



## EMPLOYMENT TRIBUNALS

**Claimant**  
**Ms R Brar**

**v**

**Respondents**

**(1) Capita Plc**  
**(2) Re (Regional Enterprise)**  
**Limited**  
**(3) London Borough of Barnet**

## OPEN PRELIMINARY HEARING

**Heard at:** London Central (By CVP remote videolink)

**On:** 11 July 2023

**Before:** Employment Judge Brown

### Appearances

**For the Claimant:**

**Ms S Aly, Counsel**

**For the Respondents:**

**1.& 2. Mr J Arnold, Counsel**

**3. Ms G Crew, Counsel**

**4. Did not attend and was not represented**

## JUDGMENT AT AN OPEN PRELIMINARY HEARING

**The Judgment of the Tribunal is that:**

- 1. The Claimant was employed by Re (Regional Enterprise) Limited from 1 October 2013 to 31 March 2023, when her employment transferred to LB Barnet under TUPE 2006.**
- 2. The Claimant did not object to the transfer to LB Barnet.**
- 3. Re (Regional Enterprise) Limited and LB Barnet are the correct Respondents to the Claimant's claim. Capita plc is removed as a Respondent.**

## REASONS

1. This Public Preliminary Hearing (“PH”) was listed to determine the following issues:
  - a) Who has been or is the claimant’s employer at all material times;
  - b) Who is properly a respondent to the claim;
  - c) Whether the claimant is still employed by one of the respondents and, if not, when her employment terminated and by whom was it terminated;
  - d) Considering the List of Issues further and giving any further necessary directions as to case management.
2. There was a bundle of documents. I read the witness statements of the Claimant, of Sharni Kent, Head of Employee Relations & Reward at the London Borough of Barnet and Rachel Ganderton, Employee Relations Partner at Capita plc. I heard live evidence from all those witnesses. There was a written closing submission from the First and Second Respondents, Capita plc and Re (Regional Enterprise) Limited. All parties who were present made oral submissions.

### **Background**

3. By a claim form presented on 17 January 2023 the Claimant brought complaints of direct race and sex discrimination, harassment related to race and sex, equal pay & victimisation against the First Respondent, Capita plc. The Second and Third Respondents were joined as Respondents to that claim at a preliminary hearing on 24 May 2023.
4. The Claimant presented a second claim, for unfair dismissal, in claim number 2210359/2023, against those same three Respondents and Capita Business Services Ltd, a Fourth Respondent.
5. On 6 July 2023 Judge E Burns ordered that the 2 claims, 2200321/2023 and 2210359/2023, are consolidated.
6. The Claimant feels strongly that her claims are against the First Respondent, Capita plc. The Respondents argue that the Claimant was never employed by the First Respondent, but that her employment transferred from the London Borough of Barnet in 2013 to Re (Regional Enterprise) Limited. They say that there was a transfer of services back from Re (Regional Enterprise) Limited to the London Borough of Barnet on 1 April 2023. Capita plc and Re (Regional Enterprise) Limited say that the Claimant objected to that transfer and that her employment terminated by way of resignation on 31 March 2023.
7. The Third Respondent has recognised the Claimant as its employee from 1 April 2023 and has paid her since then. However, at this hearing, it contended that the Claimant may have objected to the 2023 transfer.
8. All the Respondents contend that, if there was an automatic transfer under TUPE in 2023, liability for all the detriments which the Claimant alleges arose while she was employed by Regional Enterprise /Capita transferred to LB Barnet. All the Respondents who were present also contended that, even if the Claimant transferred to Barnet, Re (Regional Enterprise) Limited should remain as a Respondent to the proceedings because there are issues which it is in the interests of justice to be determined between it and the Claimant under r34 ET Rules of Procedure 2013.

9. The Claimant initially appeared to be saying that she objected to the 2023 transfer. I gave the Claimant time to consider her position at the start of the hearing. Afterwards, the Claimant's position, through her representative, was that she objected to the transfer but that she did not make a proper objection before her employment transferred.
10. The Claimant contended that Capita plc and the London Borough of Barnet are the correct Respondents to the claim.
11. All parties agreed that the Fourth Respondent in the second claim did not need to play any part in the hearing today.

