Changes to TUPE: So what?

On the face it the changes to TUPE, which came into force on 31st January 2014, make life easier for employers. However, is this a classic case of looks being deceiving? What must always be borne in mind is that the TUPE regulations are a product of an EU Directive and hence are invalid in so far as they may be inconsistent with the Directive and the case law it has spawned. Accordingly, it is well-established that the regulations must be construed purposively so as to comply with the Directive even if that means inserting words into them (see, for example, the decision of the House of Lords in *Litster and others v Forth Dry Dock & Engineering Co Ltd and another* [1989] IRLR 161). Furthermore, it has recently become clear, that even when domestic legislation cannot be read in a way that is compatible with an EU Directive the domestic court, nonetheless, is obliged to disapply national law which is inconsistent with it (*Kucukdeveci v Swedex & Co KG* [2010] IRLR 346).

Thus, it is suggested, the changes have the potential to introduce greater uncertainty into what is already an uncertain area of law. The point will be illustrated by consideration of the key changes regarding Service Provision Changes, variations to contracts and dismissals.

TUPE regulation 3 sets out two types of transfer - what has been colloquially described as "business transfers" under regulation 3 (1) (a) and Service Provision Changes under regulation 3 (1) (b). The latter, broadly speaking, are cases where "activities" are carried out by another service provider, that is cases of outsourcing and insourcing. The changes insert a new paragraph (2A) which provides:

References in paragraph (1)(b) to activities being carried out instead by another person are to activities which are fundamentally the same as the activities carried out previously.

The intention behind paragraph 2A clearly is that TUPE will not apply when any changes to the service provision are not fundamental. As for ECJ jurisprudence whilst there has been uncertainty as to what extent cases of outsourcing or insourcing are covered by the Directive (compare the decisions of the ECJ in *Schmidt v Spar-und Leihkasse der frujeren Amter Bordeshold, Kiel und Cronshagen* [1994] EUECJ C-392/92 and *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* [1997] IRLR 255) more recent decisions, such as *Guney-Gorres and another v Securicor Aviation and another* [2006] IRLR 305, seem to make it clear the general approach, to the question of whether there has been a transfer, set out in *Spijkers v Gebroeders Benedik Abattoir CV* [1986] 2CMLR 296,applies. There the ECJ held that the question of whether there has been a transfer is determinative upon whether "the business in question retains its identity". In *Bork v Foreningen* [1989] IRLR 41 the ECJ applied *Spikers* and held that the crucial question is whether "the undertaking in question retains its identity which is the case where there is still an economic entity still in existence, the operation of which is in fact continued or resumed by the new employer

carrying on the same or a similar business".

This is very difficult to reconcile with paragraph 2A - a "fundamental change" test is clearly more demanding than a "similar business" test. Thus does the more restrictive approach of paragraph 2A restrict the ambit of *Spijikers* and *Bork* in outsourcing cases? Or is paragraph 2A to be broadly construed, so as to comply with *Spijikers* and *Bork,* thereby thwarting the clear intention of Parliament. It is submitted that the answer to both cases is "no". To take the latter question first. It has been recognized that whilst the regulations generally are the product of the Directive the concept of a Service Provision Change is a domestic creation and hence is to be construed in accordance with domestic rather than EU principles (see the decision of the EAT (Burke J Presiding) in *Metropolitan Resources Ltd v Churchill Dulwich Ltd* [2009] IRLR 700).

However, it is submitted, it does not follow from that that the broader *Spijikers/Bork* approach will not serve so as to bring the transfer in question within the scope of TUPE. It has already been noted that Service Provision Changes are not the only type of transfer with which TUPE is concerned. There are, in addition, "business transfers" under regulation 3 (1) (a). Regulation 3 (1) (a) describes these as:

a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity

If that language sounds familiar it is because it is. Namely, it is the clear codification of *Spijikers/Bork.* Further, as has been said, the concept of a Service Provision Change is a domestic creation - it is neither echoed in nor a reflection of the Directive and its case law. In other words ECJ learning recognizes no distinction between a business transfer and a service provision change. Hence its case law regarding outsourcing and insourcing cases is part of its learning regarding business transfers generally. Accordingly, a case of insourcing or outsourcing may not come within TUPE by virtue of regulation 3 (1) (b) but will do so by virtue of regulation 3 (1) (a). Thus paragraph 2A will only restrict the ambit of TUPE when a Claimant just relies on it rather on, instead of or in addition to, regulation 3 (1) (a).

