The referendum effect

John McMullen shares his thoughts on TUPE & Brexit

IN BRIEF

- The possible impact of Brexit on the Transfer of Undertakings (Protection of Employment) Regulations 2006, which are underpinned by the EU Acquired Rights Directive 2001/23.

Much lawyers' ink will be spilt over the next two years speculating on the effect on UK employment laws of the decision in the 2016 referendum that the UK should leave the EU. Necessarily, speculating on the precise effect of this decision on those aspects of UK employment law which are based on an EU Treaty provision or EU Directive is, at this juncture, premature. For a start, negotiations to leave the EU under the authority of Art 50 of the Treaty on European Union have, at the time of writing, not even been triggered.

The UK government has indicated this will not be before January 2017. When Art 50 is triggered it will take up to two years of negotiations before a settlement is achieved. Until then, as the EU Commission (along with the UK government), has made abundantly clear, the UK remains a member of the EU and, therefore, current employment law which has, as its origin, European law, will be unaffected. This article does, however, put forward some (albeit speculative) thoughts on the possible impact of Brexit on the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (the 2006 regs), which are underpinned by the EU Acquired Rights Directive 2001/23.

Brexit-lite

Let us first dismiss both the possibilities of the UK Parliament making the final decision whether to leave (and ruling it out) and of a UK government re-negotiating its position with the EU and arranging another referendum (though many would like one of these to happen). Let us turn, then, to the concept of "Brexit-lite". If the UK wants access to the single market it may have no practical alternative but to join the European Free Trade Association (EFTA) (the current members of which are Iceland, Liechtenstein, Norway and Switzerland). Iceland, Liechtenstein and Norway are members of the European Economic Area (EEA) agreement. Membership of the EEA entails following a number of European directives, including the Acquired Rights Directive. Switzerland is not a member of the EEA, but has a number of bilateral agreements with the EU. Swiss law, although not incorporating the Acquired Rights Directive, nonetheless includes legal provisions which are similar in most respects. After the August Chequers "away day", Brexit-lite has (apparently) been waved aside. But we shall see.

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If the UK does remain in the EEA as a non EU member (and do not discount this yet) the Acquired Rights Directive will still affect the interpretation of TUPE (apart from the area of service provision change which (see below) is an area where, in the law on transfer of undertakings, the UK has special rules).

Under EFTA/EEA arrangements, such as those which apply, for example, to Norway, Court of Justice of the European Union (CJEU) decisions will continue to be influential. But EFTA states cannot bring a case before the CJEU. Instead, the EFTA Court was set up to deal with the interpretation of EEA law in the EFTA countries. The court used to sit in Geneva and was originally made up of the judges from five EFTA countries which originally formed part of the EEA. However, since the accession of Sweden, Finland and Austria to membership of the EU in January 1995, the court underwent a substantial change. It is now made up of judges from three EFTA countries—Norway, Iceland and Liechtenstein. The EFTA Court now sits in Luxemburg where it shares the premises and resources of the European Court of Justice and the Court of First Instance.

Competencies

The competencies and procedure of the EFTA Court are very similar to those of the CJEU. Courts within the EFTA Member States can request advisory opinions from the EFTA Court and the procedure is modelled on that of preliminary references to the CJEU under what is now Art 267 of the Treaty on the Functioning of the European Union (TFEU). There are however a number of differences:

- No opinion can be requested on the legality of an EEA Rule.
- Opinions delivered by the EFTA Court are only of an advisory nature and are not binding, even on the court that requested the opinion.
- National courts are not obliged to refer questions of EEA law to the EFTA Court. Use of the court is optional. Notwithstanding this, there are a number of interesting cases from Iceland and Norway decided by the EFTA Court dealing with the subject of outsourcing and transfer of employment rights (these may be viewed in the summary in Appendix A of McMullen: *Business Transfers and Employee Rights*).

What if the UK rejected the possibility of staying in the EEA and went it alone? Under this scenario the UK would (in theory) be free to re-write the law on business transfers.

TUPE

It is true to say that when the TUPE Regulations 1981 were introduced they were done so with "a remarkable lack

of enthusiasm" (the words of Mr David Waddington, the then Under-Secretary of State for Employment). But I argue that, since then, there has, in reality, been little enthusiasm either for removing the protection given to employees or radically changing the law on TUPE as it currently stands.

This is clearly demonstrated by the fact that the 1981 Regulations (which did not fully meet the requirements of the Acquired Rights Directive in certain respects) were embellished and refined in 2006, thereby enlarging employee rights. So a material example of the UK's willingness to keep and sustain laws protecting employees' rights on transfers of undertakings may be found in the content of the 2006 regs.

