

Appeal No. UKEAT/0170/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 2 May 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MEARS HOMECARE LIMITED

APPELLANT

MS C BRADBURN & OTHERS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

TRANSFER OF UNDERTAKINGS – Transfer

This issue in the appeal was whether, following a relevant transfer within the meaning of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (“TUPE”), the transferor continues to be bound by the duty, pursuant to s.9 of the **National Minimum Wage Act 1998** (“NMWA”), to maintain wage records in respect of the transferred employees. The ET had held that the Respondent transferor continued to be bound by that duty and was therefore the appropriate subject of a production notice. The Respondent appealed.

Held: Allowing the Respondent’s appeal, the said duty transferred to the transferee upon transfer pursuant to Reg 4(2) of **TUPE**. Accordingly, the Respondent transferor was no longer required to maintain such wage records and was not required to comply with the production notice. There was no warrant in the legislative scheme for carving out an exception from the wide scope of Reg 4(2) in respect of **NMWA** matters.

A **THE HONOURABLE MR JUSTICE CHOUDHURY**

1. The issue in this appeal is whether following a relevant transfer within the meaning of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (“TUPE”), the transferor continues to be bound by the duty pursuant to Section 9 of the **National Minimum Wage Act 1998** (“NMWA”) to maintain wage records in respect of a transferred employee.

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C **Factual Background**

2. I shall refer to the parties as they were below. The Claimants were employed by the Respondent who is the Appellant in this appeal until 31 October 2016 when the Claimants’ employment transferred to one of two transferees, neither of which remains a party to this appeal.

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E 3. On 1 February 2017, the Claimants’ served 10 production notices under s.10, **NMWA** by which they requested wage information from the Respondent for the preceding 12 months. That period would cover nine months during which the Claimants were employed by the Respondent and three months during which they were employed by the respective transferee.

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4. The Respondent failed to respond to the production notices within the period of 14 days required by s.10(9) of the **NMWA**. The Claimants then brought complaints before the Employment Tribunal (“the Tribunal”) as they were entitled to do under s.11 of **NMWA** for a declaration and award in respect of such failure.

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H 5. At a hearing before the Manchester Tribunal on 8 January 2018 before EJ Franey the Claimant’s claim was allowed. In accordance with s.11(2)(b) of **NMWA**, the Respondent was

A ordered to pay each of the Claimants the sum of £600 pounds which was 80 times the current hourly rate for national minimum wage.

B **Legal Framework**

1998 Act

6. Section 9 of NMWA imposes an obligation on employers to keep records. It provides:

“9 Duty of employers to keep records.

C For the purposes of this Act, the Secretary of State may by regulations make provision requiring employers—

- (a) to keep, in such form and manner as may be prescribed, such records as may be prescribed; and
- (b) to preserve those records for such period as may be prescribed.”

D 7. Section 10 of NMWA, so far as relevant, provides:

“10 Worker’s right of access to records.

(1) A worker may, in accordance with the following provisions of this section,—

- E
- (a) require his employer to produce any relevant records; and
 - (b) inspect and examine those records and copy any part of them.

(2) The rights conferred by subsection (1) above are exercisable only if the worker believes on reasonable grounds that he is or may be being, or has or may have been, remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage.

F (3) The rights conferred by subsection (1) above are exercisable only for the purpose of establishing whether or not the worker is being, or has been, remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage.

(4) The rights conferred by subsection (1) above are exercisable—

- (a) by the worker alone; or
- (b) by the worker accompanied by such other person as the worker may think fit.

G (5) The rights conferred by subsection (1) above are exercisable only if the worker gives notice (a “production notice”) to his employer requesting the production of any relevant records relating to such period as may be described in the notice.

(6) If the worker intends to exercise the right conferred by subsection (4)(b) above, the production notice must contain a statement of that intention.

H (7) Where a production notice is given, the employer shall give the worker reasonable notice of the place and time at which the relevant records will be produced.

(8) The place at which the relevant records are produced must be—

- (a) the worker’s place of work; or

A (b) any other place at which it is reasonable, in all the circumstances, for the worker to attend to inspect the relevant records; or

(c) such other place as may be agreed between the worker and the employer.

(9) The relevant records must be produced—

(a) before the end of the period of fourteen days following the date of receipt of the production notice; or

B (b) at such later time as may be agreed during that period between the worker and the employer.

