.*"

71. On 8 November 2019 at 15:24, the Claimant replied to Ms Knight's email again stating that he had not resigned and would not sign the new contract and he would not transfer under TUPE with the route. He said that he was expecting redundancy and would not resign. He also said that he was on sick leave and was expecting to receive sick pay.

72. On 9 November 2019, the drivers assigned to the route 27, and who had not objected to the transfer, transferred from the First Respondent to the Second Respondent under TUPE.

73. On 11 November 2019, the Claimant was signed off sick by his GP for two weeks, until 24 November 2019, due to anxiety and depression. He sent the sickness certificate to the First Respondent, which Ms Knight forwarded to the Second Respondent, and by email of 12 November 2019 advised the Claimant to contact Ms Debbie McDonnell, HR Manager of the Second Respondent for any future correspondence. In that email she also wished the Claimant well with his "*employment with Abellio*".

74. On 13 November 2019, Ms McDonnell sent the Claimant a welcome letter, acknowledging that he was off sick and inviting him to contact his new manager to discuss return to work, induction, and any required training. She asked the Claimant to provide his bank account details to set up his payroll and process his sickness payments.

75. On 22 November 2019, the Claimant telephoned Ms McDonnell and told her that he had objected to the TUPE transfer to the Second Respondent. On the same day he sent Ms McDonnell and email confirming that.

76. On 25 November 2019, the Claimant's sick leave was extended until 1 December 2019.

77. On 27 November 2019, Ms McDonnell sent the Claimant a letter confirming that he had not transferred to the Second Respondent, enclosing his P45 showing his leaving date as 10 November 2019.

78. That communication was followed by email exchanges between Ms McDonnell and Ms Knight regarding the employment status of the Claimant. The First Respondent's position was the Claimant's employment had transferred to the Second Respondent because he had refused to accept the new contract and had confirmed that he was not resigning, and therefore "*the default position*" was that his contract of employment had transferred to the Second Respondent under TUPE. The Second Respondent's position was that because the Claimant had objected to the transfer of his employment to the Second Respondent, his

employment did not transfer by operation of TUPE and the fact that he had refused to resign was irrelevant.

79. On 28 November 2019, the Claimant emailed his sickness certificates to the First Respondent asking for sick pay. Ms Knight replied saying that she was forwarding them to the Second Respondent as the Claimant's employer and re-stating the First Respondent's position in the following terms:

"As you rejected our offer to stay with London United on alternative employment and also objected to the option of resigning rather than transferring via TUPE, your employment transferred via TUPE to Abellio with the route 27."

80. The Claimant replied, copying Ms Rahman, Mrs Biddle, his union representatives and Ms McDonnell, reiterating his position that he had rejected the TUPE transfer and the new contract.

81. On 30 November 2019, Ms Knight emailed the Claimant setting out the First Respondent's position that the Claimant's employment had transferred to the Second Respondent under TUPE on 9 November 2019 and stating that the First Respondent would not correspond further on this matter.

82. On 2 December 2019, Ms McDonnell emailed the Claimant telling him that the Second Respondent was still liaising with the First Respondent on his matter and asking the Claimant to provide some further documents. Having not received a reply, on 30 December 2019, Ms McDonnell sent a reminder. The Claimant did not reply. His evidence, which I accept, are that the reason for him not replying was because he did not consider himself employed by the Second Respondent.

83. In early December 2019, the Claimant started to look for another job and attended job interviews for a bus driver position on 6 and 9 December 2019. The positions were at the Westbourne garage and in Willesden. He was unsuccessful.

84. On 13 January 2020, Ms McDonnell sent the Claimant a letter inviting the Claimant to attend a meeting to discuss his employment. In her letter, Ms McDonnell explained that because redundancy was not an option offered

by the First Respondent, "*the default position [was] that [the Claimant] [had] transferred employment to Abellio London bus automatically on 9 November 2019 with Route 27*". She asked the Claimant to attend a meeting on 28 January 2020 to discuss his return to work with his manager. The letter stated:

"*Please note, that should we not hear from you, or should you decide not attend the meeting, you will be considered absent without authorisation and we will write to you under these terms thereafter*."

85. The Claimant did not reply to this letter. His evidence are that he did not receive that letter or the Second Respondent's letter of 3 February 2020 because both had a wrong address: 21 Ellesmere Road, Chiswick, London W4 4QJ, and the Claimant's correct address is: 21 Ellesmere Court, Ellesmere Road, Chiswick London W4 4QJ.