It is also questionable whether the changes to regulation 4 - which concerns the effect of a transfer generally and the extent to which it determines whether variations can be made to a contract of employment specifically - will make any difference. Prior to the amendments paragraphs 4 and 5 of regulation 4 provided that any variation to a contract was void if the sole or principal reason for the variation was the transfer itself or a reason connected with the transfer which was not an economic, technical or organizational reason entailing changes in the workforce ('ETO"). However, variations were permissible if for a reason unconnected with the transfer of if for a reason connected with the transfer which

was an ETO entailing changes in the workforce. Paragraphs 4 and 5 have now been substituted for:

(4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the reason for the variation is the transfer.
(5) Paragraph (4) does not prevent a variation to the contract of employment—
(a) if the reason for the variation is an economic, technical or organisational reason entailing changes in the workforce; or
(b) if the reason for the variation is the transfer, provided that the terms of that contract permit the employer to make such a variation.

There are two changes. Firstly, a variation will no longer be invalid if for a reason connected with the transfer even when that reason is not an ETO. On the face of this seems to greatly diminish the protection of TUPE. In practice an employer will not seek to make changes simply because of the transfer but for matters connected to it such as, say, wishing to harmonize the wages or functions of staff.

However, in its discrimination jurisprudence the ECJ has frequently found that direct (as opposed to indirect) discrimination occurs when the protected characteristic in question is the effective or underlying rather than the immediate cause. Take, for example, its decision in *Webb v EMO Cargo Ltd* [1994] IRLR 482. Mrs Webb was pregnant. Her employers dismissed her on the grounds that she was hence unavailable for work. Her lack of availability, they argued, and not her pregnancy was the reason for dismissal. Nonetheless, the ECJ held:

Furthermore, contrary to the submission of the United Kingdom, dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract. However, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the directive.

In other words the policy consideration of providing pregnant women with a high level of protection warranted a broad approach to causation. There is no reason in principle why the policy consideration of protecting the rights of transferring employees should not, under EU law, warrant the same approach.

Indeed in *Litster* Lord Oliver suggested that an "immediate cause" test applies in determining whether TUPE was the reason for dismissal:

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.

The second change is that the variation is permissible even if the reason for the variation is the transfer - provided the terms of contract of employment permit the

employer to make the variation. This is impossible to reconcile with ECJ jurisprudence. The ECJ in *Foreningen Af Arbejdsledere I Danmark v Daddy's Dance Hall A/S* [1998] IRLR 315 considered a case where, following a transfer, both the employee and the employer agreed that the employee would receive a fixed wage rather than commission. Not only had the employee agreed to the change but the ECJ accepted that the change did not leave him in a worse position. Nonetheless, it was invalid. The protection provided by the Directive was a "matter of public policy" and 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 transfer, must be considered mandatory, meaning that it is not permissible to derogate from them in a manner detrimental to the workers". It followed that 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". This principle still applied "notwithstanding" that the employee was not in a worse position.

Similar changes are made to regulation 7. This concerns dismissals. Regulations 7 (1) and (2) provided that the dismissal was unfair if the reason for dismissal was the transfer itself or a reason connected with the transfer which is not an ETO entailing changes in the workforce. These have been substituted for:

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the reason for the dismissal is the transfer.

(2) Paragraph (1) does not apply to dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce of either the transferor or transferee before or after a relevant transfer.

The new regulation 7 (1) suggests that the dismissal is not automatically unfair when the reason for dismissal is connected with the transfer even if not for an ETO entailing changes in the workforce. Again the same points made above about the ECJ's purposive approach to causation apply.

The new regulation 7 (2) provides that even when the transfer is the reason for dismissal it will not be automatically unfair if it takes place because of an ETO entailing changes in the workforce. In contrast, under the old rules, dismissal was always unfair if the transfer was the reason for the dismissal.

