



## EMPLOYMENT TRIBUNALS

Claimants (1) Mrs C Collinson  
(2) Royal College of Nursing

Respondents (1) University Hospitals Plymouth NHS Trust  
(2) CRGW Limited  
(3) CRGW (Plymouth) Limited

Before Employment Judge Goraj 3,4,5& 6 October 2022 &  
6 & 7 February 2023

### Representation

The Claimants – Mr C Canning, Counsel

The First Respondent – Mr J Heard, Counsel

The Second and Third Respondents – Mr D Leach, Counsel

## RESERVED PRELIMINARY JUDGMENT

The JUDGMENT of the Tribunal is that: -

1. It is not necessary to determine Issue 1 relating to deliberate organisation.
2. In relation to Issue 2 - the claimant was assigned to the relevant Organised Grouping of Employees and her contract of employment therefore transferred from the First Respondent to the Third Respondent on 5 August 2020 pursuant to Regulation 4 (1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

### BACKGROUND

1. The First Claimant was employed by the First Respondent (“R1”) from 28 January 2008 until August 2020. By a claim form which was presented to the Tribunals on 3 November 2020, the First Claimant brought claims (in the alternative), against the (then) three respondents for a redundancy

payment/ breach of contract for notice/ unfair dismissal. The claimant has further expressly reserved, in her particulars of claim, her right to claim in the civil courts for damages for breach of contract for her entitlement to a contractual redundancy payment. The First Claimant's claim form and attached particulars of claim are at pages A004 – A018 of the Main Bundle ("MB").

2. The First Claimant/ the First Claimant's recognised trade union, the Second Claimant ("the RCN"), are also pursuing claims for alleged failures properly to consult in connection with the transfer of the IVF (NHS) service contract from R1 to The Second Respondent ("R2") / the Third Respondent ("R3") in August 2020. These claims do not however, form part of the preliminary issues. The First Claimant is therefore referred to as "the claimant" in this Judgment.
3. The claimant's primary contention is that her contract of employment transferred from R1 to R3 pursuant to Regulation 4 (1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE Regulations") in the light of the relevant transfer of a service provision change of the IVF (NHS) service contract, to which she was assigned, from R1 to R3 on 5 August 2020.
4. R1 shares the claimant's position. R2 /R3 accept that there was a relevant transfer by way of a service provision change, but deny that the claimant was assigned to the Organised Grouping of Employees which had as its principal purpose the carrying out of the IVF (NHS) service contract and further contend that the claimant also fails to satisfy the necessary "deliberate organisation" requirement ( as referred to in more detail below).
5. It was agreed by the parties during the course of these proceedings that R3 is the correct second respondent to the proceedings and R2 was therefore dismissed from the proceedings by consent. The matter was listed for this Preliminary Hearing to determine the "transfer" related issues.
6. The claimant's ACAS certificates in respect of R1 and R3 record that :- (a) the claimant notified ACAS of her claims against R1 on 14 September 2020 and that the ACAS Certificate was issued on 8 October 2020 and (b) that the claimant notified ACAS of her claims against R3 on 14 September 2020 and that the ACAS Certificate was issued on 14 October 2020.

#### The conduct of the proceedings

7. On 29 April 2020, R3's solicitor wrote to Mr Maguire of R1, with remarkable prescience, as follows: - " The last thing either of us want is to be left in disagreement over one or.. (two) member of staff and them being left without a job but armed with claims against both organisations – fingers crossed we can work together to ensure that does not occur".

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Unfortunately, this is exactly what has happened in this case resulting in protracted and, at times, acrimonious exchanges between R1 and R3. Further, as part of that process the Tribunal has been provided with voluminous numbers of documents (including a main bundle of 1049 pages) a significant proportion of which were not necessary for the proper determination of the Preliminary Issues.

**Witnesses**

8. The Tribunal has received witness statements (in some cases multiple witness statements) from the following witnesses: -
  - 8.1 The claimant and Mrs Alice Dungate , Assistant Practitioner.
  - 8.2 R1 – Mr Richard Maguire, HR Business Partner, and Mr Frank O’ Friel, Care Group Manager for Women and Children.
  - 8.3 R2/ R3 – Dr Amanda O’Leary, director of R2 and R3, Dr U Acharya, Consultant in Obstetrics & Gynaecology and director of R3/ former director of R2 (also formerly a Consultant with R1) and Mrs B Male, Lead Nurse and Manager with R3 (also formerly Lead Fertility Nurse Manager with R1).

**Documents**

9. As stated above the Tribunal has received voluminous numbers of documents including the MB, an Additional Bundle (“AB”) and a further supplementary bundle (“SB”) for use at the restored hearing in February 2023. The Tribunal has also received an agreed cast list / chronology together with very helpful written submissions from all parties.

**THE ISSUES**

The CMO dated 27 January 2022

10. The Preliminary issues were originally identified by EJ Smail in a case management order (“CMO”) dated 27 January 2022 ( A067 of the MB) as follows :-

“Paragraph 2 :-

The preliminary hearing issues will be:-

- (a) Whether the Claimant’s employment was assigned to the IVF service which transferred from the First Respondent to the Second/ Third Respondents on 5 August 2020. The Claimant and the First Respondent say yes. The Second and Third Respondents say no. It is essentially a question of fact”.

11. The Preliminary Issue was further clarified at paragraph 6 of the CMO dated 27 January 2020 as follows:-

“The Second / Third Respondents maintained the Claimant’s job was not assigned to the Service and so refused to have her. The Claimant maintains that 75% of her duties were for the IVF Service...” (page A068).

The CMO dated 18 July 2022

12. The Issues were further defined in EJ Roper’s CMO dated 18 July 2022 (following the postponement of the Preliminary Hearing due to a lack of judicial resources) as follows :-

“It is agreed by all parties that there was a relevant transfer being a Service Provision Change of the IVF service contract from the First Respondent to the Second/ Third Respondents on 5 August 2020, and further it is agreed by all parties that there was a deliberately Organised Grouping of Employees which had as its principal purpose the carrying out of the IVF service contract.

The Preliminary Issues to be determined are these: -

- (1) Whether the claimant was deliberately organised to carry out activities pursuant to the IVF service contract specifically (the position of the Claimants and the First Respondents is that this element of the legal test is not required); and
- (2) If so, was the claimant assigned to the Organised Grouping of Employees (and the position of the Claimants and the First Respondent is that this is the only legal test required) such that the First Claimant’s employment transferred to the Second/ Third Respondents”

The Preliminary Hearing in October 2022 and subsequent events.

13. The Preliminary Hearing was relisted for hearing on 3 – 6 October 2022. On the afternoon of 5 October 2022, a new factual issue arose during the oral evidence of Dr Acharya on behalf of R3 concerning the split of NHS/ private IVF work undertaken by R1 and the potential consequences thereof in respect of the issues of “deliberate organisation” and assignment. The Tribunal rejected the submissions of the claimant and R1 that R3 had made formal admissions regarding such matter. The claimant and R1 were however, given an opportunity to consider and respond to R3’s assertions regarding the split of NHS and private IVF work and the hearing was therefore adjourned with associated

directions. At the restored hearing in February 2023 the claimant and R1 accepted R3's contention that there was an approximately 50/ 50 split between the NHS and privately funded IVF work.

14. Following the adjournment of the hearing in October 2022, R1 made a formal application to amend its response further to contend that there was also a service provision change of the private work IVF work undertaken in the Ocean Suite from R1 to R3. This application was granted by the Tribunal and further directions given accordingly. Following however, further disclosure and discussion at the restored hearing in February 2023, R1 confirmed that it was no longer pursuing this argument.

#### Other matters

15. In March 2020, R1 ceased the provision of services (IVF and fertility) in the Ocean Suite in response to the covid pandemic. The Ocean Suite was repurposed for other uses and many of the staff (including the claimant and Mrs Male) were temporarily assigned to undertake other work as part of the covid response. This case has proceeded on the basis that any such assignments were undertaken on a temporary basis/ constituted temporary assignments for the purposes for Regulation 2 (1) of the TUPE Regulations and no one has contended otherwise.
16. As referred to further below, the delivery of the IVF (NHS) service contract transferred from R1 to R3 on a substantive basis with effect from 5 August 2020. R3 however, also undertook the delivery of the NHS fertility services on behalf of R1 on a short term subcontract basis with effect from 5 August 2020. R3 contended that the latter was a contract of short-term duration for the purposes of Regulation 3 (3) (a) (ii) of the TUPE Regulations and neither the claimant or R1 sought to contend otherwise. The Tribunal has therefore proceeded accordingly.
17. For the avoidance of doubt, the references in this Judgment to IVF services include assisted conception.

#### FINDINGS OF FACT

18. The following findings of fact are made for the purposes of the determination of the preliminary issues.

#### The claimant

19. The claimant was employed by R1 from 28 January 2008 until August 2020. The claimant is a Registered General Nurse and a Midwife. The claimant qualified as a nurse in 1993 and as a midwife in 1996.
20. At the material times, the claimant was employed by R1 as a Band 6 Senior Staff Nurse (also known as a deputy or junior sister) in the South West Centre for Reproductive Medicine located at R1's Ocean Suite at

Derriford Hospital. The claimant commenced her employment in the Ocean Suite in August 2016. Prior to that time the claimant was employed by R1 as a Band 7 midwife. The claimant was contracted to work 36 hours a week over 4 days.

21. The claimant's job description (dated May 2016) is at pages 450 – 454 of the bundle. The Tribunal has noted in particular, the job purpose, key dimensions of the post / primary duties and areas of responsibility (pages 450 – 452 of the MB). These included a range of clinical and management duties.

The management duties included acting as deputy to the Lead Nurse and having responsibility as junior sister for organising and managing nursing staff to ensure that service needs were met, providing specialist skills and professional leadership in the field of reproductive / endocrine medicine, liaising with the lead nurse and clinician in the running of Ocean Suite and responsibility for the smooth running of the outpatient clinics and theatre lists. The stated clinical duties included the ability to undertake nurse led clinics and to implement/ evaluate required investigations, involvement in treatment protocols, performance of ultrasound scans and intra – uterine and donor inseminations, pre/ post operative observations together with the giving and monitoring of intravenous sedation/ responding to any abnormal reactions, assisting the consultant / clinical nurse specialist with embryo transfers and oocyte recoveries and co-ordinating the donor insemination and oocyte programmes. It is accepted by the claimant that she did not perform ultrasound scans or independent embryo transfers.

R1

22. R1 is a large University Hospital located in Plymouth. Prior to the changes to the service in August 2020, R1 provided the following services in the South West Centre for Reproductive Medicine located in the Ocean Suite at Derriford Hospital namely, infertility, assisted conception/ IVF ("IVF") and reproductive endocrinology (page 80 of the MB). The clinical lead in the Ocean Suite was Dr U Acharya, Consultant in Obstetrics and Gynaecology who is also a specialist in reproductive medicine.

23. The volume of work in the Ocean Suite was split 70% IVF and 30% fertility which included both NHS and private work.

The IVF services provided in the Ocean Suite consisted of NHS IVF services commissioned by the local clinical commissioning groups ("CCGs") of Kernow and Devon together with those provided to R1's private patients and the private patients of Dr Acharya. It was agreed between the parties that there was an approximately 50/50 split between the NHS and private IVF work undertaken in the Ocean Suite. The NHS IVF work therefore accounted for approximately 35% of the work undertaken in the R1's Ocean Suite.

