EMPLOYMENT TRIBUNALS

Claimant: Mr D Perks

Respondent: Birmingham City Council

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by CVP)

On: 24 January 2025 and in Chambers on 31 January, 3, 7 and 10 February 2025

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: Mr Roberts, solicitor
For the respondent: Mr Starcevic, barrister

JUDGMENT

The judgment of the Tribunal is that:

The Employment Tribunal determines the following particulars as being those which ought to have been included or referred to in a statement by the respondent to the claimant given under section 1 or 4 of the Employment Rights Act 1996: The Section 14 Wording as set out in paragraph 4a of the Reasons below.

REASONS

1. After a period of early conciliation from 11 Apr 2024 to 23 May 2024, the claimant presented a claim on 23 May 2024 for breach of contract.

2. Just prior to the Hearing, the respondent raised with the claimant that the Tribunal did not have jurisdiction to hear such a claim because the claimant was still in the employment of the respondent when the claim was presented. At the start of the hearing, the claimant made an application to amend his claim to one asking the Tribunal to make a determination regarding the claimant's particulars of employment.

3. It was agreed by the parties that the claimant's application to amend should succeed on the basis that the amendment sought was as follows:

    a. The claimant asked the Tribunal to determine whether or not the particulars of employment provided by the respondent to the claimant ought to have included the wording at section 14 (headed 'Capita corporate health plan') of the Capita Terms and Conditions of Employment provided to the claimant on 4 Jan 2016 under a cover letter of the same date from Capita. We refer to this wording as the Section 14 Wording.

4. The Section 14 Wording was as follows:

    a. 'You are eligible for free single membership of the Company's Medical Insurance Scheme. Details and a Membership Form can be found on The Company intranet site, Capita Connections. You will be liable for income tax on your membership, at the appropriate rate. You may extend cover to your family by the payment of an additional premium. The scheme and provider are reviewed on an annual basis. You must apply to take up membership of this scheme by completing and submitting a Membership Form.'

5. Basically, this claim was about the claimant's complaint that the respondent stopped providing him with private medical insurance in July 2023.

6. The issues were:

    a. Was there a prima facie variation of the claimant's employment contract and, if so, did the variation mean that he was no longer contractually entitled to private medical insurance?

    b. If so, was the variation rendered void by the operation of regulation 4 of the Transfer of Undertakings Regulations (Protection of Employment) Regulations 2006 ('TUPE')?

7. We were provided with a bundle of documents of 133 pages to which further documents were added during the course of the hearing. We heard evidence from the claimant who was cross examined. We heard evidence from Claire Riley, People Service Business Partner for City Operations of the respondent, who was cross examined. Both witnesses had prepared a written witness statement. We allowed supplemental questions to both witnesses.

8. The respondent provided a written skeleton argument. Although it dealt with the breach of contact claim, much of it was still relevant to the amended claim.

9. At the start of the Hearing, after the claimant had stated he wished in principle to amend his claim, the Tribunal referred the parties to the cases of Southern Cross Healthcare Co Ltd v Perkins and ors 2010 EWCA Civ 1442 and Ponticelli UK Ltd v Gallagher 2022 EAT 140. The Tribunal gave the parties time to consider the implications of these cases and for the claimant to frame his amendment application.

10. At the point of submissions, the respondent supplied a copy of the case of North Lanarkshire Council v Mr J Cowan UKEATS/0028/07. It also made oral reference to the case of Delabole Slate Ltd v Berriman [1985] ICR 546 CA.

11. The parties did not refer us to any other authorities.

12. References to page numbers below are to pages of the bundle. Sub headings are intended to assist the navigation of the judgment and are not intended to affect interpretation of the bundle.

Relevant facts

Background to claim

13. The claimant was employed by Capita in an IT role, latterly of 'Unix Senior Service Analyst', from January 2016. Capita provided an IT service to the respondent and the claimant worked for this service. The division providing the services was called IT&D.

14. Effective on 31 Jul 2019, there was a transfer ('Transfer'), which was agreed was under TUPE, from Capita to the respondent of IT&D. The claimant's employment transferred to the respondent on the Transfer. On his transfer, the terms and conditions applying to the claimant's employment with the respondent were the Capita terms and conditions of employment provided by Capita to the claimant on 4 Jan 2016 under cover of a letter of that date. These included the medical insurance entitlement as set out in the Section 14 Wording. After the Transfer, the respondent initially maintained private medical insurance for the claimant and other relevant colleagues who had transferred to it from Capita.

