Never a dull moment?

Charles Wynn-Evans rounds up recent case law on service provision changes and other thorny TUPE issues

Charles Wynn-Evans is a partner and head of the London employment practice at Dechert LLP

'There can be a service provision change where activities are conducted by just one employee. However, the connected issues of the principal purpose of the organised grouping and whether the employee is assigned to that organised grouping can cause complexity.'

Notwithstanding the reforms made in early 2014, the transfer of undertakings legislation continues to give rise to cases considering technical arguments about the law's scope and requirements. Combined with the acute fact sensitivity of its application, this perhaps accounts for the legislation's continued reputation for uncertainty and unpredictability. This article reports on some of the recent case law in this area.

Service provision changes – more than one client

A service provision change (SPC) under reg 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) occurs on the outsourcing, re-tendering or in-housing of services performed by (per reg 3(3)(a)(i)) 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.

The activities in question must also remain fundamentally the same in the hands of the transferee as they were in the hands of the transferor (reg 3(2A)). Moreover, for an SPC to occur, the relevant activities must not comprise the supply of goods (reg 3(3)(b)) and (per reg 3(3)(a)(ii)) the client must intend that the activities be:

> ... carried out by the transferee other than in connection with a single specific event or task of short term duration.

In setting out these requirements, reg 3(1)(b) of TUPE refers to 'the client' in the singular. Taken literally, this would preclude there being an SPC where the services transferred are supplied to more than one client.

The Employment Appeal Tribunal (EAT) in *Ottimo Property Services Ltd v Duncan* [2015] considered whether there can be an SPC when the services in question are provided to a group of clients rather than one specific client. Earlier decisions such *McCarrick v Hunter* [2012] and *Taurus Group Ltd v Crofts* [2012] have established that, for there to be an SPC, the client's identity must be the same before and after the putative SPC. However, they had not addressed whether there could only ever be an SPC in relation to a single client rather than multiple clients.

Tribunal decision

In *Ottimo*, the claimant was employed as a site maintenance manager at a residential housing estate comprising several blocks, each of which had a separate management company. His employer had property management services contracts with all but one of those management companies but over time lost several of the contracts. Eventually, the remainder of the contracts were sub-contracted to Ottimo Property Services, to which the claimant employee transferred under TUPE. Subsequently, those contracts were assigned to Warwick Estate Properties Ltd, which had its own property manager and did not accept that TUPE applied. The claimant was dismissed by Ottimo Property Services and claimed that his employment had transferred to Warwick Estate Properties under TUPE.

Perhaps unsurprisingly, the employment tribunal held that there was no transfer of an undertaking for the purposes of reg 3(1)(a) of TUPE, principally because there was no

transfer of an economic entity which retained its identity. The tribunal also found that there was no SPC because reg 3(1)(b) refers to a singular client.

The tribunal held that it was not permissible for the various contracts to be considered together. The different residential blocks' management companies could not be treated as one client and therefore the overall sub-contracting process could not be considered to be one SPC. In so doing, the tribunal adopted a literal rather than purposive interpretation of reg 3(1)(b), consistent with the approach required by decisions such as *Metropolitan Resources Ltd v Churchill Developments Ltd (in liquidation)* [2009]. The SPC provisions were introduced as purely domestic legislation pursuant to s38 of the Employment Relations Act 1999. They are not derived from the Acquired Rights Directive 2001/23/EC and consequently do not have to be interpreted purposively.

EAT decision

On appeal, the EAT held that an SPC can, in principle, involve a group of clients. HHJ Eady QC could (at para 45) see:

> ... no reason why, in principle, a SPC might not involve, for example, a contract for the provision of particular services drawn up between a contractor and a group of persons who are collectively defined as 'the client' under that contract.

In the absence of a specific definition of a 'client' in this context, the EAT accepted that s6 of the Interpretation Act 1978 applied to a purely domestic aspect of TUPE such as reg 3(1)(b). Section 6(c) of this Act provides that, when interpreting statutory provisions, in the absence of an explicit statement to the contrary:

> ... words in the singular include the plural and words in the plural include the singular.

On this basis, the EAT held that it was perfectly legitimate, and did not involve any purposive interpretation, to construe reg 3(1)(b) so that an SPC can occur when services are provided to a group of clients.

However, the identity of the group of clients must remain the same after the putative SPC, consistent with *McCarrick*. Also, importantly, there needs to be a sufficient nexus between the clients in question, which must demonstrate a 'common intention' in entering into the relevant arrangements. As HHJ Eady QC put it (at para 48):

> Allowing that 'the client' may comprise more than one legal entity – and so, might more properly be described as 'the clients' – there must be some link, some commonality, between them, to permit the identification of intention for Regulation 3(3)(a)(ii) purposes... That does not mean that there must be a single contract between the legal entities comprising the client, or clients, and the contractor. There must, however, be an ability to ascertain a common intent.