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24. There was a total of 16/17 staff working in the Ocean Suite which was made up of medical (Dr Acharya), nursing (including HCAs), scientific (4 with one to join) and administrative staff (4). The nursing staff comprised of one Band 3, five band 5/6 nurses (including the claimant) and one Band 7 nurse (Mrs Male) (pages 23 and 534 of MB). The medical / nursing staff were engaged in the range of work undertaken in the Ocean Suite namely, NHS and privately funded IVF and fertility services.
25. Mrs Male, who was the Lead Fertility Nurse and Nurse Manager for the Ocean Suite, is a registered nurse and midwife. Ms Male was the claimant's immediate line manager. Ms Male had previously worked with the claimant in R1's maternity service.
26. Mrs Male's job description (stated as last reviewed in 2014), in which she is described as a senior sister reporting to the Consultant in reproductive medicine (Dr Acharya) is at pages 390 – 394 of the MB. The Tribunal has noted in particular, the stated job purpose, key dimensions and primary duties and areas of responsibility. These included being part of the senior team in the planning and provision of services in respect of HFEA, working as a Nurse Practitioner within a consultant led team and responsibility for scheduling of patient treatment cycles and HFEA related matters. The designated primary duties and responsibilities included a range of clinical and management responsibilities and duties. The designated clinical duties/ responsibilities included having specialist knowledge in the whole range of reproductive medicine issues, undertaking nurse led clinics in all aspects of the service, clinical investigations, performing autonomously procedures such as invasive examinations and inseminations, teaching and supervising infertility treatments, performing embryo transfers without medical supervision and supervising the coordination of the donor programme.
27. All the staff in the Ocean Suite, including the Consultant in charge, Dr Acharya, were accepted by R3 for transfer pursuant to the TUPE Regulations with effect from 5 August 2020 with the exception of the claimant and one of the administrative assistants. The administrative assistant accepted employment elsewhere within R1. The administrative staff who transferred to R3 included a receptionist and a finance officer. Mrs Dugate worked in Ocean Suite until March 2020, at which time she decided that she did not wish to transfer to R3 and obtained alternative employment within R1.

**R2 & R3**

28. R2 provides IVF/associated services at a number of locations in the UK. Dr A O' Leary, who is a surgeon, is a director of R2 and R3. R2 decided to build a Unit in Plymouth for the provision of IVF services in the region. The new building was completed in February 2020. R3 was incorporated

(in November 2019) to take on the running of the Unit in Plymouth including the employment of staff. Dr Acharya was appointed as a director of R3 on 4 August 2020. Dr Acharya is related to Dr O' Leary by marriage (her brother-in-law).

R1's withdrawal from the NHS IVF contract

29. In August 2019, R1 decided to withdraw from the NHS contract with the CCGs for the provision of IVF/ related services and to no longer provide such services at R1. Accordingly, R1 wrote to the CCGs in August 2019 giving 12 months' to terminate the provision of HEFA regulated fertility services at R1 (pages 3-6 of MB).
30. In or around November 2019, the CCGs decide to proceed with a competitive tendering process for the provision of a NHS funded assisted conception service. R3's tender was successful, and it was awarded the contract for NHS IVF / assisted conception services. The service specification for the NHS Assisted Conception service (which is stated to run for a period from 5 August 2020 to 4 August 2023 is at pages 51 – 58 of the AB).

The IVF contract

31. The description of the assisted conception service to be provided is at paragraph 3.3 of the service specification (page 52 of the AB). The services were stated to include full IVF and ICSI (sperm injection) cycles, IUI (intra Uterine insemination), the storage of gametes (oocytes and sperm) and embryos and the use of donor gametes. The full cycle of IVF/ICSI treatment was also stated to include appropriate diagnostic tests and scans, counselling, stimulation of ovaries to produce oocytes and harvesting, fertilisation, embryo transfer and a follow up consultation. The service description also identified the areas which were not contained in the specification which excluded general fertility assessments (including HSGs), reproductive medicine clinics, infertility assessments and investigations and diagnostic tests.

Provision of workforce information to the CCG

32. On 7 November 2019, Mr Maguire of R1 provided the Devon CCG with information concerning the Ocean Suite Team required for the tender process. This information was shared with R2 (pages 14 – 15 of the MB). All staff were included in the information provided.
33. The CCG subsequently requested clarification of the percentage time which the staff in the Ocean Suite spent providing the NHS contract in response to which Mr Maguire was advised on 14 November 2019 by the Head of Outsourced Healthcare and Commercial contracts in R1 that "... I think that we could confidently say 55% of their activity is spent on this NHS activity. The rest is made up of private activity. I don't think that we need to be more scientific than that (as long as the figure ends up over 50% for TUPE purposes)".



The diary exercise of January 2020

34. In January 2020, the nursing and administrative staff in the Ocean Suite were instructed to record by way of timed diary entries the split of working hours over a two week period between 6 January 2020 and 19 January 2020 engaged in IVF and Non – IVF work (NHS and private). This information was requested by R1’s finance team to enable it to establish the split of finances for Ocean Suite between IVF and fertility services. Staff were informed that the information was required for a financial audit but were not otherwise given any instructions regarding its completion or purpose. The information was subsequently shared with R2/R3.
35. The staff diary records are at pages 494 – 513. The entries were recorded by way of “blocks of time” recorded against each activity and do not contain any further information concerning the nature of the activity undertaken. The diary entries compiled by the claimant are at pages 505-506 of MB.
36. A tabular summary of the data provided in respect of 5 nursing staff is at page 514 of the MB. This summary was prepared by Mrs Male in response to a request by Mr Maguire in June 2020 for information regarding the January diary exercise (page 75 of the MB). The claimant is staff member B on the list. Mrs Male is not included in this analysis. The table shows that on week 1 (which was a treatment week) the claimant spent 10.25 hours on IVF and 22.75 hours on non- IVF and in week 2 (which was a non-treatment week) that the claimant spent 1.5 hours on IVF and 33.75 hours on non-IVF activities. The total percentage split of the claimant’s activities for the relevant period is recorded as 16% for IVF and 79% non-IVF. The time recorded by the claimant on IVF duties during the 2 week period is significantly lower than for the remaining nursing staff whose total percentage time spent on IVF activities during such period is recorded as ranging between 68% and 80%. In a subsequent analysis by R3 of the data relating to Mrs Male – she was recorded as spending 18.5 hours on IVF and 11 hours on non IVF during week 1 and 17.5 hours on IVF and 21.5 hours on non-IVF during week 2 with a total percentage split of 48% and 43% between IVF and non IVF work (page 515 of the MB).
37. There is a dispute between the parties as to whether the activity allocations recorded by the claimant for the 2-week period between 6 and 19 January 2020 were representative of the work undertaken by the claimant. The claimant contended that the work undertaken by her during the 2 week reference period was not representative of her substantive work load for which she has offered 2 principal explanations namely :-  
(a) that as instructed by Mrs Male she was engaged during this time in making plans/ arrangements for the transfer of services/equipment from the Ocean Suite to R3’s new premises and (b) she was involved in reorganising clinics for February / March in preparation for Mrs Male’s

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planned period of sickness absence in February / March 2020. The claimant also contended that the two week period was, in any event, a very limited time analysis of work undertaken and was not representative of her work. This is disputed by R3 who contends that the building of the new Unit was not completed until February 2020 and denies that the claimant had any significant involvement in either of the contended additional activities at that time. Further, Mrs Male contended in her evidence that whilst all nursing staff, including the claimant, were allocated tasks in preparation for the move she did not allocate the claimant significant additional duties during this period as she was mindful of the claimant's responsibilities for the fertility clinics and that the claimant would be busy covering Mrs Male's clinics during her planned sickness absence in February/ March 2020.

38. After weighing the conflicting evidence, the Tribunal is satisfied that the claimant did undertake some additional duties during this period in preparation for the forthcoming move to R3 and Mrs Male's scheduled sickness absence. This does not however, fully account for the figures in the light of Mrs Male's evidence that she shared tasks relating to the move amongst the nursing staff during this period in recognition of the fact that the claimant would be required to take on additional duties during her sickness absence. At the end of the day however, the Tribunal is not satisfied that diary entries, which are limited to a two period, are sufficient to provide a reliable assessment of the claimant's work.

### February and March 2020

39. Mrs Male was absent on planned sick leave between 4 February 2020 and 20 March 2020.
40. On or around 20 March 2020, R1 vacated the Ocean Suite with equipment and specimens etc transferring to R3's new Unit in Plymouth. R1 ceased IVF/ fertility activities at this time as a result of the covid pandemic and there was no further NHS IVF activity between March and August 2020. In or around March 2020 the majority of the nursing staff including Mrs Male and the claimant were temporarily redeployed to other nursing roles in R1 in response to the covid pandemic.

### Dealings with the R2/ R3 regarding the transfer of IVF in March – May 2020

41. R1's initial position was that all staff in the Ocean Suite should transfer to R2/3 with the IVF services contract.

42. On 24 March 2020 R3's solicitors wrote to R1 on behalf of R3 regarding the transfer of the CCG contract. This letter is at page 16 of MB. R3 challenged what it understood to be R1's view that all staff would transfer under the TUPE Regulations including R1's assessment that all staff spent 55% of their time on the contract which was due to transfer. R3 further stated that whilst recognising that the percentage of time spent was not the only relevant factor, the figure of 55% could not be correct as the staff occupied various roles with some spending significantly more than 55% of their time on the relevant contract and some spending significantly less. R3 requested R1 to provide a list of all staff together with a breakdown of how much time they spent on the relevant contract and how R1 had arrived at its figures. R3 concluded by stating that, for the avoidance of doubt, the relevant contract did not include any privately funded IVF work.
43. In May 2020 there were internal communications within R1 regarding staff job descriptions and time spent on tasks other than IVF. As part of such correspondence, Mrs Male provided Matron Williams (Matron for Gynaecology, Fertility and other Women's services) with job descriptions for the nursing staff including for the claimant (page 23 of the MB).
44. On 15 May 2020 (page 23 of the MB) Matron Williams informed Mr Maguire of R1 that she had had a meeting with Mrs Male who had advised her that very little of the nursing time in the Ocean Suite was taken up with tasks other than IVF and also that all staff undertook IVF clinics, procedures and telephone conversations etc. Matron Williams further stated that Mrs Male was absolutely adamant that no duties other than recurrent miscarriage clinics would be left at R1. Mrs Male denies making any such comments to Matron Williams and contends that she could not, in any event, have expressed such a view as she was not involved in matters relating to the service specification and did not know at that time what services were being transferred to R3. In the light of Mrs Male's denials and the absence of any supporting oral evidence from Matron Williams the Tribunal is not satisfied, on the balance of probabilities, that any such view was expressed by Mrs Male at that time.
45. On 19 May 2020 Mr Maguire wrote to the solicitor for R3 (page 28 of the MB) attaching a list of the current staff (which included the claimant) which he stated represented the staff whom R1 felt were entitled to transfer to R3. On 20 May 2020, the solicitor for R3 replied to R1 advising that on the basis of the information received his client disputed that the claimant or a named administrative assistant were assigned to the organised grouping of employees relevant to the transfer. R1 was asked to reconsider its view that they were entitled to transfer and, if R1 remained of that opinion, to provide the supporting evidence.

46. Mr Maguire sought further internal advice regarding R3's position. In response Matron Williams told Mr Maguire that the only thing that the claimant did in the service was IVF clinics and that she believed that Mrs Male and Dr Acharya were trying to get rid of the claimant (page 27 of MB).
47. On 21 May 2022, Dr O'Leary wrote to Mr Maguire (page 32- 33 of the MB) advising him that she did not feel that Matron Williams was in the best position to advise on nursing roles within the IVF unit as she did not work within the Unit or have any IVF knowledge. Dr O'Leary further stated that she had seen the exercise done by the staff in the unit earlier that year which had showed that the claimant's NHS IVF input was significantly below 50% and as such the TUPE Regulations would not apply.
48. On 21 May 2020 Mr Maguire wrote to R3's solicitor informing him that he had gone back to the leads in administration and nursing to challenge them to be absolutely sure that the TUPE Regulations applied to the claimant and the administrative employee. Mr Maguire stated that this had resulted in the administration manager accepting on balance, that the administrative staff's role was not predominately IVF, albeit that it was close. Mr Maguire further stated that in relation to the claimant, the matron was still of the opinion that the claimant's role was predominantly attributable to IVF activities and that the majority of her time was involved in IVF. Mr Maguire also provided a copy of the claimant's job description and requested R2/R3's further views (page 40 of the MB).
49. Mr Maguire consulted with Matron Williams regarding Dr O'Leary's email in response to which she advised Mr Maguire that in recognition of the fact that she did not know the detail she had had a meeting with Mrs Male the previous week during which Mrs Male had told her that the claimant only did IVF clinics 100% of her time and there was only the recurrent miscarriage activity that was non- IVF duties. Matron Williams further advised Mr Maguire that she had asked Mrs Male to give the matter further thought to see whether there was even 1 WTE RN worth of duties that could remain with R1 and that Mrs Male had returned a couple of days later to confirm that it was only the recurrent miscarriage work that was not IVF and the all other staff had to go over with TUPE Regulations. Matron Williams concluded by saying that she believed that Mrs Male was in a far better position than Dr O' Leary to say what staff would be required to meet the demand (page 31 of the MB). Mrs Male denies expressing such views. The Tribunal is not satisfied, on the balance of probabilities, in the absence of any supporting oral evidence from Matron Williams, that Mrs Male expressed such views for the reasons previously referred to above. Further, the claimant accepts that she did undertake fertility clinics and other fertility related activities of which Mrs Male would have been well aware.