**Relevant Facts**

12. These facts are set out for the purposes of this open preliminary hearing and are not intended to be determinative of any issues of liability to be decided at the final hearing.
13. The Claimant was employed as a Senior Planning Officer in the Planning Policy Team at London Borough of Barnet from 6 December 2004.
14. A London Borough of Barnet Cabinet Report dated 28 March 2011, p685-686, set out a Business Case for a Development and Regulatory Services (DRS) project, recommending that the Council undertake a procurement process to identify a strategic partner for the delivery of a number of Council-run services, including Planning Development Management and Strategic Planning.
15. By 17 July 2013, relevant LB Barnet employees, including the Claimant, were informed that Capita Symonds had been awarded the DRS contract and that they would be transferred to the joint venture, p687.
16. On 18 July 2013 Capita (BDRS) Ltd. was incorporated, p275, 690. BDRS stood for Barnet Development & Regulatory Services, p690 .
17. On 5 August 2013, p691-698, a Deed Form of Parent Company Guarantee was signed between (1) "The London Borough of Barnet" of North London Business Park, Oakleigh Road South, London N11 1NP (the Authority); and (2) "Capita PLC", a company incorporated in England and Wales with company registration number 02081330 whose registered office at 71 Victoria Street, Westminster, London SW1H 0XA.
18. On 20 September 2013, Capita (BDRS) Limited changed its name to Re (Regional Enterprise) Limited, registered address 17 Rochester Row, London SW1P 1QT, p275, 274, 365.
19. It was not in dispute that Re (Regional Enterprise) Ltd was a part of the Capita Group of companies and was set up as a joint venture between LB Barnet and Capita plc to deliver LB Barnet's outsourced services.
20. On 26 September 2013, employees of LB Barnet planning department, including the Claimant, were informed that they would be moving to the new employer under TUPE from 1 October 2013, p699.
21. On 1 October 2013 London Borough of Barnet and Capita Plc's 10-year outsourcing deal was completed and a number of Council owned back office and regulatory services, including the Claimant's area of work, "planning and building

control services”, were transferred to Re (Regional Enterprise) Ltd. The Claimant was TUPE transferred on that date from London Borough of Barnet to Re (Regional Enterprise) Ltd, p365, 366.

22. On 9 January 2017 the Claimant entered into a new contract of employment, p290.
23. C11 stated, “This statement, in conjunction with the Capita Employee Handbook (Your Guide to Capita), sets out the main terms and conditions on which Re (regional Enterprise) Ltd employs Rita Brar with effect from 9 January 2017.” P290.
24. C11 further provided, "The Company" which is referred to throughout this statement is defined as: Capita plc or any Capita company; that is any company of which it is a subsidiary (its holding company) and any subsidiaries of The Company or of any such holding company.”
25. C12 provided, “This contract, and your continued employment by Re (regional Enterprise) Ltd, is subject to you having and/or gaining, and maintaining the right to live and work in the UK...”.
26. C18 provided, “... your employment will be subject to one month's notice, given in writing by you to Re (regional Enterprise) Ltd.” P292.
27. C122 provided, “ As Capita plc is a public company, it is required to have in place arrangements for the prevention of dealing in its shares or other securities based on inside information. As an employee of Capita plc or one of its subsidiaries, you may become aware of confidential, price-sensitive information relating to Capita plc, its subsidiaries or any company for which it or they act ("inside information")” p295
28. The contract was titled, “Capita plc Statement of terms and conditions of employment.”
29. It said that sickness would be managed in accordance with the procedures set out in the “Capita Employee Handbook”.
30. The Claimant told the Tribunal that this new contract was different to the contract she had been given by Re (Regional Enterprise) Ltd when she transferred to in in 2013. She told the Tribunal that, after signing her new contract, she was allocated to work for other originations as well as LB Barnet. She also pointed out that the documentation which she was provided on transfer was branded “Re”, but later documentation, including her 2017 contract was branded “Capita”.
31. In the May 2022 local elections, the Labour Party won control of Barnet Council. Labour’s manifesto stated that it would bring previously outsourced services back in-house to LB Barnet. The first phase involved returning services including Planning, Highways and Environmental Health to Barnet from Re (Regional Enterprise) Limited, with effect from 1 April 2023.
32. The Claimant submitted a formal letter of grievance to Capita on 22 September 2022. That grievance forms the background to the Claimant’s substantive allegations in her first claim to the Tribunal.
33. On 6 January 2023 the Claimant was notified that she would be TUPE transferred from her employer to the London Borough of Barnet, p391. The letter said,” This service provision change will be a relevant transfer in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). As a result,

employees who have been identified as in scope and have been written to by way of this letter will automatically transfer from their current Capita employer, Capita RE JV ('Capita') to London Borough of Barnet on 1st April 2023." P391.

