Case No: 2329562/2007

Reserved judgment

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms C Tapere	and	**South London and Maudsley NHS Trust**

JUDGMENT AND ORDERS OF THE EMPLOYMENT TRIBUNAL

Hearing at London South on 4 & 5 November 2011

Employment Judge Baron **Members Ms S Dean**
N Shanks

Appearances

For Claimant: **James Medhurst - Consultant**

For Respondent: **Ian Scott - Counsel**

JUDGMENT

It is the unanimous judgment of the Tribunal as follows:

1 That the Claimant was dismissed by the Respondent on the grounds of redundancy;

2 That the Claimant is entitled to a redundancy payment;

3 That the Claimant was automatically unfairly dismissed under regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

REASONS

1 This was a hearing listed following the matter having been remitted from the Employment Appeal Tribunal following the first hearing of this claim by the Employment Tribunal in June 2008.[1] The Tribunal on that occasion dismissed the Claimant's claims of unfair dismissal and of an entitlement to a redundancy payment. On appeal there was no challenge to the factual findings of the Employment Tribunal, and it is useful to reproduce that section of the reasons at this juncture.

The relevant facts.

9. From 1997 to 1st April 2007 the Claimant was employed by Lewisham Primary Care Trust

[1] The judgment of the EAT is reported at [2009] IRLR 972

From 2000 she had been working in the Procurement Team based at Burgess Park, Camberwell. On 1st April 2007 the Claimant's contract of employment and that of two others was transferred by virtue of TUPE to the Respondent. Her job at the Respondent remained the same as it had been at Lewisham and her pay and grading remained the same. At Lewisham she had worked 36 hours a week on flexitime, though the core hours were 9.30 - 4 .

10. It was anticipated by the Respondent and Lewisham PCT that the Claimant's place of her work would transfer to the Respondent's premises at Bethlem Hospital in Beckenham as soon as possible after the transfer. This change of location had been discussed with the Claimant as part of the TUPE consultation process. Initially there was no room for the Claimant (and the two other members of the procurement team who had transferred) at the Bethlem site and the Claimant was told that she would be moved as soon as there was room to accommodate her. In the event the team was not required to move till 10th September 2007

11. The Claimant's contract contained a mobility clause which provided that "There may be occasions when you are required to perform your duties either temporarily or permanently at other locations within the trust".

12. The Claimant lives in Grays, Essex. She was reluctant to move to work at the Bethlem in Beckenham as she believed that it would increase her journey time. She is a single mother and has to collect her child from school and be available till 8 a.m. when her child would be collected for school by taxi. She gave evidence that if she travelled via her old route of the A13 the journey time to Beckenham would be significantly longer - an additional 10 miles.

13. In strict geographical terms the Bethlem is only 2¼ miles further from the Claimant's home than Burgess Park. The shortest route from Grays to Beckenham would be via the M25. The Claimant's evidence was that the journey time to Burgess Park in Camberwell from her home in Grays took her on average 1½ hours. From Grays to Bethlem the best route would be via the M25. The AA route planner printed off the web, and given to the Claimant during her discussions with the Respondent, gives an average journey time from Grays to the Bethlem of 50 minutes – though no doubt at peak times, such as at 8 in the morning the journey time would be longer.

14. Following the transfer the Claimant continued working at Burgess Park. Lewisham invoiced the Respondent for the continued use of their premises. She visited the Bethlem on 11th April and met Mr Ashworth and Mr Levoir who was to be her line manager. They discussed travel times. Mr Levoir lives in Essex, a little distance beyond Grays. He left at 7.45 a.m. and would get in for 9 a.m. most days though he accepted that there were occasionally problems and then he would make up the time by reducing his lunch break or staying later. Following that meeting the Claimant wrote to ask that she be given the opportunity to work shorter hours (though at the same salary) or that the Respondent pay her additional child care costs (which she estimated at £6,480 a year).

15. The Claimant met with the Respondent again on 9th May. The Claimant had continuing concerns about using the M25 and being late for her daughter. It was agreed she could start 15 minutes later and also that she should try the route and if there were problems the Respondent would revisit and come to another arrangement.

