Case law relating to service provision changes under the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006

by John McMullen

THE SERVICE PROVISION CHANGE REGIME UNDER TUPE 2006

The definition of a transfer of an undertaking under Article 1 of the Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of an employees' rights in the event of transfers of undertakings, business or parts of undertakings of businesses (the "Acquired Rights" Directive) is whether there is "a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary". The Transfer of Undertakings (Protection of Employees) Regulations 1981 were interpreted in the light of this definition, supplemented by the seminal European Court guidance in *Spijkers v Gebroeders Benedik Abbatoir CV* [1986] ECR 1119. The subsequent cases of *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] IRLR 225 illustrates the uncertainty of the law in the context of the service provision change. *Ayse Süzen* is authority for the fact that the Directive does not apply to a situation where a person has a trusted provision of services to a first undertaking and terminates that contract and enters into a new contract with a second undertaking unless there is a concomitant transfer from one undertaking to another of significant tangible or intangible assets or the taking over by the new employer of a major part of the work force in terms of numbers and skills assigned by the predecessor to the contract.

In labour intensive industries such as cleaning, maintenance and security there is rarely a transfer of assets between transferor and transferee. In such sectors the test is reduced to the question of whether a major part of the workforce is taken on by the putative transferee. In practice, therefore, this meant that the putative transferee had the ability to govern whether there would be a transfer by refusing to take on the employees. The test was also circular. Whether employees had the right to transfer depended on whether they *did* transfer.

When enacting the TUPE Regulations 2006 the traditional test of a business transfer laid down by Article 1 of the Directive was, via regulation 3(1)(a), retained for transfers of undertakings not involving a service provision change. But a wider definition in regulation 3(1)(b) was created for cases of service provision change. Under regulation 3(1)(b) as long as service activities cease by one person (transferor) and are taken up by a new person (transferee) and prior to the change over there was an organised group of employees, the principal purpose of which was to carry out those activities on behalf of the client there will be a transfer. This, overrules *Ayse Süzen* in the UK since the thrust of *Ayse Süzen* was that a mere change over of contractor did not trigger the Directive. *Ayse Süzen* is still the operative case in European law on service provision change and it is still applies in EU Member States apart from the UK. The UK has taken advantage of the liberty in Article 8 of the Directive to make provisions more favourable to employees than are contained in the Directive. Extending TUPE to a wider range of situations in service provision change cases is obviously a measure which is to the benefit as opposed to the detriment of employees, the substructure of which rights are contained in the Directive itself.

This provision is intended to be independent of the traditional business transfer test (now, as stated, contained in Regulation 3(1)(a) of TUPE 2006) and case law on its interpretation has been eagerly anticipated. This paper seeks to analyse such case law and examine the scope and boundaries of the new provision.

THE EMERGING CASE LAW

The first case on the provision was that of an employment tribunal sitting in Reading. But it is instructive. It is a case where, if *Ayse Süzen* were operative, there would have been no transfer of an undertaking. Under regulation 3(1)(b) there was. In *Hunt v Storm Communications Limited, Wild Card Public Relations Limited and Brown Brothers Wines (Europe) Limited* (Case No 2702546/2006, March 27, 2007), Storm Communications was a public relations services provider. Brown Brothers Wines (BBW) was its client. In June 2006 BBW gave Storm notice that it was re-tendering for the provision of public relations services. Storm lost the pitch and the work went, on re-tender, to Wild Card. The claimant had an employment contract with Storm, as an account manager. The job description made no specific reference to any particular client. But she started working on the BBW account from the outset of her employment and continued to do so without interruption until she ceased working for Storm. The claimant's evidence was that she spent some 70 per cent of her time each year on the BBW account. The claimant's evidence was accepted by the employment tribunal.

It is material in this case that no assets transferred from the first service provider to the new service provider. Nor was the new service provider willing to take on Mrs Hunt. Clearly, as stated, if *Ayse Süzen* were operative there would be no transfer. The employment tribunal however had no difficulty in finding there was a service provision change pursuant to regulation 3(1)(b). As this was not a contract wholly or mainly on the supply of goods or a contract concerning activities to be carried out in collection with a big event or task of short term duration (the exceptions to reg 3(1)(b)) the sole remaining question was whether, prior to the service provision change, there was an organised grouping of employees, the principal purpose of which was to provide the services to the client for the purposes of regulation 3(1)(a). Regulation 2(1) also provides that an organised grouping of employees can include a single employee. This, taken with the percentage of time spent on the client's account made Mrs Hunt an organised grouping of employee(s) and therefore the conditions in regulation 3(1)(b) were satisfied.

