Competing rights

John McMullen investigates the differing interpretations of collective bargaining

IN BRIEF

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- But in the UK, terms from a collective agreement may acquire legal enforceability by their incorporation into the individual employment contract.

Under the European Union Acquired Rights Directive (2001/23), upon a transfer of an undertaking, all of the transferors' rights and obligations arising from a contract of employment or from an employment relationship are transferred to the transferee (Art 3(1)). Furthermore, following the transfer, the transferee is obliged to continue to observe terms and conditions agreed in any collective agreement until the date of termination or expiry of the agreement or the entering into force or application of another collective agreement (Art 3(3)).

These provisions are transposed in the UK by the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006 (SI 2006/246). Regulation 4 of TUPE 2006 (formerly reg 5 of TUPE 1981) provides for the transfer of the employment contract. Regulation 5 of TUPE 2006 (formerly reg 6 of TUPE 1981) provides for the transfer of collective agreements. However, that is without prejudice to the position in UK law that collective agreements are presumed to be unenforceable. But in the UK, terms from a collective agreement may acquire legal enforceability by their incorporation into the individual employment contract. Therein lays the nub of the problem in the case here discussed.

Debate

Alemo-Herron and Others v Parkwood Leisure Ltd [2013] EUECJ C-426/11, [2013] WLR (D) 288, [2013] All ER (D) 379 (Jul) concerns the debate about whether clauses in employment contracts allowing for collective agreements to determine pay and conditions transfer—under the Acquired Rights Directive, or TUPE—to a transferee in circumstances where the transferee is not a party to the collective bargaining machinery. This occurs most commonly in public sector to private sector transfers where, in the public sector, the employment contract incorporates pay awards by reference to national collective bargaining machinery. When the undertaking transfers into the private sector, the employment contract passes to the transferee, together with the collective bargaining clause, but a private sector employer will not be party to the collective bargaining machinery and cannot therefore have a say in the outcome of the negotiating process or the outcome of the collective bargain that leads to the pay award.

This is the contest between the so-called "static" interpretation of collective bargaining clauses and the "dynamic" interpretation. The former states that the new employer is bound by the collective agreement in force at the time of the transfer, but not by future collective agreements where he is not a party to the bargaining machinery. The dynamic interpretation holds that the collective bargaining clause transfers under TUPE and continues to bind the new employer.

Transfer

Alemo-Herron itself concerned former employees of the London Borough of Lewisham. They worked in the council's leisure department until it was contracted out to a private sector company called CCL Ltd and the employees transferred to CCL Ltd under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794). Thereafter CCL Ltd was taken over by another private sector employer, Parkwood Leisure Ltd and the employees transferred, again, under TUPE. The council was a member of the National Joint Council for local government services (the NJC) which comprised local authority employers and trade unions. The terms and conditions settled by the NJC are known as "the Green Book". The employees' terms and conditions stated that they were in accordance with NJC determinations and the "Green Book".

At the time of the transfer to CCL Ltd, pay rates had been set for the period of 1 April 2002 to 31 March 2004 which were honoured by CCL Ltd. In March 2004 NJC negotiations began for the period of 1 April 2004 to 31 March 2007. Parkwood, which had now acquired CCL Ltd, could not belong to the NJC or be represented on it and so was not a party to any negotiations. The negotiations concluded on 4 June 2004 when a three-year settlement was published. Parkwood declined to give the employees pay increases in line with the collective agreement and the employees brought claims for unauthorised deductions from their wages contrary to s 13 of the Employment Rights Act 1996.

Dynamic

Earlier litigation in this context suggested that a dynamic interpretation of the employees' contract would apply. In *Ball v BET Catering* EAT 637/96 and in *Whent v T Cartlidge Ltd* [1997] IRLR 153, the Employment Appeal Tribunal (EAT) had decided that, until the bargaining arrangements were validly varied, the new employer would be bound by NJC awards even if it were in a totally different sector, outside the NJC arrangements and not represented on the NJC itself.

It is true to say that the EAT cautioned in *Whent* that this would not bind the new employer *ad infinitum*. The new employer was at liberty to negotiate to vary the employment contracts or to terminate the contracts on notice in order to offer new contracts without the offending term. Of course in practice, an employer may

face considerable difficulty negotiating variations on employment contracts in the context of a TUPE transfer and dismissal to effect the change in terms and conditions may be automatically unfair. And this is entirely consistent with British labour law on the incorporation of terms into an employment contract from a collective agreement. Such terms survive the employer's withdrawal from the collective agreement (*Morris v CH Bailey Ltd* [1969] 2 Lloyd's Rep 215; *Burroughs Machines Ltd v Timmoney* [1977] IRLR 404*; Tocher v General Motors Scotland Ltd* [1981] IRLR 55). Then, once incorporated, as the editors of *Harvey on Industrial Relations and Employment* say, the provision "falls to be construed strictly in accordance with the rules of construction applicable to contracts" (*Hooper v British Railways Board* [1988] IRLR 517).

