

**'THE PITFALLS, PERILS AND PRACTICE OF
TRANSFERRING AN UNDERTAKING'**

An introduction to the Transfer of Undertakings
(Protection of Employment) Regulations 2006

What is the purpose behind the Regulations?

It is important to commence by bearing in mind, as was said by Lord Atkins in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 HL, that an employee's right to choose for whom he may serve constitutes the main difference between a servant and a serf. Hence the transfer of a business from one party to another would, but for the regulations, have the effect of automatically terminating contracts of employment, as employees cannot be required to consent to the change in the identity of an employer. Prior to the regulations a business transfer gave rise to a dismissal which, depending upon the circumstances, may have enabled the employee to claim damages for wrongful dismissal. Of course a redundancy payment and/or compensation for unfair dismissal would now be an available remedy in appropriate cases.

Perhaps the function of the Regulations was best explained by Lord Bingham in the *North Wales Training and Enterprise Council Ltd v. Astley & Ors* [2006] UKHL 29 ('The Celtec case'): *'If an employer transferred his business undertaking to another party, the position at common law of an employee who worked for the first employer before the transfer and for the new employer after it was in principle clear. His previous contract of employment was not varied, because the second contract was made between different parties. But the first contract was the subject of an express or implied novation, involving the termination of the first contract and its replacement by a new contract. This was a readily intelligible and rational analysis. But it could work disadvantageously to the employee in any situation where his rights depended on showing that his employment had been continuous for a given period, since a novation necessarily involved a discontinuity. It was this disadvantage which the legislation now under consideration was intended to obviate. The benign intent of the legislation is not in question. But its effect is, inevitably, to introduce a fictional element into this tripartite relationship, since (where the legislative conditions are satisfied) the*

employee is treated as having been employed by the new employer all along and ex hypothesi such is not the case.'

What is the Regulations' principal effect?

The beating heart of the Regulations is to be found at 4(1), which tells us that 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.'

Regulation 4(2) confirms that:

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

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.

However, it should be noted that Regulation 10 makes special provision for occupational pensions, and that such rights are unlikely to transfer other than by express agreement between the transferee and employee. Indeed, it is easy to imagine why an employee with a substantial period of service may wish to object to their transfer under Regulation 4(7) so as to retain the benefit of the transferor's pensions provision.

How did the Regulations come into being?

It all began on St. Valentine's day 1977 with the issuing of Council Directive 77/187/EEC, known as the 'Acquired Rights Directive', which resulted in the now repealed Transfer of Undertakings (Protection of Employment) Regulations 1981.

It is worth appreciating that the ET is supposed to give effect to the intention of the Acquired Rights Directive. In *Litster and others v Forth Dry Dock &*

Engineering Co Ltd and another [1989] IRLR 161, Lord Templeman stated: *'Thus the courts of the United Kingdom are under a duty to follow the practice of the European Court of Justice by giving a purposive construction to Directives and to Regulations issued for the purpose of complying with Directives.'*

In explaining the necessity for its introduction, the preamble to 1977 Directive stated:

- Economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers.
- 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.
- Differences still remain in the Member States as regards the extent of the protection of employees in this respect and these differences should be reduced. These differences can have a direct effect on the functioning of the common market it is therefore necessary to promote the approximation of laws in this field.

After more than 20 years of litigation on the scope and interpretation of the 1977 Directive and 1981 Regulations, plus a number of amendments that incorporated decisions of the European and domestic courts, the consolidated Council Directive 2001/23/EC was conceived. What followed in the United Kingdom was a considerable period of consultation and debate that shaped the Transfer of Undertakings (Protection of Employment) Regulations 2006, which came into effect of 6th April 2006.

What were the main changes to the 1981 Regulations?

The 2006 Regulations introduced a more comprehensive application to service provision situations where services are outsourced, brought in house or assigned to a new contractor. The purpose is to achieve greater certainty that TUPE

applies to labour intensive services such as, for example, office cleaning, catering, security, and refuse collection – Regulation 3(1)(b).

The territorial application of TUPE was extended so that employees who ordinarily work outside the United Kingdom may also be caught by the transfer - Regulation 3(4)(c).

