EU Employment Law Webinar on Acquired Rights Directive/TUPE

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Chaired by Ann Bevitt
Introduction to speakers

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Introduction to speakers

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European Union

- 28 member states (and 5 candidates for membership)

- Over 500 million population

- Interplay of EU and domestic law
  - EU Directive – e.g. ARD
  - Local implementation – e.g. TUPE

- Gold plating
DE-MYSTIFYING THE ACQUIRED RIGHTS DIRECTIVE
Acquired Rights Directive

What is it?

- Purpose of national legislation on transfer of undertakings is to implement EC Council Directive 77/187, generally known as the “Acquired Rights Directive”


- Full title:

Acquired Rights Directive

When does it apply?

“...to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger” (Article 1.1(a))

What is a transfer of an undertaking?

“where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancilliary” (Article 1(b))
When is there a transfer?

(i) requires an “undertaking” or “business” or part of one

• “undertaking” includes a business undertaking but could include the activities of a charitable foundation – see Redmond (Dr Sophie) Stichting v Bartol C-29/91 [1992] IRLR 366 (ECJ)

• “part” requires a unit which is to some extent self contained, but Directive applies even if part does not retain its organisational autonomy, provided functional link between the various elements of production transferred is preserved, and that link allows transferee to use those elements to pursue analogous economic activity – see Klarenberg v Ferrotron Technologies GmbH: C-466/07 [2009] ICR 1263 (ECJ)

• pre transfer, part transferred does not have to exist as a discrete and identifiable economic entity; sufficient if part if it becomes identified as separate economic entity on the occasion of the transfer – see Fairhurst Ward Abbotts Ltd v Botes Building Ltd [2004] ICR 919
When is there a transfer?

(ii) requires transfer of an economic entity which retains its identity

• applies even if transfer is governed by foreign law or if the employees in the undertaking work outside the State or their employment governed by foreign law (see for example TUPE Reg 3(4)(b))

• applies to transfer from UK to non-EU entity where on transfer, the undertaking did not remain in jurisdiction: *Hollis Metal Industries v GMB & Newell* [2008] ICR 464

• applied where lessee of restaurant premises gave notice to employees on termination of the lease. New third party lessee continued to run the business without interruption: *Foreningen af Arbejdsledere i Danmark v Daddy’s Dance Hall A/S* [1988] IRLR 315

• Regulations require a transfer from one legal person to another so will not apply to share transfers. But courts might pierce corporate veil if it appears an intercompany transfer has been structured to make it appear there has not been a transfer of business from one entity to another: *Millam v Print Factory (London) 1991 Ltd* [2007] ICR 1331
When is there a transfer?

(iii) what is the transfer of an economic entity?


  - whether tangible assets transfer
  - value of intangible assets
  - whether majority of employees are taken over (but caution against TUPE avoidance:
    - ADI v Willer [2001] IRLR 542
    - Astle v Cheshire County Council [2005] IRLR 12)
  - whether customers are transferred
  - degree of similarity between activities before and after transfer
When is there a transfer?

Examples:

- Contracted out cleaning service even where services performed by single employee and there is no transfer of tangible assets (albeit the entity must be sufficiently structured and autonomous): *Schmidt v Spar und Leihkasse der Früheren* etc.[1995] ICR 237

- Activity itself is not an undertaking (cf service provision change in UK). In case of labour intensive undertaking with no assets (eg contract cleaning) often no transfer unless new contractor takes on majority of old contractor’s staff: *Vidal (Francisco Hernandez) v Gomez Perez* [1999] IRLR 132

- Absence of transfer of assets might be conclusive where activity required significant tangible assets: *Oy Liikenne Ab v Liskojarivi & Juntunen* [2002] ICR 155

- A further recent example involving cleaning premises: *CLECE SA v Vahor C-463/09* [2011] ICR 1319
What does it do?

1. Transfers all the employees working in the undertaking together with their contracts of employment
2. Makes any dismissal automatically unfair where the sole or principal reason for the dismissal was the transfer, unless an economic, technical or organisational reason was the sole or principal reason for the dismissal
3. Transfers liability in respect of employees dismissed by the transferor in advance of the transfer if the sole or principal reason for the dismissal was the transfer
4. Requires the provision of information to and consultation with employee representatives
5. Requires the supply of employee liability information by the transferor to the transferee in respect of the transferring employees
6. Transfers any trade union recognition in respect of the transferred employees
7. Transfers any collective agreements applicable to the transferred employees
8. Prevents variations to employees' contracts which are caused by the transfer
How does it do it?

• Requirement on member states to put it into effect - In UK that is done by Transfer of Undertaking (Protection of Employment) Regulations 2006 (“TUPE”)

• Direct effect: the Directive can be relied upon directly as against a Member state or emanation of the state (eg a body providing a public service under state control)

• “Francovich claims”: State may (exceptionally) be required to pay damages if it has not properly implemented Community law

• National courts are required to interpret national legislation in line with the directive, sometimes with drastic effects
Implementation

• Often national legislation simply repeats and clarifies the Directive but in some instances national legislation goes further. This has become known as “gold plating”.

• UK example: “service provision change” (“SPC”). TUPE applies both to the transfer of an undertaking and to an SPC. The SPC concept does not appear in the Directive.

• Recent amendments in the UK sought to reduce the scope of gold plating (see the Collective Redundancies and Transfer of Undertakings (Protection of Employment) Amendment Regulations 2014 (SI 2014/16), in force on 31 January 2014).

• Directive expressly does not affect “the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees” (Article 8).
(1) Transferring employees

**Scenario:** An undertaking transfers from A to B [or in UK, there is a service provision change from A to B]

“The transfer of the undertaking… shall not in itself constitute grounds for dismissal by the transferor or the transferee.” (Article 4.1)

- Individuals who are employed by A before the transfer automatically become employees of B from the time of transfer, on terms and conditions they previously held with A.

- **NB:** this does not mean you cannot dismiss on transfer – it does mean that the transfer will not, of itself, provide a fair reason for dismissal, so dismissal by reason of the transfer is unfair, subject to some exceptions which are explored below.

- This is subject to an individual’s right to object to being transferred. This may be more commonly exercised in some countries than others. It is very rare in the UK because objecting has the effect of terminating the contract without there being a dismissal (under TUPE Reg 4(8)).
(2) Transfer related dismissal is unfair

• Dismissal of any employee, whether before or after the transfer, where the reason for the dismissal is the transfer, is automatically unfair.

“Provision that transfer is not a ground for dismissal “shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.” (Article 4.1)

• Even if the reason is the transfer, if the reason is an “economic, technical or organisational reason” (or “ETO”) dismissal is not automatically unfair. Then the question is whether it is fair in all the circumstances, applying national criteria for unfair dismissal.

• A redundancy situation commonly gives rise to an ETO (eg the way B is going to structure the business is different from how A structured it). In the UK, dismissal for an ETO is potentially (not automatically) fair by reason of redundancy or another “substantial reason” (TUPE Reg 7(3)(b)).

• But ETO changes must include “changes in the work force” – ie in the numbers of the workforce overall or in the functions of members of the workforce (Berriman v Delabole Slate Ltd [1985] ICR 546) or in UK from 2014 “change to the place where employees are employed…” (TUPE Reg 7(3A))
(3) Liability for dismissed employees

B inherits A’s rights and liabilities in relation to individuals dismissed by reason of the transfer, as well as transferring employees

“The transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of transfer shall, by reason of such transfer, be transferred to the transforee.” (Article 3.1)

• This has been interpreted to mean that where an employee is dismissed because of the transfer (regardless of whether that coincides with the date of transfer) liability for that unfair dismissal passes to the transforee

• Liability will not transfer for an unfair dismissal if the reason is not the transfer

• Liabilities towards transferring employees also transfer. This includes all tortious and statutory claims
(4) Information and consultation

• A must inform recognised trade unions or employee representatives about consequences of the transfer and B must provide A with sufficient information in this regard. This must include:
  
  • Proposed date of transfer
  • Reasons for the transfer
  • Legal, economic and social implication of transfer
  • “any measures envisaged in relation to the employees” (Article 7.1)

• Individuals must be consulted if there are no representatives (Article 7.6). In UK, employers of < 10 people can now consult employees directly, replacing requirement for all employers to elect representatives.

• In certain circumstances it may be necessary for A or B to consult with recognised trade unions or elected employee representatives regarding the transfer
  
  • Applies where A or B “envisages measures in relation to his employee”
  • Must be “in good time... with a view to reaching an agreement” (Article 7.2)
(5) Employee liability information

“...States may adopt appropriate measures to ensure the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are known or ought to have been known to the transferor...” (Article 3.2)

• In UK, such information comprises the name, age and particulars of employment, details of any disciplinary action or grievances involving the employee on previous 2 years, any court or tribunal action by employee against the transferor in last 2 years or any such action which reasonable grounds to think may be brought in future, and details of any collective agreement (TUPE Reg 11)

• In UK, transferor is required to give information 28 days before transfer (extended from 14 days, as from 1 May 2014) or “as soon as reasonably practicable” if there are “special circumstances”

• In some States there are financial penalties payable by the transferor if this information is not provided
(6) Trade Union recognition

“If the undertaking.. or part.. preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms…” (Article 6.1)

• Where A recognises a union in respect of the undertaking transferred and, following transfer, the undertaking maintains an identity distinct from any other undertaking owned by B, B must recognise the union in respect of those employees

• If the entity merges into an existing undertaking of B, Member states must ensure that employees continue to be properly represented (Article 6.1)
(7) Collective Agreements

“Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or expiry of the collective agreement or the entry into force or application of another collective agreement.” (Article 3.3)

- Collective agreements made by or on behalf of A with a trade union recognised by A, are inherited by B (Codified in UK by TUPE Reg 4(2))

- The 2014 TUPE amendment (Reg 4A) nullifies rights under a collective agreement agreed after the date of transfer where the employment contract provides that it incorporates collective agreements “as may be agreed from time to time”

- Brings UK in line with the Directive as interpreted by the ECJ in the German case of Werhof v Freeway Traffic Systems GmbH [2006] IRLR 400 which held that the transferee is not bound by any collective bargaining process conducted after transfer

- ECJ confirmed this position in the UK case of Alemo Heron v Parkwood Leisure [2013] ICR 1116, holding that where a transferee employer is not a party to collective negotiations, it should not be bound by the outcome of those negotiations.
(8) Variations to contracts

- Another effect of Article 3.1 [transferor’s rights and obligations arising from a contract of employment transfer to transferee] is that variations to employees' contracts because of the transfer are contrary to the Directive.

- Hence in UK, except where there is an ETO, TUPE provides that a purported variation is void if sole or principal reason for it is “the transfer” (Regulation 4(4)).

- If there is an ETO, the change is not void if the change is agreed or terms of the contract permit the employer to make the variation (Regulation 4(4)).

- 2014 TUPE amendment revoked a further provision that variations “connected with the transfer” were void. UK Government (BIS) guidance suggests this amendment is not contrary to the Directive (but see Foreningen af Arbejdsledere i Danmark v Daddy’s Dance Hall A/S [1988] IRLR 315).
Case Study 1: Business purchase

You are advising the board of Global Tech, Inc., a global technology corporation with headquarters in California. The board is currently negotiating with Gizmos Ltd, a UK headquartered technology company, in respect of certain assets. Gizmos’s operations are split into two divisions – microchip and software – each with operations in the UK and Germany. There are approximately 150 employees in each division. Gizmos has a single HR function but separate accounting and finance departments sit within each division. Global Tech does not currently have a microchip business but is keen to expand in this area.

After carrying out initial due diligence, the following terms have been agreed:

• Global Tech will purchase the assets, equipment and associated intellectual property of the microchip business
• The three main customer contracts relating to the microchip business will be assigned to Global Tech
• Gizmos will continue its software business at its current locations in the UK and Germany. The leases of those premises will not be transferred to Global Tech
• Between 60% and 70% of employees in the microchip division are to be offered jobs with Global Tech
• Global Tech will relocate the employees to its own sites in the UK and Germany. On a straight line basis the sites are within 10 miles of each other in both countries.

The board has asked for your advice in relation to the following questions…
Questions

1. Is there a relevant transfer?

2. Are the head office staff assigned to the microchip business?

3. Is Global Tech able to implement their proposed change to work location or are there any risks associated with doing so?

4. What steps must Global Tech take to avoid or limit claims from employees in respect of redundancies?

5. What must Global Tech (and Gizmos) do to comply with their informing and consulting obligations?
Case Study 2: Outsourcing

You are the Human Resource Director of Best FM Ltd. For the past five years, Best FM has provided facilities management services to First Response GmbH at its sites across Europe. The current contract is due to expire in three months’ time and, whilst you had anticipated that it would be renewed, you have just received a letter from Under Cut Ltd which says it is currently negotiating a new contact with First Response and requesting information relating to your employees.

You call First Response and learn that Under Cut are willing to provide facilities management services for 20% less than you are currently charging. You are not surprised. Under Cut’s two large-scale redundancy programmes were the subject of much press attention last year and they are generally considered to pay amongst the lowest salaries in the industry. Best FM, on the other hand, prides itself in valuing its employees and has recently entered into a collective bargaining agreement with the trade union under which employees are entitled to a 3% pay increase each year for the next three years and any additional amounts negotiated. You suspect that a number of employees will not want to transfer.

You are asked to advise the board of Best FM tomorrow on employment law issues that may arise on the termination of the contract...
Questions

1. Is there a relevant transfer?

2. It is understood Under Cut will only agree to hire up to 40 employees. However, you have almost 100 employees located at the various sites. How should Best FM deal with this?

3. Do you need to provide any information relating to the employees?

4. Can the employees object to the transfer and, if so, what is the effect?

5. The union representative approaches you concerned that Under Cut will consider the pay increase set out in the collective bargaining agreement to be overly generous. Can you assure him that this will be protected?
Questions
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