However, it is difficult to see how the new regulation 7 (2) could apply in practice. To explain it is first necessary to set out the new regulation 7 (3) that has been asserted. This provides:

(3) If a dismissal takes place for a reason referred to in paragraph (2), without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—

(a) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or

(b) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

This, just as its predecessor did, makes it clear that TUPE does not stand alone. When, under regulation 7(2), the reason for dismissal is the transfer and it takes place for an ETO reason entailing changes in the workforce then the reason for dismissal is to be regarded as redundancy or some other substantial reason for the purposes of section 98 (1) of the Employment Rights Act 1996. Whether the dismissal is fair then depends on the application of the reasonableness test under section 98 (4) of the Employment Rights Act 1996.

The difficulty, with regard to how the new regulation 7 (2) can be applied in practice, lies in the fact that section 98 (1) (a) refers to "the reason (or, if for more than one, the principal reason) for the dismissal." It is submitted that under the old rules this posed no difficulty. Section 98 (1) requires an examination of the employer's state of mind - did the reason he rely on amount to a potentially fair reason (namely misconduct, incapability, redundancy, contravention of a statutory enactment and some other substantial reason) for the purposes of section 98 (1) and (2)? Hence if the transfer were connected with an ETO there would not necessarily be any need for the transfer to be operative in the employer's mind. It sufficed that the ETO was the sole or principal reason and that it was connected in some way to the transfer. Hence there was no need for the transfer to be the sole or effective cause of the dismissal and, indeed, no need for it to have played any part at all in the employer's decision to dismiss. However, the new regulation 7 (2) seems to suggest that section 98 (1) is satisfied if both the transfer and the ETO are the sole or principal reasons for dismissal. It is submitted that it is hard to see as a matter of logic how there can be more than one sole or principal reason for dismissal.

So what is the true position? Article 4.1 of the Directive reads:

The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce.

The first sentence makes it clear that the dismissal by reason of the transfer is impermissible. The second sentence does not expressly read as a qualification or exception to that principle. In other words it does not expressly provide the dismissal by reason of the transfer is permissible provided the dismissal takes place for an ETO reason entailing changes in the workforce. Here it is necessary to refer to the general statement of principle set out at paragraph 3 of the preamble:

It is necessary to provide for the protection of employees in the event of a change of employer, in

particular, to ensure that their rights are safeguarded.

With this in mind it is submitted that the second sentence of Article 4.1 is no more than an "avoidance of doubt" provision. That is it does not qualify the first sentence. It simply makes clear that when the transfer is not the reason for dismissal then, depending on the circumstances, dismissal may be permissible if because of an ETO entailing changes in the workforce.

A new paragraph 5A has been inserted into regulation and a new paragraph 3A inserted into regulation 7. Broadly they cover the same thing and hence it is convenient to consider them together.

Paragraph 5A in regulation 4 provides:

(5A) In paragraph (5), the expression "changes in the workforce" includes a change to the place (within the meaning of section 139 of the 1996 Act) where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer.

Paragraph 3A in regulation 7 provides:

(3A) In paragraph (2), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).

It is well-established that the term "changes in the workforce" means changes in the numbers and functions of the workforce and such changes must be the objective rather than the consequence of the ETO (see the Court of Appeal's decision in *Delabole v Berriman* [1985] IRLR 305). Paragraphs 3A and 5A provide that it is not only changes in the number and functions but also the location of the workforce that qualify. The reference, in both paragraphs, to section 139 makes it clear that where the employee works is a factual and not a contractual question (see the decision of the EAT (Hicks J Presiding) in *Bass Leisure Ltd v Thomas* [1994] IRLR 104).

