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TUPE and changes to contract

British Fuels Ltd v Meade and Baxendale

Wilson and others v St Helens Borough Council [1998] IRLR 706

When there is a transfer of undertaking covered by TUPE, the contracts of employment should transfer to the new employer unchanged. The question which has vexed the UK courts is whether an employer can change those terms and conditions, and if so how.

The Court of Appeal attempted to deal with the issue in these cases, but only created further confusion (see [1998] ICR 387 and issue 13). Its approach was criticised by the Employment Appeal Tribunal in Cornwall County Care v Brightman (see [1998] IRLR 228).

The House of Lords has now given its view. It is not a view which will encourage certainty or consistency in future transfers.

The two cases

Two cases were joined together for the House of Lords hearing. Each concerned a situation where there was a transfer of a business at a time when neither employer nor employees appreciated that TUPE might apply to the transaction. Existing staff were dismissed and re-employed on less favourable terms. In the St Helens case there was an overall reduction in the number of staff.

The cases involved two questions.

The first was whether the dismissals validly brought to an end the pre-transfer contracts of employment leaving employees only with a remedy for unfair dismissal, or whether the dismissals should be treated as void and ineffective so that the employees remained entitled to their old terms and conditions.

The second was whether employees who remained on their old terms and conditions could validly agree with their new employers changes in those terms and conditions where the transfer was the reason for the change.

Is dismissal valid?

The House of Lords decided that the dismissals were valid, even if they were for a reason connected with the transfer. The European Directive leaves it up to EU countries to decide on remedies for breaches of the law.

Regulation 8 of TUPE provides a remedy of unfair dismissal. This means a dismissal for a reason connected with the transfer is regarded as bringing the contract to an end, but giving a right to remedies for unfair dismissal. Liability for the unfair dismissal becomes the responsibility of the transferee who has taken over the business.

Can existing contracts be changed?

Because of its view on the first question the House of Lords did not strictly need to deal with the second question. It did, however, attempt to do so, whilst saying that it would have referred the issue to the European Court.

The House of Lords accepted that an agreed variation in contract is invalid where the reason for the change is the transfer itself and no other reason. This applies whether the dismissal takes place before the transfer, at the time of transfer or later.

However, where the reason for the changes was something other than merely the transfer, an agreed change will be effective. Where there was an economic, technical or organisational reason for the change, a Tribunal may conclude that the transfer was not the reason for the change and that the change is valid.

Implications

This means that where an employer dismisses workers on or before the transfer, the workers cannot insist on a job with the transferee on the same terms and conditions. Their only remedy is to claim unfair dismissal.

This means that employers can make changes to contracts through unlawful dismissals. This undermines the protection of the Directive.

Unfair dismissal compensation is not adequate to deal with this abuse. European law may well require that the only adequate remedy in these circumstances would be reinstatement on the previous terms and conditions: an approach adopted by the

Employment Tribunal in the Hillingdon Hospital case. Certainly any attempt to impose a cap on the level of compensation would breach European law.

Employers who try to get round TUPE by dismissing and re-employing workers face substantial claims. If all of the workforce are re-employed on new terms and conditions, the sackings will be automatically unfair. Even if reinstatement is not awarded, all the workers will be entitled to a basic award for unfair dismissal plus compensation for the reduction in earnings. If the dismissals result in a reduction in staff, they may still be unfair and will also involve the need for redundancy payments.

Employers who do not take the dangerous step of dismissing staff can secure changes by agreement where the transfer is not the reason for the change. As the House of Lords observed, it may be difficult to decide whether the variation was attributable to the transfer or some separate cause.

Time limits in discrimination cases

Mills and Crown Prosecution Service v Marshall [1998] IRLR 494 EAT

Aniagwu v L.B. Hackney 2/9/98

In discrimination cases, that claims must be lodged within three months of the act of discrimination complained of. The time limit can be extended if, in all the circumstances of the case, the Tribunal considers that it is 'just and equitable' to extend time.

