

**EMPLOYMENT LAWYERS  
ASSOCIATION**

**DEVELOPMENTS IN TUPE  
LAW AND PRACTICE 2007**

**Introduction**

1. In the 2005 DTI Consultation Document the Government's policy objective was set out as follows:  
*"The Government considers that, ideally, everyone should know where they stand when a business sale or re-organisation takes place, so that employers can plan effectively in a climate of fair competition and affected employees are protected as a matter of course."*
2. TUPE nonetheless continues to be the subject of regular interpretation via litigation and the ideal of everyone straightforwardly being able to know where they stand when faced with the implementation of the Regulations remains an objective rather than a reality as demonstrated by the following review of the recent developments on the subject.

**A. Variations in Contractual Terms**

**(a) Power v. Regent Security Services [2007] IRLR 226  
upheld by the Court of Appeal 20 November 2007**

3. Regulation 4(4) of the 2006 TUPE Regulations (new TUPE) provide:  
*"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--*  
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  - (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."*

4. The accepted orthodoxy was thus that variations in terms and conditions of employment by reason of or connected to a transfer are invalid, see Lord Slynn of Hadley in Wilson v. St Helens Borough Council [1998] IRLR 706 at para 94:  
*“..But I add that, although on a transfer, the employees’ rights previously existing against the transferor are enforceable against the transferee and cannot be amended by the transfer itself, it does not follow there cannot be a variation of the terms of the contract for reasons which are not due to the transfer either on or after the transfer of the undertaking. 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 authorities to which I have referred, validly be made.”*
5. Compare and contrast the above with the recent Judgment of Mr Justice Elias in Power v. Regent Security Services Ltd [2007] IRLR 226 which deals with the issue of whether an employee can enforce variations of a contract of employment made with the transferee on or around the time of the transfer of an undertaking and by reason of the transfer.
6. In summary, the relevant facts were that the Appellant was first employed by Capital and Counties Plc in 1985. At that stage his contract stipulated that his normal retirement age was 65. In 1997 his contract transferred to Benchmark Group plc and in 2000 he consensually agreed to a change in his contractual retirement age to 60. In 2003 there was a further transfer to ISG Occupancy Ltd. The contractual retirement age remained at 60. ISG then outsourced its facilities management requirements and the appellant was transferred to the Respondent with effect from 1 July 2005. All these transfers fell within TUPE. On 26 June 2005, shortly before the transfer took effect, the Respondent sent the appellant a letter offering him employment the effect of which was ostensibly to alter the contractual retirement age to

65. It was common ground that the variation was by reason of the transfer.
7. On 1 September 2005 the Respondent notified the appellant that they were intending to retire him on his 60<sup>th</sup> birthday. The appellant contended that his contractual retirement age was 65 based on the contract he had received and signed and he objected to his dismissal. It nonetheless took effect and he claimed unfair dismissal.
  8. The important TUPE issue posed in the case was thus the extent to which the transferee and employee can agree between themselves to vary the contract and thereby change post-transfer terms. Could the Respondent resile from the agreement made by arguing that a contract voluntarily entered into by reason of the transfer was void and couldn't be relied upon by either party, applying Foreningen af Arbejdsledere i Danmark v. Daddy's Dance Hall A/S, 324/86 [1988] IRLR 315 ECJ? The Respondent submitted that although there had been a contractual agreement to the effect that the appellant's retirement age would be 65 it was void as a consequence of the TUPE Regulations. The variation was by reason of the transfer and therefore void. The appellant contended that the relevant case law only rendered void any variation which was detrimental to the employee but did not prevent an employee taking advantage of variations which were for his benefit.
  9. The EAT held that the appellant's argument was correct. There was no reason of public policy, as reflected in the Directive, why the appellant should be barred from relying on the contractual amendment (at para 51). On the contrary, it seemed to the EAT that it would be inconsistent with the aim of protecting the workforce to refuse them benefits contractually conferred by the transferee. Nor was it seen as an infringement of the principle that rights should be safeguarded on transfer to allow employees to enforce more favourable rights conferred after or at the time of the transfer.