34. On 21 March 2021 Sara Roe from Capita Employee Relations Hub wrote to the Claimant asking for her permission to share her contact details with Sharni Kent, the Head of Employee Relations at the London Borough of Brent. On 27 March 2023 the Claimant replied, asking that her details not be shared with anyone, referring to her illness. She said, p412, "I was seen by my doctor last week and therapist this morning and both are trying their best to help me recover from the complications of ongoing activities. Attached is the latest sick note. There is no point in making me a part of tupe grouping as I will not be able to rejoin work or continue with my work anytime soon due to my health complications. Both Innes and Philip are already aware of my continuous employment wishes (until the court case is complete) mentioned in the court documents (their solicitor was copied in). Moreover, I understand that Ken Bean (nontupe, capita employer) is keen to go to Barnet council and is being swapped with my position to join my team."
35. The Claimant told the Tribunal, and I accepted, that she had written to the Tribunal in the course of these proceedings, stating her wish to remain with her current employer, who she considered was Capita, while the Tribunal proceedings and her grievance was ongoing.
36. On 29 March 2023 Sara Roe emailed the Claimant, saying that she understood that the Claimant's preference was to remain with Capita rather than transferring to LB Barnet, p478. Ms Roe said,

"Our view is that your employment should transfer here to Barnet. However we do appreciate that your internal grievances and complaints are ongoing. If your preference is not to transfer and to stay with Capita, we are prepared to explore the options.

#### Options with respect to proposed transfer

1. That your employment automatically transfers to Barnet on 1 April 2023. This is what will happen unless anything else can be agreed.
2. That we agree with you that your employment will remain with Capita. That is not the standard way TUPE works and could only happen if you, we and Barnet expressly confirm our agreement to this. Your employment would be kept on the same terms as before (subject to the same policies such as sickness absence policy and sick pay provisions). If you recover in the future and are able to return to work, we may not have a role for at the time though – we would have to explore redeployment with you to another suitable role at the time, but if that's not possible your role would be redundant.
3. You do have a formal right to object to the TUPE transfer, which gives you an absolute right not to transfer to Barnet, but we would strongly recommend against you taking that option, as it's likely not to be in your best interests. Whilst we cannot prevent you submitting any such objection prior to the transfer to block it applying to you, you should seek advice before doing so.

We will be assuming that the transfer does go ahead, as per option 1, unless we hear otherwise from you. If you did want to take up option 2 and keep your employment with Capita, you need to let us know before the transfer date and we

would then need to agree your employment continuing. In the event that you decided to formally object (not recommended), you should let us know that before the transfer date.”

37. On 31 March 2023, a reply was sent from the Claimant's email account saying, “ ... as per her occupational therapist advice, Rita requires extra time to respond to any communication as she is on sick leave . Therefore, without having had the opportunity to review the latest documentation and benefit from any additional information provided, her preference has been to remain with Capita until the Grievance and Court case is completed. This should not prejudice her right to move to Barnet Council in the future.” p477.
38. The Claimant told the Tribunal that she had dictated this email to her husband. She agreed, in cross examination, that she had done so of her own free will. At one point in her evidence, she agreed that she had opted out of the transfer. Elsewhere in her evidence she said that she had taken a middle option. She agreed that she wanted to stay with Capita until her grievance and Tribunal claim were complete, partly because she did not wish to work with the people about whom she had raised the grievance. She also gave evidence that she had said that this should not prejudice her right to move to LB Barnet because she was ill and not in a position to seek legal advice.
39. On 1 April 2023 there was a TUPE transfer back to London Borough of Barnet of all council services previously delivered by the joint venture.
40. On 17 March 2023 Ms Ganderton had sent, to LB Barnet, a list of employees who were expected to be TUPE transferring to LB Barnet on 1 April 2023, p469 – 474. The Claimant was on the list, as were other Principal Planners. The people who were on the final list of employees were sent a letter dated 28 March 2023, p419, which confirmed that they would be transferring under TUPE to Barnet on 1 April 2023. Sara Roe emailed this letter to the Claimant's personal email address on 29 March 2023, p436.
41. Ms Ganderton intended to send a final list of transferring employees to LB Barnet on 31 March 2023, but was unable to do so because of a cyber attack.
42. Every employee who was transferred to LB Barnet was sent a P45 automatically. The Claimant was automatically sent a P45 because she had been included on the list of transferring employees.
43. The Claimant was treated as having transferred to LB Barnet by LB Barnet and it has paid her salary since 1 April 2023.
44. In light of the Claimant's 31 March 2023 email, Ms Ganderton spoke to Sara Roe and Adam Ellis (Senior ER Consultant). They told Ms Ganderton that, in the absence of anything to the contrary being agreed between the parties, the Claimant would be deemed to have transferred to Barnet under TUPE on 1 April 2023. As nothing to the contrary had been agreed, they said that the Claimant should be treated as having transferred, although it remained possible this would be reversed if an agreement was later reached with her. On 5 April 2023, Ms Ganderton emailed Capita's Peoplehub asking that the Claimant's termination be processed as of 31/03/2023.
45. After 31 March 2023 there were discussions between the Claimant, Capita and LB Barnet about the Claimant continuing to be employed in the Capita Group, p493.