The more difficult question to answer is when it will be just and equitable to extend the time limit in any particular case. The appeal courts have traditionally shied away from laying down guidelines, preferring to leave the matter to the discretion of the Tribunal.

Provided the Tribunal approaches the case with an open mind and considers the circumstances, successful appeals would be rare indeed. Using bizarre language, courts did not want 'the words of the statute to become encrusted with the barnacles of authority'.

Tribunals were to consider the prejudice which each party would suffer as a result of a decision to either extend or not extend time and to have regard to all the circumstances of the case.

Clearer guidance has now been given in the landmark case of Mills and CPS v Marshall by the President of the Employment Appeal Tribunal. The case was an out of time transsexual case which was not brought until 3 years after the alleged act of discrimination and after the European Court of Justice ruled in P v S that discrimination against transsexuals came within the definition of discrimination 'on grounds of sex' in the Equal Treatment Directive and was therefore potentially unlawful.

The EAT upheld the Employment Tribunal's decision to allow the late claim stating that 'the court's power to extend time is on the basis of what is just and equitable. These words could not be wider or more general'.

In some cases it will be fair to extend time and in others it will not - the Tribunal must balance all the factors 'including, importantly and perhaps crucially, whether it is now possible to have a fair trial of the issues raised by the complaint. Reasonable awareness of the right to sue is but one factor'.

In arguing for an extension of the time limit therefore it will always be relevant to tell the Tribunal if a fair trial is still possible. If the delay does not affect the fair hearing - eg. if memories have not faded over the passage to time, it will be a strong argument for extending time.

Already Mills may be making a difference. In the unreported case of Aniagwu v L.B. Hackney, the EAT overturned an employment tribunal decision not to extend time in a late application. The Tribunal had failed to consider why the claim had not been made earlier.

The EAT ruled that the claim was valid and used the EAT's powers to substitute their judgement for that of the Employment Tribunal. They extended the time using the just and equitable principle and remitted the case to a Tribunal for a full merits hearing.

PROFESSOR BRIAN BERCUSSON

EU social dialogue: The court weighs in

The Maastricht Treaty's "social chapter" introduced a new procedure for making European Union labour law: by "social dialogue" between labour and management at EU level. This means direct talks between trade union and employers organisations at a European-wide level.

These talks can lead to agreements which can be turned into Directives binding on Member States. The first results were the agreements annexed to the directives on Parental Leave (June 1996) and Part-Time Work (December 1997).

Case T-135/96, Union Europèenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of the European Union [1998] IRLR 602 (UEAPME), decided 17 June 1998, was a challenge to the Parental Leave directive by a European organisation of employers (UEAPME), together with other national employers' organisations.

UEAPME is the european level small and medium sized employers organisation. They claimed that, as they were not party to the talks, the agreement was not valid and neither was the directive.

The challenge was based on Article 173 of the EC Treaty, which allows for complaints to the European Court of First Instance (CFI) against acts of the Council which are "of direct and individual concern" to the challenger.

The move was rejected by the CFI. The appeal to the European Court has now been withdrawn. The CFI laid down conditions to apply to all future social dialogue agreements.

Unfortunately, the CFI's ruling had to be formulated in terms of Article 173, and, in particular, the words "of direct and individual concern". Out of these words the CFI formulated conditions for social dialogue as regards the parties (representativity), the procedures (autonomy) and the outcomes (democratic legitimacy).

Democratic legitimacy

The CFI declared that EU-level agreements, when embodied in directives, must be democratically legitimate. The CFI contrasted two possible legislative outcomes producing directives. The first follows the normal EU legislative process and its "democratic legitimacy... derives from the European Parliament's participation" (para. 88).

The second outcome results from social dialogue; the directive embodies the agreement reached by labour and management. Of this, the CFI says: (para. 89)

"...the principle of democracy on which the Union is founded requires - in the absence of the participation of the European Parliament in the legislative process - that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement...".

Representativity

For an agreement to be democratically legitimate, the CFI says that it must be ascertained: (para. 90)

"whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative".