This 'common intent' would be easier to establish when the relevant services were provided under a single umbrella contract between a group of clients, rather than under various separate contracts, as in this case. However, this would be a question of fact in each case. Since the tribunal had not considered the issue (because it had rejected the argument that an SPC could arise in relation to a group of clients) the case was remitted to the tribunal to reconsider the matter.

Commentary

This is an important decision, not just in the property management context in which it arose, since (subject to any appeal) it establishes that there can be an SPC where services are supplied to a group of clients. The requirements that the clients remain the same and that the services remain fundamentally the same will still need to be satisfied. Nonetheless, the issue of whether a group of clients has the required 'common intention' to be treated in effect as a single client will inevitably be a source of evidential dispute and therefore potential uncertainty in determining the application of the SPC provisions.

Pension changes post-transfer

The pensions ombudsman's decisions are perhaps a neglected source of practical case law examples of the assessment of TUPE's operation, particularly in the context of the validity of post-transfer variations to employees' contract terms. The recent decision in *Heyes* [2015] is an example of how the ombudsman can be tasked with considering TUPE's effect on changes to the rights of transferring employees.

Ottimo establishes that there can be a service provision change where services are supplied to a group of clients.

This case concerned whether the employer was entitled to remove a right to an unreduced redundancy pension some four years after a TUPE transfer.

Beckmann v Dynamco Whicheloe Macfarland Ltd [2002] and other decisions established that rights to an early retirement pension on redundancy do transfer under TUPE, although there are other rights under occupational pension schemes which the transferee does not inherit. As set out in reg 4 of TUPE and European Court of Justice (ECJ) decisions such as *Foreningen af Arbejdsledere I Danmark v Daddy's Dance Hall* [1988], a variation to a transferring employee's terms, including such a redundancy-related pension entitlement, is void if the sole or principal reason for the variation is the transfer.

In *Heyes*, the employee was a member of the ICI Pension Fund 1967 and his employment transferred to ABB Ltd in 2001 by way of a TUPE transfer. He transferred his pension benefits to a new section of ABB's pension scheme, which replicated his original entitlements. These benefits included an unreduced pension if he was made redundant and:

- had left employment for a reason outside his control;
- was between the ages of 50 and 57 at his leaving date; and
- had completed ten years' pensionable service.

ABB had stated in the acquisition agreement that it would not, in the four years following completion, exercise any power of amendment that would adversely affect any transferring employee. It had also agreed that the transferring employees would enjoy no less valuable benefits post-acquisition than those provided by ICI.

In 2005, ABB amended the relevant pension scheme rules. Under the changes, it would pay the unreduced benefit only to members who, at the date of the amendment in August 2005 (as opposed to the actual date of leaving as originally provided), had completed ten years' pensionable service and attained the age of 50.

Mr Heyes' employment was subsequently terminated by reason of redundancy. He met the requirements of the scheme as originally constituted and would have been eligible for an unreduced redundancy pension had the rules not been changed. However, he was 45 when the scheme rules were amended in 2005, and so he was denied the unreduced pension benefit because he did not meet the revised eligibility requirements.

The decision

In his complaint to the pensions ombudsman, Mr Heyes argued that the amendment was a breach of both the acquisition agreement and, because it removed an accrued pension right, s67 of the Pensions Act 1995. Both of these arguments failed as a matter of construction of the relevant agreement and the pensions legislation.

Mr Heyes also argued that TUPE invalidated the change to the pension scheme rules because the transfer was the reason for that change. He pointed to the fact that there was a specific agreement at the time of the transfer that no pension changes would be made for four years, This, he claimed, indicated that ABB had, at the time of the transfer, intended to amend the scheme and that this intention provided the connection between the changes made in 2005 and the transfer in 2001. The changes should therefore be void as being by reason of the transfer.

The longer the period between a TUPE transfer and a contract change, the easier it will be to argue that the change is not by reason of the transfer and therefore is not void.

The deputy ombudsman rejected Mr Heyes' complaint, finding no evidence that the 2005 changes were directly related to the 2001 transfer. She rejected the argument that the contractual provision in the acquisition agreement (that no adverse changes were to be made for four years after its completion) had been agreed with the subsequent changes in 2005 in mind. In particular, she commented that 'from a practical perspective', it seemed unlikely that the new employer set up the new section of its scheme for the transferring employees 'with a view to closing it just over four years later'. There was insufficient evidence to demonstrate that the change was because of the transfer rather than an unconnected subsequent review of pension costings and provisions.

