1. BACKGROUND

The Transfer of Undertakings (Protection of Employment) Regulations 1981 implemented the 1977 Acquired Rights Directive in the UK in order to protect employee rights on the transfer of an undertaking. The protection included:

- The automatic transfer of the contracts of employment of those employees assigned to the business, together with all rights, liabilities and obligations relating to those employees;
- Protection against dismissal in connection with a business transfer; and
- The obligation to inform and consult with representatives of affected employees about the transfer and measures proposed in connection with it.

The 1977 Acquired Rights Directive was subsequently revised and then consolidated into the 2001 Acquired Rights Directive. That Directive was implemented in the UK by The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE 2006").

When TUPE 2006 was implemented, the Government took the opportunity to make a number of other amendments that were not required by the revised Directive. The main one for today's purposes was:

- Widening the scope of TUPE to make it clearer that it covers "service provision changes" i.e. cases where services are outsourced, "insourced" (i.e. brought back in-house) or assigned to a new contractor. However, the supply of goods and "one-off buying-in of services" are excluded from this extension.

Although the Acquired Rights Directive and TUPE 2001 did apply in certain outsourcing situations and European case law laid down the tests for determining when they were covered, in reality it was very difficult for the parties to a contract (and their advisers) to determine whether TUPE applied. It was for this reason that the Government amended the definition of a relevant transfer to which TUPE applies to include service provision changes.

2. SERVICE PROVISION CHANGES – THE LEGISLATIVE PROVISIONS

TUPE 2006 defines a relevant transfer to which TUPE applies as including a "service provision change" which is where:

Reg 3(1)(b)

"(i) 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");

(ii) 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; or

(iii) 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

and in which the conditions set out in paragraph (3) are satisfied." (Reg 3(1) (b) TUPE 2006)

"Contractor" for these purposes, includes sub-contractors (Reg 2(1) TUPE 2006).

Reg 3(1)(b)(3)

The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) 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;

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

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

The organised grouping of employees could be a single employee (Reg 2(1) TUPE 2006).

3. SERVICE PROVISION CHANGES – IDENTIFYING THE ACTIVITY

In order for there to be a business transfer under TUPE 2006, there must be a transfer of an economic entity which retains its identity after the transfer. This is not necessary under the service change provisions – it is not necessary that the relevant activities retain their identity after the transfer. All that is necessary is that one person ceases to provide the activities and another takes them over. As a result it is not possible for the incoming provider to avoid TUPE by performing the services in a different way. However, it will be still be necessary for the post-transfer activities to be identifiable as the pre-transfer activities for a service provision change to occur.

Metropolitan Resources Ltd v Churchill Dulwich Ltd in liquidation UKEAT/0286/08 – activities must be fundamentally or essentially the same

This case dealt with a change in the contractor providing accommodation for asylum seekers. The EAT confirmed that activities before and after the change in service provider need not be identical. It will be sufficient if they are "**fundamentally or essentially the same**". Tribunals should adopt a common sense and pragmatic approach to this question and minor differences between the nature of the tasks carried on or the way in which they are performed should not exclude the application of TUPE.

OCS Group UK Ltd v Jones UKEAT/0038/09 – different kind of food preparation

The EAT held that the service provision change provisions did not apply on the re-tendering of a catering contract as the activities carried out by the incoming contractor were "**wholly different**" to those carried out by the outgoing contractor.

OCS provided catering services to a BMW car plant. The contract provided for a centrally-located restaurant and deli bar facility supported by four "satellites". The satellites were required to provide a range of hot and cold meals and OCS staff spent a great deal of time in the preparation of the hot meals. The OCS contract was terminated and the new catering contract provided a substantially reduced meals service, selling pre-prepared sandwiches and salads. Hot food preparation was not required.

The employment tribunal held that there had not been a service provision change. The activities under the new contract were "materially different" to those under the OCS contract. The catering operation had changed from the provision of a full canteen service where the OCS staff were chefs, to staff becoming sales assistants in a kiosk.

On appeal, OCS argued that the tribunal should have taken greater account of the activities shared by both contracts, namely the provision of food and catering services for the staff at the BMW plant. The EAT disagreed. Adopting the test in *Metropolitan Resources v Churchill*, it said that the pre and post-transfer activities should be "fundamentally and essentially the same". This was a question of fact and degree to be assessed by the tribunal and the tribunal had been entitled to find that the new contractor carried out a "wholly different operation" from OCS.

Whether post-transfer activities are "fundamentally or essentially the same" as pre-transfer activities will depend on how the activities in question are defined. It has been assumed that tribunals will generally attempt to define the activities as broadly as possible in order to give effect to the purpose of TUPE 2006 (i.e. to safeguard employee's contracts of employment in transfer situations). However, the tribunal in this case felt unable to adopt a broad definition of the relevant activities. In reaching its decision that the pre-transfer and post-transfer activities were "wholly different" it was influenced by the detailed specifications for the preparation of food in the OCS contract which were absent in the new contract and by the changed job functions of the catering staff post-transfer.