16. On 22nd June the Claimant lodged a grievance with Lewisham about her transfer to the Respondent.

17. The move to Bethlem took place on 10th of September. As the Claimant was on holiday for the 2 weeks immediately preceding the move a letter was sent to her dated 5th September informing her of this move. It appears that the Claimant did not receive the letter and when the Claimant arrived at Burgess Park on 10th September, she was shocked to find that her place of work and the other two members of the team had

moved. She went over to the Bethlem that afternoon in a state of some distress, spent an hour or so there and left at the end of the day.

18. The following day (11th September) the Claimant was unwell. She telephoned a colleague on his mobile but did not speak to Mr Levoir as he was not in, and Mr Levoir did not know why she had not attended. About midday Miss Dibben telephoned the Claimant at home. We accept that she did this because she was aware that she was upset about the move and had not heard from the Claimant as to the reason for her non attendance. The Claimant said that she was ill and that the move had caused her to be ill. Miss Dibben suggested a visit to Occupational Health. We accept that Miss Dibben was not sympathetic to the Claimant on the telephone and gave the impression to the Claimant that she did not believe that she was ill, though we do not accept that she was extremely aggressive. It was the Claimant's case that Miss Dibben demanded that she submit a medical certificate even though it was her first day sick, though this is denied by Miss Dibben.

19. In any event the Claimant sent in a medical certificate signing her off for 4 weeks. On receipt Miss Dibben wrote to the Claimant arranging an appointment with Occupational Health on 1st October (140).

20. On 17th September the Claimant wrote to Miss Dibben resigning from her position (141) citing "recent telephone harassment" and "a fundamental breach of contract by moving my place of work, reducing my responsibilities and other problems associated with the transfer". On 28th September she lodged a grievance (142). On 10th October she sent a further letter making it clear that she felt she had been constructively dismissed.

21. At first the Respondent did not accept her resignation. Miss Dibben sent letters on 1st and 19th October suggesting that she reconsider and allowing her to rescind her resignation. Miss Dibben said that the Respondent would seek to be flexible as to the hours that the Claimant worked and that further discussions could take place if the journey turned out to be difficult for the Claimant.

22. Despite having resigned, the Claimant continued submitting medical certificates the last of which expired on 21st November. On 3rd December Ms Dibben wrote to say that in the absence of a medical certificate and hearing from the Claimant her pay would be stopped but would be reinstated if a certificate was received. On 11th January she accepted the Claimant's resignation with effect from 22nd November (156).

2 There does appear to be an error in paragraph 13 of those findings. It was common ground that the distances had been measured by the use of the AA Route Finder facility on the internet. The prints produced to us of the quickest and easiest routes to each destination show that in fact the journey to the Bethlem site was 2.1 miles shorter rather than longer, and the journey was 50 minutes rather than 57 minutes. In our view nothing turns on the apparent error in those factual findings.

3 The claims to the Tribunal were of constructive unfair dismissal, and also of dismissal under regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The terms of the remission are set out by the EAT in the order dated 19 August 2009 as follows:

> The Appeal be allowed and that there be substituted for that of the Employment Tribunal a Judgment that the Appellant was constructively dismissed and/or is deemed to have been dismissed pursuant to regulation 4(9) of TUPE 2006.

4 The following is an extract from the judgment:

Disposal

55. On the issue of breach of contract, we have found that the Employment Tribunal erred in law and should have concluded that the Respondent was in breach of contract. The Appellant resigned on account of it and, accordingly, a finding of dismissal is inevitable. No further facts need be found and it is not necessary to remit that aspect of the matter. Equally, our finding as to error in relation to regulation 4(9) of TUPE 2006 leads to the inevitable conclusion that the Appellant must be deemed to have been dismissed and that is a decision that we can make without the need for remission.

56. Mr Medhurst submitted that we could go on from there to find the dismissal was by reason of redundancy and that the Appellant was entitled to a redundancy payment. Whilst there might be little to argue about as to whether the facts fit the provisions of section 139(1)(a)(ii) of the Employment Rights Act 1996 (i.e. that there was a redundancy situation), entitlement to a redundancy payment depends on other matters, principally whether there has been an offer of renewal of the contract or of re-engagement or an offer of suitable new employment unreasonably refused (see section 141(1) and (2) of the Employment Rights Act 1996). These are matters that require further factual investigation and require remission. The same applies to the issue of unfair dismissal.

57. Accordingly we will substitute a finding of dismissal and remit the issues of entitlement to a redundancy payment and unfair dismissal. The parties will be at liberty to call evidence relative to those issues.

