



# EMPLOYMENT TRIBUNALS

**Claimant**

Miss Emma Ibsen

v

**Respondent**

Suffolk County Council

**Heard at:** Bury St Edmunds (in person)

**On:** 27 and 28 November 2025

**Before:** Employment Judge Laidler

**Appearances**

**For the Claimant:** Mr K Ibsen, Husband

**For the Respondent:** Mr M Harris, Counsel

## JUDGMENT Pursuant to a Public Preliminary Hearing

1. The Tribunal has no jurisdiction to consider the Claimant's claim for an alleged breach of the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE") and all claims brought under those provisions are dismissed.
2. In relation to any claim under the Equality Act 2010 for equal pay, the Respondent has established a material factor defence within the provisions of s.69 of the Equality Act 2010 and all claims under the Equality Act 2010 are also dismissed.

## REASONS

**Background**

1. This Preliminary Hearing was listed after the last Case Management hearing which took place on 11 July 2025. At that hearing it had been agreed that a Preliminary Hearing was appropriate to determine whether the Tribunal had jurisdiction to consider the claim under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') and /

or whether it was received out of time and / or whether it had any reasonable prospects of success. That would avoid the parties having to wait until the five-day Full Merits Hearing that had been listed in October 2026.

2. It was also agreed that it would be appropriate to determine whether within the meaning of s.69 of the Equality Act 2010, there were material factors which were not because of sex explaining any difference in treatment, if there was any. This will be on the basis it would be assumed there had been a breach of the sex equality clause which has not been determined and is not a matter for this Hearing.
3. The Judge had directed an agreed List of Facts and one was in the bundle at page 117. When the Claimant's representative spoke, however, it appeared that not everything was in fact agreed as in that document. Copies of emails between the parties attempting to agree the List were forwarded to the Tribunal during the Hearing. This was very unsatisfactory but rather than trying to trawl through those emails, the Judge has assumed that no facts were agreed.
4. The claim was issued on 29 October 2023 following a period of ACAS Early Conciliation between 14 September and 24 October 2023. The Claimant remains employed by the Respondent.
5. There is no dispute that the Claimant transferred to the Respondent pursuant to a TUPE transfer on 1 May 2011. The Claimant chose to remain on her NHS terms and conditions as they were at that time more beneficial for her. She received some pay increases up to 2014, whereas those employed on the Respondent's terms known as the 'Green Book' were subjected to a pay freeze.
6. In the ET 1 Claim Form the Claimant asserted that,

"SCC have refused for me to transfer over to a SCC contract in line with TUPE Guidance / Case Law for such a move / transfer. They have stated I must give up all my TUPE protected T & Cs and this has always been what has been offered by them."
7. The Claimant asserts that in the early part of 2023 she discovered that the Respondent was refusing to pay her in line with the spinal point she had earned during her time with the Respondent and,

"...again in comparison with male comparators on the same grade with the same spinal points."
8. The Claimant had originally stated that this went back to 2019 but has now sought leave to amend to allege it went back to 2014. The application for leave to amend was not determined at this Hearing as that date would not have affected the issues this Tribunal had to determine.

9. At the last Hearing as was noted in the Summary sent to the parties, was the Respondent's Summary of the Claimant's case. It had been set out in its Grounds of Resistance dated 19 June 2025. This was accepted by the Claimant as an accurate summary and read as follows:

"The offer to transfer onto the Respondent's terms of employment in 2011 without retaining any of the superior terms on which the Claimant was employed was a breach of the Transfer of Undertakings (Protection of Employment) Regulations 2006. She should have been entitled under the Regulations to transfer onto the Respondent's terms whilst retaining the more beneficial terms of her previous employment."

10. It is thus the Claimant's case that she should have retained her beneficial NHS terms in respect of pay and pension and then when the pay freeze at the Respondent ended, benefitted from the pay increases then applied to those subject to the Green Book. (See also the ET1 at paragraph 5).

