

EMPLOYMENT – TUPE 2

Has there been a transfer for the purposes of TUPE 2006? If no – if dismissed consider claims for statutory UD. If yes, then consider what the effect of the relevant transfer will have.

TRANSFERS Automatic Transfer Principle – **Reg.4 (1)** where there is a relevant transfer under Reg.3 the transfer does not terminate employment contracts. The core of this law, r.4(1) provides that employment contracts 'shall have effect after the transfer as if originally made between the person so employed and the transferee'. So new business buyers cannot escape the old business' obligations to its workforce. Employees transfer on same terms and conditions. If these are not met, there are sanctions on the employers.

WHICH EMPLOYEES ARE AFFECTED? Employees...immediately before the transfer, or would have been if not sacked, so long as they are assigned to the business/part transferred, and so long as they don't object.

*it also points out that to fall within the protection of TUPE, you had to have an employment contract "immediately before the transfer", r.4(3). This was the issue in *Litster v Forth Dry Dock*, where a relaxed and purposive interpretation was given. So, "immediately" can really mean a while, with wiggle room.

*'so long as they are assigned to the business/part transferred' - Question of fact – case by case basis – mathematical approach (work out % time spent) and holistic approach (overall). **Johnson Controls Limited v (1) R Campbell and (2)**. Temporary assignments not covered - **Botzen v Rotterdamse Droogdok Maatschappij BV** – they were assigned in a general capacity.

*'so long as they don't object' **Regulation 4(7)**: Employees have the right to object to their transfer to a new employer. Effect of an objection: the employee's contract of employment and the rights, powers, duties, liabilities under or in connection with them will not transfer to the transferee. Depends on the way they object ie if an employee objects pre transfer there is no liability as effectively resigning.

*where an employee objects to the change in the identity of the employer, then r.4(7) states he will not become one. He is to be treated as if his contract terminated when the transfer takes place, but that he is not dismissed (unless of course the employer actually does dismiss him), r.4(8). This issue came up in *Wilson v St Helens Borough Council*

***Reg. 4 (9): Non repudiatory breach with notice** Statutory right: Resigns in circumstances where a transfer would involve a substantial change in working conditions to their detriment – liability transfers to the transferee.

* **Reg. 4(11)**: where the contract is varied detrimentally on transfer, employees can treat themselves as dismissed by the employer. In the *Humphreys case (University of Oxford v Humphreys (1) and Associated Examining Board (2))* it was decided that an employee who resigns on or before a TUPE transfer because of well-founded fears that the new owner intends to impose worse terms and conditions of employment than those provided by the original owner can claim constructive wrongful dismissal against the original owner. Also the Tapere case ruled on the interpretation of mobility clauses, and where a relevant transfer involves a substantial change in working conditions which is to the employee's material detriment, held that "detriment" should be considered using the subjective approach which applies in discrimination law.

*The cases: *Katsikas v Konstantinidis*, *New ISG Limited v Vernon and Others* (claimant objected to working for new company); *Tapere v South London and Maudsley NHS Trust*; *Abellio London v Musse & Others*.

HOW IS TRANSFEEE AFFECTED? *Rights, duties, powers, liabilities, anything done or not done, transfers from to transferee, BUT not criminal liability.

Following a transfer: Can a transferee change terms and conditions of employment? Better terms? Some better terms, some worse – overall employee better off?

n r.4(4) it says that variations of employment terms 'shall be void' if the main reason is the transfer itself or 'a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.' In r.4(5) it is emphasised that employees and employers can agree to change terms where this is not the case. The normal rule is that even consensual agreements are void. Employees can cherry pick to get the best deal. No "safe" time in the TUPE regs to change Ts and Cs. *Daddys Dance Hall*– ECJ: a variation is ineffective if the transfer itself is the reason for the variation. This is harsh for employers but there is a caveat. **CAN:** Change t and cs for an ETO reason entailing changes in the workforce OR For an unconnected reason. BIS provides Guidance: Employment rights on transfer of an undertaking (June 2009).

HAS EMPLOYEE BEEN DISMISSED BEFORE THE RELEVANT FACTOR?

Eligibility for unfair dismissal(Burden on claimant). There must be a dismissal: Actual/Constructive. **If yes:** Reg 7(1) dismissal will be **automatically unfair** dismissal if dismissed because of the transfer or a reason connected with the transfer. Cannot be justified. Claim will be against the **transferor**.