As well as improving some of the defects in the original 1981 regs, the 2006 regs are notable in their creation, in reg 3(1)(b), of the concept of "service provision change" (see, in Northern Ireland, The Service Provision Change Protection of Employment) Regulations (Northern Ireland) 2006). The purpose of the creation of the concept of service provision change was to achieve greater certainty in practice for all concerned, thus avoiding unnecessary disputes, reducing litigation and lowering transaction costs. At a stroke, for the purposes of service provision change, the UK was released from the uncertainty of European Court case law such as *Ayse Süzen v Zehnacker Gebäudereinigng GMBH Krankenhausservice* (Case C-13/95) and the difficulties of applying this in a UK employment relations environment.

The UK also included valuable options in the 2006 regs which are not compulsory under the Acquired Rights Directive. These include the obligation on the old employer to supply the new employer with employee liability information. TUPE 2006 also provides that on a transfer following an insolvency (otherwise than for the purpose of liquidation of the assets of the transferor) TUPE applies but, nonetheless, allows an insolvency practitioner and employee representatives to agree changes in employment terms designed to safeguard employment opportunities and the survival of the business. Another example is the express provision for joint and several liability of the transferor and transferee for breach by a transferor of its obligations to inform and consult under reg 13 of the 2006 regs. This is not compulsory under the Directive. Had this option not been put into place, liability for a transferor's breach of the regs would exclusively pass to a transferee even where the transferee were not at fault.

When TUPE 2006 was reviewed by the government in 2013 (resulting, ultimately, in the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI 2014/16)) a number of "employer friendly" amendments were made.

Renegotiation

For example renegotiation of terms derived from collective agreements may take place one year after the transfer, even though the reason for seeking to change them is the transfer, provided that overall the changes are no less favourable to the employee. The amending regulations also provide for the "static" approach to the transfer of terms derived from collective agreements. This implements the European Court decision in *Alemo-Herron v Parkwood Leisure Ltd* (Case C-426/11) where it was held that it is impermissible for member states to allow the survival of clauses in employment contracts allowing for terms to be settled by future collective agreements to which the transferee is not a party. Third, changes in the location of the workforce following a transfer may fall within the scope of an ETO reason entailing a change in the workforce thereby preventing genuinely place of work redundancies from being automatically unfair (in contrast to the previous case law of TUPE 2006).

Regulations 4 and 7 were amended to bring them closer to the language of the Acquired Rights Directive, invalidating variations and dismissals respectively, only if the sole or principal reason for the variation is the transfer itself. And, finally, micro businesses (fewer than 10 employees) may inform and consult employees directly in the absence of a trade union or existing elected employee representatives.

Instructively, the 2013 consultation exercise received responses from a wide range of interested parties, including individual businesses, employee representatives, business representatives, service providers and employment law specialists. Sixty seven per cent of respondents were against repealing the concept of service provision change, even though this is a provision that goes further than European law protection. Around 70% of respondents expressed concern about legal uncertainty were the law on TUPE to be changed. Seventy five per cent of respondents were against the proposed repeal of the employee liability information provisions.

Respondents acknowledged that the proposed repeal was intended to be deregulatory but they did not support the removal of the provisions that required information to be shared. This was because they considered that the information provided under these provisions was a significant part of the TUPE process and was commercially important. As to any proposal to significantly alter the rule on changing employment terms the majority view was that unfair dismissal law already contained limits to employee protection (the qualifying period for making a claim, for example, is now two years). A number of respondents pointed to the experience of negotiating variations to terms and conditions within a properly negotiated collective agreement, arguing that this was generally not problematic, as a collective agreement could add certainty for both the employer and employee.

The government itself noted that: "Fairness is an important part of the government strategy for regulating the labour market. The TUPE Regulations ensure that individuals are treated fairly during a transfer of an employer, at a time which can be unsettling for all involved." (see para 8.3).

In conclusion the government stated that (see para 3.1): "TUPE Regulations are important because they provide a legal framework for the transfers of staff. The rules help facilitate outsourcing, insourcing and changing managed service contracts. It is important that TUPE is not so burdensome to stop mergers, acquisitions or service changes but maintains fairness for employees involved in transfers and a level playing field for businesses."

Review

Clearly, if the TUPE Regulations were up for review in a few years' time and European Law can be ignored, some further "business friendly" provisions may be introduced. One might, for example, be the facility to harmonise employment conditions after a TUPE transfer, on day one (currently, under *Martin v South Bank University (Case C-4/01)* the employer's desire to harmonise terms and conditions as an objective in itself will be treated as being by reason of the transfer, and therefore invalid). But we predict no more than a light touch.

The 2013 government impact assessment indicated "there are currently between 26,500 and 48,000 TUPE transfers taking place each year, with the number of employees affected likely to be between 1.42m and 2.1m per year. The number of transfers is unlikely to reduce in the future". I would suggest there will be no appetite for activity on such a scale as this to be unregulated. NLJ

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