These discussions did not result in an agreement that the Claimant would be employed in Capita.

46. Before the 1 April 2023 transfer, the First Respondent, Capita, was stated to be the Claimant's employer, on her payslips and other internal documents.
47. Sara Roe, who had engaged in much correspondence with the Claimant concerning the Claimant's grievance and potential transfer, had an email address which read "Roe, Sara (Group HR)" at capita.com. Her job title was "Employee Relations Partner - Employee Relations Hub".
48. The First Respondent had received the Claimant's grievance and investigated it internally from September 2022 to March 2023. The Claimant received correspondence about her grievance from Philip Dixon, Head of Capita's Business Integrity team, which is an independent team that has a reporting line into Capita's Chair of the Audit & Risk Committee, who sits on Capita's Board.
49. Ms Ganderton told the Tribunal that, where the Capita Group has employees engaged in the provision of a particular service, it is typical for those employees to be employed by the Capita subsidiary responsible for that service.
50. She also told the Tribunal, and I accepted, that most, if not all, HR letters and contracts of employment have the Capita logo on them, irrespective of which Capita entity is the employer. This does not mean that an individual is employed by Capita Plc, just that they are part of the Capita Group.
51. Ms Ganderton told the Tribunal that the Capita Employee Handbook applies to employment by any company within the Capita Group; it would not be practicable to have a different handbook for each subsidiary company. The Claimant disputed this.
52. Ms Ganderton also gave evidence that payroll for all companies within the Capita Group is run centrally by the Capita Plc payroll team. She referred to an email exchange between her and the Head of Payroll on 23 June 2023, p354-356, in which the Head of Payroll stated that Capita Plc operates under a single PAYE reference for HMRC purposes. Ms Ganderton told the Tribunal that it is this PAYE reference that attaches itself to payroll and any payroll outputs that the payroll team produce from it. An employee of any Capita company, is paid by Capita Plc and a payslip or P60 will show Capita Plc as the employer. In relation to P45s, Ms Ganderton told the Tribunal that P45 **section 9 "Works number/Payroll number and Department or branch (if any)"** shows the employing entity.
53. The Claimant's P45 recorded Re (Regional Enterprise) at **section 9** and Capita at **section 13 Employer name and address**, p347.

#### **Relevant Law**

54. *By Regulation 4 Transfer of Undertakings (Protection of Employment) Regulations 2006*