(10) In this section—

“records” means records which the worker’s employer is required to keep and, at the time of receipt of the production notice, preserve in accordance with section 9 above;

C “relevant records” means such parts of, or such extracts from, any records as are relevant to establishing whether or not the worker has, for any pay reference period to which the records relate, been remunerated by the employer at a rate which is at least equal to the national minimum wage.”

D 8. Section 11 of **NMWA** entitles the employee to present their complaint to the Tribunal where an employer has failed to allow access to records. Where a complaint under that section is well-founded the Tribunal must make a declaration to that effect and make an award that the employer pay to the worker a sum equal to 80 times the hourly amount of the national
E minimum wage as in force when award is made. It will be noted that there is no discretion in relation to the making of an award if the complaint is well-founded; it is mandatory.

F 9. Section 14 of **NMWA** confers powers on officers (in practice, officers of HMRC) to take enforcement action in respect of the employer’s obligations. The relevant person for these purposes, that is the employer, may be required to produce any records which are required to be
G kept and preserved pursuant to regulations made under s.9 and may inspect and examine those records and copy them. There are enforcement powers, including the power to require employers to provide information and to enter premises in order to exercise the HMRC’s
H powers.

A 10. Section 17 entitles a worker to additional remuneration where he is paid at a rate less than the national minimum wage. It provides, so far as relevant, as follows:

“Non-compliance: worker entitled to additional remuneration.

B (1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall [at any time (“the time of determination”)] be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, [whichever is the higher of –

(a) the amount described in subsection (2) below and.

...

C (2) [The amount referred to in subsection (1)(a) above is the difference between—

(a) the relevant remuneration received by the worker for the pay reference period; and

(b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.”

D 11. The effect of this provision is that the worker’s contract of employment is statutorily amended so as to entitle payment of at least the national minimum wage. It is not in dispute that this entitlement could be enforced by means of a claim for unlawful deduction from wages under the **Employment Rights Act 1996**.

E 12. By Section 19, **NMWA**, HMRC is empowered to serve a notice of underpayment for arrears. Section 19(7) provides that a notice of underpayment may not relate to a pay reference period ending more than six years before the date of service of the notice. As will be seen in due course, the period potentially covered by a notice of underpayment could exceed a period for which records must be kept.

F 13. By Section 31 of **NMWA**, it is an offence for an employer of a worker who qualifies for the national minimum wage to refuse or wilfully neglect to remunerate a worker for any pay reference period at a rate which is not at least equal to the national minimum wage. A person

A guilty of an offence under that section is liable upon conviction on indictment to a fine or on summary conviction to a fine not exceeding the statutory maximum.

B 14. Section 54 of **NMWA**, which is probably the critical provision for present purposes, contains some definitions. It provides:

“54 Meaning of “worker”, “employee” etc.

(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

C (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “agency worker” and “home worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment; or

D (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker’s contract shall be construed accordingly.

E (4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act “employment”—

(a) in relation to an employee, means employment under a contract of employment; and

(b) in relation to a worker, means employment under his contract; and “employed” shall be construed accordingly.”

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15. It is clear from the provisions of s.54(4) that the provisions of the **NMWA** can apply in respect of the current employer or a past employer “where the employment has ceased.” The **NMWA** does not expressly address a situation where there has been a relevant transfer within the meaning of **TUPE**.

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H 16. Turning then to the **National Minimum Wage Regulations 2015** (“the 2015 Regulations”) made under **NMWA**, we see that Reg 59 so far as relevant provides:

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“59 Records to be kept by an employer

(1) The employer of a worker who qualifies for the national minimum wage must keep in respect of that worker records sufficient to establish that the employer is remunerating the worker at a rate at least equal to the national minimum wage.

...

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(8) The records required to be kept by this regulation must be kept by the employer for a period of three years beginning with the day upon which the pay reference period immediately following that to which they relate ends.

17. It is relevant next to consider the provisions of **TUPE**. Regulation 4 of **TUPE**, so far as relevant provides:

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“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.

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(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

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(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.

...

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(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.”

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18. These provisions implement the requirements of Directive 2001/23/EC, the Acquired Rights Directive (“ARD”). For present purposes it is sufficient to refer to just three articles in ARD. Article 2.1 provides:

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“1 For the purposes of this Directive:

(a) "transferor" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;

A (b) "transferee" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business...

...

(d) "employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law."

B 19. Article 3.1 provides:

"1 The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer."

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20. I was also taken to Article 8. This provides that:

"This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees."