5 The relevant statutory provisions in the Employment Rights Act 1996 are as follows:

139 Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

141 Renewal of contract or re-engagement

(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment--

(a) to renew his contract of employment, or

(b) to re-engage him under a new contract of employment,

with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.

(2) Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

(3) This subsection is satisfied where--

(a) the provisions of the contract as renewed, or of the new contract, as to—

(i) the capacity and place in which the employee would be employed, and

(ii) the other terms and conditions of his employment,

would not differ from the corresponding provisions of the previous contract, or

(b) those provisions of the contract as renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee.

(4) The employee is not entitled to a redundancy payment if—

(a) his contract of employment is renewed, or he is re-engaged under a new contract of employment, in pursuance of the offer,

(b) the provisions of the contract as renewed or new contract as to the capacity or place in which he is employed or the other terms and conditions of his employment differ (wholly or in part) from the corresponding provisions of the previous contract,

(c) the employment is suitable in relation to him, and

(d) during the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate it and it is in consequence terminated.

6 Regulation 4(9) of the 2006 TUPE Regulations is as follows:

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

7 Judgment in this matter was reserved. During our deliberations we found reference to the 1971 case of *McReadie v. Thomson & Macintyre (Patternmakers) Limited* decided by the House of Lords.[2] It appeared to have potential relevance to part of the issues before us and we invited submissions from both parties on it. We received those submissions and have taken them into account.

8 The first issue to determine is whether the Claimant was redundant. No further findings of fact are required. Mr Medhurst, for the Claimant, submitted that the dismissal was due to a diminution in work at the Claimant's usual place of work, being Burgess Park, when it was closed and the functions carried out by the Claimant were moved to Bethlem. Mr Scott made submissions for the Respondent. He submitted that the reason for the dismissal was some other substantial reason within section 98(1)(b) of the Employment Rights Act 1996, and not redundancy. He said that the Claimant's place of work under her employment with the Respondent was always to be Bethlem. The Respondent had never had a place of business at Burgess Park, and had only used the premises there on a temporary basis pending its own premises becoming available at Bethlem.

9 We prefer the submissions of Mr Medhurst. The Respondent inherited the Claimant following the transfer. The Claimant's normal place or work at which she was employed by Lewisham PCT was Burgess Park. The Respondent took over as her employer with Burgess Park being the Claimant's normal place of work. The Respondent moved the function to Bethlem. There was therefore a cessation of that work being carried out at Burgess Park. There was clearly a redundancy situation as a consequence of which the Claimant was dismissed, albeit by resignation. We have further borne in mind that section 163(2) contains a presumption for these purposes that a dismissal was on the grounds of redundancy.

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[2] 6 ITR 171

10 We must next consider whether the Claimant became entitled to a redundancy payment by virtue of what occurred, and the answer to that point depends upon the application of section 141 of the 1996 Act. It is necessary to find further facts to deal with this point. We heard evidence from the Claimant, and also on behalf of the Respondent from the following:

Barry Ashworth – Assistant Director of Finance
Sally Dibben – Head of Employee Relations
Len Levoir – Supplies Manager.

11 Before the transfer of functions to the Respondent on 1 April 2007 consultation was carried out. A document was prepared and presented to the Claimant and other staff affected at a meeting on 26 February 2007. It was made available of the intranet of the transferor, Lewisham NHS PCT. That document specifically stated that it was proposed that the Claimant and one other member of staff would be based at Bethlem Royal Hospital. A letter was the written, apparently in error, to the Claimant dated 27 February stating that she was at risk of redundancy. We do not consider that letter to be relevant.

12 More importantly, a meeting was held on 7 March of the staff potentially affected by the transfer. Representatives of the two unions involved (GMB and Unison) were present. It was specifically stated at that meeting that the Claimant and one other member of staff would transfer in accordance with the TUPE Regulations and that they would be based at the Bethlem site. The Claimant asked about payment of additional travel expenses as she said that she would have to travel further. Mr Ashworth told the Claimant that there would be flexibility in starting and finishing times.

13 The Claimant wrote to Debbie Carson of Lewisham NHS PCT on 14 March 2007 raising various matters. Her principal concerns related to her view that 10 miles would be added to her existing 22 mile journey, with an adverse effect on her health and finances. Karen Price replied on 26 March saying that the journey was only 2.5 miles longer, and that the Respondent had agreed to pay any additional travelling costs for four years.