10. The implications of this judgment are:

- That transfer related variations in conditions of employment can be negotiated and agreed with employees and be effective. Post-transfer harmonisation of terms are thus encouraged where they are of advantage to the employee. Whether or not the new terms are more favourable is not an objective matter but one of perception for the employee (para 54);
- Nothing in the Regulations or the authorities require that a transferee employer be allowed to resile from a voluntarily agreed variation to the contract even where the transfer is the reason for the variation;
- An employee is entitled to rely on a term in the original contract held with the transferor if he chooses to do so rather than relying on a term in a new agreement with a transferee. The employee is the best judge of their own interests. Note however the EAT comment: *“There is a powerful argument why it should sometimes be a condition of so doing (i.e. rely on a previous term) that he gives credit for benefits derived under the new contract...”* (at para 53) and *“although he may well have to give up any benefits obtained under the varied contract as a condition of so doing”* (at para 60). There is thus some doubt about the possibility of an employee being able to cherry pick the beneficial parts of an agreed new package but later reject any disadvantageous aspects of it.

**(b) Amanda Jackson v. Computershare Investor Services Plc**  
**[2007] EWCA Civ 1065, 30 October 2007**

11. The Court of Appeal has held that Regulation 5(1), now 4(1) under new TUPE, cannot be relied on to confer additional rights on an employee after the date of transfer.
12. In summary, the facts were that the appellant brought proceedings in the ET for damages for non-payment of enhanced contractual severance pay. She was made redundant by the Respondent in 2005 to whom her original employment contract had been transferred in 2004. Her original contract contained no provision for enhanced severance pay but the Respondent had an enhanced severance pay scheme. That scheme was incorporated into the appellant's contract of employment when she transferred in 2004. The Respondent operated a dual system of redundancy terms: a distinction was drawn between the date of entry pre 1 March 2002 and New Entrants after 1 March 2002. The pre-March 2002 terms were more generous.
13. Mummery LJ rejected the submission on behalf of the appellant that by reason of the effect of Regulation 5(1) she should be treated as a pre-March 1 2002 entrant:
  - "30. *The TUPE and Acquired Rights provisions aim at preventing the employee in an undertaking from being prejudiced as a result of the transfer of the undertaking: see, for example, **Power v. Regent Security Services Ltd** [200] ICR 970 at paragraph 51-52. It is not, however, their objective to confer additional rights on the employee to improve the situation of the employee: see **Viggosdottir v. Islandspostur HF** [2002] IRLR 425 at paragraphs 35 to 39.*
  31. *So, the true effect of the deeming provision in regulation 5(1), on which the ET relied, is not to give a transferred employee access to employment benefits other than those to which the employee was entitled before the transfer of the undertaking.*

*CIS, as transferee, is substituted for Ci (UK) Ltd, as the contracting party, and the prior obligations of Ci(UK)Ltd and the rights of Mrs Jackson continue to have effect after the transfer....*

33. *In brief, I totally reject the attempt to make artificial use of TUPE in a contextual fashion for the purpose of interpreting CIS's contract for enhanced severance pay terms in a which displaces ET's undoubtedly correct finding of fact that Mrs Jackson joined CIS after 1 March 2002 and miraculously transforms her from being a post-2002 entrant to a pre-2002 joiner."*

**B. Transferor's Reason for Dismissal:**

**Hynd v. Armstrong and others [2007] IRLR 338 (CSIH)**

11. Can a transferor rely on the transferee's reason for dismissal to establish a defence under what was Regulation 8(2), now Regulation 7(2) under the new TUPE Regulations, that the dismissal was for an economic, technical or organisational reason entailing changes in the workforce.
12. In summary, the facts were that the appellant was employed as a solicitor by Morison Bishop in their Glasgow Office. The firm also had an office in Edinburgh. In 2002 the partners at the Edinburgh office decided to dissolve the partnership and form a new Edinburgh based firm, Morisons. The Glasgow partners then decided to form a partnership, Bishops, with effect from 1 August 2002. They decided that the new firm would not need an additional corporate law solicitor and on 31 July 2002 the appellant was dismissed by reason of redundancy. The appellant claimed unfair dismissal in accordance with what was 8(1) TUPE. It was agreed that there had been a transfer of part of an undertaking by Morison Bishop to Bishops within the meaning of TUPE.