Variations to contracts of employment were made expressly void if the main reason is connected with the transfer, unless:

- the principal reason for the variation is an 'ETO' (that is to say an economic, technical or organisational) reason entailing changes in the workforce - Regulation 4(4); or,
- the transferor is insolvent, and either the transferor or transferee agrees the variations with the appropriate representatives of the employees (i.e. a trade union or elected employee representatives) - Regulation 9(1).
- Regulation 7(2) now explains how employers can lawfully make transfer related dismissals on an ETO basis.

Under Regulation 8 transfers of insolvent businesses are now more viable by the introduction of greater flexibility to attract potential buyers. For example:

- If insolvency proceedings have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner, then liability for redundancy, notice and other payments to employees of insolvent companies are NOT transferred to the transferee – Regulation 8(5).
- Regulations 4 (deemed continuity of service) and 7 (automatic unfair dismissal) do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor

and are under the supervision of an insolvency practitioner – Regulation 8(7).

Under Regulation 11 the transferor is obliged to provide 'employee liability information' to the transferee at least a fortnight before the transfer. This includes information about:

- the identity and age of employees;
- their statement of terms and conditions of employment;
- any disciplinary proceedings or grievance issued in the last two years;
- any court or tribunal cases brought by the employees in the last two years, or any court or tribunal cases which the transferor has reasonable grounds to believe that an employee might bring;
- any collective agreement which will have effect after the transfer.

Why should I care?

A failure to appreciate that the Regulations apply can have very expensive consequences. In particular:

- A transferee may find itself unwittingly lumbered with liabilities arising out of acts or omissions of the transferor which occurred long before the transfer - Reg 4.
- If a transferred employee's working conditions are substantially changed to his or her material detriment and the employee resigns as a result, the transferee will be deemed to have dismissed the employee - Reg 4(9).
- Dismissals of employees (whether express or constructive) may well be found to be automatically unfair unless they can be shown to be wholly unrelated to the transfer or were for a valid ETO reason - Regs 4 & 7.
- A transferor who has failed to provide employee liability information in accordance with Regulation 11 may find

itself paying compensation to the transferee of at least £500 in respect of each affected employee, more if the tribunal finds it just and equitable having regards to the loss of the transferee - Reg 12.

- Transferors and transferees may find themselves jointly and severally liable to pay compensation of up to 13 weeks' per affected employee where there has been a failure to comply with the consultation provisions - Regs 13-15.

Who do the Regulations cover?

Regulation 4(1) makes it plain that the rights preserved are those of any person employed by the transferor and assigned to the organised grouping of resources or employees to be transferred. Assigned in this context means assigned 'other than on a temporary basis' (Reg 2(1)).

Occasionally it is important to establish whether a particular employee of the transferor is 'assigned' to the undertaking or business being transferred and whether or not the assignment may be regarded as temporary. In Botzen v Rotterdamsche Droogbok Maatschappij BV [1985] ECR 519 the ECJ observed:

'An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned.'

For the purposes of Regulation 4(1) any reference to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer (Reg 4(3)) or who would have been so employed had he not been dismissed for a non ETO transfer connected reason.

On the sometimes thorny issue of when a transfer is actually said to take place it is worth reading the decision of the House of Lords in Celtec [2006] UKHL 29, and the judgment of Mrs Justice Smith in Capita Health Solutions Ltd v McLean [2008] IRLR 595, both of which involved employees who had been seconded at about the time of the transfer and are unfortunately beyond the scope of this introduction to the topic.

What are the jurisdictional limits of the Regulations?

The Regulations apply to the transfer of an undertaking situated in the UK immediately before the transfer (Reg 3(1)), and, in the case of a service provision change, where there is an organised grouping of employees situated in GB immediately before the change (Reg 3(3)(a)(i)).

For example, where a contract to provide website maintenance comes to an end and the client wants someone else to take over the contract, if in the organised grouping of employees that has performed the contract one of the IT technicians works from home, which is outside the UK, that should not prevent the Regulations applying to the transfer of the business. However if the whole team of IT technicians worked from home which was outside the UK, then a transfer of the business for which they work would not fall within the Regulations as there would be no organised grouping of employees situated in the United Kingdom.