14 On 28 March, Ms Price wrote a formal letter informing the Claimant that her employment would be transferred to the Respondent on 1 April, and summarising the effect of the TUPE Regulations. The letter included the following paragraph:

> The accommodation that you will be using in [the Respondent] has yet to be completed therefore for the time being it is proposed that you remain based in Burgess Park until such time that you can relocate to your new accommodation.

15 The transfer was effected on 1 April 2007, but the Claimant carried on working from the Burgess Park site for the reason already stated. Mr Levoir became her official line manager.

16 The Claimant replied to Ms Price on 10 April, expressing concern about using the M25, and asking whether she could work from home on one or two days per week, or compress her working hours into four days.

17 There was then the meeting at the Bethlem site on 11 April to view what would be her new office. There was a discussion about the Claimant's starting and finishing times with Mr Ashworth saying that the core hours were 9.30 am to 4 pm. Mr Ashworth acknowledged that there needed to be some flexibility, and it was noted that Mr Levoir was himself delayed on occasions. He came from the same direction as the Claimant, but had a somewhat longer journey. Mr Ashworth said that in such circumstances Mr Levoir stayed late or had a shorter lunch break. We do not accept the Claimant's evidence that Mr Ashworth was laying down a rigid rule that any lateness in the morning had to be compensated for on the same day. That would clearly be unrealistic and unreasonable in practice.

18 Mr Ashworth sent an email to the Claimant on 12 April stating what had been discussed and adding:

> I believe you accepted that this principle was agreeable to you.

19 The Claimant continued to correspond with Ms Price and wrote on 24 April suggesting shorter hours from 10 am to 3.30 pm but that in the meantime 'the Trust' should bear extra childminding costs of £6,480 per annum. Ms Price replied on 30 April saying that the Claimant was by then employed by the Respondent.

20 The Claimant met Mr Ashworth and Ms Dibben on 9 May. The Claimant was accompanied by John Lilley, a trade union representative. No notes were made of the meeting. The Claimant expressed concern about having to use the M25 and the Dartford crossing which, she said, could cause delays on the way home. As recorded above it was agreed that the Claimant would start at 9.15 am, as that would enable her to leave at 8 am after a taxi had collected her child for school. Her finishing time was to be 5 pm. It was also agreed that the Claimant would try the route. Mr Ashworth confirmed what had been agreed in an email of that day. He stated that the position would be monitored and that hopefully the arrangements would work.

21 The Claimant raised a grievance on 22 June but addressed to Ms Price. There was subsequent correspondence. It is apparent that the Claimant did not fully understand the effects of the TUPE Regulations. Ms Price agreed that Lewisham NHS PCT should deal with those matters which occurred before the Claimant's transfer to the Respondent. It is not necessary to refer any further to the details of the grievance process.

22 The Claimant was on leave from 28 August and returned to work on 10 September. What then occurred was found by the first Tribunal and is recorded above. The Claimant never worked from the Bethlem site, and importantly did not try out the journey in either direction. She resigned by letter of 17 September 2007. There was then the correspondence recorded by the first Tribunal.

23 So much for the additional facts. The issues remitted to the Tribunal were whether the Claimant was entitled to a redundancy payment and of unfair dismissal. It appears to us that the matters we have to consider are as follows:

23.1 On the basis that the EAT determined that there was a constructive dismissal within section 95(1)(c) of the 1996 Act,

and our having found that the reason for the dismissal was redundancy, then we need to determine whether the Claimant is deprived of the right to a redundancy payment by reason of the provisions of section 141 of the 1976 Act.

23.2 That matter itself requires consideration of:

23.2.1. Whether there was an offer of employment;

23.2.2. Whether any such offer was one of suitable employment in relation to the Claimant within section 141(3)(b);

23.2.3. If so, whether the Claimant unreasonably refused the offer.

23.3 The next issue is whether the constructive dismissal was fair or unfair in accordance with the provisions of section 98(4) of the 1996 Act.

23.4 On the basis that the Employment Appeal Tribunal has determined that there was a dismissal by reason of the provisions of regulation 4(9) of the 1996 TUPE Regulations (and it not being disputed that the reason for the dismissal was the transfer), we need to determine whether the dismissal was automatically unfair by reason of regulation 7(1), or alternatively whether it is saved from having been automatically unfair as the reason (or principal reason) was an economic, technical or organisational reason entailing changes in the workforce.

