



EMPLOYMENT TRIBUNALS

Claimant: Mr Alan Bennett
First Respondent: CBRE Managed Services Ltd
Second Respondent: British Telecommunications Plc
Heard at: Southampton Employment Tribunal
On: 9 and 10 October 2017
RJD: 24 November 2017
Before: **Employment Judge Craft**

Representation

Claimant: Ms M Tether, Counsel
First Respondent: Mr J Wynne, Counsel
Second Respondent: Mr D Rushmere, Solicitor

RESERVED JUDGMENT ON PRELIMINARY ISSUE

The Claimant was assigned to the organised grouping which transferred to the Second Respondent on 27 October 2016 and his contract of employment with the First Respondent transferred to the Second Respondent under Regulation 4 of the Transfer of Undertakings (Protection of Employment Regulations 2006), SI 2008/246.

REASONS

The Issues

- 1 The Claimant claims unfair dismissal, disability discrimination and that certain monies (notice, holiday pay and arrears of pay) are due to him. The Claimant was employed by the First Respondent ("CBRE") until 27 October 2016. On that date there was a transfer of an undertaking to the Second Respondent ("BT"). CBRE considered that the Claimant was in scope to transfer and therefore became the responsibility of BT. Although the Claimant was employed in the business unit that transferred to it, BT took

the view that he was not assigned to the organised group of employees in question. This was because he had been absent from work for several years and they believed he could no longer undertake the job for which he had been employed. Since neither Respondent considered that the Claimant was its employee after the date of the transfer his employment terminated then.

- 2 It was agreed at a Preliminary Hearing held on 25 May that the Claimant had been dismissed. It was also agreed that this dismissal was in connection with a transfer and therefore was "automatically" unfair, unless the responsible employer could demonstrate an economic, technical or organisational reason for this dismissal and further acted reasonably in treating it as justifying dismissal. The Employment Tribunal confirmed that, leaving to one side the fact that no such reason is pleaded by BT, since neither Respondent treated the Claimant in the way it would have done had it believed it was dismissing him, it would seem to be inevitable that the Employment Tribunal will conclude that the Claimant was unfairly dismissed – by CBRE if he was not transferred and by BT if he was. Therefore it was agreed that the first hearing in this matter should be a Preliminary Hearing to determine whether the Claimant's employment transferred to BT. It is this matter that is before this Employment Tribunal.

The Claimant's employment history

- 3 The Claimant's employment with CBRE and its predecessors commenced on 1 July 1996 when he joined Orange Personal Communications Services Limited as a Power and Plant Engineer. He was promoted to Senior Power and Plant Engineer in 1997 and promoted again to Principal Power and Plant Engineer in 2001. When this job was made redundant in 2005 he accepted a position of Senior Engineer. In this job he was responsible for carrying out day to - day tasks on planned maintenance works. This included responding to faults on equipment, the supervision of contractors and associated administrative tasks. He was home based and required to travel to different sites in and around the Bristol area.
- 4 In August 2007 the Claimant was diagnosed with lymphoma in his oesophagus. This resulted in the Claimant being absent from work on long term sick leave. In January 2008 he began receiving payments in accordance with his contractual Permanent Health Insurance benefit ("PHI"). He remained off work and in receipt of PHI benefits until the termination of his employment.
- 5 Until his absence commenced in July 2007 the Claimant was working in an entity which provided core services to the EE Network and associated management services relating to a contract which was referred to as the "Gleneagles Project". There is no dispute between the parties that this project is a relevant entity within the terms of the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE"). During the Claimant's period of sickness absence, this entity was subject to a number of transfers in accordance with TUPE. On 1 July 2009 it transferred from Orange to BT and on 1 June 2013 it transferred from BT to Norland Managed Services Limited which on 1 February 2016 changed its name to CBRE. The transfer of the Claimant's employment in 2013 arose after CBRE was appointed to perform the mechanical and engineering work on what it referred to as the Ericsson Contract. At this time eleven employees from BT transferred to CBRE including the Claimant. These transferred employees were located at six sites across the country including the Ericsson site in Bristol. CBRE did not challenge BT's view that the Claimant was assigned to the organised grouping of employees which was transferring to it. The Claimant's job title was then Senior Power and Plant Engineer.

Claimant's medical history

- 6 In 2003 the Claimant underwent a kidney transplant and was diagnosed as suffering from Type 2 diabetes. Following the diagnosis of lymphoma in August 2007 the Claimant underwent several medical procedures and a course of chemotherapy. He then had to endure operations to deal with a perforated oesophagus and in one of those operations in October 2008 it was discovered that the lymphoma had returned for which the Claimant underwent a further course of chemotherapy which commenced in November 2008.
- 7 There were continuing medical problems for him which culminated in the Claimant being admitted to hospital from October 2010 until May 2011 during which period he had his oesophagus removed and a stoma bag fitted on his neck and a feeding tube inserted. Then, in the period from May to July 2012 the Claimant underwent an operation to reconnect his stomach following which in September 2012 his feeding tube was removed and he underwent a further operation to repair the stoma which had not fully healed. In the following year to November 2013 he received various treatments for ongoing issues regarding continued weight loss and there were continuing difficulties with malabsorption of food. In March 2015 the Claimant had a large abscess in his neck incised and drained after which his recovery was again interrupted in February 2016 when he suffered a severe pulmonary aspiration incident which left him in severe pain caused by broken ribs.