Decision to reorganise IT&D

15. As per Ms Riley's evidence, after the Transfer, it took the respondent two years to understand what roles it had inherited from Capita, and if IT&D was operating effectively. It decided that the business needs for IT&D support were not being effectively met under the existing structure, in particular around the area of digitisation. It would have begun consulting on a reorganisation in 2021, but this was delayed by Covid. It called the subsequent reorganisation 'Shaping the Future'.

16. In its grounds of resistance:

    a. The respondent stated its position as being that (para 22(a)): The reorganisation was *'triggered by a need to modernise the entire service, including addressing inconsistent terms and conditions (a legacy of the TUPE transfer) to make efficiencies and to overcome service delivery problems.'*

    b. It also quoted from and relied on its business case: *'Differing terms and conditions – Following the TUPE transfer in August 2019, approximately 45% of staff within ITD remain on differing term and conditions. This impacts the ability to move through a grade as staff who TUPE*

transferred on spot salaries are not eligible for annual incremental progression. This causes a degree of disruption for manager and has impacted on staff motivation and retention. TUPE laws protect terms and conditions indefinitely. The ability to amend these can only take place where is an economical, technical or organisational reason to do so. The Shaping the Future provides the Council with an opportunity in a fair and balanced way across IT&D to vary contractual arrangements that would bring all staff onto the Birmingham contract, thus providing opportunities for progression.' This was the only part of the Business Case which the respondent chose to quote from in its grounds of resistance.

17. Ms Riley's evidence in her witness statement (para 6) was that the business case for Shaping the Future '*identified drivers for change including the need for a review of terms and conditions that were not conducive for the vast majority of the staff that had TUPE transferred to the Council'.* At para 9 she said *'The shaping the future redesign provided the opportunity in a fair and balanced way across IT&D to bring all staff onto the Birmingham Contract as each role was a new role…A move onto the Birmingham Contract would also end the private health care provision which had been enjoyed by a small group of staff, whilst the vast majority had not been eligible for the same benefit, thus ending what was seen by many as an unfair practice. Importantly it provided greater annual leave entitlement for all those moving onto a BCC contract and reduced their hours from 37.5 hours per week to 36.5 hours.*'

18. She also said orally that the respondent would have gone through the service redesign whether or not the relevant staff included those who had been TUPE transferred. She said there was an 'ETO reason' to look at the terms and conditions as part of the reorganisation, but this was not the driver for it. She explained the 'ETO' reason as follows: economically, there was more funding for a bigger division, technologically, technology moved on and, organisationally, there was a reorganisation of the service. She said that ex Capita staff complained that they were not on the respondent's standard terms and conditions. The reorganisation gave the opportunity to move people to the respondent's terms and conditions.

Process of reorganisation

19. In 2022, the respondent began to consult with the 297 employees in the IT&D department about a reorganisation. Under this, staffing and roles were to be reorganised. There were to be 411 positions in IT&D after the reorganisation. (It actually took about 12 months for the respondent to fill all these positions.) Ten existing roles did not exist with sufficient similarity in the new structure. Employees in such roles could apply for voluntary redundancy and ten employees did so and took voluntary redundancy. The rest of the employees were required to express an interest in positions in the reorganised department with new job titles and new job descriptions.

20. All employees were sent a new job description. The claimant accepted that he got a new job description but said that all employees received the same one.

The respondent's evidence was that five or 10 people may be working to the same job description which seems more likely to us and we accept this.

21. It was the respondent's intention that, after the reorganisation, all employees in IT&D would be employed on the respondent's standard contract of employment and without benefits which did not exist under the respondent's standard contract, including private medical insurance. However, the respondent decided to continue for a year, ending in July 2023, private medical insurance for employees which it had inherited with an entitlement to it.

22. In the hearing, Ms Riley was asked why the former Capita staff could not remain on their old terms after the restructuring. Ms Riley said roles were changed and there was no rationale to keep a few people on old Capita terms/give them private medical insurance.

23. The claimant expressed an interest in a role in the new structure called 'Senior infrastructure engineer - GRS'. In the expression of interest which he completed (p123 - 129) the claimant said 'Yes' to the question, 'Can you see a role for yourself in the new structure?' He then had to choose a first preference for a role and he chose 'Senior Infrastructure Engineer-GRS'. There was then a question as to whether he believed that he undertook most of the activities for the first preference role in his current work. The claimant chose the reply that he did most of the activities of this role. (There was no option to choose that he did all the activities of the role). The claimant did not complete a second or third preference. That was the end of the expression of interest. There was no reference to new terms and conditions. Because the role chosen by the claimant was at least 70% similar to his old role and there were enough vacancies, the claimant was automatically offered that role.