Static

In the meantime, in *Werhof v Freeway Traffic Systems GmbH & Co KG* (C-499/04, [2005] ECR 1-2397) the European Court of Justice (ECJ) held that such arrangements were static in nature. That is to say, only the collective agreement in force at the time of the transfer bound the new employer. In play before the ECJ was a powerful argument in favour of the employer, that its right of freedom of association must be respected. This included the right not to join an association or trade federation. If the dynamic interpretation contented for by the employees applied, it would mean that future collective agreements applied to a transferee who was not party to a collective agreement and his fundamental right not to join an association would be detrimentally affected. So the new employer was not bound by the new collective agreement setting pay.

When *Alemo-Herron* reached the EAT, ([2009] UKEAT/0456/08) the EAT had to consider these competing arguments. The employers argued now that *Werhof* had changed the law and, in effect, disobliged a future employer from following collective agreements which replaced agreements that were in force prior to the date of the transfer. The EAT (Judge McMullen QC presiding) held that employees were entitled to enjoy pay increases in accordance with NJC decisions. It was a term of their contract which could not be altered against their wish. In this regard, *Whent* was followed.

However, in the Court of Appeal ([2010] EWCA Civ 24) it was ruled that *Werhof* overrode *Whent*. But for the European authority, in the opinion of the Court of Appeal, the employees would have won (See Lord Justice Rimer at para 46). But in the light of *Werhof* it was considered that domestic decisions in cases such as *Whent* were wrong and should not be followed.

Openings

In the Supreme Court ([2011] UK SC 26, Lords Hope Walker, Brown, Kerr and Dyson) two avenues opened up for the employees' case. First, the freedom of association argument run in *Werhof* was not being employed by the employer in *Alemo-Herron*. Second, it was argued that a member state is able to provide, in its domestic law for rights more favourable to employees than is required by the Directive or ECJ decisions interpreting the Directive. The matter was referred by the Supreme Court to the ECJ for a preliminary ruling.

The view of the advocate general in *Alemo-Herron* was not to rule out dynamic clauses, if a member state chose to apply them, provided that this obligation on the transferee should not be "unconditional and irreversible". It would be for the national court to assess, whether, in the particular circumstances of the case, under national law, the obligation was in fact unconditional and irreversible.

However, the ECJ (C-426/11; 18 July 2013 (Third Chamber) ruled that dynamic clauses are, as a matter of principle, impermissible. A dynamic clause referring to collective agreements undermines the balance between the interests of the transferee in its capacity as employer, on the one hand, and those of the employees on the other. Even though the issue of the right not to join an association was not an issue in the proceedings, under Art 16 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) an employer, said the court, must have the right to conduct a business and assert its interests effectively in a contractual process to which it is party and "to negotiate the aspects of determining changes in the working conditions of its employees with a view to its future economic activity". To provide otherwise interfered with the employer's freedom to contract. Thus: "In those circumstances, the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business."

Even though Art 8 of the Acquired Rights Directive could be interpreted as allowing member states to provide more favourable provisions as far as employees were concerned this could not be allowed adversely to affect "the very essence of the transferee's freedom to conduct a business" (para 37).

A dynamic interpretation therefore, of this kind of clause was inconsistent with the Charter. As such, member states are not permitted to allow dynamic clauses referring to collective agreements negotiated and adopted after the date of the transfer where the transferee cannot participate in the negotiation of such an agreement.

Balance

Was the court correct in deciding the case this way? This is not the first time that the ECJ has sought to "balance" competing rights in Community law. In *ITWF v Viking Line ABP and Oü Viking Line Eesti* (Case C-438/05, [2008] IRLR 143) and *Laval v un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (Case C-341/05, [2008] IRLR 160) the court held that the right to take industrial action (Charter of Fundamental Rights of the European Union, Arts 27, 28 and 30) had to be weighed against Treaty Rights of freedom of establishment or the freedom to provide services. And of course the court in *Werhof* had balanced rights under the Acquired Rights Directive with the right of freedom of association under the Charter. What is perhaps concerning is the potential of the employer's Art 16 rights as applied in *Alemo-Herron* when other aspects of the Acquired Rights Directive are considered in the future.

Finally, another criticism of *Alemo-Herron* is that it may give rise to a two-tier level of protection. If employers can effectively pull out of collective agreements even though incorporated into the employee's contracts, employees whose terms and conditions are governed by collective agreements are less well off than employees whose employment is not subject to collective bargaining. In the former case, the offending terms may be replaced either by a new collective bargain or, as in the *Alemo-Herron* case, by none at all. The individual employment contract that does not incorporate the collective agreement, will however, under the *Daddy's Dance Hall* [1988] IRLR 315 principle, never be varied validly if the reason for the transfer is the variation itself.

Changes

In fact the UK government proposes in the forthcoming revised TUPE Regulations (to be laid before Parliament in December 2013) to do two things in this context. First, it will legislate to codify the static approach in *Alemo-Herron*. Second, it will allow renegotiation of terms derived from collective agreements (but not individually agreed terms) after one year following the transfer provided employees are overall "no worse off". NLJ

Dr John McMullen is a partner in Wrigleys Solicitors LLP and visiting Professor of Law at Durham University