R1's change in position

50. On or around 28 May 2020, Mr Maguire advised R1's Board that it was R3's view that the claimant, together with one administrative member of staff, should not transfer to R3 pursuant to the TUPE Regulations as they did not work predominantly within the IVF services. Mr Maguire further advised the Board that having considered the claimant's January 2020 assessment of activities together with the views of R3, he was now of the opinion that the claimant and the administrative member of staff were not eligible to transfer to R3 because neither of them worked predominantly within the IVF services which were to transfer. R1's Board accepted Mr Maguire's advice.
  
51. Mr Maguire wrote to Dr O' Leary on 28 May 2020 advising her that having reviewed the position regarding the claimant, R1 was inclined to agree with them that the claimant fell outside the scope of a TUPE transfer. Mr Maguire also however advised Dr O'Leary that R1 had not yet had any feedback from the claimant and that R1 would be looking to hear from the claimant during the forthcoming consultation. Mr Maguire further proposed that consultation should commence later that week, with a proposed transfer date of 5 August 2020, on the basis that the TUPE Regulations applied to all staff save for the claimant and the administrative member of staff however, that this position would be tested further as part of the consultation process. Mr Maguire also proposed that any move away from the current assumption regarding the application of the TUPE Regulations should be fully evidenced based. Mr Maguire concluded his email by apologising for the fact that it had taken some time to get to this point but hoped that they would appreciate why (pages 41-42 of the MB).

Consultation paper

52. On 2 June 2020, Mr Maguire provided staff representatives with an advance copy of the consultation paper for the IVF TUPE transfer. Mr Maguire drew attention to the fact that two of the staff currently fell out of scope for the transfer and stated that R1 would be having conversations with them prior to the consultation paper going out.

Discussions with the claimant

53. The claimant was informed by R1 on or around 3 June 2020 that she was not currently considered to be eligible for a TUPE transfer as the work which she did was more aligned to general fertility than IVF. The claimant was further advised that if this position was confirmed during the consultation the claimant would remain with R1 who would identify suitable roles for her to move to (pages 49 – 50 of MB).
  
54. After seeking advice from the RCN the claimant contacted Mrs Male informing her that she had been advised to gather as much evidence as possible of her job role and requested her help in collating the relevant

information. The claimant expressed concern about her position including that this could be the end of her NHS career.

The claimant's email to R1 dated 4 June 2020

55. The claimant wrote to a Senior HR adviser in R1 on 4 June 2020 (page 56 of MB) confirming their discussions on the telephone concerning the nature of her role and division of her duties between general fertility and IVF.
56. In brief summary, the claimant acknowledged that she did general fertility work including that over a 2 week period she had 2 all day clinics. The claimant calculated that, as she worked 4 days per week, over a 2 week period 2 of 8 days ie 25% were therefore general fertility "days". The claimant acknowledged that she had done all of the general fertility clinics in February and March but explained that this was because Mrs Male was off sick and there was no-one else to do them. The claimant stated that she had originally started doing clinics because Mrs Male had had a long episode of sickness and as Dr Acharya was the only doctor he needed help. The claimant also stated that she did not feel that it was a fair representation of her workload to say that she did more general fertility than IVF and that for the remaining 6 working days in a fortnight she was just as likely to be involved in the range of IVF procedures and processes. The claimant further listed the types of IVF procedures which she stated that she was likely to be involved in as much as the other nurses including:- sedating patients in theatre and recovering them post procedure, seeing patients after their IVF scans, dealing with IVF queries and booking them in for treatment. The claimant also stated that she had until recently written the bulk of the IVF treatment plans and had co-ordinated the oocyte donation programme for at least 2 years. The claimant concluded her email by saying that she simply did not understand how the conclusions had been drawn.

Subsequent correspondence

57. In a subsequent exchange of correspondence between Mr Maguire and the RCN (pages 62- 63 of the MB) RM explained that the claimant had not been included for transfer as R1 and R2/3 believed that the majority of the claimant's work was dealing with fertility patients with very little actual IVF work that was related to the outsourced contract. Mr Maguire further stated that he had been told that the other nurses were specifically dealing with IVF and that whilst this would be fully tested as part of the consultation the current evidence suggested that the claimant did not meet the tolerance for a TUPE transfer. Mr Maguire also stated that the claimant's job description was that of a generic sister adapted for fertility.
58. On 8 June 2020 the claimant submitted a sick note.

59. On 9 June 2020, the claimant wrote to the R1 (page 72 of the bundle) asking for further information as to why it had been decided that her day to day role fell outside IVF and reiterated her previous explanations as to why she believed that 75% of her working time was spent on IVF.

Information relating to sedations and IUI's

60. On 13 June 2020, Mrs Male sent to the claimant information which the claimant had requested relating to sedations and IUI's (page 65 of MB). The attached information (sedations) is at pages 67 and (IUIs) is at pages 68 of the MB. The summary of sedations records that the claimant undertook 29 sedations between January 2019 and February 2020 which was the second lowest compared to the other nursing staff included with the lowest (KP) being 18 and the highest (JW) being 120. The information for IUIs (page 68 of the MB) records that between November 2016 and February 2020 the claimant undertook a total of 52 (including 44 independently) IUIs. This is broadly in line, when adjustments are made for the varying start dates, of those undertaken by JW and RB (with KP recording a lower total figure of 21 albeit from June 2017).

BM's email dated 13 June 2020

61. On 13 June 2020 Mrs Male responded to Mr Maguire's queries regarding the diary exercise undertaken in January 2020 (page 75 of the MB) as referred to previously above. Mrs Male concluded her email by informing Mr Maguire that, on a personal note, she found herself in an incredibly challenging position when trying to justify the non-transfer of a staff member and that she welcomed his continued support.
62. On 19 June 2020 Mr Maguire forwarded to Mrs Male an email which R1 had received from the RCN seeking further information/ confirmation of the rationale as to why the claimant was the only person not to transfer notwithstanding that she had had a lot of involvement in IVF and had provided statistics to show that she had performed more of the procedures than some of the staff. Mrs Male passed the email to Dr Acharya and replied to Mr Maguire's queries by cutting and pasting Dr Acharya's comments in response. Dr Acharya explained R3's position including by reliance, in particular, on the diary exercise which had been undertaken in January 2020 which he said indicated that the claimant did not spend more than 50% of her time doing IVF in the relevant period and further stated that he could obtain the necessary evidence to confirm the position (pages 80 and 81 of the MB).

The claimant's account dated 24 June 2020

63. After further discussions and correspondence between Mr Maguire and the RCN in which they reiterated their/ the claimant's view that the claimant should transfer to R3 as her role was at least 75% IVF, the claimant provided to Mr Maguire the written evidence which she had prepared in support of her case.

64. The claimant's detailed account of her job role in Ocean Suite dated 24 June 2020 is at pages 525 – 529 of the MB. In brief summary, the claimant :- (a) explained the background to her role (b) disputed that the diary exercise undertaken in January 2020 was representative of the true position including on the grounds that in January 2020 plans were being made to stop IVF treatments in readiness for the transfer of the IVF service which meant that senior staff including the claimant spent significant period of time planning for the transfer and the claimant was also spending time organising and planning for Mrs Male's scheduled sick leave in February and March 2020. The claimant also contended that during the week of 6 January 2020 she was working within IVF for at least 50% that week dealing with egg collections as she believed would be confirmed by the Healthroster and patient records. The claimant further contended that she was involved in other IVF duties during the relevant period including IUIs and dealing with IVF queries and egg donors and recipients (c) stated that during February and March 2020 she ran 2 IVF consent clinics and supported a junior colleague with her consent clinics as would be evidenced by patient and administrative records(d) also stated that her involvement in IVF from July 2019 was supported by the Healthroster, patient notes, the controlled drugs book and the IVF nurse on call rota (e) contended that she had had sole responsibility for oocyte donation and oocyte recipient treatment over the previous 2-3 years together with egg donor consents and protocols (f) explained her involvement in the IUI service was both direct and by supporting other staff to help them achieve competency. The claimant also acknowledged however that the number of IUIs performed on Ocean Suite was small as most were privately funded because of the lack of NHS funding in Devon (g)explained her involvement in the preparation of treatment plans and protocols including that in 2018 and 2019 she wrote/ checked at least 75% of the protocols (h) complained that she was being unfairly penalised for running her own patient and follow up clinics (once a fortnight on Tuesday afternoon, Wednesday and Thursday mornings ) which equated to no more than 25% of her job role(i) had assumed increasing responsibilities such as for applying for IVF/ ICSI for patients who were military personnel. The claimant concluded by saying that she believed that the part which she played in the Ocean Suite was clearly substantiated by the evidence which she had provided and that there was no doubt in her mind that she should be included in the TUPE transfer.

R1's further revised position and associated events

65. On 1 July 2020, Mr Maguire advised the RCN that having considered the claimant's statement and supporting documents he accepted that they demonstrated that the claimant was predominantly working within the IVF service which was transferring and should therefore transfer to R3 pursuant to the TUPE Regulations. Mr Maguire further stated that he believed that the claimant had provided compelling evidence that she was engaged as much in the delivery of the IVF services as the other nurses and had also been integral in ensuring that IVF services were delivered by managing the Suite and supervising staff.



66. Mr Maguire discussed the information which he had received from the claimant with R1's Board who agreed that the claimant should transfer to Ocean Suite with the rest of the staff.
67. On 6 July 2020, RM provided to R3 a copy of the claimant's evidence and explained to R3 that having considered the information it was now R1's view that the claimant should transfer to R3 (page 96 of the MB). Mr Maguire also confirmed the position to the claimant (page 98 of the MB).

Dr O'Leary's email dated 24 July 2020 and associated information

68. Dr O'Leary sent a detailed response dated 24 July 2020 (pages 114 – 121 of the MB) to the claimant's document dated 24 June 2020. Dr O' Leary was highly critical of the account which had been provided by the claimant and strongly maintained R3's position that the claimant was not a candidate for a TUPE transfer.
69. Dr O' Leary provided a detailed account of R3's investigations and analysis (pages 118 – 121 of the MB) in support of their position. Dr O'Leary stated that they had reviewed a total period of 10 weeks by reference to the records listed at pages 114 – 115 of the MB. The associated spread sheets and associated documents/ job adverts are at pages 118 – 124 of MB.
70. At pages 114 – 115 of the MB, Dr O'Leary explained the detailed analysis which they had undertaken "in order to refute" the claimant's assertions that at least 50% of her role was engaged in IVF activities. R3's analysis included a more detailed review of the period between 6 and 19 January 2020 (including a spreadsheet which the R3 contended showed that the claimant had not undertaken any IVF duties during the treatment week). R3 also undertook an analysis of a further six treatment weeks between September and December 2019 together with 2 additional treatment weeks between July and August 2019 which they contended all demonstrated that the claimant spent less than 50% of her working time on IVF related activities and produced results which were comparable with the original 2-week exercise undertaken in January 2020.
71. The analysis covered a wide range of activities (including follow ups to IVF scans, dealing with patient calls, patient sedation, oocyte donation and recipient treatment and IUI treatments) and source material. Dr O' Leary concluded her letter by saying that having conducted a review of IVF activities R2 remained of the view that the claimant was not a candidate for transfer to R3 pursuant to the TUPE Regulations.