24. At some date after the expressions of interest and before 1 Mar 2023, the respondent wrote a letter to the affected employees confirming the post to which they had been assigned and the date when this would start. There was no evidence that this contained any mode of acceptance and no suggestion that the claimant responded to the letter. There was no suggestion that the letter referred employees to the terms and conditions which would apply to their employment under the new position.

25. The claimant started working in the new role on 1 Mar 2023. The claimant's evidence was that this new role was exactly the same as his old one, which we accept because Ms Riley was unable to contradict this. We do not accept that this meant that all employees carried on working in their old role, but there was not the evidence to assess how many began working in a materially different role.

26. On 6 Feb 2023 and 18 May 2023, the respondent wrote to the claimant with a settlement agreement in relation to the private medical insurance. We were not shown a copy of this agreement. However, there was no dispute that its terms were to end the claimant's entitlement to private medical insurance in return for a payment. Apparently, the claimant did not respond to the 6 Feb 2023 settlement agreement because there was no correspondence on this in the bundle.

27. However, on 24 May 2023, the claimant wrote to the respondent saying that the Shaping the Future process had reduced his wages for doing exactly the same job and that he was not going to sign away his right to private medical insurance by signing the settlement agreement. Ms Riley replied, in an email of 6 Jun 2023, that his concerns would be shared with 'Employment Governance' in a meeting due to be held in early June and she would revert after that.

28. Under cross examination, Ms Riley accepted that the settlement agreement was the mechanism for giving up private medical insurance.

29. On 2 Aug 2023, the claimant was sent a letter by the respondent belatedly confirming his new position with effect from 1 Mar 2023. The letter stated that the employment was on the terms in the letter and in the enclosed contract of employment. The letter gave the salary which was lower than the claimant's previous salary. It gave the hours of work which were one hour per week less than previously. It gave the annual leave entitlement which was more generous than previously. It set out some other terms and conditions. There was no mention of the medical insurance. The letter did not over all information required to be provided in sections 1 to 4 of Employment Rights Act 1996.

Events after 2 Aug 2023

30. The claimant did not sign to accept the position offered in the 2 Aug 2023 letter. The claimant continued to work under the on comprehensive terms in that letter.

31. On 14 Aug 2023, the claimant wrote again to Ms Riley noting that he had heard nothing after her commitment to come back to him after the June meeting, and he was shocked to have received a letter from the medical insurance provider saying his cover had been cancelled. He said he had never agreed to cancel it. He asked for the cover to be renewed.

32. The claimant's evidence, which we accept as it is consistent with his email of 14 August, was that he did not know it had expired until he was asked to make a payment in respect of ongoing treatment which he was having under the policy.

33. Ms Riley replied on 16 Aug 2023. She said that a number of further discussions were held where she also asked the 'Employment Governance Group' to consider alternative options but they did not change their position relating to end of the private health care and her alternative proposals were rejected by the Group. (We did not hear evidence on what these alternative proposals were.) The Group only agreed to continue the insurance for one further year Aug 22 to Jul 23. The respondent' position was that, as employees had moved onto its contract of employment, there was no contractual obligation to pay for private medical insurance. Ms Riley confirmed that the respondent would not be reinstating medical insurance benefit and pointed out that staff benefitted from additional annual leave and a reduction in working hours.

34. The claimant appears to have pushed back on this because, on 7 Sep 2023, the respondent wrote to the claimant again that the settlement agreement he had been sent stated that private medical insurance would end on 31 Jul 2023.

It referred to its 16 August letter and said it would not pay for private medical treatment.

35. The claimant eventually tried to raise a grievance about it in March/April 2024 and was informed by Ms Riley by email of 8 Apr 2024 that there was no right of appeal or grievance.

Question of what information about post reorganisation contract was provided to the claimant

Whether new contract of employment provided

36. Ms Riley conceded that no contract of employment was sent to the claimant with the letter. Her evidence was that nothing was sent to the claimant referring him to the intranet for the contract of employment and there was no reason why the claimant would know the terms of the respondent's contract of employment.

37. Ms Riley also gave evidence contradictory to this that a blank copy of its contract of employment was made available to all relevant employees as part of the Shaping the Future consultation. We were not referred to any document in the bundle which reflected this. The respondent did not cross examine the claimant as to whether he was sent a blank copy of the contract of employment in the consultation.

38. A document (page 118) created during the consultation process, and headed 'Contractual changes – FAQ', included the following:

    a. '*A new contract will be accessible via your personal electronic file on Oracle*' and

    b. '*The following questions should only be shared with staff who have private medical insurance…What happens to my private medical care? We have had agreement to continue to pay for the current 12 months pf private medical care. We will also be providing a one-off payment at the end of their current private health care package, for people to purchase their own health care, based on the current value of your personal scheme.*'

39. The fact that the FAQ gave instructions as to what information should be shared with which employees leads us to conclude that the document was not shared with employees but was used by managers as a guide to information to provide. There was no evidence that the information it contained was actually provided to the claimant.