### **The TUPE Claim**

11. It has always been the Respondent's case that the Tribunal has no jurisdiction to determine the complaint insofar as it is put as one under TUPE.
12. It was submitted on behalf of the Respondent at this Hearing that the Claimant wanted to resile from the election she had made in 2011 to remain on NHS terms and then transfer to the Green Book when those pay terms became superior.
13. It was submitted that it is simply not a right that the Claimant has namely to transfer to the Respondent's contract in 2019 in line with TUPE, when she chose not to do that at the time of the transfer. It was argued that there are no such guidelines or case law or provisions in TUPE that entitles a person to transfer at a later date.
14. It was submitted that the Claimant had choices pursuant to Regulation 4 of TUPE, as here the Claimant transferred on her existing terms and remained on her NHS terms. It was argued that there is nothing in TUPE that permits an employee who does not object to the transfer at the time to later change that position.
15. If, however, the employee considers at the time of transfer that the terms are detrimental, they can treat that as termination and a dismissal. That did not happen here.
16. It was further submitted on behalf of the Respondent that it may be that the offer to the Claimant in 2011 to transfer to Green Book terms without saying she would retain her NHS terms, could have been considered a technical breach of TUPE at that time. Perhaps, it was submitted, she should have been offered Green Book terms but to retain her NHS terms that were superior. However, that was not done. There is no provision in

TUPE, it was argued, entitling her to bring a TUPE claim now for a breach, if there was one, for not offering to transfer to the Green Book terms but keep her NHS terms. Her only remedy would have been to resign at the time and claim a constructive unfair dismissal by reason of the transfer. The Claimant did not do that, and it is argued that she therefore waived her right to bring a claim if there was a technical breach in 2011.

17. If the Tribunal were against the Respondent then, it argues, that insofar as time is concerned and time limits, if a breach did occur it could not have occurred any later than the date of the transfer, 1 May 2011 and the claim is therefore potentially 12 years out of time.

### **Arguments for the Claimant**

18. It was argued that the Respondent had 'concealed' the relevant facts at the time of the transfer, though this is not an argument advanced in the ET1. It was suggested that the Respondent had concealed the true facts that the Claimant could transfer on her terms and conditions. The Claimant goes further than that as she is in effect alleging that the Respondent should have told her she could transfer, which she did in compliance with TUPE but that they should have also informed her that she could at any time change her terms and conditions to those that she considered more beneficial.
19. It was submitted on behalf of the Claimant that TUPE protection lasts indefinitely. The Claimant's representative relied on ACAS Guidance on changing a contract of employment after TUPE and argued that there was support in that Guidance that there is an indefinite period of protection.
20. They are trying, it was argued, to coerce employees to give up beneficial NHS terms which is illegal.

### **Material Factor Defence**

21. The material factor defence is being considered on the hypothetical basis that the Claimant had established that the sex equality clause has been breached.
22. The Respondent's submissions were really very similar to those on the TUPE argument. The Respondent's understanding is that there was no issue until 2019 or now 2014, when the Respondent increased spinal points for all grades. The Claimant was not on Green Book terms and even if she had been from 2011, she had agreed payment terms under the NHS contract. That was what she wanted at the time as they were superior to the Green Book terms because of the pay freeze and that was agreed.
23. It was submitted the Claimant has had no right to change to Green Book terms eight years after the transfer but her desire to do that is for reasons wholly unconnected to sex. There is no breach of the sex equality clause.

24. In the Respondent's submissions that was the end of the matter and the equal pay claim should be dismissed as no valid claim has been made.
25. However, the Respondent had been directed to set out its material factor defence in the re-amended Grounds of Resistance which it did at paragraph 11 – 13. It relies on the employee's choice to remain on existing terms and conditions and on that alone the material factor defence, it argues, has been made out and the claim should be dismissed for that reason.
26. If there is any disparity in pay between the Claimant and male comparators, it is because of the different terms and conditions and the comparators being under the Green Book terms. It has nothing to do with sex.
27. The Respondent also relies on the length of service. The Respondent took account of the Claimant's length of service but the Claimant had chosen not to be on Green Book terms.
28. The Respondent also referred to the historic pay freezes as at the time the Claimant chose to remain on her NHS terms, that was nothing to do with sex and was because of the pay freezes.
29. For the Claimant, it was again argued that she made a choice at the time of transfer based on incorrect information. She had not been told there was a pay difference between her and the Respondent's employees. The Claimant would argue the Respondents no longer have the defence as when the Claimant made the choice circumstances have now changed.
30. There were also submissions about the applicability of the sex equality clause and objective justification but the Tribunal was not dealing with those issues at this Hearing.
31. It was submitted that the Claimant had passed all her performance reviews over the 17 years and would be an example of someone who would be higher up the pay band due to length of service.

