WRIGLEYS
— SOLICITORS —

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Employment Law BULLETIN

Welcome to our April employment law bulletin.

This month we cover a number of interesting cases on TUPE. In *Qlog Ltd v O'Brien* the EAT considered the requirement, under TUPE, that, for a service provision change, the activities changing hands must remain fundamentally the same. The EAT points out that this is a question of fact in each case but supports the broad brush approach taken by an employment tribunal in the particular example of a service provision change concerning haulage and distribution.

In the European Court it has been decided that, in principle, the European Acquired Rights Directive (upon which TUPE is based) can apply to a situation where a company sets up a shared services company and transfers its workers into that shared services company. According to the Court, it does not matter that the transfer is between two companies within the same group, nor that the parent company still maintains overall control over and gives financial support to the shared services company. The Acquired Rights Directive can still apply.

The EAT has also examined the approach to be taken to awards against employers for failure to inform and consult over TUPE where there has been partial, albeit not complete, compliance with the requirements under TUPE to inform and consult. The EAT takes the view that the penalty in such a case should be less severe than in a situation of complete non-compliance.

The European Court has also given its long awaited decision on the question whether a commissioning mother under a surrogacy arrangement is entitled to maternity leave under European law, in particular under Directive 92/85/EEC of 19th October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. The European Court has ruled that

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1: Commissioning mother under surrogacy arrangement not entitled to maternity leave

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The European Court of Justice has confirmed the position regarding commissioning mothers under surrogacy arrangements for the purposes of Council Directive 92/85/EEC of 19th October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breast-feeding. Under EU law, reflected in the UK in the Employment Rights Act 1996 and the Maternity and Parental Leave Regulations 1999, women are entitled to maternity leave if they are pregnant, have recently given birth, or are breastfeeding. In addition, the Equality Act 2010 prohibits discrimination on the grounds of pregnancy or maternity, sex, or disability.

In CD v ST a women became a commissioning mother through a surrogacy arrangement, and she began breastfeeding it within an hour of the birth. Her employer refused her maternity or adoption leave, and the woman claimed she had been subject to a detriment and had been discriminated against because of sex and maternity. In Z v A Government Department and the Board of Management of a Community School (C-363/12), a woman unable to bear children had her genetic child through a surrogacy arrangement, but her employer offered her only unpaid leave. She claimed sex discrimination and disability discrimination.

The ECJ decided that whilst carrying mothers were entitled to maternity leave, commissioning mothers did not have the right to maternity leave, even if the mother intended to breastfeed the child, as the purpose of maternity leave 'is to protect the health of the mother of the child in the especially vulnerable situation arising from her pregnancy'. There was no sex or pregnancy discrimination because:

- A commissioning father who has had a baby through a surrogacy arrangement is not entitled to paid leave either, so there is no direct sex discrimination.
- There was nothing to establish that the refusal of maternity leave in these circumstances puts female workers at a particular disadvantage compared with male workers, so there was no indirect sex discrimination.
- A commissioning mother cannot be subject to less favourable treatment related to her pregnancy because she has not been pregnant.
- Member states are not required to provide maternity leave to commissioning mothers, so such a mother refused maternity leave is not treated less favourably related to the taking of maternity leave.

There was no disability discrimination as the inability to bear children did not affect everyday life sufficiently to be a disability for the purposes of employment law.

In the UK the recent Children and Families Act 2014 allows for the making of regulations to allow statutory adoption leave for employees who have or intend to apply for a parental order under the Human Fertilisation and Embryology Act 2008 (which covers surrogacy arrangements). However, no such regulations have yet been made.

2: The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014: effective date for certain provisions

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Most of the provisions of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 came into effect in relation to TUPE transfers taking place on or after 31st January 2014. However, there are two changes which have not yet come into effect, but which will come into effect over the early summer. First, the duty on a transferor to deliver employee liability information to a transferee not less than 28 days before the transfer (as opposed to 14 days before the transfer as previously) comes into effect in relation to transfers which take place on or after 1st May 2014.

And the new rules concerning the ability of an employer which employs fewer than 10 employees (a micro-business) to inform and consult directly with employees were there are no existing appropriate employee representatives comes into effect in relation to transfers which take place on or after 31st July 2014.

3: TUPE: Service provision change and the requirement of fundamental similarity of the activities concerned

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In Qlog Ltd v O'Brien and Others the EAT considered the test, under the service provision change rules in regulation 3(1)(b) of TUPE, that the activities undertaken before and after the service provision change are required to be "fundamentally the

same". This requirement is now enshrined in TUPE, regulation 3(2A). However, this amendment to TUPE, made by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, simply codifies previous case law on the point and therefore the Qlog case remains a useful authority on how employment tribunals should approach the question of the assessment of similarity of the activities undertaken before and after the service provision change.