40. A different FAQ document:

    a. At page 44, has the question, '*When will ex Capita staff move onto BCC terms and conditions?*'

    b. At page 50, under the heading, 'Terms & Conditions', has a statement that '*If Capita staff transfer across to BCC role, they will then be on BCC*

terms and conditions, including pay. The allowances provided under the previous Capita contract would cease.'

indicating that the question of an anticipated move to new terms and conditions was raised during the consultation. However, there is no sign in the document that the terms and conditions were provided to the consultees, and no evidence that they were provided to the claimant.

41. Given the respondent's contradictory evidence, failure to cross examine on this point and failure to provide relevant documentary evidence, we find that the claimant was not sent a blank copy of the respondent's contract of employment during the consultation.

Whether information about loss of medical insurance provided

42. Ms Riley said that the loss of private medical insurance under new roles in the new structure was raised in the consultation phase in presentations, FAQs and manager briefings. When pressed to evidence this in the bundle, the only document in the bundle to which Ms Riley could refer us was the FAQ at page 50 referred to above. The respondent provided no evidence that this statement made it clear that there would be a loss of medical insurance.

43. As above, the 'Contractual changes – FAQ' at p118 was apparently sent to managers and not directly to employees and there was no evidence that the information about medical insurance was actually given to the claimant.

Cross examination of claimant in respect of knowledge/acceptance of new terms

44. The claimant was cross examined on whether he knew, on moving to the new role on 1 Mar 2023, that there would be changes to the pay structure and he accepted that there would be. The claimant responded that he did not accept this. As he did not deny his knowledge of this contract change, we infer he did know about it. He subsequently said that he was not happy with it, but had no choice.

45. It was then put to the claimant that he knew his hours would reduce. The claimant responded that Ms Riley emailed him to say that he was getting an additional two days annual leave and his hours reduced by one hour and he should be happy. The claimant was not pressed to explain further what he was referring to. We assume that the claimant was referring to the email from Ms Riley to the claimant of 16 Aug 23 (p101) which says something similar.

46. The respondent then referred the claimant to the 2 Aug 2023 letter to the claimant (p96) which specified that the working week would be reduced from his previous hours, and suggested to the claimant that he accepted the contract change, which the claimant denied. The respondent put to the claimant that he continued to work under the new terms and the claimant said he carried on as normal and worked the hours required to do the job, which were more than the new contractual hours, so he did not accept the change.

47. It was put to the claimant that he had been taking the additional days annual leave under the new contract terms and the claimant conceded that he had been taking them and his holiday entitlement was changed with his agreement.

48. It was put to the claimant that the respondent offered a package of reduced salary, a reduced working week, and additional holiday entitlement and he worked to that package and accepted it. The claimant denied accepting it.

49. It was put to the claimant that he was cherry picking out the medical insurance cover to preserve it while accepting the other terms. The claimant denied this saying the respondent sent him a settlement agreement to cancel it and he refused to do so.

50. It was not put to the claimant that he was aware from the consultation that the new package of terms would include a loss of medical insurance.

Relevant law

Variation of contract

51. Harvey on Industrial Relations and Employment Law G(1)(a) states: '…*there has historically been relatively little direct case authority on the variation of employment contracts. This may be because this is an area where the contractual approach to employment remains strong, requiring consensus ad idem between the parties as to acceptance of the new working conditions or terms of employment, but where the application of this requirement will be primarily a question of fact.*' G(1)(c) continues: *'…where the proposed change is not to the employee's benefit. Here, the employer must be able to show consent by the employee in some legally acceptable way.'* It continues that consent may be *'…by acquiescence, ie by lack of objection on the part of the workforce, evidenced by continuing to work on the new terms and conditions'.* It says that the employee *'can try to stave off acquiescence by making clear the lack of agreement and working on 'under protest'; …and conceptually the problem is in determining how long it can last, before the danger arises of the employee being deemed to have acquiesced.*'

52. In Jones v Associated Tunnelling Co Ltd [1981] IRLR 477*,* The EAT opined that '*If the variation relates to a matter which has immediate practical application (eg, the rate of pay) and the employee continues to work without objection after effect has been given to the variation (eg, his pay packet has been reduced) then he may well be taken to have impliedly agreed. But where, as in the present case, the variation has no immediate practical effect the position is not the same*.'