It is important to note that the there is no requirement on the tribunal to interpret the SPC regime purposively as it derives from UK legislation rather than from the EU Directive. It would appear that there is an increasing trend for the EAT to limit the circumstances in which there is an SPC and this is demonstrated by the following cases.

Enterprise Management Services v Connect-Up Ltd UKEAT/0462/10 – activities reduced in scope/fragmentation

Differences between the activities carried out before and after the change in service provider meant there was no service provision change and TUPE did not apply.

EMS provided IT services to Leeds City Council ("LCC") under a framework agreement which gave it preferred bidder status amongst its schools. It offered two levels of service – a complete managed service (covering both administrative and curriculum matters) (Option A) and support for the maintenance of a software system (Option B). EMS initially provided services to all LCC schools but by the time the contact was put up for tender, this had dropped to 80%. Most schools had signed up to service level B. The new contract was awarded to Connect-Up from 1 April 2009. There were significant differences between the two contracts, the main difference being that the new contract excluded any service cover in relation to curriculum matters. Following 1 April 2009, Connect-Up lost around 40% of the schools previously serviced by EMS to five other service providers.

The EAT upheld the tribunals' decision that there had not been a service provision change. It could find no error in the tribunal's finding that the activities originally carried out were the provision of IT support for administrative and curriculum systems to schools in Leeds. There were significant differences between the activities carried out by the old and new contractors – the omission of curriculum work represented some 15% of the work. In addition, the loss of a significant number of schools by the new provider to five other contractors meant that the activities were not essentially the same due to "fragmentation".

Whilst in this case, the EAT was happy to accept the ET's decision that a 15% difference meant that the activities were not essentially the same, no doubt other tribunals would have come to a different view and classified the relevant activities differently. As it is always a matter of fact and degree, the EAT is generally unlikely to interfere with a tribunal's finding on this.

Argyll Coastal Services v Stirling & others (UKEAT/0012/11) – order of questions

JAG had a contract with the MOD to provide a ship for the delivery of cargo around the Falkland Islands. This contract continued for about 17 years, by which time the only ship owned by JAG was the St,. Brandan, which has a crew of eight. JAG employed two office staff (the JAG employees) in Scotland but the crew of the St Brandan were employed by a Guernsey company (GSML), which had contracted with JAG to employ the crew.

When the MOD contract with JAG expired in 2009, the MOD entered into a contract with a Dutch company, VWMS, for it to provide four ships and crew for work previously carried out by the St. Brandan. (In fact, VWMS only owned three ships and entered into its own contract with Argyll Coastal Services Ltd (Argyll) to hire another ship and its crew. This ship and crew took over the work previously down by the St. Brandan.

The JAG employees and the GSML employees brought claims arguing that there had been a SPC and that their employment had transferred to Argyll. The ET found that TUPE 2006 applied and that the contracts of employment of the JAG employees and the crew transferred to Argyll. This was because Argyll was carrying on the services "on behalf of the MOD" that JAG had previously carried out and it did not matter that Argyll was not aware of the MOD when it first contracted with VWMS.

The tribunal also found that the JAG employees did not have any "stand alone" purpose but supported the "operational end of JAG's activities"; in other words, the St. Brandan's operations in the Falkland Islands. The ET decided that the SPC rules under TUPE applied.

The EAT decided:

- The ET had taken the wrong approach in deciding whether the SPC provisions applied;
- It first had to be ascertained whether there is an organised grouping of employees in GB; and
- This grouping had to have as its main purpose the carrying out of the activities concerned – i.e. as required under the contract between the transferor (JAG) and the client (MOD.

Lady Smith observed that:

- An organised grouping of employees must be a grouping deliberately put together by the transferor to carry out the particular activities required under the particular commercial contract with the client. **So the starting point is to look at how those activities are scoped in the contract.**
- When deciding the activities, there is a difference between the main activities and ancillary ones. The ancillary activities facilitated the main ones – but it is the main ones that one focuses on for SPC purposes.
- An organised grouping of employees must by with the same employer.

Nottinghamshire Healthcare NHS Trust v Hamshaw UKEAT/0037/11 – services significantly different

There was no service provision change where a care home for vulnerable adults was closed and the residents (who were previously managed on a 24-hour basis by care workers) were instead re-housed in their own homes, with care provided by private care providers.

In coming to its decision, the employment tribunal found that:

- The changes represented a "material shift in the ethos" of the service and the manner of its provision. The care provision changed from "institution to home; from management to support";
- There were important changes in the daily routines of the former residents intended to develop their confidence and independence;
- There was a difference in staff duties. At the care home, staff had worked active night shifts. In contrast, once the former residents transferred to their own accommodation, the key worker would sleep in the same accommodation occupied by the resident; and

- Whilst the beneficiaries of the services (the former residents) remained the same, the services were no longer a part of the NHS and were "fundamentally different" from those operated previously.

The EAT upheld the employment tribunal decision as the services provided were not fundamentally or essentially the same.

Johnson Controls Ltd v Campbell UKEAT/0041/12 – holistic approach to identifying the activity concerned

Mr C was employed by JC as a taxi administrator. This involved him taking bookings for taxis from clients, including the UKAEA. He also did other administrative activities such as advising on journey timings, allocating jobs to subcontractors and checking invoices. Mr C claimed that 80% of his time was taken up with taxi activities for UKAEA. After some time, UKAEA decided not to use JC for booking taxis as its secretaries could book taxis directly with the taxi firms. Mr C brought a claim for unfair dismissal and a statutory redundancy payment against JC claiming the SPC rules applied.

The ET asked itself whether UKAEA was performing essentially the same activity as that carried out by JC. It found that the activity was a "central co-ordinated services" which no longer existed after UKAEA's secretaries took on the function of booking taxis direct with taxi firms. In this way, the activity was more than the "sum total" of the various activities or tasks. Therefore, the tribunal held that there was no service provision change under TUPE 2006.

The EAT held that:

- The ET was correct.
- Identifying an activity involves a holistic assessment. It cannot be decided by simply enumerating tasks and asking whether the majority of those tasks quantitatively was the same as the majority of those tasks prior to the transfer.
- In this case it was right to put emphasis on the centralised and co-ordinated nature of the nature of the service – a centralised database and control function was not the same as the activity being run in many different parts.

4. SERVICE PROVISION CHANGES – TRANSFERS TO MORE THAN ONE CONTRACTOR

A service provision change can still occur where activities are distributed among a number of contractors following a re-tendering exercise, provided that it is possible to identify with which contractor the activities end up. However, there may be circumstances where services become so fragmented after the re-tendering exercise that nothing which can properly be determined as a service provision change has taken place. Where the activities are randomly distributed amongst new contractors and are not easily identifiable as the activities carried out by the prior contractor there will be no service provision change.

Kimberley Group Housing Ltd v Hambley UKEAT/0488/07

Leena Homes Ltd was originally contracted to provide accommodation and related services for asylum seekers in Stockton and Middlesbrough. When Leena lost the contract, Kimberley Group Housing Ltd and Angel Services (UK) Ltd were appointed to provide the services in its place. 97% of the operations in Stockton and 71% of the operations in Middlesbrough transferred to Kimberley and the remainder to Angel.

Although in this case, there was found to be a service provision change the EAT recognised that there may be circumstances where the service becomes so fragmented that "nothing which can properly determine as being a service provision change has taken place."

Thomas-James and others v Cornwall County Council ET/1701021-22 – need to be able to identify the destination of the activities post-transfer

Although under the service provision test there can be a change in the way the activities are carried out, it must be possible to identify the destination of the activities, which can only be done if they have a distinct identity.

Before a re-tendering process, 17 contractors provided free employment and welfare advice over the telephone under contracts awarded by the Legal Services Commission. Following the re-tendering, the services were provided by only nine contractors. CCC was one of the contractors that ceased to provide services after the re-tender. It was not possible to work out to which contractor the work previously carried by CCC employees had been transferred. Since it was not possible to identify the destination of the activities because they did not have a distinct identity there was no service provision change.

Clearsprings Management Ltd v Ankers and others UKEAT/0054/08 - no discernible pattern of reallocation of duties

Activities previously carried out by one contractor (the provision of accommodation and pastoral care to asylum seekers under a contract with the Home Office) were awarded to several contractors on a re-tendering exercise. The EAT held that there was no service provision change as there was no "discernible pattern of reallocation" after the transfer of the activities previously carried out by the original contractor. It was not possible to determine to which new contractor the activities previously carried out by Clearsprings' employees had been transferred. The activities previously carried out by Clearsprings were too fragmented for there to be a service provision change.

Enterprise Management Services Ltd v Connect-Up Ltd UKEAT/0462/10

This is the case referred to above where is was held that the loss of a significant number of schools by the new provider to five other contractors meant that the activities were not essentially the same due to "fragmentation".

5. SERVICE PROVISION CHANGES – ORGANISED GROUPING OF EMPLOYEES

Hunt v Storm Communications ET/2702546/06

An employment tribunal held that an employee of a PR agency who spent 70% of her time on a PR contract for a particular client was an organised grouping of employees whose principal purpose was to carry out activities for that client. She therefore transferred to the new agency even though she had not been specifically employed for that contract and spent a portion of her time on other work.

Royden and other v Barnetts Solicitors ET 2103451/07

An employment tribunal held that two employees from the client's old law firm were sufficiently involved with the client's work to constitute an "organised grouping of employees" whose principal purpose was to carry out activities for that client.

LLW, a law firm based in Birkenhead, had an arrangement with Britannia Building Society (BBS) under which BBS referred mortgage customers to LLW. LLW dealt with the purchase of the property for the individual client and processed the mortgage on behalf of BBS. BBS sought tenders for its conveyancing referrals and Barnetts and Hammonds Direct were successful. With effect from 1 June

2007, referrals from BBS branches were handled by Barnetts and referrals from BBS's call centre were handled by Hammonds. Branch referrals accounted for 90% of the referrals.

The employment tribunal held that there had been a service provision change. The relevant activities for the purposes of the TUPE transfer to Barnetts were the branch referrals. Although none of LLW's staff worked exclusively on work associated with BBS and their work from BBS included work from both branch and call centre referrals, on the facts there was an organised grouping of employees whose principal purpose was the carrying out of the branch referral. However, only two employees out of six were assigned to the relevant activities so that their employment transferred – non-BBS work and work from call centre referrals was a "relatively peripheral element" of their duties.

The **BIS Guidance** dealing with the provision states that the "organised grouping" condition is meant to confine TUPE to situations where the outgoing service provider has in place a team of employees that are "essentially dedicated" to carrying out the activities that are to transfer. It excludes cases where there is no identifiable grouping of employees, which would make it difficult to identify who transfers on a change of contractor. For example, there would be no "organised grouping of employees" where a courier company serviced a particular client using different ad hoc couriers, rather than an identifiable team.

Eddie Stobart Ltd v Moreman UKEAT/ 0223/11

Employees who happened to work on a particular contract because of the shift they worked were not an "organised grouping of employees" and so did not transfer when the contract changed hands. It was not enough that they carried out the majority of their work for a particular client. Instead they must be organised by reference to the client's requirements and be identifiable as members of that client's team.

ES was providing warehousing and distribution services to two clients. The way the shift patterns operated meant that the day-shift employees worked principally on the Vion contract and the night-shift employees worked principally on the other contract. When the Vion contract was awarded to a new contractor, ES took the view that the day-shift employees were "assigned to the Vion contract" and so transferred to the new contractor.

The claimants claimed unfair dismissal when the new contractor refused to take them on. The new contractor argued that the claimants had not shown that they were assigned to any particular client of ES and therefore could not rely on TUPE.

However, the employment tribunal reached its decision on a different basis. For TUPE to apply on a change of contractor there must be "an organised grouping of employees" whose "principal purpose" is carrying out the relevant activities on behalf of the client. The claimants were not an "organised grouping of employees" – they spent the majority of their time on the Vion contract simply because of the way ES organised its shift patterns, not because they were an organised team whose principal purpose was to carry out work for Vion.

The EAT dismissed ES's appeal. An "organised grouping of employees" is not simply a group which, without any deliberate planning or intent, mostly works on tasks for a particular client. The employees must be organised in some sense by reference to the requirements of the client in question.

This case demonstrates the importance of identifying an organised grouping of employees if TUPE is to apply on a change of contractor. The fact that employees happen to work on a particular contract is not enough. They must instead be organised in some way by reference to the client's requirements - otherwise their employment will not transfer when the contract changes hands as there will have been no "service provision change" within TUPE.

Seawell Ltd v Ceva Freight (UK) Ltd and another EAT/0034/11

M was employed by CF as a logistics co-ordinator in its warehouse. CF's business involved freight forwarding and management logistics. The workforce was organised into two separate teams, one for "inbound" goods and one for "outbound" goods. M was included in the outbound team which comprised eight employees. He spent 100% of his time working on an account for S. The other 7 employees spent either some (up to 30%) or non of their time on the S account. S decided to bring in-house the work which had been carried out on its behalf by CF. CF asserted that TUPE applied so as to transfer M's employment to S, which is disputed.

The ET held that the SPC rules had transferred M from CF to S. S appealed arguing that the ET had adopted the wrong test in concluding that M was himself an organised grouping because all his work was for S.

The EAT held:

- The ET was wrong in focussing just on the fact that M worked full time on CF's account.
- The approach taken in the *Eddie Stobart* case was correct.

- An organised grouping of employees connotes a deliberate putting together of a group of employees for the purpose of the relevant client's work – it is not a matter of happenstance.
- The outbound team did not have, as its principal purpose, the carrying out of the activities for S. There is a difference between M's own principal purpose and that of the grouping in which he worked.
- Here S took back in house all aspects of its work formerly carried out for them by CF, not just those aspects which M performed.
- The fact that M carried out 100% of his work for S did not necessarily mean that he was "assigned" – this was a question of fact. "That an employee happens to be doing particular work does not, if itself, show that the employer assigned him to a grouping which was organised for the purpose of carrying it out".

6. SERVICE PROVISION CHANGES – IDENTITY OF THE CLIENT

The definition of a service provision change includes references to "a client" and "the client". The EAT recently held that these terms refer to one and the same client.

Hunter v McCarrick UKEAT/0617/10

TUPE only applies on a second generation contracting out where the activities carried out before and after the change of contractor are carried out on behalf of the same client.

Under Reg 3(1)(b)(ii) TUPE 2006, a service provision change occurs where activities cease to be carried out by a contractor on **a** client's behalf and are carried out instead by a different person on **the** client's behalf.

M was employed by Mr Hunter from August 2009 to March 2010. He needed to rely on two earlier TUPE transfers if he was to have sufficient continuity of employment to bring an unfair dismissal claim. The first was a first generation contracting out under which WG Ltd ceased to carry out property management services in relation to its own property portfolio and appointed WCP to carry out these services in its place. The second involved the mortgagee of the property portfolio (Aviva) appointing receivers to take control of the properties and new property consultants (King Sturge) to manage the properties. This meant that the property management services ceased to be carried out by WCP on WGL's behalf and were instead carried out by King Sturge on Aviva's/the receivers' behalf, resulting in both a change of contractor and of client.

The EAT held that the second transaction was not a service provision change within Reg 3(1)(b)(ii) TUPE. Reg 3(1)(b)(ii) should be given its ordinary straightforward meaning and on a literal interpretation "the client" was the same person as "a client" referred to earlier in that Regulation – the specific client on whose behalf the contractor carries out the activities. There was no need to give a purposive construction because the service provision change provisions do not originate from the Acquired Rights Directive. If TUPE had been intended to apply in such a situation it could have been drafted in such a way as to include it.

7. SERVICE PROVISION CHANGES – EXCEPTIONS

Pannu and others v Geo W King (In Liquidation) and others UKEAT/0021/11

An arrangement to supply assembled van parts to a customer fell within the exclusion relating to the supply of goods.

GWK had a contract with IBC to supply IBC with assembled van parts. Initially GWK manufactured the component parts, the claimant employees of GWK assembled the component parts and the assembled parts were then supplied to IBC. Subsequently, due to financial difficulties, the component parts were supplied by a third party to GWK which assembled them and supplied them to IBC. GWK went into liquidation and the claimants were dismissed. IBC then entered into a contract with Premier to supply the assembled parts and Premier employed one of GWK's employees as a supervisor.

The tribunal held that the activities concerned consisted wholly or mainly of the supply of goods and so there was no service provision change and TUPE did not apply. The EAT agreed. Although GWK had an organised group of employees producing parts for IBC, GWK's activities were the supply of those finished goods to IBC i.e. a supply of goods.

Whether the supply of goods exclusion applies is a question of fact for the employment tribunal.

8. STANDARD TUPE TRANSFER

Valor v Ayuntamiento de Cobisa CJEU (C-463/09) – taking back in house

This is a Spanish case under the ARD. C, a contract cleaning company, entered into a contract with a local council to clean schools and other premises belonging to it. C employed Ms V as a cleaner on that contract. The Council later decided to carry out its own cleaning in house and terminated its

contract with C. It did not take on any of C's staff who had been working on its contract and instead hired new staff to clean its premises through an employment agency. It also took on none of C's other assets such as cleaning equipment.

The CJEU held:

- The ARD did not apply because the entity (the cleaning services) did not retain its identity.
- An entity's identity is derived from its assets attributed to it. There are indicated in the *Spikers* case. Here, none of them transferred to the Council.
- The mere fact that the activities carried out by C and the Council in relation to cleaning are similar does not necessarily lead to the conclusion that an economic entity has retained its identity. An entity cannot be reduced to the activity entrusted to it. Its identity emerges from several factors such as its workforce, its management staff and the way the work is organised, its operating methods and its operational resources available to it.

Since the UK had its SPC rules, this case would probably not have had the same result if it occurred in the UK. But in all SPC cases, there is still a possible argument under the "old" TUPE, where this case has relevance.

9. DISMISSAL - IS THERE AN ETO REASON?

A dismissal will be automatically unfair where the sole or principal reason for a dismissal is:

- The transfer itself; or
- A reason connected to the transfer which is not an economic technical or organisation reason entailing changes in the workforce.

Employees are deemed dismissed if they resign in response to a repudiatory breach of contract or a substantial change in working conditions to their material detriment.

TUPE 2006 deems an employee's resignation to be a "dismissal" where it is in response to:

- An employer's repudiatory breach of contract and the employee claims constructive dismissal (Reg 4(11)); or
- A substantial change in their working conditions to their material detriment (Reg 4(9).

Reg 4(9) is much wider as the employee does not need to show a repudiatory breach of contract and instead the question is whether there has been a substantial change to their working conditions and, if so, whether the change is to their material detriment.

Since these resignations are deemed to be dismissals, they will be automatically unfair if the principal reason for the dismissal is the transfer itself, or a reason connected with the transfer which is not it is an economic technical or organisational reason entailing changes in the workforce ("ETO reason").

Franchisees

Meter U Ltd v Ackroyd UKEAT/0207/11

Where a transferee dismissed transferring employees and offered them work as franchisees, there was an economic, technical or organisational reason for the dismissals entailing changes in the workforce ("ETO reason"). The dismissals were therefore potentially fair. The EAT held that the term "workforce" does not include individuals providing their service through subcontracted franchise companies and therefore the dismissal of the employees did involve a change in workforce numbers as required for a valid ETO reason.

MU provided meter reading services. Its business model was to tender for meter reading contracts and to subcontract the work to individual meter readers who provided their services through their own independent limited companies. When it won the tender for two contracts, the employees transferred to MU. MU offered them the opportunity to set up individual companies to operate under its franchise arrangement and when they refused, it dismissed them for redundancy. The employees argued that their dismissals were for a reason connected to the transfer and were automatically unfair.

The tribunal agreed – relying on *Berriman v Delabole Slate* it noted that an ETO reason must entail changes in numbers or job functions of the workforce. It took a purposive approach, assuming that it must have been the intention of the Acquired Rights Directive to include a wider class of person than just "employees" in the term "workforce". It interpreted workforce as including all persons working in the employer's business, whether as employees, franchisees or otherwise. As a result, there was no change in the workforce's number following the transfer and so no ETO reason.

The EAT upheld MU's appeal. Although neither TUPE nor the Directive define "workforce", all possible definitions refer to individuals i.e. people, employees or workers – and common sense suggests it does not include limited companies. Since on this basis there had been a reduction in the

workforce, an ETO reason for the dismissal had been established. The dismissals were not therefore automatically unfair and the claims were remitted to the tribunal to determine their fairness.

Relocation

Royden v Barnetts Solicitors ET 2103451/07

The employees who had been involved in BBS work and were based in Birkenhead were offered work in Barnett's office in Southport but they did not wish to work there and wished to continue working in Birkenhead. They resigned and claimed constructive dismissal and that the transfer of location was a substantial change in their working conditions to their material detriment entitling them to resign and rendering their dismissals automatically unfair.

The employment tribunal held their normal place of work was Birkenhead and there was no mobility clause in their contracts. Given the location of their homes, requiring them to work in Southport was a substantial change in their working conditions to their material detriment. The dismissal were automatically unfair as although they were for an organisational reason they did not entail changes in the workforce, i.e. a reduction in headcount or changes in duties of the relevant employees.

Tapere v South London and Maudsley NHS Trust UKEAT/0410/08

Whether there has been a substantial change in working conditions is a question of fact to be determined by reference to the nature, as well as the degree, of change. In deciding whether the change was to the employee's material detriment the tribunal must consider the impact of the change from the employee's point of view. A detriment is material if it is more than trivial or fanciful.

T was employed by Lewisham Primary Care Trust and her contract stated that her place of work was Camberwell. It also contained a mobility clause which allowed the employer to move her temporarily or permanently to other locations within the Primary Care Trust. When her contract transferred to South London and Maudsley NHS Trust, it sought to move her to Beckenham. T was concerned about the effect this would have on arrangements for taking and collecting her daughter from school. When she was instructed to move to Beckenham she resigned and claimed that she had been constructively dismissed and that there had been a substantial change in her working conditions to her material detriment.

The EAT upheld T's appeal.

Constructive dismissal

As far as her claim for constructive dismissal was concerned, the terms of the contractual mobility clause did not entitle her new employer to move her to Beckenham. Beckenham was not a location within the Lewisham PCT and so the terms of the mobility clause did not cover the move. The concept of "substantial equivalence" could not be invoked to widen the geographical location of the T's workplace to cover workplaces within the South London and Maudsley PCT.

Substantial change in working conditions to employee's material detriment

Whether there has been a substantial change in working conditions is a question of fact to be determined by reference to the nature, as well as the degree, of change. The character of the change is likely to be the most important aspect in determining whether the change is substantial. As this is a question of fact, it does not have to be considered from either an objective or subjective perspective.

The need for a material detriment excludes the trivial and fanciful. The impact of the proposed change has to be considered from the employee's perspective. In T's case the change of work location meant potential disruption to childcare arrangements and a longer or altered journey she did not wish to undertake. The question the tribunal should have asked was whether T regarded those factors as detrimental and, if so, whether that was a reasonable standpoint for her to have taken. The case was remitted to the tribunal to determine this question.

Abellio London Ltd v Musse UKEAT/0238/11

A relocation of six miles because of a TUPE transfer was a substantial change in bus drivers' working conditions to their material detriment, entitling them to resign. In London, a move from north to south of the river was substantial and an increase in the working day of between one and two hours was a material detriment.

The claimant bus drivers worked out of CentreWest's Westbourne Park depot on the 414 route. That route transferred to Abellio and was operated out of Abellio's Battersea depot. The claimants were concerned about the change in location as it would extend their working day by between one and two hours and they resigned, claiming constructive dismissal and a substantial change in their working conditions to their material detriment.

The tribunal applied the *Tapere* decision and upheld the claims.

The claimants were constructively dismissed as the change of location was not permitted by the terms of the contract. Battersea was not one of the locations listed as one to which they could contractually be relocated.