86. I do not accept his evidence on that matter. He admitted receiving the Second Respondent's letter of 13 November 2019 and P45. Both had the same "wrong address". He also admitted receiving the First Respondent's letters of 5, 7 and 8 November 2019, which all had the same "wrong address". W4 4QJ is the correct post code for the Claimant's "correct address", 21 Ellesmere Road, Chiswick London has a different post code – W4 3DU.

87. Therefore, on the balance of probabilities, I find that the Claimant did receive the Second Respondent's letters of 13 January 2020 and 3 February 2020. I accept that he might have chosen not to open and read them.

88. On 3 February 2020, the Second Respondent wrote to the Claimant stating that because he had failed to attend the meeting or otherwise engage with the company the decision had been taken to terminate the Claimant's employment. The letter informed the Claimant that he had the right to appeal the decision. Applying "the ordinary course of post" rule, the letter should be deemed to have been received by the Claimant on the second business day – 5 February 2020. The Claimant did not reply to the letter.

Commuting distance between the Claimant's home and the Battersea garage

89. The Claimant's average commute times from home to the Battersea garage and back, based on his usual work schedule (starting between 4.30pm and 5.15pm and finishing between 1.30am and 2am), would have been:

    a. going to work – between 45 minutes and 1 hour 5 minutes. The fastest route would involve the Claimant walking to Chiswick train station (15 - 20 minutes), taking a train to Queenstown Road station (15 -20 minutes) and then walking from Queenstown Road station to the Battersea garage (10 -15 minutes).

    b. returning home - approximately 1 hour 15 minutes, requiring the Claimant to travel on Night buses with one or two interchanges and to walk to and from bus stops for approximately 30 minutes.

The Law

90. Regulation 4 of TUPE provides:

"4.— Effect of relevant transfer on contracts of employment

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

……..

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

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

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract

of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

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

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

91. An objection to becoming employed by the transferee within the meaning of Regulation 4(7) includes an objection simply on the grounds of the change of employer or on substantial grounds (see *Humphreys v University of Oxford and anor 2000 ICR 405, CA*).

92. The phrase "*working conditions*" in Regulation 4(9) has a winder meaning than contractual terms and includes both contractual and physical conditions, such as place of work (see *Tapere v South London and Maudsley NHS Trust 2009 ICR 1563, EAT, and Abellio London Ltd (formerly London Travel Ltd) v Musse and ors 2012 IRLR 360, EAT*).

93. In considering whether Regulation 4(9) applies an employment tribunal must identify the relevant change in working conditions and then consider whether the change is "substantial", which shall be assessed objectively considering "*the nature as well as the degree of the change*" (see *Tapere v South London and Maudsley NHS Trust 2009 ICR 1563, EAT, and Abellio London Ltd (formerly London Travel Ltd) v Musse and ors 2012 IRLR 360, EAT*).

94. The next step for the tribunal is to determine whether the change was to a material detriment of the employee concerned. "*Material detriment*" shall be interpreted subjectively by considering whether the employee believed that the detriment was "material" and whether in all the circumstances it was reasonable for the employee to hold that view (see *Nationwide Building Society v Benn and ors 2010 IRLR 922, EAT*). "*What has to be considered is the impact of the proposed change from the employee's point of view*." (see para 54 of *Tapere v South London and Maudsley NHS Trust 2009 ICR 1563, EAT*)

95. Dealing with the "repudiatory breach" issue, in *Cetinsoy v London United Busways Ltd UKEAT/0042/14/LA,* the EAT said (see paras 22 and 23) ***(my emphasis)*** "[..] *a Tribunal considering a claim for constructive dismissal needs to ask itself the following questions: a)(i) Has the employer breached the contract? (ii) If so, does that breach go to the root of the contract? b) Has the employer shown an intention not to be bound by the contract?"* [….] *The words, "the root of the contract" now look slightly old fashioned. The effect, however, is the same as the more modern formulation that in examining whether there has been a repudiatory breach* ***the test is to ask whether the employer has abandoned and altogether refuses to perform the contract. That is of course to be measured objectively and not by regard to evidence of the employer's subjective intention.***"

96. Even if the employer has committed a repudiatory breach of contract, the contract will not actually come to an end until the employee has communicated his resignation to the employer (the so-called "elective" approach – see *Geys v Société Générale, London Branch 2013 ICR 117, SC*). The employee can resign by words or by conduct, including by refusing to return to work (see *Chemcem Scotland Ltd v Ure EATS 0036/19*).

