

OLD SQUARE
CHAMBERS



A classical painting depicting a celestial scene, likely a fresco or ceiling painting. The scene is set within a dome, with figures in various poses and colors (pink, blue, white) floating or standing among clouds. The figures are rendered with soft, flowing drapery and are set against a light blue sky. The overall style is characteristic of the Baroque or Rococo periods.

UNFAIR DISMISSAL
AND POST TRANSFER
ISSUES.

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UNFAIR DISMISSAL:

- Regulation 7.
- Who has the right?
- What is a dismissal?
- Opting out of a transfer.
- Determining the reason for dismissal.
- ETO's.
- Fairness.
- Remedy.
- Who is liable

CHANGING TERMS AND CONDITIONS:

- The *Wilson* Question.
- The *Meade & Baxendale* Question.
- *Daddy's Dance Hall*
- *Power v Regent Security Services*
- Position under 2006 Regulations:
 - Contractual variations in standard cases.
 - Contractual variations in insolvency cases.
 - Compromise agreements.



Underlying principles of the Acquired Rights Directive.

The central principle of the Acquired Rights Directive is that the rights of employees under national law are to be safeguarded in the event of a transfer of an undertaking / part of an undertaking in which they are employed.

There are three key "rules":

1. Contracts of employment existing at the time of transfer are preserved and are enforceable as if originally made between the employee and transferee (M Tether's session).
2. Contracts of employment of affected employees shall not be terminated by reason of a relevant transfer.
3. Employees may not waive their rights under TUPE (although they can object to the transfer).



UNFAIR DISMISSAL:

Article 4.1 of the ARD provides as follows:

"The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee."

Reg. 7(1) of TUPE 2006 provides, so far as material, as follows:-

"Where, either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act ... as unfairly dismissed if the sole or principal reason for dismissal 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."

Is Reg 7 wider than is required by Article 4?

Power v Regent Security Services Ltd [2007] IRLR 226; para 58.



WHO HAS THE RIGHT NOT TO BE UNFAIRLY DISMISSED IN THE CONTEXT OF A RELEVANT TRANSFER?

- “Employees” have right not to be unfairly dismissed by reason of a transfer: Mikkelsen [1985] ECR 2639, ECJ.
- Reg 2(1) definition of employee potentially wider than s 230 ERA.
- New reg 7(4) makes it clear that reg 7 potentially applies to any dismissal in the context of a relevant transfer, regardless of whether it takes place pre or post transfer or whether by the transferor or transferee, and regardless of whether the employee was or was not employed in the part of the undertaking transferred.



WHAT IS A DISMISSAL?

- The concept of dismissal under the regulations is the same in the context of a relevant transfer as under national law: s95 ERA. (Note; termination of a contract need not involve termination of an employment relationship.)
- Constructive dismissal: Is there a community law concept of constructive dismissal in the context of a relevant transfer post **Merckx** [1996] IRLR 467? The EAT in **Rossiter v Pendragon plc** [2001] IRLR 256 held that the Directive places responsibility for termination of employment on the employer if a transfer involves a substantial change in working conditions to the detriment of the employee, and this is so regardless of whether that change constitutes a breach of contract. This was overturned by the Court of Appeal [2002] IRLR 483, but the position seems to have been restored by the new regulations 4(9) - (11).



Humphreys and the opt out.

- **Katsikas v Konstantinidis and Skreb** [1993] IRLR 179: ECJ held that employees are entitled to object to the transfer of their employment. The consequence of objection is a matter for Member States.
- **Merckx** -if termination is because of a substantial change to an employee's working conditions which is to his detriment, the employer is to be regarded as responsible for the termination.
- **University of Oxford v Humphreys** [2000] IRLR 183, CA.
 - an employee who exercised his right to object to transfer could nevertheless allege constructive dismissal where the reason for his objection was an actual or proposed substantial change in his working conditions which were or would be to his detriment; and
 - if he did so, liability for the constructive dismissal did not transfer to the transferee.
- Reg 4(9) and **Humphreys** - may mean that an anticipated substantial change in working conditions to the detriment of an employee post transfer will be sufficient for a constructive dismissal claim whether or not there is any breach of contract.



DETERMINING THE REASON FOR DISMISSAL:

- Whose reason?
 - That of the party which dismisses:
 - Tuck v BSG Property Services Ltd [1996] IRLR 134, EAT
 - Hynd v Armstrong and others [2007] IRLR 338, EAT.
- When is the transfer or reason connected with it the reason or principle reason for dismissal?
 - Question of fact for ET, in accordance with well established principles ("set of facts known to the employer or beliefs held by him which cause him to dismiss".)
 - The required closeness of connection between dismissal and transfer has led to a number of cases.



SCOPE OF ETO

- Note that the domestic regulations are wider than the Directive (the regs including the words transfer and also “or a reason connected to it”)
- A mere desire to harmonise terms and conditions will not be an ETO reason: **Berriman v Delabole Slate Ltd** [1985] IRLR 305, CA.
- New reg 7(3)(b) makes it clear that redundancy is an example of an ETO reason.