Regulation 3(4) sets out the justiciability of the Regulations and provides that they apply to:

- public and private undertakings engaged in economic activities whether or not they are operating for gain;
- a transfer or service provision change howsoever effected notwithstanding -
 - that the transfer of an undertaking, business or part of an undertaking or business is governed or effected by the law of a country or territory outside the United Kingdom or that the service provision change is governed or effected by the law of

a country or territory outside Great Britain;

- that the employment of persons employed in the undertaking, business or part transferred or, in the case of a service provision change, persons employed in the organised grouping of employees, is governed by any such law;
- a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.

For example, if there is a transfer of a UK exporting business, the fact that the sales force spends the majority of its working week outside the UK will not prevent the Regulations applying to the transfer, so long as the undertaking itself (comprising, amongst other things, premises, assets, fixtures & fittings, goodwill as well as employees) is situated in the UK.

Are there any types of transfer that are excluded from the Regulations?

To qualify as a business transfer, the identity of the employer must change. The Regulations do not therefore apply to transfers by share take-over because, when a company's shares are sold to new shareholders, there is no transfer of a business or undertaking: the same company continues to be the employer (Brookes v Borough Care Services [1998] IRLR 636, [1998] ICR 1198, EAT). Nor would a share take over be a service provision change within the meaning of Regulation 3(1)(b). Furthermore, the Regulations do not ordinarily apply where only the transfer of assets, but not employees, is involved. So, the sale of equipment alone would not be covered.

An administrative re-organisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not, by virtue of Regulation 3(5), a relevant transfer. Both the Acquired Right Directive and the TUPE Regulations make it clear that a reorganisation of

a public administration, or the transfer of administrative functions between public administrations, is not a relevant transfer within the meaning of the legislation. However, the Regulations will likely apply where there is contracting out to the private sector.

How do the Regulations apply to business transfers?

The 1977 Acquired Rights Directive and 1981 Regulations dealt principally with business sales, mergers and acquisitions. This is expressed in Regulation 3:

(1) These Regulations apply to

(a) 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.

It should be noted that a relevant transfer (whether a business transfer or service provision change) may be effected by a series of two or more transactions (Reg 3(6)(a)) and may take place whether or not any property is transferred to the transferee (Reg 3(6)(b)).

To be covered by the Regulations and for affected employees to enjoy the rights under them, a business transfer must involve the transfer of an 'economic entity which retains its identity'. In turn, an 'economic entity' means 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary' (Reg 3(2)). The economic entity test would generally mean that the Regulations apply where there is an identifiable set of resources (which includes employees) assigned to the business or to a part of the business which is transferred, and that set of resources retains its identity after the transfer.

The economic entity test can be broken into two parts:

Is there a 'stable economic entity' that is capable of being transferred?

Will the economic entity retain its identity after the transfer in question?

The thorough judgment of Mr Justice Akenhead in Law Society England and Wales v Secretary of State [2010] EWHC 352 (QB) well illustrates a case in which it was held that there was a stable economic entity (in the form of the Legal Complaints Service) but that it had lost its identity (when its function was taken over by the Office for Legal Complaints).

The Department for Innovation and Skills guidance titled 'The TUPE Handbook' (June 2009)¹ states: 'To decide if there is a stable economic entity that is capable of being transferred, the factors to consider include:

Is the type of business being conducted by the transferee (incoming business) the same as the transferor's (outgoing business)?

Has there been a transfer of tangible assets such as building and moveable property (although this is not essential)?

What is the value of the intangible assets at the time of the transfer?

Have the majority of employees been taken over by the new employer?

Have the customers been transferred?

What is the degree of similarity of the activities carried on before and after?

Much of the case law in relation to what constitutes an undertaking and a relevant transfer for the purposes of the 1981 Regulations will continue to be relevant in relation to TUPE 2006 so far as a business transfer under Reg 3(1)(a) is concerned.

In Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 the EAT reviewed some key ECJ decisions and distilled from these a number of factors:

'As to whether there is an undertaking ... an organised grouping of persons and assets

¹ <http://www.bis.gov.uk/files/file20761.pdf>

enabling (or facilitating) the exercise of an economic activity which pursues a specific objective ...

such an undertaking ... must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible;

in certain sectors, such as cleaning and surveillance, the assets are often reduced to their most basic and the activities are essentially based on manpower;

an organised grouping of wage-earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity;

an activity of itself is not an entity; the identity of an entity emerges from other factors, such as its workforce, management style, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.'

