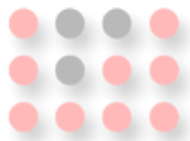


Presentation to the Institute of Employment Rights TUPE Update

The right to object to a TUPE transfer

Nerys Owen, Labour Research
Department July 2011



Labour Research Department

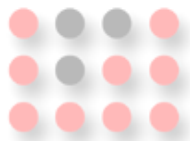
Legal basis for right to object

- Exercising “right to object” before transfer stops otherwise **automatic** transfer
- No employee should be compelled to change employer against his will
 - Katsikas v Konstantinidis [1993] IRLR 179 ECJ
- An employee who does not wish to transfer can “object” by informing either the existing or prospective new employer



The right to object - Regulation 4(7)

- “[The automatic transfer provisions] shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee”.



The legal effects of “objecting”

- These are **serious and draconian**
 - Contract terminates on transfer date
 - No dismissal
 - No redundancy payment
 - No right to claim unfair dismissal
- Basically similar to a straightforward voluntary resignation
- Contrast:
 - Resigning in response to a significant worsening of your working conditions (Reg 4(9)); and
 - Resigning in response to fundamental contract breach (Reg 4(10))



Is the right to object worth having?

- “Given the effect of these provisions, it is hard to understand the circumstances under which an employee would wish to exercise [the right to object].”

» John McMullen

- Does it need a health warning?



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What form must it take

- Any form
 - Hay v George Hanson [1996] IRLR 427
 - Employed by District Council as a joiner
 - Council outsourced work to private contractors
 - Hay argued he had not objected but ET disagreed, finding he had done everything possible to resist transfer, including:
 - Trying to arrange other employment with Council
 - Trying to negotiate redundancy package with Council after transfer date



Form of objection - continued

- Must be an objectively clear rejection of the transfer – not a “mere expression of unhappiness”
- Can convey via words, actions or both
- No duty to warn of consequences
 - Ladies Health and Fitness Clubs v Eastmond (unreported EAT 94/03)
 - » Petition against transfer –
 - » ET found “hostility and non-cooperation but no objection

When must right to object be exercised?

- Before the transfer
- Unless the transferee's identity has been concealed
 - New ISG v Vernon [2007] EWHC 2665
- Cannot transfer “under protest”
 - Capita Health Solutions v BBC [2008] UKEAT 34/07
 - Claimant's employment transferred to Capita even though she spent only six weeks “on secondment” from the BBC



Substantial negative effect on working conditions – Reg 4(9)

- If a transfer involves (or would involve) a substantial worsening of conditions for an employee who would otherwise have transferred:
 - S/he can:
 - Treat contract as terminated i.e. resign
 - Will be deemed to have been **dismissed**

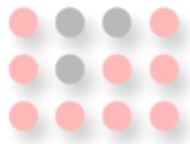


Consequences of a Reg 4(9) resignation

- Remember that a resignation/dismissal under Regulation 4(9) may still be fair:
 - if the employer can point to a valid economic, technical or organisational (ETO) reason entailing changes in the workforce; and
 - Fair and reasonable in all the circumstances
- See:
 - Tapere v South London and Maudsley NHS Trust (2008)
 - Nationwide Building Society v Benn (2010)
- But employee may qualify for a redundancy payment

Tapere v South London and Maudsley NHS Trust (2008)

- NHS reorganisation
- Move from Camberwell to Beckenham
- No other changes
- Single parent with complicated pickup and drop off arrangements
- Driving on M25
- Brought a claim based on Reg 4(9)

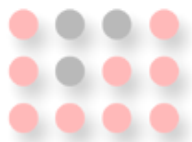


Tapere continued

- Was there a substantial change to working conditions?
 - **Yes.** “Working conditions” includes:
 - Contract terms
 - Physical working conditions
 - Discretionary benefits
 - Wider than a “fundamental breach of contract”
- Was it to her “material detriment”?
 - **Yes.** This must be seen from the employee’s viewpoint
 - Did Mrs Tapere view the changes as detrimental?
 - Was this view reasonable?
- But what was her remedy?

Bringing claims under Reg 4(9)

- Claims can be brought:
 - Before or after transfer – wait and see?
 - How long after?
- Who can rely on Reg 4(9)?
 - Only employees within the transferring “pool”



Constructive dismissal claim

- Nothing in the TUPE Regulations prevents any employee bringing a constructive dismissal claim.
 - Harder than a claim under Reg 4(9), because of the need to prove a fundamental contract breach



Presentation to the Institute of Employment Rights

TUPE AND UNFAIR DISMISSAL

Nerys Owen, Labour Research
Department July 2011



Labour Research Department

Unfair dismissal

- TUPE protection against unfair dismissal
 - Availability of “ETO reason” defence undermines protection at a time when employees are already vulnerable
 - But dismissal of employees who refuse to accept “harmonisation” of terms is unlawful – throughout contract



Basic Principles

- Who can claim unfair dismissal?
 - Must be an employee
- Service requirement?
 - One year's service
 - Unless claiming dismissal for asserting TUPE rights (no service requirement)



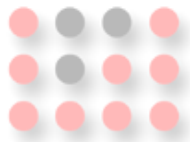
Is there a dismissal?