Commentary

Heyes demonstrates that the longer the period between a TUPE transfer and a contract change, the easier it will be to argue that the change is not by reason of the transfer and therefore is not void. That said, this is a fact-sensitive issue and the evidence will be crucial – the passage of time cannot, in itself, be relied upon to disconnect a change from a TUPE transfer. For example, a dismissal some two years after a TUPE transfer was considered to be transfer related in *Taylor v Connex South Eastern Ltd* [2000].

An organised grouping of employees

An essential component of an SPC is the existence prior to the putative transfer of an 'organised grouping of employees' whose principal purpose is the conduct of the activities in question. Regulation 2(1) of TUPE makes clear that references in the legislation to an organised grouping of employees 'shall include a single employee'. There can therefore be an SPC where activities are conducted by just one employee. However, the connected issues of the principal purpose of the organised grouping and whether the employee is assigned to that organised grouping can cause complexity.

Eddie Stobart Ltd v Moreman [2012] made clear that, for there to be an organised grouping, the employees must deliberately be organised by reference to the client's requirements and be identifiable as members of its team. This requirement is not met just because the employees happen to carry out most of their work for a particular client. If the employees carrying out the activities vary, there may not be an organised grouping and, if they work for various clients, then the requirement that the group's principal purpose be to conduct activities for the client will not be satisfied. Subsequently, *Ceva Freight (UK) Ltd v Seawell Ltd* [2013] demonstrated that an employee who dedicates all their time to a specific client may not constitute an organised grouping, if, as in that case, they are part of a team providing services to different clients.

Rynda (UK) Ltd v Rhijnsburger [2015] shows – and is a Court of Appeal authority to boot – how these issues should properly be approached. Ms Rhijnsburger was a commercial property manager originally employed by Drivers Jonas Deloitte. She was the only person managing certain properties in Holland owned by the Rynda Group, although she had previously taken on some responsibility for some other properties. Subsequently, Rynda (UK) Ltd took over the running of the relevant properties and Ms Rhijnsburger commenced employment with that company,

continuing to have responsibility for the same Dutch property portfolio. When she was subsequently dismissed, she claimed unfair dismissal but needed to show that she had sufficient continuous employment to be entitled to bring such a claim. She could do so only if her prior employment counted towards her continuous service through her employment having transferred to Rynda by way of an SPC.

The decision

The employment tribunal held that Ms Rhijnsburger was an organised grouping of employees which had as its principal purpose the management of the Dutch properties. The fact that she had, in the past, managed some other properties did not undermine this finding since she had always devoted most of her time to the Dutch properties. Both the EAT and the Court of Appeal rejected the employer's appeals.

Consistent with the principles established by (if not the result in) *Eddie Stobart*, and in contrast to the claimant's position in *Ceva Freight*, Ms Rhijnsburger was found to have constituted an organised grouping of employees. She had worked alone on the relevant property management activities and the employer had specifically decided that this should be the case, rather than it being a matter of chance. The situation thereby satisfied the requirement of there being a level of conscious and deliberate organisation of the relevant employee. The employer had also argued that the organised grouping did not have as its principal purpose the carrying out of the activities for the client but this was rejected on the same basis.

While the decision does not really break new ground, the Court of Appeal helpfully identified the following four-stage process to assess whether there is an organised grouping of employees:

- identify the service which the transferor was providing to the client;
- list the activities which the transferor's employees performed in providing that service;
- identify the employee or employees who ordinarily carried out those activities; and
- consider whether the transferor organised that employee or those employees into a 'grouping' for the principal purpose of carrying out the activities in question.

Applying this approach will reduce the risk of incorrectly assessing whether there is an SPC.

An outgoing contractor who successfully argues that TUPE applies can avoid the termination costs and associated liabilities it might face if it had to dismiss the relevant employees following loss of the contract.

Assignment and the employer's organisational framework

Regulation 4(1) of TUPE provides that the contracts of those employees who are 'assigned' to the organised grouping of resources or employees that transfers pass from the transferor to the transferee. In relation to an SPC, key questions include:

- whether there is an organised grouping of employees whose principal purpose is the conduct of the relevant activities for the client; and
- which employees are assigned to that organised grouping.

An outgoing contractor who successfully argues that TUPE applies can avoid the termination costs and associated liabilities it might face if it had to dismiss the relevant employees following loss of the contract. Where contracts for services are outsourced, in-housed or retendered within the scope of the SPC provisions, it can therefore be of considerable importance whether those who manage the services stay with the transferor or transfer to the new service provider. A useful example demonstrating that managers may not be assigned to the organised grouping of employees in question is *Edinburgh Home-Link Partnership v The City of Edinburgh Council* [2012].