97. If the employee waits too long after the employer's repudiatory breach or otherwise conducts himself in a way that demonstrates his intention to keep the contract alive, he may be taken as having affirmed the contract, thus losing the right to claim constructive dismissal (see *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*). Affirmation may be implied by the employee seeking from the employer performance of the contract, for example, by submitting sick pay claims (see *Fereday v South Staffordshire NHS Primary Care Trust EAT 0513/10*).

Discussion and Conclusions

98. The first issue that falls to be determined is whether the Claimant informed the First or Second Respondent "*that he objects to becoming employed by the* [Second Respondent]" pursuant to Regulation 4 (7) TUPE.

99. It is clear from my findings of fact (see paragraphs 57,62, 64, 65, 69, 71, 75, 80), and it was not argued otherwise by the parties, that the Claimant did object to becoming employed by the Second Respondent. His evidence, which are consistent with the documentary evidence, were that, although he did not care much about the identity of the Second Respondent as his employer, he did not want to transfer to it because it would have required him to move to the Battersea garage, which he did not wish to do. In my judgment, it was an objection to becoming employed by the Second Respondent within the meaning of Regulation 4(7), which engaged Regulation 4(8). Although the underlying reason for the objection was the change in the Claimant's workplace, that change was part and parcel of the Claimant's becoming employed by the Second Respondent, and therefore the Claimant was objecting to become the Second Respondent's employee.

100. The effect of that objection would be that the relevant transfer terminated the Claimant's contract of employment by operation of law, and he would "*not be treated, for any purpose, as having been dismissed by* [the First Respondent], unless Regulation 4(9) applied.

101. For the Claimant to come within the scope of Regulation 4(9), I must be satisfied that the transfer involved or would have involved "*a substantial change in working conditions to the material detriment of* [the Claimant]".

"Substantial change in working conditions"

102. It was rightly accepted by the parties that the move from the Stamford Brook garage to the Battersea garage was a change in the Claimant's working conditions. The parties however disagree on whether the change was substantial.

103. Ms Price, for the Claimant, submits that the change would have increased the Claimant's journey time to and from work for up to an hour each way and would have required him to travel on two Night buses on the return journey. She argues that the First Respondent's estimate of the 36 minutes journey on the way to work did not take into account the reality and transport delays that needed to be factored in.

104. Further, she says, the change was also substantial is so far as it would have changed the Claimant's method of getting to and from work from walking 15 minutes each way to having to plan his journeys in advance and rely on public transport, and that, viewed objectively, would be a substantial change for any Londoner having to undertake such work commute on a regular basis.

105. She drew my attention to the fact that on substantially the same facts (added 2 hours in two cases and an hour in one case and the move from one side of the Thames to the other) in ***Musse*** the employment tribunal had concluded that the change was substantial.

106. Finally, she argues, the fact that other bus drives might have a longer commute to work did not make the change in the Claimant's working conditions not substantial. The change must be assessed by reference to the Claimant's circumstances.

107. Mr Bailey, for the First Respondent (and the Second Respondent adopted his submissions on this and "material detriment" issues), argues that the change was not substantial. In particular, he draws my attention to the following factors:

(a) The Claimant's mobility clause enabled him to be transferred to a different garage anyway, a greater distance from his home than Battersea;
(b) His new place of work with the Second Respondent involved modest additional travel time (just over an hour);
(c) A workplace move from Chiswick to Battersea is well within the sort of travel distance expected for those who work within London;
(d) After termination, the Claimant applied for jobs a greater distance from his home than Battersea.

108. Considering the Claimant's position before and after "the change" and taking into account the relevant factual and contractual background, I find that the nature and the degree of the change was substantial. In coming to this conclusion, I use the ordinary meaning to the word "substantial", and not as describing a change that is not "insubstantial" or "minor".

109. I find that for the following reasons. In my judgment, a change from a 15 minutes' walk to and from work to having to plan and undertake a journey,

which requires a person to walk a longer distance just to get to the nearest train station, then to catch a train, and at the end of the train journey, lasting between 15 and 20 minutes, to walk for another 15 minutes to the workplace, and having to do that five days a week is on the face of it a significant change to the person's commute to work. It is even more "substantial" on the return journey leg, when instead of walking 15 minutes home, the commuter needs to catch at least two Night buses, hoping to make the connection, and walk to and from bus stops for approximately 30 minutes.

110. I accept, there might be other relevant circumstances, which may show that despite the apparent "substantiality", the change was still not substantial as far as the Claimant's working conditions were concerned. I, however, do not find that there were any such circumstances, at least not to the extent to make the change not substantial.

111. The fact that the contract had the mobility clause that allowed the First Respondent to move the Claimant to one of its other garages further away than the Battersea garage is a relevant consideration. However, in practice, the mobility clause was operated in a way that the Claimant, at his request, was relocated from the Shepherds Bush garage, which anyway was a fairly short distance from his home, to the Stamford Brook garage, so that his work location would become even closer to his home. The Stamford Brook garage was his place of work for 18 years, and there were no evidence presented to me that during that time the First Respondent attempted or planned to move the Claimant's work location elsewhere.

112. With respect to the added travel time, although ordinarily an extra hour journey in London work/commute environment might not be considered "substantial", I find that an hour estimate is the "best case scenario", and most likely not be attainable on every day. The Claimant would have had to plan his journey and in doing so, take into account possible delays and cancellations. Even if the journey time itself might be just over an hour more, trains and buses (especially Night buses) service timetables most likely would have added further waiting time to his journey and possible required him to arrive some time in advance of the start time of his shift.

113. I do not accept that the fact that the Claimant applied for alternative jobs at garages at a distance from his home should be taken as demonstrating that this change in his working condition was not substantial. This factor goes more to the issue of "material detriment", which I will address next.

114. For these reasons, I find that the change was substantial. I recognise that my finding might appear at variance with the employment tribunal's conclusions in *Cetinsoy* (but not in *Musse*). However, the EAT in *Cetinsoy* gave tribunals "*a word of caution*" before they applied that decision to other cases and clearly directed that the question was "*to be determined by particular circumstances of the individual case before the Tribunal*."

"Material detriment"

115. There are two questions that I need to answer: (i) did the Claimant consider the change to his material detriment and, if so, (ii) whether it was reasonable for him to do so.

116. It is obvious, and the parties did not argue otherwise, that the change was to the Claimant's detriment, because the working conditions would become less favourable for him. The question, however, is whether it was to his "material" detriment.

117. From the Claimant's oral evidence and the contemporaneous documents in the bundle I have no difficulty in finding that he did consider that the change was to his material detriment. The important issue, however, is whether in all the circumstances, it was reasonable for him to do so.

118. Ms Price, for the Claimant, submits that the same factors as in the determination of the question of "substantial change" should be applied. She argues that it is obvious that it was reasonable for the Claimant to consider the detriment material because of the added time and inconvenience to his travel to and from work.

119. Mr Bailey points out that apart from modest additional travel time, the Claimant advanced no other reason why the change would cause him any problem. He refers me to the Claimant's answer to my question as to such possible other reasons, to which the Claimant replied that it was the journey itself that he considered the material detriment to him. Mr Bailey

points out that there was no suggestion from the Claimant that he had caring responsibilities or personal disability or any other commitments, which would have been affected by the change in his work location.

120. I find that while the change in the workplace might not have been impossible for the Claimant to accommodate, nevertheless, it was a substantial change, which was going to significantly disrupt the Claimant's daily life and routine that he had been enjoying for at least 18 years. His evidence, which I accept, were that it was important for him to have his place of work close to home, so that he could walk there, and that is why he had joined and stayed with the First Respondent. Also, he wanted to work the late shift, so that he could have a large part of the day free for himself. The change would have taken a substantial part of such free time away.

121. The fact that the Claimant later applied for jobs a distance away from his home, in my view, cannot be taken against him as showing that his view of the material detriment was unreasonable. I must decide whether his view of the material detriment was reasonable at the time of his objection, and not at a later date, when his view might have changed due to different circumstances, such as him being out of work with no income.

122. If, however, it is suggested that this fact should be taken as showing that the Claimant was not genuine in his objection by reason of the change of his work location, and was merely trying to negotiate a redundancy pay-off, I do not accept that. Although the Claimant was clearly looking to get a redundancy payment, in my judgment, it was his last and the least attractive option, after he had turned down the transfer because of the change in his workplace and the proposed new terms because of the increase in his working time and other changes to the terms. I do not accept that he was always intending to use the transfer to get a redundancy payment and then get another job irrespective of its location. I accept his evidence that with being out of work and without means to sustain himself he eventually decided that he needed to look for another job, even if it required some commute.

123. Considering all the relevant factors, I find that it was reasonable for the Claimant to consider that the change in his workplace was to his material detriment. It follows that, in my judgment, Regulation 4(9) was engaged.