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21. In Berg v Besselsen [1990] ICR 396, the ECJ held that under Article 3.1 of the ARD:

"...the transfer of an undertaking entails the automatic transfer from the transferor to the transferee of the employer's obligations arising from the contract of employment or an employment relationship, subject however to the right of Member States to provide for joint liability of the transferor and transferee following the transfer. It follows that unless the Member States avail themselves of this possibility the transferor is released from his obligations as an employer solely by reason of the transfer and that this legal consequence is not conditional on the consent of the employee's concerns."

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I should mention that the quote there was referring to a previous Directive 77/187/EEC.

22. The UK has not sought to impose joint or several liabilities in respect of any obligations arising before the date of the transfer. Accordingly, a relevant transfer, as provided for in Regulation 4(2) in **TUPE**, has the effect of transferring all of the transferor's rights, duties and obligations under or in connection with the contract of employment to the transferee.

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23. What is transferred has been considered in a number of cases. I was referred to the decision of the Scottish Court of Session in Allan & Ors v Stirling District Council [1995]

A ICR 1082, where the question was whether liability for unfair dismissal transferred to the transferee. Lord Morrison, giving the Judgment of the court, having referred to what was then Regulation 5(2) of the predecessor regulations held as follows at p.1086:

B “The word ‘transferred’ necessarily denotes that all the transferor’s liabilities, whether accrued or continuing, pass to the transferee and the transferor is no longer subject to any of them. We agree with what was said by Morrison J in *Ibex Trading Company Limited v Walton* [1994] ICR 907 916C that ‘use of the word transfer in its natural and ordinary meaning suggests [a] taking away from one and handing over to another.’ Indeed, we would go [further] and hold that the word cannot bear any other meaning in any other circumstances....”

C Allan was cited with approval by the Court of Appeal in Bernadone v Pall Mall Services Group Limited & Others [2001] ICR 197 at [28].

D The Tribunal’s Decision

E 24. In an admirably clear and well-structured decision, the Tribunal approached the matter on the basis that the key question of statutory interpretation was whether the Respondent was an employer in respect of whom employment had ceased within the meaning of s.54(4) of NMWA. The Respondent had argued that the effect of Regulation 4 of TUPE was that the relevant transfer did not operate to terminate the contract of employment and that it was therefore incorrect to suggest that employment had ceased for the purposes of s.54(4).

F 25. The Tribunal rejected that argument. It is perhaps helpful to set out its reasons for doing so in full:

G “43. Despite the persuasive way in which Mr Feeny presented his case I preferred Mr Brittenden’s argument. Whilst regulation 4 of TUPE introduces a legal fiction that the contract has always been with the transferee, that is not a legal fiction applicable for all purposes. It is for the purpose of ensuring that the contract of employment has effect after the transfer as if it had originally been made with the transferee. Regulation 4(2) takes effect at the moment of transfer, and regulation 4(2)(b) is expressly concerned with any act or omission before the transfer is completed.

H 44. Importantly, I rejected Mr Feeny’s argument that the UK had not adopted the model envisaged by Article 2(1) of the ARD by choosing to link the definition of the employment relationship to a contract of employment. It seemed to me that Article 2(2) gave member states a measure of discretion in relation to the characterisation of those relationships to which the domestic provisions would apply. That did not undermine the general principle in Article 2(1) that where the domestic provisions

A applied, the effect of a transfer would be that the transferor ceased to be the employer and the transferee became the employer.

B 45. Accordingly in my judgment the fourth respondent was the "employer" of these claimants within the meaning of section 54(4) NMW because they had been employed by R4, and that employment had ceased. There was no longer a contract of employment between R4 and the individual claimants. Although for the purposes of their relationship with the transferee it was deemed that their contract of employment had always been with the transferee, that did not change the underlying reality that on 31 October 2016 R4 employed the claimants and on 1 November 2016 it had ceased to do so.

C 46. Further, I accepted Mr Brittenden's argument that the duty to keep records in section 9 and the NMW Regs was inextricably bound up with the right of access in section 10 of the NMW and the mandatory award for a breach of that provision found in section 11. There was nothing in the NMW or the NMW Regs to suggest that the obligation to retain records came to an end when the worker transferred to a different employer under TUPE. The length of time for which records had to be kept was not defined by reference to the length of the employment relationship, but rather by reference to calendar years and the pay reference period in question (regulation 59(8)). That same period was in effect the time limit for serving a production notice by virtue of section 10(10) NMW. That being so, the right to serve a production notice after a transfer would be an empty right if the notice had to be served on the transferee who did not have the records or any obligation to keep them."