Evidence, Authorities and Submissions

- 8 There was an Agreed Bundle of Documents (Exhibit R1). The Employment Tribunal received evidence from seven witnesses, including the Claimant, all of whom gave evidence in chief by written statements as noted below. The Employment Tribunal received evidence from Mr F Black, Area General Manager, Ms R Hayward, HR Business Partner and Ms M Fallon, Regional HR Manager on behalf of the First Respondent (Exhibits R2, R3 and R4 respectively); from Mr D Byrne, Manager and Mr M Cruise, HR, M & A and Outsourcing Consultant on behalf of the Second Respondent (Exhibits R5 and R6 respectively); and from the Claimant and Mr G McKintosh, Engineer, on behalf of the Claimant (Exhibits C1 and C2 respectively).

- 9 The parties referred the Employment Tribunal to the following authorities:

Botzen and others – v – Rotterdamsche Droogdok Maatschappij BV [1985] ECR 519

Duncan Web Offset (Maidstone) Ltd – v – Cooper and others [1995] IRLR 633

Fairhurst Ward Abbots Ltd – v – Botes Building Ltd and others [2004] IRLR 304

Royal Mail Group Ltd – v – Communication Workers Union [2009] IRLR 1008

Eddie Stobart – v – Moreman [2012] IRLR 356

London Borough of Hillingdon – v – Gormanley and others UK EAT/0169/14

BT Managed Services Limited – v – Edwards and another [2015] IRLR 994

Piscarreta Ricardo – v – Portimao Urbis E.M. SA(in liquidation) and others CaseC-416/16CJEU

Lom Management – v – Sweeney UK EATS/0058/11

United Guarding Services – v – St James Security Group UK EAT/0770/03/RN

- 10 Ms Tether had also prepared a chronology (Exhibit C3) and submitted a skeleton argument for the Claimant, together with outline submissions (Exhibit C4). Mr Rushmere also submitted a skeleton argument on behalf of the Second Respondent (Exhibit R7). The facts above as to the Claimant's employment and medical history are agreed between the parties. The Employment Tribunal made the following additional findings of fact on the balance of probabilities. In doing so the Tribunal did not make findings upon all the evidence presented to it but made material findings of fact upon those matters relevant to the issue to be determined by it.

Findings of fact

- 11 Mr Byrne had overall management responsibility for the Claimant from 2010 onwards. His employment had transferred from BT to CBRE in 2013 and has subsequently transferred from CBRE to BT in October 2016. Mr Byrne and the Claimant kept in contact by telephone from time to time. They met on 14 May 2014 and at this meeting the Claimant agreed to a referral to Occupational Health ("OHS") following which a Medical Report was prepared. This Report stated, inter alia, as follows:

"Alan tells me he continues to suffer and has struggled to put on weight; he has extreme tiredness and poor energy levels. He sees no likelihood of an early and successful return to work, however, despite being PHI (and believing this is guaranteed until normal retirement date) Alan tells me he is still hopeful that he might achieve a return to work perhaps in a part time role or even in modified or different duties. He knows the organisation are not obliged of course to find such a role for him, but he would like to be reviewed again in perhaps six months' time to see if this is an option".

- 12 Mr Byrne concluded that, as recommended by OHS, the Claimant should have a face to face review in six months' time in order to ascertain whether his condition had improved enough for a return to work in some capacity. Mr Byrne met with the Claimant again on 8 October 2015 accompanied by Ms Hayward. The Claimant provided a summary of his medical history and his present medical position to them. He confirmed that he thought his health had improved considerably (and Mr Byrne informed Miss M S Hayward that the Claimant looked much better) and said that he would be looking to return to work in about twelve weeks' time. The Claimant also suggested to Mr Byrne that he should carry out light engineering works, together with supervision of contractors and other areas of administration. The meeting concluded with those present agreeing that the Claimant should be referred back to OHS to obtain a further medical report after which it was anticipated there would be a further meeting to discuss the Claimant's potential return to work.
- 13 The Claimant subsequently attended on OHS and a Medical Report was sent to CBRE and the Claimant by email on 21 December. This had been prepared by Dr Atkinson who had attended on the Claimant for a face to face assessment. I stated, inter alia, as follows:

"In my opinion, Mr Bennett is currently unfit for any work as a result of his conditions and level of function. We discussed his contracted role. I understand that this is a safety critical role working as an engineer in a power plant. His job involves lifting, bending, working at height and in confined spaces, and working with power tools. He told me that he was working on a full-time basis and worked one in three weeks on-call, which often involved travelling during the night to site working on his own.