In *London Borough of Hillingdon v Gormanley* [2014], the EAT provided valuable guidance on the question of assignment, making clear the need to adopt a 'structural' rather than 'snapshot' approach to the issue. In this case, the claimants worked for a company which performed painting and decorating work for the London Borough of Hillingdon under a number of contracts.

Eventually, Hillingdon said it would not give the company any further work and took the relevant functions in-house. The council took the view that TUPE did not apply to the termination of the relationship. However, the company argued that there was an SPC in this situation and that therefore 17 employees transferred to Hillingdon, a position which Hillingdon rejected.

The decision

Various claims were brought in the employment tribunal. On the question of assignment, the tribunal held both that there was an organised grouping of employees whose principal purpose was the carrying out of housing maintenance for Hillingdon and that the claimants were assigned to it.

The EAT considered that the test of assignment remains as set out in the ECJ's judgment in *Botzen v Rotterdamsche Droogdok Maatschappij BV* [1985]. As it was put in para 14 of that judgment:

> The only decisive criterion regarding the transfer of employees' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organizational framework within which their employment relationship took effect.

The EAT therefore considered (at para 36) that it is:

> ... material to consider the way in which an organisation is structured and the Claimant's role within it in order to determine whether for the purposes of TUPE he or she is assigned to the organised grouping of employees carrying out relevant activities.

The tribunal should not determine assignment simply by using a percentage test of the time spent on the relevant activities when the transfer takes place. A more detailed and substantive structural assessment is required.

The EAT also indicated (at para 37) that an important source of information on an employee's role in an organisation is likely to be their contract of employment because:

> The job description or statement of duties is likely to inform a decision as to whether their duties are confined to certain activities or whether they include more general duties.

What duties employees could be called on to perform under their contracts as well as those which they were actually performing at a particular moment in time can be important to this assessment. This approach is consistent with *Costain Ltd v Armitage* [2014], (see 'Who is in Scope' *ELJ*156 pp16-19), which made clear that the tribunal should not determine assignment simply by using a percentage test of the time spent on the relevant activities when the transfer takes place. A more detailed and substantive structural assessment is required.

Applying these principles, the appeal was allowed because the tribunal had not made any factual findings about whether any particular employees were assigned to the organised grouping. More particularly, the EAT held that the tribunal had erred in failing to consider each claimant's contractual duties and their roles in the transferor's organisational framework. This was important given that some of the claimants continued to provide services to the transferor after the services contract terminated.

TUPE information for consultation purposes

LLDY Alexandria Ltd v UNITE the Union [2014] demonstrates a relatively minor but potentially important point concerning the obligation imposed on the transferor under reg 13(2) of TUPE. Regulation 13(2) requires the transferor to provide specified information to

Dismissed before, but successful appeal after, transfer

Salmon v Castlebeck Care (Teesdale) Ltd & Ors [2014] demonstrates that those dismissed by the transferor before the transfer may nonetheless become employed by the transferee if an appeal against that dismissal is successful after the transfer. Effectively, the employee's contract is revived, so that they are deemed never to have been dismissed.

Ms Salmon was dismissed before a transfer of the undertaking in which she worked. Colleagues who transferred over to the transferee heard an appeal against her dismissal, which was successful. The employment tribunal held that the appeal decision could not on its own revive Ms Salmon's employment. This was because there had been no actual decision to reinstate her and she had not been informed of any such decision.

On appeal, the EAT considered the earlier ruling in *G4S Justice Services (UK) Ltd v Anstey* [2006]. This confirmed the principle that whether an employee in Ms Salmon's position is deemed employed by the transferee depends on whether the appeal against dismissal succeeds and reinstatement is ordered. If the dismissal is set aside, it vanishes, viewed retrospectively, and the employee continues in employment, but with the transferee. If the appeal is unsuccessful, the original dismissal stands and the employee would not then have been employed by the transferor immediately before the transfer.

The question in *Salmon* was whether the appeal decision alone revived the claimant's contract of employment or whether a decision to reinstate her was also needed, as *G4S* could be read as requiring. The EAT concluded that no such separate decision was required. It considered the concept of reinstatement in *G4S* to refer to the revival of the contract of employment which the appeal effected rather than a separate decision by the employer. It added (at para 36) that there was:

> ... no reason in principle why in any event it would be necessary for there to be an express revival or reinstatement... [and that] it must be implicit in any system of appeal, unless otherwise stated, that the appeal panel has the right to reverse or vary the decision made below.