The representativity of the parties is measured "in relation to the content of the agreement" (para. 90). The implication for trade unions is that, for the future, agreements may be democratically legitimate when signed by organisations which are only representative as regards the narrow scope of the agreement concerned.

The key phrase repeatedly used by the CFI to describe the parties to a valid agreement is "sufficient cumulative representativity" (in the official language of the case, French: "reprèsentativitè cumulèe suffisante"; the English translation of this phrase, "sufficient collective representativity" is imperfect).

This phrase was used by the CFI to decide whether UEAPME qualified as a complainant under Article 173 as "directly and individually concerned" by the directive: (para. 90)

"...representatives of management and labour... which were not parties to the agreement, and whose particular representation - again in relation to the content of the agreement - is necessary in order to raise the collective representativity of the signatories to the required level, have the right to prevent the Commission and the Council from

implementing the agreement at Community level by means of a legislative instrument... they must be regarded as directly and individually concerned by that measure".

The implication for trade unions is that, even after the difficult process of social dialogue has resulted in an agreement, EC law may allow non-signatories to challenge the validity of directives implementing social dialogue agreements. Organisations excluded from the social dialogue negotiations may seek to undermine these agreements.

It offers an opportunity, in that agreements negotiated at EU level by social partners who do not have sufficient cumulative representativity may be challenged by legitimate representatives.

The qualification that representativity need only be "cumulative" is important as it allows agreements to be signed by organisations which, taken individually, are far from representative in general. The qualification "sufficient" implies not an absolute standard, but one which is adequate.

While emphasising the importance of representativity, the CFI was reticent on the question of criteria. The CFI seemed to look for evidence of representativity in parties "having regard to their cross-industry character and the general nature of their mandate" (para. 96).

But it explicitly rejected the single criterion of numbers. This reinforces the implication of "sufficient", rather than absolute representativity being adequate. The CFI seemed to be satisfied if the interests of a category were taken into account (para. 105).

Autonomy

The CFI strongly asserted the voluntary nature of the social dialogue under the Maastricht Agreement: (paras. 78-79)

"...the Agreement [does] not confer on any representative of management and labour, whatever the interests purportedly represented, a general right to take part in any negotiations... even though it is open to any representative... to initiate such negotiations... it is the representatives of management and labour concerned, and not the Commission, which have charge of the negotiation stage...".

The CFI strongly asserted the voluntary nature of the social dialogue under the Maastricht Agreement.

This autonomy ceases when the parties wish their agreement to be transformed into an EC legal measure by a decision of the Council and turns to the Commission (para. 85) "which thereupon resumes control of the procedure and determines whether it is appropriate to submit a proposal to that effect to the Council".

Although apparently post-agreement, this control in effect reaches back to the conduct of negotiations. For example, exclusion of other parties from the negotiations may lead to the Commission and Council rejecting the agreement, through their assessment of the representativity of the parties to the agreement: (para. 88)

"It is proper to stress the importance of the obligation incumbent on the Commission and the Council to verify the representativity of the signatories to an agreement...".

The Commission and the Council can effectively force the participation of certain parties required for the "sufficient cumulative representativity" needed to achieve democratic legitimacy. In addition, the CFI seemed to approve the view that the Commission could also consider: (para. 86)

"the representative status of the contracting parties, their mandate and the 'legality' of each clause in the collective agreement in relation to Community law, and the provisions regarding small and medium-sized undertakings...".

This amounts to major potential influence of the Commission, as the parties negotiate under its scrutiny.

These conditions are a stunning reminder of how the courts can shape the emerging EC labour law. If the EC social dialogue plays a role in future EC labour law, the issues of democratic legitimacy, representativity and autonomy cannot be avoided. The question is whether the European Court is the best place for these questions to be decided.

The European Parliament, in an Initiative Report of 20 March 1998 *"calls on management and labour either themselves or as part of the social dialogue to draw up proposals for negotiating rules and principles"* (para. 6). As the European Court weighs in, time is running out.

