The Transfer of Undertakings (Protection of Employment) Regulations 2006

AN OVERVIEW

Introduction to Employment Law

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INTRODUCTION TO EMPLOYMENT LAW

The Transfer of Undertakings (Protection of Employment Regulations) 2006 ("TUPE")

Introduction

This paper is intended to provide an overview of the law. TUPE is a complex subject on which whole books have been written and a huge number of cases have been fought. As a result, this paper inevitably contains many simplifications but it should help you deal with the questions that come up most frequently and aid you to know where to start your research on any particular topic, not end it.

The background

The law governing the transfer and protection of employees in the circumstances of business mergers, acquisitions and outsourcings is known colloquially as 'TUPE', standing for, in its latest incarnation, the Transfer of Undertakings (Protection of Employment) Regulations 2006.

The original Regulations date back to 1981 which itself gave effect to the Acquired Rights Directive 1977. Following a revised directive in 2001 and pressure from the unions, important changes were made resulting in an updated version of TUPE which came into force in April 2006.

TUPE 2006 amended TUPE 1981 as follows:

- The right to renegotiate contractual terms derived from collective agreements one year after the transfer provided that the change is overall no less favourable to the employee.
- Acknowledgement of the "static" interpretation of terms under a collective agreement incorporated into an employment contract if the transferee does not participate in the post-transfer negotiations leading a subsequent change. This reflects the CJEU's decision in *Alemo-Herron and others v Parkwood Leisure Ltd Case C-426/11 ECJ*.

- The wording under regulation 4 (the right to amend terms and conditions of employment) and regulation 7 (protection against dismissal) was amended to align it more closely with the wording of the Acquired Rights Directive. The revised regulations prohibit dismissals or variations if the sole or principal reason is "the transfer" rather than the then wider prohibition if the dismissal or variation was for a reason "in connection with the transfer".
- A post-transfer dismissal for a geographic change in location will be an "ETO reason entailing a change in the workforce", this reversed the previous position under case law – see *Abellio London Limited (formerly Travel London Limited) v Musse and others [2012] IRLR EAT*.
- Employee liability information under regulation 11 has to be provided at least 28 days before the transfer rather than the previous 14 days.

Amendments were made under the Trade Union and Labour Relations (Consolidation) Act 1992 to confirm that under statute collective redundancy consultation that begins pre-transfer can count towards compliance with collective redundancy consultation, provided that the transferor and transferee agree and where the transferee has carried out meaningful consultation.

The Department of Business Innovation & Skills published updated TUPE guidance in January 2014:https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf.

The purpose of the Directive and TUPE

The purpose of TUPE is to protect employees when the business in which they work changes hands. For TUPE to apply there has to be a change in the person who is carrying on the business and who bears responsibility as employer (*Berg –v- Besselsen [1990] ICR 396*). TUPE works by transferring staff and liabilities from the old contractor to the new contractor, or from the old owner of the business to the new owner. The employees affected (with some exceptions) cannot lawfully be sacked but rather automatically continue in their jobs with their existing terms and conditions and their continuity of service preserved intact. Broadly speaking it is as if the new employer has always employed the people it has inherited.

TUPE also requires the old employer to give the new employer information about the staff transferring, their terms and conditions and any associated liabilities.

In addition, staff representatives must be informed, and normally consulted, over the implications of the transfer. If there is no recognised trade union or works council, an ad hoc elected group must be formed for this purpose. Amendments to TUPE (by Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023) provide that where a transfers occurs on/after 1 July 2024 direct consultation with employees will be permitted, where worker representatives are not already in place, in the case of small businesses (i.e. with fewer than 50 employees), and all sizes of business where a transfer of fewer than 10 employees is proposed.

IMPACT OF BREXIT

The European Union (Withdrawal) Act 2018 (EUWA) effectively provided that existing CJEU judgments and domestic case law in relation to EU law made on or before the end of the Transition Period (i.e. 31 December 2020) (retained EU case law) were to be given the same binding and precedent status as domestic case law.

The UK Supreme Court and Court of Appeal had the power to depart from retained EU case law if "it appears right to do so" (the test applied by the Supreme Court when deciding whether to depart from its own case law).

From 1 January 2021, the UK's domestic courts are no longer bound by CJEU decisions. Accordingly in the event that CJEU judgments develop employment law principles under the Acquired Rights Directive (and potentially expand employment rights) beyond the principles established in European case law as at 31 December 2020 the English courts are not bound to follow such decisions when interpreting TUPE, but can have regard to them.

However the EU Law (Revocation and Reform) Act 2023 ("ERRA) includes provisions that will introduce significant changes to the current status and operation of retained EU law (renamed as 'assimilated law' by ERRA) with effect from 1 January 2024. In broad terms ERRA removes from English law the three legal principles of: direct effect, the supremacy of EU law and the general principles of EU law with effect from 31 December 2023. ERRA erases, as if they never existed, the interpretative principles and settled decisions which the courts and tribunals have relied upon to give a settled and predictable meaning to employment law rights and obligations which are derived from EU law. So legislation on the UK statute book (including TUPE) will be interpreted and applied without reference to those three legal principles. In addition ERRA changes the basis upon which the appellate courts can depart from retained EU case law; the court must have regard (among other things) to: (a) 'the fact that decisions of a foreign court are not (unless otherwise provided) binding'; (b) 'any changes of circumstances which are relevant to the retained EU case law'; and (c) 'the extent to which the retained EU case law restricts the proper development of domestic law'. ERRA provides that first instance courts & Tribunals can refer points of law arising in retained EU case law to higher courts for determination at their own instigation or at the request of parties. A point of law is only referrable if (a) the lower court is bound to follow the relevant case law and (b) it is on a point of general public importance. One possible candidate for such a referral is the issue explored in *ISS Facility Services v Govaerts* of what happens to employees' contracts when a service is TUPE transferred to multiple new providers.

WHEN DOES TUPE APPLY?

TUPE applies if either there is:

- a service provision change; or
- the transfer of an economic entity which retains its identity.

These two circumstances are not mutually exclusive.

Service provision changes

A service provision change occurs when activities are:

- contracted out for the first time (“first generation outsourcing”);
- moved from the incumbent contractor to a new contractor (“second generation outsourcing”); or
- brought back ‘in house’ by the business (“insourcing”).

For the rules on service provision changes to apply, before the change there must have been an employee or an organised grouping of employees with the principal purpose of carrying on the activities. The phrase "organised grouping of employees" requires that the employees work as a team and are deliberately organised by reference to the particular client contact – it is not a matter of happenstance (***Ceva Freight (UK) Ltd v Seawell Ltd*** [2013] CSIH 59 CS*;* ***Eddie Stobbart Ltd v Moreman and others*** [2012] IRIR 356 EAT). Whether or not there is an organised group of employees is assessed by reference to the facts immediately before the transfer. The EAT in ***London Care Ltd –v- Ms J Henry and others UKEAT/0219/17*** and ***Carewatch Care Services Ltd –v- Ms J Henry and others UKEAT/0220/17***, confirmed that when considering whether or not a company organised its employee or employees into a "grouping" for the principal purpose of carrying out the relevant activities, the tribunal must satisfy itself that there was, immediately before the putative transfer, a grouping of employees (which could for these purposes, also, be a single employee) and that the grouping was intentionally or deliberately organised, before turning its mind to the purpose of the group. Moreover the activities, being those activities required by the client (***Argyll Coastal Services Ltd v Stirling and others*** EATS/0012/11), must be "fundamentally or essentially the same". For example, in ***OCS Group UK ltd v Jones*** *(UKEAT0038/09)* TUPE was held not to apply to a full service staff restaurant switching to becoming a sandwich shop where any food was prepared off site. The activities were not deemed sufficiently similar.

When considering whether or not there is a service provision change, the first stage is to identify the relevant activities undertaken by the original contractor and then decide whether or not the activities undertaken by the new contractor are fundamentally or essentially the same with minor differences being ignored (***Enterprise Management Services Ltd v Connect-up Ltd and others*** [2012] IRLR 190 EAT; ***Metropolitan Resources Ltd v Churchill Dulwich Ltd (in liquidation) and others*** [2009] IRLR 700 EAT). The word "activities" should be given their ordinary, everyday meaning – ***The Salvation Army Trustee Company –v- Ms J Bahi and others*** UKEAT/0120/16. Identifying the activities is a balancing act: on the one hand, they should not be described too generally so that the specific relevant activities are not described properly;

equally, the definition should be holistic, weighing the relevant facts and evidence in the round. The courts look to avoid too narrow a focus on what the activities were and are. They caution against taking a 'pedantic and excessively' detailed an approach to the analysis. See also ***CT Plus (Yorkshire) CIC –v- Black and others*** UKEAT/0035/16.