Mr Maguire's email to Dr O'Leary dated 31 July 2020

72. Mr Maguire wrote to Dr O'Leary by email dated 31 July 2020 (pages 167 – 168 of the MB) informing her that having had an opportunity to discuss her response with the claimant/the RCN and R1's senior managers, R1 remained of the view that the TUPE Regulations applied to the claimant. Mr Maguire further stated that the claimant was of the view that the data which R2/3 had provided was not representative of her IVF activity and further that her role was supervisory as she was a key link between Mrs Male and the band 5 nurses who were eligible for TUPE transfer.
73. Mr Maguire also provided Matron Williams' further views (page 167 of MB) which included that the claimant always worked purely in the "IVF unit", that on the whole her duties were dictated by the Nurse Manager (Mrs Male), that as an experienced Band 6 nurse the claimant was often left doing protocols for IVF patients / giving them advice and guidance over the telephone which were her main duties. Mr Maguire advised Dr O' Leary that in order to test the claimant's / Matron Williams' views around activity Matron Williams would be attending R3's premises to undertake an audit of a selection of patient notes. Mr Maguire concluded by saying that R1 remained of the view that the TUPE Regulations applied but looked to reach an agreement with R3.

Audit on 4 August 2020

74. On 4 August 2020 Matron Williams attended R 3's premises and advised she had been tasked with auditing 50 sets of notes of patients who had attended the fertility service in 2019. There was a disagreement between the parties as to the ambit of the audit and Mrs Male expressed concern to Matron Williams that her audit went beyond IVF activity/ the specified dates. Matron William's audit is at page 633 of the bundle.

Letter to staff concerning transfer dated 4 August 2020

75. On 4 August 2020 R1 wrote to all staff, including the claimant, whom it considered would be transferring to R3. This letter is at page 171 of the MB. In this letter Mr Maguire confirmed that staff would be transferring to R3 with effect from 5 August 2020 pursuant to the TUPE Regulations and that the key elements of their role would remain broadly similar.

R3's letter dated 4 August 2020 and subsequent correspondence

76. On 4 August 2020 R3's solicitors wrote to R1 (page 192 of the MB) expressing surprise and concern that R1 had sent an email to the claimant saying that she would transfer to them on 5 August 2020 which it stated would not happen. The solicitors stated that R1 would need to decide whether to terminate the claimant's employment or to retain her and that they could not understand R1's position in the light of the absence of any supporting evidence.
77. The solicitors also attached a copy of an email which they had received from Dr O'Leary dated 4 August 2020 (pages 198 – 199 of the MB) in

which she recorded what she described as Mrs Male's response to Matron Williams' comments regarding the claimant's duties including disputing what had been said regarding the claimant's main duties.

78. R3 subsequently sought assurances that the claimant had been informed that she had not been accepted for transfer under the TUPE Regulations and that she should not report to R3 (page 193). In response Mr Maguire informed Dr O' Leary that whilst R1 was of the view that the claimant was part of an organised grouping and that the TUPE Regulations should apply they had agreed with the claimant that the status quo should apply in the hope of reaching an agreement with R3.
79. On 4 August 2020 (page 194 of the MB) R1 wrote to R3 attaching documents which they believed demonstrated the claimant's involvement in IVF related supervision and management.
80. 4 August 2020 the parties had further unsuccessful discussions to try and agree the way forward regarding the claimant's TUPE status.

#### The events of 5 August 2020

81. On 5 August 2020, the claimant attended for work at R3's premises. The claimant was not permitted to remain. The claimant was told by Mrs Male that as far as she was aware no definite decision had been made at that time about her working for R3.
82. On 5 August 2020, Mr Maguire sent to R2/R3 (page 263 of the MB) the further evidence upon which R1 relied to demonstrate the claimant's supervisory/ management involvement in IVF including that she deputised in Mrs Male's absence. Mr Maguire also sent the outcome of Matron Williams' audit which he stated demonstrated that the claimant had had been involved in 44 of the 50 sample patients which he contended further demonstrated that the claimant was part of an organised grouping and that the TUPE Regulations should therefore apply.

#### Statements of staff supplied by R3

83. On 5 August 2020 R3's solicitor sent to R1 a copy of the statements which R3 had obtained from nursing/ HCAs working in Ocean Suite in response to the claimant's contentions regarding her involvement in management/ supervision. The statements, which were prepared at the request of R3 and were given by the staff on the understanding that they were provided in confidence (albeit that names of staff appear on the statements in the bundle), are at pages 606-617 of the MB. The statements include a statement from Dr Acharya. Overall, the statements state that the claimant provided only limited supervision and a couple are critical of the nature of any supervision

provided. The Tribunal has placed limited weight on these statements as they have not been tested on oath. Further, it is notable that R3 did not provide a statement from Mrs Male who, described in her oral evidence, the supervision and support provided by the claimant to nursing staff including, by way of example in respect of the Monday IVF theatre lists/ scans and on Thursday afternoons.

R1's response

84. On review, R1 did not consider that the statements undermined its position on supervision or demonstrated that the claimant was not working predominantly in the IVF services which had transferred to R3.

Dr O'Leary's letter dated 10 August 2020.

85. On 10 August 2020 Dr O' Leary emailed RM (page 283 of the MB) regarding the audit which had been undertaken by Matron Williams questioning how the patients had been chosen and challenging its validity. Dr O' Leary contended that 30 of the patients were general fertility patients and /or the information dated back to 2017. Dr O' Leary informed Mr Maguire that she had asked Mrs Male to undertake a further audit concentrating on patients who had undergone one full IVF/ICSI treatment cycle in 2019. Dr O' Leary asked Mr Maguire to confirm that he was in agreement with the proposed way forward so that she could ask Mrs Male to make a start.

The claimant's email dated 10 August 2020

86. The claimant wrote to Mr Maguire on 10 August 2020 (page 288 of MB) expressing concern that R3 were challenging R1's evidence in order to justify their decision. The claimant expressed concern that R3 was comparing her work with the Band 5 nurses which was not comparing like for like as the claimant's role was different and that they should have been comparing her work with that of Mrs Male. The claimant contended that if R3 had compared her work with that of Mrs Male they would have seen that she wrote more protocols and answered more calls than Mrs Male.

R1's email dated 13 August 2020.

87. Mr Maguire responded to Dr O'Leary's email dated 10 August 2020 (page 282 of the MB) on 13 August 2020 setting out Matron Williams' explanation of how the patients had been chosen including that they had been chosen randomly when staffing was good and included their normal range of work. Mr Maguire did not respond to Dr O' Leary's proposal for a further audit.

The review by Mr O'Friel dated 13 August 2020

88. Following an internal discussion, at which R1 remained of the view that the claimant was part of the relevant organised grouping of employees for transfer, Mr O' Friel was requested to undertake a formal review of

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the available information. Mr O' Friel's report dated 13 August 2020, in which he confirmed R1's position, is at pages 294 – 304 of the MB.

### R1's letter dated 14 August 2020

89. On 14 August 2020 R1 wrote to R3 confirming its position and enclosing a copy of Mr O' Friel's report. The email and accompanying letter from R1's director of People is at pages 293 and 305 of the MB. In summary, R1 informed R3 that R1 remained of the firm belief that TUPE applied to the claimant, that her employment should therefore transfer to R3 as part of the service and that R1 would therefore be dismissing the claimant with effect from 5 August 2020 for the reason that her employment had legally transferred pursuant to the TUPE Regulations. The letter concluded by asking R3 to review and confirm its position by 21 August 2020.

### R3's audit

90. Following receipt of Mr O' Friel's report, Dr O' Leary instructed Mrs Male to undertake the proposed further audit. As R3 considered that the 20 remaining patients from the audit undertaken by Matron Williams was too small a sample to provide a proper assessment R3 reviewed the records of 96 patients who received at least one complete cycle of IVF or ICSI treatment on 14 designated weeks during 2019. R3's audit is at pages 5-8 of the AB. The audit records the number of interactions of the claimant, the Band 5 nursing staff and an HCA/ student. The audit does not however include any interactions by Mrs Male. A copy of the audit was subsequently provided to R1.

91. In brief summary, R3's audit records the following: -

- 91.1 There were 1075 interactions in respect of one complete cycle of IVF/ ICSI treatment which were attributed as follows :- (a) the claimant - 152 (b) the remaining nursing staff : -225, ( staff member stated to be absent for 10 weeks due to an injury) , 280 ( stated combined total for 2 members of staff who covered each on maternity leave) 57 ( member of staff was stated also to be undertaking an MSc in Ultrasound and 294 and (c) HCA 67 (page 6 of the AB).

- 91.2 There were a total of 1548 stated possible interactions during the relevant period which were attributed as follows: (a) the claimant – 242 (b) the remaining nursing staff – 324 (the staff member who was absent due to injury) 390 (the combined score of the staff members on maternity leave) 90 (the staff member on the course ) and (c) HCA/ student – 95.

### R3's letter dated 20 August 2020

92. The solicitors for R3 wrote to R1 on 20 August 2020 – this letter is at page 307 – 308 of the MB. The solicitors also provided Dr Acharya’s detailed response (pages 309 – 319 of the MB) to Mr O’ Friel’s report. In summary, R3 expressed confusion and concern regarding R1’s position. R3 stated that a dismissal could not be backdated and that as far as it was concerned the claimant’s employment did not transfer when the organised grouping transferred on 5 August 2020 and the claimant would therefore remain an employee of R1 unless and until her employment was terminated or the claimant resigned. R3 also stated that the claimant was not in scope to transfer as there was a clear distinction between IVF and fertility and that R3 had provided strong evidence that the claimant was essentially dedicated to fertility rather than IVF. The solicitors acknowledged that if the fertility contract had also transferred to R3 there was a possibility that the claimant would also have transferred at the point. R3’s solicitors further stated that the fertility contract would not be transferring following the trial which was a one off event of short duration and did not therefore constitute a service provision change / would, in any event, transfer back to R1 on the completion of the trial.
93. Dr Acharya’s response was a critique of Mr O’ Friel’s report in which he robustly challenged R1’s assertions and evidence and strongly reiterated R3’s position.

R1’s letter to the claimant dated 27 August 2020

94. On 27 August 2020 (page 357-358 of MB), Mr Maguire wrote to the claimant on behalf of R1 “ to confirm that on 5 August 2020 your employment will transfer to R3” as R1 believed that she was part of an organised group and that the TUPE Regulations therefore applied to her. R1 also confirmed that the claimant had been placed on special leave from 5 August 2020 to 31 August 2020 in order to maintain the status quo whilst attempting to seek agreement with R3 regarding her TUPE status but having failed to do so her employment had transferred to R3 pursuant to the TUPE Regulations and any decision regarding her employment was a matter for them.

Subsequent correspondence between R1 and R3

95. R1 wrote to R3’s solicitors on 28 August 2020 confirming that R1 would be proceeding with the TUPE transfer of the claimant as R1 believed that she was part of the organised group and that the TUPE Regulations therefore applied. R1 further confirmed that its position was that the claimant’s employment had, as a matter of law, transferred to R2 on 5 August 2020 and that any decision regarding the claimant’s employment was a matter for them (page 465 of MB).
96. R3’s solicitors replied by letter dated 28 August 2020 in which they disputed that the claimant was in scope to transfer to R3 and stated that they would be writing to the claimant to confirm the position. R3 reiterated its view that the claimant remained an employee of R1.

R2's letter to the claimant dated 31 August 2020

97. Dr O'Leary wrote to the claimant on 31 August 2020 on behalf of R2 confirming that as far as they were concerned the claimant remained in the employment of R1. Dr O' Leary further stated that they did not agree that the claimant was assigned to the organised grouping of employees which transferred to them on 5 August 2020 and confirmed that the claimant would not be offered employment with them. Dr O' Leary stated that it was frustrating that R1 had not responded to the evidence which it had supplied. Dr O' Leary further stated that the claimant knew as well as they did that the claimant's role and responsibilities were centred around fertility rather than IVF and suggested that the claimant should admit this in which case R1 might accept the reality of the situation (page 369 of MB).

The fertility contract.