23.5 If the dismissal was not automatically unfair, then the final question is whether it was unfair within section 98(4).

24 Each of Mr Medhurst and Mr Scott made submissions for the respective parties. Mr Medhurst submitted that there had not been an offer of new employment which was capable of acceptance. There had only been a dictation of terms. Even if there had been such an offer, then it was not objectively suitable for her to accept, and it was reasonable of her to decline to accept it. He referred to *Curling v. Securicor* [1992] IRLR 549 and *Marriott v. Oxford and District Co-operative Society* [1969] 2 All ER 1126.

25 In response to the Tribunal's request for any submissions on *McCreadie* Mr Medhurst said that it was distinguishable as there was no mobility clause in the contract in *McCreadie* and the new place of work was apparent from the terms of the notice. He said that the case was authority for the proposition that any changes between the old and new contracts must be identified, and that as there was no new mobility clause specified then there could not be a valid offer. Further, he said that the House of Lords had not considered the difference between an offer and an instruction.

26 He submitted that if the Claimant had accepted the role at Bethlem then that would have been a new contract, but it would have been void because in order to contract out of the provisions of TUPE regulation 18 requires there to be an agreement complying with the provisions of section 203 of the 1996 Act. That regulation is as follows:

18 Restriction on contracting out

> Section 203 of the 1996 Act (restrictions on contracting out) shall apply in relation to these Regulations as if they were contained in that Act, save for that section shall not apply in so far as these Regulations provide for an agreement (whether a contract of employment or not) to exclude or limit the operation of these Regulations.

27 Mr Scott submitted that there had been an offer, that the work was suitable, and that it was unreasonable of her to refuse it, particularly taking into account the efforts made by the Respondent to arrange flexible working times, to pay any additional travelling expenses for four years and to review the arrangements if there was any difficulty.

28 Mr Scott submitted that there were similarities between the position of the Claimant and the circumstances prevailing in *McCreadie*. He correctly pointed out that section 141 does not require a written offer, whereas that was required under section 2(4) of the Redundancy Payments Act 1965, being the legislation in force at the date of the *McCreadie* case. He drew the attention of the Tribunal to *Ramseyer Motors Ltd. v. Broadway and Magee* [1971] 11 KIR 169 and *Kay v. Cooke's (Finsbury) Ltd* [1973] 3 All ER 434 in which cases there had been reference to *McCreadie*. The approach, he said, should be a flexible non-technical and non-legalistic one.

29 We now turn to consider the competing submissions and the authorities. We consider first whether there was an offer for the purposes of section 141 of the 1996 Act. The principal issue in *McCreadie* was whether a notice posted on a notice board was an offer in writing for the purposes of section 2(4) of the Redundancy Payment Act 1965. The circumstances were not significantly different from this case in that the employers were moving their place of business. A notice was placed on the notice board requiring all employees to report to the new premises from the date stated in it. Lord Guest (with whom his colleagues agreed) said that

> ... as long as the offer is in writing, brought to the notice of the employee, capable of being understood by him then, in my view, this part of the section has been complied with.

30 The reference to writing is technically superfluous in the light of the wording of section 141. The second point in *McCreadie* was that it is not necessary for the employer to point out the similarities between the old contract and the new one but only the differences. It was on the necessity to state the differences that Mr Medhurst relied.

31 The point in *Ramseyer Motors* was whether an offer can be contained in several documents. The Queen's Bench Division (to which an appeal from an industrial tribunal then lay) held that it could, and Bridge J adopted the view of the House of Lords in *McCreadie* that the interpretation of the legislation should not be too technical. The facts of *Kaye* were very similar to those of *McCreadie* save that the date for the move of premises was not stated. The NIRC held that that did not invalidate the offer. In our judgment neither of those cases adds anything of significance to *McCreadie* but rather they are examples of the informality principle established in it being applied.

32 The provisions of section 2(4) of the 1965 Act are now in section 141 of the 1995 Act, although differently structured. The only difference is that under section 141 the offer need not be in writing. In *Kaye* there was a subsidiary point about one proposed term not having been stated in

writing, but that is not strictly relevant by reason of a change in the relevant statutory provision. The court held that the term not in writing did not invalidate the offer but it should not be taken into account by the tribunal in determining whether the offer complied with section 2(4).