In ***Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and others [2016] IRLR 406 EAT***, the EAT confirmed that the separation of a service into different functions, in this case a split in the service following a re-tender, does not in itself preclude a service provision change transfer. The EAT noted that there is no express requirement in the TUPE Regulations 2006 for the relevant activities to constitute "all of the activities" carried out by the putative transferor. The EAT stated that it could see "no reason why the [service provision change] provisions should not in principle apply in a case involving a division on functional lines". The EAT further considered how to approach the question as to whether there was a service provision change when activities or services are fragmented in ***London Care Ltd –v- Ms J Henry and others UKEAT/0219/17*** and ***Carewatch Care Services Ltd –v- Ms J Henry and others UKEAT/0220/17***. The EAT emphasised the importance of correctly identifying and describing the relevant activity which is the subject of the transfer. In, ***Enterprise Management Services Ltd v Connect-up Ltd and others*** [2012] IRLR 190 EAT, the EAT set out a two stage test to determining whether or not there was a service provision change: the employment tribunal's first task is to "identify the relevant activities carried out by the original contractor"; and its second task is to determine whether or not the activities carried on by the subsequent contractor "are fundamentally or essentially the same as those carried out by the original contractor. In ***London Care Ltd*** **and** ***Carewatch Care Services Ltd***, the EAT accepted that the issue of fragmentation should be considered when undertaking the second task.

Example

A group of cleaners work at the offices of an insurance firm every morning. When the contract expires, the firm appoints another company to do the work. This is a "second generation outsourcing" and a service provision change, resulting in the staff transferring directly from the previous cleaning company to the new one.

Example

A travel agency carries out bookings for several clients but without dedicating any of its staff to particular accounts. One of the agency's main clients decides to switch to a different travel operator. This will not be a service provision change because there was no organised grouping of employees whose purpose was to carry out the activity for the client. It may, however, be transfer under the standard definition.

There are some exceptions to the concept of service provision change. For example, a 'one-off' buying-in of services to fulfil a short-term need will not normally be covered.

Example

Contrast the hiring of security staff to protect athletes during the 2012 Olympic Games with a contract for the provision of security advice to the event organisers over a period of several years running up to the Games. The first example would be a short-term buying-in of services and so excluded from TUPE, whereas the second example runs for a significantly longer period and would be covered. However, see ***Liddel's Coaches*** *later.*

In the context of a service provision change, activities, before and after the transfer, must be fundamentally or essentially the same, so, for example, where care for patients went from institutionalised NHS care to private support in the patient's own home it was held that there was a "fundamental difference in the ethos of the old and the new…arrangements" such that there was no TUPE transfer. *(**Nottinghamshire NHS Trust v Hamshaw & Others** UKEAT/0037/11).*

Activities mainly related to the supply of goods rather than services are also excluded – such as where a business purchases components for machinery it is producing ***(Pannu and others v (1) Geo W King Ltd (in liquidation) (2) Premier (3) IBC Vehicles Ltd*** EAT/0021/11), or buys sandwiches for re-sale in its canteen. Here, though, the alternative test of whether TUPE applies would still need to be considered (see below).

In situations where a client provides a regular flow of a variety of different types of work, e.g. to an advertising agency or law firm, surprisingly, the EAT has held that where the old instructions are completed

by the old contractor and the new firm effectively takes on only new instructions there is no service provision change. (See ***Ward Hadaway Solicitors v Love and Ors*** *EAT 0471/09).*

Also, for an outsourcing transaction (where responsibility for the activity moves from one provider to another) to fall within the service provision change definition the activity or service carried out by the outgoing and incoming service provider must be carried out for the same company – that is for the same client. If the activity or service is provided to a different company the service provision change test will not apply (***McCarrick –v- Hunter*** [2013] IRLR 26 CA). Whether or not there is a relevant transfer under TUPE will then be assessed under the original standard test – see below for more details. For the purposes of TUPE a 'client' is more simply a beneficiary or end-user of a service: it is a company which is capable of carrying out the activities itself or commissioning another person or company to carry them out (***CT Plus (Yorkshire) CIC –v- Black and others*** UKEAT/0035/16)

Also, to meet the service provision change definition the intention of the client must be that the activities will be carried out by the transferee other than in connection with a single specific event or task of short term duration (reg. 3(3)(a)(ii)). In ***Liddels's Coaches v Cook and others*** EAT/0025/12, the EAT said that the term "single specific event" is not qualified by the term "short term duration". The short term qualification only applies to the task. This decision runs counter to the obiter comments in ***SNR Denton UK LLP v Kirwan and another*** EAT/0158/12. The EAT in ***Swanbridge Hire & Sales Ltd v Butler and others EAT/0056/13***, said, obiter, that it preferred the interpretation in *SNR Denton*, being that the short-term duration qualification applies to both tasks and events.

The intention of the client must be judged at the time of the alleged service provision change. And where the client has not expressed an intention, the Tribunal must draw an inference from the evidence before it – see also *Swanbridge Hire*. The intention that the task or event will be of a short-term duration must be more than a 'hope or a wish' (***Robert Sage Ltd t/a Prestige Nursing Care Ltd v O'Connell and others UKEAT/0336/13***).

There is a tension as to whether the 'service provision change' transfer definition should be construed using a purposive or literal interpretation.

A transfer of an undertaking (or part of it): the original and standard definition

A standard definition transfer is often most clearly seen where there is a sale of a business. TUPE does not apply to share sales but such a sale may occasion such a transfer if the new party (i) has become responsible for carrying on the business, (ii) has incurred the obligations of employer and (iii) has taken over day to day running of the business. In other words, "has the new party stepped into the shoes of the employer?" (***ICAP Management Services Limited –v- Dean Berry and another [2017] EWHC 1321 (QB))***

A business typically comprises assets such as premises, equipment, customers, staff and goodwill. If those are transferred and the business is continued, TUPE will normally be deemed to apply.

Although the sale of a business is likely to be a transfer, the concept is wider than that.

A transfer covers activities that may be central (e.g. a hardware manufacturer selling its plant) or merely ancillary (e.g. cleaning the manufacturer's plant).

In determining whether TUPE applies to a particular situation by reason of the transfer of an operation or part, there are two stages:

- identify the operation and what it comprises; and then
- consider whether it has transferred with its identity retained.

The requirement that the operation retains its identity does not mean that things have to continue exactly as they did before. According to the leading case, ***Spijkers v Gebroeders Benedik Abattoir*** *CV (24/85)*, a fairly broad 'multi-factorial' approach is taken, the relevant factors including:

- whether tangible assets have transferred;
- whether intangible assets have gone across (e.g. intellectual property, goodwill);
- whether the majority of employees/key staff are retained;

- whether customers are transferred;
- the similarity between the activities before and after the transfer; and
- the duration of any gap in the performance of such activities.

None of these factors is decisive and an overall assessment is made. The relevant factors are simply that, factors, no more, no less. All of the relevant factors should be taken into account. In general, if the activities are the same, the customers are the same and staff are still required, even if not the same staff, that will often be enough for there to be retention of identity. One factor which is sometimes considered is the effect of any cessation of service. The *ECJ* considered this factor in ***Collina Sigüenza –v- Ayuntamiento de Valladolid and others (Case C-472/16***. Specifically, whether a temporary cessation - in this case a cessation of about 5 months - of activities meant there was no relevant transfer of an undertaking._ The ECJ said that the fact that the undertaking was closed and had no employees at the time of the putative transfer was, though a relevant factor in deciding whether or not there was a relevant transfer, not determinative; this factor would not in itself preclude there being a transfer of an undertaking. The ECJ said that it was possible that the circumstances and facts of the arrangements qualified as a relevant transfer under the ARD, but referred the ultimate decision back to the Spanish Court. Of particular relevance to the ECJ recommendation was the fact that during the five month period during which the activities ceased, three of those months were because of a usual cessation in that sector.

In assessing every case, all the factors set out above are relevant, but often a different emphasis is placed on each factor according to the nature of the business.

Example

A manufacturer and supplier of vehicle parts contracts out the production of braking gear to another company. This part of the business is heavily reliant on plant and machinery, so the extent to which assets and equipment are transferred under the outsourcing deal will be very relevant.

In many businesses, their main asset is their staff and they have few non-human assets (for example, an advertising business or a cleaning contractor). Accordingly, in such a labour intensive undertaking, whether

the majority of the stafftransfer is of prime relevance (rather than, for example, whether the same buckets and mops are used) in determining whether the economic entity has retained its identity post the putative transfer. Conversely, where the business or activity is based essentially on equipment/assets, the fact that the former employees of the undertaking are not taken on by the new owner/contractor is not, in itself, sufficient to preclude the existence of a TUPE transfer *(Aira Pascual and Algeposa Terminales Ferroviarios, C-509/14*).