In my opinion, Mr Bennett is unlikely to be unable to return to his full range of contracted duties in the future as a result of his conditions. It does not appear likely that he will be able to return to any heavy lifting, or duties which involve lying flat or bending down for prolonged periods. Mr Bennett also indicated that he has not needed to do any work involving cooling towers since his kidney transplant as a result of the immunosuppression and risk of infection. He would need close access to toilet facilities. His concentration and memory are reduced at present, although this could improve in the future. Consideration could be given to whether there are any adjustments possible longer term or alternative roles that would enable Mr Bennett to return to work in the future. If adjustments are not possible to his contracted role, then consideration could be given to ill-health retirement from his contracted role with consideration to alternative roles if available.

At present, it is my opinion that Mr Bennett is unfit for any form of work as a result of fatigue, side-effects of medication, as well as reduced concentration and memory. His symptoms are improving and he may be able to return to some form of work in the next six / twelve weeks if these aspects continue to improve and he recovers well.

Consideration could be given to Mr Bennett returning to non-safety critical work to start with, if suitable duties were available, such as non-safety critical office-based work, either at work or from home. A phased return is recommended when appropriate over at least six weeks to gradually increase his hours. A comprehensive risk assessment will be needed in relation to any duties proposed to ensure that he was safely able to carry these out.....Once it has been confirmed that he has recovered well and his concentration and memory are good, then consideration could be given to him returning to some level of safety critical issues if needed. I recommend re-referral to Occupational Health before returning to any safety critical tasks for a review of his condition and function".

- 14 In February 2016 the Claimant suffered a bad attack of aspiration which left him with severe pain across his chest and sides. Mr Byrne had not initiated any further discussions with the Claimant up to this time. In March an x-ray led to immediate referral to a cancer specialist in case his cancer had returned. Towards the end of May a Thoracic Consultant confirmed that the Claimant was suffering from two broken ribs caused by a cough fracture. After receiving this diagnosis the Claimant informed Mr Byrne that this would delay his return to work.
- 15 Mr Black had assumed overall responsibility for the Ericsson contract in December 2015 and, within a couple of months of doing so, CBRE was informed by BT that the contract (which the parties have always accepted was an undertaking within the TUPE Regulations) would be transferred back to BT in October of that year. Mr Black was ultimately responsible for CBRE's management of the Claimant. CBRE provided mechanical, electrical and fabric maintenance and repair services across the Ericsson portfolio. This included a number of sites across the UK which were technical data centres, switch sites and general office accommodation. CBRE's team was made up of predominately mobile engineers who would look after a handful of sites situated near their home along with a few engineers who only looked after one site. All of the engineers and managers (excluding Mr Black) worked solely on the contract. Mr Black would meet with contract managers and account managers on a monthly basis. Soon after taking over management of the contract he noticed the Claimant's absence record. He discussed this in or around January 2016, with Mr Byrne and Mr Brierley, the Contract Manager. He was given a brief overview of the medical difficulties which the Claimant had endured. Mr Byrne explained to him that the intention was, if it was at all possible, to get the Claimant back to work on the contract.

- 16 Mr Black continued to discuss the Claimant's position with Mr Byrne and Mr Brierley throughout January and February 2016. There was active discussion as to how CBRE could adapt his duties and phase him back into work gradually if he was fit to return to work. Initially the management team was proposing to arrange for a laptop at his home where he could assist with administrative tasks such as planning of maintenance and repair works, preparation of quotations and review of statutory compliance. Mr Black explained that they then intended to get him to attend sites and undertake audits of statutory documentation, compliance and equipment and hoped that he would be able to attend to physical tasks in due course anticipating substantial adjustments depending on his condition and fitness. Mr Black was referred to the latest occupational health report as this time. Mr Black explained that they wanted to slowly but surely move the Claimant back to a full-time role on the contract again if that was at all possible. However the management team recognised that suitable adjustments might have to be made around his condition and current level of fitness. These discussions did not consider any alternative work outside the contract. They only reviewed tasks that the Claimant could potentially undertake within it on his return to work.
- 17 On 14 June 2016 CBRE sent a memo to all its employees working on the Ericsson contract to inform them that the contract would migrate back to BT on 26 October 2016. This was sent with a letter from Ms Fallon to all those staff on the contract (including the Claimant) indicating, amongst other points that CBRE believed that they were eligible to transfer to BT and that they would be included in the consultation process that would be undertaken in respect of the migration.
- 18 Ms Fallon did not join CBRE until April 2016. She had discussed the Claimant's position with Mr Byrne soon after commencing her employment with CBRE. At that time there was no plan for the Claimant's imminent return. Mr Byrne had explained to her that he had thought that the Claimant would be returning to work on a phased basis undertaking amended duties within the contract but that a medical condition had prevented this which meant that he was not able to return as soon as everyone had hoped. Mr Byrne also told Ms Fallon that he was in regular contact with the Claimant who would provide him with an update as and when he could do so. It was never at any time suggested to Ms Fallon during her involvement with the Claimant's position that he should return to another part of CBRE's business outside the contract, or would need to do so.
- 19 Mr Cruise provided HR support to BT's business in respect of the transfer of the Ericsson / Gleneagles' contract back to BT. He confirmed that the contract was very self-contained which meant that identification as to which roles would transfer was straightforward and was not contested by either CBRE or BT except in the case of the Claimant. The personnel concerned were a team of twenty regional engineers working in designated areas throughout the country, two managers and two contract support administrators. In addition to this there were also five jobs which transferred to Ericsson. Due diligence was undertaken between the Respondents over the summer of 2016 and roadshows were undertaken by BT at the primary sites, including Bristol, which the Claimant could not attend.
- 20 Mr Cruise first met the Claimant with his colleague, Gae Kennedy at a one to one meeting on 20 September. The Claimant gave a full explanation to them of his medical history and the physical limitations that this could have on aspects of his job and how this had been discussed and considered with CBRE up to then. He also confirmed that a medical report had been obtained by CBRE in December 2015. Mr Cruise had made enquiries to Ms Fallon about the Claimant's position before this meeting, and had also asked her for further details about his position from her, which he had not yet received.

