BUSINESS REORGANISATIONS (II) TUPE

Preparation

This is the second seminar which considers the legal aspects of business reorganisations. In particular, the law on the transfer of undertakings will be considered. In order to prepare for this seminar you should read from one or two of the textbooks from the general reading listed below. You should then look at and consider the four questions that will be discussed. For each question you should read any specific material cited and undertake any specific tasks set.

General Reading:
Deakin and Morris pp. 196-216 and 499-509
Selwyn chapter 9*
Honeyball & Bowers chapter 6*
Painter and Holmes pp. 586-640*
Pitt, pp. 317-333*
Smith & Wood pp. 541-563*

Journal Reading:
P. Davies, “Transfers Again: Contracting Out and the Employee’s Option” (1993) 22 Industrial law Journal 151
John McMullen, “TUPE-Sidestepping Suzen” (1999) 28 ILJ 360
Paul Davies, “Transfers – the UK Will Have to Make Up Its Own Mind” (2001) 30 ILJ 231
Wanjiru Njoya, “The Interface Between Redundancy and TUPE Transfers” (2003) 32 ILJ 123
J. McMullen, “The ‘Right’ to Object to Transfer of Employment under TUPE” (2008) 37 Industrial law Journal 169*

Question 1:

What was the position before the introduction of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794)?
Specific Reading:
Nokes v Doncaster Amalgamated Collieries Ltd. [1940] AC 1014*
Woods v WM Car Services (Peterborough) Ltd. [1981] IRLR 347

Question 2:
What are the principal implications of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (“TUPE”)? When does TUPE apply, e.g. does it apply to the disposal of a business by way of the sale of shares in a company incorporated under the Companies Acts?

Specific Reading:

Foreningen of Arbejdsledere I Danmark v Daddy's Dance Hall A/S [1988] ECR 739
Wilson v St. Helens Borough Council/Meade and Baxendale v British Fuels Ltd. [1998] IRLR 706*
ECM (Vehicle Delivery Service) Ltd. v Cox [1999] IRLR 559*
Credit Suisse First Boston (Europe) Ltd v Lister [1998] IRLR 700*
Millam v The Print Factory (London) 1991 Ltd. [2007] IRLR 526*
Balfour Beatty v Wilcox [2007] IRLR 63
Javini v Princess Personal [2007] IRLR 1005
Klarenberg v Ferrotron [2009] ICR 1263

Question 3:
What liabilities transfer to the transferee under TUPE and what practical contractual and non-contractual steps can a transferee take to minimise these liabilities when purchasing a business? Do pension liabilities transfer?

Specific Reading:
Daddy's Dance Hall [1988] IRLR 315*
Beckmann v Dynamco Whicheloe Macfarlane Ltd. [2002] 2 CMLR 45*
Martin v South Bank University [2004] IRLR 74*
Delayahe v Ministre de la Fonction Publique et de la Reforme Administrative [2005] IRLR 61
Cross v British Airways plc [2006] IRLR 804
Werhof v Freeway Traffic Systems [2006] IRLR 400
G4S Justice Services v Anstey & Simpson [2006] IRLR 588
Regent v Power [2008] IRLR 67
Jackson v Computershare [2008] IRLR 70
Amicus v Dynamex [2009] ICR 511
Vigano v Red Elite [2009] 1 CMLR 428
Mirja Juuri v Fazer Amica Oy [2009] 1 CMLR 902
Question 4:

Do you think that TUPE 2006 deals with all of the difficulties in the case law which interpreted the prior Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794) (which are now repealed)?

“ABSTRACT

This article analyses the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006, which revoke, entirely, the TUPE Regulations 1981. As well as comprising the UK Government's response to the amending Acquired Rights Directive 1998/50/EC, they purport to fulfil a four-fold aim of increasing the coverage of TUPE in outsourcing situations; clarifying the law on transfer connected dismissals and when employees may agree transfer related changes to employment conditions; providing for the supply by transferors of employee liability information; and relaxing the provisions of TUPE in insolvency situations to the extent permitted by the Acquired Rights Directive 2001/23/EC.