Further, for a transfer to be a relevant transfer, there has to be a transfer of a going concern or of a stable economic entity, as indicated, among other things, by the purchaser continuing or resuming the business. Goodwill is often included but is not essential.

The *ECJ* in ***Ferreira da Silva e Brito and others v Estado portugues (C-160/14)*** reviewed settled Acquired Rights Directive case law relevant to determining whether there is a transfer of a business. The key criterion, when assessing if there is a relevant transfer, is whether 'the entity in question retains its identity' after the transfer. All the facts characterising the transaction should be considered. The ECJ repeated those factors identified in *Spijkers* (see list of factors above), reconfirming that there should be an overall assessment and that single factors cannot be considered in isolation. The degree of importance to be attached to each factor will vary according to the nature of the activity, business or undertaking.

In determining whether there is a transfer of a business under the Directive, it may be irrelevant, depending on the circumstances of the case, that the transferred entity, which is taken over, is integrated into the new owner's structure, without the transferred entity retaining any autonomous structure. What is important is that a link is maintained between the assets and employees who transfer and the pursuit of the activities previously carried on.

When deciding whether the identity of the transferred entity has been preserved, there must be a 'retention of the functional link of interdependence and complementarity between the various elements of production transferred', allowing the transferee 'to use them – even if they are integrated, after the transfer, in a new and different organisational structure – to purse an identical or analogous economic activity'.

Example

In a warehousing and distribution operation, the warehousing would have organisational coherence. Staff would say "I work in the warehouse". In contrast, say a number of employees are recruited on short-term contracts, but sprinkled around a business performing different roles. In that scenario, it is very unlikely that the group of short-term employees would be regarded as being allied to an organisationally coherent part of the business – in which case, TUPE would not apply to them.

Mergers and acquisitions

The merger of two organisations or the takeover of one company by another may involve a TUPE transfer. The key point here is that share sales are not covered by TUPE: the employer itself must change (as opposed to there being a change in the composition of its ownership) in order for TUPE to apply. However, a subsequent internal reorganisation or transfer of operational control of and responsibility for the business can trigger the application of TUPE.

Example

A company purchases the share capital of another company, but runs the two companies separately. TUPE does not apply because the identity of the employer is unchanged. The employees of the acquired company continue with the same employer, albeit that it has a different owner. Their employment continues without interruption and with the same rights as before but they have no special protection against dismissal or to information and consultation, for example, as they would if TUPE applied.

That said in ***Millam v Print Factory (London) 1991 Limited*** [2007] EWCA Civ 322 *the Court of Appeal ruled that where a formal separation remained but in practice the two businesses were run as a single operation, TUPE applied. In that case, board meetings were run jointly, staff were paid from the same payroll and the two companies shared the same sales function. See, also,* ***Jackson Lloyd Ltd and another v Smith and others UKEAT/0127/13***. Contrast with ***ICAP Management Services Limited v Dean Berry and another [2017] EWHC 1321 (QB)*** where the High Court said that a subsidiary's lack of independence will, of itself, not mean that the holding company owns or controls the business. There needs to be more; the parent company must take over the day-to-day running of the subsidiary.

How can employers avoid TUPE?

It is often difficult for employers to take steps to prevent the application of TUPE and not normally a useful exercise. Businesses cannot decide between themselves that they will not apply TUPE. If employees argue for its application, courts and tribunals will look behind obvious avoidance attempts, such as deliberately not taking on staff or assets used in the old operation.

There are, however, some circumstances in which TUPE probably applies in theory but it does not suit anyone (including the employees) to apply it.

Example

An advertising agency loses an account to another agency. TUPE is likely to apply if there are employees dedicated to the account. But the agency losing the account may not want to lose its staff, the agency winning the account may not want to take on the old agency's staff and the staff themselves may want to stay with their existing employer or take a redundancy package. Also, the client has probably changed agencies for a reason and is unlikely to want all (or perhaps any) of the same staff working for it at the new agency. In such cases it may be possible to work within TUPE to avoid most of its implications.

In other cases, the outgoing employer can sometimes manage a situation such that TUPE does not apply by fragmenting the service which was previously provided. (***Enterprise Management Services Ltd v Connect-Up Ltd and others*** [2012] IRLR 190 EAT; ***Clearspring Management Ltd v Ankers and others*** Eat/0054/08). Also, the Tribunal can take into account the terms of the agreement between the transferor and transferee when assessing whether there is a relevant transfer (***Qlog Limited v O'Brien and others UKEAT/0301/13***).

Example

A council used to have a single team of dustmen working across the borough with no specifically designated wards allocated to any of the dustmen and it now puts out to tender rubbish collection in six different wards.

It will not be possible to say who would transfer to each of the six new contractors and the law would probably say that the service is too fragmented to have retained its identity.

Cross-border transfers

TUPE does not apply to a transfer *into* the UK, although the country in which the old operations were based may apply similar legislation (especially if that country is also an EU member state).

As regards the transfer of an undertaking *out of* the UK (i.e. 'off-shoring'), TUPE will normally apply where the new employer is located abroad – whether inside or outside of the European Union.

In practice, employees would rarely wish to transfer abroad and would probably not envisage making claims against the overseas contractor. Indeed, they would most likely prefer it if TUPE did not apply so as to ensure they received a redundancy payment from their old employer.

However, given the legal position, it would be advisable for the parties to a cross-border transfer to negotiate suitable indemnities and take the other precautions discussed below when TUPE applies (see below). In particular there should be consultation with the employees' representatives.

Example

A company in the UK, decides to off-shore its IT support function to India. Assuming TUPE applies, the contractor should technically offer the jobs in India to the UK company's in-house IT staff – although they are unlikely to want to relocate to India. The most likely practical outcome is that the existing employer will make the necessary redundancies as agent for the Indian company, perhaps having negotiated a contribution from the contractor in the off-shoring agreement. There would also need to be collective consultation. However, the position becomes more complicated if the Indian company was part of a wider Group with a UK subsidiary.

Miscellaneous

There is no rule to the effect that the old and new employer must have a relationship for there to be a transfer. For example, if a restaurant closes down and the lease is forfeited and a month later a new owner opens up a restaurant on the same site that would be a TUPE transfer.

However, an administrative reorganisation of public administrative functions between public administrative authorities is not a relevant transfer under TUPE.

WHO AND WHAT TRANSFERS UNDER TUPE?

This section considers which categories of staff fall within the scope of TUPE. It then goes on to look at how the TUPE principle of automatic transfer applies to such employees and the rights and obligations in connection with their employment contracts that are protected.

Who transfers?

TUPE applies only to employees, including those on maternity or sick leave. It does not cover self-employed persons such as, for example, freelancers and subcontractors. Part-time and temporary staff will be covered, so long as they satisfy the test of being an 'employee'. It should be noted that there is a first instance decision (Dewhurst v Revisecatch Ltd t/a Ecourier ET2201909/18) in which it was held that workers (as well as employees) qualify for protection under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) on the grounds that that reg 2(1) of TUPE covered 'workers' as well as 'employees'. It appears that the case was settled before the appeal was heard.

Temps supplied by an employment agency are unlikely to be protected by TUPE, although in rare situations tribunals might be prepared to imply a direct employment relationship between an agency worker and the 'end-user company, in which case TUPE would apply to them.

On a literal reading of TUPE, TUPE does not appear to cover employees whose employer is a different group company from that which owns the operation to be transferred – i.e. employees seconded from one

group company to another. However, tribunals always viewed such arrangements with suspicion and the ECJ has ruled very clearly that the corporate veil can be pierced in such circumstances - see ***Albron Catering BV v FNV Bondgenoten*** (C-242/09).

The assignment test

It is only employees who are 'assigned' to the relevant organised grouping of resources or employees who transfer to the new employer. See ***Botzen v Rotterdamnsche Droogdok Maatschappij Br*** [1986] Case C 186/83 ECJ. Assignment on a temporary basis is insufficient. The question of whether an employee is so assigned turns on the particular facts. Relevant factors include:

- the proportion of time the employee spends on the part of the operation/activities transferring as compared to other parts of the business;
- the amount of value given to each part of the business by the employee;
- the employee's job description, i.e. the terms of the contract showing what the employee could be required to do; and
- how the costs to the employer of the employee's services are allocated between the different activities of the employer.

Essentially, this boils down to asking "does the employee belong to the part of the employer being sold or to the activities being outsourced?" As such, the percentage of time an employee spends on the part of an employer's operation or devoted to the activities transferring is used a general rule of thumb albeit not the true legal test. There have been cases in which employees have been found not to be assigned to the operation or activity transferring, despite devoting the majority of their time to it.