13. The Court of Session held that the right to dismiss under 8(2) without incurring liability for unfair dismissal arises where the employer dismisses the employee for reason of its own, relating to the future conduct of its own business, entailing a change in its own workforce and not where the employer dismisses the employee for reasons unrelated to the future conduct of its own business.
14. It is noteworthy that the purpose of the Regulations was taken into account in deciding that it was not intended to expand the circumstances in which an employer may dismiss employees on grounds of redundancy. An interpretation that Regulation 8(2) protects an employer who dismisses an employee on grounds of redundancy prior to the transfer where the employee is surplus to requirements of the transferee was held to be inconsistent with the intention of the Directive.

**C. A Relevant Transfer**

**Balfour Beatty Power Networks Ltd and Interserve v. Wilcox and others [2007] IRLR 63 CA**

15. A relevant transfer requires a transfer of an economic entity that retains its identity. In Regulation 3(2) on new TUPE an economic entity is defined as:  
*“an organised grouping or resources which has the objective of pursuing an economic activity, whether or not that economic activity is central or ancillary.”*
16. Although the events in Wilcox case pre-dated new TUPE the Court of Appeal’s judgment on the issues raised can properly be taken to be applicable when considering whether a transfer has taken place under the new Regulations.

17. In summary, the central facts were that Hyder had contracted with Western Power Distribution, an electricity authority, for a number of services that were provided under three contracts. A dig and lay contract (not relevant to these proceedings); a jointing contract (involving joining electric cables together) and a RASP contract involving the maintenance of overhead lines and replacing poles. Each contract was operated as a separate entity with a contract supervisor and foreman, separate administration and dedicated employees. Each was self-sufficient (para 5 Judgment).
  
18. The contracts came to an end at the end of 2001. The jointing contract was awarded to Balfour Beatty and the RASP contract to Interserve. The issue was whether the employment of the employees in the separate entities had been transferred under the TUPE Regulations. The new contractors did not treat the change as one governed by TUPE. In respect of the RASP contract, vehicles and more specialised equipment were leased for the groundwork. Some of the employees who had worked for Hyder were recruited by Interserve. It was found by the Tribunal that the work was carried out exactly as before by the employees who went to work for Interserve.
  
19. In Wilcox Buxton LJ endorsed the approach that the application of TUPE depends on 2 straightforward questions as set out in Cheesman v. Brewer [2001] IRLR 144:
  - (a) before the transfer was there an identifiable stable economic entity capable of being transferred?
  - (b) on the alleged transfer did the economic entity retain its identity (applying Spijkers) ?
  
20. On appeal to the Court of Appeal it was submitted on behalf of the contractors that in fact there could not be an economic entity as the continuity of the work could not be guaranteed and in fact the contract was lost shortly after the transfer. Such an approach had been clearly rejected in the EAT on the grounds that it would defeat the purpose of

the Regulations and would encourage attempts to avoid the consequences of TUPE . Buxton LJ agreed with the EAT's analysis and went on: *"The enterprise may be stable as a matter of practical and industrial reality, even though its long-term future is not assured."* (at para 39)

21. The Court of Appeal was also unpersuaded by an argument that it was necessary as a matter of European law to distinguish between "labour intensive" and "asset dependent" operations and where asset dependency existed a failure to transfer the assets would result in no transfer within the Regulations applying Oy Liikenne [2001] IRLR 171. In response, Buxton LJ commented: *"I have considerable doubts whether the European Court of Justice intended to lay down a rule as stark as that.....I am respectfully impressed by the view of the Court of Session in the Scottish Coal case [2005] SC 105 at para 35:.....We doubt whether the recent decisions of the Court of Justice in Oy Liikenne and Abler represent the shift away from previous authorities for which counsel for the appellants contended. In both cases, the Court reaffirmed the guidance previously given in Spijkers and other cases that all relevant facts and circumstances must be identified, and weighed in the balance, to determine whether an undertaking has or has not been transferred...."* (at para 52).
22. It will thus be appreciated that, consistent with the considerations of the purpose and objective of the Directive to provide protections for the transferor's employees, attempts to limit the ambit of the Regulations, however inventive, are likely to be resisted in favour of the flexible multifactorial approach. The Court went on to observe in Wilcox that in any event where tools and equipment are leased it would be *"difficult to see how exactly "transfer of leased assets would operate, or how the existence of those assets can override the general obligation to approach the case on a multifactorial basis."*