- 21 After this meeting Mr Cruise concluded that if the Claimant returned to work he would not be able to fulfil the job of a Senior Engineer on the contract. He wrote to Ms Fallon on 27 September by email which stated, inter alia, as follows:

"As you know we saw Alan Bennett as part of the one to one sessions and having spoken to Mr Bennett we are of the opinion that he should not be considered as in scope for the purposes of TUPE.

As you know Mr Bennett has been off continuously since 2008 with a number of serious medical issues. The nature and impact of these is such that Mr Bennett could, if he were to return to work, no longer fulfil the role of a Senior Engineer or Engineer.

Mr Bennett advised us that he has not been in contact with anyone from HR at CBRE and has not been asked to undergo any medical assessment since his time at CBRE. He has some contact with his line manager but nothing formal. He has not attempted any return to work since he went off in 2008 and has been permanently in receipt of Permanent Health Insurance (PHI) since this date. In short he has been employed only as an administrative method of him receiving his PHI and he in no way contributes to economic output of the organised grouping.

Due to all of the above we believe he has ceased to be assigned to the undertaking and is no longer actively engaged in the economic entity which is transferring to BT within the meaning of TUPE Regulation 4(1). This follows the guidance provided in the case of Edward v BT Managed Services Limited".

- 22 This email contained an error in that the Tribunal is satisfied that the Claimant had informed Mr Cruise that he had undergone medical assessments during his employment with CBRE. The Employment Tribunal preferred the Claimant's evidence to that of Mr Cruise in respect of this point. The Claimant had always been prepared to discuss his medical position and circumstances with his employers and was able to give detailed information in respect of it. It is accepted by Mr Cruise that he asked a question as to whether any medical assessments had been undertaken by CBRE and the Employment Tribunal, taking note of all the evidence presented to it, find it inconceivable that the Claimant would not have informed him of this position. Indeed in later correspondence it is noted that the Claimant sent a copy of the latest Medical Report to Mr Cruise.

- 23 The position outlined in Mr Cruise's email of 27 September remained his position, and that of BT, up to the date of the transfer of the undertaking on 26 October. It was subject to continuing debate between the Respondents in the intervening period but that debate was one sided to the extent that it consisted of CBRE attempting, with the Claimant, to persuade Mr Cruise that his initial view was wrong.

- 24 Having taken legal advice, Ms Fallon replied to Mr Cruise by email of 30 September which stated, inter alia, as follows:

"Alan has had contact with myself and has had frequent contact with his Account Manager, David Byrne and advised he is making good progress with his recuperation.

The case you reference Edwards vs BTMS was pursued by BTMS for appeal, therefore indicating to me that BT agreed that Alan as Mr Edwards was in fact subject to TUPE, I believe you settled the matter before it went to appeal.

Legal guidance in this matter states:

Despite the EAT decision in Edwards we do not assume that because an employee is on long term sick leave, they will not transfer under TUPE. EAT was clear that those absences temporarily where there is a reasonable belief that the employee will return to work (eg maternity leave, non-permanent sick leave, temporary lay-off) can still be assigned to the relevant grouping of employees and transfer under TUPE. It is only where the absence can be viewed as permanent and there is no expectation that the employee will be returning to work to participate in the activities (as was the case with Mr Edwards) that their absence will exclude them from the service provision change transfer – exactly what constitutes a temporary absence or a reasonable expectation of the employee returning is likely to be difficult to identify and fact specific and so employers should approach the issue with caution".

