

The effect of the transfer

Reg.4 concerns the effect of a relevant transfer. It is the essence of the regulations. Reg.4(1) and reg.4(2) provide:

- (1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
- (2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—
 - (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
 - (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.”

Reg.4(2) sets out the protection afforded by TUPE – namely the employee’s contract of employment is preserved and the liabilities of the employer, in connection with the contract, are passed from the transferor to the transferee. However, for the employee to be entitled to the protection of Art.4(2), including the right not to be unfairly dismissed, three criteria must be satisfied. Firstly, he must have been assigned to the undertaking. Secondly, he must have been employed by the undertaking immediately before the date of the transfer. Thirdly, as eluded to in reg.4(1), he must not have objected to the transfer.

Once these requirements have been satisfied reg.4(2) will apply. The only exception is when reg.4(6) applies which provides:

Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

Was the employee assigned to the entity?

Reg.4(1) sets out the requirement, in the following terms, that the Claimant must have been assigned to the entity:

Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

The right to object, under reg.4(7) and referred to in reg.4(1), shall be considered below. The reference to an organised grouping of resources or employees is a reference to how an undertaking has been defined by the case law, pre the 2006 regulations, considered in Ch. 2. The pre- 2006 case law will also govern the approach to determining whether the Claimant was assigned. Regulation 2 (1) gives it something of an incomplete definition namely, “‘assigned’ means assigned other than on a temporary basis.”

Here the authorities have dealt with three matters. Firstly, the approach to determining the meaning of “assigned”. Secondly, the relevance of which part of the undertaking the Claimant is assigned to and, thirdly, whether the Claimant has been assigned temporarily.

The leading authority is the decision of the ECJ in the Dutch case of *Botzen and others v Rotterdamsche Droogdok Maatschappij BV* [1985] EUECJ R – 186/83. The transferors went into liquidation. In order to safeguard as many of their employees’ jobs as possible

they entered into an agreement with another company who agreed to take over several of the transferor's departments and the staff employed within them. The others, including the Claimants, were dismissed by the liquidators of the transferor. The liquidators claimed that the Directive did not apply to them as they did not work full-time or substantially full-time. The ECJ opined that the Directive "must be interpreted as not covering the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, although not employed in the transferred part of the undertaking, performed certain duties which involved the use of assets assigned to the part transferred or who, whilst being employed in an administrative department of the undertaking which has not itself been transferred, carried out certain duties for the benefit of the part transferred." In other words the Claimant is not transferred if he performs duties for or spends part of his working time involved in the part transferred but is not employed within it at the time of the transfer even though he may be employed elsewhere within the transferor's undertaking.

An illustrative example of the application of *Botzen* is the Court of Appeal's decision in *Gale v Northern General Hospital NHS Trust* [1994] IRLR 292. Mr Gale was employed, by the transferor health authority, initially as a trainee nurse. Much of his employment was spent working at different hospitals within the authority. For the last few months of his employment and the last few months before the transfer he was based at the Northern General Hospital. The transfer took the form of the hospital becoming a trust. The trust dismissed him for a reason relating to the transfer. A major issue in his subsequent claim for unfair dismissal was whether he had the necessary continuity of service to entitle him to claim unfair dismissal. This turned on whether it could be said that he had been assigned to the hospital throughout his employment. The Tribunal found this to be the case. The EAT and the Court of Appeal did not.

Lord Bingham MR referred to *Botzen* and posed the question "was Mr Gale assigned to the part of the health authority's undertaking which was transferred?" He answered this question in the negative. As the health authority determined "how and where" he was to work he was not "part of the human stock belonging to the Northern General Hospital."

The EAT (Morison J Presiding) in *Duncan Webb Offset (Maidstone) Ltd v Cooper and others* [1995] UKEAT/47/95 stressed that the meaning of assigned depends on the circumstances of the case. The transferors were owned by a parent company which owned a number of other companies. When the transferors went into receivership they transferred their business to Duncan Webb. The Claimants, at the time of the transfer, divided their time between working for the transferor and other companies within the group. However, the Tribunal found, as a matter of fact, that most of their time was spent with the transferor at the time of the transfer. They were all dismissed for reasons relating to the transfer. The Tribunal was satisfied that they had been assigned to the transferor and upheld their claims.

The EAT did likewise. In discussing the approach to the term assigned the EAT considered three different scenarios. Firstly, when "X transfers part of his business to Y." In such cases the relevant question is "which of X's employees were assigned to the part transferred." Secondly, when "a person is employed by X to work on Y's business and Y transfers that business to Z." In such cases TUPE would *prima facie* not apply as "the employee must be employed by the transferor." However, "it may be possible to say...that if the person always and only worked on Y's business then X was employing him *on behalf of and as agent for* Y." Also, the EAT went on, "there may be circumstances in which X might be regarded as party to the transfer" or "it may be that the employee remained employed by X." A third scenario is when the whole of "undertaking is transferred by X to Y." Here "it seems to us that almost certainly X's employees will be transferred." However, the EAT went on, "there may be cases where one could say that despite being employed by X they were in reality assigned to the business of another

part of the group. This simply recognises that the contract of employment test is not the only matter for consideration. In other words, an employee might be employed by one company but be assigned to the business of another." Accordingly, the EAT decided it could not give guidance as "the facts will vary so markedly from cases to case."

In the present case the Tribunal were entitled to "put considerable weight on the fact that the applicants were employed" by the transferor. Furthermore, "it would take some persuasive evidence to suggest that an employee was not assigned to the business of his employer, where the whole of his employer's business was transferred."

The following emerges from the judgment: The question of whether the employee was assigned to the transferor is a question of fact. In answering that question the Tribunal must be mindful of a variety of scenarios. In other words the term must be sufficiently flexible to cover a variety of arrangements presented by the reality of modern industrial relations. In a case where the Claimants worked for a number of companies in the same group considerable weight ought to be attached to which of the companies they were employed by.

A question that has arisen is to what extent EU competition law impacts on the issue of whether the Claimant was transferred – i.e. assigned to the part of the undertaking transferred – to the transferee. Art.81 of the EU treaty is concerned with controlling unfair competition by preventing "agreement between undertakings." In *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc* [1974] ECR 1147 the ECJ held that the Article is "not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between undertakings." In *Hydrotherm Geratebau GmbH v Compact Del Inq Maria Andrioli & Sas*, 170/83 [1985] CMLR 224 the ECJ held that an undertaking can constitute an economic unit "even if in law that economic unit consists of several persons, natural or legal." The questions that arise, as far as TUPE is concerned, is whether the same meaning of "undertaking" applies when a group of companies is transferred and whether in such cases it is necessary to ask whether the Claimant was assigned, in the *Botzen* sense, to the part transferred.

The EAT (Tucker J Presiding) in *Michael Peters Ltd v (1) Farnfield and (2) Michael Peters Group plc* [1995] IRLR 190 said, in effect, "no" to the first question and "yes" to the second. Mr Farnfield was the chief executive of the Michael Peters Group ("the Group") a holding company for a number of companies. He was responsible for overseeing the financial management of its subsidiary companies but was not employed by any of them. The Group and four subsidiaries went into receivership. The four subsidiaries, but not the Group, were purchased by a company which then called itself Michael Peters Ltd. The other parties to the agreement were the subsidiaries but not the Group. Despite this certain assets owned by the Group, but in the possession of the subsidiaries, such as premises, books, goodwill and office equipment were transferred. Michael Peters Ltd did not wish to employ Mr Farnfield and the receivers made him redundant. The Tribunal, having regard to EU competition law and *Hydrotherm*, held that the Group and the subsidiaries were a single economic unit, they had therefore all been transferred and it thus followed that Mr Farnfield's employment was transferred, he had been dismissed by the transferee and his dismissal was unfair.

The EAT took a different view. *Hydrotherm* did not apply as it "is not appropriate to apply a decision based on an economic approach to an employment situation." The Group "were not and could not properly be found to be the transferor of the undertaking which was transferred to the appellants." However, the EAT did not close the door on any suggestion that a group of subsidiary companies and their parent company could, in certain circumstances, constitute a single unit or undertaking for the purposes of the regulations. TUPE might apply when "there may be business and trading conditions under which subsidiary companies do not have discretion to determine their continued

membership of their parent company. Whilst subsidiary companies have a legal entity, and clearly defined legal accountabilities, their ownership and ultimate accountability for performance and financial standards may well be vested in their parent company or group of companies." In the present case, however, *Botzen* applied and "the organisational structure of the undertaking must be excluded, it being contemplated that there is a part of it to which the employee is assigned." Mr Farnfield, who was not employed by any of the subsidiaries and who merely oversaw their financial management, could not be said to have been assigned to them.