### **Relevant Law**

32. The Regulations 4 and 7 of TUPE are set out below:

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

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

- (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
- (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) 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.

(5) 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.

(5A) In paragraph (5), the expression “changes in the workforce” includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).

(5B) Paragraph (4) does not apply in respect of a variation of the contract of employment in so far as it varies a term or condition incorporated from a collective agreement, provided that—

- (a) the variation of the contract takes effect on a date more than one year after the date of the transfer; and
- (b) following that variation, the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation.

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

(6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

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

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

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

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

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

## 7. Dismissal of employee because of relevant transfer

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal)

as unfairly dismissed if the sole or principal reason for his dismissal is—

- (a) the transfer itself; or
- (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

- (a) paragraph (1) shall not apply;
- (b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

(5) Paragraph (1) shall not apply in relation to the dismissal of any employee which was required by reason of the application of section 5 of the Aliens Restriction (Amendment) Act 1919([1](#)) to his employment.

(6) Paragraph (1) shall not apply in relation to a dismissal of an employee if the application of section 94 of the 1996 Act to the dismissal of the employee is excluded by or under any provision of the 1996 Act, the 1996 Tribunals Act or the 1992 Act.

33. Section 69 of the Equality Act 2010 dealing with the material factor defence, provides:

#### **69. Defence of Material Factor**

- (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the

responsible person shows that the difference is because of a material factor reliance on which—

- (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
- (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.

(5) "Relevant matter" has the meaning given in section 67.

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

34. Section 69 of the Equality Act 2010 provides that if a woman establishes like work, work of equal value or rated as equivalent to that of an appropriate male comparator, then it is presumed that any difference between her salary and that of her comparator is due to the difference in sex.

35. In the absence of a successful defence on the part of the employer, the woman will reap the benefit of the sex equality clause deemed to be in her contract of employment.

36. The defence in s.69, however, provides that a sex equality clause will have no effect if the employer can show that the difference in pay is due to a material factor, reliance on which does not involve direct or unjustified indirect discrimination.

37. Case law has established that the factor must, as the words of the statute provides, be material and the difference in pay must be due to the factor relied on. It must be significant and relevant and explain the difference in pay.

## **Conclusions**

### ***TUPE Claim***

38. The choice for the employee is at the time of the transfer. To object and leave and not be considered as dismissed, unless there are substantial changes in working conditions to the material detriment of the employee within the meaning of Regulation 4.9, when she could have resigned and claimed constructive unfair dismissal.
39. The Claimant did exactly what TUPE envisaged. She transferred to the Respondent on her existing terms and conditions. If she had not wished to do so her option was to object. She would not have been transferred but she would also not be taken to have been dismissed unless the provisions referred to under Regulation 4.9 were met.
40. There is no claim under TUPE for a Claimant who transfers in accordance with it under her existing terms, to then decide years later that she wishes to be on different terms, to remain employed and to bring a claim.
41. The Employment Tribunal is a creature of statute and there are no statutory provisions for the bringing of such a claim.
42. It was submitted that the Claimant is being coerced to give up her NHS terms. She chose to transfer over on them and that remains the case.

### ***Time Limits***

43. With regard to time limits, as there is no cause of action under TUPE it is difficult to construct when time would run from. Claims envisaged by TUPE are those brought arising out of the transfer, which was in 2011. The claim therefore brought in 2023 was 12 years out of time.
44. The Tribunal does not have jurisdiction to determine the claim the Claimant brings under TUPE and it is therefore dismissed.

### ***Material Factor Defence***

45. The Respondent set out in its re-amended Grounds of Resistance at paragraph 13, the matter relied upon. This fundamental argument, however, is the same as with the TUPE point. It was the Claimant's choice to transfer on her existing terms and that is the reason for any pay disparity, if there is one.
46. The Tribunal accepts that is a material factor within the Equality Act 2010. It is significant and relevant and the reason why any pay disparity has arisen, if it has.

### ***Remaining matters***

47. The other two matters relied upon are really part and parcel of the same argument, that there were historic pay freezes when the Claimant

transferred. They did not affect her but other employees of the Respondent on Green Book terms.

48. The reason therefore for any disparity in pay, if there is one, is nothing to do with sex.
49. The claims under the Equality Act 2010 must fail and are also dismissed.

**Approved by:**

Employment Judge Laidler

Date: 4 December 2025

Sent to the parties on: .  
12 December 2025.

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For the Tribunal Office.

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