When answering the question of 'assignment', tribunal and EAT decisions stress the importance of considering all the relevant facts and circumstances. For example though an employee's long-term absence from work will not, in itself, mean he or she is not assigned to the relevant grouping, an employee who did not participate in the transferring economic activity and would never do so in the future, will not be 'assigned'; absent some level participation in the economic activity, a mere administrative connection would, though a relevant factor, be insufficient to 'assign' the employee to the relevant grouping. For employees who are temporarily absent from work or where there are reasonable grounds for the belief that they will

return to work, answering the question "where could the employee be required to work if able to do so", is of real help in determining whether an employee is assigned to a particular grouping; it is, however, of little assistance where an employees does not and will never work.

The 'assignment' test may also have to be applied where a whole undertaking is TUPE transferred *but* then split between two or more transferees; (see further below Can an employee transfer to more than one employee?).

Example

The chief executive of a group of ten businesses spends 80% of his time working on one of the businesses which is being sold. A tribunal may well not regard him as being assigned to that business as he still 'belongs' to the group.

Can an employee transfer to more than one transferee?

Historically the position of the English courts was that either the employee is sufficiently assigned to an undertaking and accordingly transferred with the undertaking to one transferee or the employee's duties are spread across individual parts of the undertaking in a more disparate manner, such that the employee may be said not to be assigned to any part transferred so the employee does not transfer (with their potential reassignment or redundancy by the transferor) see for example the decision in **Kimberley Group Housing Ltd v Hambley** [2008] IRLR 682 in which it was held in broad terms that where an organised grouping splits into two parts each of which is subject to a relevant transfer to a different transferee, liability for individual employees cannot be divided between the two transferees.

However the CJEU in ***Iss Facility Services NV v Govaerts*** ***([2020] ICR 1115)*** held (controversially) that where there were multiple transferees upon the transfer of an undertaking the contract of employment of transferring employees could be split between the transferees. It envisaged the employees having multiple part-time contracts with different employers following the transfer. Essentially the rationale for this was to avoid the injustice of a single transferee becoming liable for all of a given employee's contract of employment when only part of that employee's work transfers to the transferee. However, the CJEU held that where dividing a contract proved impossible or resulted in a deterioration in an employee's rights and

working conditions, the contract could be terminated and the termination must be regarded as being the responsibility of the transferee(s), even if it was initiated by the employee. The transferees would then be fixed with liability for compensation in appropriate shares. As the ***Govaerts'*** decision was handed down before the end of the Brexit transition period (31.12.20) it is binding on the English courts and Tribunals until such time as the Court of Appeal or Supreme Court elect to overturn it applying the new test set out in s6 ERRA (after 1 January 2024).

Subsequently, In ***McTear & Mitie v Amey & Others*** the EAT held that the CJEU decision in ***Govaerts*** applies in domestic law both to 'standard definition' transfers and to (the non-EU derived) service provision change transfers under TUPE; albeit that strictly speaking the Govaerts' decision was only retained EU law for the purposes of the English courts' interpretation of 'standard definition' business transfers under Reg 3(1)(a) TUPE. This means that the contract of employment of a given employee who transfers pursuant to a service provision change may as a matter of law be split between multiple transferees.

The EAT held that there is no reason in principle why an employee may not, following such a transfer, hold two or more contracts of employment with different employers at the same time, provided that the work attributable to each contract is clearly separate from the work on the other(s) and is identifiable as such. The division, on geographical lines, of work previously carried out under a single contract into two new contracts is, in principle, a situation where there could properly be found to be different employers on different jobs.

The case was remitted to the ET to consider the issue of whether the claimants had TUPE transferred to multiple transferees..

The ***McTear*** and ***Govaerts*** decisions give rise to a number of practical uncertainties for the commercial parties to business sales, transitional services arrangements, outsourcing and retendering exercises.

The ***McTear*** decision means that in a situation where an outgoing service provider is replaced by two or more incoming service providers consideration must be given to the question of whether an employee's contract should be divided between multiple transferees. In principle this assessment should be made in respect of each potentially transferring employee, as opposed to relying on a team-based assessment albeit

that the practicalities of such an approach are likely to be challenging particularly where a large workforce is involved.

In ***Govaerts*** the CJEU held that, where dividing an employee's contract proves impossible or results in a deterioration in the employee's rights and working conditions, the contract might be terminated but that termination must be regarded as being the responsibility of the transferee(s), even if it was initiated by the employee. In practice it is likely that dividing a contract between multiple transferees will adversely impact an employee's rights or working conditions. The implications of the ***Govaerts's*** decision is that in those circumstances any such termination of an employment contract of an employee with two years' continuous service will likely be automatically unfair under TUPE, unless the transferee can argue there is an economic, technical or organisational reason for it that entails changes to the workforce.

It should be noted that in: Retained EU Employment Law A government response to the consultation on reforms to retained EU employment law and the consultation on calculating holiday entitlement for part-year and irregular hours workers the Government stated it is monitoring the issues raised by the Govaerts case and will consider whether any action is required on this in the future.

Employment at time of transfer

TUPE applies to those who are employed in the relevant operation (or part) 'immediately before the transfer' – that is, at the time of the transfer. However, employees may also be protected if they are dismissed shortly before the transfer takes place.

This is because TUPE also applies to staff who would have been employed at the time of the transfer had they not been dismissed beforehand for a reason related to the transfer. This includes dismissals where the purchaser has not yet been identified but the business is being slimmed down to make it more attractive for sale. Whilst such dismissals are effective, they would be automatically unfair and liability would pass to the new employer under TUPE.

Contracts that 'would otherwise terminate'

Another provision in TUPE limits its scope to staff whose contracts of employment 'would otherwise be terminated by the transfer'. These words may give some leeway to employers who wish to prevent certain employees from transferring under TUPE by re-directing them to work in a part of the business they are retaining. Arguably, if such employees are moved out of the operation that is transferring, their contracts would not otherwise be terminated by the transfer.

There are several potential difficulties with this approach. First, tribunals tend to be suspicious about the use of secondment arrangements to avoid the application of TUPE: the same probably goes for reassignments. Secondly, an employer using this device would need to have a contractual right to relocate the employees or get them to agree to it in advance of the transfer. Third, such employees might claim that the relocation amounted to a substantial detrimental change in their working conditions which gives them a right to claim constructive unfair dismissal. Fourth, the ECJ in ***Celtec Ltd v Astley*** (C478/03) seems to suggest that any such retention of employment model is ineffective unless the employee clearly and unequivocally objects to the transfer (see below). The Scottish EAT case of ***Capita Health Solutions v McLean*** *[2008] IRLR 595* goes yet further and suggests that even if the employee clearly objects to the transfer but works for the transferee as a secondee, the objection is ineffective; this case should be viewed with caution.

Regulation 4(1) provides that "*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".* In ***Nicholls & another –v- London Borough of Croydon and others UKEAT/0003/18***, it was argued before the EAT that the qualifying words "*which would otherwise be terminated by the transfer",* had the effect that if an employee was offered employment by a transferee such that his or her employment was not terminated and was instead preserved, the transfer could not have had the effect of terminating employment, and, therefore, had the effect of taking the employment contract and the employee outside of the scope of automatic transfer principles established by regulation 4(1) of TUPE. The EAT gave this argument short shrift: TUPE must be interpreted to give

effect to the ARD; the ARD does not contain any such qualifying wording; to introduce any such qualification would be inconsistent with the ARD and should, therefore, not be taken into account when determining the scope and applicability of regulation 4(1).

The right to object

Finally, employees do not transfer under TUPE if they object to it beforehand. This is covered later on, in the section on Termination of Employment.

What rights and obligations transfer?

In legal terms, the new employer of staff who transfer under TUPE steps into the shoes of the old employer for most purposes. It is as if the new employer has always been the employer of the individuals concerned. Transferring employees' past employment with their old employer will count as continuous with their new employment for most purposes.

There are some legal exceptions and some difficult areas which are considered below. But for the most part the position is straightforward: rights and obligations under the employment contract of a transferring employee go across intact to the new employer.

The recent EAT decision in ***Amdocs Systems Ltd v Langton (previously UKEAT/0093/20)*** clearly illustrates how a transferee will assume the transferor's contractual obligations in relation to the transferring employees. In this case the transferee employer was liable to provide escalator payments under a long term sick income protection scheme set out in an offer letter and summary of benefits provided by the employee's original employer (the transferor) prior to a TUPE transfer. The transferor employer had contractually committed to such payments (albeit seemingly by mistake as there was no health insurance cover in place to fund it) and the transferee assumed this contractual liability. *Example*

An employee is entitled to a salary of £100,000 per year with his old employer. The new employer must also pay the employee £100,000 per year unless it can negotiate a change (although this carries its own complications under TUPE – see below).