D 26. Having so concluded, the Tribunal went on to consider three matters which it said fortified its conclusions. Once again it is helpful to set these matters out in full:

E "48. The first consideration was that such a conclusion appeared to be in line with the enforcement provisions involving HMRC. An employer whose employees transfer out under TUPE remains liable to preserve its National Minimum Wage records for the period prescribed by the NMW Regs, and remains liable to criminal prosecution if it has failed to do so: section 31(2) NMW. It is in the best position to defend any such criminal proceedings by producing the records as evidence that it kept and preserved them at the relevant time. If any obligation to preserve those records vanishes at the moment of transfer of the employee to another employer, the transferor runs the risk of not being able to show retrospectively that the records were kept at all. No such difficulty arises if the obligation to preserve those records survives the termination of employment by TUPE transfer.

F Policy

49. The second consideration was that there would seem to be sound policy reasons why the obligation to produce records rests with the person obliged to make and retain those records during the pay reference periods in question.

G Anomalies

H 50. The third consideration was the anomalies which would result if the respondent's contention were correct. A transferee could become liable for a mandatory award when there was nothing it could do about it. There was nothing requiring a transferor to provide its National Minimum Wage records to a transferee upon transfer. Mr Feeny acknowledged that regulation 11 did not provide complete protection in that respect, but suggested that it provided some protection because of the obligation to notify the transferee if the transferor had reasonable grounds to believe that an employee might bring such a claim against the transferee. That seemed to me to fall a long way short of being sufficient. Although a transferee faced with an unlawful deduction from wages complaint could utilise Employment Tribunal or County Court procedures to secure disclosure of the relevant documentation by the transferor, that would not be a possibility open to a transferee where simply faced with a production notice and an employee refusing to extend the 14 days for a response.

A 51. Further, those difficulties would be even more acute in a service provision change as opposed to a business transfer, where there might not be any relationship at all between transferor and transferee, or in a situation (such as this) where it was disputed whether TUPE applied at all.

52. Finally, one would have expected there to have been provision in TUPE for liability arising out of a failure to produce records to be shared between transferor and transferee if the transferee was going to become liable in any way for such a failure.

B 53. In contrast the anomalies resulting from the interpretation for which the claimants contended appeared minor. The "windfall" argument relied upon by Mr Feeny was not a significant factor. It was open to employees of the same employer to serve a series of production notices during a year resulting in a mandatory award each time the relevant information was not supplied within 14 days. The fact these claimants faced the prospect of two awards from two different employers for the same 12 month period was not therefore material.

C 54. Perhaps more significant was the fact that any claim for arrears of pay based on what the records show will be pursued against a transferee if the claimant has transferred under TUPE after the pay reference periods in question, yet on the claimants' case the records will lie with the transferor. However, the law offers a clear solution to this anomaly: a transferee facing such a claim (in which it bears the burden of proof) can seek an order compelling the transferor to produce the records if unable to obtain them through other means. Again that seemed to me to be a minor matter."

D Accordingly, the Claimant's claim was allowed and the award mentioned at the beginning of this Judgment was made.

E Grounds of Appeal

27. The Notice of Appeal raised eight grounds, 'A' through to 'H'. Mr Jupp of Counsel who appears for the Respondent, but who did not appear below, has rationalised those grounds down to two main grounds. I shall refer to these as Grounds 1 and 2. These are as follows.

F (i) Ground 1: The Tribunal erred in treating the employment as having ceased for the purposes of s.54(1) and 54(4) NMWA. Where there has been a relevant transfer the effect of Regulation 4(1) of TUPE is that the employment does not cease.

G (ii) Ground 2: The Tribunal erred in failing to consider whether the obligation to keep and preserve minimum wage records is itself an obligation that transfers where there is a relevant transfer. The further obligation to produce records, which is parasitic on the obligation to maintain records, must therefore necessarily also transfer.
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A Submissions

28. The parties' respective submissions this morning may be summarised as follows without, I hope, doing a disservice to Counsel. Mr Jupp submits that it is significant that s.54(4) of **NMWA** defines an employer as the person by whom the employee or worker is employed or where the employment has ceased was employed. The very essence of **TUPE** is, he says, that absent any objection, employment does not cease upon a relevant transfer; it continues.

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29. Regulation 4 of **TUPE** makes it clear that not only shall the relevant transfer not operate so as to terminate the contract of employment, but also that the contract shall have effect after the transfer as if originally made between the person so employed and the transferee. In other words, the transferee steps into the shoes of the transferor and is treated as if it had been the employer all along.