The relocation from Westbourne Park to Battersea involved a "substantial" change in their working conditions. Although it was only a move of six miles, a move from north to south of the river, bearing in mind the travel conditions involved, was a substantial change. From the employees' point of view, the proposed change was to their material detriment and this was a reasonable position for them to adopt.

The EAT held that the tribunal had been correct to apply the *Tapere* decision and upheld the tribunal's decision.

10. IS THE CHANGE IN TERMS AND CONDITIONS CONNECTED TO THE TRANSFER?

Changes to terms and conditions of employment are void if the reason or principal reason for the change is:

- The transfer itself; or
- A reason connected with the transfer that is not an economic, technical or organisation reason entailing changes in the workforce.

Transferees will often wish to harmonise terms and conditions of transferring staff with their existing workforce but this is not generally possible, as although this would be an organisational reason for the change it does not entail changes in the workforce – which case law requires there to be changes in the numbers employed or the functions performed by the employees (*Delabole Slate Co Limited v Berriman [1985] IRLR 305*).

Enterprise Managed Services Ltd v Dance & others UKEAT/0200/11

The EAT agreed that changes to terms and conditions made after a TUPE transfer designed to improve performance and efficiency were not connected with the transfer. Although the changes resulted in a harmonisation of terms, this was not the principal reason for the changes being made. As the changes were not connected to the transfer, the subsequent dismissals of those employees who refused to accept them was not connected to the transfer either and were not automatically unfair.

Two contractors were providing different types of services to a client under separate service contracts. The client informed the contractors that when those contracts terminated, it would be awarding a single contract for the provisions of both services and would be looking for cost savings and improved service delivery. Prior to the expiry of the contracts, one of the contractors agreed changes to terms and conditions with its workforce which included the introduction of performance-related pay and different working hours. That contractor was awarded the new combined contract by the client and inherited the other contractor's employees under TUPE. It subsequently sought to agree similar changes to terms and conditions with those employees. Those who refused were dismissed and brought tribunal claims arguing that their dismissals were automatically unfair because they were connected to the transfer.

The EAT said that tribunals should ask what was the reason for making the changes and for dismissing those who refused to accept them? Since the principal reason for the change was to increase productivity, the changes were not connected to the transfer and nor were the subsequent dismissals. The dismissals were not therefore automatically unfair.

This case shows that if the reason for a change is not connected to the transfer and harmonisation is simply a happy consequence of the changes, the changes will not fall foul of TUPE. Nevertheless, the distinction may be a fine one and legal advice should always be sought before attempting to change terms and conditions where there has been a TUPE transfer.

Smith v Trustees of Brooklands College UKEAT/0128/11

The transferee employer sought to change terms when it discovered that part-timers were being paid a full-time salary by mistake. The employment tribunal held that the change was not prohibited by TUPE – the reason for the change was a genuine belief that they were being overpaid by mistake and this was not connected to the transfer.

11. TRANSFER OF COLLECTIVE AGREEMENTS

Under Regulation 6 of TUPE, the applicable collective agreements for the transferring employees also transfer to the transferee. Whilst it has been long accepted that this applies to those terms incorporated through collective agreements as at the transfer date, it remains an open question whether this is so in respect of changes in terms and agreements which are agreed post-transfer and the transferee is no longer part of the collective bargaining machinery. In other words, do collective agreements have "static" effect (i.e. changes agreed post transfer do not apply) or "dynamic" effect (i.e. the transferee is bound by post transfer agreed changes). This has considerable importance

particularly for public sector outsourcing, and had been referred to the CJEU in the case of **Parkwood Leisure v Alemo Herron (2011 UKSC 26)**. The UK has traditionally adopted the "dynamic" approach.

The issues in the Parkwood case is whether a pay increase negotiated by the local government NJC was applicable to leisure employees who had since transferred to a private sector employer. The question put to the ECJ is a bit loaded. It asks whether the ARD permits a Member State to adopt the "dynamic" approach if it so wishes.

12. GOVERNMENT CONSULTATION

As part of its review of employment law and its promise to cut regulation, in November 2011 the Government issued a call for evidence on the effectiveness of TUPE. It asked employers for details of their experiences of operating within current TUPE laws and the difficulties faced. It is concerned that businesses believe current laws are overly bureaucratic and "gold-plated" i.e. they go beyond what is required by the Acquired Rights Directive.