Example

Before a TUPE transfer, the old employer's managing director sexually harassed an employee. The MD has stayed with the old employer but the harassed employee has transferred under TUPE. Strange as it may seem, the new employer is liable for the MD's actions towards the employee concerned because this is a liability in connection with her employment contract which has transferred with her.

Example

Employees are paid monthly in arrears on the last day of each month. The transfer takes place on 15 May. The new employer must still pay the employee for the full month worked on 31 May even though for half of May the employee was actually working for the old employer.

It is normal for the new employer to seek indemnities against liability referable to employment with the old employer (see below). For instance, in the second example above the new employer should, if it can, negotiate an indemnity with the old employer to secure reimbursement of any fees and damages it may have to pay in respect of the harassment. The ***Amdocs Systems Ltd v Langton*** case also illustrates the importance of conducting due diligence on the nature and extent of insured benefits (such as long term ill health income protection cover) and whether contractual benefits are fully insured.

Pension rights – non-occupational schemes

In many cases, pension entitlements go across under TUPE in exactly the same way as any other benefit. This applies to personal pension schemes, group personal pension (GPP) schemes and 'stakeholder' schemes. It will also apply to auto-enrolment and NEST.

Example

Pre-transfer, the old employer paid 10% of an employee's salary into her personal pension scheme. That obligation goes across to the new employer.

Example

Pre-transfer, the old employer paid 5% of the employee's salary into a GPP scheme provided that the employee also contributed 5% of his salary into that scheme. The new employer will have to operate the pension scheme in exactly the same way after the transfer.

Occupational Pension schemes

Occupational pension schemes are different. If the old employer has a pension scheme which it has set up itself with company and member nominated trustees, then – subject to the major caveats below – the new employer is *not* obliged to replicate the old scheme.

It has the choice of either admitting transferred employees to its own occupational pension scheme or it can make a contribution to a stakeholder scheme instead.

In either case, in broad terms, it is a pre-condition that the employer must be prepared to pay up to 6% of the employee's salary into such a scheme and can only require the employee to make contributions of up to a maximum of 6% of salary. This may result in a substantial deterioration in pension benefits for the employees who transfer.

The relevant rules are not contained in TUPE but in the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005.

Example

The old employer had a final salary scheme. The new employer operates a GPP scheme for its entire staff, under which it pays contributions of 10% of salary so long as the employees do the same. The new employer cannot simply admit the transferred employees into its GPP, as that is neither an occupational scheme nor a stakeholder scheme. In any case, the requirement on the employee to match contributions at 10% would be a breach of the Pension Protection Regulations. Unless the new employer can get this particular group of staff to contract out of the Regulations, it must either set up its own stakeholder scheme for them or (less likely) set up a special occupational pension scheme for them.

Example

Pre-transfer, the old employer had an occupational money purchase scheme under which it paid 12% of employees' salary into the scheme on a non-contributory basis. The new employer wishes to implement the cheapest scheme possible in replacement. It would be entitled to offer to match employee contributions into a stakeholder scheme up to 6%.

Example

The old employer had a final salary pension scheme. The new employer may replace this with a stakeholder scheme so long as it will match contributions up to 6%, even though the benefits to the employees will be far inferior.

Some rights under occupational pension schemes do still transfer under TUPE. This is a complex and uncertain area but it includes schemes conferring pension benefits in the event of redundancy and/or early retirement (see the cases of ***Beckmann v Dynamco Whicheloe Macfarlane Ltd*** (C-164/00) and ***Martin v South Bank University*** (C-4/01)). Only that part of an enhanced early retirement pension right which was not underwritten by the transferring member becoming entitled to a deferred pension in the transferor's schedule will transfer. Further the early retirement benefit ceases to be an early retirement from when the employee reaches his so her normal retirement age. ***The Procter & Gamble Company v Svenska Cellulasa Aktiebologed SCA and another*** [2012] EWHC 1257 (ch). As almost all occupational pension schemes include early retirement benefits, the incoming employer in these circumstances may find it safer to replace transferring employees' occupational pension entitlements with a scheme providing equivalent benefits – albeit that this will be expensive.

In addition, employers inheriting staff from public sector bodies under TUPE need to be aware that public sector procurement requirements will generally require employees to be provided with pensions that are certified by the Government Actuary's Department to be substantially equivalent to those they enjoyed in the public sector.

If an employee has been made assurances which are contractually binding in relation to their pension by the transferor (such that post-transfer the employees will have no worse provisions than they had pre-transfer) then these will go across to the transferee in the form of a contractual novation of the entitlements. *See* ***Whitney v Monster Worldwide Ltd 2010*** *EWCA Civ 1225.*

Finally, as we shall see later, employees who suffer a substantial change in working conditions following on from a TUPE transfer may be able to claim constructive unfair dismissal. Therefore, even where an employer has complied with the Pensions Act 2004 and the Pension Protection Regulations, there may still be scope for employees whose pension rights have suffered on a transfer to bring claims for breach of contract and/or constructive unfair dismissal.

Benefits which are difficult to replicate

Only occupational pension schemes are treated differently under TUPE: no other exceptions are made. The new employer is therefore theoretically obliged to replicate all other contractual benefits. This can be awkward in relation to benefits that are difficult to replicate in practice such as profit-related pay, bonus, commission, share schemes or share options. However, the courts have taken a pragmatic approach to benefits that are impossible to replicate and will look for new employers to produce benefits of substantial equivalence.

Example

Under TUPE, an employer is inheriting a profit-related pay scheme which is tied to the profits of the old employer. The new employer is likely to have done enough to satisfy TUPE if it can show it has introduced a broadly equivalent scheme which pays out depending upon its own financial performance.

In *Ponticelli UK Ltd v Gallagher [2023] CSIH 32*, the Inner House of the Court of Session recently held that an employee's right to participate in a share incentive plan (SIP) arose "in connection with" their contract of employment for the purposes of section 4(2)(a) of TUPE 2006. It was an integral part of the employee's financial package. Accordingly it upheld the EAT and Tribunal decisions that the transferring employee became entitled to participate in a SIP of substantive equivalence or comparable value to the SIP operated by

the transferor and held that the employee's section 1 ERA 1996 statutory statement of particulars should reflect the obligation to provide him with a SIP of substantive equivalence. It has been suggested by some commentators that the practical implications of the Ponticelli case may arguably be confined to situations in which there is some ongoing right of the transferring employee to further awards/share purchases, which in many transactions will not be the case. It is not known whether this case will be appealed further.

Non-legal entitlements

Whilst legally the new employer steps into the shoes of the old employer under TUPE, this does not mean that the new employer has to do everything the same way. Some changes which the new employer will wish to introduce will not impinge on legal rights at all.

Example

A sales executive's contract says that he reports to an account director or such other person as the company may specify. The new employer wishes the sales executive to report to its finance director. The new employer is operating within the contractual flexibility which the old employer conferred upon itself, so TUPE is not engaged (unless the change amounts to a substantial detriment – see below which is unlikely).

Example

The old employer had a practice of having a team meeting every morning for an hour. The new employer thinks this is inefficient and wishes to do away with the meeting. This is in no way a breach of contract and unlikely to be regarded as a substantial detrimental change to the employees' working conditions. Accordingly, the new employer is free to make the change.

Trade union recognition and collective agreements

TUPE contains provisions requiring the transfer of trade union recognition arrangements and collective agreements in some circumstances. However, since such agreements tend to be voluntary and 'binding in honour only' in the UK, they can be terminated with relative ease (subject to industrial relations issues). Accordingly, TUPE generally has little practical impact in this area.

One situation where the transfer of a collective agreement is significant is where it confers rights which are incorporated into employees' contracts. Employees' rights to benefit from collectively agreed terms are 'static'– that is, they only get the benefit of whatever has been negotiated at the date of the transfer, rather than 'dynamic' i.e. getting the benefit of what has been negotiated after the transfer even though the transferee has not been party to the collective bargaining). Regulation 4A reflects the The CJEU ruling that the directive only requires the 'static' interpretation, (***Alemo-Herron v Parkwood Leisure*** Case C-426/11 ECJ). The CJEU reached its decision by seeking a fair balance the interests of the employee, on the one hand, and, the transferee, on the other hand. This decision was influenced by article 16 of the Charter of Fundamental Rights of the European Union, being the freedom to conduct business. This freedom requires that a transferee must be able to assert its contractual interests effectively, including changes to its employees' working conditions. This right would otherwise be breached if a transferee was bound by terms agreed through a collective process in which the transferee was unable to participate.