98. There were discussions between R1 and R2 regarding the possibility of R2/3 taking on, in addition to the IVF (NHS) service contract, the delivery of the general fertility services on behalf of R1. R1 and R2 subsequently entered into a short-term agreement dated 1 August 2022 for the provision of fertility services on behalf of R1. A copy of that contract is at pages 1182 – 1294 of MB. The contract was stated to commence on 5 August 2020 and expire on 31 December 2020. The contract states, by way of background that as part of the transfer of the NHS IVF provision from R1 to R2 the fertility elements of the contract would remain with R1. The contract further states that as the Ocean Suite staff were transferring to R2 under the TUPE Regulations and the Ocean Suite was being repurposed, a decision had been made to subcontract the fertility services to R2. The fertility activity to be subcontracted is identified at page 1243 of the MB. The contract further states at page 1244 that although it was acknowledged that staff were transferring from R1 to R2 as part of the NHS IVF contract no staff were expected to transfer as a result of the subcontracting of the fertility agreement. R2/3 notified R1 in August 2020 that they had decided not to continue with the fertility contract beyond December 2020.

The claimant's duties

99. The Tribunal has given careful consideration to the nature of the claimant's duties during the relevant period. The Tribunal has been provided with a substantial amount of documents / statistical evidence regarding the claimant's work activities by R1 and R3 in support of their respective positions. The Tribunal has found the following information to be of particular assistance :-
- 99.1 The claimant's job description (pages 450 – 452 of the MB and paragraph 21 above.

- 99.2 The witness evidence (written and oral) of the claimant and Mrs Male (including Mrs Male's account during her oral evidence of a typical working week for her and the claimant in Ocean Suite).
- 99.3 The audit / statistical information provided by R3 including in particular the audit undertaken by R3 in August 2020 of IVF interactions ( pages 5-8 of AB) during the specified weeks in 2019 together with the information provided by R3 concerning general fertility clinics / patients seen during 2019 at pages 734 – 736 of the MB.
- 99.4 Overall, the Tribunal considers the audit/ statistical information provided by R3 to be more reliable than that provided by R1. This is because (as acknowledged by Matron Williams and others in R1) Dr Acharya and Dr O' Leary have a greater level of understanding of the technical processes involved in IVF and more ready access to the relevant information and records.
- 99.5 The main purpose of the information provided by R3 has been to demonstrate that the claimant was principally a fertility nurse who spent significantly less (less than 50%) of her working time on IVF activities compared with her Band 5 nursing colleagues.
- 99.6 The Tribunal is not however satisfied that the audit/ statistical information provided by R3 provides a complete picture including that it captures all relevant IVF related activities such as with regard to the supervision and support of more junior nursing colleagues. Moreover, the information provided by R3 is largely limited to comparisons between the claimant and her (more junior) Band 5 nursing colleagues and does not generally also include relevant comparative information relating to Mrs Male notwithstanding that the claimant was contractually required to deputise for Mrs Male. Moreover whilst the Tribunal recognises that Mrs Male was a Band 7 nurse with greater technical experience than the claimant of some procedures (such as embryo transfers) it was clear from the oral evidence of Mrs Male, when she described a typical working week in Ocean Suite, that she had a close working relationship with the claimant including that there was significant amount of interchangeability / overlap between their roles such as providing cover for each other on their alternate Monday/ Fridays days off and joint participation in clinics and procedures (IVF and general fertility).
- 99.7 The Tribunal has also had regard to the "January audit" on which R3 also relies in support of its case. For the reasons already explained above, The Tribunal is not however satisfied that the "January audit" is a reliable representation of the claimant's activities.

The nature of the claimant's role



100. By way of context, Mrs Male accepted in evidence, that the claimant was an able deputy and excellent nurse. There was no suggestion that the claimant had failed to perform her contractual duties.
101. It is apparent from the claimant's job description (pages 450 – 454 of the bundle and paragraph 21 above, that the claimant's role divided into two main areas namely:- (a) the claimant's clinical activities (which required her to undertake IVF and general fertility duties) and (b) the claimant's management/ supervisory and associated duties which the Tribunal has addressed separately below.

The claimant's clinical activities

Fertility work

102. The claimant accepts that she undertook/ was involved in 3 fertility clinics per fortnight (Tuesday afternoons and Wednesday and Thursday mornings) together with further associated work. The statistics provided by R3 at page 734 of the MB record that in 2019 298 patients out of a total of 526 fertility patients were seen by the claimant. R3 accepts that all nursing staff were required to undertake general fertility work however, the statistics do not contain details of the number of fertility patients seen by other nursing/ medical staff. The clinics on Tuesday and Thursday were also conducted by Dr Acharya and/or Mrs Male (which is confirmed by the further statistics provided by R3 at page 735 of the MB) whom it is likely would have dealt with the more complex cases. These clinics (as confirmed by Dr Acharya) generated approximately 20% further associated work. HSG procedures were also undertaken on a Tuesday or a Thursday morning by either the claimant or Mrs Male.

IVF activities

103. The Tribunal has noted the stated requirement in the claimant's job description (450 – 451 of the MB) to provide clinical supervision and professional leadership for reproductive / endocrine medicine together with the specific IVF related responsibilities and duties identified such as assisting with patients undergoing embryo transfers and oocyte recoveries, co-ordinating the donor insemination and oocyte programmes and teaching patients with regard to selfmedication/ administration of drug regimes.
104. R3's audit in August 2020 (pages 5- 8 of the AB) records that of a total possible 1548 IVF interactions in 2019, the claimant had 242 interactions (with the Band 5 nurses / HCA each recording between 90 – 407 interactions). The Tribunal is satisfied that such figures should

however properly be considered in the context of the fact that, unlike the Band 5 nurses, the claimant also had supervisory/ management and associated responsibilities. It was confirmed by the claimant / Mrs Male in oral evidence, that the claimant undertook a range of IVF duties including (alternating with Mrs Male on a Monday) assisting / providing support / supervision for the IVF theatre list, following up with IVF patients who attended the daily scan list (for fertility and IVF patients) and conducting the IVF consent clinic on a Wednesday morning (conducted by the claimant or Mrs Male).

105. The claimant was also involved in the preparation of patient protocols (page 637 of MB), undertook patient sedations (page 67 of MB) , intra – uterine inseminations (IUIs) (page 68 of the MB) and was the egg donation co-ordinator. R3 contended that the claimant's work in such areas was small. Having weighed the evidence (including the statistics provided by R3 which are at page 637 of the MB), the Tribunal is satisfied that the claimant had a significant involvement in the preparation of patient protocols (page 637 of MB). The Tribunal accepts however, that IUIs/ egg donation work was a relatively small element of the Ocean Suite's / the claimant's work.

The claimant's managerial/ supervisory and associated work

106. The claimant contends that the managerial / supervisory and associated work formed a significant part of her role. R3 denies this and seeks to rely in particular on the statements from Dr Acharya and nursing staff to refute the claimant's contentions regarding such matters. Having weighed the evidence, the Tribunal however accepts that the above duties did form a significant part of the claimant's role.
107. When reaching this conclusion, the Tribunal has noted in particular the management and associated duties identified in the claimant's job description which included, acting as deputy to the Lead Nurse ( Mrs Male), having responsibility as junior sister for organising and managing nursing staff to ensure that service needs were met , providing professional leadership and liaising with the Head Nurse and clinician in the running of the Ocean Suite and having responsibility for the smooth running of the outpatient clinics and theatre lists. The Tribunal has also had regard to the oral evidence of Mrs Male who acknowledged that the claimant was an able deputy and gave evidence in her description of a typical week in Ocean Suite of the ways in which the claimant deputised for her / undertook supervisory management duties. Mrs Male explained to the Tribunal by way of example, the way in which the claimant covered for her on their alternate Monday/ Friday working arrangements including with regard to the IVF activities referred to above together with responsibility for rotas, annual leave etc ( which would have covered both IVF and general fertility).

The percentage time spent by the claimant on IVF work

108. There has been a substantial dispute between the parties regarding the percentage time which the claimant spent in the Ocean Suite on IVF activities. The claimant's case, which is supported by R1 (after initial changes in position), is that she spent approximately 75% of her time on IVF activities (including related management/ supervisory / administrative tasks). This is disputed by R3 who, in essence, contended that the claimant was primarily a fertility nurse who spent very limited time on IVF related activities as demonstrated by the January and subsequent audits and that, in any event, the claimant spent significantly less than 50% of her time on IVF activities.
109. In so far as it is necessary to determine this matter for the purposes of Issue 2, the Tribunal has done its best to weigh the competing statistical material and associated evidence. When considering this aspect of the matter, the Tribunal has taken into account that it is accepted by the parties that there was a 70% / 30% split between IVF and general fertility services (NHS and private work) in the Ocean Suite and that both types of work were undertaken by the nursing staff as part of their normal duties. The Tribunal has further taken into account that in the detailed audits/ reviews undertaken by R3 the focus for comparison is between the claimant and the Band 5 nurses, who did not have the managerial/ supervisory responsibilities of the claimant, and does not generally include Mrs Male.
110. Having weighed the evidence, the Tribunal is satisfied, on the balance of probabilities, that the claimant spent at least 50% of her time on IVF activities (NHS and private) in Ocean Suite. When reaching this conclusion the Tribunal recognises the outcome of R3's audits and reviews regarding the breakdown of the general fertility and IVF activities undertaken by the claimant including that R3's statistics at page 734 of the MB show that the claimant had the highest number of fertility patient contacts during 2019 (298 out of the 526 ) and that R3's audit, at page 8 of the AB, shows that the claimant only had a total of 242 out of a possible 1548 IVF interactions in 2019.
111. The Tribunal is however satisfied that, as previously explained above, the statistics do not show the full story. It is accepted by R3 that all nursing staff undertook some fertility work in Ocean Suite. Moreover, it was accepted by Mrs Male in evidence that two of the three fertility clinics were also conducted by her / Dr Acharya. Moreover, the statistics at page 735 of the MB confirm that a significant number of fertility patients were also seen by Dr Acharya / Mrs Male and who are likely to have seen the more complex cases.

112. The Tribunal has also taken into account that notwithstanding the claimant's responsibilities for fertility, the claimant undertook a wide range of IVF activities as referred to above and further that R3's audit of August 2020 ( pages 5-8 of the AB) indicates that whilst the claimant was involved in less IVF interactions than her Band 5 colleagues (save for KP who was however also engaged on a training course) she was nevertheless involved in 242 IVF interactions in 2019. The Tribunal has further taken into account Mrs Male's oral evidence regarding the way in which she and the claimant shared duties to cover their 4 day working week ( the claimant and Mrs Male working alternative Mondays and Fridays) including by way of example that if Mrs Male was not working on a Monday the claimant would be responsible for reviewing GP referrals ( IVF and fertility), would be overseeing or leading on the IVF theatre list and dealing with matters arising from scans (IVF and fertility) and could also be dealing with off duties and annual leave (which would affect the delivery of both the IVF and general fertility work). Given that it is accepted that the IVF work (NHS and private) was by far the greater percentage of the work undertaken in the Ocean Suite the Tribunal is satisfied that this would, on the balance of probabilities, also be reflected in the work referred to above.
113. In all the circumstances, and viewing the matter in the round, the Tribunal is satisfied, on the balance of probabilities, that the claimant spent at least 50% of her time in Ocean Suite at the relevant time on IVF activities(NHS and private).

#### CLOSING SUBMISSIONS

114. The Tribunal has had regard to the (detailed) written and oral submissions of the parties together with the authorities referred to therein. The respective principal submissions of the parties are briefly summarised, below as part of the section explaining the reasons for the Tribunal's Conclusions. The various relevant authorities relied upon by the parties are listed on an attached sheet.

#### THE LAW

115. The Tribunal has had regard in particular to the following statutory provisions and authorities: -
- (1) Regulations 2, 3 (1) (b) (ii),(2A) and 3(3) and 4 (1) of the TUPE Regulations.
  - (2) The authorities referred to on the attached sheet.

#### THE CONCLUSIONS OF THE TRIBUNAL

116. The surviving Issues which the Tribunal are required to determine are set out below for ease of reference.

The question of “deliberate organisation” (Issue 1). Whether the Claimant was deliberately organised to carry out activities pursuant to the IVF contract specifically (the position of the Claimant and R1 is that this element of the test is not required).