The facts in this case were that Ribble is an independent converter and manufacturer of cardboard packaging. It needed assistance in the transfer and delivery of its goods from Oldham to its customers throughout the UK. It had an agreement with McCarthy Haulage Limited to delivery bulk loads of products to customers. It employed drivers, a transport manager, and four shunters.

Ribble then terminated the arrangements with McCarthy and appointed Qlog Ltd. Qlog was a company of logistics engineers. It was a 'logistics platform' business. That meant it owned no vehicles itself and employed no drivers. It acted as a "middle man" tendering between the customer (Ribble) and haulagers who would actually undertake the deliveries and collections on behalf of Ribble. In discussions about TUPE, Qlog conceded that the shunters and the transport manager would transfer, but denied responsibility for the drivers as Qlog itself would not be employing drivers and would, instead, subcontract transport delivery services with individual haulage companies bidding for each specific delivery required by the customer. It was Qlog's position that there were fundamental and essential differences in the way in which the distribution of Ribble's goods was to be carried out for the future by reason of its "logistics platform" role and the subcontracting of the actual haulage itself. Indeed the tribunal recognised that Qlog operated differently from McCarthy: "it is a very different business". It noted also that, given there was no transfer of vehicles (because Qlog did not use vehicles itself), nor drivers, this could not be a transfer of an economic entity for the purposes of a regulation 3(1) (a) (business) transfer.

In deciding whether it was a service provision change under reg 3(1) (b), and whether the services after the handover were fundamentally or essentially the same, however, it had regard to the contract documentation, which included the broad statement that: "[Ribble] wishes to transfer the provision for part of its transportation, delivery and distribution services from its incumbent provider to [Qlog]". This was the substance of the activities concerned, the mode of delivery of those services being a sub-detail. It held there was a service provision change and therefore a TUPE transfer.

Qlog appealed. It contended the employment tribunal had taken the wrong approach to the examination of the activities actually carried out by Qlog and had failed to carry out a sufficiently detailed scrutiny of what this meant. It was suggested that the employment tribunal had confined itself to looking at Qlog's ultimate contractual or, as it was put, "meta-level" responsibilities. The EAT disagreed. The EAT adopted the authorities requiring an identification of the activities undertaken before and after the service provision change and that they be fundamentally or essentially the same (Metropolitan Resources Limited v Churchill Dulwich Limited [2009] ICR 1380; Enterprise Management Services Limited v Connect-Up Limited [2012] IRLR 190 and Johnson Controls v UK Atomic Energy Authority (UKEAT/0041/12)). However the EAT stressed that the question of the identification of 'the activities' is a matter for the tribunal. And it had asked the right question. It had concluded that the activities carried out by McCarthy were to transport Ribble's goods from its premises to customers and this was, likewise, carried out by Qlog. The tribunal had had regard to the different mode of delivery of the service but was

entitled to take the view it did on the similarity of the overall service itself. Furthermore, it was entitled to rely upon the contractual documentation between the parties, which characterised the overall service as being broadly the same.

A final interesting point on appeal arose with regard to natural justice. The employment tribunal had discussed, at length, the DTI consultation document on the 2006 regulations published in 2005 and had drawn assistance from it in noting that the intention behind the 2006 regulations was not to exclude "innovative bids" from the scope of service provision change. The 2005 document had not been raised by either party to the employment tribunal proceedings and nor did the tribunal invite representations from the parties on that document before making reference to it in its decision.

But ultimately, the question was whether the document played an influential part in shaping the tribunal's decision. The EAT considered that it did not, in view of the way that it had correctly relied upon the subsequent case law and applied it to the facts.

4: TUPE and awards for failure to inform and consult

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The issue in London Borough of Barnet v UNISON was how stringently the remedy for failure to inform and consult over multiple redundancies and under TUPE should be applied where there has not been a total failure to inform and consult but, rather, a partial failure to comply with the information and consultation obligation.

Barnet Council undertook a redundancy exercise and also proposed two TUPE transfers. In relation to the latter, one was a transfer of housing staff from Barnet to Barnet Homes and the second was the transfer of parking staff from Barnet to an organisation named NSL Limited.

Since 1st October 2011, following the Agency Workers Regulations 2010, it has been the rule that, for the purposes of giving information to appropriate employee representatives, in the case of redundancies under section 188(4) of the Trade Union and Labour Relations (Consolidation) Act 1992 and regulation 13(2A) of TUPE, information about the use by the employer of agency workers must be provided. This means:

i. The number of agency workers working temporarily for and under the supervision and direction of the employer;

ii. The parts of the employers' undertaking in which those agency workers are working; and

iii. The type of work those agency workers are carrying out.