#### *4 Effect of relevant transfer on contracts of employment*

*(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be*

*terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*

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

*(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and*

*(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.*

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

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

55. Paragraph (7) does not lay down any procedure for objection. It has no requirement of writing and objection can be construed from word or deed or both, even though the effects on the employee can be draconian: *Hay v George Hanson (Building Contractors) Ltd* [1996] IRLR 427, EAT. In that case the Tribunal had found that the employee had taken all possible steps within his capacity to resist the transfer. For example, he had sought alternative employment with the transferor, without success, and after the transfer had continued to seek through his union a redundancy package from the transferor. At one stage, the transferee had written to the employee informing him that, in its opinion, his behaviour meant that he was objecting to the transfer but received no reply from either him or his union. On appeal, the EAT upheld the Tribunal's decision that the Claimant had objected to the transfer. It stated that the word 'object' in the context of what is now Reg 4(7) TUPE 2006 means a refusal to consent to the transfer, and that such a state of mind does not amount to an effective objection unless and until it is conveyed to the transferor or the transferee. That said, objection could be imputed by either word or deed, or by both. In each case, it would be a question of fact whether the employee's state of mind amounted to a refusal to consent to the transfer and whether that state of mind was in fact brought to the attention of the transferor or transferee prior to the transfer.
56. In *Senior Heat Treatment Ltd v Bell* [1997] IRLR 614, EAT, the employees were given three options: (a) alternative employment within the transferor; (b) transfer to the transferee with existing conditions of employment and full continuity of employment, in accordance with the Transfer of Undertakings Regulations; or (c) exercise of the right under the Regulations to "opt out" of the transfer, in which case a payment would be made in accordance with the relocation severance package. The employees were asked to complete a form stating their preferred option. The employees ticked the third box, which read: "I do not wish to transfer to Senior Heat Treatment pursuant to the Transfer of Undertakings (Protection of



Employment) Regulations 1981 and would like details of the redundancy payment which the company proposes to make to me ...". Their employment with the transferor ceased on Friday, 28 April 1995 when the transfer took place, and they received redundancy payments in accordance with the severance package. Before that date, however, the employees had entered into contracts of employment with the transferee and they commenced work under those contracts on Monday 1 May 1995. The EAT decided that (now Regulation 4(7)) was inserted into TUPE to deal with the case of an employee who objects to working for the new employer and accords with the principle that a person cannot be compelled to work for another. It cannot be construed as meaning more than that an employee who, before the transfer date, informs either the transferor or the transferee that he objects to being employed by the transferee will not be treated as having been dismissed by the transferor and his employment will not automatically be transferred to the transferee. Whether an employee does object to being employed by the transferee is a question of fact for the industrial tribunal. The EAT decided that, in that case, before the relevant transfer date, the employees had entered into contracts of employment with the appellants to take effect immediately after the transfer. In those circumstances, the tribunal was entitled to find that the employees' acceptance of the option which stated that they did "not wish to transfer" to the appellants "pursuant to the Transfer of Undertakings Regulations", did not amount to an objection by them to being employed by the appellants as a result of the transfer.

57. in *Capita Health Solutions Ltd v McLean* [2008] IRLR 595, EAT the Appeal Tribunal held that an employee who had objected to her employment transferring to an outsourcing company, but who had subsequently agreed to work on a six-week secondment with the transferee, had not validly objected to the transfer. The EAT decided that her acceptance of the secondment indicated that she was prepared to — and in fact did — work for the transferee and that this was inconsistent with a valid objection. The EAT reached this conclusion even though it was clear that the employee had stated her objections to the change in the identity of the employer by raising a grievance and giving notice of resignation. However she agreed to go to work for the transferee under a 'secondment' arrangement during the six weeks she was working out her notice. Lady Smith, presiding, said, 'when what was said and done is looked at as a whole, the only proper interpretation that can be put on it is that the claimant did not object to being employed by the [transferee]. She was, clearly, only prepared to work for them for a limited period of six weeks but that being so, she cannot, at the same time, insist that she objected. What her approach shows is that she was in fact agreeable to working for the [transferee] albeit only for a short period. ...'.
58. In *Celtec Ltd. v Astley* [2006] IRLR 2006, HL, Lord Bingham of Cornhill said, at paragraph 55, "55. On the other hand it is a fundamental right of the employee to be free to choose his employer. So he cannot be obliged to work for an employer whom he has not freely chosen: Katsikas, paragraph 32. From this it follows that it is open to an employee whose contract of employment would otherwise be transferred automatically from the transferor to the transferee on the date of the transfer of his own free will to withdraw from this arrangement by declining to enter the employment of the transferee: Mikkelsen, paragraph 16; Berg, paragraph 12; Katsikas, paragraph 32. That, then, is the extent of the sole reservation referred to in paragraph 37. It does not, as my noble and learned friend Lord Mance suggests, work the other way round. It does not enable effect to be given to an employee's

wish to continue to be employed by the transferor while continuing to be employed in the unit to which he has been assigned after its transfer to the transferee. But the application of the rule that he can withdraw from the arrangement depends on two things: first, that the employee is in a position to choose whether or not to enter the employment of the transferee after the date of the transfer; and second, that he in fact exercises that choice by deciding of his own free will not to do so.”