33 Mr Medhurst cited *Curling* as authority for the proposition that an offer of new employment had to be specific. We entirely accept that as a proposition of law, but as pointed out by Knox J at paragraph 23 of the judgment that is a question of fact for the Tribunal to determine.

34 We find that there was an offer which was sufficiently precise to be capable of acceptance. There was no material difference save for the place of work. Mr Medhurst was only able to point to the mobility clause as being potentially different. We entirely accept that if any new written contract were to be entered into then it would not contain the same provision as there had been in the contract with the transferor. That does not in our view mean that the proposal that the Claimant work from a different site prevents there being an offer for the purposes of section 141. We do not accept that it is necessary for every fine point of any proposed new contract to be covered in any offer. We do not accept the submission of Mr Medhurst that because there was no mention in the discussions of any new mobility clause (or the absence of a clause) then there was no identifiable offer.

35 Mr Medhurst also referred to *Curling* where reference was made to the difference between an employer purporting to invoke a mobility clause on the one hand, and making an employee redundant and offering employment elsewhere on the other. We do not find that point of assistance to us. This case has been put to this Tribunal solely on the basis that there was an offer of suitable employment which was unreasonably refused.

36 Mr Medhurst referred to *Marriot* as being authority for the proposition that there was no offer but only a dictation of new terms. The passage from the judgment of Lord Denning MR to which our attention was drawn was concerned with whether a letter from the employer to the employee referring to a reduction in hourly pay and status was an offer or a dictation of terms upon which the employee was to work. The Court of Appeal decided that the effect was to terminate the employment of the employee within the provisions then applicable to redundancy. We do not find it relevant to the issues which we have to determine because the Employment Appeal Tribunal has already decided that there had been a dismissal of the Claimant.

37 We must therefore consider whether the offer was one of suitable alternative employment in relation to the Claimant, and also whether it was unreasonably refused. Those are two separate matters. In connection with the first element, we must consider the question on an objective basis. We find that the offer was of suitable alternative employment. The job was precisely the same although for a new employer, the status of the Claimant was to be the same, and her salary was the same. Mr Medhurst submitted that the offer of the job at Bethlem was not suitable for the Claimant as a single mother. In our view that

point is a matter to be considered next when deciding whether there was an unreasonable refusal of the offer.

38 We now turn to that second element as to whether there was an unreasonable refusal. We are taking into account the points made by Mr Medhurst in relation to the suitability of the post. Mr Medhurst submitted that the journey to work was increased by ten miles, that there was little flexibility in hours to take into account her childcare responsibilities, and also there was no flexibility about bringing her child into work. He added that there was no reason for this Tribunal to depart from the conclusion of the Employment Appeal Tribunal that there was a material detriment to her. The test in section 141 was very similar to that of material detriment in regulation 4(9).

39 Mr Scott pointed out that flexible attendance times had been discussed and agreed, any extra travelling expenses were to be paid for four years, and the extra travelling time was insignificant. No attempt was made by the Claimant to try the new journey. Further discussions could take place if difficulties arose. It was unreasonable of the Claimant to refuse the offer.

40 We set out the factors we have taken into account and our conclusion. All the relevant circumstances before and after the move to Bethlem were the same, save for the different location. The work had not changed, and the Claimant's domestic circumstances had not changed. The difficulty facing the Claimant is simply that there was no attempt ever made by her to try the journey to or from work. The information supplied by the AA Route Finder facility provided to us was that the quickest and easiest route to the Bethlem site was both shorter and quicker than the one to the Burgess Park site. By any standards the difference was not significant. The Respondent offered flexibility in agreeing to a delayed starting time of 9.15 am to allow time for the taxi to collect the Claimant's child at 8 am. The Respondent agreed to keep the matter under review. The point about bringing the Claimant's child into work was not one which was raised at the time, and as to which there was no evidence of any substance before the Tribunal. We discount that as not being relevant.