Did the Claimant treat his contract of employment as having been terminated?

124. The next question I need to determine is whether, having come within Regulation 4(9), the Claimant treated his contract of employment as having been terminated. If he did, he would be treated for any purpose as having been dismissed by his employer.

125. Ms Price submits that he did. She points out that the wording in Regulation 4(9) does not require the Claimant to actually resign. It does not even require any notification to the employer. She argues that the Claimant's treating his contract as having been terminated is to be found in his clear intention not to come to work at the Battersea garage. She says, the Claimant clearly stated that it was not an option for him.

126. Ms Price draws my attention to the Claimant's email to Mrs Biddle of the First Respondent in which he refers to his "counter-offer" of 6 September 2019, that being his formal request to be made redundant. She says the "counter-offer" was not accepted and that should mean there was no contract. She further argues that the Claimant considered that there was a redundancy situation and therefore his contract was to be terminated for that reason. She says, the Claimant did not want to formally resign because he had been advised that if he had he would not get any money. Finally, she points out that he never returned to work and self-certified himself as unfit to work. Therefore, she submits, the test of "treating the contract as having been terminated" was met.

127. Mr Bailey and Ms Cummings, for the Respondents, both argue that the Claimant clearly did not treat the contract as having been terminated. They point out to the Claimant's numerous assertions before and after the relevant transfer that he had not resigned, did not wish to and would not resign, to him submitting sick pay claims to the First Respondent and continuing to seek redundancy. They submit that his conduct was wholly inconsistent with someone treating his contract of employment as having been terminated.

128. I agree with the Respondent's submissions. In my judgment, the Claimant was clear in his words and acts that he did not wish his contract to end, he did not terminate it himself and did not treat it as having been terminated. The fact that he did not attend work after the transfer, in my judgment, is not inconsistent with him not treating his contract as having been terminated. He was off sick until early December 2019. He, however, continued to submit his sick notes and demand sick pay from the First Respondent. I do not accept Ms Price argument that the Claimant's "counter-offer" in any way shows that he treated the contract as having been terminated. On the contrary, he was trying to negotiate an acceptable termination of the contract while being at pains to keep it "alive", because he knew or was so advised that by walking away from the contract, he would be significantly reducing his chances of getting redundancy. For these reasons, I find that he did not treat his contract as having been terminated.

<u>What is the consequence of the Claimant's choice not to treat his contract as having been terminated?</u>

129. The next question I need to answer is what should the consequence of the Claimant choosing not to treat his contract as having been terminated, while still objecting to the transfer because it involved a substantial change in working conditions to his material detriment, be?

130. I discussed this issue with the parties during their closing submissions. They gave me their views but were not able to refer me to a direct legal authority on this issue.

131. In my view, there are four possible answers to this question:

    a. the Claimant's extant objection to the transfer operates as him treating his contract of employment as having been terminated under Regulation 4(9) and him being treated as having been dismissed; or

    b. the Claimant's objection to the transfer must stands, however, having chosen not to treat his contract of employment as having been terminated he cannot be treated as having been dismissed under Regulation 4(9) and instead his extant objection has effect of

terminating his employment by operation of law under Regulation 4(8); or

c. the Claimant contract of employment transfers to the Second Respondent under Regulation 4(1) despite his objection by reason of the Claimant choosing not to treat his contract as having been terminated; or

d. the Claimant contract of employment does not transfer to the Second Respondent under Regulation 4(1) by reason of his objection, and he remains employed by the First Respondent until his dismissal or until he elects to treat the contract as having been terminated under Regulation 4(9).

132. Both Respondents argue that once the transfer had taken place, the Claimant's employment ended by reason of Regulation 4(8), which shall be considered as "deemed resignation", and it was legally impossible for the Claimant to object to the transfer and maintain his employment contract alive.

133. Mr Bailey, for the First Respondent, argues that an employee who objects to the transfer but fails to resign has no remedy, because a claim under Regulation 4(9) can only take place where the Claimant has treated the contract as having ended prior it ending under Regulation 4(8).

134. Ms Cummings for the Second Respondent agrees and further submits that "*any conduct of the Claimant after 9th November 2019 on which the Claimant might seek to rely as demonstrating he treated his contract of employment with the First Respondent as having been terminated is irrelevant. By that stage, the Claimant's employment had terminated by virtue of Reg 4(8)*".

135. Ms Price, for the Claimant, argues that Regulation 4(9) give the employee a choice to treat his contract as having been terminated or not, and if the employee choosing not to treat the contract as having been terminated has the effect of the employee losing the protection afforded by Regulation 4(9) that would undermine the whole purpose of the regulation.