The Government sought views on:

- Whether the 2006 changes to TUPE (the introduction of the service provision change and employee liability information provisions) have provided greater clarity on when TUPE applies in a contracting-out situation and greater transparency around the employment rights and obligations which transfer;

- Whether employers and commissioners of services generally comply with the obligation to provide employee liability information and if not whether there are particular problems around the timing or accuracy of the information they provide;

- Whether the inclusion of the service provision change provisions reduced the burden on business or created additional burdens, whether they reduced the need to take legal advice, resulted in fewer tribunal claims and whether changes in professional services should be covered, as is currently the case;

- Whether the lack of provision for post-transfer harmonisation is a significant burden for business and how harmonising terms and condition after a TUPE transfer might be achieved whilst remaining in line with the Directive which prevents <u>any</u> reduction in employees' terms

and condition by reason of a transfer. The Government recognises that this might involve harmonisation upwards but also asks whether it would be helpful to allow renegotiation of the contract if overall the terms are no less favourable;

- Whether additional guidance on what amounts to an ETO reason would be helpful and whether any other area of TUPE would benefit from additional guidance;

- The interaction between redundancy and TUPE collective consultation obligations where redundancies are made at the time of a TUPE transfer. The Government recognises that although the consultations are linked they cannot take place at the same time as the transferee cannot consult about post-transfer redundancies until after the transfer when he becomes the employer of the transferring employees; and

- Whether more should be done to clarify the application of TUPE in insolvency situations and whether the legislation should be amended to make it clear which proceedings fall within which provision, or whether more detailed guidance would be sufficient.

The call for evidence closed on 31 January 2012.

As TUPE implements the Acquired Rights Directive, there are limits on what the Government can do by way of amendment. Nevertheless, certain parts of TUPE 2006 do go beyond what is actually required by the Directive and others arguably do so.

What changes might we see to TUPE?

Service provision change

The service change provisions are not required by the Acquired Rights Directive. All that the Directive requires is that employee rights are protected on the transfer of an undertaking. Many contracting-out situations fall within the standard definition of a business transfer under the Directive and amount to the transfer of an undertaking under Reg 3(1)(a) TUPE 2006 as well as a service provision change under Reg3(1)(b) TUPE 2006. We could in theory go back to the situation where every contracting-out situation has to be considered on its facts to see if it amounts to a transfer of an undertaking under Reg 3(1)(a) however this is unlikely.

ELA response to consulation:

- The Government should consider allowing parties to agree where all concerned want the "retention of employment" model to apply

Employee liability information

The main problem experienced with the employee liability information provisions is that the obligation to provide information only arises 14 days before the transfer date which is too late in the day, firstly as it gives insufficient time for consultation on any resulting proposed measures and secondly because it is not available at the tender stage when the contract is being priced . We may well see a change requiring this information to be provided earlier, perhaps even at the tender stage, and we may also see an extension of the type of information which has to be provided.

ELA response to consultation:

- The current provisions are not helpful
- Perhaps the Government should look at mirroring the timescales in the collective consultation process so information to be provided 30 days before the transfer where less than 99 employees transferring and 90 days before the transfer where more than 100 employees transferring

Professional services exemption

An exemption from the service provision change provisions of TUPE was hotly debated before those provisions were introduced in 2006. The Government is looking at this issue again, the argument being that in professional services, it is the calibre of the people who are providing the service that is fundamental to the service itself. When a client terminates its arrangement with a professional services provider it will generally be because it is dissatisfied with the service provided and it will not want the same people providing the service going forward. The Government could exclude professional services from the service provision change provisions but this would not exempt them from TUPE entirely. it is still possible that on a change of provider there will be a transfer of an undertaking under Reg 3(1)(a), for example if the service provided constitutes a discrete part of an undertaking which retains its identity.

ELA response to consultation:

- A difficulty with carving out professional services would be how you define the term – arguably lawyers and accountants would clearly be covered but what about medical staff for example – is a doctor a professional? What about a nurse or a physiotherapist?

Harmonisation and changing terms

As the Government recognises, any change in this area may be problematical and could result in TUPE not complying with the Directive. We may see some tinkering around the edges but we are unlikely to see anything of substance.

ELA response to consultation:

- The point of TUPE is to protect employees at the point of entry – once they have arrived with their new employer there should be an ability to change terms and conditions in the same way there was with their old employer
- Perhaps changes to terms and conditions that are connected to the transfer could be made where they are done through a collective agreement or employee representatives and there is a six month cooling off period
- If the employees decided not to accept the "detrimental" changes after six months they would also not be allowed to insist on the "positive" changes continuing to apply

Information and consultation/ Interaction with collective redundancy consultation obligations

One of the problems with the information and consultation obligations is that the duty to consult appropriate representatives about measures is restricted to the employer taking those measures. Since it will generally be the transferee that will be taking measures once the employees have transferred, it is possible that TUPE might be amended to allow transferees to attend consultation meetings with the transferring staff. Whilst this does sometimes happen in practice, it might happen more often if TUPE and/or the Trade Union and Labour Relations (Consolidation) Act 1992 were amended to allow pre-transfer consultation about post-transfer redundancies to start the clock running for collective redundancy consultation purposes – so that pre-transfer consultation counts towards the 30/90 day "consultation period" under TULRCA.

ELA's view generally on the current TUPE provisions is that the attempt to make service provision changes easier has actually resulted in more litigation and it tends to be small to medium sized

companies who are involved in the litigation as larger institutions tend to just accept TUPE applies and proceed on that basis.

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