THE TRANSFER OF UNDERTAKINGS REGULATIONS

INTRODUCTION

1 This paper examines the approach which has been taken by the Courts in cases concerning the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), with particular emphasis on recent developments.

2 This Government intends to reform the TUPE Regulations with effect from December 2013. The proposed reforms were described in detail in the Government Response to Consultation on the Transfer of Undertakings (Protection of Employment) Regulations 2006, which was published by the Department for Business Innovation and Skills in September 2013. The proposed changes to TUPE are summarised in a separate powerpoint.

WHEN DO TUPE APPLY?

3 TUPE provide for two types of relevant transfer, viz:

(1) a transfer of an undertaking, business or part of an undertaking or business where there is *"a transfer of an economic entity which retains its identity"*; and

(2) a service provision change ("SPC").

Depending on the circumstances, a change in service provider may be both a classic transfer and an SPC.

TRANSFER OF AN UNDERTAKING

4 Traditional transfers are covered by regulation 3(1)(a), which provides:

> *(1) These Regulations apply to –*
>
> (a) *a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity; …*

5 In deciding whether there has been a transfer of an undertaking or part, there are two separate questions which require to be raised and answered, namely (1) was there an economic entity and (2) did it retain its identity – see ***Cheeseman and others v R Brewer Contracts Ltd*** [2001] IRLR 144. Unless the employment tribunal takes care in spelling out precisely what the relevant entity is, it may mislead itself when deciding whether that entity has retained its identity – see ***Cheeseman*** at paras 19 to 23.

6 The principles to be applied under both limbs of the test are helpfully distilled in ***Cheeseman*** at paragraphs 10 to 12 and 15.

What is an economic entity?

7 Regulation 3(2) defines the expression *"economic entity"*. It states:

> *In this regulation, 'economic entity' means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*

8 This definition can be traced back to the jurisprudence of the European Court of Justice ("ECJ), now known as the Court of Justice of the European Union ("CJEU"). One of the earliest cases to consider the meaning of the phrase *"economic entity"* was ***Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice*** C-13/95 [1997] IRLR 255. In that case the issue was whether the Directive applied when a contract for cleaning a secondary school changed hands. In its ruling in ***Suzen***, the Court pointed out that an entity cannot be reduced to the activity entrusted to it. It went on to say that the factors which may distinguish an economic entity from a mere activity include:

(1) the workforce;

(2) the management staff;

(3) the way in which work is organised;

(4) operating methods;

(5) where appropriate, the operational resources available to the entity.

9 However, in subsequent cases the Court of Justice has made it clear that an organised grouping of employees who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity – see, for example, ***Francisco Hernandez Vidal SA v Gomez Perez*** C-127/96 [1999] IRLR 132. The issue in ***Vidal*** was whether the Directive applied to a situation in which an undertaking which had previously contracted out its cleaning operations decided to terminate the contract and bring back cleaning in-house. In its judgment the Court said:

> *Whilst … an [economic] entity must be sufficiently structured and autonomous, it will not necessarily have significant assets, tangible or intangible. Indeed, in certain sectors, such as cleaning, these assets are often reduced to their most basic and the activity is essentially based on manpower. Thus an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity.*

How important is organisational structure?

10 The decisions in ***Suzen*** and ***Vidal*** appear to suggest that, to constitute an economic entity, a grouping of resources must have a recognisable organisational structure. But in ***Jouini and others v Princess Personal Services GmbH*** C-458/05 [2007] IRLR 1005 the Court of Justice held that the absence of an identifiable organizational structure will not always be fatal. The background was that Mayer & Co GmbH was a temporary employment business. At the request of one Mayer's principal clients, another temporary employment business, Princess Personal Service GmbH was set up to fulfill Mayer's needs. Some of Mayer's staff were transferred to Princess, including an office worker, branch manager, some customer advisers and the managing director, as well as some of the temporary staff (approximately one third). The Austrian Court asked the Court of Justice whether this situation could amount to a transfer, notwithstanding the fact that the part of the workforce that had been transferred lacked any identifiable organizational structure.

11 The Court held that, in deciding whether the absence of an identifiable organizational structure was critical, it was necessary to take account of the nature of the relevant business. Temporary employment agencies are in general characterized by a lack of structure. Accordingly, in the context of a

temporary employment business, it was sufficient to ask whether the assets transferred by the transferor constituted an *operational* grouping sufficient in itself to provide services characterising the business's economic activity, without recourse to other significant assets or to other parts of the business. The Court said:

> *37 It can be concluded from the foregoing that a single grouping consisting of management personnel, temporary workers and know-how, can pursue an objective of its own, namely the provision of services consisting in the temporary assignment of workers to user undertakings in return for remuneration, and that such a grouping can constitute an economic entity which can operate without recourse to other significant assets or to other parts of the transferor. That may in particular be the case in the main action, since the grouping consisted of an office worker, branch manager, some customer advisors, one-third of the temporary workers and some management personnel possessing certain expertise. It is for the national court to establish whether that is the case.*

Part of an undertaking: the Court of Appeal's decision in *Fairhurst Ward*

12 In ***Fairhurst Ward Abbotts Limited v Botes Building Limited*** [2004] IRLR 304, the Court of Appeal held that where a transfer relates to *part* of an undertaking, it is not necessary for the particular part transferred to exist as a discrete and identifiable stable economic entity before the date of the transfer.

13 In ***Fairhurst Ward***, a single contract for the maintenance of void properties in the London Borough of Southwark was divided into two separate contracts when re-tendering took place. The new contracts covered two separate geographical areas, Areas 1 and 2. After the outgoing contractor learnt that its tender for Area 2 had been unsuccessful, eight employees who had previously spent 56.6% of their time in Area 2 were sent to work exclusively in that area until the existing contract came to an end. The employees in question were re-allocated in this way because the outgoing contractor was keen to ensure that they were assigned to Area 2, so that they would transfer to the successful tenderer under TUPE. The contractor which in due course took over responsibility for Area 2 sought to argue that TUPE did not apply because the group of employees who had been assigned to Area 2 did not constitute an economic entity *before* the transfer.

14 The Court of Appeal held that this did not negate the existence of a transfer. Mummery LJ said:

> *Neither the legislation nor the case law expressly requires that the particular part transferred should itself, before the date of the transfer, exist as a discrete and identifiable stable economic entity. Nor do I think that such a requirement is implicit in the need to identify a pre-existing stable economic entity. In my judgment, it is sufficient if a part of the larger stable economic entity becomes identified for the first time as a separate economic entity on the occasion of the transfer separating a part from the whole.*

Retention of identity: the multifactorial test

15 Under the Acquired Rights Directive, the test of whether there is a transfer of an undertaking or part of an undertaking is whether there is *"a transfer of an economic entity which retains its identity"*. This definition of a transfer has been incorporated in regulation 3 of TUPE.

16 In ***Spijkers v Gebroeders Benedik Abbattoir CV*** C-24/85 [1986] ECR 1119, the Court of Justice held that the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, which may be indicated by the fact that its operation is continued or resumed by the new employer. The Court went on to say that, in order to determine whether the conditions for the transfer of an undertaking are met, it is necessary to consider all of the facts characterising the transaction in question, including:

(1) the type of undertaking;

(2) whether tangible assets transfer;

(3) the value of intangible assets at the time of the transfer;

(4) whether the majority of the undertaking's employees are taken over by the new employer;

(5) whether or not customers are transferred;

(6) the degree of similarity between the activities carried on before and after the transfer;

(7) the period, if any, for which those activities were suspended.

17 The Court pointed out that each of these factors is only part of the overall assessment required and that individual factors cannot therefore be considered independently of each other. This has become known as the *"multi-factorial test"*.

18 The ruling in ***Spijkers*** also emphasised that whilst all of the above factors are potentially relevant, the weight to be accorded to them in individual cases will depend on the nature of the undertaking. In this context, the ECJ has drawn a distinction between undertakings which can be characterised as asset reliant and those which can be described as labour intensive.

Asset reliant undertakings: case law of the Court of Justice

19 In ***Oy Liikenne Ab v Liskojarvi*** C-172/99 [2001] IRLR 171 the Greater Helsinki Joint Board awarded the operation of seven local bus routes to a new contractor, Oy Liikenne, in place of a previous contractor. The company took over the 45 drivers who worked on the routes but no vehicles or other assets connected with the operation of the bus routes were transferred. The Court of Justice held that, where tangible assets contribute significantly to the performance of an activity, there can be no transfer if none of the relevant assets are taken over by the new employer. It said:

> *.... in a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity.*

20 It is not, however, necessary that the incoming employer should acquire ownership of the assets used in the undertaking. This was made clear in ***Abler and others v Sodexho MM Catering Gesellschaft mbH and Sanrest GroBKuchen Betriebsgesellschaft mbH*** C-340/01 [2004] IRLR 168. In that case the Court was asked whether a service contractor was to be treated as *"taking over"* assets if the premises and equipment used in the service belonged to the recipient of the service. The case involved a hospital catering contract. The Court held that a defining feature of the contract was the

obligation to prepare meals in the hospital kitchen and thus to take over the premises and equipment provided by the hospital. That obligation was sufficient to give rise to the transfer of an economic entity. It was immaterial that the tangible assets taken over by the new contractor belonged to the contracting authority, since it was clear that the Directive applies whenever there is a change in the identity of the employer responsible for carrying on the business.

21 This principle is now reflected in regulation 3(6)(b) of TUPE, which provides that a relevant transfer may take place whether or not any property is transferred to the transferee by the transferor.

Labour intensive undertakings

22 It has already been explained that the case of ***Suzen*** involved a change in cleaning contractor. Against that backdrop the Court pointed out that the mere fact that the service provided by two successive contractors is similar does not support the conclusion that an economic entity has been transferred. The Court said that, because an economic entity cannot be reduced to the activity entrusted to it, the mere loss of a service contract could not by itself indicate the existence of a transfer within the meaning of the Directive. However, the Court also observed that, where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot depend on the transfer of such assets. The Court said:

> *Since in certain labour intensive sectors a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, it must be recognised that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, as stated in paragraph 21 of Rygaard [1996] IRLR 51, cited above, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis.*

23 This principle was more recently applied by the Court of Justice in ***CLECE SA v Valor and another*** C-463/09 [2011] IRLR 251. In that case a local authority

terminated a cleaning contract with a private cleaning company and decided to employ its own staff to carry out cleaning. The Court held that there was no transfer under the Directive. Because the authority had not taken over any of the existing staff and there had been no transfer of any assets, the only factor creating a link between the putative transferor and transferee was the fact that the activities were similar. This was not sufficient to establish the transfer of an economic entity. The Court went on to say that in the case of an economic entity which is essentially based on manpower, identity cannot be retained if the majority of its employees are not taken on by the alleged transferee.

Type of undertaking: approach of UK Courts

24 Although the case law of the Court of Justice tends to suggest that a clear distinction should be drawn between undertakings which are asset reliant and those which are labour intensive, the UK courts have been reluctant to follow this approach. In ***Scottish Coal Co Ltd v McCormack and others*** [2005] SC 105 the Court of Session (Inner House) said:

> *We do not read either case [Oy Liikenne and Abler] as laying down an invariable requirement that, in the context of a claimed TUPE transfer, a given business must necessarily be characterised as either 'asset-reliant' or 'labour-intensive', as if those were mutually exclusive categories that defined exhaustively the range of possibilities that could arise. The range of intermediate possibilities appears, a priori, to be unlimited. The cases illustrate the position at one end of the spectrum when a transfer must include the production assets of the entity. In intermediate cases, it must always be an issue for the fact-finding tribunal whether, on an appreciation of all relevant facts and circumstances, the undertaking in question can be said to have transferred for the purposes of the 1981 Regulations.*

25 In ***Balfour Beatty Power Networks Ltd v Wilcox*** **[**2007] IRLR 63, the Court of Appeal expressed its agreement with the approach adopted by the Court of Session in ***Scottish Coal***. The issue in ***Balfour Beatty*** was whether TUPE applied when Balfour Beatty took over a street lighting contract. The ET held that there was a transfer because the majority of the former contractor's workforce had been transferred to Balfour Beatty, and the same work was being carried on by almost the same people with the same objectives.

26 On appeal, Balfour Beatty argued that the ET erred in law in failing to take into account the fact that there was no transfer of assets. It pointed out that the vehicles and equipment used by the previous contractor had not been taken over and, relying on the ruling in ***Oy Liikenne***, argued that in a sphere of activity where tangible assets are important, there could be no transfer if none of those assets were taken over.

27 The Court of Appeal dismissed the appeal and held that the ET had been entitled to find that there was a relevant transfer. In considering the effect of ***Oy Liikenne***, the Court of Appeal observed that it was doubtful whether the Court of Justice intended to say that it was necessary, *as a matter of law*, to distinguish between *"labour intensive"* and *"asset reliant"* operations or to hold that when the latter are in issue, failure to transfer the assets will inevitably mean that there is no TUPE transfer. However, the Court added that, even if there were such an absolute rule, in the instant case the assets were leased rather than owned and it was difficult to see them as an integral part of the business.

28 In the ***Balfour Beatty*** appeal, it was also argued that there had been no transfer of a *"stable"* economic entity because there was no guarantee that the street lighting contract would continue and it was in fact lost shortly after the transfer. The Court of Appeal rejected that argument, holding that an enterprise may be stable as a matter of practical and industrial reality, even though its long term future is not assured.

29 Another case in which a transfer was found to occur notwithstanding the absence of a transfer of assets in a business which was arguably asset reliant is ***P & O Transport European Ltd v Initial Transport Services Ltd and others*** [2003] IRLR 128. The dispute giving rise to that appeal arose when P & O took over Initial's contract to provide a petroleum delivery service to Shell without taking over any of Initial's vehicles. P & O contended that since the petroleum industry is asset-reliant, it was not open to the tribunal to find that there was a transfer in the absence of any transfer of tangible assets. Dismissing the appeal, the EAT said:

> *In our opinion, the Court of Justice [in **Oy Liikenne**] was not laying down a principle that in all cases of asset-intensive industries the absence of a transfer,*

to a significant extent, of such assets would always lead to the conclusion that no transfer had taken place. When the judgment is read as a whole, it is apparent that the Court of Justice was reaffirming the principle that all relevant factors had to be weighed in assessing whether a transfer had taken place or not, and that the weight to be given to particular factors would vary in accordance with the facts of the case.