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30. Mr Jupp made reference to the case of **Carisway Cleaning Consultants Limited v Richards & Cooper Cleaning Services** [1998] UKEAT/629/97, where HHJ Hull QC, having referred to predecessor provisions, said as follows:

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“As has been pointed out in a number of authorities that amounts to a statutory novation of the contract. It is as if, for legal purposes, the old employer and the new employer had got together with the employee and said: "do you agree to your contract being transferred with all its terms, advantages and liabilities to the new employer?" and the employee had said to both them: "yes, I do agree." That would be a novation of the contract, as it would be called legally. Article 5 has that effect where there is a relevant transfer.”

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31. It is also clear, submits Mr Jupp, that in order for the employment to have ceased within the meaning of s.54(4) of **NMWA**, the contract of employment must have terminated. That is clear, he says, from the provisions of s.54(5), which define employment by reference to the contract under which the employee or worker is engaged. If the contract has not terminated then the employment cannot have ceased. Article 2(1) of **ARD**, which refers to the transferor

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A ceasing to be his employer, does not assist the Claimants, he says because that occurs by reason of the transfer without there being any cessation of the contract.

B 32. Mr Brittenden, who appears for the Claimants (as he did below), submits that s.54 of **NMWA** is a straightforward provision; the meaning of which is clear and should not be misapplied having regard to Regulation 4 of **TUPE**. In particular, he says that Reg 4 of **TUPE** does not have the effect of extinguishing the identity of the previous employer or the fact that **C** employment with the transferor has come to an end. It simply makes provision as to the consequences of the relevant transfer. Fundamentally, submits Mr Brittenden, employment by the transferor had necessarily ceased as at the date of transfer. On that basis, s.54(4) did apply, **D** and, accordingly, the Respondent continues to be responsible for the preservation and maintenance of minimum wage records and for any liabilities that may arise as a result of failing to produce those records when requested to do so.

E 33. Article 2(1) of ARD envisages that the transferor ceases to be the employer upon a relevant transfer taking place. The effect of s.54, which Mr Brittenden notes is contained in primary legislation, should not be overridden by an interpretation of secondary legislative **F** provisions which put a gloss on the plain and natural meaning of s.54.

G 34. Furthermore, submits Mr Brittenden, the definition of employer in s.54 must possess a consistent meaning throughout **NMWA**. However, if the Respondent's contention is correct then it would not be the employer for the purposes of s.54 or for the purposes of ss.10, 14 and **H** 31. This would result in a situation whereby an employer who sought deliberately and wilfully to flout the requirements of **NMWA** in respect of the keeping of records could evade prosecution or penalty simply by reason of the fact there has been transfer.

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35. Moreover, it is said that there were other adverse consequences of the Respondent's interpretation. These include the fact that an employer underpaying staff would not be required to retain any records following the relevant transfer, such obligation having transferred to the transferee, and enforcement officers would not have any means of scrutinising records for the purposes of proving known non-compliance. An employer could, he says, also manipulate the situation to engineer a transfer situation in order to avoid investigation by HMRC. In short, he says, the Respondent's interpretation would have the effect of substantially reducing the reach of ss.14 and 31 of **NMWA** and that cannot have been the intention of Parliament.

36. Those submissions deal, in broad terms, with ground 1. As to ground 2, Mr Jupp submits that it is well-established that all rights and liabilities that exist at the point of transfer pass from the transferor to the transferee. The primary obligation in relation to minimum wage records is that set out in s.9 of **NMWA**. That obligation is one that is connected with the employee's contract of employment and falls to be transferred along with other obligations and liabilities.

37. Other obligations, such as the obligation to produce records when requested to do so, are dependent upon the primary obligation to maintain such records. Once it is clear that the obligation under s.9 of **NMWA** transfers to the transferee then it must follow that any production notice served in relation to those records can only be intended to be served on the party to whom the obligation to preserve records has passed. Mr Jupp submits that it would be nonsensical to require a party who was no longer under a civil duty to preserve records to answer a production notice that related to them.

A 38. The fact that criminal liability does not transfer by reason of Reg 4(6) of **TUPE** should not, says Mr Jupp, be reason to undermine or carve out an exception under Reg 4(2). There will be many instances where criminal liability does not pass, notwithstanding the fact that civil liability does.