Strike setback

UCLH NHS Trust v UNISON

The Court of Appeal has upheld an injunction against UNISON over proposed strike action at University College London Hospital NHS Trust. The proposed strike action was over the Trust's failure to secure guarantees as to future terms and conditions of employment following a successful Private Finance Initiative bid.

The decision will have far reaching consequences, not only for industrial action in PFI situations, but also whenever a dispute is in any way associated with a change of employer.

The disputes

The Trust was in negotiations with a consortium under the Private Finance Initiative whereby private companies were to build and then run a new hospital for the Trust. UNISON members, originally employed by the Trust, were to be transferred, under TUPE, so as to be employed by members of the consortium. UNISON, as a matter of long standing policy, is opposed to the principle of PFI.

On behalf of its members, UNISON sought an assurance from the Trust that a 30 year guarantee would be written into the contract between it and the consortium which would protect:

(i) the terms and conditions of staff employed by the Trust who would transfer to the consortium;

(ii) the terms and conditions of staff who had not previously been employed by the Trust, but who were subsequently to be employed by members of the consortium;

Throughout, UNISON argued that the industrial act should be protected because it would have been taken "in contemplation or furtherance" of a "trade dispute."

(iii) the existing collective bargaining arrangements; and

There was also a separate strand of protection sought whereby employees employed by members of the consortium would have equally favourably conditions to those of Trust staff in the future.

The Trust failed to give the requested assurances and UNISON balloted its members for strike action. An overwhelming majority of members voted in favour, but the Trust applied to the High Court for an injunction to restrain the strike action.

The law

A Union is immune from action against it where it calls for industrial action "in contemplation or furtherance of a trade dispute", provided that the balloting and notification requirements are complied with. A "trade dispute" is defined as "a dispute between workers and their employer which relates wholly or mainly to one or more of the following ...". The definition then sets out seven issues capable of forming the basis of a "trade dispute". The relevant categories in this case were "(a) terms and condition of employment, or the physical conditions in which any workers are required to work;" and "(g) machinery for negotiation or consultation, and other procedures relating to [any of the above matters], including the recognition by employers of employers' associations of the right of a trade union to represent workers in such negotiations or consultation or in the carrying out of such procedures."

Throughout, UNISON argued that the industrial act should be protected because it would have been taken "in contemplation or

furtherance" of a "trade dispute". That trade dispute related both to terms and conditions of employment and machinery for negotiation or consultation in terms of the assurance sought from the Trust.

The High Court

The High Court Judge granted an injunction against UNISON on three grounds. First, he found that it was likely that the dispute in fact related mainly to the political objectives of UNISON's opposition to PFI as a matter of policy, rather than one of the issues capable of founding a trade dispute.

Secondly, he found that the dispute was not about terms and conditions of employment at all, but was in reality about the term and conditions of the contract to be entered into between the Trust and the consortium. Thirdly, he found that the dispute was not protected because it involved workers who were not yet employed by the Trust, but who were to be employed, by members of the consortium, at some future date.

The Court of Appeal

The Court of Appeal disagreed with the High Court Judge on the first issue. It found that a union could have a policy of opposing PFI, and, concurrently, also have a more limited objective - that is alleviating the adverse consequences which might flow from that more general policy.

On that basis, the Court of Appeal found that the proposed industrial action was potentially capable of being in contemplation or furtherance of a trade dispute rather than in consequence of some overall political objective which would itself be insufficient to qualify as a trade dispute.

The existing employees' dispute related to their subsequent employment with members of the consortium.

However, the Court of Appeal upheld the grant of the injunction on two grounds. First, it was not possible for the statutory protection to cover terms and conditions of employment of employees of members of the consortium who would never have been employed by the Trust against which the industrial action was to be taken (i.e. subsequently employed employees). This alone was enough to sink UNISON's defence.

The decision fails to take into account the objectives of TUPE in terms of the transfer of rights, liabilities and responsibilities.

Secondly, the Court of Appeal found that the dispute related to existing employees' subsequent, and different, employment with the consortium - itself an as yet an unidentified entity. UNISON tried to argue that, although the parties to a trade dispute had to be workers and their employer, the subject matter of the dispute could relate to employment with a different employer.