53. However, in FW Farnsworth Ltd and anor v Lacy and ors 2013 IRLR 198 ChD, by implied acceptance, L was bound by post termination restrictions in a contract which had been given to him following a promotion, which he had read but had not signed, by virtue of his application for benefits arising under that contract.

54. In North Lanarkshire Council v Cowan UKEATS/0028/07, a council tried to introduce a new working pattern which involved a reduction in working hours,

an increase in hourly rates of pay and an unpaid element of lunch break. The employees did not consent to the change and worked under protest. They later claimed that they accepted the reduced hours and the new rate of pay, but that the council was in breach of contract in failing to pay them at the higher rate of pay during their lunch break. The EAT held that the unpaid element of lunch break was an essential part of the whole package of measures. As the employees had not accepted the whole package, their contracts had not been varied lawfully and their original terms of employment remained in place. They therefore had no contractual entitlement to receive a higher rate of pay.

TUPE

55. Under Regulation 4(2) of TUPE: … on the completion of a relevant transfer— (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee.

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

57. Under Regulation 4(5) of TUPE: Paragraph (4) does not prevent a variation of the contract of employment if—

    (a)the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or

    (b)the terms of that contract permit the employer to make such a variation.

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

59. Harvey G(1)(d) explains '*if there has been a TUPE transfer, any post-transfer change of terms and conditions of the transferred employees by the new employer is void if it is 'transfer-related', even if it was freely entered into, for good consideration and otherwise valid in contract law (Wilson v St Helens BC [1998] IRLR 706, [1998] ICR 1141, HL'.* It continues: *'it has always been the case that a simple desire to rationalise the terms and conditions of the new cohort of workers on to the new employer's standard terms and conditions of employment is not an ETO reason (Delabole Slate Co Ltd v Berriman [1985] IRLR 305, [1985] ICR 546, CA). Such a reason needs a change in the workforce and so the employer can only lawfully make the changes if such workforce change can be shown or if it can be shown on the facts that the change in question is not (or is no longer) 'transfer-related'***.'**

60. As per McMullen: Business Transfers and Employee Rights Chapter 9 B (6): '*in Hazel v Manchester College [2014] EWCA Civ 72, [2014] IRLR 392 that simply because an employer is running a redundancy exercise (which would be for an ETO reason entailing changes in the workforce) alongside a harmonisation exercise, any dismissals of employees refusing to accept the*

new, harmonised contracts do not thereby acquire validity by association. This would equally apply to an attempt to vary those contracts without dismissal.'

61. In Mears Ltd v Salt and others UKEAT/0522/11, the EAT stated, '*merely because the variation takes place against the backdrop of a transfer does not mean that it is the reason for that variation: this is not a "but for" test and context alone is not sufficient. The question to be asked is: what is the reason? What caused the employer to do what it did?*'

Parties arguments

Whether prima facie variation of contract

62. The respondent did not argue that there had been a termination of the claimant's contract and his re-employment under new contract terms. Nor did it argue that the claimant's terms were agreed collectively that that the claimant was subject to collectively terms agreed.

63. The respondent said that the contract between the respondent and the claimant was varied with effect from 1 Mar 2023. The appointment to the role of Senior Infrastructure Engineer, for which the claimant applied in the reorganisation, involved a variation of contract in terms of a significant change in his duties and other contractual changes including pay and reduced hours. The claimant signalled implied acceptance of the new terms by applying for the post on the terms offered and made known and by accepting the post and continuing to work and be paid in accordance with the new terms.

64. The respondent said that the claimant was aware from the consultation process that his contract would change and how, and that he accepted the changes to his pay, hours and holiday. It argued that, by applying for a new position when it had been explained in the consultation that he would be on the respondent's standard contract without private medical insurance, he should be taken as accepting all the standard contract terms in the new post. It said that the claimant could not then say that he objected to one part of those terms, as a matter of contract law.

65. It relied on Cowan as authority that, where an employer seeks to impose a package of interrelated new terms, employees will not be able to cherry pick some terms and reject others. It argued that the claimant could not accept the contract changes of reduced pay, reduced hours and increased holiday without also accepting that he was on a new contract which did not contain a private medical insurance benefit.

66. The claimant argued that he did not sign anything to agree to a variation in his terms and conditions of employment. Further, no evidence had been presented that information about private medical insurance had been shared with the claimant prior to his starting his new role in March 2023. The FAQs relied on by Ms Riley (p118) stated that the answer to the question about the insurance should only be shared with relevant employees, implying that this was advice to line managers about what to say if questions were asked. The appointment letter of August 2023 appeared irrelevant; the respondent did not appear to be

relying on it. Ms Riley's evidence was that the settlement agreement was the mechanism for removing the entitlement to private medical insurance; therefore, it could not have been removed as at March 2023. As the settlement agreement was not signed, it did not in fact remove the benefit. It resisted the suggestion that Cowan meant that terms and conditions must be accepted wholesale, and said the case was fact specific. (Unfortunately, as the case was only provided to the claimant at the start of submissions, the claimant had only had chance to read para 40 of it.)