FRACTIONAL TRANSFERS

So far so good. But some factual scenarios previously unexplored have arisen subsequently testing robustness of regulation 3(1)(b). These problem cases mainly concern fractional transfers where, upon a re-tender, the service is dispersed, not to one single service provider but to a number of service providers. In *Kimberley Group Housing Limited v Hamberley* [2008] IRLR 682, the EAT considered there could be a relevant transfer upon such a re-tender. The question of whether an employee transfers to a particular transferee is a question of fact. This may be illustrated thus. In this case, the transferor provided accommodation and related services for asylum seekers pending determination of their applications for asylum. There were 140 properties in the Middlesbrough and 50 properties in Stockton to accommodate a fluctuating number of asylum seekers. In 2006 the incumbent contractors, Leema, lost the contract and Kimberley and another contractor were awarded the right to succeed Leema as a new contractor. It was held that transfers may take place to more than one transferee even if there was only one transferor. It might be the case that there are some circumstances in which a service is being provided by one contractor to a client that, in the event, is *so* fragmented that nothing which can be properly determined as being a service provision change has taken place – but this was not the case here.

Nonetheless, the EAT decided that, there could not be a *partial* transfer of an employee (a view redolent of the decision in *Hassard v McGrath (NICA)* [1996] NICA 586, a case decided under TUPE Regulations 1981). Either the employee was transferred with the part of the function changing hands or he or she was not. This was a question of fact, taking into account where the substantial majority of the employee's time was spent or required to be spent. In the present case, when 29 per cent of the activities were performed in Middlesbrough by Leema and 71 per cent by Kimberley, the EAT considered that liabilities in relation to the employees concerned should transfer to Kimberley. As to Stockton, where Kimberley took over 97 per cent of the activities formerly carried out by the transferor there was no contest. There was a regulation 3(1)(b) transfer to Kimberley exclusively.

DIFFUSE SERVICE PROVIDERS

The question has arisen, however, whether regulation 3(1)(b) can apply on service provision changes where there are diffuse successor providers. An example in point is the employment tribunal case of *Thomas – James v Cornwall County Council* (Case No 1701021-22) where it was held that it was not possible to apply regulation 3(1)(b) where it was, on the facts, impossible to identify a new service provider following the service provision change. This was a case where Cornwall County Council contracted with *17* service providers to provide a free legal helpline service. Under the scheme, callers would be routed to any available adviser from the service providers concerned. On the contract revision, the service providers were reduced to nine, but it was impossible to determine that there was an organised grouping of employees of servicing a particular client. Regulation 3(1)(b) did not therefore apply. Also to be noted in this context is *Clearsprings Management Limited v Ankers* EAT/0054/L8. This case involved the National Asylum Seekers Service (NASS) the function of which was to provide accommodation for asylum seekers. Contracts were awarded to contractors to provide this service. In the North West there were four such service providers, including Clearsprings. On the expiry of the contract the service was

re-let. Three contractors, but not Clearsprings, were appointed. The asylum seekers looked after by Clearsprings were randomly allocated to the incoming contractors. As in *Thomas-James* no particular transferee could be identified as having taken over the activities; it was so fragmented that regulation 3(1)(b) could not be engaged.

Metropolitan Resources Limited v Churchill Dulwich

Currently, the leading case on the construction of Regulation 3 (1) (b) and its relationship with legacy case law under TUPE 1981 is *Metropolitan Resources Limited v Churchill Dulwich* [2009] IRLR 700. In this case, Migrant Helpline, an agency of the Home Office, had a contract with Churchill Dulwich (CD) under which CD provided accommodation to asylum seekers. Upon the expiry of that contract Migrant Helpline entered into a new contract with Metropolitan Resources Limited (MRL) for provision of the service at a different location. There were also minor changes in the manner in which the service provision was to be carried out including (not only, as stated, a change of location) a change in length of stay, and with a faster turnaround for residents which required some adjustment to staff duties. Finally, not all residents made the move to location on the same date. The employment tribunal held that regulation 3(1)(b) of the Regulations applied; there was a service provision change under that paragraph in that a relevant transfer had occurred. MRL, the putative transferee, appealed that decision, arguing that the employment tribunal had failed to take into account the guidelines of the EAT in *Cheesman v Brewer Contracts* [2001] IRLR 144 (a case on TUPE 1981) which required a multi-factorial approach to the question of whether there was a stable economic entity prior to the transfer and whether there was a transfer of *an economic entity retaining its identity* in the hands of the transferee. It was argued that this approach was still valid as far as regulation 3(1)(b) was concerned.