- To claim TUPE-related unfair dismissal, there must be a dismissal:
 - Contract terminated by employer
 - Non-renewal of a fixed term contract
 - Resignation in response to fundamental breach of contract (constructive dismissal)
 - Resignation because of a “substantial change” to employee’s “material detriment” (Reg 4(9))
- The transfer is not a dismissal



TUPE protection against unfair dismissal

- A dismissal will be **automatically unfair**:
 - where the main reason for dismissal is:
 - The transfer itself; or
 - A reason related to the transfer that is not an economic, technical or organisational reason entailing changes to the workforce (ETO reason)
 - Liability for automatically unfair dismissals transfers to the new owner on the transfer date



Unfair dismissal

- Even if there is a valid ETO reason, dismissal must be fair and reasonable in all the circumstances
 - size and administrative resources
 - Equity and the “substantial merits of the case”
 - Includes fairness of *collective* as well as individual consultation
 - Nationwide v Benn [2010]



TUPE Protection against dismissal

- All employees:
 - Employed immediately before the transfer; and
 - Assigned to the transferring business;
- Automatically become employees of new employer unless they object before transfer (Reg 4(1))
- To stop employers avoiding TUPE by dismissing staff shortly before transfer
 - Any employee dismissed before transfer for an unlawful, transfer-related reason is “deemed” to have been employed “immediately before the transfer”
 - Litster v Forth Dry Dock and Engineering Co Limited (in receivership) [1989] HL

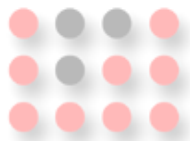
Who is protected?

- TUPE protection against automatically unfair dismissal covers:
 - Transferring employees
 - Employees who are left behind
 - Existing employees of buyer
- TUPE protection is available
 - Before and after transfer
 - Whether dismissals are by old or new employer



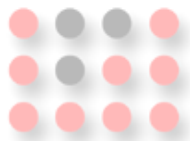
But is the reason for the dismissal related to a transfer?

- TUPE does not prevent fair dismissals at any time for reasons unrelated to a transfer
 - E.g. gross misconduct
 - E.g. pre-transfer dismissals by an administrator who runs out of money to pay wages?
 - Crucially, liability for unfair dismissal will not transfer to the buyer where the dismissal reason is not related to a transfer
- *Dynamex Friction v AMICUS* [2008]



What if there is no transferee on the horizon?

- Slimming down a business ready for sale?
- Dismissals can still be “related” to a transfer even where no transferee has been identified
 - CAB Automative v Blake [2007]
 - Confirmed in Spaceright Europe v Baillavoine [2011]
- And TUPE will apply to all business sales (“going concern” sales) by administrators
 - OTG v Barke [2011]



ETO Reason

- Dismissal will not be automatically unfair if it is for:
 - An economic, technical or organisational reason
 - Entailing changes to the workforce



ETO Reason

- **Economic:** lack of demand in new business for seller's product line
- **Technical:** buyer operates new technology seller workforce cannot reasonably be trained to work
- **Organisational:** transfer leads to duplication of roles, or need to relocate

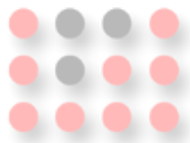


Entailing changes to the *Workforce*

- Historically narrow interpretation, mainly limited to redundancies
- **Planning** an organisational change which will result in need for **fewer employees** or **changes in their functions**
 - Berriman v de Bole Slate [1985]
- Dismissing an employee for refusing to agree to changes to bring terms into line with existing workforce where there is no valid ETO reason (i.e. “harmonisation”) is unlawful (Berriman)
- Not necessarily the whole workforce
 - Nationwide v Benn [2010]
 - Just transferring managers

Recent example of successful ETO reason - Nationwide v Benn [2010]

- Acquisition of Portman by Nationwide
- Substantial cut in commission earnings of Portman managers as a result of transfer
- Portman managers resigned
- Resignation deemed to be a dismissal under Reg 4(9)
- Reason for cut in commission earnings of Portman managers was the much narrower product range carried by Nationwide
- Narrower product range was an “organisational reason”
- The “organisational reason” “entailed” changes to the workforce because:
 - Selling a narrower Nationwide product range was a change in the functions of the Portman managers
 - It entailed changes to the workforce even though only the transferring managers from Portman were affected
- Result: Portman managers were fairly dismissed, even though the TUPE transfer resulted in a drastic cut to their earnings and brought their commission structure into line with that of the Nationwide
- So, can employers “harmonise” contract terms without infringing TUPE as long as they make changes to job roles, however detrimental?



Making redundancies after a TUPE transfer

- An employer who wants to rely on the “ETO reason” defence must be planning changes **to its own workforce**
- This is because the “ETO reason” defence is meant to be about enabling businesses to continue as a going concern
- A seller cannot rely on the new owner’s business plans to justify redundancies
 - Hynd v Armstrong [2007]
 - Spaceright v Baillavoine [2011]
- So in practice, pre-transfer redundancies by a seller (e.g. an administrator slimming down a business, or a seller pressured to cut the workforce by the buyer) will usually be automatically unfair
- Redundancies are normally carried out after the transfer by the buyer, out of the combined workforce.



How does this work in practice

- Often very difficult to carry out fair redundancies out of a combined pool
- E.g. First Scottish Searching Services v McDine [2011]
 - Redundancies out of combined workforce, but all job losses fell on incoming employees
 - Both sets of employees were assessed by their own managers
 - Highly subjective selection criteria – “efficient use of time, flexible approach, can-do attitude” etc
 - No mechanism used to try to ensure both sets of managers shared a common understanding of the selection criteria
 - EAT held:
 - As long as selection process is basically fair, with no obvious bias or error, and the employee is given opportunity to challenge selection, nothing further is required.

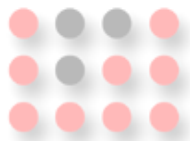
The claims failed



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How long does protection last?

- In theory, TUPE protection lasts throughout employment
 - Taylor v Connex South Eastern [1999]
 - Dismissal 2 years after transfer
- But in practice, the passage of time is likely to bring other potential reasons e.g. the need to cut costs
- But simple “harmonisation” will always be unlawful, no matter how much time has passed



LRD Publications

- “TUPE – a guide for trade unionists”
 - Priced £6:65
 - Available from www.lrd.org.uk