If so whether void under TUPE

67. The respondent did not argue that the terms of the contracted permitted the employer to make the variation.

68. The respondent said that the Tribunal's decision making process should be should be as follows:

    a. The Tribunal must first decide whether at common law the terms of the employee's contract have been varied and in this case whether the variation includes the removal of the benefit of private health insurance.

    b. The Tribunal must then decide whether the reason or principal reason for the variation was the Transfer. If the reason or principal reason was not the Transfer, the contractual terms, including the absence of health insurance was valid, and the claimant could have no claim for breach of contract.

    c. If the reason or principal reason for the variation was the Transfer, under reg.4(4), the variation was void, subject to reg.4(5).

    d. Even if the reason or principal reason for the variation was the Transfer, the Tribunal must consider whether the sole or principal for the variation was an economic, technical or organisational reason entailing changes in the workforce within reg.4(5).

69. The respondent argued that the sole or principal reason for the variation to contract terms was not the Transfer. It relied on the evidence given by the respondent for the reason for the reorganisation. It also relied on the fact that the variation did not happen for three or four years after the transfer, and that there was a reorganisation. It said that the reason for the variation was to rationalise and provide the best structure for delivery under Shaping the Future. Therefore, the variation was not void under Regulation 4(4).

70. Alternatively, it argued that Regulation 4(5)(a) TUPE applied. It said that the reason for the variation was an ETO entailing changes in the workforce within reg.4(5)(a), which was agreed to by the claimant and the respondent. The changes in the workforce was changes in the tasks and duties of employees and in the claimant's case, a 30% change in his duties and tasks. It said that the essential requirement was a collective change in the workforce and it was irrelevant if the claimant's job did not change. It referred to Delabole Slate as a case where it was held that 'a reason entailing changes in the workforce' meant a change in the overall number or the functions of the personnel employed. It

said it was irrelevant whether or not the ETO reason required the removal of private medical insurance. It was for the respondent to decide its business case on this.

71. The claimant argued that the transfer was the reason for the removal of the benefit, not the restructure. Ms Riley's evidence was that the reason for Shaping the Future was to harmonise terms and conditions. The respondent chose to repeatedly state the harmonisation reason in its response. Ms Riley could not explain why the restructure meant that the claimant had to lose private medical insurance. She could not contradict the claimant's evidence that there was no change to his duties. It argued that the fact others' duties changed should not mean that the claimant had to lose a benefit.

Conclusion

Whether prima facie variation of contract

72. It was not argued that there was an express agreement to vary the terms of the claimant's employment. At no time did the claimant sign any document to say that he agreed to a change in terms. The only document which the claimant completed was the Expression of Interest. There was nothing on this document to indicate that, by expressing an interest, the claimant accepted that he would be employed on different terms and conditions.

73. The question therefore is whether there was an implied agreement by the claimant to lose his private medical insurance.

74. To address the respondent's first argument that the claimant signalled implied acceptance of the new terms by applying for a post in the new structure on terms offered:

    a. The respondent did not cross examine the claimant on this point; it failed to refer the claimant to the application for the post; and it failed to cross examine on what the claimant knew of the terms which would apply when he made his application. In its cross examination, it only referred to what the claimant knew on taking up the new position on 1 March 2023. Therefore, we do not see that the respondent can rely on its first argument.

    b. Even if the respondent could rely on this argument:

        i. We have found that the claimant was not sent or referred to a copy of the new contract of employment at all;

        ii. If the respondent is only referring to the term on medical insurance, there was no conclusive evidence as to what the claimant knew about the respondent's intentions regarding the private medical insurance on applying for the new post (or indeed after that prior to its being removed from him). Given the absence of evidence that the claimant knew he would lose medical insurance on applying for the new post, we do not accept the respondent's argument.