Consequently, the EAT concluded that there had been a successful appeal and that Ms Salmon's contract was revived (para 47):

> ... without the need for either an express decision to reinstate or communication of it.

She was therefore employed immediately before the transfer and so her claims lay against the transferee.

'appropriate representatives' of the affected employees. It must do so far enough in advance of the transfer to enable consultation to take place on any 'measures', such as changes to terms and conditions or dismissals, which either it or the transferee envisages taking. Failure to comply with the applicable information and consultation obligations can lead to an award of up to 13 weeks' pay per employee. Depending on the number of employees involved, this can lead to significant financial consequences, even if the breach is minor and the tribunal does not make the maximum award.

The information to be disclosed includes the fact of, reason for and timing of the transfer, as well as any measures envisaged in association with the transfer and its 'legal, economic and social implications'.

In *LLDY*, a trade union complained of breach of reg 13(2) because it was not given all the reasons for implementing the transfer. It claimed that the transferor had decided to outsource the activities in question because of a pay dispute with the union and because the managing director had threatened to outsource the work if no agreement were reached. However, the information provided just referred to costs savings as the reason for the outsourcing. The union also claimed that the TUPE information was not provided long enough before the transfer to enable consultation. The employment tribunal upheld both these complaints.

The decision

On appeal, the EAT concluded that the tribunal was entitled to find that:

- the managing director had expressed an intention to outsource the activities if the pay dispute were not resolved;
- the pay dispute and the managing director's expressed intention were among the reasons for the transferor's decision to implement the transfer; and
- the reasons given to the transferor in the required TUPE information (cost savings) did not include all of the reasons for the transfer.

To be disclosable, the reasons in question did not need to be the only reason for the transfer but, if they were reasons at all, then the obligation arose to mention them. As the EAT put it (at para 29), it would:

> ... have been a simple matter for the writer of the letter to have expanded on [the reason given] and to have stated that the existence of the industrial dispute, and the view taken by the managing director that failure to settle it would result in outsourcing were relevant in the decision making.

This decision demonstrates that care needs to be taken to ensure that the notification to the appropriate representatives of the required TUPE information does not paraphrase, gloss over or only selectively describe the reasons for the transfer. The EAT also held that the tribunal was entitled to find that the TUPE information was not provided sufficiently long before the transfer to enable consultation, being given only 48 hours ahead of early closing for a weekend.

Care needs to be taken to ensure that the notification to the appropriate representatives of the required TUPE information does not paraphrase, gloss over or only selectively describe the reasons for the transfer.

Developing case law

The decisions considered in this article not only demonstrate important technical aspects of TUPE. They also serve as useful reminders of the need to consider the ingredients of a TUPE transfer carefully, to employ due diligence over who and what transfers, and to keep abreast of new case law in what remains a developing area. ■

Case C-164/00 *Beckmann v Dynamco Whicheloe Macfarland Ltd* [2002] IRLR 578, ECJ

Case C-186/83 *Botzen v Rotterdamsche Droogdok Maatschappij BV* [1985] ECR 519

Ceva Freight (UK) Ltd v Seawell Ltd [2013] CSIH 59

Costain Ltd v Armitage [2014] UKEAT/0048/14

Determination in a complaint by Mr Michael Heyes 23 January 2015 (PO-3333)

Eddie Stobart Ltd v Moreman & ors [2012] UKEAT/0223/11

Edinburgh Home-Link Partnership & ors v The City of Edinburgh Council & ors [2012] UKEATS/0061/11

Case C-324/86 *Foreningen af Arbejdsledere I Danmark v Daddy's Dance Hall* [1988] ECR 739

G4S Justice Services (UK) Ltd v Anstey [2006] UKEAT/0698/05

LLDY Alexandria Ltd (formerly Loch Lomond Distillery Company Ltd) v (1) UNITE the Union (2) People for Work Ltd [2014] UKEATS/0002/14

London Borough of Hillingdon v Gormanley & ors [2014] UKEAT/0169/14

McCarrick v Hunter [2012] EWCA Civ 1399

Metropolitan Resources Ltd v Churchill Developments Ltd (in liquidation) [2009] UKEAT/0286/08

Ottimo Property Services Ltd v Duncan & anor [2015] UKEAT/0321/14

Rynda (UK) Ltd v Rhijnsburger [2015] EWCA Civ 75

Salmon v Castlebeck Care (Teesdale) Ltd & ors [2014] UKEAT/0304/14

Taurus Group Ltd v Crofts [2012] UKEAT/0024/12

Taylor v Connex South Eastern Ltd [2000] UKEAT/1243/99