An example of the situation envisaged by the EAT in *Michael Peters*, namely a subsidiary company's accountability for performance being vested in its parent company, arose before the EAT (Lord Coulsfield Presiding) in *Sunley Turriff Holdings Ltd v Thomson and others* [1995] IRLR 184. Mr Thomson was chief accountant and company secretary for Lilley Construction Ltd (LC) and Lilley Construction Ltd (Scotland) (LCS). His contract of employment was with LC but he undertook work in relation to LCS. LCS operated very much under the control of LC. It only had £100 in capital, it depended on the support of LC to gain contracts, it had no employees of its own and did not operate a business account – payments made to it being transferred to LC. Both companies went into receivership and LC, but not LCS, was eventually sold to Sunley Turriff. They declined to employ Mr Thomson on the grounds that his contract of employment was with LC. He continued to work for the receivers after the transfer but was eventually made redundant by them. His claim for unfair dismissal succeeded both before the Tribunal and the EAT.

The Tribunal found that in effect LCS and LC were one and the same and that it thus followed that Mr Thomson was assigned to the undertaking transferred. The EAT opined that on the facts found by the Tribunal "there was a transfer of an undertaking which comprised not merely LC (S) but a very substantial of what had previously been the undertaking of LC." What significance, however, flowed from the fact Mr Thomson, prior to being made redundant, worked for the receivers after the transfer? It was submitted on behalf of Sunley Turriff that that meant he had never been employed by them but by the receivers all along. The EAT rejected this submission:

In certain circumstances the Claimant working for the receiver after the transfer could be the basis of an inference that he had been employed by them prior to the transfer. However, in the circumstances of the present case the arrangement in principle, must have come about through a new agreement, or at least a variation of the previous agreement.

It is not necessary for the Claimant to work exclusively for the part of the undertaking transferred in order for him to be assigned to it. So said the EAT (Mummery J Presiding) in *Buchanan-Smith v Schleicher & Co International Limited* [1996] IRLR 547. The transferor serviced and sold shredding machinery. Mrs Buchanan-Smith was involved in both sides of the business – she dealt with the sales of the smaller shredding machines and the organisation and running of the service side. The sales side ceased to trade and the service side of the business was transferred to Schleicher. They subsequently dismissed her. The Tribunal, influenced by the fact that she had a general role in the business, concluded that she was not assigned to the service side and thus rejected her claim.

The EAT held that the Tribunal's reasoning was erroneous. An employee, they declared, "may in fact be regarded as assigned to an employer's business, even though the employee spends time looking after another business, even the business of someone other than the employer. In the case of one employer carrying on two undertakings, an employee *may* be assigned to one of the undertakings, even though engaged in the activities of the other undertaking." The Tribunal had therefore erred in holding that the Claimant undertaking a general role in the business was the determinative consideration. As "the part transferred was the service part...she ran and organised it"

and there was no sales work to which she “could be regarded as assigned” the only permissible conclusion was that she had been assigned to the part transferred.

The Claimant will not be assigned to the part transferred if the transferor gulls him or deceives him into working at the part. So said the EAT (Hull J Presiding) in *Carisway Cleaning Consultants v Richards & Cooper Cleaning Services* [1998] UKEAT/629/97. Mr Richards was employed by Carisway as a cleaner. Following a complaint from one of their clients they placed him on a different site in respect of which they had a contract with a different client. They increased his wages in order to persuade him to agree to the change. A few weeks later they lost that contract to Cooper Cleaning Services who took on Mr Richards. He later resigned and brought claims for unfair constructive dismissal against both Carisway and Cooper. During cross-examination the manager of Carisway who had decided to post Mr Richard to the different site admitted that he did so because he knew that it would be transferred and hence he and Carisway could rid themselves of Mr Richards. The EAT upheld the Tribunal’s finding that Mr Richards was not assigned as sending him to the different site was a sham. Hence Carisway, the transferor, and not Cooper, the transferee, were liable. As the EAT explained “he was persuaded to go...by fraud and what is fraudulent is void.”

The EAT (McMullen J Presiding) in *Securiplan Ltd v Bademosi* [2003] UKEAT/1128/02 considered when an assignment can be said to be “temporary”. Mr Bademosi was a security guard. For most of his employment he was based at the site of one of his employer’s clients. This came to an end due to an industrial injury and he was stationed at the site of another of the employer’s clients – Marylebone Magistrates Court. This was intended to be temporary and about a year later his employers lost the contract with the court to another company. Mr Bademosi was unhappy about the change, resigned in protest and claimed unfair constructive dismissal. At a preliminary hearing the Tribunal found that Mr Bademosi had not been assigned to the court and that therefore TUPE did not apply. This was because his assignment to the court was temporary. It was the employer’s case, however, that TUPE applied and that Mr Bademosi’ employment had been transferred to the other company and thus they were not liable.

The EAT disagreed and upheld the Tribunal’s decision. In the light of *Botzen* the relevant question was whether Mr Bademosi “was assigned to the undertaking which consisted of the duties performed at the magistrates’ court.” The Tribunal was entitled to find that he was not, in the TUPE sense, assigned to the court as he was “assigned on a temporary basis.” As for what amounts to “temporary” the EAT opined that “the judgment as to what is temporary and what is permanent is a matter for the Employment Tribunal”. In other words it is a question of fact.

The meaning of “assigned” arose before the EAT (Lord Johnston Presiding) in *Skillbase Services Ltd v (1) King and (2) Falkirk Council* [2004] UKEATS/0058/03. Falkirk Council outsourced its housing repair work to Skillbase Services. The work was carried out from one of their depots managed by Mr King. He was personally responsible for the rest of Skillbase’s contracts managed out of the depot. However, he did not have day to day responsibility in respect of the Falkirk work. The Council subsequently decided to bring the work back in house. A question then arose as to who was assigned to the contract. The Tribunal found that Mr King had not been assigned to the contract as he was not directly involved in the operation of the contract on a day to day basis. The EAT upheld their decision as “the issue in each case is essentially a question of fact to be determined by reference to all the evidence.” That said the EAT did go on to add that “there is a distinction between someone working exclusively on a particular contract and a person employed in an executive capacity managing a branch, such as the position of Mr King, here.” This suggests than an employee may be assigned to an undertaking if works exclusively on the contract concerned.

The EAT (Bean J Presiding) in *Williams v (1) Advance Cleaning Services Ltd and (2) Engineering and Railway Solutions Limited (in Liquidation)* [2005] UKEAT/0838/04

drew a distinction between being assigned to an undertaking and involved in an undertaking. Mr Williams was employed by the transferor, Engineering and Railway Solutions, as Project Manager for one of their contracts based at Havant. This remained his primary base and workplace. However, he frequently worked on the transferor's contract in London. At the time of the transfer he spent 60 to 70% of his time there. However, he was not involved in the management of the project. The transfer arose when his employers lost the London contract, after it had been put out for tender, to the transferee – Advance Cleaning Services Ltd. The transferee did not wish to employ Mr Williams and shortly after the transfer the transferor went into liquidation. The Tribunal dismissed his claim for unfair dismissal. He had not, the Tribunal found, been assigned to the London contract. This was because whilst he spent most of his working time on the contract at the time of the transfer, the duration of his involvement had been limited, he was manager of another project, based elsewhere and not been involved in the management of the London contract.

The EAT upheld the decision. The EAT held that “weighing up whether somebody is assigned to the part transferred” is “a question of fact.” However, the EAT went on, “it is not sufficient for an employee to show that he was substantially involved in the part transferred: he has to show that he was effectively assigned to the part transferred.” In the present case the facts revealed that “while Mr Williams spent probably the majority of his time working on the London terminal contract he never became an integral part of it and his job continued to be one of project manager in the employment of E&R S.”

The EAT (Langstaff J Presiding) in *Kimberley Group Housing Ltd v Hambley and others, Angel Services (UK) Ltd v Hambley and others* [2008] IRLR 682 sought to apply *Botzen* and *Duncan Webb* to a situation where a service is provided by a contractor but henceforth is provided by two or more in succession to the first. The transferor provided accommodation and other services to asylum seekers. They lost the contract to Kimberley and Angel. First there was a transitional arrangement whereby the transferor, Kimberley and Angel would provide all services but the transferor would provide increasingly less until the others gradually took over all the contract. The six Claimants worked at locations where the vast bulk of the operations were undertaken by Kimberley. They were eventually dismissed in connection with the transfer. The Tribunal held that the arrangement amounted to a service provision change and hence a relevant transfer for the purposes of TUPE.

The Tribunal went on to hold that liability should be divided amongst the employers on a percentage basis to reflect the extent to which each provided services at the relevant locations. The EAT disagreed. They considered *Botzen* and *Duncan Webb*. Whilst the present case was, unlike *Botzen* and *Duncan Webb*, a service provision transfer there was “no principled reason for there being any different approach.” Whilst, as the EAT in *Duncan Webb* had held, “there is not necessarily an exhaustive list of factors which will conclusively determine to which part of an undertaking an employee is assigned or in a case such as the present to which aspect of the activities involved in service provision the employee is assigned” the “overall principle” is “clear” – namely, “what is to be focused upon is essentially the link between the employee and the work or activities which are performed.” There was a stronger link between the work the Claimants performed with Kimberley than with Angel as Kimberley undertook the bulk of the services at the locations where the Claimants worked.