B 39. Mr Brittenden submits that the effect of the Respondent's contention is that the obligation to retain records for three years under s.9 and the criminal liability imposed under s.31 are both displaced upon the mere or fortuitous incidence of a **TUPE** transfer. He submits
C that there is nothing in the legislative framework to support the submission that in respect of an employee whose employment has transferred, the employer does not need to comply with the obligation to retain records and/or was otherwise exempt from enforcement provisions or
D prosecution under s.31. Mr Brittenden also submits that the various anomalies, which the Tribunal identified as resulting from the Respondent's interpretation of the legislative provisions, provide further support for the interpretation fixed upon by the Tribunal.

E **Discussion**

40. Section 54(4) of **NMWA** defines an employer for the purposes of that Act as the person "by whom the employee or worker is (or where the employment has ceased was) employed."
F The question, therefore, is whether the effect of the relevant transfer is that the employment ceased. In my judgment, Mr Jupp's submission that the employment has not ceased is to be preferred.

G 41. Regulation 4(1) of **TUPE** provides that a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor. In the absence
H of any other mechanism operating to terminate the employment, such as the giving of notice, it is clear, in my judgment, that the contract of employment does not terminate when a relevant

A transfer takes place. Instead, it continues as if it had originally been made between the person so employed and the transferee. On that basis, it does not appear to me that it can be said that employment has ceased for the purposes of s.54(4) of **NMWA**.

B 42. Mr Brittenden’s reliance upon the fact that the transferor is no longer the employer does not assist. The transferor may have ceased to be the employer, but the underlying employment relationship, which in this case is governed by a contract of employment, continues as if it had
C been with the transferee all along. It is significant, in my judgment, that s.54(5) defines employment as being employment ‘under a contract of employment’. That means that the reference to employment having ceased under s.54(4) must mean that the employment under a
D contract of employment has ceased. However, the clear effect of Reg 4(2) is that it has not. Mr Brittenden submitted that there is significance in the fact that s.54(4) refers to cessation of employment rather than termination. However, it seems to me that the plain and ordinary
E meaning of “cessation of employment”, in the context of this provision, is that there is a termination of the contract. It is difficult to see how a contract could cease without also having terminated. If the intention had been for s.54(4) to apply so as to maintain an employer’s liability in circumstances where there is merely a change of employer without a cessation of
F employment then the definition would have been differently worded. It would have provided that “the employer is the person by whom the employee or worker is (or where the employment by that employer has ceased was) employed.” Had that been the definition it might have been
G arguable that, notwithstanding the change of employer introduced by the relevant transfer, the transferor continued to be the employer for the purposes of **NMWA**. However, that is not what s.54(4) provides. The words “by that employer” are not contained within it.

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A 43. The Tribunal’s reliance upon Article 2(1) of ARD does not assist the Claimants. Whilst
the transferor does indeed cease to be the employer, that has no impact on the contract of
B employment which continues as if it had been with the transferee. That analysis does not
involve, as Mr Brittenden submitted, rewriting or otherwise adding a gloss to the plain and
natural meaning of s.54. The plain and natural meaning of s.54 of **NMWA** is that there needs to
be a cessation of employment in order to be in a position to treat a transferor as continuing to be
an employer subject to all the obligations and liabilities which that entails under the **NMWA**.
C Where there is no cessation of employment, the part of the definition which seeks to bring a
past employer within its scope simply does not apply.

D 44. The Claimants in this case did not cease to be employed at any stage. All that happened
was that as a result of Reg 4(2) of **TUPE**, and the resultant statutory novation of the contract, a
new employer seamlessly stepped into the shoes of the old. As such, the only part of the
definition which applied was that relating to the current employer as at the date that the
E production notices were served. That employer was the transferee.

F 45. In my judgment, the Tribunal erred in concluding at paragraph 45 of the Reasons that
the Respondent was the employer of the Claimants within the meaning of s.54(4) of **NMWA**
because employment by the Respondent had ceased. The Tribunal incorrectly focused on the
identity of the employer rather than the key question, which is whether the employment under a
G contract of employment had ceased. For the reasons already set out in my judgment, it had not.

H 46. As to Ground 2, as a matter of statutory construction, the position, it seems to me, is
quite clear: the obligation to maintain records under the **NMWA** transfers to the transferee.
Regulation 4(2) of **TUPE** provides that the effect of a relevant transfer is that “all of the

A 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 “any act or omission before the transfer is completed shall be deemed to have been an act or omission of the transferee.”

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47. There are limited exceptions to the broad scope of this regulation, none of which relate to the obligations arising under the **NMWA**. As a matter of statutory construction, therefore, there is nothing in **TUPE** that has the effect of excluding the obligation to preserve and maintain records from the collection of rights and obligations that will transfer to the transferee.