As to the question of whether there had been a transfer, the following factors were highlighted by the EAT in *Cheesman*:

- the decisive criteria for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated ... by the fact that its operation is actually continued or resumed;
- in considering whether the conditions for ... a transfer are met, it is necessary to consider all the factors characterising the transaction in question, but each as a single factor and none is to be considered in isolation;
- amongst the matters ... for consideration, are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before

and after the transfer, and the period, if any, in which they are suspended;

- account has to be taken ... of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on;
- where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction ... cannot logically depend on the transfer of such assets;
- even where the assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer;
- the absence of any contractual link between the transferor and transferee may be evidence that there has been no relevant transfer, but it is certainly not conclusive as there is no need for any direct contractual relationship;
- when no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.

The following decisions of the ECJ serve to illustrate the circumstances in which a transfer may be found to have occurred:

P Bork International A/S v Foreningen af Arbejdsledere i Danmark: 101/87 [1989] IRLR 41 (the forfeiture of a lease followed by the sale of the freehold to the new owner);

Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S: 324/86 [1988] IRLR 315 (the termination of a non-transferable restaurant and bar lease and grant of the new lease);

Dr Sophie Redmond Stichting v Bartol: C-29/91[1992] IRLR 366 (the transfer of a subsidy from one foundation engaged in assisting drug addicts to another);

Merckx v Ford Motor Co Belgium SAC-171/94, 172/94 [1996] IRLR 467 (the termination of a dealership and its award to another entity without any transfer of assets);

Jouini and Others v Princess Personal Service GmbH (PPS): C-458/05 [2007] All ER (D) 84 (Sep), [2007] IRLR 1005 where part of the administrative personnel and part of the temporary workers were transferred to another temporary employment business in order to carry out the same activities in that business for the same clients, the assets affected by the transfer (the administration and temporary workers) were sufficient in themselves to allow the services characterising the economic activity in question to be provided without recourse to other significant assets; and

Although the transferor and transferee will, in most instances, be unconnected parties, it is to be borne in mind that a relevant transfer can take place between companies that are in the same group: Allen v Amalgamated Construction Co Ltd [2000] IRLR 119 (ECJ case C-234/98).

What is a service provision change?

One of the key changes brought about by the 2006 Regulations was the introduction of the concept of the 'service provision change' (SPC) and the extension of the definition of a relevant transfer to include a SPC.

Regulation 3 (1)(b) defines a SPC as a situation where:

(i) activities cease to be carried out by a person ('a client') on his own behalf and are carried out instead by another person ('a contractor') on the client's behalf; (ie an outsourcing situation)

(ii) activities cease to be carried out by a contractor on the client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ('a subsequent contractor') on the client's behalf; (ie a re-tendering situation)

(iii) activities cease to be carried out by a contractor or a subsequent contractor on the client's behalf (whether or not those activities had

previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf (ie in-sourcing).

And where the requirements of Regulation 3(3) are also satisfied, that is:

(iv) Immediately before the SPC

(a) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(b) the client intends that the activities will, following the SPC, be carried out by the transferee other than in connection with a single specific event or a task of short term duration;

(c) The activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

Which are the simplest questions to answer when examining a potential SPC?

Is there an activity consisting wholly or mainly of the supply of goods?

In connection with a service provision change, where the activities concerned comprise 'wholly or mainly' of 'the supply of goods' for the client's use, these activities will not satisfy the conditions necessary to constitute a relevant transfer (Regulation 3(3)(b)) (although there is nothing to prevent such circumstances giving rise to a transfer under Regulation 3(1)(a), if there is a transfer of an economic entity retaining its identity).

So, the BIS Guidance explains that the Regulations are not expected to apply where a client engages a contractor to supply, for example, sandwiches and drinks to its canteen every day, for the client to sell on to its own staff. If, on the other hand, the contract was for the contractor to run the client's staff canteen, then this exclusion would not come into play and the Regulations might therefore apply.

Is there a single specific task or a task of short-term duration?

In the context of a service provision change, where it is intended that the activities will, following the service provision change, be carried out by the transferee 'in connection with a 'single specific event or task of short-term duration' this will not give rise to a relevant transfer (Reg 3(3)(a)(ii)).