BUT Can transferor rely on the Reg 7(2) defence? states that employees will be considered dismissed unfairly, if they are dismissed where the employer showing an economic, technical or organisational reason for dismissal. What is certainly not included in this concept is dismissals simply to improve the price of the company before it is sold. Where there is an economic, technical or organisational (ETO) reason for dismissals, these are considered 'substantial reasons' (i.e. justified reasons) under the fair dismissal provision of the Employment Rights Act 1996 (s.98(2)(c)). reason must entail a change in the workforce. An economic reason is a reason relating to profitability or market performance of the business; technical reasons relate to the nature of the equipment or production processes; organisational – management or structure of the business). If employer can argue successfully the t and cs are changing due to one of these reasons, there will not be a problem. *Delabole Slate Co Ltd v Berriman*– changes in the numbers employed or the functions performed by employees, not just the new people coming in in isolation. If not, dismissal will be automatically UD. Transferor will have no defence. If yes, consider UD, transferor can rely on permitted reason redundancy and some other substantial reasons (ERA 1996) (Pleasure business: *Iceland Frozen Foods*)

The result for the employee is that he is considered redundant, and thereby should receive a compensation payment if they have been an employee for more than two years under s.135 ERA 1996. importantly, an employee dismissed by the seller of the business is held to have been dismissed by the purchaser too. This means an unfair dismissal claim can be brought against either party.

*After TUPE transfer there is usually a period of harmonization: *Campbell v MGN Ltd* (even though waited a year, still void as related to transfer) , *Credit Suisse First Boston (Europe) v Lister* (again void, even though employees seemed satisfied with conditions), *Hyatt v James South Eastern Ltd*, *Regent Security Services Ltd v Power*, *Manchester College v Hazel*

AUTOMATIC ID: If dismissed by reason of the transfer...It's automatically unfair...Unless it's for an ETO entailing a change in the workforce. See further: *Dynamex Friction Ltd v Amicus*

*ETO reason defence unsuccessful - *Wheeler v Patel & Golding Group/Spaceright Europe v Baillavoine* (dismissing chief executive is not a ETO reason). In contrast *ETO reason defence successful- *Honeycombe 78 Ltd v Cummins* (dismissed some of the staff as did not have the £ to pay them – cost cutting measure)

LEGAL CONSEQUENCES OF A TRANSFER – duty to inform (if contract stays the same) and consult (more significant changes). Union Representative or Elected Representatives, of the AFFECTED employees will negotiate on their behalf. Specific information to be provided (reg 13(2)). Long enough before the transfer to allow adequate consultation with a view to reaching agreement. *Transferor to provide transferee with: Employee Liability Information, In Writing. At least 2wks before the transfer.

REMEDIES: For employee: UD claim (compensation); re-engagement/re-instatement; declaration of void contract variation; failure to inform and consult – up to 13wks pay. For transferee – failure to supply ELI: declaration; compensation (min £500 per employee).

*In practice: in the contract between old and new company they write warranties and indemnities used to allocate liabilities between the parties. Due diligence is very important ie finding out what you are buying/getting.

EVALUATION: The benefits to individual workers is clear; TUPE prevents the possibility of everybody in the firm losing their jobs, just because the company providing the service changes. This gives employees increased certainty. A side-effect of the new regulations could prove unfortunate for some employers. This has been particularly highlighted in connection with law firms. // According to the *The Law Society Gazette*, law firms might be forced to employ teams of lawyers when taking over contracts. Under the new rules, if a client decides to source their legal work from a different provider, the legal team from the old provider would be entitled to transfer to the new provider under the same terms and conditions as before; if the new provider were to object, the new employees would be entitled to sue for unfair dismissal.// Objections to the new regulations had been raised during consultation. An exemption for professional services firms had apparently been mooted by the government but was eventually ruled out. In 2012, the UK coalition Government sought feedback on the efficacy of TUPE in relation to professional services and found that there were "mixed views" about whether professional services should continue to be covered by the service provision change regime. In certain sectors, particularly advertising, there was strong support for the idea of introducing an exemption. However, lawyers have highlighted problems with the operation of the New Zealand equivalent of TUPE and warned the Government to be cautious in trying to exclude certain groups of employees.// There are potential problems for employees as well. An employee might not want to transfer to the new employer. But they have no option to seek redundancy from their current employer, even though their post is effectively being deleted. They must either transfer against their will, or resign their employment.// Ultimately, whether TUPE applies in any situation depends on all relevant circumstances, and in the event of a dispute this can only be settled at an employment tribunal or higher court. It is therefore vital that organisations have the correct management systems and legal support in place from the start.