136. In my judgment, the answer (a) cannot be correct because it makes the words "***may*** *treat the contract of employment as having been terminated*" devote of any meaning (***my emphasis***). If the effect of the employee objecting to the transfer on the established grounds under Regulation 4(9) were to have the same effect, i.e. him being treated as having been dismissed, irrespective of whether he chooses to treat his contract as having been terminated or not, the words "*may treat the contract of employment as having been terminated*" would be superfluous. I note that these words were not in the previous version of the TUPE regulations and were included in the 2006 version to bring it in line with the EU Acquired Right Directive (No 2001/23) and the European Court of Justice judgment in *Merckx and anor v Ford Motors Co (Belgium) SA 1997 ICR 352, ECJ*.

137. I find that the answer (b) is ought to be wrong too. The operation of Regulation 4(8) is "*subject to*" Regulation 4(9) and 4(11), the aim of which is to preserve the employee's right in relation to "*substantial change in working conditions to the material detriment*" and "*repudiatory breach*" by his employer. As in a situation where the employer commits a repudiatory breach, under Regulation 4(9) the employee is given a choice whether to accept the substantial change in working conditions as bringing the contract to an end, or not. In my judgment, the effect of not accepting the substantial change as having the contract terminated should be the same as electing not to treat the contract as at an end by reason of the employer's repudiatory breach, meaning that the contract remains in force. There is nothing in Regulation 4(9) to suggest that despite the employee not treating the contract as having been terminated, he, nonetheless, must be regarded in law as having been dismissed, or that should have the effect of Regulation 4(8) coming back into play.

138. In my judgment, it cannot be right that the very same objection that has brought the employee within scope of Regulation 4(9) can then operate to deprive him of the protection afforded by that regulation because the employee has chosen not to treat his contract as having been terminated, when the regulation specifically gives him that choice.

139. However, this conclusion, in my view, does not mean that the employee completely loses his right to later rely on such substantial change in

treating his contract as having been terminated, with such termination still being regarded as dismissal under Regulation 4(9). Of course, the longer the employee waits or if he acts in a way to show that he has accepted the substantial change he might be taken as having affirmed the change, thus losing his Regulation 4(9) protection.

140. Further, Regulation 4(1) has the effect of preserving the employment contract, "*except where objection is made under paragraph (7)*". Paragraph (7) states that paragraph (1) shall not operate to transfer the contract of employment of an employee who objects to becoming employed by the transferee. If a valid objection is made it appears there are three possible outcomes: (i) Regulation 4(8) "resignation"; (ii) Regulation 4(9) "dismissal", and (iii) Regulation 4(9) employee choosing not to treat the contract as having been terminated. In any of the three scenarios the contract of employment does not transfer to the transferee by reason of the employee's objection.

141. Such outcome might appear at odds with the purpose and operation of TUPE, namely "automatic transfer". However, such "automatic transfer" is always subject to the employee's right to object, and the employee cannot be forced to transfer his employment to the transferee despite his objection (see *Katsikas v Konstantinidis 1993 IRLR 179, ECJ*).

142. I find that, although the Claimant has chosen not to treat his contract as having been terminated, he never withdrew his objection. On the contrary, he kept repeating it. Accordingly, considering his clear and persistent objection to becoming employed by the Second Respondent, the Claimant choosing not to treat his contract of employment as having been terminated, in my judgment, cannot be taken as disapplying or overriding his objection. In my view, the answer (c) is also wrong.

143. The First Respondent was simply wrong in saying that the "*default position*" was that in the absence of the Claimant's resignation his contract transferred to the First Respondent. For these reasons, I find that his contract did not transfer to the Second Respondent.

144. Mr Bailey argues that the Claimant cannot avoid transferring to the Second Respondent and remain employed by the First Respondent. He

submits that "*[t]he fallacy in that reasoning is that he either had to elect to treat his employment terminated prior to the transfer (taking his chance under Reg 4(9)) or to go along with the transfer and treat his employment as terminated after the transfer; again taking his chance under Reg 4(9)*".

145. I understand Mr Bailey's argument as saying that it was not open to the Claimant to put himself into such "limbo". He had to decide whether he "goes across" or he "goes away", and "staying put" was not an option he could take.