117. R3 contends that, as a starting point, it is necessary for the Tribunal to determine the above issue before considering the issue of assignment.
118. This is disputed by the claimant and R1 who both contend that as it is agreed by all parties that (a) “there was a relevant transfer being a Service Provision Change of the IVF service contract from R1 to R2/R3 on 5 August 2020” and (b) “there was a deliberately Organised Grouping of Employees which had as its principal purpose the carrying out of the IVF service contract” it is not necessary for the Claimant to satisfy this requirement and therefore that the only issue which the Tribunal is required to determine is Issue 2 namely, whether the claimant was assigned to such Organised Grouping of Employees.
119. The claimant and R1 contend that the claimant was assigned to the above mentioned “Organised Grouping of Employees.” They do not contend that the claimant constituted a separate “organised grouping” in her own right.
120. The Tribunal has therefore considered first below, the anterior question of whether it is necessary for the claimant to satisfy the Tribunal that she was deliberately organised to carry out activities pursuant to the IVF service contract (the CCG NHS IVF contract).

The submissions of the parties on this Issue

The submissions of R3

- 121 In brief summary, R3 made the submissions below.
- 122 It is well established in law, that when considering whether there is an organised grouping of employees whose principal purpose is the carrying out of the activities which transfer for the purposes of Regulation 3 (3) (a) of the TUPE Regulations the organisation must be deliberate. Whilst explicit labelling is not required there must be some deliberate design.
- 123 In the light of the authorities of Eddie Stobart (paragraph 16), Costain (paragraph 34) , Argyll (paragraphs 18-21 Seawell (paragraphs 15-18 and 40- 48 of the EAT judgment and paragraphs 29-31 and 35 of

the judgment of the Court of Session) which were drawn together and approved by the Court of Appeal in Rynda (paragraphs 43 – 44) it is abundantly clear that before the question of assignment arises, the question of “deliberate organisation” must be determined.

- 124 R3’s acceptance that there was an organised grouping that transferred is not sufficient to dispose of the question of “deliberate organisation”. It is necessary for each one of the employees making up the organised grouping to have been deliberately organised in the relevant way. The effect of the claimant’s / R1’s argument is that it is possible in law to have an organised grouping of employees plus another separate employee who is nevertheless assigned to the organised grouping that transferred. This argument was specifically rejected by the EAT in Argyll (paragraph 21) on straightforward principles of statutory construction. The Tribunal is concerned in this case with the “fourth step” identified at paragraph 44 of Rynda namely, with identifying whether “company B organised that employee or those employees into “a grouping” for the principal purpose of carrying out the listed activities”
- 125 The Tribunal therefore has to decide whether the claimant was deliberately organised in the relevant way and if not, that is the end of the matter. The Tribunal does not however have to decide whether any of the other employees who were treated as having transferred pursuant to the TUPE Regulations were also deliberately organised in the relevant way.
- 126 The R3 developed its position further in its oral closing submissions – R3 contended, relying on the authorities referred to below, that it is not legally possible to have an organised grouping of employees which does not include the claimant but to which she is nevertheless assigned. The Tribunal therefore has to be satisfied, before any consideration of assignment arises, that the claimant formed part of/ was deliberately organised to the organised grouping of employees in question.

#### Submissions of R1 / the claimant

- 127 The claimant adopted the written submissions of R1 on this point. In summary, R1 contended as set out below.
- 128 The Tribunal does not need to decide whether the claimant was deliberately organised to carry out activities pursuant to the IVF service contract and it would be a misreading of the legal framework to suggest otherwise. The starting point is the TUPE Regulations. Regulation 3 sets out what constitutes a relevant transfer and defines what constitutes a service provision change. (Regulations 3 (1) (b) and 3 (3)). Where those conditions are met there will have been a relevant

transfer. The effect of the relevant transfer is then determined by Regulation 4 (1) of the TUPE Regulations.

- 129 The question of whether there was an organised grouping of employees (including the question of “deliberate organisation”) arises for the purposes of Regulation 3 (3) (a) of the TUPE Regulations and it is not an issue for further determination when applying regulation 4 (1) of the TUPE Regulations. This is clear from the wording of Regulation 4 (1) of the TUPE Regulations.
- 130 The upshot of R3’s pleaded case and its subsequent agreement of the Issues, is that R3 has conceded that there was a relevant transfer of the NHS IVF contract from R1 to R2/R3 on 5 August 2020 by way of a service provision change pursuant to Regulation 3(1) (b) (ii) of the TUPE Regulations.  
Further a necessary consequence of such admission (as Regulation 3 (3) (a) is part of the definition of a service provision change) is that R3 has also admitted that there was an organised grouping of employees which had as its purpose the carrying out of activities on behalf of its client the CCG.
- 131 It is wrong in law to suggest that the Tribunal needs to decide if the claimant was also deliberately organised for such purposes. The only determination required of the Tribunal is whether the claimant was assigned to the (already admitted) organised grouping of employees.
- 132 Further, insofar as R3 relies on the named authorities in support of the proposition that the “deliberate organisation” issue arises for determination at both the Regulation 3(3) (a) and 4 (1) of the TUPE Regulations stage, such a submission is based on an erroneous reading of such authorities.
- 133 In the light of the caselaw (and in particular Costain) the role of the Tribunal on this issue is limited to the identification of the organised grouping. On R3’s admission the organised grouping were the claimant’s colleagues who worked in the Ocean Suite who transferred. Moreover, on R3’s further admission the principal purpose of that organised grouping was the carrying out of NHS IVF activities on behalf of the CCGs.

#### THE CONCLUSIONS OF THE TRIBUNAL ON ISSUE 1

- 134 Having given careful consideration to all of the above together with the case law referred to below, the Tribunal is satisfied that it is not necessary for the Tribunal to determine whether the claimant was deliberately organised to carry out activities pursuant to the IVF (NHS) contract for the reasons explained below.

- 135 The Tribunal has considered, as a starting point, the construction and language of the TUPE Regulations.
- 136 The Tribunal is satisfied that in cases concerning an alleged transfer of an employee's contract of employment pursuant to a relevant transfer by way of a service provision change ("SPC") involves a 2 stage process namely: -
- 136.1 The determination of whether there has been a relevant transfer of a SPC for the purposes of Regulation 3 (1) (b) which also requires the Tribunal to consider for such purposes whether the associated conditions at Regulation 3 (3) (a) (i) of the TUPE Regulations have also been met.
- 136.2 The determination of the above involves the consideration of the 4 elements identified at paragraph 44 of Rynda (referred to further below) namely when determining whether there has been a SPC within Regulation 3 of the TUPE Regulations the Tribunal is required to :- (1) identify the service which the company was providing to the client (2) list the activities which the staff of the company performed in order to provide the service (3) identify the employee or employees of the company who ordinarily carried out those activities and (4) consider whether the company organised that employee or those employees into a "grouping" for the principal purpose of carrying out the listed activities.
- 136.3 If such criteria are met, the Tribunal is then required to determine at the second stage of the process, in accordance with Regulation 4 (1) of the TUPE Regulations, whether the contract of employment of the person concerned was "assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise have been terminated by the transfer...".
- 137 Therefore, on the face of the TUPE Regulations the consideration of whether there was an organised grouping of employees which had as its principal purpose the carrying out of any relevant activities falls to be determined at the first stage and not at the second stage of the process.
- 138 As far as Regulation 3 (1) (b) of the TUPE Regulations is concerned, R3 has made formal admissions, which it has at no time sought to withdraw, in respect of Regulations 3 (1) (b) and 3(3) a of the TUPE Regulations namely, that (a) "there was a relevant transfer of the IVF service (NHS) contract from the First/ Third Respondents on 5 August 2020" and further (b) "that there was a deliberately Organised



Grouping of Employees which had as its principal purpose the carrying out of the IVF (NHS) service contract”.

- 139 The Tribunal has therefore gone on to consider whether the authorities upon which R3 seeks to rely in anyway change the position.
- 140 Eddie Stobart – In this case (unlike in the present case), no admissions had been made by the alleged transferee on the question of whether there had been a relevant transfer by way of a SPC for the purposes of Regulation 3 (1) (b) of the TUPE Regulations. The questions of: - (a) whether there was an organised grouping of employees with the relevant purpose within the meaning of regulation 3 (3) (a) and (b) the question of assignment for the purposes of Regulation 4 of the TUPE Regulations were both live.
- 141 The EAT confirmed in Eddie Stobart that the issues of whether there was an organised grouping satisfying the requirements of Reg 3 (3) (a) of the TUPE Regulations and of whether, if so, all or any of the claimants were assigned to that grouping were analytically distinct. Further, whilst the EAT recognised that the 2 issues overlapped to a very considerable extent, as it was necessary to identify what the grouping consisted of (paragraph 16 of the Judgment) for the purposes of considering who was assigned to it for the further purposes of Regulation 4 of the TUPE Regulations, there was no suggestion that a claimant who contended that they formed part of a wider organised grouping was also required to establish that he/ she was deliberately organised to the relevant activities prior to the consideration of the issue of assignment.
- 142 Argyll – in this case, the alleged transferee denied that there was a relevant transfer by way of a SPC. In the subsequent appeal against the finding that there was a relevant transfer by way of a SPC, the EAT gave guidance at paragraphs 18 – 21 regarding the relevant elements which the claimants were required to show in order to establish that there had been a SPC together with the subsequent requirement to satisfy the provisions of Regulation 4 (1) relating to assignment.
- 143 The Tribunal has noted the discussion in the Argyll judgment regarding the nature of an organised grouping of employees including that at paragraph 18 of the judgment the EAT stated that an organised grouping of employees “ connotes a number of employees which is less than the whole of the transferor’s entire workforce deliberately organised for the purposes of carrying out the activities required by the particular client contract and who work together as a team” There is also a discussion at paragraph 21 of that judgment as to whether the phrase “organised grouping of employees” had a different meaning in regulation 4 (1) of the TUPE Regulations than for the purposes of

Regulation 3 (3) (a) (i) of the TUPE Regulations – which was rejected by the EAT.

- 144 The Tribunal has been unable to identify anything in Argyll to support R3's contentions that if a claimant is able to establish that there was a relevant transfer by way of a SPC pursuant to Regulation 3 (1) (b) of the TUPE Regulations (including that there was an organised grouping of employees for the purposes of Regulation 3 (3) (a) of the TUPE Regulations) (as is accepted in the current case) that he/ she is also required to establish (in addition to and as a precursor to the question of assignment for the purposes of Regulation 4 (1)) , that he/ she was, on an individual basis, also deliberately organised for the principal purposes of carrying out the relevant activities.
- 145 Seawell - in this case, ( in which the relevant activities were taken back in house) it was denied by the alleged transferee that there was an organised grouping of employees which had as its principal purpose the carrying out of the relevant activities and this matter was therefore in issue. Again, the Tribunal is unable to identify anything in this judgment to support R3's contentions on this matter.
- 146 Costain – in this case it was accepted that there had been a relevant transfer by way of a SPC for the purposes of Regulation 3(1) (b) of the TUPE Regulations. The EAT considered in this case the interplay between Regulation 3 (3) (a) relating to the “the organised grouping of employees” and the question of assignment for the purposes of Regulation 4 of the TUPE Regulations. The EAT found, applying the approach adopted in Eddie Stobart, that following the concession that there had been a SPC pursuant to Regulation 3(1) (b) of the TUPE Regulations, the Tribunal had been required to define the “organised grouping of employees” for the purposes of Regulation 3 (3) (a) (i) for the further purposes of determining whether the claimant had been assigned to that grouping pursuant to Regulation 4 (1) of the TUPE Regulations. There is a discussion at paragraphs 60 – 61 in that Judgment regarding the requirement to provide a definition of the organised grouping. There is however no suggestion in this Judgment that the Tribunal was also required to consider whether the claimant was “deliberately organised” as part of such grouping as a preliminary matter before going on to consider the further question of assignment for the purposes of Regulation 4 of the TUPE Regulations.
- 147 Rynda - this case involved a single employee who was employed to manage a client's properties in the Netherlands. In this case the Court of Appeal was required to determine 2 grounds of appeal namely whether the claimant constituted (in her own right) an “organised grouping” and also whether the claimant was deliberately organised for

the purposes of Regulation 3 (3) (a) (i) of the TUPE Regulations. No concessions had been made by the alleged transferee regarding such matters. The Court of Appeal took the opportunity to review the case law on whether there had been a relevant SPC for the purposes of Regulation 3 of the TUPE Regulations as summarised at paragraph 44 thereof (and above).