Accordingly the Regulations would not be expected to apply where a client engages a contractor to organise a single conference on its behalf, even though the contractor has established an organised grouping of staff – e.g. a 'project team' – to carry out the activities involved in fulfilling that task. Thus, were the client subsequently to hold a second conference using a different contractor, the members of the first project team would not be required to transfer to the second contractor.

How many people do you need for an organised grouping of employees?

Despite the use of the plural 'employees' in Regulation 3(1)(b), it is clear that a sole employee may in fact meet the definition of an 'organised grouping of employees' (Regulation 2(1)).

What if the business has lost its identity?

Regulation 3(1)(b) asks whether the relevant activities are carried out by the transferee and is not concerned with whether the original business identity is preserved. Indeed in many SPC transfers the original identity will be destroyed in the process. Similarly, Regulation 3(1)(b) is not concerned with whether any assets transfer. It follows that the guidance set out in *Cheesman* is irrelevant to a tribunal's consideration of whether there has been a Regulation 3(1)(b) transfer (although it is very relevant in determining whether there has been a Regulation 3(1)(a) transfer).

What are the more challenging issues to grapple with in identifying a SPC?

Regulation 3(1)(b) speaks of the activities ceasing to be carried out by one party and being carried out by another party instead.

However, in practice, outsourcing, insourcing and re-tendering activities are often more complicated.

They frequently involve employees of the alleged transferor who spent some of their time carrying out activities on behalf of more than one client, and changes where the activities after the change are carried out by more than one contractor on behalf of a client.

Remember that an SPC must not only be an outsourcing, re-tendering or insourcing situation. There must also be:

- an organised grouping of employees in Great Britain whose principal purpose is to undertake the activities concerned;
- there must be this organised grouping immediately before the transfer;
- the individual employee must be assigned to that organised grouping other than on a temporary basis in order to transfer.

What if employees are not engaged solely for one client?

The BIS guidance on the 2006 Regulations makes clear that the intention behind the wording of Regulation 3(1)(b) is that the transferor should have in place a team of employees 'essentially dedicated to carrying out the activities being transferred'. So where a courier service provided on behalf of B is provided by different employees of A making deliveries on an "ad hoc" basis, this would not constitute an organised grouping of employees whose principal purpose was to undertake the courier activities on behalf of B.

However, neither the guidance nor the Regulations go so far as to suggest that there must be a group of employees who spend 100% of their time on the relevant client's activities in order for them to be an organised grouping with that client's activities as their principal purpose. Clearly if 5 of the contractor's employees spend 100% of their time on one particular client's activities, that will most probably be an organised grouping whose principal purpose is to carry out that client's activities. On the other hand if the contractor has 100 employees and a particular client's work is split amongst them on an ad hoc basis, they will not be such an organised grouping. It is the middle ground which is more difficult.

In Hunt –v- Storm Communications Ltd, Wild Card Public Relations Ltd and Brown Brothers Wines (Europe) Ltd (case no 2702546/2007) C was originally employed by Storm as a PR account manager. Brown Brothers Wines ('BBW') engaged Storm to undertake its PR and C spent about 70% of her working year carrying out work on the BBW PR contract. In 2006, BBW informed Storm that the contract would end on the 26th July 2006. There was then a period of time when BBW was undertaking PR on a 'caretaker basis'. On the 8th August 2006 Storm unsuccessfully pitched for the new contract. The contract was instead awarded to Wild Card on 29th August 2006 and Wild Card began providing PR on behalf of BBW on the 2nd October 2006. Storm believed that TUPE applied to transfer C to Wild Card. Wild Card disagreed and C's employment was terminated.

C brought a claim in the employment tribunal, which found that she:

- was the sole employee in the 'organised grouping of employees';
- had spent 70% of her working year on the BBW contract (including evening and weekend work at home) and her principal purpose was to work on the BBW contract;
- had transferred employment on the 28th July 2006, despite the fact that Storm did not know at this stage that it would not be awarded the new contract and that Wild Card did not know that it would win the new contract.

The decision in Hunt appears surprising in its approach to the question of the date of the transfer. However, on the facts of that case, the tribunal was probably influenced by the fact that the delay in the awarding of the new contract was to do with the impact of TUPE.