**D. Objecting to the Transfer**

**New ISG Limited v. B.J. Vernon and Others [2007] EWHC (Ch)**

**14 November 2007**

23. An employee's right to object to the transfer of his contract of employment is contained in Regulations 4(7) and 4(8) of TUPE. It will be recalled that in Hay v. George Hanson (Building Contractors) Ltd [1996] IRLR 427 the EAT held, amongst other things, that an effective objection has to be communicated before the transfer takes place. However, that position has now been distinguished in a very recent High Court Judgment in New ISG Ltd in circumstances where the employees involved were not informed of the identity of the transferee until after the date of the transfer.
24. In summary, the Respondents had restrictive covenants in their contracts with ISG. On the 27<sup>th</sup> July 2007 Administrators sold assets including the goodwill of ISG to New ISG. All the Respondents resigned on 1 August 2007 and began work for ESS. The Respondents contended that they objected within the meaning of Regulation 4(7) and thus that they never became employees of New ISG and accordingly New ISG could not enforce the restrictive covenants in their contracts of employment. New ISG took the point that to be effective the objection must take place before the transfer.
25. His Honour Judge Behrens QC found that the employees were not informed of the identity of the transferee and were not informed of their right under regulation 4(7). He went on to hold that to require an objection to take place before the date of transfer in a case where an employee does not know the identity of the transferee before the date of transfer undermines the fundamental freedom of the employee to choose his employer, applying Katsikas v. Konstandinidis [1993] IRLR 179. The Judge adopted a purposive construction of regulation 4(7) recognising that a valid objection can be made after the transfer where an employee does not know the identity of the transferee and objects

as soon as he finds out (at para 70 of the Judgment). The employees' objection had retrospective effect and thus the effect of the restrictive covenants had not been transferred to New ISG. The Judge distinguished Lord Johnston's approach in Hay v. Hanson on the grounds that the Court in that case did not have in mind circumstances where an employee was not informed of the identity of the transferee until after the transfer. The employees objection had retrospective effect and thus the effect of the restrictive covenants had not been transferred to New ISG.

**E. LEGAL TRANSFER WITHIN THE DIRECTIVE**  
**JOUINI and Others v. PRINCESS PERSONAL SERVICE GMBH**  
**[2007] IRLR 1005**

26. The flexible and purposive interpretation of the protections afforded by the Directive and the Regulations has recently again been demonstrated by the ECJ in Jouini.
27. The Directive applies to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger (Article 1(1)(a). In Jouini the European Court of Justice referred to the flexible interpretation given to the requirement of a legal transfer on account of differences between the language versions of the Directive and the divergences between the laws of the Member States with regard to the concept of legal transfer in keeping with the objective of the Directive which is to safeguard employees in the event of a transfer of their undertaking (at para 24).
28. The ECT went on to hold that:
- “25. That flexible interpretation also relates to the form that the “legal” transfer must take. The concept of legal transfer is thus capable of covering, as the case may be, a written or oral agreement between the transferor and the transferee relating to*

*a change in the person responsible for the operation of the economic entity concerned and a tacit agreement between them resulting from aspects of practical co-operation which imply a common intention to make such a change.....*

27. *The concept of legal transfer, as interpreted by the court, does not therefore preclude the finding of a transfer of a business between Mayer and PPS, even if, as maintained by PPS at the oral hearing, the businesses concerned did not enter into any written or oral agreement.”*

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