This is a relatively new amendment to the law and at the time of the redundancies and transfers in the present case both Barnet and UNISON were unclear about this provision. But it was clear from the facts that UNISON raised issues around information concerning agency workers and was certainly unhappy about the information it was receiving. The employment tribunal found there had been a breach of the legislation in failing to provide, in particular, the relevant required information about agency workers under both sets of legislation.

The question, however, was how seriously to treat the employer's breach. Since the

cases of Susie Radin Limited v GMB and Others [2004] ICR 893 and Sweetin v Coral Racing [2006] IRLR 252 it has been clear that, in assessing the length of the protective award, where there has been no consultation the employment tribunal should start with the maximum period (90 days pay in a redundancy case and 13 weeks pay in a TUPE case) and reduce it only if there were mitigating circumstances justifying a reduction to an extent which the tribunal considered appropriate.

However in Todd v Strain and Others [2011] IRLR 11 Underhill J stated that Susie Radin was applicable only where there had been no attempt at information and consultation and the rule should not be applied mechanically where there has been some information given and/or some consultation undertaken, but not to the full extent required.

The employment tribunal in the Barnet case correctly cited Susie Radin and its qualification in Todd v Strain. However, the tribunal nonetheless then went on to say:

"Having said that, we are not quite sure where we should start if we do not start with the maximum and work down. It was not put to us by either of the respondents' representatives that there was a better place to start and given that in our view this is a relatively serious failure we do indeed start with the maximum".

It then made an award relating to a protected period of 60 days in respect of the redundancies, 40 days pay in relation to the housing transfer and 50 days pay in relation to the parking transfer.

On appeal the EAT overturned the employment tribunal decision. It had misdirected itself. Having directed itself that it should not use the maximum award as a starting point for assessment, it then proceeded to do so. Therefore the case was remitted to the employment tribunal for it to apply the test properly.

A final point arose in relation to the allocation of liability for the TUPE information and consultation awards. The employment tribunal failed to make a declaration that both the local authority, Barnet, and the transferee in relation to the parking transfer (NSL Limited), were jointly and severally liable for breach of the regulations in accordance with regulation 15(9). It was wrong not to do so. The transferor and transferee are, by virtue of regulation 15(9), jointly and severally liable for a transferor's failure to inform and consult. Contrary to popular belief, a tribunal also has no power to apportion liability between transferor and transferee according to fault. That is a matter for the ordinary courts under the Civil Liability Contribution Act 1978 (see Todd v Strain; Country Weddings Limited v Crossman and Others (UKEAT/0535/12/SM).

5: Transfer of Undertakings and Shared Services

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The question for the European Court in the recent case of Amatori and Others v Telecom Italia SpA Shared Service Center Srl was whether, on the creation of a shared services vehicle by a company, employees working in the services concerned automatically transferred to the shared services company even where (1) the part of the business transferred was not a functionally independent economic entity already existing before the transfer and identifiable as such by the transferor and the transferee at the time when it was transferred and (2) where, after the transfer, the transferor undertaking wielded "in-depth and supreme" control over the transferee, a relationship which manifested itself through a tight commercial bond and the commingling of business risk.

In this case, Lorenzo Amatori worked for a part of Telecom Italia. He worked in IT operations. In 2010 Telecom Italia then spun–off its IT operations, subsequently transferring it to the shared services center, a subsidiary of Telecom Italia. Following the transfer the employees, including Lorenzo Amatori, continued to perform services for Telecom Italia. The shared services centre was also subsidised by Telecom Italia. Amatori and others objected to the transfer of their employment and contended that the Italian civil code was wrong to allow a transfer of their employment as there could not be said to have been a functionally autonomous economic entity beforehand and, secondly, the shared services operation was under the control of Telecom Italia and subsidised by it. As such they argued they could not be transferred without their consent.

The European Court ruled that a transfer could take place in such circumstances under Italian law.

The Court ruled that if the entity transferred did not before the transfer have sufficient functional autonomy, that the transfer would not be covered by Directive 2001/23. However, there was nothing to prevent Member States from providing for the safeguarding of employees' rights in that situation, as the Italian civil code did.

Secondly, case law of the European Court (case C-234/98: Allen and Others [1999] ECR 1-8643) had provided that a transfer of an undertaking can take place between two subsidiary companies in the same group and the fact that the companies not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in that regard. To develop that idea, a situation such as that in the present case, in which the transferor undertaking exercises extensive overriding powers over the transferee, which manifests itself through a tight commercial bond and the commingling of business risk, cannot, of itself, prevent the application of Directive 2001/23.