Effect of TUPE avoidance

30 The approach laid down by the Court of Justice in ***Suzen*** and ***CLECE*** appears to mean that, in the special case of a labour intensive undertaking, the question of whether there is a transfer, and hence whether the new employer is legally obliged to take over all members of the existing workforce, may depend on whether it voluntarily takes over a majority of the staff in question.

31 Unsurprisingly, the UK Courts have perceived some difficulty with that approach, because it means that whether employees transfer to the new employer by operation of law may depend on whether the employer is willing to take them over voluntarily. Consequently the Court of Appeal has held that, where there is evidence that the transferee has declined to take over employees in order to ensure that there is no transfer, little weight should be given to the fact that employees were not taken on - see the following trio of cases:

(1) ***ECM (Vehicle Delivery Services) Ltd v Cox and others*** [1999] IRLR 559, in which the Court of Appeal held that, in a case where there is evidence of TUPE avoidance, an employment tribunal is entitled to have regard to the reasons why the workforce was not taken on in deciding whether TUPE applied;

(2) ***ADI (UK) Ltd v Willer and others*** [2001] IRLR 542, in which a majority of the Court of Appeal (Simon Brown LJ dissenting) held that if the circumstances of an alleged transfer are such that there would have been a relevant transfer if the employees had been taken on, and the reason for not taking them on was to avoid a transfer, then the tribunal is obliged to deem the workforce to have been transferred for the purpose of carrying out its multi-factorial assessment;

(3) ***RCO Support Services and another v Unison and others*** [2002] IRLR 401, which goes even further than *ECM* and the majority decision in ***ADI***. In RCO the Court of Appeal held that the new employer's unwillingness to take on the existing workforce may be a significant factor whether or not its stance is actuated by a desire to avoid TUPE and gave their support to the following propositions:

(a) in determining whether there was a relevant transfer, the tribunal is entitled to have regard, as a relevant circumstance, to the reason why the employees were not taken over by the new employer;

(b) this requires the tribunal to make an *objective* assessment of all the facts, including the context in which the decision not to take on the workforce was made;

(c) the *subjective* motive of the putative transferee, and in particular whether the transferee was attempting to avoid the application of TUPE, is not "the real point".

32 A case which illustrates the difficulties these principles may cause is ***Atos Origin UK Ltd v (1) Amicus and others (2) Compaq Computer Ltd (3) Compaq Computer Customer Services Ltd*** EAT/0566/03 26 February 2004. In *Atos* the transferee was initially willing to take on a minority of the existing workforce but subsequently decided not to take on any of them in order to ensure that there was no transfer. In reaching the conclusion that TUPE did not apply, the tribunal held that since the staff whom the transferee would have been prepared to engage voluntarily were a numerical minority of the staff assigned to the entity, this element was not sufficiently significant for the economic entity to retain its identity. On appeal it was argued that, in the face of a finding that a TUPE avoidance policy had been adopted, the correct approach in law was for the tribunal to deem as transferred all the staff who were assigned to the economic entity.

33 The EAT disagreed. It held that there was nothing in any of the authorities to suggest that where a TUPE avoidance policy has been adopted, the attitude of the tribunal should be the punitive one of deeming all employees to have been transferred regardless of whether such employees would otherwise have been

taken on.

34 The Appeal Tribunal also held that in deciding whether a major part of the workforce has transferred, a tribunal may err in law if it simply compares the number of employees transferred, or deemed transferred, with the number which existed immediately prior to the transaction. The Appeal Tribunal said that where the undertaking has reduced in size or requires fewer workers, it may be necessary to consider whether those who have been taken over constitute a major part of the workforce required after the transfer.

Changes in the nature of the operation

35 Changes in the way in which an undertaking is operated are a factor to be taken into account in deciding whether it has retained its identity. But they will not normally negate the existence of a transfer unless they are fundamental in nature.

36 In ***Porter and Nanayakkara v Queen's Medical Centre*** [1993] IRLR 486, a regional health authority decided that there should be a change in the provider of paediatric and neonatal services. As a result the location from which the services were provided changed. In addition, there were changes in the nature of the services provided, which moved away from a traditional hospital-based service to one involving the greater provision of services in the community.

37 The High Court held that these changes did not prevent TUPE applying. The service was being carried on in a different way but the changes did not alter the essential character of the service. The judge added:

> *One factor which is always to be taken into account is the type of undertaking in question. Here it is an undertaking for the provision of medical services. Medical science does not stand still. As it advances, methods of giving neonatal and paediatric care are naturally modified and improved. This process is going on all the time. It does not mean that the object of the undertaking is changing but only that new means of achieving it are being adopted.*

38 ***Porter*** may be contrasted with ***Nottinghamshire Healthcare NHS Trust v Hamshaw and others*** UKEAT/00371/11 19 July 2011, where the changes in the nature of the service were held to be so fundamental that identity was lost. Nottinghamshire Healthcare NHS Trust ("the Trust") operated a residential

facility known as Hillside House for vulnerable adults who required long-term welfare and medical support. By March 2010 Hillside House had seven residents, who were supported by healthcare assistants and qualified nursing staff employed by the Trust. The Trust provided this service under a contract with Bassetlaw Primary Care Trust ("the PCT").

39 With effect from 1 April 2010, Nottinghamshire County Council took over responsibility for the residents' welfare support. Hillside House was closed and the residents were re-housed in homes of their own. Two new providers were appointed to provide care for the former residents in their own homes. Three of the seven former residents were allocated to Perthyn and four to Choice Support. Of the 18 employees employed by the Trust at Hillside House, three were taken over by Perthyn and 12 by Choice Support. Under the new arrangements, the vulnerable adults were supported by care staff in their own accommodation. A nominated member of staff would sleep in the accommodation provided for and occupied by the vulnerable adult to assist him or her where required.

40 The PCT continued to be responsible for the residents' medical care, but only in the sense that if one of the vulnerable adults fell ill at home a GP would be called.

41 The ET found that there was no relevant transfer, because the new scheme for providing care (described as a "*multi-agency commission led service model"*) involved *"fundamental changes*" from the regime operated at Hillside House. The key changes were:

(1) the removal of each resident from a residential setting to his or her own home pursuant to a tenancy agreement with a local housing association;

(2) the structuring of personally focussed care plans aimed at both challenging and developing the capabilities of the individual whilst ensuring the provision of a safe environment within which existing skills might be enhanced; and

(3) the discharge of the former residents from the care of the Trust.

42 On appeal, the EAT held that the ET had been entitled find that the service provided after 1 April 2010 was essentially different from the regime that operated at Hillside House. The mere fact that the object of the service i.e. the provision of care and support for vulnerable adults remained the same was not in itself sufficient to establish the retention of identity when the nature of the service had changed fundamentally.

43 Bean J also rejected the contention that the ET had given insufficient weight to the fact that the great majority of the staff employed by the Trust at Hillside House were taken over by the two new providers. He pointed out that the economic entity of Hillside House did not consist solely of the residents and staff, but also comprised the premises, equipment, resources and organisation, none of which had transferred.

44 The EAT went on to reject an appeal against the ET's finding that that there had been no SPC, for reasons which are considered below in the discussion of SPCs.

Effect of post transfer integration

45 An issue which has generated surprisingly little case law in the UK is whether an economic entity can be said to retain its identity if it is integrated in the business of the transferee and ceases to have any organisational autonomy following the putative transfer.

46 The issue came before the European Court of Justice (ECJ) in ***Klarenberg v Ferroton Technologies GmbH*** C-463/09 [2009] IRLR 301. Mr Klarenberg was employed by ET Electrotechnology GmbH (ET), a company which specialised in the development and manufacture of products in the field of industrial automation, measurement and control technology for the steel industry. The part of the business in which he worked was sold to Ferrotron, who engaged some members of Mr Klarenberg's team but not Mr Klarenberg himself. Ferrotron subsequently integrated the business it had acquired into its own business, requiring the employees it had taken over to carry out duties in relation to products other than those it had acquired from ET.

47 When Mr Klarenberg brought proceedings alleging that Ferrotron should re-employ him, Ferrotron countered by contending that there was no transfer

because the business it had acquired from ET had not retained its organisational autonomy after the acquisition.

48 The Court held that the Directive may apply where the part of the undertaking or business transferred does not retain its organisational autonomy, provided that (1) the functional link between the various elements of production transferred is preserved and (2) that functional link enables the transferee to use those elements to pursue an identical or analogous economic activity.

49 The Court rejected the argument that the identity of an economic entity depended entirely on its organisational autonomy. It pointed out that if a transferee's decision to integrate the business it had acquired into its own organisational structure prevented there being a transfer, the effective protection of employee rights would be frustrated.

Can there be a transfer if there is a temporary cessation of activity?

50 The fact that work is performed continuously without interruption will be a factor pointing towards the existence of a transfer. But the fact that there is a gap between the cessation of operations by one employer and the start of operations by another will not necessarily negate the existence of a transfer.

51 In ***Ny Molle Kro*** C-287/86 [1989] IRLR 37 the issue was whether there could be a transfer within the meaning of the Directive when there was a change in the employer responsible for running a seasonal inn which was only open in the summer and was closed at the time the new employer took over. The ECJ held that the temporary closure of the undertaking and the absence of staff at the time of the transfer were not in themselves sufficient, particularly in the case of a seasonal business, to preclude the applicability of the Directive.

52 Until recently, there was no domestic authority on the effect of a temporary cessation of activity. However, the issue arose in ***Wood v Caledon Social Club Ltd (Debarred) and London Colney Parish Council*** [2010] UKEAT/0528/09 12 March 2010. The claimant was employed by R1 as a bar steward at the Caledon Community Centre. On 11 August 2008 R1 surrendered its lease of the Centre to R2, which owned the freehold. The claimant was dismissed the following day, on 12 August 2008. On 16 September 2008, R1 surrendered its licence of the club area to R2. In due

course, R2 resumed the operation of the bar, with effect from 6 October 2008. The ET found by a majority that there was no relevant transfer, because the bar had ceased to operate for a period.

53 On appeal, the EAT overturned the decision of the majority. It held that there was merely a temporary cessation of the operation of the bar and that the economic entity did not cease but was *"temporarily suspended"*. The transfer took place on 16 September 2008 because it was plain by that date that R1 intended to re-open the bar.

WHAT IS A SERVICE PROVISION CHANGE?

54 Under the 1981 Regulations, it was often difficult to say with certainty whether TUPE would apply to a change in service provider. TUPE 2006 aim to eliminate this uncertainty by expressly applying the regulations to SPCs.

55 The rules in relation to SPCs are to be found in regulation 3. Regulation 3(1)(b) describes a service provision change as a situation in which:

(1) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor") i.e. out-sourcing;

(2) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf i.e. replacement of one contractor by another;

(3) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf i.e. in-sourcing,

and in which the conditions laid down in regulation 3(3) are satisfied.

56 The conditions prescribed by regulation 3(3) are that:

(1) immediately before the SPC –

(a) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(b) the client intends that following the SPC the relevant activities will be carried out by the transferee, other than in connection with a single specific event or task of short term duration; and

(2) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

57 Regulation 2 of TUPE provides that references to *"contractor"* in regulation 3 include a sub-contractor, from which it must follow that there can be an SPC when one sub-contractor replaces another or when a service previously provided by a sub-contractor is re-tendered.

Need for organised grouping of employees

58 In ***Eddie Stobart Ltd v Moreman and others*** [2012] IRLR 356, the EAT held that a group of employees deployed on a particular activity will not constitute an *"organised grouping of employees"* unless they are organized by reference to the requirements of the client in question. The background was that Eddie Stobart Ltd ("ES") provided warehousing and transport services from premises known as Manton Wood. At the time of the alleged transfer, it was providing a warehousing and meat delivery service for two clients, Forza and Vion. Because the clients placed orders at different times of the day, ES' nightshift employees worked principally on the Forza contract and the dayshift employees worked principally on the Vion contract. When ES closed Manton Wood, Vion arranged for the work done at Manton Wood to be taken over by FJG.

59 The ET held that this did not amount to an SPC. It found that the employees who worked principally on the Vion contract were not an organised grouping of employees, because they were not a dedicated, autonomous team. Underhill P dismissed an appeal. He said:

> ***18*** *… I believe that the judge came to the right answer for the right reasons. Taking it first and foremost by reference to the statutory language, reg. 3(3)(a)(i)*

does not say merely that the employees should in their day-to-day work in fact (principally) carry out the activities in question: it says that carrying out those activities should be the (principal) purpose of an 'organised grouping' to which they belong. In my view that necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. The statutory language does not naturally apply to a situation where, as here, a combination of circumstances - essentially, shift patterns and working practices on the ground - mean that a group (which, NB, is not synonymous with a 'grouping', let alone an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. The paradigm of an 'organised grouping' is indeed the case where employers are organised as 'the [client A] team', though no doubt the definition could in principle be satisfied in cases where the identification is less explicit.

***19** I do not regard that conclusion as objectionable on policy grounds. No doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in the specified circumstances they 'go with the work' (though the assumption that in every case that will benefit, or be welcome to, the employees transferred is not universally true). But it remains necessary to define the circumstances in which a relevant transfer will occur, and there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible."*

60 The EAT's decision in ***Eddie Stobart*** was approved by the Court of Session (Inner House) in ***Seawell Ltd v Ceva Freight (UK) Ltd and others*** [2013] IRLR 726. The claimant in that case, Mr Moffatt, had been employed by Ceva Freight Limited ("Ceva") as a logistics co-ordinator in a warehouse where the workforce was organised into two separate groups, one for inbound goods and one for outbound goods. Mr Moffat was part of the outbound team, which comprised eight people. He spent 100% of his time working on an account for a single customer, Seawell Ltd ("Seawell"). However, his line manager spent only 20% of his time on the Seawell account, the general manager about 10% and two of the warehousemen between 20 and 30%. After about a year as a client of Ceva, Seawell took the work carried out by Ceva in-house.