What if there is more than one potential transferee?

The question of whether a Regulation 3(1)(b) transfer will occur is even more complicated where a service is intended to be carried out by

more than one party in the future. In principle the Regulations can apply in this case: Kimberley Group Housing Ltd –v- Hambley [2008] IRLR 682. However, where the activities are to be carried out by a number of contractors after the change, it will be necessary to identify that the activities previously carried out by the organised grouping to which the particular employee was assigned have gone to an identifiable transferee. It may be that the activities have become so fractured that this is not possible, in which case there will be no Regulation 3(1)(b) transfer.

Kimberley itself is an example of the tribunal and EAT managing to repair what might have seemed to be a fracture. The six Cs were employed by Leema Homes which entered into a 5 year contract with the Home Office in 2000 to provide accommodation to asylum seekers in the Middlesbrough and Stockton areas. The Cs worked providing these services under the Home Office contract and 3 of them were based in Leema's Middlesbrough office, 3 in the Stockton office. In 2006 Leema lost the contract and the Home Office instead awarded new contracts to Kimberley and Angel to carry out the services Leema had previously provided. The tribunal treated the provision of services in Middlesbrough and Stockton as essentially two separate contracts. It found that after Leema lost the contract Kimberley performed 71% of the Middlesbrough work and Angel 29% and that Kimberley performed 97% of the Stockton work, with Angel only performing 3%.

In Kimberley it was clear that prior to the change there was a designated team of employees carrying out the Home Office contract work. It was also clear that the activities previously carried out by Leema were now being carried out by two other identifiable contractors. The difficult question was what that meant for the employees. Did their employment transfer? Who had liability for them?

The tribunal held that liability for the Cs should be apportioned between Kimberley and Angel according to the percentage of Leema's activities taken on by the particular contractor. On appeal by both Kimberley and Angel, the EAT held that the tribunal had been wrong to apportion liability between the transferees. It should have looked at which aspect of the activities in the service

provision the employees were assigned to. If the employee was assigned to the part transferred to a particular transferee, his employment would transfer to that transferee. According to Langstaff J *'what is to be focused upon is essentially the link between the employee and the work or activities which are to be performed'*.

So what of those cases, recognised in Kimberley, where the activities are too fractured? This was the situation in Clearspring Management Ltd –v- Ankers [2009] All ER (D) 261 (Feb) where the EAT held that no Regulation 3(1)(b) transfer took place because provision of the activities had become so fragmented that no particular transferee could be said to have taken on the activities. Prior to the alleged transfer 4 contractors, one of which was Clearspring, provided accommodation to asylum seekers under contracts with the National Asylum Seekers Service (NASS). When those contracts expired, NASS awarded contracts to 3 contractors, not including Clearspring. The asylum seekers looked after by Clearspring were randomly allocated to the incoming contractors. There was *'no discernible pattern of re-allocation'* of the activities previously carried out by Clearspring and there was accordingly no Regulation 3(1)(b) transfer.

How similar must the transferred activities remain?

It is important that the activities carried out before the change are 'fundamentally and essentially' the same as those carried out by the alleged transferee after the change: OCS Group UK Ltd –v- Jones [2009] All ER (D) 250 (May). In that case a change from (a) the preparation and service of hot food, cleaning and maintenance of a canteen to (b) cleaning and maintaining the canteen but serving only ready made sandwiches and salads with no hot food or food preparation, was sufficient to render the activities 'materially different' such that no Regulation 3(1)(b) transfer took place.

It is important to analyse carefully what the activity is which was carried out by the original contractor and whether the new party really is carrying out 'fundamentally or essentially' the same activity.

The point might sound obvious but there are cases where what looks like a transfer situation at first blush might not be once the activities are properly analysed. A recent illustration of this point was Ward Hadaway –v- Love & Scott & Capsticks [2010] All ER (D) 138 Sep. After a re-tendering process, the Nursing & Midwifery Council (NMC) decided that it would not in future refer cases to a panel of firms including Ward Hadaway (WH) but would either handle the cases itself or refer its cases to Capsticks. However, none of the work in progress which WH had already been instructed on was handed over. In other words, even after the change WH retained the NMC work it had already been instructed on.