It is to be argued that some of these aims are realised in the new Regulations, and others not. And certain areas worthy of new regulation are ignored. What is ultimately apparent however is that the new Regulations cannot be taken to be an ‘employers' charter’.

In some instances the new Regulations may breathe new life (and litigation) into the law."


It seems appropriate to conclude on this point by noting that the implementation of transfer directives in the Member States has led to harmonization concerning information and consultation of workers representatives and the applicable collective agreements. I would add that, with regard to collective agreements, there is a strong need for techniques providing a gradual transition from one agreement to another, in cases in which there is a worsening of employment conditions.

**TUPE**

To attempt to prevent two-tier workforce.

e.g. Hospital
    Cleaners etc sourced out to private company
    Terms and conditions must remain similar to those employed by public entity.
    Currently suspended in England.
Question 1
What was the position before the introduction of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794)?

Common law...

EmployEEs at mercy of employERs
BUT
CAN’T force an employEE to work for employER.
This is the main difference between employEE and slave.

_Nokes v Doncaster Amalgamated Collieries Ltd. [1940] AC 1014*
“At common law, a contract of employment was a personal contract between the employER and employEE;
when the relationship ceased, the contract of employment came to an end.
Thus if a business was sold, the purchaser had the right to choose who he wished to employ, and the employEE had the right to choose for whom he worked.
Indeed, ‘…the right to choose for himself whom he would serve…constituted the main difference between a servant and a serf.’” (Selwyn, 9.1)

_Woods v WM Car Services (Peterborough) Ltd. [1981] IRLR 347_
“Whether an employER’s conduct amounts to a constructive dismissal is a question of fact for the ET to determine.” (Selwyn, 17.46)

“Summary: Constructive dismissal: implied term of trust
Abstract: An employer who persistently attempts to vary an employee’s condition of service acts in a manner calculated to or likely to destroy the relationship of confidence and trust between them, and such action is a fundamental breach of the contract which amounts to a repudiation of the contract.
The new owners of a business agreed to continue to employ the employee on equally favourable terms, but shortly attempted to vary the terms to the detriment of the employee. She left and complained of unfair dismissal, claiming constructive dismissal within the Employment Protection (Consolidation) Act 1978 s.55. The tribunal found that although some pressure had been put on her, there was no breach of the implied term of confidence and trust.

_Held (CoA)_ That whether the employer’s conduct amounted to a repudiatory breach was a question of mixed law and fact and there was evidence to support the decision of the Tribunal. _Pedersen v Camden LBC [1981] I.C.R. 674_.
Judge: Browne-Wilkinson, J.”
Question 2
What are the principal implications of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) ("TUPE")? When does TUPE apply, e.g. does it apply to the disposal of a business by way of the sale of shares in a company incorporated under the Companies Acts?

Preserving continuity of employment.

Many EU cases as the UK is not sure how to apply TUPE.

TUPE 2006 clarifies position.

Crystal Smidt
One cleaning lady in a bank.
Held: She was an undertaking.

Was there an 'economic entity' that retained its identity?

TUPE 2006
3.— A relevant transfer

(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;

(b) a service provision change, that is a situation in which—

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

(ii) activities cease to be carried out by a contractor on a 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; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a 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,
and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation “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.

TUPE

Simply tipex out name of old employer
Write in name of new employer

Changing Terms & Conditions
Can be VOID if this is done due to TUPE

• Traditional Business Transfer – reg 3(1)(a)

3.— A relevant transfer
(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;

• Service Provision Changes – reg 3(1)(b)

Outsourcing
Definition clarifies position.
No longer required to examine case law like previously.
No need for ‘economic entity’ retaining identity.
Excludes: supply of good one-off transfer.
(b) a service provision change, that is a situation in which—
(i) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client's behalf (“a contractor”);

(ii) activities cease to be carried out by a contractor on a 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; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a 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; or