146. I disagree, because that ignores the choice of not treating his contract of employment has having been terminated, which, in my judgment, Regulation 4(9) gives to the Claimant. Further, I do not see why it must be the employee who should be "*taking his chance under Reg 4(9)*", and not the employer. It is the employer who makes a change to the employee's working conditions, and if the employer considers such change not "substantial" and/or not "to the material detriment" of the employee, it would seem logical that the employer should be taking its chance by treating the employee's contract as having been terminated by operation of law under Regulation 4(8), and the employee should not be force to make "the first move" by resigning or otherwise treating his contract as having been terminated.

147. If the employee chooses the option of not treating his contract as having been terminated under Regulation 4(9), while objecting to the transfer, in my judgment, it must follow that his contract remains with the transferor until such time as he is dismissed by the transferor or until he changes his mind and elects to treat his contract as having been terminated by reason of the substantial change under Regulation 4(9) (subject to the "affirmation" issue).

148. The Claimant's objection under Regulation 4(7) set in motion the mechanism of Regulations 4(8) and 4(9). Having decided that the transfer would involve a substantial change in working conditions to his material detriment, the Claimant arrived at the junction where he had to decide whether or not to treat his contract as having been terminated and himself as being dismissed by the First Respondent. By making the decision not

to treat his contract as having been terminated, in my judgment, he effectively kept his contract with the First Respondent alive, and by maintaining his objection to the transfer - he stopped it from transferring to the Second Respondent.

149. Mr Bailey submits that "[i]*t was legally impossible to achieve what [the Claimant] wanted which was to object but to continue to be employed by [the First Respondent] on his existing terms and conditions. The only way in which his employment could continue on the same terms and conditions was to transfer*."

150. I agree, however, in my judgment, what was not legally impossible for the Claimant is to continue to be employed by the First Respondent on the terms as varied by the "substantial change" until his dismissal by the First Respondent or his acceptance of the substantial change as terminating the contract. That is because, in my judgment, Regulation 4(9) gives the Claimant that option.

151. It might be argued that from the practical point of view, the First Respondent simply could not perform the Claimant's contract as varied by the "substantial change". It did not have a garage in Battersea, nor could it operate the route 27 bus service after 9 November 2019. However, in those circumstances, it was open to the First Respondent to terminate the Claimant's contract, as, I find, it has done (see below).

152. For these reasons, I find that the correct position is the answer (d), and that in those circumstances the Claimant's contract of employment could not and did not transfer to the Second Respondent on 9 November 2019.

How and when has the Claimant's employment ended?

153. I find that the Claimant's employment has ended on 8 November 2019 by reason of the First Respondent dismissing the Claimant by purporting to transfer his contract of employment to the Second Respondent despite the Claimant's objection and by informing the Claimant that it no longer considered him to be its employee. The First Respondent made it clear in its letters of 5, 7 and 8 November 2019 (see paragraphs 65, 67 and 68 above) that it would treat the Claimant's employment as at an end either by reason of his resignation or the TUPE transfer to the Second

Respondent. The fact that the First Respondent was wrong in its legal assessment does not mean that it was not ending the contract by its words and conduct.

154. In email of 8 November 2019 at 14:11 Ms Knight made it clear to the Claimant that as far as the First Respondent was concerned the matter was closed and he was no longer in the First Respondent's employment.

155. The First Respondent informed the Second Respondent that the Claimant was their employee as from 9 November 2019, and refused to accept the Claimant's sick pay requests, forwarding those to the Second Respondent, thus further evincing its position of treating the Claimant's employment with it as at an end.

156. The fact that the Second Respondent mistakenly thought that the Claimant had transferred to it and made several attempts to engage with him, and for a period of time treated him as its employee, in my judgment, is irrelevant. By that time, the Claimant's contract had been terminated by the First Respondent, and therefore it did not transfer to the Second Respondent, and there was nothing for the Second Respondent to terminate as it purported to do on 22 November 2019 and again on 3 February 2020.

157. Finally, it might appear that after all that "mental gymnastics", I have arrived at the same result as it would have been if the Claimant's extant objection had been taken as him treating the contract as having been terminated under Regulation 4(9) (see paragraph 131.a above). In my view, there is a difference, not least in relation to remedies, in particular the application of Regulation 4(10). However, these issues are yet to be explored in these proceedings, and at this stage I make no judgment on them.

<u>Was the change in workplace location a repudiatory breach?</u>

158. While I find that the change in the Claimant's workplace location was a substantial change to his material detriment for the purposes of Regulation 4(9), in my judgment, it does not necessarily follow that it was also a repudiatory breach.