The effect of *Kimberley* is threefold. Firstly, in providing that the principles in *Botzen* and *Duncan Webb* apply to service provision transfers it makes it clear that the same approach to “assigned” applies to all transfers. Secondly, it provides that when services under a contract are provided by two different employers the question of which employer is liable is determined by considering to which employer the employee is assigned. In contrast previous cases had focused on the question of whether the employee was assigned to the part of the transferor's undertaking which was transferred. *Kimberley* makes it clear that the same principles apply in determining

which transferee is liable. Thirdly, *Kimberly* affirms that the questions of whether an employee is assigned and to which part of the undertaking he is assigned are questions of fact but narrows the focus by providing that the focal point of the approach is the link between the employee and the work or activities which are performed.

At the outset of this discussion it was suggested that the authorities deal with three questions. Firstly, the meaning of "assigned." It is clear that this is a question of fact and, as the EAT in *Duncan Webb* made clear, the Tribunal must be cognizant of the variety of working arrangements conjured up in the modern world of industrial relations. However, the discretion that this affords the Tribunal is not entirely unfettered. The focus of the inquiry must be on the link between the Claimant and the work or activities performed. It is not sufficient that he was substantially involved in the part of the undertaking assigned and neither does it necessarily suffice that he performed services for, as opposed to being employed within, the part transferred. This comes to the second question. The employee must be assigned to the part of the transferor's undertaking transferred. It is not sufficient that he was assigned elsewhere within in the transferor's undertaking even if he spent part of even most of his time working in the part transferred. Similarly, in respect of the third question, whether the Claimant was assigned temporarily is also a question of fact.

Immediately before the transfer

A question which has arisen is whether the regulations only apply when the employee was dismissed after the transfer or whether there are circumstances in which they may apply when the employee was dismissed before the transfer. The ECJ addressed the question in *P Bork International A/S v Foreningen AF Arbejdsledere i Danmark/ Olsen v Junckers Industrier A/A; Hansen and others v Junckers Industrier A/A; Handels-Og Knotorfunktionaerernes Forbund I Danmark v Junckers Industrier A/S* [1989] IRLR 41. The activity concerned was a factory. The owners of the lease terminated the lease and dismissed all the employees who had worked on the premises. Shortly afterwards the assets of the business were purchased by the new lessee of the premises who re-engaged half the original workforce. A question arose as to whether the employees who had been dismissed by the original lessee before the transfer – i.e. before the lease for the premises was awarded to the subsequent employer – were entitled to the protection of the Directive.

The ECJ held:

the only workers who may invoke Directive 77/197 are those who have current employment relations or a contract of employment at the date of the transfer. The question whether or not a contract of employment or employment relationship exists at that date must be assessed under national law, subject, however, to the observance of the mandatory rules of the Directive concerning the protection of workers against dismissal by reason of the transfer. It follows that the workers employed by the undertaking whose contract of employment or employment relationship has been terminated with effect on a date before that of the transfer, in breach of Article 4(1) of the Directive, must be considered as still employed by the undertaking on the date of the transfer with the consequence, in particular that the obligations of the employer towards them are fully transferred to the transferee, in accordance with Article 3(1) of the Directive. In order to determine whether the only reason for dismissal was the transfer itself, account must be taken of the objective circumstances in which the dismissal occurred and, in particular, in a case like the present one, the fact that it took place on a date close to that of the transfer and that the workers concerned with re-engaged by the transferee.

In other words the ultimate question is not whether the employee was dismissed before or after the transfer. The question is simply whether the transfer was the cause of the dismissal. This is a question of fact but the transfer is more likely to be held to be the cause of the dismissal when the dismissal took place on a date close to the transfer.

The question came before the House of Lords in *Litster and others v Forth Dry Dock & Engineering Co Ltd and another* [1989] IRLR 161. Then the 1981 Regulations applied. Especially relevant was reg.5(3) which provided: “Any reference in para (1) or (2) above to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those regulations.” It must also be noted that the provision that the effect of the transfer is that the liabilities of the transferor pass to the transferee was contained at reg.5(2) (now reg.4(2)) and the provision stipulating that the a dismissal connected with the transfer or due to the transfer is unfair was contained at reg.8(1) (now 7(1)).

Forth Dry Dock Engineering went into receivership. This resulted in the Claimants being summarily dismissed. Later on the very day that they were dismissed the assets of the business were purchased. The purchaser declined to take on the dismissed employees. The Tribunal found that the Claimants had been employed immediately before the transfer and hence the transferee/purchaser was liable. The EAT allowed the appeal but on other grounds. The Court of Session, however, held that reg.5(3) did not apply. This was because as the dismissals occurred immediately before the transfer, albeit only a very short time before, the Claimants did not have a contract of employment at the time of the transfer with the transferor – Forth Dry Dock.

Lord Oliver first considered whether “the time which elapsed between the dismissals and the transfer was of so short a duration that, on a true construction of reg.5, the appellants were ‘employed immediately before’ the transfer, as required by sub-para.(3) of that regulation?” His Lordship answered this question in the negative. He accepted that “the expression ‘immediately before’ is one which takes its meaning from its context, but in its ordinary signification it involves the notion that there is, between the two relevant events, no intervening space, lapse of time or event of any significance.” This gave rise to a further question namely “what difference (if any) does it make that the reason, or the principal reason, for the dismissals was, as it clearly was, the imminent occurrence of the transfer?”

His Lordship opined that the assumption behind reg.5 of the 1981 regulations “is that the contract of employment...is one which, apart from the transfer, would have continued in force and that what ‘terminates’ it, or would, apart from the regulation, have terminated it, is the repudiatory breach constituted by the transfer.” The crucial question, his Lordship held, “is what is meant by the reference to a contract being terminated ‘by’ a transfer.” If, his Lordship went on, “the employer, contemporaneously with the transfer, announces to his workforce that he is transferring the business and that they are therefore dismissed without notice, it is, strictly, the oral notification which terminates the contract; yet it could not, as a matter of common sense, be denied that the contract has been ‘terminated by the transfer’ of the business.” Similarly if “the employer announces to his workforce that he is transferring his business to another person at 5.00pm on the following Friday and that they are to consider themselves dismissed from his employment at 4.59pm on that day, it is difficult to see any reason why the interposition of a one-minute interval between the express repudiation becoming effective and the transfer which would, in any event, have operated as a repudiation if nothing had been said, should invest the breach of contract by the employer with some different quality.” His Lordship went on:

In each case the effective cause of the dismissal is the transfer of the business, whether it be announced in advance or contemporaneously, or whether it be unannounced, and it would be no misuse of ordinary language in each case to speak of the termination of the contracts of the workforce as having been effected by the transfer.

This, however, left the problem that the literal reading of the expression ‘immediately before’ did not, as his Lordship had held, assist the Claimants. His Lordship went on to

consider *Bork* and asked whether it was possible to construe reg.5(3) in the same way the ECJ had constructed the Directive. His held that it was. This was because “having regard to the manifest purpose of the Regulations, I do not, for my part, feel inhibited from making such an implication in the present case. This involved “reading reg.5(3) as if there were inserted after the words ‘immediately before the transfer’ the words ‘or would have been so employed if he had not been unfairly dismissed in the circumstances described in reg.8(1)’”.

This ruling has been expressly incorporated into the 2006 regulations. Reg.4(3) now provides:

Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in reg.7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

Put simply the effect of *Litster* and reg.4(3) is that TUPE applies when the transfer is the effective cause of the dismissal or is connected with the dismissal irrespective of when the dismissal occurred.

Must the employee have been employed by the transferor?

Reg.4(1) refers to the “contract of employment of any person employed by the transferor.” Thus it seems that reg.4 can only apply if the employee was employed by the transferor. However, the decision of the ECJ in *Albron Catering BV v FNG Bondgenoten and another* [2011] IRLR 86 raises the question of whether this provision in reg.4(1) accurately reflects the Directive. The case concerned Heineken International. They were a group of companies and their business was the production of beer in the Netherlands. Whilst the group consisted of different companies all the employees were employed by one of the companies in the group, Heineken Nederlands Beheer BV (HNB). HNB then assigned them to work in different business run by different companies within the group. Mr Roest was employed by HNB and was assigned to work in the group’s catering department. This was run by one of the other companies in the group, Heineken Nederlands BV (HN). Subsequently the catering services performed by HN were contracted out to a company outside the group, Albron Catering BV. Mr Roest’s union, FNG Bondgenoten, contended that the Directive applied and hence he was entitled to the more generous terms and conditions he had enjoyed with Albron.

The ECJ agreed with him. They noted that A.3(1) refers to the “transferor’s rights and obligations arising from a contract of employment or from an employment relationship.” Accordingly they held that: “*The requirement under A.3(1) of Directive 01/23 that there be either an employment contract, or, in the alternative and thus as an equivalent, an employment relationship at the date of the transfer suggests that, in the mind of the Union Legislature, a contractual link with the transferor is not required in all circumstances for employees to be able to benefit from the protection conferred by Directive 01/23.*” It thus followed that the Directive “does not prevent the non-contractual employer, to which employees are assigned on a permanent basis, from being likewise capable of being regarded as a ‘transferor,’ within the meaning of Directive 02/23.”

In other words there does not need to be a contract of employment between the transferor and the employee. It suffices that there is an employment relationship. This principle is likely to apply where staff are employed by a service company within a corporate entity and when employees of a parent company are assigned to its subsidiaries.