- 148 R3 contends at paragraph 18 of its final written submissions, relying on Rynda, that “the tribunal is concerned here with the “fourth step” identified at para. 44 of identifying whether “company B organised that employee or those employees into ‘a grouping’ for the principal purposes of carrying out the listed activities”. The Tribunal understands this to be the principal basis for R3’s contention that this Tribunal is required to consider, as a fourth step, whether the claimant was deliberately organised as identified in Issue 1.
- 149 Having given the matter careful consideration, the Tribunal is however satisfied, that the four steps identified at paragraph 44 of Rynda are for the purposes only of determining whether there has been a relevant SPC “ within regulation 3 of TUPE” (paragraph 44 of Rynda) including whether the attached conditions specified in Regulation 3 (3) (a) of the TUPE Regulations have been met. The Tribunal is also satisfied that the reference to “whether company B organised that employee or those employees into a grouping” ... relates to the fact that Court of Appeal had earlier recognised at paragraph 42 of that judgment that a single employee (as was the situation in Rynda) could constitute an organised grouping for such purposes.
- 150 The Tribunal is further satisfied in the light of the above, that Rynda is not authority for R3’s proposition that in cases (such as in the present case) where it has been formally conceded that there was a relevant transfer by way of a SPC, including for the purposes of Regulation 3 (3) (a) (i) of the TUPE Regulations, that a claimant who contends that she was part of an organised grouping of employees (as opposed to a separate organised grouping of her own), is nevertheless still required to establish that he/ she was also deliberately organised to carry out the relevant activities.
- 151 WCG Services - in this case whilst it was common ground that there had been a relevant transfer by way of a SPC of the relevant cleaning contracts it was contended on appeal to the EAT that the Tribunal had failed to carry out the analysis required for the purposes of Regulations 3 and 4 of the TUPE Regulations to determine whether the claimants’ employment had transferred and in particular, for such purposes, to determine what organised group or groups carried out the activities and whether the claimants were assigned to that organised grouping. In this case the EAT gave guidance regarding the 4 questions which the

Tribunal was required to consider in such circumstances including (paragraph 16):- (a) were activities carried out by a contractor on a client's behalf and what were they? and (b) was there an organised grouping of employees which had as its principal purposes the carrying out of the activities concerned. The case again confirmed the need for a Tribunal to define the relevant organised grouping of employees for the purposes of applying Regulation 4 (1) of the TUPE Regulations and was critical of the Tribunal's failure to identify the nature of the relevant organised grouping/ the relevant activities undertaken.

- 152 The Tribunal cannot however discern from this Judgment any consequential requirement in a situation, like in the present case where the respondent has made the formal admissions referred to above, including that there was a deliberately Organised Grouping of Employees which had as its principal purpose the carrying out of the IVF (NHS) service contract, to also establish that he/she was also personally deliberately organised to carry out the relevant activities.
- 153 In the circumstances, having given careful consideration to all of the above, the Tribunal is satisfied that it is not necessary for the Tribunal to determine whether the claimant was deliberately organised to carry out activities pursuant to the IVF service contract and Issue 1 therefore falls away save to the extent referred to below.

#### The identification of the Organised Grouping of Employees

- 154 The Tribunal is however, in accordance with the guidance contained in the authorities referred to above, required to define what the "organised grouping of employees" consisted of pursuant to Regulation 3(3) (a) (i) of the TUPE Regulations for the purposes of determining the question of assignment under Regulation 4 (1) of the TUPE Regulations.
- 155 R1 contends that the organised grouping were the claimant's colleagues who worked in the Ocean Suite who transferred to R3. The claimant adopts a similar approach. R3 relies on the matters referred to above and has not, in the circumstances, proposed any alternative formulation.
- 156 When considering this question, the Tribunal has reminded itself that it is agreed between the parties/ accepted by R3 that, " there was a deliberately Organised Grouping of Employees which had at its principal purpose the carrying out of the IVF contract".
- 157 Having given this matter careful consideration and applied the various guidance referred to above to the relevant facts, the Tribunal is satisfied that the Organised Grouping of

Employees consisted of: -

“The employees of R1 who immediate before the transfer of the relevant SPC to R3 carried out in R1’s Ocean Suite ( or who would have done so but for any covid related temporary assignments elsewhere in R1), the relevant activities. The relevant activities for such purposes are the carrying out of duties for the safe and effective delivery of the (NHS) IVF service contract on behalf of the CCGs including in respect of the IVF procedures as identified in the IVF Service description at page 52 of AB and associated processes”.

- 158 The Tribunal has, for these purposes, utilised the service description of IVF services contained in the service specification for the contract commencing on 5 August 2020 as the Tribunal has not been provided with a copy of the previous contract and there has been no evidence before the Tribunal to suggest that there were any relevant changes to the service specification.

Issue (2)

Was the Claimant assigned to the Organised Grouping of Employees such that the Claimant’s employment transferred to R2/R3

- 159 The Tribunal has therefore gone on to consider Issue (2) relating to assignment.

The submissions of the parties  
The claimant

- 160 The claimant’s primary submission is that she transferred to R3 because she was assigned to the admitted organised grouping of employees who admittedly transferred.
- 161 In brief summary, the claimant contends as set out below.
- 162 R3 accepts that there was a transfer and that the doctor and all the nursing/ HCA staff transferred to R3 except for the claimant. R3 therefore accepts that there was an organised grouping with the principal purpose of carrying out the IVF (NHS) contract and that all staff except for the claimant were part of it.
- 163 Such acceptance is supported by the evidence as most patients and consultations were for IVF with around 400 assisted conception patients a year compared with around 130 new general fertility patients (pages 734 – 735 of the MB). Further there were around 1650 IVF appointments per annum compared to 526 for general fertility (page 734 of MB). Moreover, on R3’s own case all of the staff apart from the claimant were mainly dedicated to that work so the great balance of the work in the Ocean Suite must have been IVF

work. The organised grouping mainly serviced the IVF work whilst also carrying out some general fertility work.

- 164 Whatever the Tribunal's conclusions on the amount of IVF and non-IVF work undertaken by the claimant she was manifestly deliberately assigned to the organised grouping. The claimant relies on Gormanley in which the EAT invited attention to be made to the claimant's place in the organisational structure.
- 165 In the present case the claimant was the deputy manager of the nurses in the group. They were together "Ocean Suite". The amount of the IVF work undertaken by the claimant is not the issue.
- 166 The claimant is best placed to say what she was doing on a day-to-day basis. Dr O'Leary had never met the claimant and Dr Acharya did not share a working space with the claimant. Mrs Male was better placed to say what the claimant did on a day-to-day basis but gives little relevant information in her witness statement.

#### Fertility work

- 167 The claimant contends that she spent approximately 25% of her time on general fertility work which is supported by R3's documents. The table at page 735- 736 of the MB records the claimant as taking two fertility clinics (mornings only) every fortnight which given that the claimant worked four days a week amounted to 1/8 of her time. Even if you add in Dr Acharya's estimate that the general fertility clinics generated an additional 20% of work the fertility clinic work remained a modest minority of the claimant's working time.
- 168 The tables at pages 734- 736 of the MB do not show that the claimant saw the majority of fertility patients. Pages 735 – 736 of the MB record the number of times that the claimant apparently saw a patient however the records show that she sometimes saw patients in a joint clinic or where the clinic holder was Dr Acharya or Mrs Male.
- 169 The evidence does not show that the claimant was a Lone Ranger who was divorced from and not part of her team who left her on 4 August 2020.

#### Fertility work

- 170 The claimant's evidence as to the proportion of IVF clinical work undertaken by her is supported by R3's audit. The claimant did more clinical work than Mrs Male but less than the Band 5 nurses.

- 171 Mrs Male does not appear on Dr O' Leary's audit at page 118 of the MB and she accepted that she had not compared the two.
- 172 R3's very detailed audit at pages 5-6 of the AB shows the claimant undertaking 152 interactions during the period of the audit - about 30% less than the next nurse up in the hierarchy (RB 225) which is consistent with the claimant's evidence. The audit also shows that the claimant had some contact with the majority of the patients undergoing treatment for IVF the claimant being recorded as having at least one contact with the majority of the patients itemised on the audit which suggests that she was often busy doing IVF clinical work. Further, the claimant says that she sometimes acted as a "second nurse" to provide support to a patient or colleague when her name may not appear in the notes.
- 173 Protocol writing - although this is not caught by Dr O' Leary's audit at page 118, R3's audit at page 637 shows that the claimant undertook the greatest share of protocol writing as against any other clinician audited.
- 174 What the claimant says about her IVF tasks should be accorded substantial weight particularly when the evidence is supported by R3's audits.

#### Management

- 175 The evidence supports the claimant's assertions that she spent the rest of her time on management/supervision/administration. Such work supports the claimant's case on transfer as the work was done for the benefit of the other members of staff in the Ocean Suite / benefitted its functioning. Even if some of this work is referable to general fertility as well as IVF it does not assist R3 as it accepts that the principal purpose of the Ocean suite was the provision of the IVF service.

#### The January audit

- 176 The claimant says that there is good reason to doubt the reliability of this audit including as it was not prepared for the purposes of a TUPE assessment, it was a rough and ready assessment with no guidance been given on what should be included. Further, the claimant recalls that she was engaged on other matters during the period in question. The unreliability of the January audit is clearly demonstrated by a comparison with Dr O' Leary's audit. Further the results which showed the claimant with a 16%/ 79% non-IVF split are at variance with all other documentary evidence.

#### The claimant's job description

177 Whilst the claimant contended in evidence that her job description did not capture the balance of the work which she did and that there were aspects of the job description that were generic for a Band 6 nurse, the claimant nevertheless pointed to the 8th, 9th, 11th and 12 bullet points which were specific to IVF activity. Further the job purpose put the claimant under the auspices of the fertility and Embryology regulator and required her to act as a deputy to the Lead Nurse (Mrs Male).

R1's submissions

178 R1's submissions are set out in summary below.

179 The undisputed background clearly points to the claimant being assigned to the organised grouping including as of the 17 employees who worked in the Ocean Suite all of them transferred to R3 save for the claimant and a member of the administrative staff.

180 The claimant is the best person to know how much time she spent working on the IVF service.

181 R3's assessments are inherently unreliable and fail to look at the bigger picture of what the claimant's IVF related work included. R3 focused on the claimant's clinical IVF work and failed to consider how the non-clinical aspects of the claimant's work were performed on behalf of the Ocean Suite as a whole and which were, in any event, mostly IVF related given the IVF was the dominant service within the Ocean Suite.

182 The January audit was not representative of the claimant's work as not only was the claimant undertaking other responsibilities at that time but, in any event, the two week window was not a reliable representation of her work.

183 Even on R3's analysis at page 734-736 of the MB, the claimant's work was mostly IVF related. The claimant worked for approximately 167 days during 2019 of which there were at least 93 days when the claimant was not doing fertility work and was therefore undertaking IVF related work.

184 Dr O'Leary's investigation and conclusions (MB 114 – 121) were limited in scope and unreliable. On the other hand Matron William's and Mr O' Friel's audit / reviews were an accurate and reliable assessment of the claimants IVF work.

185 Applying the judgment of Duncan Webb Offset, the claimant clearly spent the majority of her time performing the IVF contract which clearly pointed to the claimant being assigned to the organised grouping which



themselves did IVF and fertility work. Moreover, the value of the claimant's work in IVF was high and she was a key and senior component in the operation and running of the IVF service.

