Brexit, the Great Repeal Bill and the future of TUPE

CHARLES WYNN-EVANS, Dechert LLP

Could Brexit present an opportunity for a beneficial reform of TUPE once it is free from the shackles of the European Acquired Rights Directive?

No Brexit bonfire

Many commentators have expressed concern about whether Brexit will prompt a bonfire of domestic employment protection rights, whether or not originally derived from EU law obligations. Government statements to the contrary have not quelled these concerns, not least given the suggestion in some quarters that the UK should opt for a low tax and low regulation model, and further deregulate its labour market following a 'hard' Brexit. Nonetheless, the Government's recent white paper on legislating for withdrawal from the European Union confirms the preservation of the current employment regime, at least for the time being.

Repeal

Outright repeal of TUPE would run counter not only to current Government policy but also to the support widely expressed by business – principally referable to the certainty which it provides – for the service provision regime when its repeal was proposed in the consultation leading to the changes made to TUPE in 2014. Moreover, quite apart from the damage the repeal of TUPE would do to employment protection, the commercial consequences could be unpalatable given the volume of contractual arrangements that will have been entered into on the assumption that TUPE will apply on their termination.

TUPE preserved

The Great Repeal Bill, flagged by the white paper, will convert EU law as it stands at the moment of exit into UK law. As the white paper puts it, this 'allows businesses to continue operating knowing the rules have not changed significantly overnight, and provides fairness to individuals, whose rights and obligations will not be subject to sudden change'. It 'also ensures that it will be up to the UK Parliament (and, where appropriate, the devolved legislatures) to amend, repeal or improve any piece of EU law (once it has been brought into UK law) at the appropriate time.'

Entrenching TUPE into domestic law appears to be reasonably straightforward and not to require any amendments to reflect its transformation into a piece of purely domestic law. There would appear to be no need, in relation to TUPE, to deploy the controversial 'Henry VIII' powers proposed by the Great Repeal Bill to make secondary legislation with the stated purpose of enabling corrections to be made to existing legislation that would otherwise no longer operate appropriately after Brexit. Establishing TUPE as purely domestic legislation will also presumably put to bed any lingering arguments that certain provisions of TUPE are invalid as incompatible with the ARD and its jurisprudence – namely, reg 4(5A) deeming relocation to be an 'economic, technical or organisational' reason; reg 4(5)(a) permitting a contract change for which there is an ETO reason; and reg 4(5)(b) legitimating contract changes made pursuant to a pre-existing variation power.

The white paper confirms that decisions of the Court of Justice of the European Union subsequent to Brexit will not bind the domestic courts – adopting, as the TUPE jargon would have it, a 'static' rather than a 'dynamic' approach. That said, one can envisage advocates suggesting that subsequent CJEU case law should still be treated as being of persuasive assistance, given TUPE's ARD antecedents.

This argument might be encouraged by the existing readiness – as evidenced by decisions such as *Inex* – to apply a purposive interpretation to TUPE on the basis of domestic canons of interpretation in order to ensure that it addresses the mischiefs at which it is directed and to consider CJEU jurisprudence as being of potential assistance, by way of analogy, in applying the purely domestic service provision change provisions.

TUPE reform options

In the longer term, Brexit inevitably raises questions as to whether TUPE should be reformed. Certain possible reforms are at the more politically controversial and deregulatory end

'rather more controversially, perhaps, the principle established by the CJEU in Alemo-Herron could be reversed'

of the scale. The scope and/or extent of TUPE's information and consultation requirements, and the compensation payable for their breach, could be reduced. The relaxation of TUPE in insolvency situations could be widened. To facilitate redundancy exercises conducted as part of a TUPE process, the transferor could be permitted to 'borrow' the transferee's reason for dismissal. On this basis the transferor could then terminate an employee's employment prior to transfer for an ETO reason that relates to the transferee's future post-transfer conduct of the business without that dismissal being automatically unfair. This last proposal was rejected in the consultation leading to the amendments made to TUPE in 2014.

Insolvency proceedings

From a more technical perspective, while not, perhaps, of immense significance, the domestic insolvency procedures in relation to which the normal effects of TUPE are modified could be explicitly identified by reference to specific provisions of the domestic insolvency legislation, thereby removing the uncertainty which the approach of 'copying out' the relevant provisions of ARD and leaving it to the courts and tribunals to decide what constitutes 'bankruptcy or other analogous insolvency provisions' produced in cases such as *Key2Law*.