159. While, as observed by the EAT in *Cetinsoy* "*substantial change" and "fundamental breach" go together*", that was in the circumstances of that specific case and the employment judge's finding that there was not a substantial change to working conditions of the claimants in that case. Logically, it followed that there could not have been a repudiatory breach by reason of such change.

160. In the present case, my findings are that there was a substantial change in the claimant's working conditions to his material detriment. However, the inverse logic does not apply here, because not every substantial change amounts to a repudiatory breach.

161. The test is different, and one must look at the contract terms and decide whether the breach, assessed objectively, could be said to show that "*the employer has abandoned and altogether refuses to perform the contract"*, or putting it differently - whether the breach was such as to deprive the Claimant "*of substantially the whole benefit*" of the contract (see *Hong Kong Fir Shipping Co. Ltd -v- Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26, at p.70*).

162. Ms Price submits that it was a fundamental breach because the change in location was a substantial change and, although the contract had a mobility clause, in practice it was operated to bring the Claimant's place of work closer to his home at his request, and the clause states that relocation requests will usually be accepted.

163. Mr Bailey submits that although it was technically a breach because Battersea was not one of the First Respondent's garages, the breach was not repudiatory because it was not sufficiently serious. The Claimant's contract envisaged a range of possible garages to which he could be deployed, there was a simple process by which the First Respondent could have added another garage by opening one at Battersea.

164. Although the change of the location was technically a breach of the Claimant's contract of employment and that was also a substantial change to his working conditions, in my judgment, the breach was not sufficiently serious to attain the standard of the First Respondent *abandoning and*

altogether refusing to perform the contract or the Claimant being deprived *of substantially the whole benefit* of the contract.

165. Unlike the question of the substantial change in working conditions, where not only contractual but physical conditions ought to be examined, in determining the question of repudiatory breach, in my judgment, the focus should be on the contract terms and the breach in the context of those terms.

166. By entering into the employment contract with the First Respondent, the Claimant agreed that he would be prepared to work from any of the First Respondent's garages. Even if interpreting that provision as meaning the garages that were in existence at the time of the contract and not subsequently opened by the First Respondent, the Claimant was still under express obligation to work at locations substantially further away from his home than the Battersea garage. The fact that he was never asked to do so, and on the contrary, his request to move from the Shepherds Bush garage to Stamford Brook was accepted, does not mean that the term was not effective or should be disregarded. Except for the change in the place of work, the transfer did not involve any other changes to the Claimant's contract terms to his detriment. He would have retained his salary and benefits, his hours of work and rest breaks would have been the same.

167. Finally, although a technical breach of contract, in the circumstances where the First Respondent did not initiate the change in working conditions itself, and the change came about by the First Respondent losing the operation of the route 27 to the Second Respondent, it would seem wrong to conclude that the First Respondent "*has abandoned and altogether refuses to perform the contract*". It did not positively seek to transfer the Claimant to the Second Respondent knowing that the Second Respondent would breach the Claimant's contract by requiring him to work from the Battersea garage. The anticipatory breach arose by operation of TUPE.

168. To the extent the Claimant claims that the change in his work place was not only a breach of the express term of his contract (mobility clause), but

also a breach of the implied term of trust and confidence, I find the First Respondent did have a "*reasonable and proper cause*" to change the Claimant's place of work (namely the TUPE transfer) and by doing so, it did not "*conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between*" it and the Claimant (see *Woods v WM Car Services Peterborough Limited [1981] ICR 666*). It simply followed TUPE and the TfL Guidelines on TUPE transfers.

169. For these reasons, I find that the breach of requiring the Claimant to change his place of work from the Stamford Brook garage to the Battersea garage was not a repudiatory breach.

170. For the sake of completeness, I shall add that in any event the Claimant did not resign in response to the breach on 8 November 2019. It was his case, as clarified by Ms Price at the start of the hearing, that his email of 8 November 2019 at 15:24 was his acceptance of the First Respondent's repudiatory breach. That email says quite the opposite: "*I have not resigned … I will not resign*".

171. It follows that his claim for breach of contract against the First Respondent must fail.

Remaining issues

172. My judgment on the first issue also deals with issues 3 and 8. The remaining issues in the case shall be decided at a final hearing to be listed by the Tribunal on a first available date. Time estimate - two days. The parties must write to the Tribunal giving their dates to avoid for June – September 2021.

Signed: Employment Judge P Klimov
London Central Region

Dated: 4 May 2021

Sent to the parties on:

04/05/2021

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For the Tribunals Office

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