59. *By Regulation 18 TUPE Regs*

*“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.*

60. *S203 Employment Rights Act 1996* requires certain conditions and formalities to be complied with in order for an agreement to be valid and enforceable, including that the agreement must be in writing, must relate to the particular proceedings, and the employee must have received advice from a relevant, insured, independent adviser as to the terms and effect of the proposed agreement and its effect on his ability to pursue his rights before an employment tribunal.

**Discussion and Decision**

61. **The Claimant’s Employer 1 October 2013 – 31 March 2023**

62. It was not in dispute that the Claimant TUPE transferred to RE (Regional Enterprise) Limited on 1 October 2013. It was not in dispute that she was employed by Re (Regional Enterprise) Ltd from that date continuously until 9 January 2017
63. I decided that, in accordance with the express terms of the Claimant’s contract dated 9 January 2017, p290, the Claimant continued to be employed by Re (Regional Enterprise) Ltd after 9 January 2017. The contract expressly stated at cl1, “ Re (Regional Enterprise) Ltd employs Rita Brar with effect from 9 January 2017.” Cl2 expressly provided, “This contract, and your continued employment by Re (regional Enterprise) Ltd, is subject to you having and/or gaining, and maintaining the right to live and work in the UK...”.
64. I did not consider that the fact that the contract also described the contract as being “Capita plc Statement of terms and conditions of employment” indicated that the Claimant was, in fact, employed by Capita plc. Nor did I consider that other references to Capita contradicted the express statement that the Claimant was employed by (Re Regional Enterprise) Ltd.
65. The references to Capita plc were consistent with the provision in cl1: “‘The Company” which is referred to throughout this statement is defined as: Capita plc or any Capita company; that is any company of which it is a subsidiary (its holding company) and any subsidiaries of The Company or of any such holding company.’ That is, that the Company in the contract was Capita or any of its subsidiaries.
66. It was not in dispute that Re (Regional Enterprise) Ltd was part of the Capita group. The references in the contract to Capita and The Company were therefore

consistent with the Claimant being employed by Re (Regional Enterprise) Ltd, which was a subsidiary of, or part of, the Capita Group.

67. Taken as a whole, the contract provided that the Claimant was employed by Re (Regional Enterprise) Ltd, which was a Capita group company. It did not provide that the Claimant was employed by Capita plc.
68. I agreed with the Respondents that the use of Capita logo, Capita employee handbook and name of Capita on pay slips are satisfactorily explained by the evidence of Rachel Ganderton: The use of the Capita logo indicates that the employee is employed by an entity which is part of the Capita group; The employee handbook is not exclusive to Capita plc employees as it would not be practicable to have a different handbook for each subsidiary company; and Payroll for all companies within the Capita group is run centrally by the Capita plc payroll team.
69. I also noted that, while on the Claimant's P45, section 13 "Employer name and address" gave Capita plc's name and address, on the same form, section 9 "Works number/Payroll number and Department or branch (if any)" recorded Re (Regional Enterprise). That indicated that Re (Regional Enterprise) was the relevant branch of Capita which employed the Claimant.
70. All these things were consistent with the Claimant being employed by Re (Regional Enterprise), which was itself part of the Capita Group.
71. The involvement of Capita HR in the Claimant's grievance was also explained by the fact that Capita appears to have Group HR function. This is evident from the email addresses of Sarah Roe, for example.
72. The First and Second Respondent appeared to have used "Capita" to mean a company in the Capita group. This was consistent with group "Capita" branding.
73. In any event, I considered that none of these matters would be sufficient to displace the express terms of the contract.
74. The Claimant was employed by Re (Regional Enterprise) Ltd from 1 October 2013 to 31 March 2023.

### **The Claimant's Employment After 31 March 2023**

75. Taking the Claimant's conduct and correspondence as a whole, I did not find that the Claimant objected to the transfer to LB Barnet.
76. It was clear that the Claimant's preference, as she stated in writing before the transfer of services from Re (Regional Enterprise) to LB Barnet on 1 April, was to stay with Capita and not to transfer to Barnet. The Claimant said this in her emails of 27 and 31 March 2023 and she repeated this in evidence at the Tribunal.
77. I agreed with the Claimant that I also needed to consider both Sara Roe's email on 29 March 2023, p478 and the Claimant's reply on 31 March 2023, p488, in deciding whether the Claimant did object to the transfer.
78. I noted that Ms Roe gave the Claimant 3 options with respect to proposed transfer:  
  
"1. That your employment automatically transfers to Barnet on 1 April 2023. This is what will happen unless anything else can be agreed.