41 We find very considerable force in the submission by Mr Medhurst that the test is similar to that under regulation 4(9). The wording in section 141 is of an unreasonable refusal. Paragraph H1552 of Harvey with reference to section 141 is as follows:

> The question is not whether a reasonable employee would have accepted the employer's offer, but whether that particular employee, taking into account his personal circumstances, was being reasonable in refusing the offer: did he have sound and justifiable reasons for turning down the offer?
>
> > "The employee's behaviour and conduct must be judged, looking at it from her point of view, on the basis of the facts as they appeared, or ought reasonably to have appeared, to her at the time the decision had to be made' (*Everest's Executors v Cox[1980] ICR 415*, per the EAT)."
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> That dictum has been cited and applied in several subsequent cases, eg *Hudson v George Harrison Ltd (2003) Times, 15 January, [2003] All ER (D) 381 (Mar), EAT; Ward v Commission for Healthcare Audit & Inspection [2008] All ER (D) 107 (Jun), EAT*).

42 It is clear from the judgment of HHJ Hand QC in the EAT in this case that for the purposes of regulation 4(9) the approach of Lord Hope in paragraph 35 of his speech in *Shamoon v. Royal Ulster Constabulary*[3] should apply. The relevant sentence is as follows:

> Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?

43 The matter has to be approached from the point of view of the Claimant, and not by looking at the reasonableness of the actions of the Respondent nor by weighing up competing arguments.[4]

44 The Employment Appeal Tribunal held that there had been a constructive dismissal because of a fundamental breach of contract by the Respondent, and also a dismissal within regulation 4(9) and, although not specifically articulated, must thereby have held that there had been a material detriment to the Claimant within the meaning of that paragraph in the change of her place of work. Although the wording is different, where it has been found that the Claimant was reasonable in deciding that working from Bethlem would be to her detriment then we fail to see how it could be said that her refusal to accept the offer was unreasonable.

45 We have to conclude that the refusal of the Claimant to accept the offer of the employment at Bethlem was a reasonable one in the circumstances. The Respondent does not therefore obtain the benefit of the exemption from liability to make a redundancy payment. We have not been tasked with determining the amount, and were told that that was not in dispute.

46 The next issue is whether the dismissal was fair or unfair, and that itself breaks down into several different points. The Employment Appeal Tribunal concluded that there was a dismissal within regulation 4(9) of the 2006 TUPE Regulations. That being so, the dismissal has to be automatically unfair in accordance with regulation 7(1) unless regulation 7(2) applies. We will consider that matter first before considering the issue of 'ordinary' unfair dismissal. Regulation 7 insofar as relevant is as follows:

> **7 Dismissal of employee because of relevant transfer**
>
> (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is-
>
> (a) the transfer itself; or
>
> (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.
>
> (2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.
>
> (3) Where paragraph (2) applies-
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> (a) paragraph (1) shall not apply;

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[3] [2003] IRLR 285

[4] See paragraphs 53 and 54 of the EAT judgment

(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

47 Mr Scott also drew the attention of the Tribunal to part of Article 4.1 of Council Directive 2001/23/EC pointing out that there was no definition of 'entailing changes in the workforce':

> The transfer of the undertaking, business or part of the undertaking or business shall not of itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce ....

48 Mr Scott submitted that there were good economic and organisational reasons for the relocation to Bethlem. The Respondent had its own premises available at Bethlem, and would not have to pay rent and service or management charges for the continued use of Burgess Park. That point was not seriously disputed by Mr Medhurst, and we accept it. The difference between them relates to whether such reason(s) entailed a change in the workforce.

49 Mr Medhurst drew the attention of the Tribunal to the unreported judgment of HHJ McMullen in the Employment Appeal Tribunal in *London Metropolitan University v. Sackur*[5] in which case authorities were reviewed starting with the seminal case of *Delabole Slate Ltd. v. Berriman*.[6] Mr Medhurst submitted that moving employees did not involve a reduction in the workforce or a change in functions. The Tribunal was, he said, bound by *Berriman* and the ETO defence could not succeed.

50 Mr Scott submitted that the reorganisation of the workforce into one place involved a change to a section of the workforce within regulation 7(2) and referred to *Crawford v. Swinton Insurance Brokers Ltd.*[7] and the more recent authority of *Nationwide Building Society v. Benn and others*[8]. *Berriman* was also referred to in that case, as indeed was the judgment of the Employment Appeal Tribunal in this case.