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48. Whilst it may appear at first blush to be more convenient for the transferor to maintain such records given that it has collated them, mere inconvenience is not a reason for the obligation to maintain not to transfer. The requirement to keep records is not unique to **NMWA**. I was referred to the **Working Time Regulations 1998**, Reg 9 of which imposes on the employer a duty to keep records which are adequate to show whether limits of working time have been complied with and which must be retained for a period of two years from the date on which they were made. I also note that under the provisions of Reg 11 of **TUPE**, the transferor is required to provide information as to the identity and age of transferring employees, their particulars of employment, information as to any disciplinary or grievance procedure relating to the employee and information as to any claim or action by the employee against the transferor in the previous three years, or to any such claim or action that the transferor has reasonable grounds to believe that the employee may bring against the transferee.

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49. It is difficult to see why the provision to keep minimum wage records in respect of a pay reference period imposes any significantly greater burden on the transferor than that involving

A the provision of employee liability information. However, even if in some circumstances it did impose a greater burden, that in itself is not a reason for treating the obligation to maintain such records as one that is not to be transferred.

B 50. The fact that the stipulated employee liability information does not include minimum wage records does not of itself mean that the obligation to maintain and preserve records does not fall within the ambit of obligations transferred. As discussed in the course of argument, the transferee may be liable for equal pay claims going back several years prior to the relevant transfer, but the transferor is not required under Regulation 11 of **TUPE** to provide the transferee with details of payments made to employees for that period.

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D 51. The Regulations could have provided for joint and of several liabilities in the event of a transfer: see Article 3(1) of ARD. That might have addressed some of the situations where administrative convenience or practicality might have dictated the retention by the transferor of certain obligations. However, that was not the course adopted by Parliament. Subject to the limited exceptions identified in Reg 4(2) of **TUPE** itself, there is a blanket transfer of other rights, duties and obligations to the transferee, and that would, in my judgment, certainly include the obligations under the **NMWA**.

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G 52. Mr Brittenden's submissions as to anomalous consequences are largely predicated on the contention that the obligation to retain any records "vanishes" upon there being a relevant transfer. In my judgment, that is not what happens at all. It is not the case that the obligation to maintain and preserve records vanishes or ceases; rather it is that that obligation, like all the other obligations of the transferor, transferred to the transferee. The obligation to maintain records does not cease to have value merely because it transfers to the transferee.

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53. There is no reason why the transferee upon taking over should not be a position to insist that, as part of the arrangement under the transfer, all records maintained by the transferor for the purposes of **NMWA** are delivered to the transferee. Given that such records are likely to be held in electronic form, the difficulties hardly appear to be insurmountable. If that were to occur then the right to serve a production notice after the transfer would not be an “empty right” as the Tribunal found at paragraph 46 of the Reasons. It would be a substantive right exercisable against the transferee who would be able to use the records obtained from the transferor to comply with the request.

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54. The Claimants complained that this is unlikely to happen in reality and that in most cases the records would not be transferred over with the consequence that the transferee would be potentially liable in respect of a matter over which it could exercise little or no control. It seems to me, however, that that is the sort of risk that could be catered for by the provision of indemnities in a standard transfer and/or other contractual arrangements where this is a service provision change, for example, in order to protect the transferee’s position.

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55. There was no issue in respect of criminal liability because, insofar as there was a wilful failure to comply with **NMWA** prior to the transfer, the transferor would remain criminally liable. The Tribunal referred to the difficulty that the transferor in that situation would have in defending an allegation if the obligation to maintain records vanishes at the moment of transfer to the transferee. As stated above, the obligation does not vanish but is transferred to the transferee. A transferor concerned about the difficulty of protecting his position against criminal prosecution could either retain a copy of the records, which the transferee is now obliged to maintain, request a copy from the transferee or make contractual provision for the

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A delivery up of such records in the event of a prosecution. None of these practical concerns or “anomalies” as they were described by the Tribunal seem to me to provide any proper basis for avoiding the blanket transfer of obligations upon the occurrence of a relevant transfer.

B 56. Mr Brittenden submitted that one consequence of the Respondent’s position is that different meanings are ascribed to the term “employer” under different parts of the **NMWA**.
C However, on analysis, it seems to me that it is the Claimants’ position has that effect rather than that of the Respondent. On Mr Brittenden’s case, ss.9, 10, 11, 14, 31 and 54 are all interlinked. In all of them, he submits the transferor continues to be the ex-employer within the meaning of s.54 and therefore continues to be bound by the obligation to maintain records and is subject to
D the enforcement powers of HMRC Officers.