Pre-transfer objections

In terms of the fairness of the operation of TUPE as between transferor and transferee, the decision in *Humphreys* could also be addressed. The logic of that decision – that a claim consequent upon an objection to transfer pre-transfer on the basis of constructive dismissal or a substantial change to working conditions can only lie against the transferor as the then employer – is difficult to fault on the basis of the explicit wording of TUPE. However, it seems inappropriate that the transferor can then end up responsible for a claim caused by the statements and actions of the transferee as the employee's future employer – especially in circumstances where the transferor cannot obtain indemnity protection from the transferee against such liability. Where the transferee is at fault, such an objection could be treated as a dismissal the reason for which is the transfer and therefore liability for which could then transfer to the transferee.

The dynamic/static debate

Rather more controversially, perhaps, the principle established by the CJEU in *Alemo-Herron* could be reversed, applying the 'dynamic' rather than the 'static' approach to the transfer of contractual entitlements under TUPE. This would mean that employees whose terms are contractually determined by a third-party bargaining process would retain those contractual rights when they transfer to a new employer, even if the new employer is not a party to the relevant arrangements. Following *Alemo-Herron* and the changes made to TUPE in 2014 by the introduction of reg 4A, where the relevant employees' contracts are collectively determined, they are effectively 'frozen' at the point of transfer and cannot be amended by an otherwise contractual third-party determination process to which the employer is not a party.

Some would see such a change as the reintroduction of valuable protection for collective remuneration determination arrangements. Such a reform could also be seen as properly protecting employees' contractual entitlements – to third party determination of terms – in the face of a CJEU decision that deployed, arguably spuriously, the right to conduct a business established by Article 16 of the EU Charter of Fundamental Rights to deny member states the right – effectively by way of subsidiarity – to adopt more favourable domestic provisions than ARD requires. Such a change would no doubt encounter employer resistance.

Harmonisation

A more significant reform that would be of significant benefit for employers dealing with TUPE transfers would be explicitly to permit post-transfer harmonisation of contract terms. In the course of the consultation process leading to the 2014 amendments, the Government did indicate that it wished to address the issue of harmonisation with its European partners, although it is not clear that any steps were taken to progress this. Brexit clears the path towards amendment of TUPE in this regard. This reform would do away with the convoluted and arguably ineffective provisions which have been introduced into TUPE to seek to allow contract changes which could be seen as being by reason of the transfer without falling foul of the principle established by the ECJ in *Daddy's Dance Hall*, and reiterated in innumerable cases since, to the effect that, even if agreed, a contract change the reason for which is the transfer is void.

The argument for this reform is that, once an employee

'the Great Repeal Bill ... will entrench rather than repeal the existing body of EU-derived law'

has transferred to the transferee in accordance with TUPE, the individual's position has been protected adequately – the employee's employment does not end as a result of the transfer of the business in which he or she works, as would be the case under the common law, but the individual's employment and contractual terms are transferred and preserved. On this analysis, whether or not a change can then be made to the individual's contractual terms should be governed by the principles applying to any employee.

Allowing harmonisation – subject to the otherwise applicable contractual rules and statutory protections – would be of considerable value to employers and would avoid the complexities and uncertainties created by *Daddy's Dance Hall* in terms of what degree of connection is required between a transfer and a contract change – or indeed, for that matter, a dismissal – to trigger TUPE's protections.

Conclusion

The Great Repeal Bill, if it retains that title, runs the risk of falling foul of the trading standards authorities as it will repeal only the European Communities Act 1972, and will entrench rather than repeal the existing body of EU-derived law. Nonetheless, even if this is a naively optimistic view, Brexit does present the opportunity to make improvements to TUPE without succumbing to more extreme deregulatory pressures and to which legislators might one day have the time to return.

Charles Wynn-Evans is the author of 'The Law of TUPE Transfers', second edition, Oxford University Press, 2016.

KEY:

TUPE	The Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) SI 2006/246
ARD	Council Directive 2001/23/EC, 12 March 2001
White paper	'Legislating for the United Kingdom's withdrawal from the European Union', Department for Exiting the European Union, March 2017, CM 9446
Inex	*Inex Home Improvements Ltd v Hodgkins & ors* [2016] IRLR 13, EAT
Key2Law	*Key2Law (Surrey) LLP v D'Antiquis* [2012] IRLR 212, CA
Humphreys	*University of Oxford v Humphreys* [2000] IRLR 183, CA
Alemo-Herron	*Alemo-Herron & ors v Parkwood Leisure Ltd* [2013] IRLR 744, ECJ
Daddy's Dance Hall	*Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] IRLR 315, ECJ