DISMISSAL AND CHANGING TERMS

This section explains the restrictions on changing employees' terms and conditions in the context of a TUPE transfer and then goes on to examine the circumstances in which employees can be fairly dismissed. It also considers the position of employees who object to the transfer.

Changing terms and conditions

TUPE makes life difficult for employers wishing to change terms and conditions following a transfer.

To bring about a change in working conditions in the absence of TUPE, you normally need to get the employee's express consent (although sometimes consent can be implied). The good news is that once consent is obtained, it is invariably binding on the employee. This provides welcome certainty for the employer.

The position where TUPE applies is very different. The basic rule is that no detrimental variation of any contractual term is permitted if the sole or principal reason for the variation is the transfer unless: (i) the reason for the variation is an economic, technical or organisation reason entailing changes in the workforce and agreed by the employee; or (ii) the terms of the employee's contract permit the change. The prohibition on variations applies even where the employee's position is better overall as a result of the changes and he or she has expressly consented to them. (In ***Ferguson and others v Astrea Asset Management Ltd UKEAT/0139/19*** the EAT held that regulation 4(4) of TUPE 2006, when interpreted consistently with EU law, rendered void all changes agreed by reason of the transfer, whether detrimental or beneficial to transferring employees).Because any such consent is effectively invalid, employees have the right subsequently to claim any pay or benefits which they expressly agreed to waive – going right back to the date of transfer. Obviously this can give rise to significant and unexpected liabilities for an employer.

Example

An employee expressly agrees to five fewer days' holiday per year in exchange for a 10% pay rise. A year later, having pocketed the extra pay, he demands his additional holiday back (or further pay in lieu of lost holiday). TUPE allows the employee effectively to 'cherry pick' the terms he considers most favourable to him. That said, it is possible that the employer might be able to reduce the employee's salary back to its previous level when he demands his original holiday entitlement. The law is unclear on this last point.

When does TUPE allow changes?

As mentioned above, there are permitted exceptions to the general prohibition on transfer related variations. It is permissible for to make changes to terms and conditions if:

- the variation is for a reason totally unconnected with the transfer; or
- the sole or principal reason for the reason is an economic, technical or organisational reason entailing changes in the workforce and the employee has agreed to the variation; or
- the terms of the employee's contract permit the variation – this last permitted reason may breach principles under the Acquired Rights Directive.

These hurdles are often difficult for an employer to clear. For example, many employers want to change terms and conditions after a TUPE transfer because they simply want to 'harmonise' the terms of the transferring employees with those of their existing workforce. This will almost certainly be considered to be a change by the sole or principal reason of the transfer and so void under the general rule.

TUPE permits in certain circumstances, variations to incorporated collective terms and conditions. Specifically, regulation 4(4) permits a variation of a contract if it varies a term or condition incorporated from a collective agreement provided: (i) the variation takes effect more than one year from the transfer; and (ii) the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately prior to the variation.

See ***Tabberer and others –v- Mears Ltd and others UKEAT/0064/17*** for a post transfer change found to be unconnected with the transfer. In *Tabberer,* an historic and outdated travel time allowance (which served no justifiable purpose) could be permissibly removed after a relevant TUPE transfer without offending the restriction to varying terms and conditions of employment under regulation 4(4).

Example

An employer inherits a group of employees under TUPE who are entitled under their contracts to be paid £20 per hour, whereas existing staff doing exactly the same type of work are paid only £17 per hour. It persuades the transferring staff to reduce their hourly rate of pay by £3 in exchange for a one-off payment of £4,000. This would not be a valid variation under TUPE. The employees could take the £4,000 and still claim to be entitled to be paid £20 per hour. Arguably they would not even have to pay back the £4,000.

Example

Clerical staff transfer under TUPE to a new company, which decides it needs to retrain them to perform a combination of clerical and production work. The employees are prepared to agree. Although the reorganisation relates to the transfer, it is likely to be treated as a change in job functions and so not void.

Practical solutions

In summary, the TUPE provisions on changing terms are highly restrictive and inflexible. There are, however, some possible ways through for an incoming employer seeking to change terms and conditions post-transfer. One option is to terminate employees' contracts and offer continuing employment on the new terms. This is on the basis that dismissals at or around the transfer count as effective, even if they are due to the transfer itself. The main disadvantage of this approach is that the dismissed employees may claim unfair dismissal – and a transfer-related dismissal in these circumstances would most likely be automatically unfair (see below).

In this type of situation, it is unclear how far settlement agreements can help in securing binding contractual changes. Case law suggests that settlement agreements are effective to settle claims of employees *dismissed* by reason of a TUPE transfer, but not where they are used to vary existing terms in respect of *continuing employment* following the transfer.

A different tactic altogether is to allow as much time as commercially possible to pass between the transfer and the contractual change. That is, until such time as the link between the desired variation in terms and the transfer can safely be regarded as broken. Unfortunately, there is no prescribed period after which changes can be freely made and much will depend on the particular facts. But it is inevitably harder for an employee to show that a particular variation was caused by a TUPE transfer that took place many months or even years previously.

Another way of weakening claims that contractual changes are linked to a TUPE transfer is to delay them until the next scheduled pay review. If the employer offers a pay rise in exchange for employees accepting certain contractual changes, it may have an argument that the main cause of the changes was the pay rise rather than the transfer.

'Substantial' changes and breach of contract

Apart from the above rules, there are two further provisions of TUPE that are relevant to changing terms and conditions. Firstly, TUPE confirms that employees can resign and claim constructive dismissal in response to a fundamental breach of contract by their employer. Secondly, employees can also treat themselves as dismissed where a transfer involves or would involve a 'substantial change in working conditions' to their 'material detriment'. Both of these provisions are covered in more detail in the following section.

Termination of employment

TUPE anticipates three categories of dismissal:

- dismissals where the **sole or principal reason** for the dismissal is the transfer itself that is <u>not</u> an "economic, technical or organisational reason entailing changes in the workplace" (an "ETO reason") (effectively 'Eurospeak' for redundancy – including a change in location dismissal). This will include dismissals by administrators of employees of a company in administration, even when no specific purchaser for the company's business has been found *(*See ***Spaceright Europe Ltd v Baillavoine and anor*** *EAT 0339/2010).* – these are automatically unfair. The proximity of a transfer to the dismissal, though not conclusive, may provide, absent other evidence of a motivation unrelated to the transfer, strong evidence in support of the reason for the dismissal being the transfer – see ***Hare Wines Ltd –v- Kaur [2019] EWCA Civ 216*** referring to ***P Bork International –v- Foreningen AF Arbejdsledere I Danmark (C-101/87)[1989 IRLR 41***;
- dismissals by the new employer for a reason connected with the transfer arising from an ETO reason – these are potentially fair so long as the employer satisfies the test of 'reasonableness' under normal unfair dismissal rules; and
- dismissals unconnected with the transfer – normal unfair dismissal rules apply, so these may be fair or unfair depending on the circumstances.

A dismissal could be before or even some years after the transfer and still be 'connected' with it but the Employment Tribunal will have to determine whether the 'sole or principal' reason for the dismissal was the transfer not simply whether the dismissal is 'connected'.

Where an employee is dismissed by reason of the transfer, but before the transfer takes place, liability for that dismissal will pass across to the transferee under TUPE.

If an employee is terminated because of the transfer, the dismissal will not be automatically unfair if the sole or principal reason for the dismissal is an ETO reason, entailing a change in the workforce. There is no statutory definition of the phrase "entailing a change in the workforce". However, case law confirms that the phrase requires that there is a change in the overall numbers or functions of employees making up the workforce (***Delabole Slate Ltd v Berriman [1985] IRLR 305 CA***). Before the amendments in January 2014 to the regulations dismissals linked solely to a change in location would not satisfy the 'entailing a change in the workforce' test; the test requires a change to the people comprising the workforce. However, regulation 7(3A) now provides that the phrase 'entailing change in the workforce' includes a change to the place where employees work.

It remains the case that a transferor cannot rely on a transferee's ETO reason for dismissal (***Hynd v Armstrong and others [2007] IRLR 338 CS***).

Can employees refuse to transfer?

Sometimes employees facing a transfer will, for whatever reason, not wish to transfer. They have a right to object to being transferred, but this brings their employment to an end without a dismissal. In effect, the employee leaves employment without any remedies for the ending of the employment contract. He or she cannot claim unfair dismissal, for example, or damages for notice. This may seem a little harsh, but it can be a useful ‘exit route’ for employees quickly to extricate themselves from a business, as they are released from any obligations they would otherwise have had, such as to give notice and restrictive covenants (vis a vis the transferee).