2. That we agree with you that your employment will remain with Capita. That is not the standard way TUPE works and could only happen if you, we and Barnet expressly confirm our agreement to this. ...

3. You do have a formal right to object to the TUPE transfer, which gives you an absolute right not to transfer to Barnet, but we would strongly recommend against you taking that option, as it's likely not to be in your best interests. Whilst we cannot prevent you submitting any such objection prior to the transfer to block it applying to you, you should seek advice before doing so."

79. I noted that Ms Roe specifically said that the Claimant would transfer to LB Barnet on 1 April 2023 "unless anything else can be agreed". The second option was an agreement that the Claimant's employment remaining with Capita, which Ms Roe said would need to be agreed between the transferor, Barnet and the Claimant.
80. I considered that, by her reply on 31 March, the Claimant had chosen option 2 of Ms Roe's 3 options – that, by agreement, she should stay with Capita.
81. I did not accept the Respondents' contention that the Claimant had chosen a fourth option. The Claimant was simply setting out her perspective on how her continued employment with Capita would work. Ms Roe had also set out a possible future scenario in that regard, but she did not put this in definitive terms. The Claimant's description of her choice of option 2 was not inconsistent with anything Ms Roe had stated about option 2.
82. Ms Roe had said, however, that if no agreement was possible, the Claimant's employment would automatically transfer to Barnet on 1 April 2023. I decided that, on the facts, the Claimant did not challenge this. She accepted option 2 and, therefore, as a matter of construction, she also accepted that, if there was no such agreement, she would transfer to LB Barnet.
83. I considered that the Claimant's statement that her choice to remain with Capita "should not prejudice her right to move to Barnet Council in the future" was consistent with accepting that she could transfer to LB Barnet. Putting it another way, this statement was inconsistent with the Claimant objecting to her transfer to LB Barnet.
84. The Claimant was also given by Ms Roe, the "formal right to object to the TUPE transfer" as her third option. None of the wording of the Claimant's 31 March 2023 indicated that she had chosen the option to object to the transfer. She did not use any of the language of option 3.
85. I was bolstered in my conclusion that the Claimant did not object to the transfer by the fact that the Second Respondent understood, at the time, that the Claimant had not objected to the transfer.
86. There was also, on the facts, no agreement that the Claimant could stay with Capita. That being the case, the fact that the Claimant wished to continue to be employed by RE (Regional Enterprise) Ltd, or Capita, had no effect –per Lord Bingham in *Celtec v Astley* at [55].
87. As a result, given that the Claimant did not object to the transfer, the Claimant's employment transferred to the London Borough of Barnet on 1 April 2023. No agreement was reached with the Claimant that satisfied Regulation 18 TUPE and which would have allowed the Claimant to opt out of the operation of the TUPE

provisions and there was nothing else to prevent the operation of the regulations. The transfer was automatic – *Celtec v Astley*.

88. The Claimant was employed by LB Barnet from 1 April 2023. She continues to be employed by LB Barnet.

**The Correct Respondents to the Claim**

89. The Claimant is employed by LB Barnet and all rights and liabilities in relation to her contract have transferred to LB Barnet. LB Barnet is a correct Respondent to the claim. As the Claimant was employed by RE (Regional Enterprise) Ltd immediately before the transfer, and the facts of her claim relate to matters which occurred when she was employed by RE (Regional Enterprise) Ltd, it is also a correct Respondent to the claim. There are issues which it is in the interests of justice to be determined between it and the Claimant under r34 ET Rules of Procedure 2013.

**Case Management**

90. A Judicial Mediation is due to take place in the next 2 weeks.
91. A date for a future case management hearing could not be agreed between the parties at this hearing. If the claim continues after mediation, the parties will need to agree a date for a case management hearing.

**EMPLOYMENT JUDGE BROWN**  
**On: 11 July 2023**

**SENT TO THE PARTIES ON**

**13/07/2023**

**FOR SECRETARY OF THE TRIBUNALS**