When did the transfer take place?

Closely connected to the question of whether the Claimant was employed by the transferor immediately before the transfer is the question of when the transfer took place. In other words it cannot be determined whether the Claimant was employed immediately before the transfer without first determining the date when the transfer occurred. The question is often determinative of an issue in respect of deciding whether the Claimant had the necessary continuity of employment so as to bring a claim for unfair dismissal or pursue other accrued rights.

The leading authority on the matter is the decision of the House of Lords in *Celtec Ltd v Astley and others* [2006] IRLR 635. The Claimants were at first employed by the Department of Education. The Government decided to transfer part of the Department's training responsibilities to private Training and Enterprise Councils. In September 1990 the Claimants were placed on secondment with the councils. In 1993 they were told that either they could become directly employed by the Councils or go back to the Department of Education. They chose to resign from the Department and take up direct employment with one of the councils which later became known as Celtec Limited. In 1998 a redundancy situation arose at Celtec. The Claimants sought a declaration from the Tribunal that their employment was continuous from the date they joined the civil service.

Their claims succeeded before the Tribunal. The Tribunal held the transfer took place in stages commencing in September 1990 when the Claimants were placed on secondment. The EAT, however, disagreed. The EAT held that a transfer takes place when the new employer is "in actual occupation and control of the old business." Accordingly, the transfer rather than commencing in September 1990 took place then as that was the date when the Councils started to undertake the training work formerly done by the Department of Education. Furthermore the Claimants, being on secondment, were employed by the Department after the transfer. As the transfer only preserves continuity of employment when the employee is employed by the transferor at the time of or immediately before the transfer it followed that their continuity of employment was not preserved by the transfer. The Court of Appeal, on the other hand, restored the Tribunal's decision agreeing that a transfer can take place over a period of time. The House of Lords referred the matter to the ECJ. The ECJ, in agreement with the EAT and contrary to the view of the Tribunal and the Court of Appeal, held that the date of the transfer "is a particular point in time, which cannot be postponed to another date at the will of the transferor or transferee." This left the question of what relevance, if any, was to be attached to the fact that the Claimants were on secondment. Here the ECJ held that "contracts of employment or employment relationships existing on the date of the transfer....are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties in that respect."

It was then for the House of Lords, when the matter came back to them, to apply the ECJ's ruling to the facts. Lord Hope (with whom the other Law Lords, save Lord Roger, agreed) first considered the effect of the ECJ's judgment. He held that as a general rule "the contracts of employment of workers assigned to the undertaking transferred are automatically transferred to the transferee on the date of the transfer. Then there is the fact that it is not possible for this rule to be derogated from in a manner unfavourable to the employees. The rights conferred on them by the Directive may not be made subject to the consent either of the transferor or the transferee nor the consent of the employees' representatives." Expressed simply the transfer, as a general rule, transfers employment regardless of whether the transferor, the transferee and the employee like it or not or agree or decide otherwise. The sole exception to this general rule, his Lordship went on, is when the employee "of his own free will" declines "to enter the employment of the transferee." In the present case the exception did not apply. The

secondment arrangement clearly did not qualify and thus it “did not affect the respondents’ right to continuity of employment under the Directive.”

TUPE, of course, only applies to employees. Thus it could be said that even when there is a relevant transfer the protection afforded by Art.4 will not apply if the Claimants were not employees at the date of the transfer. The effect of *Celtec* is, although the House of Lords did not say so in express terms, that the meaning of employee and, indeed, employer, may in recognition of the fundamental objective of the Directive – i.e. to safeguard the rights of employees on a transfer - be stretched so as to bring the case within the ambit of the regulations. Thus their Lordships held that TUPE applied even though the Claimants were on secondment and even though, as secondees, it could not, in other circumstances, be said that Celtec were their employers. Hence Lord Roger, in his dissenting judgment, described the majority judgment as a “legal fiction” playing “as spectacular a role in the law of the European Community as fictions ever played in the law of ancient Rome.” Here however, it should be borne in mind, that the ECJ referred not just to “contracts of employment” being transferred irrespective of any arrangements made by the parties but also to “employment relationships.”

Whilst, as the House of Lords found, the date of the transfer is a particular point of time the question still remains of how that particular point is identified. This was a question that was addressed earlier by the EAT (Popplewell J Presiding) in *Brook Lane Finance Co Ltd v Bradley* [1988] IRLR 283. Mr Bradley was employed by Hunt Finance. In February 1986 it was agreed that the company would be bought by Brook Lane Finance Co Ltd. On 28th February 1986 there was a deed of assignments of the loans and debts from Hunt to Brook Lane and on 26th March 1986 an agreement was signed for the sale and purchase of Hunt’s office, fixtures and fittings. Mr Hunt ceased working for Hunt on 28th February 1986 and commenced work for Brook Lane on 1st March 1986. The Tribunal found that the transfer had taken place on 1st March. The EAT disagreed holding that it had taken place on 26th March 1986. This, as the EAT reasoned, was because “the completion date is the point at which ownership changes.” The EAT found that it followed that Mr Bradley could not avail himself of TUPE as he was not employed by the transferor, Hunt, at that time having started employed for Brook on 1st March. This part of their decision is questionable in the light of *Litster* (it is not clear if Mr Bradley was dismissed as the judgment was solely concerned with a preliminary issue of continuity of employment).

Furthermore, it is unlikely that in all cases the particular point of time when the transfer occurs is the date when ownership changes as, as has been shown in chapters two and three of this Part, change in ownership of assets is not essential for there to have been a transfer. Suffice to say when, in the circumstances of the case, it is impossible to conclude that there has been a transfer without the exchange of assets and their ownership then the date that ownership changes is likely to be the date of transfer. A different approach will be required in other cases. The particular point of time is, it is submitted, purely a question of fact.

The right to object

At common law an employee cannot be transferred to another employer against his will. Thus in the House of Lord’s decision in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 Lord Atkin declared: “*I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that right of choice constituted the main difference between a servant and a serf*”. Accordingly the House of Lords found that the employment contracts of employees of a company that had been wound up did not transfer, without the consent of the employees, to a new company which was an amalgamation of that company and others.

Reg.4 overrides this principle. The sole exception to the general rule that the effect of the transfer is that the contract of employment is passed on intact from the transferor to the transferee is when the employee objects to the transfer. It has already been noted, at the outset of the discussion of the meaning of “assigned,” that reg.4(1), in laying down the general rule, states “except where objection is made under para.(7).” It is reg.4(7) that concerns the right to object. Reg.4(8), (9) and (11) are also material. Reg.4(7), (8), (9) and (11) provide:

- (7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.
- (8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.
- (9) Subject to regulation 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 is 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.
- (11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer

Reg.4(7), 4(8) and (11) were contained in the 1981 Regulations as reg.5(4A), 5(4B) and 5(5). Reg.4(9) is unique to the 2006 regulations. Reg.5(4A) and reg.5(4B) (now reg.4(7) and reg.4(8)) were inserted into the regulations following the decision of the ECJ in the consolidated German cases of *Katsikas v Konstantinidis*, *Skreby PCO Stauereibetrieb Paetz & Co Nachfolger GmbH*, *Schroll v PCO Stauereibetrieb Paetz & Co Nachfolger GmbH* [1993] IRLR 179. Mr Katsikas was a cook employed in a restaurant owned by Mr Konstantinidis. Mr Konstantinidis sold the restaurant to another employer. Mr Katsikas refused to work for him. Mr Konstantinidis dismissed him allegedly in the name of the new employer. He subsequently claimed that only the new employer, and not he, could be liable as, at the time of dismissal, the transfer had taken place. Similarly, Mr Skreby and Mr Schroll objected to their employment being transferred from PCO, their employers, to a new employer. They were subsequently dismissed. The ECJ held that whilst the Directive “allows an employee to remain in employment with a new employer on the same conditions as those agreed with the transferor it cannot be interpreted as obliging the employee to continue his employment relationship with the transferee. Such an obligation would undermine the fundamental rights of the employee who must be free to choose his employer and cannot be obliged to work for an employer that he has not freely chosen.”

In these cases the objection was personal. In the Belgian case of *Merckx and Neuhuys v Ford Motors co Belgium SA* [1996] IRLR 467 the ECJ considered a case where the objection was based on the prospect of adverse changes to terms and conditions being imposed by the transferee. Mr Merckx and Mr Neuhuys were employed as salesmen at a dealership owned by Ford Motors in Belgium. Their employers transferred the dealership to another employer. Mr Merckx and Mr Neuhuys objected to the transfer as the new employers proposed to reduce their pay. They claimed their contracts with Ford Motors had thus been terminated and they brought claims against Ford, not the new employer, for redundancy payments.

The ECJ determined the matter in the light of A.4(2) of the Directive. This provides:

If the contract of employment or the employment relationship 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 termination of the contract of employment or of the employment relationship.

Applying those words to the present case the ECJ held that “a change in the level of remuneration awarded to an employee is a substantial change in working conditions within the meaning of that provision, even when the remuneration depends in particular on the turnover achieved. Where the contract of employment or the employment relationship is terminated because the transfer involves such a change, the employer must be regarded as having been responsible for the termination.”