Constructive and 'quasi-constructive' dismissal

In addition to the simple type of objection described above, where no claim arises, there are two situations under TUPE in which an employee is entitled both to object to the transfer and claim for unfair dismissal:

- where the employer proposes or commits a fundamental breach of an employee's terms and conditions (i.e. 'constructive dismissal'); or
- where the transfer involves or would involve a 'substantial change in working conditions to the material detriment' of a transferring employee. This has been dubbed 'quasi-constructive dismissal', as it gives rise to a right to claim unfair dismissal but not notice pay.

In either case, the employee's rights may, depending on the circumstances, be exercisable against the old employer as well as the new one. If an employee is treated as dismissed under either of these provisions, the dismissal is likely to be automatically unfair unless the employer's actions arose out of a reorganisation and it acted reasonably.

The scope of the quasi-constructive dismissal provision is broad. The employee has no need to show a breach of contract, just a substantial detrimental change in working conditions. In ***Tapere v South London and Maudsley NHS Trust*** *(*UKEAT/0410/08), for example, the Claimant's workplace relocated to roughly the same distance from her home but to a location which made it more difficult for the employee to drop her child off at school and then get to work. She was entitled to claim quasi-constructive dismissal. See, also ***Abellio London Ltd (formerly Travel London Ltd) v Musse and others*** UKEAT/0283/11. However, please note that, as a result of changes introduced by TUPE 2006 (Reg 7(3A) (after these cases were decided) any dismissal — constructive or otherwise — based on the fact that the employee's place of work has changed after a transfer will now be regarded as a 'change in the workforce' for the purposes of the 'ETO defence' in Reg 7(2) . This makes it highly likely that 'change of workplace' dismissals will be regarded as being for 'redundancy' or 'some other substantial reason' to which the ordinary reasonableness test in S.98(4) ERA will apply to determine the question of fairness and will not be automatically unfair under Reg 7(1) ..

OBLIGATIONS TO INFORM AND CONSULT

This section covers two separate measures that apply to employers under TUPE:

- the duty to inform and sometimes consult representatives of employees affected by the transfer; and
- the obligation of the old employer to give the new employer information about the employees who are transferring and associated liabilities.

Dealing with staff representatives

TUPE requires employers to inform and in some cases consult 'appropriate representatives' of employees who are affected by a transfer. These are either:

- representatives of a trade union recognised by the employer (if the affected employees are covered by a union recognition agreement); or
- in any other case, employee representatives appointed or elected by the affected employees.

Employers must inform and consult trade union representatives if a union is recognised in respect of any of the affected employees. If no union is recognised, or the recognition agreement does not cover all of the affected employees, then employee representatives will (in the latter case, also) be needed. These can be either:

- standing representatives who were appointed or elected by the affected employees for other purposes (e.g. a workers' council) but who have appropriate authority to be informed/consulted in the context of TUPE; or
- (more likely) representatives specifically elected for the purposes of consulting and receiving information. In this case, there are detailed requirements governing elections that must be followed. That said, where an employer is faced with a situation where the number of genuine nominations for election and the number of representatives tally, there may be no need to hold a formal election. (***Phillips v Xtera Communications***).

Under Regulation 13A TUPE, microbusinesses (i.e. with fewer than 10 employees) have the flexibility to consult directly with their employees where worker representatives are not already in place.

Amendments being made to TUPE will permit direct employee consultation by small businesses (i.e. with fewer than 50 employees), and all sizes of business where a transfer of fewer than 10 employees is proposed in relation to transfers on/after 1 July 2024 (but only where worker representatives are not already in place).

What information must be provided?

The outgoing employer on a TUPE transfer must supply the following information to the appropriate representatives:

- the fact that the transfer is to take place, when it will occur and the reasons for it;
- the legal economic and social implications of the transfer for the affected employees; and
- any 'measures' (i.e. material changes) that it is envisaged will be taken in connection with the transfer either by it or the new employer in relation to affected employees.

Note that 'affected employees' are *any* employees – of either of the parties to the transfer – who may be affected by the transfer or measures taken in connection with it. This may include staff who do not transfer employees who will or may be transferred, whose jobs are in jeopardy by reason of the transfer or who have internal job applications pending at the time of the transfer. Please see ***Unison v Somerset County Council and ors*** *EAT 2010 ICR 498*. Technically, the incoming employer also has obligations to inform and consult representatives of its affected employees, but this is rarely an issue in practice.

More importantly, the incoming employer must supply information about the measures it is proposing to take after the transfer to the outgoing employer to enable the old employer to carry out its duty to inform the employee representatives about the matter. Failure to do so can give rise to significant liability for the old and the new employer.

The information must be provided to the representatives long enough before the transfer to enable the employer to consult with them effectively. How long that is will depend on how much there is to consult about. That said, the information must be given to the employees before the transfer even if there is nothing that the employer is obliged to consult about at all. This is in order to allow time for consultation on matters

that the employer is not obliged to consult about, such as whether there should be a transfer at all – see ***Cable Realisations v GMB Northern*** *(UKEAT/0538/08).*

What does consultation involve?

The legal duty to consult under TUPE arises only if it is envisaged that measures will be taken by the pre-transfer employer in relation to any of its affected employees. If no such measures are envisaged, the obligation is merely to provide information to the representatives.

Where measures are envisaged, the employer must consult with the representatives with a view to seeking their agreement to the measures to be taken. In other words, the employer must consider representations made by the representatives and reply to them. Amongst other things, if the employer rejects those representations, it should in most cases give its reasons for doing so and give the representatives the chance to make counter-proposals.

In many cases, the old employer will envisage taking no measures in connection with the transfer with regard to the staff transferring – inevitably those most affected. The new employer almost certainly will envisage taking such measures. In this case, technically, there is no obligation to consult. This is because each employer only has to consult about the measures it intends to take in relation to its own pre-transfer staff. However, it is certainly good industrial relations practice to consult in these circumstances. In particular, it makes sense for the old employer to facilitate discussion between its staff who are transferring and the new employer.

Special circumstances defence

Where there are sudden and unforeseen circumstances making it not reasonably practicable for an employer to comply with any duty to inform/consult, the employer need only take such steps towards performing the duty as are reasonably practicable in the circumstances. Tribunals are, however, generally reluctant to allow employers to use this defence.

That said, in ***Unison v Somerset County Council and others*** *(UKEAT/0043/09)* the EAT appeared to accept that failure to consult over a last minute change to proposed redeployment procedures was covered by 'special circumstances' due to an imminent commercial deadline and the threat that the whole deal might collapse. On the face of it, there does not seem to be anything particularly special about that.

What are the sanctions for failing to comply?

If an employment tribunal upholds a complaint of failure to inform/consult, it makes a declaration to that effect and may order the old and new employers (jointly and severally) to pay compensation to the affected employees. This can be up to 13 weeks' pay, depending on what the tribunal considers just and equitable having regard to the seriousness of the employer's breach. It is known as a 'protective award'. Tribunals start at the maximum and then work downwards if the employer has good arguments in mitigation or can show partial compliance. The normal cap on a week's pay (currently £544) does not apply for these purposes and employer's pension contributions count towards pay.

Recently in *Clark v Middleton and another [2022] EAT 31* the EAT held that the transferor's failure to tell affected employees the identity of the transferee was not a mere technical breach warranting no compensation. It held that it matters to know the name and identity of the unique legal person who will be the employer, and the tribunal should not have viewed this as a mere technicality. The EAT remitted the claim to a fresh tribunal to decide the remedy.

Information about employees and liabilities

In addition to the requirement to inform appropriate representatives, the old employer must give information about the transferring workforce to the new employer. This is information on:

- the identity and age of the employees who will go across;
- the information about their terms and conditions that has to be provided under section 1 of the Employment Rights Act 1996;
- any relevant collective agreements;

- any action or grievances instigated under the ACAS code within the preceding two years;
- any legal proceedings brought by the relevant employees in the preceding two years; and
- any legal claims which the old employer has reasonable grounds to believe an employee may bring.

The information must be supplied at least 28 days before completion of the transfer, unless it is not reasonably practicable to do so. It can be given in instalments and must be updated if there are changes.
If the old employer fails to comply with the rules on providing the necessary information, an employment tribunal may order it to pay compensation, taking into account any loss sustained by the new employer. The award must be a minimum of £500 per employee, unless the tribunal considers it just and equitable to award less than that.

These rules aim to protect employees from a problem that often arises where a service provision contract is re-tendered (i.e. second generation outsourcing). Without these rules, new contractors could take over a contract with no idea who they would be inheriting unless the old employer was willing to tell them voluntarily, which would not always be the case. This could leave the hapless employees to persuade the new employer that it really did now have to give them a job on their old terms.