51 We have no difficulty in finding that the reason for the dismissal was connected with the transfer. That reason was that the Respondent did not have any right to remain at Burgess Park, and decided to relocate the Claimant to Bethlem. That matter is not in dispute. What is in dispute is whether the reason was an economic, technical or organisational reason entailing changes in the workforce, and we have already said that it is the reference to changes in the workforce upon which we must make a determination.

52 The headnote to the ICR report of *Berriman* is as follows:

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[5] EAT/0286/06

[6] [1985] ICR 546 CA

[7] [1989] ICR 85 EAT

[8] [2010] IRLR 922 EAT

... that the employers' objective in dismissing the employee was to produce a standardisation in rates of pay for all their employees and not a 'reason entailing changes in the workforce', since a change in the workforce meant a change in the overall number or the functions of the personnel employed and, accordingly, regulation [7(2)] did not apply and the dismissal was unfair.

53 The facts very briefly were that on a transfer one employee was offered the same pay terms as pre-existing employees in order to effect a standardisation, and he resigned. In *Crawford* the EAT held that a change in the job functions of two members of staff was a change in the workforce, although there was no change in the numbers employed. The EAT applied *Berriman* and there was a substantial analysis of the judgment.

54 The next authority chronologically is the *London Metropolitan University* case. In that case there was a merger of London Guildhall University and the University of North London to form LMU. The contracts were different. It was decided to move LGU staff onto UNL type contracts. The appeal by the employer against the adverse finding of the Employment Tribunal was not allowed to proceed to a full hearing because all that occurred was a change in terms and conditions, and that did not fall within the wording in the Regulations as interpreted in *Berriman*.

55 That brings us to *Nationwide Building Society*. That case resulted from the takeover of Portman Building Society by Nationwide. The Employment Tribunal held that the change to the roles of the employees in question, and the changes to the pre-existing bonus scheme were grounds for a constructive dismissal and also a dismissal under regulation 4(9). The next issue was whether there was an ETO reason. There was no dispute that there was an organisational reason. The issue, as here, was whether that entailed changes in the workforce. Slade J noted that the TUPE regulations refer to part of an undertaking and it is not necessary for the whole of the workforce to be affected for there to be an ETO reason. However, it is apparent from the part of the judgment of the Employment Tribunal which was quoted in the judgment of the EAT that it had been found that there had been a change in the job functions of the transferring employees in question.

56 None of the authorities cited to us deal specifically with the point as to whether a change of workplace of the transferring employees falls within the concept of entailing changes in the workforce. Mr Scott submitted that a change from a dispersed workforce to one forming part of the whole at Bethlem constituted a change in the workforce. Mr Medhurst submitted that the only categories allowed by *Berriman* and subsequent authorities are a reduction in the workforce or a change in functions.

57 This Tribunal is of course bound by *Berriman* and subsequent authorities. In *Berriman* the issue was a change in terms of employment, and that was held not to be an ETO entailing changes in the workforce. *Crawford* and *Nationwide Building Society* are cases where the job function changed. *London Metropolitan University* on the other hand is a case where there was an attempt to harmonise terms, and it was held not to be a qualifying ETO. In our judgment this is a case which falls within the *Nationwide Building Society* category and there was no economic,

technical or organisational reason entailing changes in the workforce. The dismissal was therefore automatically unfair.

58 The matter will be listed for a hearing as to remedies for the Claimant.

ORDERS

1 The matter will be listed for a hearing to consider a remedy for the Claimant with one day allocated. A separate notice of hearing will be issued.

2 The Tribunal **orders** that on or before 4 February 2010 the Claimant provides to the Respondent a provisional schedule of loss, and that on or before 18 February 2010 the Respondent provides to the Claimant a counter-schedule or comments upon the Claimant's schedule setting out what matters are agreed and what are in dispute.

3 The Tribunal **orders** that not later than 14 days before the further hearing the Claimant supplies to the Respondent the following:

3.1 A schedule of loss made up to the date of the hearing;

3.2 A witness statement to substantiate the losses claimed;

3.3 By way of standard disclosure a bundle of all documents material to the losses claimed and their mitigation.

4 The Tribunal **orders** that not later than 7 days before the further hearing the Respondent supplies to the Claimant a copy of any witness statement and documents upon which it proposes to rely at the remedies hearing.

Employment Judge Baron

12 January 2011

Judgment sent to the parties on

12/01/2011

and entered in the Register

for Secretary of the Tribunals