75. To address the respondent's second argument that the claimant signalled implied acceptance of the new terms by accepting the post and continuing to work and be paid in accordance with the new terms:

    a. We have found that the claimant was not sent or referred to the new contract of employment at all, so we do not see how his continuing to work could signal acceptance of any terms which had not yet affected him.

        i. The claimant did not work on without protest after receiving a new contractual document saying he would not receive the insurance. The claimant never received such a document. The letter confirming his appointment to the new post did not say anything about the terms and conditions. Even the 3 August 2023 letter did not say anything about the private medical insurance or enclose all the terms and conditions or refer the claimant to where he could find the terms and conditions.

        ii. The claimant was not cross examined about what he knew about the loss of private medical insurance and when he knew it, so the respondent can hardly rely on the argument that he worked on after knowing about it.

        iii. There was no conclusive evidence as to what the claimant knew about the respondent's intentions regarding the private medical insurance on and after 1 Mar 2025 (until it was removed from him). Given the absence of evidence that the claimant knew he would lose medical insurance on or after 1 Mar 2025, we do not accept that the claimant accepted the loss of it.

        iv. As soon as he found that the medical insurance had been stopped, he immediately objected on 14 Aug 2023. He also seems to have protested again because there was a further letter from the respondent to him on the subject on 7 Sep 2023. In March/April 2024, the claimant tried to raise a grievance about it. There was an ongoing dialogue about his objection which prevented an implied acceptance. As per Jones, arguments for acquiescence must be treated with caution where the effects were not immediate. In the case before us, as we have said, it is not even clear that the claimant new of the change before the effect became known to him.

    b. We also consider it absurd to suggest that, on 1 Mar 2023, there was an implied agreement between the parties that the claimant's medical insurance would end when:

        i. Ms Riley sent the claimant two copies of a settlement agreement to sign under which he would lose the entitlement, and her oral evidence was that the settlement agreement was the mechanism for giving up private medical insurance;

ii. The claimant ignored the February 2023 settlement agreement under which he would get a payment for confirming the loss of medical insurance. If he accepted he was losing medical insurance, in any event, it would have been logical for him to have signed and got the payment, rather than simply losing the insurance without a payment;

iii. The claimant actively refused to accept the loss of medical insurance associated with signing the settlement agreement, in his email of 24 May 2024;

iv. In Ms Riley's email of 6 Jun 2023, she said the claimant's concern about medical insurance would be shared with 'Employment Governance' and she would revert. We consider that this response implied that the question of removal of private medical insurance was something which was still up for consideration.

v. In Ms Riley's email of 16 Aug 2023, she said that a number of further discussions were held where she also asked the 'Employment Governance Group' to consider alternative options relating to the end of the private medical insurance. This also shows that the position on the ending of private medical insurance was not fixed.

76. To address the respondent's argument that the claimant could not cherry pick which terms he accepted and which he did not accept:

a. The claimant conceded that he accepted the change in his pay and holiday entitlement. We consider that the claimant did accept the beneficial change to his nominal working hours. He did not deny knowing about this under cross examination and he worked on without protesting about the change after 1 Mar 2023.

b. We find it difficult to apply Cowan to this case because the claimant did not reject the whole package of new terms and then seek to rely on one term in that new package. We find FW Farnworth more applicable. The claimant applied for holiday under the increased holiday entitlement in the package of new terms. If the rest of the factual scenario were the same as FW Farnworth, we would find that, by doing so, he accepted all of the new package of terms. However, what the claimant reasonably understood the package of new terms to be is far less clear cut than in FW Farmworth where L was provided with the new contract.

c. The problem for the respondent is that we have concluded that the claimant was not provided with a copy of the new contract of employment and that the respondent did not show that the claimant knew of the loss of the medical insurance before August 2023. On the contrary, the evidence points to the question of the medical insurance being one on which the respondent was not itself clear until August 2023. We refer to our paragraph 75b above.

d. Therefore, we do not consider that the principle against cherry picking in FW Farnworth (or in Cowan to the extent that is generally authority for the proposition that employees cannot cherry pick terms) applies to the factual scenario in this case. The losing of medical insurance was not clearly part of the new terms.

77. We find that there was no prima facie variation of the claimant's contract of employment.

78. Ultimately, the respondent was in control of the reorganisation process and of the documents it chose to include in the hearing bundle and the witness evidence which it chose to produce. It failed to control the reorganisation process so as to clearly effect a change in contract terms which it could have done, for example by including acceptance of a package of varied terms in the expression of interest process. If it were true that all employees were, in the consultation process, sent a blank contract and that the claimant was told he would lose his medical insurance, there was nothing to stop the respondent producing conclusive evidence on this. It failed to do this.

79. This is sufficient to decide the claim. Nevertheless, we will also consider the TUPE issue.

If so whether void under TUPE

Whether the sole or principle reason for the variation was the Transfer

80. We do not consider that the principal reason for the reorganisation was the Transfer. We accept Ms Riley's evidence that the respondent's business needs were not being effectively met under the existing IT&D structure and that the reorganisation would have gone ahead even if there had not been a Transfer.