61 At first instance the employment tribunal decided that this gave rise to an SPC and that Mr Moffat had transferred to Seawell under TUPE, because he was

himself *"an organised grouping of employees"*. However, the Court of Session disagreed. It pointed out that:

(1) the fact that an organised grouping can consist of a single person does not mean that an employee who spends all of his time on work for one client necessarily constitutes an organised grouping;

(2) the concept of an organised grouping implies that there be an element of conscious organisation by the employer of its employees into a grouping - of the nature of a *"team"* - which has as its principal purpose the carrying out de facto of the activities in issue;

(3) where activities are carried out by the collaboration, to varying degrees, of a number of employees who are not organised as a grouping, it is wrong to isolate one of their number on the basis that he devoted all of his time to the collaborative effort.

Client must remain the same

62 In ***Hunter v McCarrick*** [2013] IRLR 26 the Court of Appeal held that regulation 3(1)(b) cannot apply unless the activities carried out by different contractors before and after an alleged transfer are for the ***same*** client. If there is not only a change of contractor but also a change of client, there can be no SPC.

63 This reasoning was followed by HH Judge Richardson in the subsequent case of ***Taurus Group Ltd v Crofts and another*** UKEAT/0024/12 22 May 2012. In that appeal the claimant, Mr Crofts, was one of two security officers employed by Reliance Security Services Limited ("Reliance") at a building known as Glasshouse, which was a building housing student accommodation in Nottingham. Reliance had been providing security services at Glasshouse under arrangements with a company called CRM, who were acting as the managing agents of the building. On 17 February 2011 Glasshouse was acquired by the Mansion Group who, on taking over management of the site, appointed Taurus to provide security services at the building.

64 The EAT held that the appointment of Taurus in place of Reliance did not give rise to an SPC, because the client had changed. The judge rejected the

contention that the *"client"* for the purposes of reg 3(1)(b)(ii) is the person who from time to time requires the provision of the service.

65 The principle laid down by the Court of Appeal in ***Hunter*** was also applied by the EAT in ***SNR Denton LLP v Kirwan*** [2013] ICR 101. In that case the claimant had been employed as a solicitor in a group of companies. Her role was mainly concerned with selling management contracts to outside purchasers. When the companies in the group entered administration, the administrators engaged SNR Denton to dispose of company assets. These included service contracts that had previously been the claimant's responsibility. The claimant argued that the appointment of SNR Denton gave rise to an SPC and that she had transferred into the LLP's employment under TUPE.

66 The EAT rejected that contention. Langstaff P held that although administrators are for some purposes agents of the company, theirs is a special type of agency created for a peculiar purpose. Consequently solicitors retained by administrators to assist with the disposal of a company's assets were not to be taken as providing a service to the company for the purposes of the rules on SPCs.

Division of service between two or more contractors

67 The decision of the Employment Appeal Tribunal ("EAT") in ***Kimberley Group Housing LTD v (1) Hambley and others (2) Angel Services (UK) Ltd*** [2008] IRLR 682 considered the problems that can arise when a service which has previously been provided by one contractor is henceforth to be divided between two or more contractors.

68 Leena Homes Limited ("Leena") provided accommodation and related services to asylum seekers under a contract with the Home Office. It provided these services in Middlesborough and Stockport. When Leena lost the contract, two contractors were appointed, namely Kimberley Group Housing Limited ('Kimberley') and Angel Services (UK) Limited ("Angel"). Kimberley acquired the lion's share of the work, taking over 71% of the operation in Middlesborough and 97% of the operation in Stockport. Employees of Leena lost their jobs when the contract changed hands since the new providers did

not accept that TUPE applied. Six of the employees brought complaints of unfair dismissal, three of them having worked at the Middlesborough office and the remainder at Stockport.

69 The ET found that there had been a SPC within the meaning of regulation 3(1)(b) of TUPE. On appeal, the EAT held that the ET had been entitled to reach that conclusion. The EAT acknowledged that in some circumstances a service which had previously been provided by a single contractor could become so fragmented that TUPE would not apply. But where, as in this case, there were two overlapping contracts providing for activities previously provided by one provider, the degree of fragmentation was not such as to preclude the finding that an SPC had taken place.

70 ***Hambley*** can be contrasted with ***Clearsprings Management Ltd v Ankers and others*** UKEAT/0054/08 24 February 2009, which also involved contracts for the provision of accommodation and pastoral care to asylum seekers. Following a tendering exercise, five old service providers in the North West area were replaced by three new providers. Service users who had been allocated to the outgoing contractors were distributed randomly amongst the new providers. Upholding the decision of the Employment Tribunal, the EAT found that the service was too fragmented to give rise to an SPC.

71 For another case where the degree of fragmentation was so great as to preclude an SPC see ***Enterprise Management Services Ltd v Connect-up Ltd and various claimants*** [2012] IRLR 190. In that case Enterprise Management Services Ltd ("Enterprise") supplied IT support services to some 240 schools which were the responsibility of Leeds City Council ("LCC"). When the service was re-tendered by LCC, Enterprise decided not to tender. In due course, Connect-up Ltd took over IT support for 62.5% of the schools formerly serviced by Enterprise. An organization known as SICTS Ltd took over 24.6% of the schools and the remainder were distributed among four other providers. On appeal, the EAT held that the ET had been entitled to conclude that following the re-tendering exercise the provision of the services formerly provided by Enterprise was so widely spread that no SPC had taken place.

Changes in the nature of the activity

72 There is no explicit requirement in the rules relating to service provision changes for the activities to retain their identity. However, the EAT has made it clear that a change in service provider will not amount to an SPC unless the activities carried on before and after the transfer are essentially the same - see ***Metropolitan Resources Limited v Churchill Dulwich Limited and others*** [2009] IRLR 700. This was another case arising from a change in the contractor responsible for providing accommodation services to asylum seekers. Migrant Helpline ("MH") had a six month contract with Churchill Dulwich Limited ("CDL") for the provision of accommodation services at a hostel called Barry House. With effect from 26 January 2007, MH decided to divert new asylum seekers to Metropolitan Resources Limited ("MRL"), which had a hostel at Coombe Farm. However, the contract with CDL was allowed to continue to the end of its six month term, which expired on 31 March 2007. The only contractual differences between the 2 contracts were the change in location and the fact that the contract with MRL stated that the intention was to provide accommodation for one or two nights only. The claimants continued to work for CDL until the end of March 2007 and presented themselves for work with MRL on 2 April 2007. MRL refused to employ them.

73 The ET found that there was an SPC within the meaning of TUPE, holding that:

(1) there had been an organised grouping of employees which had as its principal purpose the carrying out of activities on behalf of MH;

(2) those activities had ceased to be carried out by CDL and were instead carried out by MRL;

(3) the transfer took place when MH entered into a contract with MRL which resulted in new asylum seekers being diverted to the latter, even though asylum seekers who had already been housed remained with CDL until the end of March 2007.

74 On appeal, the EAT held that the ET had not erred in law in reaching these conclusions. It held:

(1) there is no need for an ET to adopt a 'multifactorial' or 'purposive' approach in deciding whether there has been an SPC. A service provision change is a wholly new statutory concept. It is not defined in

terms of the transfer of an economic entity or other concepts developed under TUPE or the decisions of the ECJ. The circumstances in which an SPC occurs are comprehensively and clearly set out in regulation 3(1)(b) and regulation 3(3) of TUPE. Whether the conditions set out in the regulations are satisfied must be decided by a straightforward and commonsense application of the relevant statutory words to the individual circumstances of the case;

(2) the tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. However, minor differences between the nature of the tasks carried on or the way in which they are performed will not prevent there being an SPC;

(3) a difference in location is highly unlikely, of its own, to be determinative against the existence of an SPC;

(4) equally the fact that a provider who is performing all the services carried out by his predecessor also provides additional services is unlikely to negate the existence of a transfer under regulation 3(1)(b), unless the addition is of such substance that the activity being carried on is no longer essentially the same;

(5) regulation 3(6)(a), which provides that a TUPE transfer can be effected by a series of transactions, applies as much to SPCs as it does to transfers of an economic entity. In practice, it is unlikely that an SPC will always be achieved in one day. Although the decision in *Celtec Limited v Astley* [2006] IRLR 635 requires the ET to find one date on which any type of TUPE transfer occurred, it does not require that all the steps which constitute the transfer must take place on the same day. Where the date of the transfer is in issue, the ET must determine the date at which the essential nature of the activity carried on by the alleged transferor ceases to be carried on by him and is instead carried on by the transferee.

75 In ***Ward Hadaway Solicitors v Love and others*** UKEAT/0471/09 25 March 2010 the EAT took a rather restrictive view of the meaning of the word “activity”

in the context of the rules relating to SPCs. Ward Hadaway ("WH") was on a panel of four firms of solicitors who provided services for the Nursing and Midwifery Council ("NMC"), the regulatory body for nurses and midwives. There was no obligation on NMC to allocate any cases to WH and no obligation on WH to accept such cases. In 2007 NMC decided to tender out its work and chose a single provider of services, Capsticks. The work which Capsticks was to do was found by the ET to be different, in that much of the work previously done by panel firms, including advocacy, was to be taken in-house by NMC. After Capsticks were appointed, no new work was assigned to WH, but they continued to work on some 100 to 140 cases which had been assigned to them when they were on the panel.

76 The ET separated the work in progress carried on by WH from the firm's expectation of future work and held that only the former constituted *"activities"* within the meaning of regs 3(1)(b) and 3(3). It went on to find that since work in progress did not transfer from WH to Capsticks, there had been no SPC. It also found that in any event the work done by Capsticks was different from that carried out by WH, in that the services they provided on individual cases were less extensive and were carried out by a paralegal rather than a solicitor.

77 On appeal, the EAT held that these were permissible conclusions. McMullen J held that whilst an expectation of future work could be an activity which could be transferred, it looked more like an economic entity than a service provision.

78 There have been a number of appellate decisions in which the change in the nature of the service was considered sufficiently great to negate the application of TUPE. They include the following:

(1) ***OCS Group Ltd UK Ltd v Jones and another*** UKEAT/0038/09 4 August 2009. In that case the ET held that an SPC had not occurred because the activities carried on by the old provider (centrally located restaurant which provided full canteen service including cooked breakfasts and lunches) were substantially different from those carried on by the new provider (five kiosks selling sandwiches and salads with no preparation of hot food). The EAT was not prepared to interfere with the tribunal's conclusion;

(2) ***Nottinghamshire Healthcare Trust v Hamshaw and others*** UKEAT/00371/11 19 July 2011, which has been discussed above in the context of traditional transfers. In ***Hamshaw*** the fundamental changes in the nature of the service which led the ET to conclude that the economic entity had not retained its identity also formed the basis for its decision that there was no SPC because the activities carried on by the new providers were materially different. On appeal, the EAT upheld that conclusion;

(3) ***Johnson Controls v Campbell*** UKEAT/0041/12 14 February 2012, in which there was held to be no SPC when the UK Atomic Energy Authority cancelled a contract for the provision of a taxi administration service and instructed its secretaries to book taxis directly with taxi companies;

(4) ***Enterprise Management Services Ltd v Connect-up Ltd and various claimants*** [2012] IRLR 190. In that case the outgoing contractor had provided IT support services to schools which covered the administration network (85% of the services) and the curriculum network (15% of the services). When the contract was re-tendered by Leeds City Council, the new contract excluded the provision of cover for curriculum systems. The ET held that because curriculum support had been removed from the service, there were significant differences between the activities carried out by the outgoing and incoming contractors. On appeal, the EAT refused to interfere with this finding.

Focus on what is happening *"on the ground"*

79 In ***Lorne Stewart plc v Hyde*** UKEAT/0408/12 1 October 2013 the outgoing contractor carried out repair and maintenance work for Cornwall County Council under a Framework Agreement. Some types of such work were given to and done by the contractor under obligations in the agreement. For other types of work the Council was free to place the work elsewhere and the outgoing contractor could decline the work. In practice, however, the Council gave all such work to the outgoing contractor and the outgoing contractor accepted it. After a re-tendering process, the Council appointed a new contractor under a similar framework agreement which was operated in a similar way.

80 The Tribunal found that one of the claimants worked for the outgoing contractor on work which the Council was not obliged to give to the contractor under the Framework Agreement, but nevertheless held that he was assigned to the organised grouping of employees that was the subject of the SPC.

81 The EAT held that ET had not erred in law. According to His Honour Judge Burke QC, it is not necessary for the work which the employees do to be work which the client is obliged to provide to the contractor. The focus must be on what was actually being done before and after the putative SPC i.e. on what was actually going on *"on the ground".*

Single specific event or task of short-term duration

82 The exception in respect of activities connected with a single specific event or task of short-term duration is designed to ensure that the rules in relation to SPCs do not catch cases where a client buys in services on a short-term 'one off' basis.

83 In ***SNR Denton LLP v Kirwan*** [2013] ICR 101 Langstaff P expressed the *obiter* view that the words *"of short term duration"* qualify the words *"single specific event"* as well as the word *"task".* But in ***Liddell's Coaches v Cook and others*** [2013] ICR 547 Lady Smith held that the phrase *"single specific event"* stands alone, although she went on to say that a single specific event is, by definition, of short term duration. On the facts, it was held that a one year contract to transport children by bus from their usual school to other schools in the area whilst a new school was being built related to a task of short-term duration.

Contracts for supply of goods

84 The first appellate decision on the scope of the regulation 3(3)(b) exclusion was the decision of the EAT in ***Pannu and others v Geo W King Ltd (in liquidation) and others*** [2012] IRLR 193. The claimants had worked for Geo W King Ltd ("GWK") on an axle assembly line. GWK supplied the finished axles to IBC Vehicles Ltd ("IBC"). When GWK went into liquidation, IBC entered into a contract with Premier under which Premier assembled axles at IBC's premises in Luton.

85 The employment tribunal held that there was no SPC, because the activities involved consisted wholly or mainly of the supply of goods by GWK to IBC. The EAT upheld ET's decision. Clark J observed that, in deciding whether an activity consists wholly or mainly of the supply of goods, the tribunal should focus on the nature of the activity which the contractor carries out for the client, and not on the activities carried out by the organised group of workers. In the instant case, GWK had employed an organised group of workers on the axle assembly line who were dedicated to producing axles, but the activity that GWK carried on for IBC was the supply of finished axles, which essentially involved the supply of goods.

Public undertakings and transfers within public administration

86 Regulation 3(4) provides:

> "Subject to paragraph (1), these Regulations apply to –
>
> (a) public and private undertakings engaged in economic activities whether or not they are operating for gain; …"

87 Regulation 3(4) gives effect to case law of the Court of Justice holding that the Directive applies to all undertakings which are engaged in economic activity, whether in the public or private sector – see, for example, ***Dr Sophie Redmond Stichting v Bartol and others*** C-29/91 [1992] IRLR 366 (a case involving the activities of a charitable foundation) and ***Mayeur v Association Promotion de l'Information Messine*** C-175/99 [2000] IRLR 783 (where it was held that the Directive applied where a tourist information function carried out by a private non-profit making organisation was taken over by a public authority).

88 The ECJ has, however, ruled that the re-organisation of the structure of public administration and the transfer of administrative functions between public administrative authorities fall outside the protection of the Directive – see ***Henke v Gemeinde Schierke and Verwaltungsgemeinschaft Brocken*** C-289/94 [1996] IRLR 701.

89 This exclusion is reflected in regulation 3(5) of TUPE, which provides:

"An administrative re-organisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer".

90 The scope of the ***Henke*** exception was considered by the Court of Justice in ***Ivana Scattolon v Ministero dell'Istruzione, dell'Universita e della Ricerca*** C-108/10 [2011] IRLR 1020.

91 Until 1999, certain auxiliary services at Italian State schools, such as cleaning, caretaking and administrative assistance had in some cases been provided by local authorities, who operated the services by means of their administrative, technical or auxiliary ("ATA") employees. In 2000, the local authority ATA employees employed in State Schools were transferred under a statutory scheme onto the list of State ATA employees. Mrs Scattolon was a local authority ATA employee who was transferred to the Ministry of Education under this scheme. In due course an issue arose as to whether her local authority service counted towards her seniority for the purposes of determining her salary. The Italian Court therefore sought a preliminary ruling from the Court of Justice as to whether the Directive applied to the transfer of ATA employees.

92 The Court held that it did. It drew a distinction between:

(1) activities which fall within the exercise of public powers, which are excluded in principle from classification as economic activities;

(2) services which, without falling within the exercise of public powers, are carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive (which can be classified as economic activities).

93 The Court was satisfied that the local authority ATA employees carried out economic activities and that they were entitled to the protection of the Directive, notwithstanding the fact that the transfer of their employment occurred within the context of a reorganisation of the public administration.

94 The effect of regulations 3(4)(a) and 3(5) was considered by the High Court in ***Law Society of England and Wales v Secretary of State for Justice and another*** [2010] IRLR 407. The case arose from the Government's decision to

transfer responsibility for dealing with complaints about solicitors from the Legal Complaints Service ("LCS"), an autonomous part of the Law Society, to the Office for Legal Complaints (OLC), a body created by the Legal Services Act 2007. OLC is completely independent of the Law Society, will also deal with complaints against barristers and will be under the supervision of an ombudsman with power to resolve complaints. The Legal Services Act provided that LCS was to deal with all complaints made before a certain date and OLC with all complaints after that date i.e. there was to be no transfer of complaints between the two bodies.

95 The Law Society brought proceedings seeking clarification of whether its staff would transfer to OLC. Mr Justice Akenhead held:

(1) that LCS was an undertaking for the purposes of TUPE, even though it did not perform its functions for gain. It could be regarded as an economic entity even though its central activity i.e. the resolution of complaints against solicitors was not an economic activity. The Law Society represented solicitors who provide a wide range of professional services to the public: that was an economic activity. Consequently the servicing of complaints against solicitors was effectively an ancillary service or facility;

(2) there was no transfer of LCS's undertaking to OLC because:

(a) unlike LCS, OLC was intended to be wholly independent of the professions against whose members complaints could be pursued;

(b) nothing was being transferred from LCS to OLC i.e. no tangible or intangible assets would go over and there was no transfer of buildings;

(c) none of the complaints being handled by LCS would be transferred;

(d) although OLC would process complaints about solicitors, it would also have the additional function of dealing with complaints about other parts of the legal profession;

(e) the OLC jurisdiction, which includes the ombudsman scheme, was materially and substantially different from that of LCS.

96 In the light of his finding that there was no transfer, it was not necessary for Mr Justice Akenhead to decide whether regulation 3(5) applied. However, he considered that the exclusion would apply because in his view LCS was a public administrative body exercising administrative functions which were to be transferred to OLC. As the Law Society is not a public sector body, it is debatable whether this analysis is correct.

No application to share sales

97 A transfer of shares is not covered by TUPE. In ***Brookes and others v Borough Care Services and CLS Care Services Ltd*** [1998] IRLR 636, the EAT held that there was no relevant transfer when CLS acquired the shares of Borough Care Services and thereby assumed responsibility for the management of care homes operated by Borough Care Services. This was so notwithstanding the fact that a share sale was adopted with the purpose of avoiding TUPE.

98 Where, however, the evidence shows that, following the change in control, the new parent company in fact assumes control over the business of its new subsidiary, there may be a relevant transfer – see ***Millam v Print Factory (London) 1991 Ltd*** [2007] IRLR 526.

99 In ***Millam*** the employment tribunal held that there was a relevant transfer when McCorquodale Confidential Print Ltd acquired the shares of Fencourt Print Limited. The tribunal found that after the share sale McCorquodale were effectively controlling Fencourt's activities. It concluded that McCorquodale's handling of a significant element of the management of Fencourt set its actions apart from those of a mere shareholder. On appeal, the Employment Appeal Tribunal took the view that the employment tribunal had erred in law, holding that the effect of their decision was to pierce the corporate veil between the two companies.

100 However, the Court of Appeal held that the approach taken by the EAT was erroneous. According to Buxton LJ, no issue of piercing the corporate veil arose. The employment tribunal had not found that the activity was being carried on by Fencourt and then pierced the corporate veil to attribute that activity to McCorquodale. Rather, the tribunal had found that as a matter of fact

the day to day activity was being carried on by McCorquodale. The tribunal was therefore entitled to hold that there had been a relevant transfer.

WHICH EMPLOYEES TRANSFER?

101 Under the 1981 Regulations, an employee's contract of employment transferred to the new employer if s/he was "employed in the undertaking or part transferred" – see regulation 5(1). These words were replaced under the regulation 4(1) of TUPE 2006 with a reference to a person "employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer".

Employed by the transferor

102 The requirement for an employee to be *"employed by the transferor"* must be construed in the light of the principles laid down by the Court of Justice of the European Union ("CJEU") in ***Albron Catering BV v FNV Bondgenoten and another*** Case C-242/09 [2011] IRLR 76. (The ECJ changed its name to the CJEU from December 2009.)

103 Within the well known Heineken group of companies, businesses were run by the various operating companies. However, all staff were employed by one company within the group, Heineken Nederlands Beheer BV ("HNB"), and seconded to the various operating companies to carry out their duties. The group's catering department was operated by Heineken Nederland BV until 2005, when Heineken decided to outsource the catering function to Albron Catering BV ("Albron").

104 The claimant, Mr Roest, had been employed by HNB but was assigned to Heineken Nederland BV. When catering was outsourced, he entered the employment of Albron, but in due course a dispute arose as to whether the terms and conditions of his previous employment with HNB continued to apply. In order to resolve this dispute, the Regional Court of Appeal, Amsterdam, decided to ask the CJEU for guidance as to whether Heineken Nederland BV could be a "transferor" within the meaning of the Directive even though the staff who worked for it were actually employed by HNB.

105 In its judgment, the CJEU pointed out that the aim of the Directive is to protect

employees who have a contract of employment or an employment relationship with the person responsible for running a business. According to the Court, the fact that protection is conferred on persons who have an employment relationship at the date of the transfer shows that a contractual link with the transferor is not essential.

106 The Court went on to say that where employees are employed by one company within a group of companies but are permanently assigned to an undertaking operated by another company in the group, the company which runs the undertaking can be regarded as the transferor within the meaning of the Directive, even though the employees are contractually linked to a different company.

107 It seems likely that the UK courts and tribunals will interpret regulation 4(1) so as to give effect to the decision in ***Albron***. Even before the CJEU clarified the position, the Employment Appeal Tribunal ("EAT") had been attracted by the contention that an employee who was assigned to an undertaking could transfer under TUPE even if he was not employed by the operating company – see, for example, ***Sunley Turriff Holdings Ltd. v Thomson and others*** [1995] IRLR 184. However, there was also a line of authority which suggested that an employee could only take advantage of the automatic transfer principle if his actual employer employed him as agent for the operating company – see the decision of the EAT in ***Duncan Webb Offset (Maidstone) Ltd v Cooper and others*** [1995] IRLR 633 and the judgment of the Court of Appeal in ***Governing Body of Clifton Middle School and others v Askew*** [1999] IRLR 708.

108 In the light of the decision in ***Albron***, a more liberal approach to the interpretation of regulation 4(1) would appear to be justified.

The assignment test

109 The reference in regulation 4(1) to a person *"assigned to the organised grouping of resources or employees that is subject to the relevant transfer"* gives statutory effect to the decision of the Court of Justice in ***Botzen and others v Rotterdamsche Droogdok Maatschappij BV*** (Case C-186/83) [1985] ECR 519. In ***Botzen*** the Court of Justice held that that the test which must be applied in deciding whether an employee is employed in an

undertaking or part of an undertaking is whether he or she is assigned to it. The Court went on to say that an employee can be regarded as *"assigned to"* part of an undertaking if it forms the *"organisational framework"* within which the employee's employment relationship takes effect. If the employee is assigned to some other part of the business, the fact that he performs duties which are for the benefit of the part of the undertaking which is being transferred or involve the use of assets assigned to it does not mean that he transfers to the new employer.

110 The assignment test can operate harshly where the majority of the employee's duties are concerned with the undertaking or part transferred but the employee is attached to another department – see, for example, ***CPL Distribution Ltd v Todd*** [2003] IRLR 28 and ***Michael Peters Ltd v Farnfield (1) and Michael Peters Group PLC*** *(2)* [1995] IRLR 190.

Exclusion of temporary assignments

111 TUPE include a definition of the expression "assigned". Regulation 2 provides that:

> *'assigned' means assigned other than on a temporary basis;*

112 The DTI Consultation Document states that the exclusion of employees assigned on a temporary basis accords with the decision of the Employment Appeal Tribunal ("EAT") in ***Securiplan v Bademosi*** EAT/1128/02 9 May 2003, in which an appeal tribunal presided over by His Honour Judge McMullen held that a security guard who had been temporarily re-assigned from his usual place of work to a magistrates court for a period of one year was not assigned to the provision of security services at the court.

113 The effect of the exclusion of temporary assignments was considered by the Court of Appeal in ***Marcroft v Heartland (Midlands) Limited*** [2011] IRLR 599. Mr Marcroft was employed by PMI Health Group Limited ("PMI") in their commercial insurance department. He gave notice of resignation on 15 September 2009, which was to expire 26 October 2009. On 25 September 2009 the directors of PMI informed Mr Marcroft verbally that the commercial insurance business was to be sold to Heartland (Midland) Ltd ("Heartland"). They told Mr Marcroft that he need not attend work but should be *"on call"* at

home. The transfer of the commercial insurance business to Heartland took place on 2 October 2009.

114 Following his resignation, Mr Marcroft joined a competitor and started to solicit clients of the commercial insurance business. Heartland consequently brought proceedings against him, arguing that his activities were in breach of restrictive covenants in his contract of employment. Mr Marcroft sought to defend the proceedings by arguing that he had not transferred from PMI to Heartland under TUPE, because by the time of the transfer he was only "temporarily" assigned to the commercial insurance business.

115 The judge rejected this contention and the Court of Appeal gave short shrift to Mr Marcroft's appeal. The Court pointed out that it could not be right that an employee's assignment to an undertaking would automatically become temporary simply because he had handed in his notice, and that he would therefore lose the protection of TUPE.

116 Mr Marcroft also sought to argue that the transfer was inoperative to transfer his contract of employment to Heartland because the directors of PMI had not notified him of the impending transfer in writing and had not complied with their obligations under regulation 13 of TUPE to provide information to employee representatives. He claimed that the failure to provide information about the transfer in writing had deprived him of his right to object. The Court of Appeal held that although the transferor has a duty under regulation 13 to provide representatives of affected workers with certain information, there is no obligation to provide information to the affected workers personally. The Court went on to say that compliance with regulation 13 is not a condition precedent to an effective transfer of a contract of employment. Mummery LJ observed that if it were, there would be no point in TUPE conferring the right to object, since the transferor employer could always prevent a transfer by the simple device of not providing the employee's representative with the information prescribed by regulation 13. His Lordship added that such a construction would undermine the protective purpose of TUPE and the Directive.

Permanent re-assignment

117 Case-law establishes that an employee who has been *permanently* re-assigned to the undertaking will be entitled to transfer, even if the employee was redeployed shortly before the transfer - see ***Securicor Guarding Ltd v Fraser*** [1996] IRLR 552 and the decision of the EAT in ***Fairhurst Ward Abbots Ltd v Botes Building Limited and another*** EAT/1007/00 27 March 2003.

118 Where, however, the employee is actually employed in the business at the time of the transfer, s/he will not transfer to the transferee even if there is a mobility clause in the contract of employment. So held the EAT in ***Royal Mail Group Limited v Communication Workers Union*** [2009] IRLR 108, a case which arose from the Royal Mail's decision to transfer certain post office branches to W H Smith. The transfers were made on the basis that no staff would be transferred under regulation 4 of TUPE because staff would either be re-located pursuant to a mobility clause in their contracts of employment or given the option of voluntary redundancy. On this basis it was assumed that staff would not be employed in business at the time of the transfer, or would not be employed under contracts which would otherwise be terminated by the transfer, and there was no formal consultation with the recognized union.

119 In fact, some of the affected employees had not been transferred to new posts by the relevant transfer dates and were still working in the branches. CWU brought proceedings alleging a breach of regulation 13, on the ground that Royal Mail had failed to inform the union of the legal implications of the transfer for affected employees. On appeal, it was necessary for the EAT to decide whether the employer had misconstrued regulation 4 in assuming that the automatic transfer principle would not apply to any of the staff.

120 The Appeal Tribunal held that if an employee is employed at the time of the transfer in the undertaking transferred, he will automatically transfer to the transferee, even where the employer has power under a mobility clause to transfer the employee away from the business transferred. If the employee is not in fact redeployed in another part of the business prior to the transfer, s/he must be regarded as assigned to the business at the time of the transfer, with the consequence that the automatic transfer principle will bite on his/her contract of employment.

121 The EAT also pointed out that an employee can choose to remain with the transferor but cannot do so if he thereafter works for the transferee. In addition, the EAT observed that it is at least arguable that where a mobility clause is used for the very purpose of ensuring that an employee who would otherwise transfer is precluded from doing so, this is incompatible with the protection afforded by the Directive.

Effect of last minute re-assignments

122 It is not uncommon for transferors to re-organise the workforce shortly before a TUPE transfer. In ***Fairhurst Ward***, a single contract for the maintenance of void properties in the London Borough of Southwark was divided into two separate contracts when re-tendering took place. The new contracts covered two separate geographical areas, Areas 1 and 2. After the outgoing contractor learnt that its tender for Area 2 had been unsuccessful, eight employees who had previously spent 56.6% of their time in Area 2 were sent to work exclusively in that area until the existing contract came to an end. The employees in question were re-allocated in this way because the outgoing contractor was keen to ensure that they were assigned to Area 2, so that they would transfer to the successful tenderer under TUPE. The contractor which in due course took over responsibility for Area 2 sought to argue that the employees were not assigned to it. However, the employment tribunal rejected this contention, holding that there were "genuine business reasons" for the re-organization. This finding was not disturbed when the case went before the EAT.

123 Although the outgoing contractor also attempted to assign the contract supervisor to Area 2, the tribunal held that in his case this was a "paper exercise" and that in fact he was not employed to work either substantially or exclusively in that area. There appears to have been no appeal against that finding.

124 See also the EAT's decision in ***Carisway Cleaning Consultants Ltd. v Richards and another*** [unreported] EAT/6229/97 19th June 1998, in which the EAT (Judge Hull presiding) held that an employee who had been deceived into joining a part of the undertaking which was on the point of being transferred under TUPE did not pass across to the transferee.

Applying the assignment test to service provision changes

125 It can be particularly difficult to know what effect the assignment test will have in the context of service provision changes. In ***Kimberley Group Housing Limited v Hambley and others*** [2008] IRLR 682, services previously provided by one contractor were divided between two contractors (Kimberley and Angel) following a re-tendering exercise. The issue which fell to be decided was whether liabilities relating to the dismissal of employees who lost their jobs as a result of the change of contractor transferred to Kimberley, Angel or both of them. The ET concluded that both contractors were liable and apportioned the liabilities between them on a percentage basis.

126 On appeal, the EAT held that this question had to be answered by applying the assignment test. There was no warrant for the notion that liabilities could be divided between transferees on a percentage basis. What had to be focused on was the link between the employee and the work and activities which are performed. As the evidence showed that the bulk of the work had been taken over by Kimberley, the EAT held that liability in respect of the claimants' dismissals fell on them.

Employed immediately before the transfer

127 In ***G4S Justice Services (UK) Ltd v Anstey and others*** [2006] IRLR 588 the EAT considered the position of employees who were dismissed by the transferor for misconduct prior to the transfer but had appeals against dismissal pending at the time of the transfer. Their appeals were heard and upheld by the transferor after the transfer had taken place. The EAT held that the claimants' employment had transferred to the transferee. When their appeals were upheld, the original dismissals were expunged. The claimants were therefore to be treated as having been employed by the transferor immediately before the transfer.

128 In ***Bangura v Southern Cross Healthcare*** UKEAT/0432/12 12 March 2013 the EAT held that the principle in ***G4S*** does not apply if the appeal is unsuccessful or if it has not been heard by the transferor. In such a case the dismissal takes effect on the original date and an employee who is dismissed prior to the transfer cannot be regarded as employed immediately before the

transfer (unless, of course, the dismissal is related to the transfer and subject to the ***Litster*** principle).

The right to object

129 An issue which has been the subject of debate amongst commentators is whether the right to object to a transfer can ever be exercised after a transfer. In ***Hay v George Hanson (Building Contractors) Ltd*** [1996] IRLR 427 the EAT suggested (without deciding) that an objection will only be effective if it is communicated *before* the transfer**.** Lord Johnston observed that although the regulations are silent as to the timing of the objection, an obligation to communicate an objection to the transferor or the transferee prior to the transfer was implicit in the fact that, under what is now regulation 4(8), it is the transfer itself which terminates the contract where the right to object is exercised.

130 However, in ***New ISG Limited v Vernon and others*** [2008] IRLR 115, the High Court (Chancery Division) held that where the employee does not know the identity of the transferee before the date of the transfer, an objection can be made after the transfer. The Judge pointed out that in those circumstances a requirement to object before the transfer would undermine the fundamental freedom of an employee to choose his or her employer. The Court also held that a letter of resignation could be construed as an objection and found that employees who had continued in the employment of the transferee for two working days after the transfer could not be regarded as having waived their right to object.

131 An objection may be regarded as ineffective if the employee nevertheless becomes an employee of the transferee. This principle is illustrated by the judgment of Lady Smith in ***Capita Health Solutions Ltd v McLean and another*** [2008] IRLR 595. Mrs McLean was employed by the BBC as an occupational nurse. When the BBC decided to outsource its human resources department, including the occupational health service, to Capita, Mrs McLean intimated that she would object to the transfer. She was concerned that there would be a significant change in her role and that the pension conditions would be less favourable. However, the BBC invited her to work her six week notice period on secondment to Capita, assisting with the transition of the service.

She agreed to work for the BBC during those weeks and tendered her resignation on those terms. Her salary was paid by the BBC during this period. Capita agreed to the arrangement. When her employment ended Mrs McClean brought complaints of unfair dismissal against the BBC and Capita.

132 Lady Smith held that Capita was the proper respondent to the complaint. She pointed out that under the regulations the effect of an objection is that the employee's contract of employment terminates. Consequently, working for the transferee after the transfer is likely to produce the result that the employee's contract is transferred, even if there has been an agreement between transferor and transferee to the contrary. The fact that the arrangement in relation to Mrs McClean had been described as a "secondment" did not change matters. This was not a secondment in the proper sense, because it was not intended that Mrs McClean would ever return to work for the BBC, which no longer had an occupational health department. Accordingly, Mrs McClean was not to be regarded as having objected to the transfer.

133 Lady Smith was careful to point out that her judgment did not mean that an objecting employee could not be employed after the transfer by the transferor. However, she emphasized that such employment would have to be under a contract of employment.

134 Objections prompted by impending changes in terms and conditions are considered below.

WHAT RIGHTS ARE TRANSFERRED?

135 The effect of a TUPE transfer on the rights of transferring employees is governed by regulation 4(2) of TUPE.

136 Regulation 4(2)(a) stipulates that on completion of a relevant transfer all the transferor's rights, powers, duties and liabilities under or in connection with the contract of any transferring employee transfer to the transferee. Regulation 4(2)(b) provides that any act or omission of the transferor in respect of that contract or employee is deemed to have been an act or omission of the transferee.

Terms affected by the identity of the employer

137 The courts have emphasised that the object of the automatic transfer principle is simply to ensure that the benefit and the burden of the contract devolves on the transferee. It must not be applied in a way which increases the burden on either party - see ***Morris Angel & Son Limited v Hollande*** [1993] IRLR 169. It follows that if the literal transposition of a term would impose obligations which are either wider or narrower than those originally contemplated by the parties, the term in question must be construed purposively, so that it has the same effect post-transfer as it did pre-transfer.

138 In ***Tapere v South London and Maudsley NHS Trust*** [2009] IRLR 972, the EAT had to decide how a mobility clause should be construed following the transfer of an undertaking. The claimant had originally been employed by Lewisham Primary Care Trust. Her contract stated that she would be based at specified premises but also included the following provision:

> ***Location*** *There may be occasions when you are required to perform your duties either temporarily or permanently at other locations within the Trust.*

After inheriting the claimant under TUPE, the South London and Maudsley NHS Trust moved her to premises of their own. One of the issues which came before the EAT was whether this was a fundamental breach of the claimant's contract of employment.

139 The Appeal Tribunal held that the words *"within the Trust"* were plainly words of definition which restricted the geographical area within which the claimant could be required to work. Further, these words fell to be construed at the time when the contract was entered into. Accordingly, the area in which the employee could be required to work was confined to the geographical area covered by the transferor's operations. The clause could not be read as giving the transferee trust the right to move the claimant anywhere within the area covered by its operations. Accordingly, the claimant's contract of employment had been broken when she was required to move.

Transfer of right to bonus

140 If a transferring employee is contractually entitled to a bonus, the transferee will be required to continue the relevant scheme or, where that is not practicable, to provide a scheme of substantial equivalence – see ***MITIE Managed Services***

Ltd v French [2002] IRLR 512.

Terms incorporated from a collective agreement

141 Article 3(3) of the Directive provides:

> *"Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.*
>
> *Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year."*

142 The meaning of Article 3(3) was considered by the CJEU in ***Werhof v Freeway Traffic Systems GmbH & Co KG*** [2006] IRLR 400. In ***Werhof*** the claimant's terms of employment were governed by a collective agreement negotiated between a German union representing metal and electrical industry workers and the Metal Industry Federation. However, the claimant then transferred to a new employer which was not a member of the Federation. Against that background, the Court of Justice was asked whether the claimant was entitled to the benefit of a new collective agreement which was negotiated after the date of the transfer.

143 The ECJ held that where a contract of employment refers to a collective agreement to which the employer is a party, and there is a transfer of an undertaking to an employer who is not a party to the agreement, the rights and obligations arising out of the collective agreement in force at the date of the transfer continue to bind the transferee, but the transferee is not bound by new collective agreements concluded after the transfer. The Court observed that the objective of the Directive is simply to safeguard the rights of employees in force at the date of the transfer and not to protect their expectations as to future rights. The Court also held that it would be contrary to the principle of freedom of association to hold that a transferee who was not party to a collective agreement was bound by future changes to that agreement. In this context the Court pointed out that the principle of freedom of association, which is one of the fundamental rights protected in the Community legal order, includes the

right not to join an association.

144 Prior to the decision in ***Werhof,*** there had been a series of cases in the UK Courts in which it was held that a transferee could be bound by collective agreements negotiated after the transfer - see, for example, ***Whent and others v T Cartledge Ltd*** [1997] IRLR 153 and ***Glendale Managed Services v Graham and others*** [2003] IRLR 465.

145 The validity of this line authority is currently being considered by the Supreme Court in ***Parkwood Leisure Limited v Alemo-Herron and others*** [2011] IRLR 696. In that case the claimants were employed by the London Borough of Lewisham until 2002, when they transferred to Parkwood Leisure. Their employment contracts stated:

> *During your employment with the Council your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the National Joint Council for Local Government Services, set out in the Scheme of Conditions of Service (commonly known as the Green Book) supplemented by agreements reached locally through the Council's negotiating committees.*

146 In 2004 the NJC negotiated a comprehensive revision of terms relating to pay, training and development and other employment issues. The claimants argued that they were contractually entitled to the benefit of the pay increases negotiated by the NJC. The ET rejected their claims. Relying on ***Werhof***, the ET held that the 2004 agreement was a new collective agreement. On appeal, the EAT held that the ET had erred in law by failing to give effect to the special link which exists under UK law between a contract of employment and a collective agreement. According to Judge McMullen, UK law provides for the protection of a *"dynamic wage-fixing clause"* and the decision in ***Whent*** therefore represented the application of domestic legal principles correctly decided without reference to the Directive. Accordingly, the position in the UK had not changed as a result of ***Werhof***. The Court of Appeal disagreed and restored the decision of the ET.

147 The Supreme Court stayed the case in order to make a reference to the CJEU. The Court pointed out that if the question had been solely one of domestic law, there would be no doubt that the transferee was bound by subsequent changes

in the collective agreement. The Court observed that if an incorporation clause provides that terms and conditions will be set by an external body, there is no reason why the transfer should cause any change in the meaning of these words. Further, Article 7 of the Directive allows a member state to introduce laws which are more favourable to employees so long as no other provisions of EU law preclude this. Although ***Werhof*** established that the Directive does not *require* that transferred employees be entitled to the benefit of collective agreements concluded after the transfer, it did not decide whether the Directive *precludes* a dynamic approach to the relationship between collective agreements and individual terms and conditions.

148 The Supreme Court therefore asked the CJEU for a preliminary ruling on whether Article 3(1) of the Directive precludes national courts from giving a dynamic interpretation to TUPE.

149 In a judgment handed down on 18 July 2013, the CJEU ruled that Article 3 of the Directive precludes a Member State from providing that collective agreements negotiated after the transfer should be enforceable against the transferee, where the transferee is not able to participate in the negotiations. The Court held that where the transferee is not able to participate in the collective bargaining body, a dynamic approach to the transfer of rights deriving from collective agreements would reduce the transferee's contractual freedom to such a degree as to amount to a breach of Article 16 of the Charter of Fundamental Rights of the European Union (the freedom to conduct a business) - see ***Parkwood Leisure v Alemo-Herron and others*** C-426/11 [2013] IRLR 744.

Transfer of trade union recognition

150 Article 6 of the Directive provides that where the undertaking retains its autonomy the status and function of the representatives of employees affected by the transfer shall be preserved on the same terms and conditions as existed before the date of the transfer.

151 Article 6 is implemented by regulation 6 of TUPE, which applies where, after a relevant transfer, the transferred organised grouping of resources or

employees maintains an identity distinct from the remainder of the transferee's undertaking – see regulation 6(1).

152 Regulation 6(2) provides:

> *(2) Where before such a transfer an independent trade union is recognised to any extent by the transferor in respect of employees of any description who in consequence of the transfer become employees of the transferee, then, after the transfer –*
>
> *(a) the trade union shall be deemed to have been recognised by the transferee to the same extent in respect of employees of that description so employed; and*
>
> *(b) any agreement for recognition may be varied or rescinded accordingly.*

153 The statement in regulation 6(2)(b) that any agreement for recognition *"may be varied or rescinded accordingly*" is thought to reflect the Government's view that, because trade union recognition is generally voluntary in the UK, the transferee is entitled to withdraw from inherited trade recognition arrangements.

154 There is, however, nothing in the language of Article 6 to support the proposition that the transferee is free to abolish existing representation arrangements in a case where the Directive provides for them to be preserved. Moreover, it is possible that the principles developed by the Court of Justice when considering the effect of Article 3 may also apply in the context of Article 6. The Court's jurisprudence in relation to Article 3 holds that any power the transferee may have under national law to vary terms and conditions of employment is subject to the qualification that the transfer itself cannot be the reason for the changes. The Court has also said that where the transfer of an undertaking is the reason for a change in terms and conditions, the variation will be legally ineffective – see, for example, *Daddy's Dance Hall* C-324/86 [1988] IRLR 315. It might be argued by analogy that even where national law allows an employer to withdraw or vary recognition at will, that power cannot be exercised if the transfer of an undertaking is the reason for rescinding recognition.

155 It is therefore arguable that regulation 6 of TUPE does not comply with the Directive. This could mean that, in circumstances where a service which falls

within the scope of the Directive is being outsourced by an employer which is an emanation of the state, that employer may have a directly enforceable obligation to ensure that existing trade union recognition arrangements are preserved by the incoming contractor. A duty to require the contractor to respect inherited trade union recognition arrangements may also be imposed on public authorities by Article 11 of the European Convention on Human Rights and by certain other international treaties – see ***Demir and Baykara v Turkey*** [2009] IRLR 766 and ***The Dramatic Implications of Demir and Baykara*****: K D Ewing and John Hendy QC**, Industrial Law Journal Vol 39 No 1 March 2010.

Pension rights

156 The automatic transfer principle does not extend to an employee's right to participate in an occupational pension scheme in respect of service after the date of transfer, although the Pensions Act 2004 makes provision for the protection of pension rights in the event of a TUPE transfer.

157 Regulation 10(1) of TUPE, which excludes from the scope of regulation 4 so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Pension Schemes Act 1993. This exclusion gives effect to Article 3(4) of the Directive, which provides that the principle of automatic transfer shall not apply in relation to *"employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in the Member States"*.

158 By virtue of regulation 10(2), the exclusion in regulation 10(1) does not extend to pension scheme provisions relating to matters other than benefits for old age, invalidity and survivors. Regulation 10(2) reflects the principles explained by the ECJ in ***Beckmann v Dynamco Whicheloe Macfarlane Ltd*** C-164/00 [2002] IRLR 578 and ***Martin and others v South Bank University*** C-4/01 [2004] IRLR 74. In those cases the ECJ was asked to decide whether an employee's right to receive enhanced superannuation benefits if s/he is made redundant or takes voluntary early retirement after reaching a certain age falls within the exception provided for by Article 3(4). The Court held that the phrase *"old-age benefits"* is limited to benefits paid from the time when the

employee reaches the end of his normal working life and does not apply to early retirement benefits and benefits intended to enhance the conditions of early retirement, even though such benefits are calculated by reference to the rules for calculating normal pension benefits.

159 The scope of the ***Beckmann*** principles was considered by the High Court (Chancery Division) in ***The Procter & Gamble Company v Svenksa Cellulosa Aktiebolaget SCA and another*** [2012] IRLR 733. The background to the case was the transfer of P & G's tissue towel business to SCA. The terms of the asset sale and purchase agreement recognised that SCA would be liable for any pension obligations which transferred by operation of law under TUPE and provided that P & G would compensate SCA for any such liability by means of an adjustment to the purchase price. The parties were unable to agree what adjustment should be made, in part because they took differing views as to what rights had transferred to SCA under TUPE. It fell to Hildyard J to resolve the issues that were in dispute.

160 The following aspects of the judgment are of general interest:

(1) the Court observed that the phrase *"rights and obligations"* in Article 3(1) of the Directive and in TUPE is to be liberally interpreted, without regard to domestic distinctions between a discretionary entitlement and a legally enforceable right;

(2) the Court held that the right to be considered for an early retirement pension was capable of transferring to SCA. This was because TUPE operate to transfer an employee's right to apply for a benefit and to have that application properly considered by the employer, even if the employer's discretion is unfettered and exercisable having regard to the company's own interests and subject only to the implied obligation of good faith explained in ***Imperial Group Pension Trust Ltd and others v Imperial Tobacco Ltd and others*** [1991] 1 WLR 589. According to Hildyard J, *"the [employees'] expectation of being fairly treated (in accordance with the **'Imperial'** duty) in exercising their entitlement to be considered for early retirement benefits"* was protected by Article 3 of the Directive and regulation 4 of TUPE;

(3) SCA was under no obligation to provide those parts of the package of early retirement benefits which would be satisfied by the provision of deferred benefits under the P & G pension scheme. This meant that only the liability for certain enhancements transferred to SCA. The Judge described this as the *"smiling pensioner"* point. He accepted that pensioners would enjoy a windfall if the operation of TUPE allowed them to claim benefits from SCA which duplicated the benefits to which they were already entitled under the P & G scheme;

(4) benefits payable after normal retirement age are properly characterised as *"old age benefits"* even if they are paid as part of a unitary pension which is first paid before normal retirement age. In so holding, HIldyard J refused to accept that there was any rule that *"once an early retirement benefit, never an old age benefit.*

INSOLVENCY AND THE AUTOMATIC TRANSFER PRINCIPLE

161 It became clear at an early stage in its history that the Directive does not apply to the transfer of an undertaking, business or part of a business where the transferor has been adjudged insolvent and the undertaking or business in question forms part of the assets of the insolvent transferor – see ***Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*** 135/83 [1985] ECR 469 ECJ and ***D'Urso and others v Ercole Marelli Elettromeccanica Generale and others*** C-362/89 [1992] IRLR 136 ECJ.

162 This body of case law establishes that there is a distinction between, on the one hand, insolvency proceedings which have as their primary purpose the liquidation of the assets of the transferor and, on the other, judicial or administrative proceedings (such as judicial suspension of the payment of debts) which are designed to facilitate the rescue of the transferor, by allowing it to continue trading with a view to its subsequent recovery. Where transfers are effected in the context of the latter type of procedure, the Directive will apply.

163 When the 1977 version of the Directive was amended, Member States were given a number of options in relation to transfers effected in the context of

insolvency proceedings. Article 5(1), which effectively codifies the principles laid down in ***Abels***, provides:

> *"Unless the Member States provide otherwise, Articles 3 and 4 [automatic transfer principle and protection from dismissal] shall not apply to any transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)."*

164 Article 5(2) applies where insolvency proceedings have been opened in relation to a transferor (whether or not such proceedings have been instituted with a view to the liquidation of the assets of the transferor) and are under the supervision of a competent public authority, including an insolvency practitioner determined by national law. It gives the Member States two options in the context of such proceedings, namely:

(1) to provide that certain of the transferor's pre-existing debts towards the employees should not pass to the transferee;

(2) to provide that employers and employee representatives may agree changes to terms and conditions of employment by reason of the transfer itself, provided that this is in accordance with national law and practice and with a view to ensuring the survival of the business and thereby preserving jobs.

165 When introducing the 2006 Regulations, the Government decided that where transfers are effected in the context of bankruptcy or liquidation proceedings, the automatic transfer principle should not apply and employees would not be protected from dismissal. The Government also elected to exercise both of the options set out in Article 5(2) of the Directive in accordance with the policy of promoting the *"rescue culture"*.

Regulation 8

166 Regulation 8 distinguishes between two types of insolvency proceedings, viz:

(1) bankruptcy or analogous insolvency proceedings which have been

instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner (referred to in this paper as "liquidation proceedings");

(2) insolvency proceedings which are not with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner, referred to in TUPE as "non liquidation proceedings".

167 Regulation 8(7) provides that regulation 4 (transfer of contracts etc) and regulation 7 (protection from dismissal) do not apply if the transferor is subject to liquidation proceedings. Since the exclusion is limited to regulations 4 and 7, it follows that other parts of the regulations do apply to a relevant transfer effected in the context of liquidation proceedings, in particular the obligation to consult appropriate representatives of affected employees.

168 The provisions exempting the transferee from certain of the transferor's pre-existing debts are contained in regulations 8(1) to 8(6), which apply where the transferor is subject to non liquidation proceedings.

Scope of regulation 8(7) exception

169 As Rimer LJ pointed out in ***Key2Law (Surrey) LLP v de'Antiquis*** [2012] IRLR 212, regulation 8(7) of TUPE adopts, almost verbatim, the language of Article 5(1) of the ARD.

170 The issue in ***Key2Law*** was whether the regulation 8(7) exception can ever apply if the transferor is in administration. This question was the subject of conflicting authority at EAT level. In ***Oakland v Wellswood (Yorkshire) Ltd*** [2009] IRLR 250, Judge Clark held that the purpose of any individual administration is a question of fact for the employment tribunal to determine. But in ***OTG Ltd v Barke and other cases*** [2011] IRLR 272 Underhill P rejected the fact-based approach adopted by Judge Clark in favour of what he described as an *"absolute"* approach. The President held that regulation 8(7) can never apply to administration proceedings, because the statutory starting point for every administration is to rescue the company as a going concern.

171 The Court of Appeal in ***Key2Law*** preferred the absolute approach. The Court held that the focus of Article 5(1) of the Directive is on the purpose of the

insolvency procedure in question and not on the reasons for which the procedure is invoked or the result which it is anticipated will be reached. Applying that approach, the Court held that administration proceedings under Schedule B1 of the Insolvency Act 1986 necessarily fall outside the scope of regulation 8(7), because the statutory purpose of administration is to rescue the company as a going concern. The Court pointed out that the absolute approach has the merit of achieving legal certainty, since it means that all know where they stand when an administrator is appointed.

172 The Supreme Court gave Key2Law permission to appeal but the appeal was dismissed after the appellant failed to pay the Court fees.

173 In contrast to administration, the statutory purpose of compulsory winding up is the liquidation of the company's assets. It follows that regulation 8(7) must necessarily apply where an insolvent transferor has been placed in compulsory liquidation.

When is a transferor *"subject to insolvency proceedings"*?

174 In ***Secretary of State for Trade and Industry v Slater and others*** [2007] IRLR 928 the EAT was asked to determine what principles should be applied in deciding whether an employer was subject to relevant insolvency proceedings at the time of the transfer. It held that, in order to determine whether such proceedings have commenced, it is necessary to identify the particular type of proceedings and then determine, in accordance with the provisions of the insolvency legislation relating to that type of proceeding, whether they have commenced or not. The concept of when the proceedings have begun has to be the same under TUPE as it is in the insolvency legislation: there is no basis in law for fixing a different starting point for TUPE.

175 On the facts it was held that a creditors voluntary winding up commenced as a result of a resolution of the creditors, which occurred at a meeting after the transfer. Accordingly, regulation 8 did not apply.

Exemption of transferee from certain pre-transfer debts

176 Regulations 8(1) to 8(6) provide that where a transfer takes place in the context of non-liquidation proceedings, the transferee will have a limited exemption

from some of the transferor's debts.

177 This scheme applies to:

(1) *"relevant employees"*, who are defined as employees who transferred to the transferee and employees who would have so transferred had they not been unfairly dismissed by the transferor by reason of the transfer itself or a non-ETO reason connected with the transfer;

(2) sums payable under the "relevant statutory schemes", which are defined as:

(a) Chapter VI of Part XI of the Employment Rights Act 1996 ("ERA") i.e. the statutory redundancy scheme; and

(b) Part XII of the ERA i.e. the insolvency payments guarantee.

178 Regulation 8(5) provides that regulation 4 shall not operate to transfer liability for the sums payable to relevant employees under the relevant statutory schemes. Employees instead have the right to claim payments owed to them by the transferor under the relevant statutory schemes from the Secretary of State, out of the National Insurance Fund.

179 The transferee is liable for any other debts owed to relevant employees.

180 Under Part XII of the ERA, an employee whose employer is insolvent can only make a claim against the National Insurance Fund if his or her employment has been terminated. However, regulation 8(3) provides that debts protected by Part XII of the ERA will be payable to an employee even though s/he has not been dismissed. To this end, it provides that "the transfer shall be treated as the date of termination and the transferor shall be treated as the employer". This means that the Secretary of State will discharge the transferor's liability for arrears of wages and for holidays taken prior to the transfer for which the employee was not paid, up to the usual statutory limits. Redundancy pay, the basic award for unfair dismissal, accrued holiday pay and notice pay will only be discharged by the Secretary of State if the employee was dismissed and will not be payable if the contract continues with the transferee.

181 The EAT has made clear that debts are only covered by the State guarantee if

they arise *before* the transfer – see ***Pressure Coolers Ltd v Molloy and others*** [2011] IRLR 630 and ***OTG Ltd v Barke*** [2011] IRLR 272. Consequently the Secretary of State will not be liable for:

(1) notice pay or the basic award for unfair dismissal in the case of an employee who is dismissed after the transfer – see ***Pressure Coolers***;

(2) any redundancy pay payable to an employee dismissed after the transfer – see ***OTG***.

CHANGING TERMS AND CONDITIONS

182 It is clearly established that an employee's agreement to vary his or her terms and conditions of employment will not be binding if the transfer of an undertaking is the reason for the variation. This was the principle laid down by the ECJ in ***Foreningen v Daddy's Dance Hall A/S*** C-324/86 [1988] ECR 739. In that case the Court held that although the Acquired Rights Directive does not prevent the transferee agreeing with transferred employees to alter their employment relationship insofar as such an alteration is permitted by applicable national law, the transfer of the undertaking itself may never constitute the reason for such an alteration.

183 Harmonisation of terms and conditions is a paradigm example of a transfer – related variation – see ***Martin and another v South Bank University*** C-4/01[2004] IRLR 74. Moreover, the protection afforded to transferred terms and conditions is not limited to any specific period of time, although the longer the period that has elapsed since the transfer, the easier it will be for the transferee to demonstrate that changes in terms and conditions are not connected to the transfer.

184 In ***London Metropolitan University v Sackur*** UKEAT/0286/06 17 August 2006 an attempt to harmonise terms and conditions two years after a transfer was held to be ineffective because it was connected with the transfer. On appeal, the EAT held that the fact that the harmonisation was implemented two years after the transfer did not mean that it had lost its relationship with the transfer, especially since the evidence showed that there had been an intention to place all staff on the same terms and conditions from the outset.

185 In ***Smith and others v Trustees of Brooklands College*** UKEAT/0128/11 5 September 2011, the transferee college reduced the pay of four teaching assistants whom it had inherited from Spelthorne College under TUPE. The reason for reducing the claimants' pay was the HR Manager's belief that they had been paid a higher rate of pay than was appropriate by mistake. On appeal, the EAT held that the ET had been entitled to find that the agreed variation of the claimants' salary was not for a reason connected with the transfer. It was immaterial that the reduction in pay might not have been implemented if the employees had not come within the *"bailiwick"* of the Brooklands HR Manager: the test of whether the reason for a change in terms and conditions is transfer-related is not a *"but for"* test.

186 In ***Regent Security Services Ltd v Power*** [2008] IRLR 66 a transferee attempted to rely on the principle in *Daddy's Dance Hall* to avoid a change in retiring age which had been agreed with the employee at the time of a TUPE transfer. The Court of Appeal held that the employee was entitled to rely on the post-transfer variation of his retiring age. The aim of the TUPE regulations and the Directive is to safeguard the rights which an employee enjoyed with the transferor. There is nothing in the EC or domestic legislation to prevent an employee from obtaining an additional right.

187 It follows that where the transferee agrees contractual changes with an employee, the employee can then choose between enforcing the transferred acquired right or the newly obtained right.

Substantial change in working conditions to employee's material detriment

188 Regulations 4(9) and (10) introduced a new right to complain of unfair constructive dismissal where the transfer involves a substantial change in working conditions which are to the material detriment of the employee but fall short of being a repudiatory breach of the contract of employment.

189 Article 4(2) of the Directive provides that where a contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for the termination of the contract. The meaning of this provision was considered in ***Rossiter v Pendragon plc and Air Foyle Ltd***

v Crosby-Clarke [2002] IRLR 483, in which the Court of Appeal held that an employee can only claim to have been constructively dismissed by reason of a substantial detrimental change in his working conditions if the employer's actions constitute a repudiatory breach of the contract of employment.

190 The Government considered that ***Rossiter*** was wrongly decided and decided to reverse the decision statutorily. This was achieved by regulation 4(9), which provides as follows:

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

191 Consequently, an employee is entitled to complain of unfair constructive dismissal where there is a substantial and materially detrimental change in working conditions which does not amount to a breach of contract. The requirement for the detriment to be "material" was added at a late stage in the consultation process in response to concerns that an employee should not be able to claim constructive dismissal for changes to working conditions which had no more than a minor detrimental effect.

192 It should be noted that an employee who relies on regulation 4(9) to establish a deemed dismissal will have no claim for wrongful dismissal at common law. This is because regulation 4(10) provides:

> *"No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work."*

193 By contrast, where there is a repudiation of the employee's contract of employment, the normal legal rules apply. In that situation, the employee can resign and complain of unfair and wrongful dismissal – see regulation 4(11).

194 The effect of regulation 4(9) of TUPE was considered by the EAT in ***Tapere v South London and Maudsley NHS Trust*** [2009] IRLR 972, a case which has already been discussed. The EAT held that in requiring the claimant to move

workplace (from Camberwell to Beckenham), the Trust had imposed a substantial change in her working conditions to her material detriment. It took the view that the issue of whether there is a material detriment to the employee must be considered from the employee's point of view, having regard to his or her personal circumstances. In Mrs Tapere's case it was reasonable for her to regard the change of location as detrimental, because it meant potential disruption to her childcare arrangements and an altered journey which she did not find attractive.

195 The EAT subjected regulation 4(9) to further analysis in ***Abellio London Ltd v Musse and others; Centrewest London Buses Ltd v Musse and others*** [2012] IRLR 360. The case arose from a change in the operator responsible for the 414 bus route, which was agreed by the parties to constitute an SPC. The five claimants were employed by Centrewest to drive buses on the route. There was a mobility clause in their contracts of employment which gave the employer the right to require them to work at any of the work locations identified in a contracts of employment folder. Before the SPC, the claimants were employed at the Westbourne Park depot, which suited their domestic circumstances.

196 Two months before the SPC was due to take place, Centrewest informed the claimants that when Abellio took over the route it would require them to work from a depot in Battersea. Battersea was not one of the work locations mentioned in the employment contracts folder and the ET found that travelling to Battersea would have added at least two hours to the working day in the cases of four claimants and over an hour in the other. All five claimants objected to the transfer. One resigned whilst he was still employed by Centrewest and the other four resigned on the day of the transfer, going to the Battersea depot in order to do so.

197 The ET upheld the claimants' claims of constructive dismissal. It found that the change in base from Westbourne Park to Battersea was both a repudiatory breach of the claimants' contracts of employment and a substantial change in their working conditions which was to their material detriment.

198 On appeal, the EAT held that the tribunal was fully entitled to come to these conclusions. Langstaff P pointed out that *"working conditions"* is a phrase that

is wider than *"contractual conditions"*. Although it may relate to contractual conditions, it may also embrace physical conditions and is certainly capable of relating to matters such as place of work. The EAT also rejected a contention on behalf of the employers that the test of *"material detriment"* developed by the EAT in *Tapere* was overly subjective and gave inadequate weight to the need to strike a balance between the competing interests of employer and employee. The President said:

> *The central point made in **Tapere** … was that in asking the question whose detriment had to be considered there is only one answer, and that is the employee's. It is therefore the employee's perspective that must be considered, albeit that the tribunal must consider objectively the effect of what has taken place upon someone in that person's position.*

Pre-transfer resignations: *Oxford University v Humphreys*

199 Unfortunately the Government did not take the opportunity to reverse the Court of Appeal's decision in ***University of Oxford v Humphreys and another*** [2000] IRLR 183. In that case it was held that where an employee objects to the transfer of his or her contract of employment because s/he knows that *the transferee* intends to make substantial and detrimental changes in terms and conditions, the exercise of the right to object can be regarded as a constructive dismissal by *the transferor*. The Court also held that liability for the relevant dismissal rests with the transferor and does not transfer to the transferee under regulation 5(2). In so concluding, the Court refused to accept that the liability for a *constructive* dismissal which occurs because the transferee is threatening to change terms and conditions passes to the transferee in accordance with the *Litster* principle.

200 The language of regulation 4(9), referring as it does to a transfer which involves or *"would involve"* a substantial change in working conditions to the detriment of a person whose contract was or *"would be"* transferred seemingly envisages the possibility of ***Humphreys*** type claims being brought against the transferor if the employee chooses to resign before the transfer.

TRANSFER-RELATED DISMISSALS

201 Regulation 7 provides that an employee shall be treated as unfairly dismissed if

the sole or principal reason for dismissal 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 ("ETO").

When is a dismissal transfer-related?

202 A question which has long been controversial is whether a transfer to a *specific* transferee must be in contemplation at the time of dismissal if the dismissal is to be connected to the transfer. There were conflicting authorities on the point at EAT level, which included ***Ibex Trading v Walton*** [1994] IRLR 564 and ***Harrison Bowden v Bowden*** [1994] ICR 186.

203 In ***Spaceright Europe Ltd v Baillavoine and another*** [2012] IRLR 111, the Court of Appeal came down firmly in favour of the view that there is no need for a specific transferee to have been identified at the date of dismissal for a dismissal to be transfer-connected.

204 The claimant was employed by the transferor as its Chief Executive Officer. The company went into administration in May 2008 and the claimant was dismissed by the administrators on the same day. A month later the business was sold to a company which had been set up by other directors of the transferor company. The employment tribunal held that the claimant's dismissal was related to the transfer. It found that the administrators had dismissed the claimant because they believed that the purchaser would either be an existing company with its own executive officer or that it would be a new venture where the chief executive would come from the ranks of the directors, and that in either case the purchaser would not wish to employ the claimant.

205 The ET went on to decide that the reason for dismissal was not an ETO. The reason did not relate to the conduct of the business as a going concern because the business was always going to require a managing director, and the dismissal did not therefore contemplate a diminution in the number of employees.

206 On appeal, the Court of Appeal held that the ET was entitled to find that the claimant's dismissal was for a reason related to the transfer, notwithstanding that no specific transferee had been found at the date of dismissal. Giving the leading judgment, Mummery LJ observed that regulation 7(1) does not require

a particular transfer or transferee to be in existence or in contemplation at the time of the dismissal for a dismissal to be transfer-connected.

207 The Court of Appeal also agreed with the ET's finding that the claimant was not dismissed for an economic reason. Mummery LJ said:

> *"For an ETO reason to be available, there must be an intention to change the workforce and to continue to conduct the business, as distinct from the purpose of selling it. It is not available in the case of dismissing an employee to enable the administrators to make the business of the company a more attractive proposition to prospective transferees of a going concern."*

208 The reasoning in ***Spaceright*** was followed by the EAT in ***Kavanagh v Crystal Palace FC (2000) Ltd and others*** [2013] IRLR 291. In that case the EAT held that dismissal cannot be for an ETO reason if it is part and parcel of a process designed to achieve a sale of the business. Wilkie J emphasised that an ETO reason requires an intention to change the workforce whilst continuing to conduct the business.

Whose reason?

209 In ***Dynamex Friction Limited and others v Amicus and others*** [2008] IRLR 515, the transferor was potentially insolvent as a result of being ordered to pay £3 million compensation for unfair dismissal to employees who were dismissed for taking part in a strike. The owner of the company, Craig Smith, decided to petition for an administration order, which was granted. Shortly after their appointment, the administators dismissed the workforce because there was no money to pay their wages. Just over a week later the business was sold to a company with which Mr Smith was closely associated. The ET found as a fact that there was no collusion between the administrators and Mr Smith or between the administrators and the transferee. It therefore concluded that the employees had been dismissed for economic reasons which were not related to the transfer.

210 On appeal, it was argued that the ET had erred in law by failing to consider the contention that the administration was stage-managed and that the administrators had been the *"unwitting tool"* of Mr Smith.

211 The Court of Appeal (Lord Justice Collins dissenting) rejected this contention.

The majority held that in deciding whether the reason for dismissal is an economic one, one has to identify whose thought process is the subject of that analysis. It has to be the person who took the decision. In the instant case, the transferor was under the control of the administrators at the date when the dismissals were effected. The relevant question was therefore what were their reasons for effecting the dismissals. Since the ET found that the administrators had made staff redundant solely because there was no cash to pay their wages, it had been entitled to hold that the dismissals were for economic reasons. The possibility that Mr Smith had cynically manipulated the insolvency of the transferor could not alter that conclusion.

212 In an interesting dissenting judgment, Lawrence Collins LJ pointed out that the jurisprudence of the ECJ has focused on the *"objective circumstances in which the dismissal took place"* – see, for example, ***Bork*** [1989] IRLR 41. He suggested that this line of authority supported a more liberal interpretation of TUPE under which the possibility that Mr Smith had stage managed the administration and used the administrator to regain the business without having the liability to pay the strikers would be relevant.

Entailing changes in the workforce

213 It is clearly established that an economic, technical or organizational reason for dismissal will not be regarded as entailing changes in the workforce unless it involves changes in the number of employees or changes in their functions – see ***Berriman v Delabole Slate Ltd*** [1984] ICR 546.

214 In ***Manchester College v Hazel*** UKEAT/0642/11 9 July 2012 the transferee college initiated a process of cost savings which involved voluntary redundancies and the harmonisation of terms and conditions, including cuts in wages. When the claimants refused to agree to new terms and conditions, they were dismissed and offered re-employment on the new terms. They accepted the new contracts but sued for unfair dismissal.

215 The ET held that the reason for the claimants' dismissals was not an ETO reason, because the imposition of new contracts was designed to harmonise terms and conditions, and did not involve a change in the number or functions of the workforce. Dismissing an appeal, the EAT pointed out that it was not

enough that the College was making other employees redundant alongside the harmonisation process. It is the reason for dismissal of a particular employee that must entail a change in the number or functions of the workforce. So the fact that other employees had been dismissed by reason of redundancy i.e. a change in the number of the workforce, did not alter the fact that the claimants had been dismissed for the reason of harmonisation, which was not a change in the workforce. The case is currently before the Court of Appeal.

216 In ***Nationwide Building Society v Benn and others*** [2010] IRLR 922 an employment tribunal held that transferred employees were constructively dismissed when the transferee (1) assigned them to roles which involved a diminution in their skills and responsibilities and (2) introduced a bonus scheme which resulted in a substantial drop in potential and/or actual income. However, the ET also found that the claimants' dismissals were for an organisational reason entailing changes in the workforce, on the ground that the transferee building society did not have in place the range of products or funds which would have enabled claimants to continue to function at the level they had previously.

217 Both findings were upheld on appeal. The EAT was satisfied that the ET had been entitled to find that the changes in the claimants' jobs and their entitlement to bonus involved fundamental breaches of their contracts of employment. In upholding the finding that the dismissals were for ETO reasons, the EAT rejected the argument that the ETO exception did not apply because the changes made by Nationwide only affected the transferred employees and not the workforce as a whole. Slade J pointed out that regulation 7(2) does not state that an organisational reason must entail changes in the entirety of the workforce. In this case the organisational change affected a body of transferring employees and it could not therefore be said that the ET erred in law in concluding that the dismissals were for an organisational reason.

218 The EAT has also made clear that although a change in job functions can amount to an ETO reason for dismissal, the changes must be more than minor if they are to be regarded as entailing changes in the workforce - see ***Miles v Insitu Cleaning Co Ltd*** UKEAT/0157/12 2 October 2012.

219 In ***Meter U Ltd v Ackroyd and others; Meter U Ltd v Hardy and others*** [2012] IRLR EAT, the EAT held that the term *"workforce"* refers to individual workers or employees and does not include limited companies. The background to the appeal was that directly employed meter readers were transferred under TUPE to Meter U Ltd. That company does not employ meter readers but instead provides meter reading services by means of franchises with limited companies, typically owned by individual meter readers.

220 When they transferred to Meter U, the claimant meter readers were offered the opportunity of forming franchise companies, but only one of them did so. The rest were dismissed by reason of redundancy.

221 Separate employment tribunals sitting in Leeds and Exeter found that the claimants' dismissals were not for an ETO reason, because they did not entail changes in the workforce. There were slight differences between the reasoning of the different tribunals, but both essentially took the view that there was no ETO reason for dismissal because there was no reduction in the respondent's requirement for meter readers.

222 On appeal, the EAT held that the employment tribunals had erred in concluding that limited companies could be included within the respondent's *"workforce"* for the purposes of deciding whether the claimants' dismissals were for ETO reasons entailing changes in the workforce. The EAT observed that the term *"workforce"* is not defined in TUPE or the Directive but went on to hold that, applying a common sense use of the word, it did not include limited companies.

223 It followed that there had been changes in the workforce when the claimants were dismissed. However, the EAT remitted one group of cases to the employment tribunal to determine whether the franchise arrangements were a sham.

Claims in the employment tribunal

224 Where an employee pursues claims against transferor and transferee but settles his claims against one party, the sums received from the settlement must be taken into account in calculating any compensatory award which the other party is required to pay. The employee cannot be permitted to make a profit from a compensatory award - see ***Optimum Group Services plc v Muir***

[2013] IRLR 339.

225 On the other hand, a compromise agreement concluded with the transferor will not prevent the claimant pursuing claims against the transferee - see ***Tamang v Act Security Ltd*** UKEAT/0046/12 31 August 2012.

DUTY TO INFORM AND CONSULT EMPLOYEE REPRESENTATIVES

226 Regulations 13 to 15 impose a duty to inform and, where measures are envisaged, consult representatives of the affected employees.

Meaning of affected employees

227 *"Affected employees"* are defined in regulation 13(1) as employees of the transferor or transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it.

228 In ***I Lab Facilities Ltd v Metcalfe and others*** [2013] IRLR 605, the EAT held that the phrase *"affected by the transfer"* does not cover an indirect effect, such as where the transfer of part of an undertaking makes the remaining part less viable. The EAT also said that, although the duty to inform and consult arises before a proposed transfer, it cannot be said definitively that the employer is in breach of that obligation until the transfer has taken place. It follows that if the transfer does not proceed, there can be no complaint of a breach of the Regulations.

Election of employee representatives

229 The requirements for the election of employee representatives were considered by the EAT in ***Shields Automotive v Langdon*** UKEATS/0059/12 21 March 2013. Langstaff P (sitting in Scotland) held that an election was not fair where:

(1) the election was rushed through in a single afternoon (when one of the employees who was entitled to vote was off work);

(2) the employer decided that one of two employees who had received the same number of votes should be elected without consulting the affected

employees.

The duty to inform

230 Under regulation 13(2), the employee representatives must be informed of:

(1) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(2) the legal, economic and social implications of the transfer for any affected employees;

(3) the measures which the employer envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be taken, that fact; and

(4) if the employer is the transferor, the measures in connection with the transfer, which he envisages the transferee will take in relation to any of the affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

Information relating to agency workers

231 With effect from 1 October 2011, regulation 13 was amended by the Agency Workers Regulations 2010 SI 2010/93 so as include a requirement to provide information about agency workers.

232 This requirement is set out in regulation 13(2A), which provides that where information is to be supplied by an employer under regulation 13(2):

(1) it must include suitable information relating to the use of agency workers (if any) by that employer; and

(2) *"suitable information"* relating to the use of agency workers is means –

(a) the number of agency workers working temporarily for and under the supervision and direction of the employer;

(b) the parts of the employer's undertaking in which those agency

workers are working; and

(c) the type of work those agency workers are carrying out.

233 There is no requirement to provide information about the agency workers' terms and conditions.

Nature of obligation to inform

234 Two decisions of the EAT hold that the obligation to inform employee representatives is a discrete obligation which arises even if no measures are contemplated in relation to the transfer – see ***Cable Realisations Ltd v GMB Northern*** [2010] IRLR 42 and ***Todd v Strain and others*** [2011] IRLR 11.

235 It is clearly established that the word "measures" is a word of the widest import which includes any action, step or arrangement – see ***Institution of Professional Civil Servants v Secretary of State for Defence*** [1987] IRLR 373. In ***Todd*** the EAT held that the word is apt to cover administrative arrangements relating to the transfer, whether or not they are disadvantageous to the employees. However, the EAT went on to emphasise that a measure must be something deliberately done by the employer over and above what necessarily occurs as a consequence of the transfer itself.

236 In ***Royal Mail Group Ltd v Communication Workers Union*** [2009] IRLR 1046, the Court of Appeal held that regulation 13(2)(b) requires the employer to describe what he genuinely believes to be the legal, social and economic implications of the transfer. It does not require him to warrant the accuracy of his views of the relevant implications.

237 The Court added that, so far as legal implications are concerned, there must be an obligation on the employer to consider the legal implications, and if he does not do so, then he will not be able to defend his views as being genuine. But since legal implications are something it can be difficult to be certain about, it would be unfair to require employers to warrant their accuracy.

The duty to consult

238 Regulation 13(6) of TUPE provides:

> *An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.*

239 Regulation 13(6) gives effect to Article 7(2) of the Directive, which provides:

> *"Where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of his employees in good time on such measures with a view to reaching an agreement".*

240 The provisions of regulation 13(6) make clear that:

(1) the transferor is obliged to consult employee representatives in relation to measures it envisages taking in connection with the transfer;

(2) the transferee is obliged to consult employee representatives in relation to measures it envisages taking in relation to its existing employees.

However, an important question which has never been resolved is whether the transferring employees have any right to be consulted about measures which the transferee intends taking in relation to them.

241 On any view, regulation 13 does not require the transferor to consult in relation to measures envisaged by the transferee. Further it is difficult to see how the transferor could carry out meaningful consultation *"with a view to seeking agreement"* in relation to measures that it does not itself intend to take. On the other hand, a literal interpretation of regulation 13 would lead to the conclusion that a transferee who plans to take measures in relation to transferring employees has no duty to consult their representatives because it is not their employer during the period prior to the transfer. If, however, that is the correct analysis, it would appear to follow that the transferred employees have no right to be consulted by anybody about measures which the transferee envisages taking in relation to them.

242 One way of filling this apparent lacuna in the duty to consult would be to say that a transferee who intends to take measures in relation to transferring employees has a duty to consult their representatives once it becomes their

employer i.e. after the transfer has taken place. However, that argument did not find favour with the EAT in ***Amicus and another v City Building (Glasgow) LLP and others*** [2009] IRLR 253.

243 In ***Amicus*** the claimant trade unions relied on the provisions of Article 7 of the Directive to argue that transferee employers have a duty to consult post transfer. Rejecting this contention, Lady Smith held that the duty to consult is limited to the period prior to the transfer. She took the view that a duty to consult after the transfer would be unduly burdensome to employers and potentially unworkable, because it would be impossible to know when it had come to an end. She also refused to refer the case to the ECJ, expressing the view that there is no room for doubt about the meaning of Article 7.

244 Another possible solution to the conundrum would be read words into regulation 13(6) so as to make it clear that, as their prospective employer, the transferee has a duty to consult representatives of the transferring employees prior to the transfer about any measures it envisages taking in relation to them after the transfer has taken place.

245 The claimant unions in the ***Amicus*** case did not argue that the transferee has a duty to consult *pre transfer* in relation to measures which it envisages taking in relation to transferring employees. Accordingly, the binding part of the EAT's decision is that Article 7 and regulation 13 provide for no duty to consult *post transfer*. Nonetheless, some of Lady Smith's *obiter* observations lend support to the contention that TUPE do not require the transferee to consult with representatives of the transferring employees at any stage – see paras 26 to 32 of her judgment.

246 However, the consequences of Lady Smith's analysis are anomalous and potentially asymmetrical. Having regard to the purpose of the Directive, it makes no sense that (a) the transferring employees have the right to be consulted about measures envisaged by the transferor (b) employees of the transferor who will not transfer have the right to be consulted about any measures that may affect them (c) existing employees of the transferee have the right to be consulted about measures envisaged by the transferee but (d) the transferring employees have no right to be consulted about measures envisaged by the transferee.

247 Lady Smith's answer to this (para 63) was:

> *There is no point in providing for the transferring employees to be entitled to consultation regarding measures envisaged by the transferee employer because their contracts of employment cannot be changed even by agreement, if the reason for the change is the transfer.*

However, this is clearly not an adequate answer – firstly because a transferee may envisage all sorts of measures which do not involve changes in contracts of employment and secondly because the transferee may want to alter contracts of employment whether or not it has the right to do so and/or for ETO reasons.

248 Whilst it may be fair to say that the Directive does not provide an immediate answer to the question of whether there is any obligation to consult transferring employees in relation to measures which are going to be taken by the transferee, the effect of Article 7(2) is, in the writer's respectful submission, very far from being *acte clair*. Furthermore, Article 7(1) requires the transferee to give information to representatives of his employees *"in good time, and in any event before they are directly affected by the transfer as regards their conditions of work and employment".* There would seem to be a significant gap in the protection afforded by the Directive if transferring employees have no right to be consulted by the transferee before they are directly affected by the transfer as regards their conditions of work and employment.

Compensation for failure to inform and consult

249 In ***Todd*** the EAT pointed out that the principles laid down by the Court of Appeal in ***Susie Radin Ltd v GMB*** [2004] IRLR 400 also apply in the context of the TUPE consultation obligations i.e. the starting point is to take the maximum award and then discount, if appropriate, for mitigating circumstances. In ***Todd*** the ET made a maximum award of 13 weeks' pay because the transferor failed to arrange for the election of employee representatives. The EAT substituted an award of seven weeks pay, on the ground that the transferor had provided relevant information to the individual employees.

250 The EAT also held that the effect of regulation 15(9) is that the transferor and transferee are jointly and severally liable for compensation payable in respect

of any breaches by the transferor of its duties to inform and consult.

251 However, the issue of apportionment between them must be decided in the ordinary courts under the Civil Liability (Contribution) Act 1978 - see ***Country Weddings Ltd v Crossman and others*** UKEAT/1535/12 30 April 2013.

252 In ***Kaman v Kozee Sleep Products Limited*** [2011] IRLR 196 the EAT held that the cap on weekly pay imposed by section 227 of the Employment Rights Act 1996 (£400 per week) does not apply to an award of compensation under regulation 15 for a breach of the duty to inform and consult. For the purposes of such an award, weekly pay is uncapped.

EMPLOYEE LIABILITY INFORMATION

253 Article 3(2) of the Directive gave Member States the option to introduce provisions requiring the transferor to notify the transferee of all rights and obligations in relation to employees that will be transferred, insofar as the relevant obligations are or ought to be known to the transferor at the time of the transfer. The UK Government decided to take full advantage of this option.

Transferor's duty to supply employee liability information

254 The duty to supply employee liability information is governed by regulations 11 and 12 of TUPE.

255 The transferor's duty to supply employee liability information applies in relation to two categories of employee:

(1) any person employed by the transferor who is assigned to the organised grouping of resources or employees that is the subject of the relevant transfer – see regulation 11(1);

(2) any person who would have been so employed and assigned if they had not been unfairly dismissed in the circumstances described in regulation 7(1) – see regulation 11(4).

256 The information can be provided in one of two ways, which are (a) in writing or (b) by making it available to the transferor in a readily accessible form.

What is employee liability information?

257 “Employee liability information” is defined as:

(1) the identity and age of the employee;

(2) the particulars of employment that an employer is required to give to an employee under section 1 of the Employment Rights Act 1996;

(3) information of any disciplinary procedure taken against an employee and any grievance procedure taken by an employee within the previous two years *“in circumstances where a Code of Practice issued under Part IV of the Trade Union and Labour Relations 1992 which relates primarily to the resolution of disputes applies”* This would clearly include any disciplinary proceedings in which dismissal was contemplated, even if the sanction ultimately imposed was a warning;

(4) information of any court or tribunal case, claim or action:

(a) which has been brought by an employee against the transferor within the previous two years; or

(b) that the transferor has reasonable grounds to believe might be brought by an employee against the transferee arising out of his employment with the transferor;

(5) details of any collective agreement which will have effect after the transfer in relation to the employee.

Notification and timescale

258 Regulation 11(3) provides that the information supplied must be as at a specified date not more than 14 days before the date on which it is notified to the transferee. Regulation 11(5) requires the transferor to notify the transferee in writing of any subsequent change in the employee liability information.

259 The notification must be given not less than 14 days before the relevant transfer unless there are special circumstances which make this not reasonably practicable, in which case the information must be supplied as soon as reasonably practicable – see regulation 11(6).

260 Regulation 11(7) makes clear that employee liability information may be given

in more than one instalment or indirectly, through a third party e.g. the client where there is a change of service provider.

Enforcement

261 The recourse available to a transferee where the transferor fails to comply with the notification requirements is a complaint to an employment tribunal. The time limit for a complaint is 3 months from the date of the transfer, with a reasonable practicability extension.

The remedy

262 Regulation 12(3) provides that if the transferee's complaint is upheld, the tribunal will be required to make a declaration to that effect and may make an award of compensation. Regulation 12(4) states that this shall be of such amount as the tribunal considers just and equitable in all the circumstances, having regard to:

(1) any loss sustained by the transferee which is attributable to the matters complained of; and

(2) the terms of any contract between the transferor and the transferee relating to the transfer under which the transferor may be liable to pay any sum to the transferee in respect of a failure to notify the transferee of the employee liability information.

The amount of compensation must not be less than £500 per employee in respect of whom the transferee has failed to comply with a provision of regulation 11, unless the tribunal considers it just and equitable in all the circumstances to award a lesser sum – see regulation 11(5). In addition, regulation 11(6) imposes a duty on the transferee to mitigate its loss.

263 Failure to notify a transferee of information relating to an employee will not normally cause the transferee loss unless there was something the transferee would have done differently as a result of receiving the information.

No contracting out

264 It is not open to the parties to contract out of the obligations imposed by

regulation 11. Any such contract would be rendered void by the restriction on contracting out contained in regulation 18.

MELANIE TETHER

30 October 2013

Old Square Chambers

10 – 11 Bedford Row

London WC1R 4BU

Tel: 0207 269 0300

e-mail: mtether@oldsquare.co.uk