However, it questionable whether *Delabole*, let alone paragraphs 3A and 5A, are compatible with the Directive. In *Wheeler v Patel and another* [1987] IRLR 211 the EAT (Scott J Presiding) held that an ETO entailing changes in workforce is a reason which relates to the conduct of the business. The Court of Appeal in *Whitehouse v Chas a Blatchford & Sons Ltd* [1999] EWCA Civ 1255 gave *Wheeler* lukewarm approval. Buxton LJ was content to adopt it. However, he did not wish to "necessarily be thought as accepting that the formulation of Scott J in that case (helpful thought it is) is to be treated as some sort of statutory mantra that solves all problems under the Regulations". This, his Lordship held, was because the term "economic, technical or organizational" in the Directive was "merely a broad description of the whole range of circumstances that might, in any one of the member states, give rise to justification for dismissal." If this is

correct then the term “economic, technical or organizational reason entailing changes in the workforce” means no more than any of the five potential fair reason set out in sections 98 (1) and (2) of the Employment Rights Act 1996. If that is right it follows that it is not necessary that dismissal involve changes in not only location of the workforce but also its number and functions.

However is Buxton LJ’ construction of the Directive correct? On one hand a literal construction of the words “economic”, “organizational” and “technical” and “entailing changes in the workforce” seem to suggest reason for dismissal, or variation in contracts, akin to redundancy type or re-organizational type situations – re-organization, of course, being a long established “some other substantial reason” (see, for example, *Chapman and others v Goonvean and Rostowrack* [1973] ICR 310.

However, the Directive does not define an ETO. It is submitted that the only reason it uses, at Article 3.1, the expression “economic, technical or organizational reason entailing changes in the workforce” is simply because it envisages that many dismissals following a transfer, which are not because of the transfer, will often be for reasons amounting or approaching to redundancy or re-organization. Whether such a dismissal is fair depends on domestic not EU law. In other words the Directive does not lay down a particular approach to be followed in such cases. If that is right it must follow that does not set down a rigid or specific definition of an ETO as set out in *Wheeler* and *Delabole*.

Thus it could be said that in this sense paragraph 3A of regulation 7 and paragraph 5A of regulation 4 are perhaps closer to what was intended by the Directive in so far as by extending the reach of an ETO they provide for a more flexible approach. Nonetheless, it is submitted that the correct approach in TUPE cases concerning variations to a contract or dismissal is firstly to ask whether the transfer was the reason for the variation or dismissal. However, the causative approach is wide and is not solely determinative upon the main reason that operated in the employer’s mind at the time of variation or dismissal. The question is determined upon applying an effective cause test. In this sense the provisions which the amendments replace were closer to what was intended by the Directive in so far as they provided that the variation or dismissal was caught by TUPE if for a reason “connected” with the transfer.

If, however, the transfer was not the reason for variation or dismissal then the question of whether the variation or dismissal was lawful or fair turns on domestic and not EU law. Here the term “economic, technical or organizational reason entailing changes in the workforce” merely means that many, but by no means all, such cases will give rise to considerations relating to redundancy and re-organization.

Finally newly inserted paragraphs 5B and 5C into regulation 4 must be noted. They provide:-

(5B) Paragraph (4) does not apply in respect of a variation of contract in so far as it varies a term or condition incorporated from a collective agreement, provided that—

(a) the variation of the contract takes effect on a date more than one year after the date of the transfer; and

(b) following that variation, the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation.

(5C) Paragraphs (5) and (5B) do not affect any rule of law as to when a contract of employment is effectively varied.

In other words even when a contract is varied because of the transfer the variation will not be void if it varies a term incorporated from a collective agreement provided the variation takes effect more than a year after the transfer. Furthermore, the variation must be no less favourable to the employee. It has already noted that the ECJ held in *Daddy's Dance Hall* that variation of the contract by reason of the transfer is not permissible. This applies even when the variation does not result in the employee's position being less favourable – therefore paragraph 5B (b) is likely to be ineffectual.

Thus, in conclusion, the changes are either incompatible with the Directive or, otherwise, likely to have limited scope. Service Provision Changes are a domestic creation. However, ECJ case law makes it clear that cases of outsourcing and insourcing come within the general meaning of a transfer. Removing the provisions that reasons for variation or dismissal which were connected to the transfer but were not an ETO were contrary to TUPE does not recognize the fact that causative approach to the question of whether such variation or dismissal was by reason of the transfer is wide. Greater scope for making changes to terms and conditions following a transfer ignores the principle that the rights conferred by the Directive cannot be waived. Whilst extending the meaning of an ETO entailing changes to the workforce may be closer to the spirit of the Directive it remains highly questionable whether the Directive intends any precise meaning to be given to the term.