The submissions of R3

- 186 R3's submissions on assignment are in summary as set out below.
- 187 According to the EAT in Costain, the percentage time spent by an employee on the transferring activities, "might not be an irrelevant question but it is not the test". The point is illustrated by the case of Mowlem.
- 188 The leading test for assignment is that of Buchanan – Smith.
- 189 Further, whilst exclusivity is not required to satisfy the Botzen test a small degree of involvement in an undertaking or work would not be sufficient for assignment to be established.
- 190 The claimant was not, as a matter of fact, assigned to the organised grouping as was in line with the position in Mowlem
- 191 The January assessment is the best available evidence of the claimant's limited involvement in IVF specific activities during that period. The claimant's activities included only 16% IVF activities. The claimant has provided inconsistent and unsatisfactory explanations relating to Mrs Male's absence / planning work to justify such figures. Mrs Male has however given compelling evidence that whilst some planning work was undertaken in January this was mostly undertaken by other staff and further that the claimant did very little in respect of planning for Mrs Male's scheduled sickness absence. In reality, the January period was entirely representative of the claimant's activities.
- 192 Sedations- In the period between January- February 2020 – the claimant performed only 8.5% of sedations compared with 35.2% by JW.
- 193 IVF theatre work - in the six-week period from September to December 2019 the claimant carried out the lowest volume of IVF theatre work by some considerable distance (page 118 of the MB).
- 194 The audits – Matron William's (R1) audit of 50 patients was fundamentally flawed as 30 of the 50 patients either did not have any IVF treatment or were very old cases. R1 later accepted that this was what had happened.

- 195 In light of the unreliability of Matron William's audit, R3 undertook a second audit showing the number of actual and possible IVF related interactions in 2019. This audit showed that apart from one member of staff, who was undergoing ultrasound training, the claimant's were otherwise the lowest of the nurses by some distance.
- 196 Management and supervision – the claimant has failed to provide any satisfactory evidence of her management and/or supervision in respect of IVF duties. The emails provided by the claimant / relied upon by R1 relate to management tasks for the whole unit which was however engaged in the provision of general fertility as well as IVF services. Further, the claimant has only provided a relatively small no of emails covering a period of around 2 ½ years.
- 197 Protocols - the claimant's assertions regarding the time spent on protocols is contradicted by the evidence of R3. Dr O' Leary gave evidence that all registered nurses performed individual patient protocols which each took a maximum of 15 minutes to complete using a proforma/ template.
- 198 Further as far as the protocol documents for procedures were concerned - the majority were updated some considerable time before the transfer and generally only involved a small amount of work.
- 199 Following the transfer, R1 replaced the claimant with a general fertility nurse who was trained by Mrs Male. The job description for that role essentially consisted of the non – IVF elements of the claimant's former role together with endometriosis.

## THE CONCLUSIONS OF THE TRIBUNAL ON ISSUE 2

### Issue 2

Was the claimant assigned to the Organised Grouping of Employees such that the claimant's employment transferred to R3?

- 200 When reaching its conclusions, the Tribunal has reminded itself in particular of the provisions of Regulation 2 (1), 3 and 4 (1) of the TUPE Regulations together with the associated authorities referred to in the attached sheet.
- 201 The Tribunal has further reminded itself in particular of the following: -

- 201.1 As a starting point, it is agreed by all parties that :- (a) there was a relevant transfer being a SPC of the (NHS) IVF service contract from R1 to R3 on 5 August 2020 and (b) there was a deliberately Organised Grouping of Employees which had as its principal purpose the carrying out of the IVF (NHS) service contract (for the purposes of Regulation 3 (1) (b) and 3 (3) (a) (i) of the TUPE Regulations.
- 201.2 Further, the Tribunal has defined (for the purposes of Regulation 4 (1) of the TUPE Regulations), the Organised Grouping of Employees as identified at paragraph 157 above.
- 201.3 The Tribunal is therefore required to determine whether the claimant was assigned to that Organised Grouping for the purposes of Regulation 4(1) of the TUPE Regulations.
- 202 The Tribunal has had regard to the authorities referred to on the attached sheet which, in brief summary, provide the following guidance :-
- 202.1 Botzen -The starting point is the Judgment of the ECJ in Botzen in which the European Court concluded that “an employment relationship is essentially characterised by the link between the employee and the part of the undertaking or business to which [they are ] assigned to carry out [their ] duties”.
- 202.2 Duncan Webb Offset- the EAT observed in this case that it might be relevant to look at the amount of time an employee spent on the part of the business, the amount of value given to each part by the employee, the terms of the contract showing what the employee could be required to do and how the costs of employing the employee have been allocated between the different parts of the business.
- 202.3 Buchanan – Smith - in this case the EAT stated that “ The test whether a person is employed in an undertaking or part is simply: was he assigned to the undertaking or part? That is a question of fact to be determined by considering all the relevant circumstances”.
- 202.4 Gormanley - in this case it was held by the EAT that the Tribunal had failed to consider the organisational structure of the transferor and the role of the claimants, including their contractual obligations, within it.

- 203 As summarised above, the claimant /R1 contend that the claimant was assigned to the Organised Grouping of Employees and that her contract of employment therefore transferred to R3. In essence, they contend that whilst the claimant did spend more than 50% of her working time on IVF activities this is not, at the end of the day, the key question which relates to the organisational structure of the Organised Grouping of Employees and the claimant's place in it and, on the application of such test, she was assigned to the relevant Organised Grouping of Employees.
- 204 As summarised above, R3 denies that the claimant was assigned to the Organised Grouping of Employees. In essence, it is R3's case that facts demonstrate that the claimant was primarily a fertility practitioner with her own fertility clinics/ associated fertility work having limited involvement in IVF clinical activities and that any management / supervisory duties and responsibilities were limited and generic in nature. R3 further says that this case is on fours with the Court of Session's decision in Mowlem in which it was held that the contract of employment of one of the employees, Mr King, did not transfer despite the fact that the relevant undertaking represented 80% of the operation in which they worked as he was principally concerned with the management of the depot in which they worked.

## THE CONCLUSIONS OF THE TRIBUNAL ON ISSUE 2

- 205 The Tribunal has considered first the claimant's place in the organisational structure of the Organised Grouping of Employees.
- 206 When considering this issue, the Tribunal has had regard in particular to the following matters: -

### The structure of the Organised Grouping of Employees

- 206.1 The definition of the Organised Grouping of Employees at paragraph 157 above. On the face of it, this would include all of the nursing staff (including the claimant) as it is accepted that all the nursing staff undertook IVF and general fertility work albeit that by far the greater percentage of the work undertaken in the Ocean Suite was IVF (NHS and private) work namely 70%. It is further accepted that there was a deliberately Organised Grouping of Employees which had as its principal purpose the carrying out of the NHS IVF Service contract.
- 206.2 On the facts, the department in which the Organised Grouping of Employees worked namely, the Ocean Suite, was a discrete Unit (the South West Centre for

Reproductive Medicine) within R1 based at Derriford Hospital. Ocean Suite provided a consultant led service in reproductive / endocrine medicine with its own local level organisational structure in which the relevant senior clinical professional leadership/ management was provided by Dr Acharya, Consultant in Reproductive Medicine and Mrs Male , Lead Nurse Manager (page 390 of the MB).

- 206.3 At the relevant time, the Ocean Suite comprised of 16/17 staff which included medical, scientific, nursing, administrative / finance staff all of whom were accepted by R3 for transfer, except for the claimant and one member of the administrative staff, as a team.

#### The claimant's place in the organisational structure

207 The Tribunal has therefore gone on to consider the claimant's place in the organisational structure of the Organised Grouping of Employees. The Tribunal has given careful consideration to the competing arguments. In essence, the claimant and R1 both contend that the claimant was an integral part of the organisational structure having regard to the claimant's management and clinical responsibilities and duties. On the other hand R3 contends that the claimant was "not in scope to transfer" as she operated outside the Organised Grouping of Employees as she worked as a "detached" general fertility practitioner providing minimal IVF services and associated management and supervision/ that any management duties were of a generic nature.

208 Having given careful consideration to the competing submissions, the Tribunal is satisfied, on the facts, that the claimant was an integral part of the organisational structure within Ocean Suite both with regard to her direct involvement in the delivery of the IVF(NHS) service contract and in her role as a deputy to the Lead Nurse Manager (Mrs Male) in respect of the delivery of such services by other nursing staff. When reaching such conclusions, the Tribunal has had regard in particular to the matters referred to below.

#### Junior sister/ deputy to Mrs Male

209 The claimant's job description (pages 450 – 452 of MB) (paragraph 21 above) required the claimant to act as a deputy to the Lead Nurse (Mrs Male) with responsibility as junior sister for providing special skills and professional leadership in reproductive and endocrine medicine, for liaising with the Lead Nurse and Clinician (Mrs Male and Dr Acharya) and for the smooth running of the outpatient clinics and theatre lists. The claimant's job description further identified a range of clinical duties which the claimant was required to undertake which included IVF related activities (paragraph 21 above) .

- 210 Further, it is clear from the Tribunal's findings of fact regarding the day to day nature of the claimant's duties (paragraphs 100 – 113 above) that the reality of the situation was that the claimant worked as part of the team in the Ocean Suite. Mrs Male described the claimant in evidence as "an able deputy" and it is clear from the above mentioned findings of fact that the claimant worked closely with Mrs Male including covering for Mrs Male on their alternate days off on Monday/ Friday. Mrs Male described in her oral evidence, by way of example, the way in which the claimant deputised for her on Mondays in relation to the IVF theatre list (NHS and Private) and associated supervision and management as identified at paragraph 104 above.
- 211 It is further clear on the facts, that whilst the claimant undertook general fertility work this was also the case for Dr Acharya and Mrs Male ( who both conducted joint clinics with the claimant) and for the remaining nursing staff. It is also clear that the claimant undertook a range of IVF activities both directly and by way of supervision/ support to nursing staff (paragraphs 104-105 above)
- 212 R3 contends that this case is on all fours with that of Mowlem. The Tribunal is however satisfied that the situations are not comparable. In the Mowlem judgment, the relevant employee, Mr King, had no involvement in the operational aspect of the relevant contract on a day to day basis unlike in the present case where the claimant had both management/ supervisory and direct clinical involvement in the IVF (NHS) Service contract as explained above (also paragraphs 101 – 113 above).
- 213 Having given careful consideration to all of the above, the Tribunal is satisfied on the facts that the claimant was an integral part of the nursing team and associated organisational structure within the Ocean Suite/ the Organised Grouping of Employees notwithstanding that she was not " accepted for transfer" by R3.

Percentage time on the IVF (NHS) service contract

- 214 The Tribunal has gone on to consider the matter in the light of the guidance in Duncan Webb Offset and subsequent cases regarding the other likely relevant factors for determining the question of assignment including the percentage time which the claimant spent on the relevant contract namely the NHS IVF service contract.
- 215 The Tribunal has found, as a finding of fact, that the claimant spent at least 50% of her time on IVF activities (NHS and Private) (paragraphs 110 – 113 above) .

- 216 It was agreed between the parties that there was an approximately 50/50% split between NHS and private IVF work which, on the basis of such figures, means that the claimant spent less than 20% of her time on the relevant NHS IVF service contract. The Tribunal is however satisfied that it is necessary to consider this in the context of the overall value of the work including in respect of both the :- (a) value of the personal contribution made by the claimant to the delivery of the NHS IVF service contract as a respected junior sister providing both hands on clinical skills and professional leadership as an able deputy to Mrs Male and (b) that the parties all agree that the principal purpose of the Organised Grouping of Employees was the carrying out of the IVF (NHS) service contract.
- 217 The Tribunal is also satisfied that the figures should also be considered in the context of the fact that the reduction of the percentage time by reason of the 50/50 split of the NHS/Private IVF work applied equally to the remaining medical/ nursing members of the Organised Grouping of Employees who on such figures would all have spent less than 35% of their working time on the NHS IVF service contract (as they all also had varying responsibilities for general fertility) but were all, nevertheless, considered to be “in scope” for transfer to R3.
- 218 Having weighed all of the above and viewing the matter overall, the Tribunal is satisfied that the claimant has established that she was assigned to the Organised Grouping of Employees and that her contract of employment therefore transferred to R3 on 5 August 2020 pursuant to Regulation 4 (1) of the TUPE Regulations.

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Employment Judge Goraj  
Date: 9 March 2023

Judgment sent to the Parties on 10 March 2023

For the Office of the Tribunals

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