The EAT (His Honour Judge Burke QC, sitting alone) held that this argument should fail. The history of the TUPE Regulations 2006 was that when a new service provision change regime was intended to remove – or at least mitigate – the uncertainties or difficulties involved in establishing a traditional transfer under TUPE 1981 (or, now, regulation 3(1)(a) of TUPE 2006). "Service provision change" is a wholly new statutory concept. It is, as stated, independent of European law as the Acquired Rights Directive does not make a similar provision. The EAT robustly took the view that case law on TUPE 1981 (and what is now reg 3(1)(a)) is only applicable in cases *other* than service provision changes and, it followed, the guidance of *Cheesman* did not apply to the question of whether there was a service provision change. Thus:

- In considering whether there was a service provision change, the employment tribunal had to consider whether the service provided after the change was fundamentally, or essentially, the same as that provided before the change.
- The answer to that question is a matter of fact.
- The fact that the transfer did not take place wholly on one day, that the employees did not leave the transferor on the date of the transfer and the providers use different locations, were not, individually or collectively, fatal to the existence of the service provision change.
- It cannot have been intended by the draftsman of the new service provision rules that the concept should not apply because of some minor differences between the nature of the tasks carried on after the service provision change, compared with before.
- As to the issue of the time of the transfer, bearing in mind not all users of the service transferred on the same date, the EAT noted that Reg 3 (6) (b) provides that a TUPE transfer can be effected by a series of transactions. It held that that paragraph applies equally to Regulation 3 (1) (a) and to Regulation 3 (1) (b) cases.

However regulation 3(1)(b) does not apply for any activities following the change-over are "wholly different". Notwithstanding the broad approach taken to "activities" in *Metropolitan Resources Limited v Churchill Dulwich* (see above) in which it was stated that those activities after the change-over compared with before cannot be identical, as long as they were fundamentally, or essentially the same as those carried out by the putative transfer, *OCS Group v Jones* [2009] ALL ER (D) 138(Sep) EAT provides an example where regulation 3(1)(b) does not apply because the activities were "wholly different".

In this case, OCS had a contract to provide catering services to the BMW car plant at Cowley. This was to apply for a centrally located restaurant/deli/bar supported by what are described in the decision as four "satellites and a general shop". The service specification provided for English and continental breakfasts, beverages, lunch involving hot soup and hot meals, vegetables as well as a salad bar, hot and cold baguettes, sandwiches, rolls, pizza, jacket potatoes together with hot and cold deserts and normal beverages. The two claimants in this case were respectively a chef and a supervisor working in the satellites.

On a re-tender MIS took over the contract from OCS on August 1, 2007. The employment tribunal found however as a matter of fact, that the MIS contract was a substantially reduced service which was "materially different to that operated by [OCS]". There were now five "dry goods kiosks" – there was no requirement for hot food preparation at the satellites. The satellites were selling pre-prepared sandwiches and salads (although some of the staff duties remained in that the staff were to continue to ensure the cleanliness of tables, the presence of clean trays, condiments and the rotation of sandwiches). The employees argued that there had been a relevant transfer although they had a right to transfer to MIS from OCS.

The employment tribunal held, as stated, the MIS contract was "materially different" and "wholly different" from the OCS contract. It was switched from a full time canteen service to a dry goods and previous catering staff who were chefs and the like were, in effect, becoming sales assistants working in a kiosk.

Another case where arguments under regulation 3(1)(b) failed is *Ward Hadaway Solicitors v (1) Love (2) Scott (3) Capstick Solicitors LLP* EAT/0471/09. In this case, Ward Hadaway carried out legal work, externally, for the Nursing & Midwifery Council (NMC) as a panel solicitor. Upon a re-tender, Capstick's were appointed the sole external legal services provider. As part of the re-structuring of the provision of legal services, a fair amount of work was also taken in-house by NMC, Ward Hadaway were not required to transfer over any work in progress to Capsticks and the firm continued to work on the files it had already been given. Employment tribunal felt that there had been an organised grouping of employees which had, as its principal purpose, been carrying out the activities on behalf of the client. But it found that it was not the case that activities ceased to be carried out by a contractor on a client's behalf and carried out instead by another person (a subsequent person) on a clients behalf as is required by regulation 3(1)(b)(ii). Ward Hadaway continued to work on its files; there were no activities which have ceased to be carried out by Ward Hadaway. There were some 100 – 140 such files providing work for Ward Hadaway for at least six months. Therefore there was no service provision change. The EAT (Judge McMullen QC presiding) agreed and dismissed Ward Hadaway's appeal and, there being no TUPE transfer, any termination claim by employees not taken on by Capsticks lay with Ward Hadaway.

CONCLUSION

Upon the enactment of regulation 3(1)(b) of TUPE 2006 it is widely expected that litigation over service provision changes would virtually cease, so wide is its apparent compass. New factual scenarios, including radical reconstruction of service provision contracts and fractional transfers to multiple service providers have indicated however the area will continue to be a fertile ground for litigation.

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