The Court of Appeal did not find this relevant: the existing employees' dispute related to their subsequent employment with members of the consortium and was not therefore protected. It upheld the grant of the injunction and refused to grant leave to appeal to the House of Lords. UNISON is petitioning for leave to appeal.

The implications

The decision is extremely frustrating. It fails to take into account the objectives of TUPE in terms of the transfer of rights, liabilities and responsibilities for actions. When unions are negotiating in advance of a transfer of members to a new employer, it is sensible and appropriate to try to protect members' terms and conditions in the future by way of assurances from the current employer. However, it now seems that industrial action taken as a consequence of a current employer's refusal to give assurances will not be protected.

To mitigate or not to mitigate?

Dench v Flynn and Partners, CA [1998] IRLR 653

An unfairly dismissed employee has a duty to "mitigate" his or her loss. This normally means making reasonable efforts to obtain other work.

Most employees, faced with unemployment, will seek other work and may be compelled to accept a new job knowing that it is not entirely suitable. Starting a new job inevitably carries a certain degree of risk and frequently will be subject to a probationary period. This risk is increased if the job is not suitable to begin with and the employee may soon be out of work again.

This was the predicament Ms Dench faced having previously been unfairly dismissed by Flynn and Partners, a firm of solicitors. Ms Dench was employed as a solicitor working in their conveyancing department. She was given 3 months notice of dismissal by reason of redundancy with effect from 16 September 1995.

During the notice period she made a number of job applications to other firms but only one of these was successful. She felt compelled to accept the job offered notwithstanding her reservations as to its suitability, that it was subject to a 3 month probationary period and that she had been advised against it by a colleague.

She started the new job on 30 October but, as she had feared, the new job did not work out and she was dismissed from this employment with effect from 31 December 1995.

An unfair dismissal claim against Flynn and Partners was lodged with the Employment Tribunal who found in her favour on the basis that there was no redundancy situation at the time of the dismissal. On the question of compensation, the tribunal had to decide whether to assess loss up to the date she started the new job or to take account of her subsequent dismissal.

The tribunal decided on the former, stating: *"This employment was not temporary work or work of a different nature.....It was an appointment, unlimited in duration except for the usual probationary requirement, as a qualified solicitor carrying out work of which she already had experience....That in the event she was unable to work amicably with the sole principal...for whatever reason, was unfortunate but is not something for which we consider it would be appropriate to visit the financial consequences upon the Respondents".*

The Court of Appeal disagreed, allowing the appeal and remitting the case to the tribunal to re-assess the amount of compensation. The tribunal had been wrong to take the view that compensation could only be assessed up to the date she started the new job.

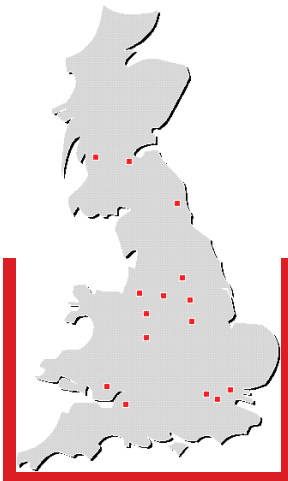
An unfairly dismissed employee has a duty to "mitigate" his or her loss.

Section 1, 2, 3 of the Employment Rights Act 1996 provides that the "amount of the compensatory award shall be such amount as the Tribunal considers just equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

The tribunal has to determine whether the loss in question was caused by the unfair dismissal or by some other cause. The tribunal must then ask what amount is just and equitable to award.

This decision is to be welcomed but likely to have limited impact. In most cases the Applicant will not be able to prove that loss arising from the termination of subsequent employment was caused by the original unfair dismissal.

It will remain the case that as a general rule the obtaining of new employment of a permanent nature at an equivalent or higher salary, will serve to put a stop to the period by which compensation can be recovered. This case does, however, recognise that there may be circumstances in which a link can be proven and if so there is no reason why an Applicant should not recover compensation.



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