It is noteworthy that both A.4(2) and the ECJ state that the “employer,” rather than transferor or transferee, is responsible for the termination of the contract when the transfer involves a substantial change in working conditions. However, the ECJ also affirmed that there is no transfer when the employee objects and that in these circumstances member states may “provide that the contract of employment relationship should be maintained with the transferor.” It thus seems implicit in the judgment that when the employee objects due to the transfer involving a substantial change in working conditions that the reference to “employer” in A.4(2) is a reference to transferor. In circumstances where the transfer does entail such a change in working conditions but there has been no objection then “employer” must refer to “transferee.”

What, however, is meant by an “objection”? This question was addressed by the EAT (Lord Johnston Presiding) in *Hay v George Hanson (Building Contractors) Ltd* [1996] IRLR 427. Mr Hay had been employed by a District Council as a joiner. The council decided to transfer the work, in respect of which he was employed, to a firm of private contractors. Mr Hay did not expressly tell the council that he objected to the transfer. However, he sought alternative employment within the council, after the transfer he sought a redundancy package and tried to re-negotiate his terms and conditions with the transferee. He was subsequently dismissed by the transferee and he brought a claim for unfair dismissal against them. His claim failed as, so the Tribunal found, he had objected to the transfer and thus under reg.5(4A) (now 4(7)) his employment had not been transferred to the private contractors.

The EAT upheld the Tribunal’s decision. The EAT construed the word “object” “as effectively meaning a refusal to accept the transfer.” Furthermore, “it is equally clear from [reg.4(7)] that that state of mind must be conveyed to either the transferor or transferee.” The Tribunal was entitled to infer on basis of actions before and after the transfer that he had objected: “*Each of the elements contained there may in themselves individually be insufficient, but cumulatively they are more than sufficient to entitle the Tribunal to conclude that the relevant information had been conveyed by way of objection in the sense we have construed it.*” To determine whether the Claimant had objected the Tribunal can draw inferences from the Claimant’s conduct, before and after the transfer, and it matters not whether he expresses his objection to either the transferor or the transferee.

The interaction between reg.4(7), (8) and (11) and their impact on the common law position, as set out by the House of Lords in *Nokes*, was addressed by the Court of Appeal in *University of Oxford v (1) Humphreys and (2) Associated Examining Board* [2000] IRLR 183. Mr Humphreys was employed in the Oxford Delegacy of Local Examinations. The University decided to transfer the business of the Delegacy to the Associated Examining Board. He objected on the grounds that the transfer would entail substantial changes to his terms and conditions. Mr Humphreys claimed that the proposed transfer constituted a constructive dismissal and brought proceedings against the university for wrongful dismissal. The High Court refused to strike out his claim. The decision was upheld by the Court of Appeal.

For the purposes of the appeal it was conceded that the transfer to the Board would have involved a substantial change in Mr Humphrey’s working conditions to his detriment. The University submitted, however, that whilst, what is now, reg.4(7) meant there had been no transfer the effect of reg.4(8), which provides, as already noted, that when the employee objects he “shall not be treated, for any purpose, as having been dismissed by the transferor,” was that the university could not be liable. The issue was

whether reg.4(11), despite the express wording of reg.4(8), preserved the Mr Humphreys common law right to choose his employer and sue that employer for substantial changes to his contract. It was submitted on behalf of the university that whilst reg.4(11) confirmed that an employee, after a relevant transfer or, when 4(7) applies, there is no transfer, may exercise his right to sue arising from substantial and detrimental changes to his contract but the consequences of affecting that right are governed by reg.4(8).

The Court rejected that construction. Moore-Brick LJ noted that “the task of this court when faced with legislation passed to give effect to Council Directives is to adopt a purposive approach and so far as possible to construe it in such a way as will give effect to the Directive as it has been construed by the European Court.” The effect of *Merckx*, his Lordship went on, was that “A.4(2) of the Acquired Rights Directive is to be understood as meaning that if the transfer of an employee’s contract of employment would result in a substantial change to working conditions to his detriment and he objects to the transfer on those grounds, the contract is to be regarded as terminated because the transfer involves a substantial change in working conditions to the detriment of the employee.” His Lordship considered that the language of 4(11) “is more apt to refer to the situation in which a change in working conditions has actually been brought about than one in which such a change is simply foreseen.” That said “if the purpose of the Directive is to be fulfilled, [para 4(11)] must be given a generous interpretation and I do not think that it is too difficult to construe it as applying to a case of that kind.” Accordingly, despite reg.4(8) reg.4(11) was “capable of being construed as covering the case where the employee exercises the right to treat himself as constructively dismissed because the proposed transfer to the new employer would necessarily result in a substantial change in working conditions to his detriment.” Applying the purposive approach reg.4(8) “should be understood as applying only to the case where the employee objects to the transfer of his contract on the grounds that he does not wish to work for the transferee, in other words, when he simply objects to the change in identity of his employer as appears to have been the case in *Katiskas*.”

Having ascertained the meaning of 4(8) and 4(11) the question that remained was whether the transferor, i.e. the University, or the transferee, i.e. the Board, should be liable. Here his Lordship was unequivocal: “*In my judgment the position under both the Directive and the Regulations is quite clear: if an employee objects to the transfer of his contract of employment the transfer of the undertaking will not transfer to the transferee either the contract of employment, or any of the rights or liabilities associated with it all of which remain with the transferor.*”

The High Court in *New ISG limited v (1) Vernon, (2) McMullin and (3)Harvey* [2007] EWHC 2665 also adopted a purposive approach to construction of the regulations. This time the issue, as it had been before the EAT in *Hay*, was what constituted an objection for the purposes of reg.4(7). Mr Vernon, Mr McMullin and Ms Harvey had all been employed by the New Infrastructure Services Group Limited. The company went into Administration and was then sold to New ISG Limited. They were only informed of the transfer after it had taken place. They subsequently resigned and commenced employment with a competitor of New ISG. New ISG then sought to enforce restrictive covenants in their contracts. They obtained an interim injunction to this effect. Mr Vernon, Mr McMullin and Ms Harvey argued that their resignations amounted to objections, their contracts of employment had thus not been transferred to New ISG and, accordingly, New ISG were not entitled to rely on the clauses in those contracts in respect of restrictive covenants. HH Judge Behrens QC agreed with them. If the objection could only be valid, for reg.4(7) purposes, if made before the transfer then when the employee “does not know the identity of his employer” the “fundamental freedom of the employee to choose his employer” would be undermined. Accordingly, the injunctions were not continued.

However, as the decision of the EAT (Lady Smith Presiding) in *Capita Health Solutions Ltd v McLean and another* [2008] IRLR 595 demonstrates there are limits to the purposive approach to the construction of reg.4(7). Mrs McLean was employed as Occupational Nurse by the BBC. The BBC decided to transfer their Human Resources Department, including their Occupational Health Service, to Capita. Mrs McLean expressed her objection to being transferred by means of a grievance. Her grievance was rejected. She, the BBC and Capital agreed that she would be placed on secondment to Capita for a six week trial period and that during that time she would be paid by the BBC. She tendered her resignation on those terms. The BBC made it clear that it was not necessary for her to resign to give effect to the agreement. Nonetheless they accepted her resignation, she worked her six week secondment with Capita and her salary, during that time, was paid by the BBC. Once the secondment expired she brought proceedings for unfair dismissal against the BBC and Capita. The Tribunal dismissed the claim against the BBC on the grounds that her employment had transferred to Capita.

The EAT upheld their decision. The EAT was satisfied that Mrs McLean's employment had transferred to Capita. This was because "she was, clearly, only prepared to work for them for a limited period of six weeks but that being so, she cannot, at the same time, insist that she objected. What her approach shows is that she was in fact agreeable to working for the second respondents albeit only for a short period." The question then was whether reg.4(7) covers post-transfer objection. The EAT was satisfied that it does not "except perhaps in exceptional circumstances such as where employees are not aware of the transfer in advance of it occurring, as happened in the *New ISG Ltd* case. There are no exceptional circumstances here."

It seems, therefore, that in determining whether a post transfer objection is valid the crucial question is whether the Claimant's freedom to choose their employer is compromised. Only in exceptional circumstances will this be so. Otherwise the objection must have been made prior to the transfer. This approach perhaps sits uncomfortably with the earlier decision of the EAT in *Hays* where the EAT seemed to imply that the correct approach is to consider all the evidence, whether pre or post transfer, assess it cumulatively and then decided whether it can be said that the employee transferred.

What is clear, however, is that the effect of an objection is that the contract of employment of the employee who has objected is not transferred to the transferee. It is equally clear that his employment with the transferor terminates. Whether this amounts to him being dismissed by the transferor and entitles him to pursue a claim arising from the dismissal against the transferor depends on the circumstances. If the employee objected to the transfer on the grounds that it would entail substantial changes in his working conditions which would be to his detriment then he may treat himself as having been constructively dismissed by the transferor and bring a claim against the transferor. If, however, he merely objected to the identity of the transferee then, whilst his contract of employment has been terminated, he cannot regard himself as having been dismissed by the transferor. In such circumstances the employee has not been dismissed at all. Rather he has resigned.