57. The difficulty with that submission is that s.17 of the **NMWA** expressly entitles a worker to additional remuneration if he is underpaid in respect of any pay reference period by
E his employer. It was accepted that any claim brought by a worker post-transfer would be brought against the transferee. That would mean that, at least for the purposes of s.17, the employer is the transferee. However, that would be at odds with the position contended for by
F the Claimants which is that for these purposes, the employer, post-transfer, is the transferor.

58. There was no cogent or satisfactory attempt to reconcile those positions. It was
G suggested, at least for the purposes of enforcement, that HMRC retains a discretion to pursue claims either against the transferor or the transferee. I was taken to an HMRC update issued in September 2018, which is some months after the decision below, in which HMRC set out some changes to how NMW penalties would apply in respect of employers whose staff transferred
H under **TUPE**. It states as follows:

A “HMRC has changed its approach to charging penalties when enforcing NMW where there has been a transfer of staff from one employer to another under TUPE Regulation 2006 Provisions[sic]. Since 2 July 2018 where TUPE applies all NMW liabilities, including the full penalty amount are applied to the new employer. HMRC previously charged the former employers all or part of the penalties where they were triggered by arrears that had accrued before workers had transferred under TUPE provisions.”

B 59. I was not given any background information as to the reason for HMRC’s change of policy. Both sides sought to rely upon the change as being supportive of their respective positions. Mr Jupp submitted that the current position adopted by HMRC is consistent with his
C contention that the obligation in respect of maintaining records transfers to the transferee. Mr Brittenden submits that this change in policy demonstrates that for the 20 or so years prior to the change, HMRC had applied penalties to the transferor thereby lending support to the
D Claimants’ contentions.

60. In my judgment, in the absence of any further information as to the reason behind the change in policy, or whether it involved any realisation that the previous approach had been
E erroneous, it would not be appropriate to place much reliance on the update in determining the correct interpretation of the legislation. In my judgment, the interpretation of the **NMWA** contended for by Mr Jupp is the one that leads to a more consistent position across the relevant
F provisions. That position is incidentally (and I put it no higher than that) consistent with HMRC’s current enforcement policy.

G 61. I can deal briefly with some of the other reasons relied upon by the Tribunal and/or which were put forward in submissions. It was submitted that the obligation to maintain records and produce them for inspection when required was one of those that remained with the transferor despite the provisions of Reg 4(2) of **TUPE**. The position was said to be comparable
H with the duty not to provide a negligent reference which is one that remains with the former employer, notwithstanding any transfer. I was not referred to any authority which deals with the

A transfer or otherwise of that specific duty in the event of a relevant transfer, although it is well-established that tortious duties that are in connection with the contract of employment do transfer: see **Bernadone v Pall Mall** at 36 to 38.

B 62. It seems to me, however, that any liability arising from the provision of a negligent reference would arise at the point the reference was given. That would therefore be a liability arising after the relevant transfer and is not one that falls within the ambit of Reg 4(2) of **TUPE**.

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D 63. Both sides accepted that their respective contentions would throw up some anomalies. I have dealt with some of the more significant ones above. It does not seem to me that the Respondent's contentions result in a significantly more anomalous position than would arise in respect of other obligations which transfer pursuant to Reg 4(2) of **TUPE**.

E 64. Finally, I should address Mr Brittenden's submission that his interpretation produces a fairer outcome and confers greater protection on low-paid employees than would be the case if the Respondent were correct. It seems to me, however, that many of the difficulties identified by Mr Brittenden were ones more likely to be faced by the transferee than the employees. The transferee would be the one who would be unable to produce records if it had not taken steps to secure them upon the transfer. The employees' remedy is largely unaffected. If there is a failure to provide the records within 14 days then, irrespective of whose fault that may be, the **F**
G Tribunal will make a declaration and an award.

H 65. As for the enforcement mechanism, it would appear from HMRC's recent policy statement that it does not envisage any particular difficulty in pursuing the transferee as opposed to the transferor in respect of the recovery of penalties. Accordingly, if there were any

A doubt about the correct interpretation, which in my view there is not, this is not a case where adopting a purposive approach to construction would necessarily result in accepting the Claimants' position.

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Conclusion

66. For all these reasons, and notwithstanding Mr Brittenden's helpful submissions, this appeal must be dismissed.

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