81. However, this is not the relevant question. The relevant question is whether the sole or principal reason for the *variation* was the Transfer. To answer that, the Tribunal should ask: What was the reason for the change? What caused the employer to do it?

82. We are assisted in answering that question by the respondent's business case, quoted in its response. The business case referred to the TUPE transfer in August 2019 and that, following the Transfer, about 45% of staff in IT&D remained on differing terms and conditions. We consider it clear from this that the respondent wished to change the terms and conditions because of the TUPE transfer had left a large percentage of staff on different terms.

83. Added to this is the respondent's reliance in the business case on the reorganisation to allow 'ETO' changes to terms and conditions. If the sole or principal reason for the changes in terms and conditions had not been the Transfer, the respondent would have had no reason to rely on an 'ETO' reason.

84. Further, under cross examination, Ms Riley was unable to explain why the claimant and his colleagues had to lose their medical insurance benefit. She was only able to say that there was no rationale for it being retained. That the respondent could have maintained the benefit is shown by the fact that it did so

from the time of the Transfer to July 2023. There was no evidence that, for example, there was some economic imperative on the respondent, which was unrelated to the Transfer, to cut benefits.

85. We do not consider that the four year passage of time from the Transfer to the change in terms outbalances this. The reason for the delay was so that the respondent could assess the service it had inherited and was due to Covid. The respondent thought that it could vary terms by using what it termed an 'ETO reason' associated with a reorganisation so it would naturally wait for the reorganisation to attempt to vary terms.

86. The respondent's business case stated 'TUPE laws protect terms and conditions indefinitely. The ability to amend these can only take place where is an economical, technical or organisational reason to do so.' It is clear that the respondent considered that the variations it wanted to make were due to the Transfer and that it had to rely on an 'ETO' reason to make them. This is inconsistent with the respondent then trying to argue that the change had nothing to do with the Transfer.

87. Therefore, we consider that the sole or principal reason for the variation was the Transfer.

Was the sole or principal reason for the variation an ETO reason within Regulation 4(5)?

88. Having made that finding, we go on to explore Regulation 4(5) TUPE arguments, this being the legal approach relied on by the respondent.

89. The application of the 'ETO' reason requires the employer and employee to agree the variation. As we have already found that there was no agreement between the parties to the variation to remove private medical insurance, the 'ETO' reason cannot be relied on.

90. If we are wrong on the question of agreement to the variation, and there was in fact an implied agreement to vary, we find as below.

91. We accept that there were changes in the workforce on the reorganisation, in that the number of employees changed and the job descriptions of employees changed (even if the role of the claimant did not change). We accept that these changes were for technical and/or organisation reasons. However, we do not consider this enough to prove the respondent's case.

92. By analogy with Hazel, because an employer is running a reorganisation exercise (which would be for an ETO reason entailing changes in the workforce) alongside a harmonisation exercise, harmonised contracts do not thereby acquire validity by association. Reg 4(5) demands that the sole or principal reason for the *variation* was an economic, technical, or organisational reason entailing changes in the workforce.

93. Also, as per Salt, 'merely because the variation takes place against the backdrop of a transfer *does not mean that it is the reason for that variation: this*

is not a "but for" test and context alone is not sufficient. The question to be asked is: what is the reason? What caused the employer to do what it did?'

94. Ms Riley gave evidence on what the 'ETO' reason was. She said that, economically, there was more funding for a bigger division, technologically, technology had moved on and, organisationally, there was a reorganisation of the service. None of these provide any reason for the variation of terms and conditions to remove the medical insurance. For example, as we have already remarked, there was no evidence that there was some economic imperative on the respondent, which was unrelated to the Transfer, to cut benefits. In fact, the evidence from the respondent was that there was more funding for the division, not less.

95. We consider that the reason for the variation was, as Ms Riley said in evidence, roles were changed and there was no rationale to keep a few people on old Capita terms/give them private medical insurance. Further, private health care provision for a small group of employees had been seen by many as an unfair practice. These reasons are not economic, technical or organisation requiring a change in the workforce.

96. We consider therefore that, had the variation been agreed, it would be void under Reg 4(4) of TUPE.

Employment Judge Kelly

Approved on 10 February 2025

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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V1022 An employee cannot selectively '**cherry**-pick' some terms from a package of inter-related terms which an employer seeks to impose, while rejecting others. In *North Lanarkshire Council v Cowan (2007) EATS 0028*, the employee rejected some terms but sought to benefit from an improvement to break pay which was held to be an integral part of the package which the employers sought to introduce. Because the whole package had not been accepted, the **contracts** had not been varied, so there was no right to higher break pay.