Constructive dismissals

It was shown in Part Three of this book that a constructive dismissal occurs when the employee resigns due to a fundamental breach of contract, or a series of minor breaches which constitute a fundamental breach when taken together, perpetrated by the employer. Given that the purpose and effect of a relevant transfer is to preserve the contract of employment will the employee, after a transfer, be entitled to claim constructive dismissal simply because the contract has been varied irrespective of whether, in the circumstances, this amounts to a breach, let alone a fundamental breach, of his contract?

The EAT (Wilkie J Presiding) in *Rossiter v Pendragon PLC* [2001] IRLR 256 considered the question. Mr Rossiter was employed by Lex Ford. His holiday pay was based in part on average commission earnings during the preceding 12 months. His employment transferred due to the operation of TUPE to Pendragon PLC. Pendragon refused to carry on paying holiday pay based on average commission earnings during the previous 12 months. He resigned in protest and claimed constructive dismissal. The Tribunal found there had been no breach of contract. This was because the relevant express terms of the contract authorised the employer to amend the scheme as he wished. Nonetheless there had still been a constructive dismissal.

This finding was upheld by the EAT. This left the question of whether TUPE effects the approach to constructive dismissal. The EAT held that it did. In so finding the Tribunal was mindful of reg.4(11) which, as the Court of Appeal had noted in *Humphreys*, preserves the employee's right to claim constructive dismissal. Furthermore, s.95(1)(c) of the ERA 1996, which defines constructive dismissal, has to they held:

be construed in a purposive way so as to give effect if at all possible to the Directive. In our judgment the wording of s.95(1)(c) is sufficiently wide to bear a construction which does require the employer's actions complained of to constitute a breach of contract. In our judgment that section, by its drafting, is apt to be construed so as to enable anyone who suffers a substantial change in his working conditions to his detriment to resign and claim constructive dismissal under s.95(1)(c). The fact that, in a purely domestic context, s.95(1)(c) is given a different construction does not, in our judgment, preclude that section being given a wider purposive construction having regard to the duty so to construe it to give effect to the Directive where the context so requires.

However, the employers appealed and the Court of Appeal restored the Tribunal's decision. The appeal was consolidated with the case of *Air Foyle Ltd v Crosby Clarke* as *Rossiter v Pendragon PLC, Air Foyle Ltd v Crosby-Clarke* [2002] IRLR 483. Mr Crosby-Clarke was employed by Air Foyle as an airline pilot. His contract provided that his hours of duty were "governed by...the Government legislation in force." Under Flight Time Limitations applicable to Air Foyle, where he was based, no more than three consecutive flights could be imposed by the employer. A TUPE transfer took place from Air Foyle to a Belgian company. Under Belgium Flight Time Limitations the maximum period without a time off was 11 days. Mr Crosby-Clarke took this as substantial change to his working conditions which would be to his detriment. He resigned and brought a claim for unfair constructive dismissal against Air Foyle. His claim succeeded before the Tribunal and the EAT.

However, the Court of Appeal, just as they did in *Rossiter*, held that TUPE did not affect the approach to constructive dismissal. Mummery LJ turned to reg.4(11). He noted that it referred to a right "apart from these regulations." His Lordship then opined: "*The only right to claim constructive dismissal which arises apart from TUPE is the right of the employee to resign when faced with a repudiatory breach of contract by the employer. If there were to be a right to claim constructive dismissal by reason only of a substantial change in working conditions to the employer's detriment, without there being a breach of contract, that would be a new right. The right would not arise apart from TUPE, but only be reason of TUPE.*" In neither *Rossiter* nor *Crosby-Clarke* had there been a breach of contract. In *Rossiter* the contract authorised the employer to change the holiday pay scheme and in *Crosby-Clarke* the provision in the contract that working hours would be governed by government legislation did not just mean UK legislation but applicable government legislation which in the circumstances of the case covered Belgian legislation.

The Court of Appeal's decision can be criticised on the grounds that it turned on a literal reading of the regulations which is inconsistent with the purposive approach of the House of Lords in *Litster*, the Court of Appeal in *Humphreys* and, indeed, the EAT in *Rossiter*. That said it is the decision of the EAT and not the Court of Appeal that correctly

represents the law. That is because of the insertion, by the 2006 regulations, of reg.4(9) which was not contained in the 1981 regulations. As already noted reg.4(9) provides:

(9) Subject to regulation 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 is 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.

It is noteworthy that reg.4(9), unlike reg.4(11), refers to a substantial change in working conditions rather than a repudiatory breach of contract. It is submitted that this makes it clear, as the EAT in *Rossiter* found, that provided that the change is substantial that is sufficient to render any resulting resignation a constructive dismissal even when there has been no breach of contract. It will only be necessary for there to have been a fundamental or repudiatory breach of contract when the Claimant objects to the transfer as in such cases his employment will not transfer and he can bring a claim for constructive dismissal, under reg.4(11), against the transferor and the traditional approach to constructive dismissal will apply. In other words the best advice for the Claimant will often be not to object to the transfer, allow his employment to be transferred and then bring a claim for constructive dismissal against the transferee. This is because he can then avail himself of the less onerous test for constructive dismissal prescribed by reg.4(9).

The decision of the EAT (Hand J Presiding) in *Tapere v South London and Maudsley NHS Trust* [2009] IRLR 972 confirms the traditional contractual analysis in constructive dismissal cases does not necessarily apply in TUPE cases. Mrs Tapere was employed by Lewisham Primary Care Trust. Her contract contained a mobility clause which provided: “*There may be occasions when you are required to perform your duties either temporarily or permanently at other locations within the trust.*” Her employment transferred, in accordance with TUPE, to South London and Maudsley NHS Trust. In reliance on the clause they required her to move to their premises. She objected as this would entail greater travelling which would make it harder for her to collect her child from school. She resigned. The Tribunal dismissed her claim holding that an “objective approach” yielded the conclusion she had suffered no material detriment.

The EAT reversed their decision. The EAT considered that by “objective” the Tribunal meant “the competing arguments of the employee and employer should be contrasted, weighed and arbitrated upon.” The EAT held that in the light of *Marckx* that was not the correct approach. Rather “what has to be considered is the impact of the potential change from the employee’s point of view.” In the present case the change “meant potential disruption to child care arrangements.” The correct approach was to ask “whether the employee regarded those factors as detrimental and, if so, whether that was a reasonable position for the employee to adopt.” The Tribunal “by weighing the employee’s position against that of the employer and deciding that the employer’s position was reasonable” had “looked at the matter from the wrong stand point and thus misdirected itself as to the correct approach to reg.4(9).”

Given that the apparent effect of reg.4(9) is that a substantial change to working conditions, even when it does not amount to a breach of contract, can amount to a constructive dismissal it is necessary to consider the extent to which the parties can agree to alter the contract in connection with the transfer. This is because a literal reading of reg.4(9) would suggest that a variation to the contract, when done with the consent of the employee, could lead to a constructive dismissal provided the variation is substantial and to the employee’s detriment.

Whether the parties can agree a variation in the contract was a question that arose before the ECJ in *Foreningen Af Arbejdsledere I Danmark v Daddy’s Dance Hall A/S* [1988] IRLR 315. Mr Tellerup’s employment was transferred under the Directive. Following the transfer both parties, agreed in the form of a new contract, that he would receive a fixed

wage rather than commission and that there would be a three month trial period within which either party could give three months' notice.

In considering whether this was permissible under the Directive the ECJ was mindful that overall the changes did not leave Mr Tellerup in a worse position. Nonetheless, the Directive prohibited the variation. The ECJ held that as the protection provided by the Directive was "a matter of public policy" it was "outside the control of the parties to the employment contract" and thus "the provisions of the Directive, in particular those relating to the protection of workers against dismissal because of the transfer, must be considered mandatory, meaning that it is not permissible to derogate from them in a manner detrimental to the workers." It followed the "workers concerned do not have the option to waive the rights conferred on them by the Directive and that it is not permissible to diminish these rights, even with their consent."

What, though, was the position when the change did leave the employee in a worse position? The ECJ held their interpretation still applied "notwithstanding" that Mr Tellerup was not in a worse position. However, the ECJ went on, "the Directive does not aim at setting up a uniform level of protection for the whole of the Community based on common criteria." Therefore it was open to the Member States to authorise a variation of the contract with the transferee provided it is "on the understanding that in no case the transfer of undertaking itself can constitute the reason for this alteration." Thus a variation in the contract, agreed by both parties, following the transfer is permissible provided that the reason for variation is not the transfer and is sanctioned by the law of the Member State concerned.

The House of Lords considered the effect of *Daddy's Dance Hall* in the consolidated appeals of *Wilson and others v St Helens Borough Council, British Fuels Ltd v Baxendale and Meade* [1998] IRLR 706. The facts and ratio of the case will be considered in the discussion, below, of who is liable for a TUPE unfair dismissal. Here it suffices to note Lord Slynn opined, *obiter*, that "it may be difficult to decide whether the variation is due to the transfer or attributable to some separate cause. If, however, the variation is not due to the transfer it can, in my opinion, on the basis of the authorities to which I have referred, validly be made."