25 Mr Cruise replied on 6 October having by then received a copy of the OHS Report of December 2015. His email stated, inter alia, as follows:

- *"Whilst the report states Alan is hopeful of a return to work the facts tell a different story. It is worth bearing in mind that Mr Edwards during his evidence was also hopeful of a return to work but it was recognised this was only an aspiration and could not be supported by the facts. Our view is that the situation is very similar here.*
- *The report states ill-health retirement could be considered. This is a clear example within the report that it is envisaged that Alan will not be able to carry out his contracted role.*
- *It is noteworthy that CBRE have not, at the very least, re-referred Alan for an up to date view on his medical condition there are only one of two logical explanations for this. The first is that CBRE believe it would not be useful as it is clear Alan is not likely to return to his role, anytime soon or in the future. The second is that CBRE are not actively managing Alan any longer, whichever explanation it is, it is evidenced that Alan is no longer economically contributing to the services and is not likely to ever be fit enough to do so again. The facts of this case are pretty clear and we are confident in our position.*

On this basis we still contend that Mr Bennett should no longer be considered as in scope to transfer to BT under TUPE and urge CBRE to confirm they are in agreement.

26 Ms Fallon telephoned the Claimant on 11 October to inform him of BT's decision, and the potential impact of that decision on him. The Claimant was shocked and reiterated his view to Ms Fallon that he would be able to return to work with adjustments. Ms Fallon also arranged for an up to date occupational health assessment with CBRE's OHS as the Claimant requested her to do. The purpose of doing so was to confirm CBRE's understanding as to the Claimant's potential fitness to return to work. The Claimant also contacted Mr Cruise on 14 October when he submitted that he was not permanently incapacitated and would now be able to return to work with adjustments. The Claimant also had further conversations with Ms Fallon and undertook his own research in respect of the case to which Mr Cruise had referred. It is not necessary for the Employment Tribunal to detail this ongoing correspondence between the Claimant, Ms Fallon and Mr Cruise who also mistakenly wrote to the Claimant on 20 October to inform him his employment was transferring to BT. The Occupational Health Report was completed on 21 October following consultation by telephone on that day. The opinion and recommendation section of the Report states

as follows:

"Therefore you might want to consider the following based on my view of the case and my discussion with Alan today:

- *I do feel Alan is potentially fit and could return to work even after many years*
- *A return to work would need to be heavily modified, staged for a phased to allow him to "work harden" (getting use to work) and perhaps in a modified role taking into account your risk assessment and those concerns that I have raised above*
- *A return to work may potentially on my assessment today being a different role with a different range of responsibilities, duties and workload*
- *Any return to work could potentially occur forthwith but once again subject to that analysis to what Alan can and cannot do, identifying a role for him, providing him with re-training and support and mentoring and a graded return to work in terms of hours, duties and responsibilities*

As you can see, all of this will take some time but he is at this stage I feel able to achieve a return to work as long as Alan's health maintains itself at its current level. If a role can be identified for him. Lastly whether he does indeed achieve that successful and sustained return to work with all the checks and balances put in place and assuming of course that any possible re-training and / or return to work process goes smoothly.

I hope this is of some assistance".

- 27 Ms Fallon sent a copy of the Report to Mr Cruise on 24 October. After reading the report Mr Cruise concluded it did not change his view or BT's position as to the Claimant. He did not consider the Claimant was capable of returning to the engineering job in any meaningful way. He sent an email to Ms Fallon on 25 October to confirm this view and set out his reasons for doing so. He also wrote to the Claimant by email on 26 October. This stated, inter alia, as follows:

"To address your concerns, the reason you have not transferred to BT by operation of TUPE is because you are not eligible to transfer. This is because even though the medical report suggests a return to work may be possible it also states that you cannot return to the engineer role as a result of the restrictions placed on you by your health. Because you cannot return to the engineering role you are not assigned to the undertaking which was transferred and therefore you remain a CBRE employee".

- 28 Finally, the Claimant was able to provide a detailed breakdown of his job at the time he went off sick which demonstrated that his job comprised supervisory and administrative responsibilities as well as attending and undertaking engineering work. The summary was not challenged. However, how the working time was divided between the two elements of his job was not agreed. The Claimant stated that only 25% of his job was spent on manual work (but this would have excluded driving to and from different sites which might also have been challenging for him, at least initially, on his return). Mr Black and Mr McKintosh considered that the Claimant's estimate was reasonably accurate. Furthermore, Mr Black estimated that of the physical work only about 10-15% was what he described as testing manual work. Mr Byrne estimated the split at around 50:50. The Tribunal does not need to make a specific finding of fact. It is satisfied that at least half, but almost certainly more of the Claimant's working time prior to his illness would have been taken up in supervisory and administrative work

and that CBRE's management team had identified that he could be involved in a far higher percentage of such work when he returned to work which would support that return as well as provide valid assistance to the business and open up the opportunities for investigating extending his range of activities in the job going forward. However, all those concerned at CBRE, unsurprisingly, and understandably, accepted that there were a number of uncertainties as to what a return to work by the Claimant would bring to him but were committed to supporting the Claimant's wholehearted efforts to do so.