6: Amendment of the Transfer of Employment (Pension Protection) Regulations 2005

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To take into account auto-enrolment the Government has been consulting on the level of pension contributions that a transferee employer has to make following a TUPE transfer pursuant to the Transfer of Employment (Pension Protection) Regulations 2005 (SI 2005/649). Under the 2005 Regulations as originally drawn, in a case where the transferee employer intended to satisfy the obligation to make pension contributions via a money purchase scheme or a stakeholder scheme an employee might require the employer to make contributions up to 6% if the employee made contributions accordingly. However, this causes a conflict with the auto-enrolment provisions. A transferor employer might only be obliged, in certain circumstances to pay an initial minimum contribution of 1%. The Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2014 (SI 2014/540) amend the rules so that the 2005 Regulations will be satisfied if the transferee employer matches just the contributions of the transferor employer was making, even if this is less than 6%. Otherwise, some employees would be better off than they were before following a TUPE transfer, which is not the intention of the TUPE Regulations. Their function is to protect employment rights on a transfer but not to enhance them. The new rules came into force on 6th April 2014.

7: Client briefing: Restrictive covenants in employment contracts

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This client briefing explains what restrictive covenants are, when they are likely to be enforceable, and how they can be used in employment contracts to protect the interests of the organisation.

What is a restrictive covenant and when will it be enforceable?

- An organisation can use restrictive covenants to protect its interests by restricting an employee's activities for a period of time after their employment has ended.
- A restrictive covenant will only be enforceable if it protects a legitimate business interest; otherwise it will be regarded as an unlawful restraint of trade. The only recognised business interests are:
    - trade connections (including the relationship between the organisations' customers or clients and its workforce);
    - trade secrets and confidential information.
- If the organisation has a legitimate business interest to protect, the restriction will be enforceable, provided that it is no wider than is necessary to protect that interest. The covenant must be limited in terms of the restricted activities themselves and also apply:
    - for a limited time; and
    - within a limited geographical area (if appropriate).

Ensure restrictive covenants are drafted carefully

Restrictive covenants must be drafted carefully so that they:

- accurately reflect each employee's role.
- reflect the circumstances of the organisation.
- go no further than is necessary.

The organisation should regularly review contracts that include restrictive covenants and check whether they need to be updated (for example if the employee's role has changed).

Non-solicitation restrictive covenants

Clients and customers

- An organisation can include a covenant in an employee's contract preventing them from soliciting clients or customers after they have left the organisation. This type of covenant will be particularly useful if the employee has a strong relationship with certain clients or customers.
- Generally, the covenant should be restricted to customers that the employee had

contact with during a specified period before they left. There are a number of factors the organisation should consider when trying to establish the length of this period, including:

- The amount of time it could take for the employee's successor to gain influence over the organisation's contacts;
- The employee's seniority within the organisation;
- The extent of the employee's role in securing new business;
- The loyalty (or otherwise) of the clients or customers in the particular market; and
- The length of similar restrictions in the employment contracts of competitors.

Potential clients and customers

A restrictive covenant that attempts to extend the restriction to potential customers will be harder to enforce. However it may be possible to protect an interest in a genuine prospective customer if they are accurately defined.

Other employees

A restrictive covenant preventing a former employee from poaching your existing employees is likely to be enforceable, as the stability of the organisation's workforce is a legitimate business interest. However the covenant should usually be limited to those employees at the same level as the former employee and/or those more senior to them. Any clause that attempts to prohibit the poaching of employees will need to consider:

- How long the former employee's influence over the other employees will last;
- The roles of the employees over whom the influence exists.

Non-dealing restrictive covenants

- A restriction on the solicitation of customers can be extended to cover not only enticement or interference (where active steps are taking by the former employee), but also the provision of services where no active steps are required (for example where the customer approaches the former employee). This is known as a non-dealing covenant.
- This type of covenant has a clear advantage as it avoids the need to prove that the former employee made an approach, which is usually difficult to show. However it does broaden the prohibition and consequently may make it more difficult to enforce.
- The enforceability of a non-dealing covenant will depend on the interest the organisation is trying to protect (for example enforcement may be more likely if the organisation can establish a substantial personal connection between the former employee and the organisation's customers).

Non-competition restrictive covenants

- Employees are prohibited from disclosing confidential information amounting to a trade secret (for example a confidential system process used the organisation). An organisation can also include express confidentiality provisions in their employment contract to protect the information. In such a case additional restrictive covenants might be regarded as unnecessary and non-competition restrictions in particular can be hard to enforce.
- However, there are circumstances in which a non-competition restriction is likely to be enforced. For example, where the former employee's influence over customers or suppliers is so great that the only effective protection is to ensure they are not engaged in a competing business activity in anyway.

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