FAIRNESS AND REMEDY.

- If the employer establishes a valid reason for dismissal, the fairness of the dismissal is to be determined in accordance with section 98(4) ERA.
- The obligations under the Employment Act (Dispute Resolution) Regulations 2004 apply to dismissals by reason of an ETO. (Note Gibbons recommendations)
- Similarly, the question of remedy is to be determined in accordance with the ordinary law of unfair dismissal (including reinstatement / reengagement).



WHO IS LIABLE?

- The principle enunciated by the House of Lords in Litster v Forth Dry Dock [1989] IRLR 341, HL, is now expressly enacted in new regulation 4(3).
- Where an employee objects to transfer in anticipation of a breach by the transferee, the transferor is potentially liable (Humphreys). The same is true where the objection is to an anticipated substantial change in working conditions post transfer which is to his detriment, whether or not it amounts to an anticipatory breach.



CHANGING TERMS AND CONDITIONS OF EMPLOYMENT.

Wilson v St Helens Borough Council / British Fuels Ltd v Meade & Baxendale.

[1998] IRLR 706, HL.

THE WILSON QUESTION.

- To what extent can changes in terms and conditions be agreed with employees who are protected by TUPE?

THE MEADE & BAXENDALE QUESTION.

- If agreement cannot be achieved, can change be imposed by the transferor dismissing the protected employees and re-engaging them on new terms and conditions?



THE WILSON QUESTION.

- Starting point is Daddy's Dance Hall. [1988] IRLR 355, ECJ. Employee dismissed by transferor, entered into new contract which differed in many respects, with transferee. Despite having agreed a shorter notice period with the transferee, he was not held to this and could rely on the original contract which had been transferred, notwithstanding that to offset any disadvantages arising from the change, he obtained new advantages so that he was left overall in no worse a position.
- Para 17 of Daddy's Dance Hall:
"employment relationship may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor provided that the transfer of the undertaking itself may never constitute the reason for that amendment."



- What does a variation "by reason of the transfer itself" mean?
 - That any agreement which is for reasons connected with the transfer is invalid?
 - OR, that an agreement is only invalid if the reason for it is the transfer and no other reason (eg an ETO)?
- Lord Slynn stated in Wilson that any variation which is "due to the transfer and for no other reason" is invalid.
- The HL judgment on this point has been subject to much criticism as it failed to provide clarity in relation to the extent to which variations of terms and conditions could be made.



- CA in **Credit Suisse First Boston v Lister** [1998] IRLR 700 held that an employer cannot avoid the doctrine by showing that on a fair view of the contract as a whole, the employee was better off under the varied contract. CA considered that there were a number of issues not determined by Daddy's Dance Hall. This included the question of whether an employee can seek to resile from an agreement that he has made by successfully arguing that a contract voluntarily entered into by reason of the transfer is void and cannot be relied upon by either party.
- This was precisely the question which arose in **Power v Regent Security Services Ltd** [2007] IRLR 227. Elias P held: "In our view Daddy's Dance Hall and Credit Suisse merely establish that if the employee wishes to rely upon a term originally found in the agreement with the transferor rather than relying upon a term in the varied or new agreement with the transferee, he will be entitled to do so. It is not a question of whether objectively viewed the original term is more beneficial or not. It is simply a question of whether the employee wishes to rely on it." (para 53)



MEADE AND BAXENDALE QUESTION.

HL held that dismissal for a transfer related reason is legally effective even if it is not for an ETO reason. It is not a legal nullity. Employees were not therefore entitled to retain the benefit of their previous terms and conditions after they were dismissed by the transferor. Their cause of action was for unfair dismissal.



POSITION UNDER THE 2006 REGULATIONS:

- Contractual variations in standard cases:
 - Regulation 4(4) provides "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
 - the transfer itself, or
 - a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce."
 - Conversely, regulation 4(5) provides "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 reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce, or
 - a reason unconnected with the transfer."



Variations to terms and conditions in insolvency proceedings cases.

- A new regulation 9 enacts an exception to the Daddy's dance Hall principle:
 - "If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings these Regulations shall not prevent the transferor or transferee (or an insolvency practitioner) and appropriate representatives of assigned employees agreeing to permitted variations".
- What is a "permitted variation"? Essentially one which is designed to safeguard employment opportunities by ensuring the survival of the business.



COMPROMISE AGREEMENTS

- Solectron Scotland Ltd v Roper [2002] IRLR 4: the EAT recognised a distinction between variations of contract and a case where parties are in dispute as to the terms applicable in the event of a termination and agree a compromise. Whilst the former might be affected by Daddy's Dance Hall principles, the latter is not.
- Be warned that the court might scrutinize the agreement carefully to ensure that it is a genuine compromise and not a device to avoid Daddy's Dance Hall.

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