- 29 Mr Cruise's conclusions were based on his initial discussion with the Claimant and his immediate comparison with the **Edwards** case. He accepted that in his discussion with the Claimant he should have considered adjustments with him but did not do so. Furthermore he held no discussions with Mr Byrne as to the Claimant's workload and the only enquiries made by BT in respect of the Claimant's workload were indirectly made by an Engineering Operator to Mr Byrne by email on 24 October for which no relevant information was available or could be provided by Mr Byrne.
- 30 The result of this dialogue was that CBRE maintained that he had transferred to BT and BT maintained that he remained in the employment of CBRE. These are the facts which the Employment Tribunal has found.

Submissions

- 31 Mr Rushmere made oral submissions to the Employment Tribunal with reference to his Skeleton Argument. He submits that the question of whether the Claimant was assigned to the relevant organised grouping that transferred from CBRE to BT is one of fact to be determined by the Employment Tribunal based on all the relevant circumstances placed before it. He further submits that the burden of proof that the Claimant was assigned to the undertaking rests with CBRE. He submits it is not for BT to prove the Claimant was not assigned to the organised grouping. In the absence of sufficient proof that the Claimant was assigned the Employment Tribunal must find there was no transfer of the Claimant's employment to BT. Furthermore he submits that if the Employment Tribunal accepts BT's submission and determines that the Claimant was not assigned to the organised grouping then the Employment Tribunal does not need to consider where he was in fact assigned.
- 32 Mr Rushmere further submits that any previous transfer of the Claimant by operation of TUPE is not relevant to the issue before the Employment Tribunal. It is BT's case that on the evidence available the Claimant could not return to participate in the activities of the organised grouping and that because of this demonstrates that he was permanently incapacitated from doing so. In the alternative BT argues that if the Claimant was not permanently incapacitated from doing so then the question for the Employment Tribunal to determine is whether there are reasonable grounds for believing that the Claimant was likely to return to work and perform the activities of the organised grouping in the foreseeable future. There must be evidence that it was likely that this would happen for the Employment Tribunal to be able to conclude that he was assigned to the undertaking.
- 33 There was absence of fit notes being submitted by the Claimant in the later stages of his employment with CBRE, no face to face assessment for the purposes of a medical report in October 2016 and no risk assessment prepared by CBRE in respect of a return to work either before or after the Medical Report obtained in December 2015. This establishes that there was no likelihood of a return to work.
- 34 Mr Wynne reminded the Employment Tribunal that the fact of the TUPE transfer is

agreed between the parties and that the potential usual issues that can arise as to whether or not an employee is assigned to an undertaking that has been transferred are absent in this case. If the Claimant had not been absent he would have been working 100% on the contract that transferred back to BT. Therefore, the issue before the Employment Tribunal is whether the nature of his absence at the time of the transfer prevented his assignment to the undertaking which means that he would not have transferred to BT's employment.

- 35 Mr Wynne also reminded the Employment Tribunal that in respect of absences caused by illness (whether for a predicted period or for an uncertain duration), holiday and maternity leave the authorities leave no room to doubt that there would have been an assignment to the undertaking. Furthermore the fact there is some uncertainty is not the reason that he was not assigned.
- 36 Thereafter Mr Wynne asked the Employment Tribunal to consider the nature of the uncertainty in the Claimant's case. There had been a long term sickness absence with a succession of different illnesses over a period of seven years. He had continued to express keenness to return to work whether he could return to his full time job or if he did not whether there was any new job to which he could be assigned in the Ericsson contract. Therefore, after 25 October, all parties have to accept that in the absence of the TUPE transfer his employment with CBRE would have continued. His recovery was still anticipated. It was for the Claimant to identify when he wanted to take forward further consideration of his return to work. The absence of formal documentation is entirely explained by his length of absence. There was no requirement, or need, to go into the terms of his return when there was still considerable uncertainty as to the date of it. CBRE had no doubt that they should, and would, be able to introduce him back into the workforce supporting the contract provided his recovery was sustained.
- 37 In taking this approach CBRE was abiding by a web of legal obligations: these included the Claimant's contract of employment with CBRE and its implied term of trust and confidence and the duty to make reasonable adjustments to support his return to work by reason of his disability. The purpose of the Acquired Rights Directive and the TUPE legislation is to preserve and protect the employment relationship. The most obvious route to do so was for BT to take over the responsibilities of CBRE in respect of the Claimant's future return to work. A finding that the Claimant was not assigned to the undertaking would remove all legal protections available to the Claimant and would be contrary to the purpose of TUPE.
- 38 Finally, Mr Wynne submitted that now and at the relevant time BT were relying on the **Edwards** case. He submits that the **Edwards** case is not on all fours with the Claimant's position as BT asserts. There was an expectation of future participation in the undertaking at every stage by the Claimant, Mr Black and Mr Byrne and what was being considered was much more than merely an administrative connection to ensure the continuing payment of PHI. Furthermore **Edwards** makes it clear that this is not a legal test. However, there were reasonable grounds for CBRE and the Claimant to believe that the Claimant would have returned to work in due course and so any such test has been satisfied by the evidence. The Claimant was assigned to the undertaking and his employment transferred to BT because he had an expectation that he would return to a job within the contract and this was not a fanciful expectation. He was also assigned because no decision had been taken that he was employed for purely administrative reasons and there was no equivalent inevitability (as in **Edwards**) that he would not return.
- 39 Ms Tether adopted Mr Wynne's submissions. The stark contrast between the Claimant's particular circumstances and those of Edwards is that CBRE had not