These passages in *Daddy's Dance Hall* and *Wilson* are reflected in the 2006 regulations in reg.4(4) and reg. (5) which provide:

- 4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—
 - (a) the transfer itself; or
 - (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.
- (5) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is—
 - (a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or
 - (b) a reason unconnected with the transfer."

Returning to the effect of reg.4(9) it is submitted that it must be read subject to reg.4(4) and reg.4(5). In other words a substantial change in working conditions which is to the employee's detriment will not engage reg.4(9) if the employee agreed to the variation and the variation was not connected with the transfer. It is submitted that the cases envisaged by reg.4(9) are cases when the contract permits a variation in working conditions without the necessity of agreeing the change with the employee. Such was indeed the case in *Rossiter and Crosby-Clarke*.

It is also noteworthy that reg.4(10) provides:

No damages shall be payable by an employer as a result of a dismissal 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.

Thus a constructive dismissal under reg.4(9), unlike a constructive dismissal in other cases, does not entitle an employee to resign without notice and claim damages in respect of his notice period.

Who is liable?

Who is liable for any unfair dismissal in a case where TUPE applies? The transferor or the transferee? The effect of reg.4(1) and (2) is that, as a general rule, it will be the transferee. The question arises to whether there are exceptions to this rule – i.e. will the transferor ever be liable. As has been shown the effect of reg.4(7), (8) and (11), as construed by the Court of Appeal in *Humphreys*, is that the transferor, and not the transferee, will be liable when, prior to the transfer, the Claimant objects to the transfer. His employment will then be deemed to have been terminated by the transferor, under reg.4(8), and reg.4(11) preserves his right to claim unfair or wrongful constructive dismissal against the transferor. Another exception was also come across during the course of the discussion of the term “assigned.” It was then shown that when, as in *Carisway Cleaning Consultants v Richards & Cooper Cleaning Services* [1998] UKEAT/629/97, the employee is deceived by the transferor into working in the part of the undertaking transferred he will not be regarded, as under reg.4(1), as having been “assigned” and hence the transferor and not the transferee will be liable.

The transferee cannot be liable for constructive dismissal when, prior to the transfer, the employee resigns because of a breach of contract which he believes the transferee will commit when he becomes his employer after the transfer. The EAT (Lord Johnson Presiding) explained why in *Sita (GB) Ltd v Burton and others* [1997] IRLR 501. Mr Burton and Richard resigned, before the transfer, on the grounds that Sita, the transferee to be, would, so they believed, breach their contracts after the transfer. Their belief was based on certain remarks they had heard managers of Sita make. The Tribunal found that their resignations amounted to an unfair constructive dismissal and that Sita were liable.

The EAT disagreed. If, they declared, “there is to be any liability upon the appellants, it must come to them under the transfer regulations which itself assumes that there was a breach of contract by the transferor creating a liability which thus becomes transferred.” The transferor had not perpetrated a breach so it could not be liable and neither could the transferee as the contracts had not been transferred.

When the transferor dismisses the employee the question of whether he, rather than the transferee, is liable depends on whether the transfer is the effective cause of the dismissal. So said the EAT (Morison J Presiding) in *Ibex Trading Co Ltd v Walton* [1994] IRLR 564. The Claimants were employed by Ibex. The company went into administration. The administrators then dismissed the Claimants. About a month later Alpine Ltd offered to purchase the business. The transfer took place about two months later. The Tribunal and the EAT both found that Ibex – the transferors – had unfairly dismissed the employees. The transferee was not liable as the Claimants had not been employed by the transferor immediately before the transfer.

Ibex relied upon *Litster* and thus submitted that the Claimant should have been regarded as employed immediately before the transfer as the transfer was the effective cause of their dismissals. The EAT rejected that submission. *Litster* did not apply as “here, the employees were dismissed before any offer had been made for the business. Whilst it could properly be said that they were dismissed for a reason connected with the possible transfer of the business, on the facts here we are not satisfied that they were dismissed by reason of *the* transfer or for a reason connected with *the* transfer. A

transfer was, at that stage of the dismissal, a mere twinkle in the eye and might well never have occurred." Accordingly the Tribunal had been right to find the transferor liable.

The EAT (Mummery J Presiding) adopted the same approach in *Longden and Paisley v Ferrari Ltd and Kennedy International Ltd* [1994] IRLR 157. Mrs Longden and Mr Paisley were employed by Ferrari. The company went into receivership. Kennedy expressed an interest in purchasing the business but would only do so after the receivers provided them with sufficient information. Kennedy agreed to provide the receivers with sufficient funds to keep the business "ticking over" whilst the negotiations took place. Nonetheless the receivers, shortly before the transfer, dismissed all the staff including the Claimants. The Tribunal found that Kennedy, the transferees, were not liable as the reason for dismissal was not the transfer but financial restraint. The EAT upheld their decision as it could not be said "that the decision of the Tribunal on this point was made without evidence and perversely."

This principle was determinative of the Court of Appeal's decision in *Dynamex Friction Ltd v Amicus and others* [2008] IRLR 515. Friction Dynamics went into administration. The administrators then dismissed all the company's employees on the grounds that there was no money to pay them. The business was then transferred to two companies – Dynamex Friction Ltd and Ferotec Realty Ltd. The Tribunal found that the transferor administrators were liable as the dismissals were not related to the transfer. The EAT remitted the matter on the grounds that the Tribunals' findings of fact were inadequate. The Court of Appeal restored the Tribunal's decision. Ward LJ found, with regard to the Administrator, "the Employment Tribunal found as a fact that he decided that he had no option but to dismiss the employees because he had no money with which to pay them. That is an economic reason. True it was that at the time when that decision was taken there was a need to sell the business and there was the possibility that a sale could be achieved. But no purchaser had been identified until a week later. There is nothing to suggest that the administrator took the view that he had to dismiss the staff in order to have a better prospect of selling the business...As the tribunal found, the administrator dismissed the employees in spite of any transfer not with a view to effecting it. That finding destroys any argument that the transfer had anything to do with the dismissals."

However, it does not follow that the transferor is necessarily liable solely because he and not the transferee dismissed the Claimant. If the dismissal is transfer related then the transferee is liable. The Court of Session made this clear in *Stirling District Council v Allan and others* [1995] IRLR 301. The Claimants were employed by Stirling District Council. The Council made them redundant in connection with a transfer to Brophy Ltd. The Claimants brought their claims against Stirling rather than Brophy. Before the Tribunal their claims failed on the grounds that liability had transferred from Stirling to Brophy. The EAT, however, disagreed. They held that whilst the act of dismissal was deemed to have been done by the transferee it did not follow that the transferor could not be liable when the dismissal took place immediately before or simultaneously with the transfer.

The Court of Session restored the Tribunal's decision. Lord Morison noted that A.3(1) of the Directive provides, *inter-alia*, that "member states may provide that, after the date of the transfer....and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship." His Lordship further noted that there was no so much provision in the regulations and that from this it followed that "it was not intended that there should be any continuation if provision were not made." His Lordship also rejected a submission that a "continuation of the former employer's liability was to be implied on ordinary principles in the absence of express provision" as the effect of the Directive was that joint or continued liability could only be imposed if the United Kingdom had expressly accepted the invitation in A.3(1) to provide for it which it had not.

The question of whether the transferor could be liable arose before the ECJ in the Belgian case of *Jules Dethier Equipment SA v Dassy and Sovram SPRL* [1998] IRLR 266. Mr Dassy was employed by Sovram. The company went into liquidation. The liquidator dismissed Mr Dassy. The assets of the company were subsequently transferred to Jules Dethier. The Belgian Labour Court held that Sovram and Jules Dethier were jointly and severally liable and that as Mr Dassy was unlawfully dismissed before the transfer he should have been regarded as still employed by Sovram on the date of the transfer.

The ECJ disagreed. The ECJ observed that “employees dismissed before the undertaking was transferred, contrary to A.4(1), must be regarded as still employed by the undertaking on the date of the transfer.” For this it followed that “the contract of employment of a person unlawfully dismissed shortly before the transfer must be regarded as still extant as against the transferee even if the dismissed employee was not taken on by him after the undertaking was transferred.” Accordingly, “employees unlawfully dismissed by the transferor shortly before the undertaking is transferred and not taken on by the transferee may claim, as against the transferee, that their dismissal was unlawful.”

The House of Lords followed and considered the effect of *Dassy* in *Wilson and others v St Helens Borough Council, British Fuels Ltd v Baxendale and Meade* [1998] IRLR 706. Mr Baxendale and Mr Meade were employed by National Fuel Distributors (NFD). The company merged with British Fuels Ltd (BFL) in circumstances which amounted to a TUPE transfer. Shortly before the transfer NFD dismissed Mr Baxendale and Mr Meade on the grounds of redundancy. Thereafter BFL offered them employment on lower rates of pay. They accepted this change to their terms and conditions and commenced employment with BFL. They then brought Employment Tribunal proceedings seeking a declaration that they were still employed by NFD. The Tribunal and the EAT both found they had been validly dismissed by NFD. The Court of Appeal, however, held that their dismissals were a legal nullity as they were connected with the transfer and the effect of the transfer was to transfer their employment to BFL.

In *Wilson* the Claimants were employed by Lancashire County Council as care workers at a Community Home. The council was unable to carry on managing the home due to funding problems. St Helen's agreed to take over responsibility provided that Lancashire made 72 of the staff redundant. St Helen's would then, and indeed did, offer them employment on lower rates of pay. The Claimants were amongst those who were dismissed and who were offered and accepted the less favourable terms and conditions. They brought proceedings claiming that the lower rates of pay amounted to unauthorised deductions of wages as due to the operation of TUPE St Helen's were bound to pay them what they had been paid by Lancashire. The Tribunal held that the variation in the contract was effective. The EAT, however, held that when the operational reason for the variation is the transfer the variation is ineffective. The Court of Appeal held that on the facts the Tribunal was entitled to find that the dismissals were not due to the transfer and hence St Helen's were entitled to offer them different terms and conditions.

The principal issues in both cases was whether the dismissals carried out by the transferors, prior to the transfers, were rendered, due to the operation of TUPE, legal nullities. It was submitted on behalf of the employees that they were and hence they were still employed by the transferors and entitled to the higher rates of pay that the transferors had paid them. The House of Lords rejected this submission. Lord Slynn referred to *Bork, Daddy's Dance Hall* and *Dassy* and noted that in those cases “the emphasis is on the same terms and conditions applying if the employment is continued.” However, his Lordship went on, it did not follow that this means “that the transferee is bound actually to take on an employee who has been dismissed, whether because of the transfer or for independent reasons, and to give him the same work as he had before. They mean that if he does take the employee he takes him on the terms of the employment with the transferor, i.e. there is a deemed novation by the two willing

parties.” In other words the dismissals by the transferors in both cases were not legal nullities, neither BFL nor St Helens had been obliged to take the dismissed employees on and as they had been dismissed they could not claim they were still employed by NFD or Lancashire.

However, his Lordship continued:

if the transferee does not take the employee because the latter has already been dismissed by the transferor, or because he himself dismisses the employee on the transfer, then he must meet all of the transferor’s contractual and statutory obligations.

In other words even though the dismissal effected by the transferor is legally effective it is the transferee and not the transferor who is liable. Furthermore, the effect of the ruling is that there is no defence, available to the transferee, that he cannot be liable for the transfer-related dismissal, carried out by the transferor, on the grounds that there was no effective dismissal.

As will be shown in greater detail in the next chapter a dismissal under reg.7 is fair, even if connected to or by reason of the transfer, provided that the reason for dismissal was an economic, technical or organisational reason entailing changes in the workforce (ETO) and the employer acted reasonably in the s.98(4) sense. This raises the question of who is liable if the transferor dismisses the employee for an ETO but the dismissal is nonetheless unfair under s.98(4). The reason why this raises a question as to who is liable is because fairness under s.98(4), unlike an ETO under reg.7, is a creature of the ERA and thus separate from TUPE.

This question was addressed by the EAT (Morison J Presiding) in *Kerry Foods Ltd v Creber and others* [2000] IRLR 10. The Claimants’ employers went into receivership. The receivers dismissed all the workforce including the Claimants. The business was then purchased by Kerry Foods. They refused to take on any of the dismissed employees. The Tribunal and the EAT both found that TUPE applied and the dismissals were unfair.

The EAT found that, following the House of Lords’ decision in *Litster*, the Claimants were employed immediately before the transfer as the transfer was the effective cause of the dismissal and hence the Claimants were “to be treated as though they had been employed by Kerry but dismissed by them by reason of the transfer.”

In so finding the EAT identified the following, relevant principles of law:

- 1) Every dismissal is effective to terminate the employment relationship – see *Wilson v St Helen’s Borough Council* [1998] IRLR 706.
- (2) A dismissal by the transferor by reason of the impending transfer will be automatically unfair.
- (3) The employees concerned will enforce their remedies in relation to that dismissal against the transferee, in accordance with the *Litster* principle.
- (4) If the main reason for the dismissal by the transferor is an ETO reason, neither Regulation [7(1)] nor the *Litster* principle will apply.
- (5) If the reason for the dismissal is an ETO reason but the dismissal is nonetheless unfair, then the principle in the previous point [4.] remains true. It seems to us clear that the *Litster* principle is not directed at the fairness of the dismissal, but rather at the reason for it. Thus, if an ETO reason is the main reason for the dismissal by the transferor but the dismissal is unfair the employee may recover only from the transferor. It seems to us that it is only when Regulation [7(1)] applies that the *Litster* principle operates.
- (6) If the dismissal is effected by the transferee then the employee’s remedy lies against the transferee. A transferee may dismiss by reason of the transfer or for an ETO reason.

In other words the transferor will be liable if the transferor dismisses for an ETO but the dismissal is unfair. This is because *Litster* provides that liability for the dismissal is passed to the transferee when and only when the transfer is the reason for dismissal. It follows that if an ETO, rather than the transfer, is the reason for the dismissal liability remains with the transferor and is not passed to the transferee. This essentially makes explicit what was implicit in *Wilson* – namely the transferor and not the transferee is liable when the transfer is not the reason for or the effective cause of the dismissal.

The EAT (Burke J Presiding) followed and approved *Kerry Foods in Thompson v SCS Consulting Ltd and others* [2001] IRLR 801. Mr Thompson was employed by SCS and subsequently by a Canadian company Lava Systems Ltd. Both were owned by the Canadian company Lava Systems Inc. Lava Systems Inc went into receivership. Open Text (UK) Ltd agreed to purchase SCS. Open Text agreed with the receivers that before they purchased the business they would inform them which employees they wished to remain and which should be dismissed. Mr Thompson was not amongst those who was to remain. He and others who fell into this category were dismissed and then Open Text purchased the business. The EAT upheld the Tribunal's finding that the transferee had fairly dismissed Mr Thompson for an ETO. In so finding the EAT also held, in reference to *Kerry Foods*, that "the *Litster* principle applies only where the dismissal is for or principally for a Reg [7(1)] reason and does not apply where the dismissal is for or principally for an ETO reason within Reg [7(2)] and that in the latter case if the relevant employee has been effectively dismissed by the transferor at such a time that he cannot be said to fall with Reg [4(3)] on its ordinary meaning....any liability to the employee falls on the transferor and not upon the transferee."

Kerry and Thompson warrant further comment. It is submitted that they are wrongly decided in so far as they can be read as providing that when the transferor dismisses for an ETO but the dismissal is unfair under s.98(4) the transferor and not the transferee is liable derives from their understanding of *Litster*. In *Litster* the House of Lords found that liability passes to the transferee when the transfer is the reason for dismissal. The reason why the EAT in *Kerry and Thompson* found that when the reason for dismissal is transfer related but not for an ETO that liability remains with the transferor was because in *Litster* the question of ETO did not arise on the facts. It is submitted that this is too narrow a reading of *Litster*. In *Litster* and also in *Kerry and Thompson* the reasons for dismissal were transfer related. It is submitted that it is no materiality whether the reason was an ETO or not. In *Kerry* the EAT further held that as *Litster* was concerned with the reason for dismissal and not its fairness it followed that when the reason for dismissal is an ETO *Litster* does not apply. Again it is submitted that this is not correct as the ETO is not determinative of fairness. The ETO merely amounts to some other substantial reason under s.98(1). Ultimately the question of fairness depends on the application of s.98(4).

If, however, the effect of *Kerry and Thompson* is that when the reason for dismissal is an ETO, unrelated to the transfer, the transferor is liable this is surely correct in so far as it is simply a further recitation of the principle that the transferor is liable when the dismissal is unrelated to the dismissal. If this is the ratio of both decisions it is unhelpful to describe the reason for dismissal in such circumstances as an ETO as an ETO reason implies a reason that is connected with the transfer.

In summary there are four exceptions to the general rule that the transferee is liable. Firstly, when the Claimant objects to the transfer and *Humphreys* applies. Secondly, when the transferor gulled or deceived the Claimant into working in the part transferred. Thirdly, when the transferor dismisses the Claimant and the reason is neither the transfer nor connected with the transfer. Fourthly when the transferor dismisses for an ETO but the dismissal is nonetheless unfair under s.98(4).

It is clear that reg.7 restricts the scope of reg.4. A literal reading of reg.4 is that in all circumstances the transferee inherits the liabilities of the transferor. However, an effect of reg.7 is that in cases of dismissal the transferee only inherits liability if the dismissal is transfer related – i.e. the transfer is either the reason for dismissal or the reason for dismissal is connected to the transfer.

Conclusions

When under reg.3 the transfer is one to which TUPE applies it will not necessarily follow that the protection of the regulations will apply. This will depend on whether the requirements set out by reg.4 are satisfied. However, it is clear that in most cases, due to the propensity of the Courts and Tribunals to ensure that the objective of the Directive, namely the safeguarding of the rights of employees following a transfer, is satisfied that the employee will be entitled to the protection afforded by reg.4(2). This ensures that the transferee will be liable for any unfair dismissal. The question then arises as to when a dismissal, connected with a transfer, is unfair. It is to that question that this discussion now turns.