A related problem that these rules do not solve is that bidders for service contracts may have to 'bid blind', as they have no legal entitlement to know the terms and conditions of the incumbent contractor's employees (but would still have to adopt them if they won the tender). Whilst the incumbent would have to give this information to the successful bidder, until the winner is selected, it has no entitlement to the information. This puts the incumbent in an advantageous position in the bidding process – something which a client would be well advised to correct through contractual arrangements, if possible. This is discussed in more detail below.

TRANSFER OF INSOLVENT BUSINESSES

This section deals with how the application of TUPE works when an employer is acquiring a business that has run into serious financial difficulties. There are different types of insolvency proceedings, briefly outlined below, and the extent to which TUPE applies largely depends which procedure is used.

In essence, if it is not possible to save a business and it has to be wound up, TUPE is unlikely to come into play at all. But if it is possible to keep the business going and sell it – or perhaps just the viable part of it – as a 'going concern' often by means of a pre-pack, then TUPE will apply in modified form.

In these circumstances TUPE is watered down by two specific measures to encourage the sale of insolvent businesses as going concerns:

- certain of the business's debts to employees will not transfer to the new owner; and
- the insolvent business or the new owner may agree certain changes to terms and conditions of employment with employee representatives.

These measures are referred to below as 'the rescue provisions'.

Freedom from certain employee debts

In situations where the rescue provisions apply, the debts to employees that do not transfer under TUPE include:

- statutory redundancy payments;
- up to eight weeks' arrears of pay;
- payment for the statutory minimum notice period (i.e. up to the maximum 12 weeks);
- up to six weeks' accrued holiday pay; and
- any basic award for an unfair dismissal made before the transfer. See ***OTG Ltd v Barke & Ors and other cases*** *EAT 2011 IRLR 272* and ***Pressure Collers Ltd v Molloy & Ors*** *UKEAT/2011/0272.*

All of the above are subject to the statutory cap on a week's pay (currently £544). When an employer becomes insolvent, employees can receive payment of these debts by making an application to the Insolvency Service.

Importantly, liability for other debts passes to the new owner of the business under TUPE in the normal way. This would include, for example, any amounts in excess of £544 per week or in respect of full contractual notice pay. So whilst this might initially appear attractive to a prospective purchaser, it is actually very limited in scope.

Example

Company A goes into administration and it is decided one of its insolvent businesses should be sold. Company B wants to buy the business, but intends to make a number of the employees assigned to the business redundant. It finds out that the employees are entitled to a generous contractual enhanced redundancy scheme. Under the provisions outlined above, Company B will avoid liability only for the statutory redundancy pay due to the employees. Any payment owed beyond that by Company A under the enhanced redundancy scheme will transfer under TUPE. Company B could try to get this liability apportioned between the parties in the purchase agreement, although negotiating indemnities in relation to insolvent businesses tends to be difficult in practice.

Agreed changes to terms and conditions

The second rescue provision is the flexibility to agree changes to employees' terms and conditions. Such variations would most likely be void under TUPE under normal circumstances (see above). The changes must be designed to safeguard employment opportunities by ensuring the survival of the business. If that is so, the insolvent business, its new owner or the insolvency practitioner can agree the changes with employee representatives, despite the fact that they are by reason of the transfer or connected with it. The changes will take effect as terms of employees' contracts of employment, even without their individual agreement.

Example

Company B, having bought Company A's insolvent business, believes it can turn it around by reducing employees' salaries. The Unitison trade union is recognised in respect of the employees assigned to the

business. Company B is free to agree the salary reductions with the union representatives if it can show this is designed to ensure the survival of the business (i.e. by making it more profitable) and safeguard employment opportunities (i.e. by avoiding redundancies). The salary reductions will be effective with or without employees' individual agreement. Any variation agreed cannot breach employees' statutory entitlements – so, for example, Company B could not reduce the salaries below the national minimum wage.

If the employee representatives are not union representatives, there are additional safeguards:

- the change must be recorded in writing and signed by each of the representatives (or a duly authorised agent); and
- in advance of the agreement being signed, the employer must provide all employees with the text of the changes and guidance on its implications.

PRACTICAL POINTS TO CONSIDER

There are many practical matters that contractors and sellers and purchasers of businesses need to consider when negotiating the deal. In particular, the incoming employer will want to know as much as possible about what it is acquiring and any potential liabilities it is taking on.

As we have seen, the old employer's obligation to provide information about the transferring workforce is unlikely to give the new employer all the information it needs (see above). This is because the information that the old employer is obliged to give excludes certain types of information and also because it needs to be given only 28 days prior to the transfer and only to the successful bidder. So, in practice, the incoming employer will need to make specific enquiries at an early stage in order to acquire comprehensive details of the operation, the employees and any liabilities.

Once the new employer has sufficient information to assess the risks, it may well want to protect itself through the outsourcing contract or business sale agreement (as the case may be). This protection could be in two main forms:

- **'warranties'** – legal statements that particular facts are correct. If a warranty turns out not to be true, a claim for damages can be brought; and
- **'indemnities'** – contractual promises to compensate the other party for specific losses or damage suffered.

Due diligence and staff information

Assuming TUPE applies, the new employer is the party mainly at risk because it is the one which will acquire the employees and almost all of the liabilities associated with them. It will therefore want to know:

- who is employed in the operation (or the relevant part);
- what terms those staff are employed on; and
- what claims it is at risk of inheriting.

If the transfer is a business sale, the buyer should ask for this information as part of a 'due diligence' exercise into the state of the business at the start of negotiations. This will form part of the buyer's assessment of whether the business is worth buying and how much it should pay. The seller will expect to have to provide the information as a prerequisite of securing a sale. But what if the transfer comes about through a change in contractors on the outsourcing of an activity?

In this situation, a new company bidding for the contract is in a more difficult position to obtain the information. The incumbent contractor may not have any incentive to provide the information and, as it is in danger of losing the contract, may simply refuse. As for the information it is required to give under TUPE, this will most likely be provided too late to be of any practical value. Some suggestions on how to deal with this in the outsourcing contract are set out below (under 'Indemnities on an outsourcing').

Indemnities on a business sale

On the sale of a business, once the buyer knows what liabilities it may be inheriting, it will want the seller to give appropriate indemnities. In particular, it should request indemnities for:

- any liabilities relating to the period during which the transferred staff worked for the seller (e.g. unpaid wages including underpaid holiday pay (for example where guaranteed overtime payments have not been factored into the holiday pay calculation);
- any other liabilities which it inherits (e.g. unfair dismissal claims because the seller dismissed staff unfairly for a reason connected with the transfer);
- any claim of any kind against the buyer by any employee other than those named as transferring; and
- any liabilities arising from a failure by the seller to inform and consult with affected staff.

The indemnity should cover costs the buyer might incur, as well as the liability itself.

As the thrust of TUPE is to transfer staff and liabilities to the new owner of the business, the seller will be at less risk than the buyer. However, the seller normally asks for indemnity protection too to cover:

- any liabilities relating to periods during which the transferred staff work for the buyer;
- any claim by an employee who resigns before the transfer date because of detrimental changes the buyer intends to make to his or her terms or working conditions; and
- any liabilities arising from a failure by the buyer to inform the seller of relevant measures it envisages will be taken in relation to affected employees.

Unexpected arrivals

One tricky issue that sometimes arises is individuals transferring when they are not expected to do so. An employer might acquire employees under TUPE (and an obligation to pay them) in circumstances where it was not anticipating that.

The most common way to deal with this is to provide in the contract that, if individuals do unexpectedly transfer, the new employer can dismiss them within a reasonable time and the old employer will indemnify against any salary costs and unfair or wrongful dismissal claims.

Indemnities on an outsourcing

The most important point to remember about outsourcing is that there may not only be a TUPE transfer at the start of the arrangement. There is potentially another transfer at the end, when a new contractor is appointed or the client takes the service back in-house. The outsourcing contract should deal with both scenarios.

An incoming service provider will want the same information about staff and liabilities it will inherit as would the buyer of a business. It will also want the same indemnities. On the initial outsourcing, the client will be able to give the necessary information and indemnities because the staff transferring will be its own employees. However, on any subsequent transfer, the staff will be employed by the outgoing service provider. Therefore, the client should ensure that the initial contract also provides that:

- the service provider cannot unreasonably change the staff working on the contract or account or alter their terms during the course of the contract;
- at a reasonable time before the end of the contract, the service provider will give the client or a prospective new contractor relevant information about the staff, their terms and any liabilities;
- the service provider will inform and consult affected staff on a subsequent transfer (either to a new contractor or back to the client); and
- when the contract ends, the service provider will indemnify the new contractor or the client (as the case may be) against liabilities that arose during its watch and which might transfer.

Paper prepared originally by Gareth Brahams

Brahams Dutt Badrick French LLP

Updated by Patrick Brodie, RPC LLP, November 2019

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