decided that he was permanently unfit for work and his employment was not being maintained solely to permit him to receive insurance benefits. CBRE had been keeping his fitness for work under review and at the time of transfer there was a reasonable prospect that he would be able to return to work within the organised grouping, with reasonable adjustments being made for his disability.

- 40 Ms Tether also contends that BT's broad interpretation of the principles established by **Edwards** would, if accepted, mean that TUPE would be capable of frustrating the rights conferred on disabled employees by the Equality Act. This would be incompatible with domestic and EU law. Ms Tether goes further and submits that the recent decision of the ECJ in **Ricardo** demonstrates that the decision in **Edwards** was not compatible with Directive 2001/23 EC because the ECJ has held in that case that the Directive protects all persons whose contract of employment, or employment relationship is in existence at the time of the transfer. Accordingly, an employee who was on paid leave at the time of the transfer and whose contract of employment was suspended had the right to transfer under Article 3 of the Directive if he was protected in his capacity as an employee by national law. Under UK law, a person who is on long term sick leave enjoys legal protection as an employee, whether or not he is in receipt of income protection. Therefore in Ms Tether's analysis it must follow that an interpretation of TUPE which excludes such an employee (which would include the Claimant) from the protection of TUPE is incompatible with EU law.
- 41 Ms Tether submits that at all material times up to the date of the transfer the Claimant was employed as a Senior Power and Plant Engineer in his normal place of work at Ericsson Bristol. The various discussions which took place about the possibility of the Claimant returning to work were all about him coming back to work in that job. All of the relevant adjustments considered by CBRE involved him in carrying out work which was part of the economic activity which in due course transferred from CBRE to BT. The undisputed evidence before the Employment Tribunal confirms that at no time did CBRE decide that the Claimant was permanently unable to return to work or that a return to work should not be pursued and that he should be kept at home in receipt of PHI payments, and for that purpose alone.
- 42 The final Occupational Health Report in October 2016 disclosed an improvement in the Claimant's health but it was the transfer that pre-empted any attempt to put in place an appropriate return to work plan at that time. Mr Cruise's view that the Claimant was not capable of returning to work at the time of transfer was based on inadequate information, without consultation with the Claimant or consideration of the occupational health advice sent to him taking account of how CBRE had been dealing with this matter and the decisions it had made.
- 43 Ms Tether submits that the critical distinguishing feature of **Edwards** was that in that case the transferor had taken a conscious decision to retain the claimant in its employment for the sole purpose of allowing him to receive PHI payments. She referred the Employment Tribunal to HH Judge Serota QC's observation at paragraph 33 of the **Edwards** Judgment. The possibility that an employee is (or may be) unfit for work at the time of the transfer could only be relevant to the question of assignment if the transferor has in fact decided, prior to the transfer, that the employee is permanently unfit for work and thus no longer part of the organised grouping. An employee's statutory rights would be significantly undermined if an employee whose future within the organised grouping has not been decided at the time of a transfer were to be deprived of his rights under TUPE.
- 44 BT's decision in this case that the Claimant was not assigned to the organised grouping was taken without making a proper assessment of the effects of his disability.

It gave no consideration to the possibility of making reasonable adjustments before concluding that he was not capable of returning to any job within the organised grouping. Finally, Ms Tether submitted that Mr Cruise's views are irrelevant. The key issue was whether there had been a decision that the Claimant had ceased to be assigned to the organised grouping. CBRE had not made that decision. In those circumstances the Claimant must be treated as assigned to the organised grouping and Ms Tether invited the Employment Tribunal to find that the Claimant was assigned to the organised grouping of resources and / or employees that transferred from CBRE to BT on 27 October 2016 and that the Claimant's contract of employment therefore transferred to BT on that date.