On the facts of that case, the EAT held that the tribunal had been entitled to reach the view that no activities had transferred from WH to Capsticks. The activity carried out by WH was to handle the cases it had been instructed on, which activity was not passed over. However, the EAT did recognise that in appropriate cases, activities carried out by a panel firm might include provision of a dedicated team with administrative support to deal exclusively with that client's work. In that type of case if the client then awarded its work to another firm, there could be a transfer of the relevant activities because the activities would go beyond that which the tribunal found in Ward Hadaway.

What guidance has emerged on the service provision transfers?

In Metropolitan Resources Limited –v- Churchill Dulwich Ltd [2009] IRLR 700, HHJ Burke QC took the opportunity to give some guidance on how potential SPC cases should be approached:

- Case law concerning the 1981 Regulations is not necessarily helpful in determining whether there has been a SPC transfer.
- A difference in location of the provision of services is highly unlikely on its own to determine that no SPC has taken place.
- The fact that the new contractor performs some additional duty or function is unlikely to negate the application of Regulation 3(1)(b).

In determining whether there has been a SPC, the tribunal has to consider whether the service provided after the change is fundamentally or essentially the same as that provided before the change and the answer to that question is a matter of fact.

On the facts of Metroplitan Resources Limited the EAT upheld the tribunal's decision that a SPC had taken place. Migrant Helpline (MH) had a contract with Churchill Dulwich Ltd (CD) to provide accommodation to asylum seekers at Barry House. 2 months before that contract expired, MH entered into a replacement contract with Metropolitan Resources Ltd (MRL) to provide accommodation at the more secure Coombe House. From that date, all new asylum seekers were sent to Coombe House, with just a few left at Barry House. The claimants, employees of CD, continued to work at Barry House until the contract between MH and CD expired. The claimants then presented for work at MRL claiming that there had been a SPC. MRL denied that there had been a transfer, pointing to the fact that MRL provided accommodation for shorter periods of time than CD had done and that the location at which accommodation was provided was different and more secure. The tribunal held that essentially the same activities carried out by CD were now being carried out by MRL and that there had been a relevant transfer on the day on which MH ceased to send any more asylum seekers to Barry House.

What is clear is that in a potential SPC situation, the facts must be examined very carefully in order to determine whether there is a relevant transfer. The fact sensitive nature of decisions in this area means that it may be difficult to predict what view a tribunal will take in all but the clearest cases. Being a question of fact, it is also likely to be difficult to challenge an unfavourable tribunal decision in the EAT.

What might the future hold?

It may be that the 2006 Regulations do not remain in their current form for much longer. The new government has stated that it intends to *'review employment and workplace laws, for employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for*

enterprise to thrive'. It has also said that it wants to ensure that British businesses are not disadvantaged in comparison to their European counterparts. This may mean amendments to the 2006 Regulations which go beyond the relevant Directive. So where might we see change?

The first provision which the government is likely to want to change is Regulation 3(1)(b), concerning a SPC. Prior to the election Lord Hunt, on behalf of the Conservatives, wrote that *'the TUPE regulations here in the UK go beyond what is required by EU law, for the EU directive states only that regulations should apply where there is a transfer of an economic entity which retains its identity. A conservative government would seek to rein in those of the [Labour government's] SPC ...that go beyond what is required. This would take many transactions outside the scope of the law, giving firms more freedom to out-source work and change service providers, giving service providers more freedom to bid for contracts'*.

It remains to be seen whether the government will now make these changes and, if it does, to what extent the current Regulations might be amended. On one reading of Lord Hunt's statement it might seem that the concept of a SPC could be eliminated all together.

The other provisions which might come under review are the insolvency provisions, in particular Regulation 8. Back in May 2006 Lord Hunt proposed a motion that the 2006 Regulations be revoked on the grounds that the insolvency provisions were *'drafted in language that is so loose and imprecise it is not possible to discern with any clarity how they are supposed to work. Instead of bringing clarity, they bring confusion to new, unprecedented heights.'*

On the issue of TUPE and insolvency, it is also worth looking out for the EAT's decision in Oxford Tool & Gauge Ltd –v- Barke & ors; Olds –v- Late Editions Limited UK/EAT/0320/09/RN & 0321/09/RN, a case concerning the issue of when a buyer of a business in administration can avoid the automatic transfer of employees.

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