Conclusions

- 45 It is agreed there had been a service provision change within the TUPE Regulations 2006 when BT took the Gleneagles project / Ericsson contract back from CBRE. Regulation 4 of TUPE provides, inter alia, as follows:

"4 Effect of a 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 ...*

(3) *Any reference to 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"*

- 46 **Botzen** confirmed that the only decisive criterion regarding the transfer of employees' right and obligations is whether or not a transfer takes place of the entity to which they were assigned and which formed the organisational framework within which their employment relationship took effect. The question of assignment is one of fact for the Employment Tribunal. The test is whether the employee is assigned to the relevant organised grouping immediately before the transfer.

- 47 In **Fairhurst Ward** which related to an employee who had been off sick at the time of transfer, the Court of Appeal held:

"A person on sick leave, like a person on holiday, on study leave or on maternity leave, remains a person employed in the undertaking, even though he is not actually at his place of work. The question is whether he was employed in the part transferred. That is a factual matter."

- 48 The EAT (Judge Serota QC) held in **Edwards** that in order for an employee to be assigned to a particular grouping, within the meaning of Regulation 4(3) of TUPE, something more than a mere administrative or historical connection is required. The question of whether or not an individual is assigned to the organised grouping of

resources of employees and is subject to the relevant transfer, will generally require some level of participation or, in the case of temporary absence, an expectation of future participation in the carrying-out of the relevant activities on behalf of the client, which was the principal purpose of the organised grouping.

49 The **Edwards** case was decided on its own facts. The claimant had been on sick leave for more than five years when his permanent health insurance payments had run out the employer (the transferor) had agreed to carry on making equal payments even though it was conceded by all concerned that he would never be in a position to return to work. He was to remain on the books to continue to receive his PHI payments. This is what is described as a mere administrative or historical connection.

50 His Honour Judge Serota QC observed at paragraph 33 of the judgment in **Edwards** inter alia as follows:

"... The case depends entirely upon its particular facts and included not simply the fact that the claimant was absent and in receipt of PHI payment but "crucially" the fact that a specific decision was taken not to pursue a return to work in his case, but simply to keep him at home in receipt of PHI payments".

51 Mr Burnham and Ms Tether are correct in observing that, contrary to Mr Cruise's analysis and Mr Rushmere's submission the **Edwards** case is not on all fours with the claimant's position in these proceedings. It has its own set of circumstances and factors to be considered which are on objective consideration markedly different from those in **Edwards'**. There was a wholehearted and genuine recognition of the Claimant's determination to return to the entity and careful consideration of how that could be done and an expectation that such a return could be achieved. CBRE had at no time determined that the Claimant was permanently unable to return to work and that he would be kept on its books solely for the purpose of ensuring continuing PHI payments.

52 The Employment Tribunal agrees with Mr Burnham and Ms Tether that the outcome of the **Edwards** case would not have been the same if the employer in that case had not taken the specific decisions which it did as to ongoing payment of PHI benefits and notwithstanding that a decision had been made that the claimant would not return to work in the relevant undertaking. The fact that CBRE had the potential power to make that decision or to transfer the Claimant to another part of its business is irrelevant if that power has not actually been exercised which it was not in this case.

53 CBRE had not decided that the Claimant was permanently unfit for work and thus no longer part of the organised grouping. Statutory and contractual rights identified by Mr Wynne require an employer to exercise care and act with circumspection before deciding that an employee is permanently unable to work, and would certainly should involve an extensive discussion with the employee concerned because of the impact of such a decision. Those rights would be significantly undermined if an employee whose future had not been decided at the time of the transfer were then to be deprived of his rights under TUPE because the new employer imposed its view of that person's position as Mr Cruise had done on behalf of BT in the Claimant's case. And, in doing so, had not undertaken any substantial enquiries of the Claimant himself but relied on a view that a previous case, decided on its own facts, could determine the Claimant's position.

54 Therefore, after careful review of the substantial submissions and authorities submitted to it, the Employment Tribunal has decided that the submissions made on behalf of the Claimant and CBRE by Ms Tether and Mr Wynne are complementary and correct.

Those submissions confirm that BT's position in Claimant's case is untenable by reference to the undisputed facts found by the Employment Tribunal and the authorities, including the authority of **Edwards** on which BT relies, to which the Employment Tribunal has been referred.

- 55 The Employment Tribunal's conclusions summarised above mean that it is not necessary for it to consider, and adjudicate on, Ms Tether's submissions (which Mr Rushmere opposed) as to the **Ricardo** case and the compatibility of the **Edwards** case with EU law.
- 56 Therefore, the Employment Tribunal finds that the Claimant was assigned to the organised grouping which transferred to BT and that his contract of employment therefore transferred to BT under Regulation 4 of TUPE.
- 57 This case will now be listed for a further preliminary hearing for case management purposes which the Employment Tribunal anticipates can be held by telephone conference call subject to any submissions it may receive from the parties as to that arrangement. It is proposed to allow one hour for that discussion.

Employment Judge Craft

JUDGMENT SENT TO THE PARTIES ON

15 December 2017

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS