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Questions and problems of applying the Acquired Rights Directive in the United Kingdom

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Introduction

Almost 25 years ago the United Kingdom transposed the Acquired Rights Directive[3] into domestic law by the Transfer of Undertakings (Protection of Employment) Regulations 1981.[4] The 1981 Regulations were replaced early in 2006 by the Transfer of

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[3] 77/187/EEC.

[4] SI 1981/1794. The commencement date for most of the key provisions of the 1981 TUPE Regulations was 1st May 1982.

Undertakings (Protection of Employment) Regulations 2006.[5] These Regulations are a form of secondary legislation prescribed by the European Communities Act 1972. The Regulations are drawn up by the U.K. government and are subject to approval by Parliament.

Because of their title, the Regulations are generally known in the U.K. as the "TUPE Regulations" and the field of labour law covered by the Acquired Rights Directive is referred to as "TUPE".

This paper examines the way in which the U.K. has implemented the Acquired Rights Directive, and argues that the history of the U.K.'s implementation of the Directive can be divided into three distinct phases. The evolution of those three phases offers a compelling insight into the mechanisms provided in both U.K. domestic law and Community law so as to ensure that a directive is applied in accordance with its intent.

The U.K. labour law system

Before coming to that analysis, it is necessary briefly to explain the system of labour law in the United Kingdom. There are three separate legal jurisdictions within the U.K.: England and Wales; Scotland; and Northern Ireland. Each has its own autonomous judicial system for civil and criminal courts. The only common element is that that the House of Lords is the ultimate court of appeal for all three jurisdictions, except that in Scotland there is no appeal to the House of Lords in criminal matters.

[5] SI 2006/246.

For most employment law, it is the U.K. Parliament that legislates for all three jurisdictions, including implementation of Directives such as the Acquired Rights Directive. The TUPE Regulations apply to all of the U.K. The vast majority of cases arising under the TUPE Regulations are decided in Employment Tribunals (formerly known as Industrial Tribunals). The British system distinguishes between "courts" and "tribunals". Tribunals do not form part of the judicial system, but for all practical purposes, our Employment Tribunals are *Arbeitsgerichte.*

An Employment Tribunal consists of a lawyer as chairman sitting with two lay members, one from a trade union background, and one from an employer background. The procedure is relatively informal and normally involves examination and cross-examination of witnesses and oral submissions. The decision of the Employment Tribunal is final on questions of fact. The decision can be appealed, on a point of law only, to the Employment Appeals Tribunal ("EAT"). The chairman of the EAT is a Judge of the High Court of England, Scotland or Northern Ireland, again sitting with two laymen.

Decisions of the EAT can be appealed to the Court of Appeal in England or the equivalent appeal court in Scotland or Northern Ireland, and thence to the House of Lords. The Employment Tribunals, the EAT, the courts of appeal and the House of Lords are all empowered to refer questions to the European Court of Justice under Article 234.

The 1981 Regulations

The Acquired Rights Directive was passed by the Council of the EEC on 14th February 1977. The Directive required Member States to implement a package of protection for employees of a "transferred" undertaking. This protection included:

(1) automatic transfer of the transferor's rights and obligations arising from the employment relationship to the transferee;[6]

(2) a bar on dismissals for reasons relating to the transfer;[7]

(3) preservation of the worker's status and function after the transfer;[8] and

(4) the right to be informed and consulted as to the transfer.[9]

This package of protection represented a very significant departure from the domestic law of the U.K. as it then stood. In U.K. law, contracts of employment were (and in principle still are) personal and non-transferable.[10] An employer who purchased a business possessed a relatively unfettered right to reconfigure its workforce.

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[6] Article 3.

[7] Article 4.

[8] Article 5.

[9] Article 4.

[10] *North Wales Training and Enterprise Council Limited (t/a Celtec) v Astley* [2006] UKHL 29, para 2, per Lord Bingham.

The Acquired Rights Directive reversed this principle, allowing dismissals or changes to terms and conditions *only* for "economic, technical or organisational reasons entailing changes in the workforce."[11] Professor Hepple noted in 1976 that the provisions of the Directive required radical changes in British labour law. It would, he said, "mean the end of the legal fiction of the personal non-transferable nature of the employment relationship and replace this by the principle of automatic transfer."[12]

The U.K.'s legislative response to the Directive was unenthusiastic. Draft regulations were presented to Parliament in 1978 but could not be agreed. Early transposition of the directive became still less likely with the election in May 1979 of Mrs Thatcher's first Conservative government. One of the central tenets of that government's policy was the creation of a more flexible labour market. The Party's manifesto for the 1979 election had declared, amongst other things, that:

> "Too much emphasis has been placed on attempts to preserve existing jobs. We need to concentrate more on the creation of conditions in which new, more modern, more secure, better paid jobs come into existence. This is the best way of helping the unemployed and those threatened with the loss of their jobs in the future."[13]

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[11] Article 4(1).

[12] Hepple, "Workers' Rights in Mergers and Takeovers", [1976] ILJ, 5, 197.

[13] Conservative Party Manifesto, 1979 General Election, http://www.conservativemanifesto.com .

This approach to labour market flexibility arguably conflicted with the social policy lying behind the Directive, which functioned so as to protect a worker's terms, conditions and tenure against the vagaries of the free market. By guaranteeing job security when there was a transfer of an undertaking, the Directive necessarily restricted the ability of employers in the U.K. to "hire and fire". As the ECJ itself later observed in answer to the argument that the Directive curtailed the freedom to carry on business, "such a restrictive effect is inherent in the very purpose of the Directive."[14]

It was therefore unsurprising that it was not until 1981 (nearly two years late) that the U.K. government finally transposed the Directive into domestic law by way of the TUPE Regulations. The government's attitude towards those Regulations was one of barely disguised hostility. The Minister responsible for their passage through the House of Commons, David Waddington, said: "I am recommending them with a remarkable lack of enthusiasm."[15] When pressed on detail, he observed "We are merely incorporating in the regulations the precise obligation placed on us by the Directive and which by law we are bound now to put into effect through regulations."[16]

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[14] Case C-362/89 *D'Urso v Ercole Marelli Elettromeccanica Generale SpA* [1991] ECR I-4105, points 14-15.

[15] HC Deb, 7 December 1981, vol 14, c680.

[16] HC Deb, 7 December 1981, vol 14, c696.

The Minister's confidence that the regulations enacted the "precise obligations" of the Directive was unjustified. In their original form, the regulations gave the Acquired Rights Directive a narrow construction,[17] in that TUPE:

(1) applied only to a "commercial venture";[18]

(2) granted special exceptions for "hiving down" in the case of insolvency;[19]

(3) provided that consultation rights would apply only where there was a recognised trade union;[20]

(4) made no provision for timely consultation with a view to seeking agreement;[21]

(5) dramatically limited the available compensation for failure to consult; and

(6) provided a "special circumstances" defence to failure to consult which is not contained in the Directive.

Each of these differences between the Directive and the Regulations had the effect of giving workers less protection than the Directive intended. In particular, restriction of application of the Regulations to "commercial ventures" was not a restriction to be found anywhere in the Directive. Even in 1982, therefore, it was tolerably clear that the U.K. had transposed the Directive in a manner which was, in a number of important respects,

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[17] McMullen, *Business Transfers and Employment Rights* (Looseleaf, 1998) Chapter 4[6].

[18] Regulation 2(1).

[19] Regulation 4.

[20] Regulation 10.

[21] Regulation 10.

inconsistent with its terms.[22] It has taken nearly a quarter of century (until the passing of the 2006 Regulations) for these inconsistencies to be resolved.

Because of the way in which the Directive had been implemented in the U.K., the courts developed four key assumptions about the scope of TUPE, each of which was gradually challenged and overturned in subsequent years. It is possible to observe three phases in this process. During the first phase of "inaction", lasting until the late 1980s, each of the four key assumptions was developed. During the second phase of "upheaval", lasting from the late 1980s to around 1998, it became apparent that the scope of the Directive was in fact wider than had previously been appreciated. The third phase of "consolidation", from about 1998 to the enactment of the 2006 Regulations, has seen the U.K. government and courts create a system of protection that goes substantially beyond the Directive. In short, this is the history of a remarkable turnaround.

The period of inaction: 1981 to the late 1980s

From 1981 to the late 1980s the narrow scope of the original 1981 Regulations, and in particular the six inconsistencies between the Regulations and the Directive noted above, caused the law to develop in a restrictive manner. During this period the U.K. courts proceeded on the basis that their task was to apply the Regulations as U.K. law without

[22] See Hepple, "The Transfer of Undertakings (Protection of Employment) Regulations" (1982) 11 ILJ 29: "Arguably, the regulations are not in full compliance with the spirit and intent of the Directive."

looking behind them at the terms of the Directive. This was not surprising, since the rule that national law must be interpreted in the light of the directive it implements was not enunciated by the ECJ until the decision in *Von Colson*[23] in 1985. It was hardly noticed as an important doctrine of EC law until the decision in *Marleasing*[24] in November 1990 (hence it is known as "the *Marleasing* doctrine" rather than "the *Von Colson* doctrine"). On that basis, the courts developed four assumptions as to the scope of the Regulations.

The first assumption as to the scope of TUPE was that the law did not protect workers who were dismissed before the "transfer" took place, even if this was only a matter of days or even hours. This assumption arose from regulation 5(3) of the Regulations, which provided that

> "Any reference … to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed *immediately before* the transfer".

The phrase "immediately before" was at first applied strictly by the U.K. courts. In a case where an employee was dismissed only three days before the transfer of the shop in which she worked, although negotiations for its sale were complete before that time, the

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[23] Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26.

[24] Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

EAT held that the employee's contract of employment did not transfer to the purchaser, since she had not been employed *"immediately before"* the transfer.[25]

The second assumption was that "transfer" required a change in *ownership* of the business, as opposed to a mere change in factual control. In part, this assumption grew out of pre-existing case law on business transfers, which asked the question, "After the transfer did the business remain the same business but in different hands?"[26] So, construing the 1981 Regulations, the EAT said that the "correct test" was whether "there has been a change in the ownership of the business".[27]

The third assumption was that the expression "undertaking" included only profit-motivated entities. Whereas the Directive applied to "an undertaking, business, or part of an undertaking or business"[28] (a definition which explicitly contemplates that an "undertaking" is not necessarily a "business"), regulation 2(1) of the Regulations defined "undertaking" as follows:

> "…'undertaking' includes any trade or business but does not include any undertaking or part of an undertaking which is not in the nature of a commercial venture."

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[25] *Wheeler v Patel* [1987] ICR 631.

[26] *Lloyd v Brassey* [1969] 2 QB 98, 103, per Lord Denning MR.

[27] *SI (Systems and Instrumentation) Ltd v Grist* [1983] ICR 788.

[28] Article 1(a).

This definition broadly equated "undertaking" with "business", and we have found no cases where the U.K. courts applied the Regulations to anything other than entities which were readily identifiable as "businesses".[29]

The English Court of Appeal went further and interpreted "undertaking" as applying only to entities which were "interested in financial return", so that a fee-paying school was found to be outside the ambit of TUPE altogether.[30] This narrow approach was followed in subsequent cases. For example, the EAT held that a catering service run by the Ministry of Defence which was contracted out to a private company was not an undertaking "in the nature of a commercial venture", and therefore TUPE did not apply.[31]

The fourth assumption, which in many ways led on from the third, was that the contracting out of *public* services was not a transfer of an undertaking for the purposes of TUPE.[32] It was a vital plank of government policy that services previously provided by

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[29] See *Robert Seligman Corporation v Baker* [1983] ICR 770, EAT; *O'Kelly and Others v Trusthouse Forte P.L.C.* [1984] QB 90, CA; *Premier Motors (Medway) Ltd. v Total Oil Great Britain Ltd.* [1984] ICR 58, EAT.

[30] *Woodcock v Committee for the Time Being of the Friends School, Wigton* [1987] IRLR 98, 101, per May LJ.

[31] *Expro Services Ltd v Smith* [1991] ICR 577.

[32] The evolution of this assumption is described in detail in Radford & Kerr, "Acquiring Rights – Losing Power: A Case Study in Ministerial Resistance to the Impact of European Community Law" [1997] MLR 23.

the state could be more cheaply provided by the private sector. From 1980 onwards, central government imposed on local authorities a policy of "Compulsory Competitive Tendering" ("CCT"), which prohibited them from continuing to perform certain activities themselves unless those activities were put out to competitive tender, allowing private companies to bid for contracts. The Local Government Planning and Land Act 1980 applied CCT to construction, building maintenance and highways, and the Local Government Act 1988 extended it to many other areas, including school meals, refuse collection and street cleaning.

From 1981 through to the early 1990s the U.K. government assumed that CCT transfers of employees from the public to the private sector were not governed by TUPE. Many such transfers therefore took place, and substantial changes were made to employees' terms and conditions as a result of those transfers. The Treasury acknowledged in the mid-1980s that "most savings from contracting out arise because contractors offer poorer conditions of employment".[33] Even in 1992, the Department of the Environment maintained that CCT transfers would not engage TUPE at all.[34] This assumption was maintained despite Article 1(c) of the Acquired Rights Directive, which stated that it would apply "…to public and private undertakings engaged in economic activities whether or not they are operating for gain."

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[33] HM Treasury, "Using Private Enterprise in Government" (1986).

[34] See Advice from the Department of the Environment to Local Authority Executives in England and Wales (1992), cited in McMullen, *Business Transfers and Employment Rights* (Looseleaf, 1998) 5/286.

The four assumptions identified above are not exhaustive of the way in which the U.K. treated the Acquired Rights Directive during this first period. However, they each give a flavour of the initially uncertain and somewhat cautious approach taken by the U.K. courts to the TUPE Regulations before the late 1980s.

The period of upheaval: the late 1980s to 1998

In the late 1980s the TUPE Regulations, and the restrictive way in which they had so far been interpreted by the U.K. courts, came under serious and sustained challenge. In the ensuing decade, each of the four assumptions identified above was challenged and overturned by a combination of pressures from: (1) the case law of the U.K. courts; (2) the case law of the ECJ; and (3) legal action by the Commission.

The *"immediately before the transfer"* assumption

As noted above, the U.K. courts had adopted a very restrictive interpretation of regulation 5(3), confining the benefit of TUPE to workers who had been employed "immediately before the transfer." The high point of this approach came in *Spence*,[35] in which both the EAT and the Court of Appeal held that a gap of a few hours between dismissal and transfer was sufficient to mean that the regulations did not apply. It was obvious to unscrupulous employers that this offered a very easy way in which to circumvent the intended effect of the Acquired Rights Directive. However, adopting the literal approach

[35] *Secretary of State for Employment v Spence* [1986] ICR 651.

to the TUPE Regulations which had so far permeated much of the case law, the Court of Appeal felt constrained to find as it did.

It was the U.K.'s own highest domestic court, the House of Lords, which put an end to this literalist approach to the regulations. In *Litster*,[36] twelve workers who had each been dismissed one hour before the sale of the assets of the business in which they worked argued that their resulting claims for unfair dismissal should be capable of being brought against the transferee. The House of Lords overturned the decision of the Scottish appeal court which had followed the decision of the English Court of Appeal in *Spence*, and held that since the TUPE Regulations were expressly enacted for the purpose of complying with the Acquired Rights Directive, the courts of the U.K. were under a duty to give a purposive construction to the Regulations, in a manner which would accord with the Directive and the case law of the ECJ. The House of Lords therefore held that regulation 5(3) must be interpreted as if, after the words "…employed immediately before the transfer", there were added the words "or would have been so employed if he had not been unfairly dismissed in the circumstances described by regulation 8(1)." Consequently, regulation 5 operated to transfer the applicants' contracts of employment, with their attendant obligations, from the transferor to the transferee.

It is difficult to overstate the significance of this decision for the approach taken by the U.K. courts to the interpretation of the TUPE Regulations. Although the technique of reading words into regulations had been employed previously by the House of Lords in

[36] *Litster v Forth Dry Dock Engineering Co. Ltd* [1989] ICR 341.

the case of *Pickstone*,[37] that had been an equal pay case, so that Article 119 of the EC Treaty (now article 141) was directly in play. *Litster* confirmed that the same approach could be taken to implementing Regulations even where there was no Treaty article directly in play. With a single case, therefore, the House of Lords transformed the approach which the U.K. courts took to the TUPE Regulations and the Acquired Rights Directive, and overturned the assumption that workers dismissed only hours before a transfer were not entitled to protection. As will be seen, the courts in the U.K. adopted a very different approach to the regulations in the ensuing years.

[37] *Pickstone v Freemans plc* [1988] ICR 697.

The *change in ownership* assumption

The second assumption was that a "transfer" for the purposes of the Acquired Rights Directive necessarily involved a change of ownership. From the mid-1980s there were a number of references to the ECJ on the question of what exactly constituted a "transfer".

The first and still the most important case on this point was *Spijkers*,[38] in which the Court held that "…the decisive criterion for establishing whether there is a transfer for the purposes of the Directive" is "…whether the business in question retains its identity". The court held that this question should be answered by a consideration of the following factors:

(1) the type of undertaking or business concerned;

(2) whether assets, tangible or intangible, were transferred;

(3) whether employees were taken over;

(4) whether customers were transferred; and

(5) any degree of similarity between activities carried on before and after the transfer and the period, if any, for which those activities are suspended.

It will be noted that a change of ownership was not regarded as a necessary or even relevant factor. Indeed, the Court said:

"…it is clear from the scheme of Directive No 77/187 and from the terms of Article 1 (1) thereof that the Directive is intended to

[38] Case 24/85 *Spijkers v Gebroeders Benedik Abattoir CV* [1986] ECR 1119.

> ensure the continuity of employment relationships existing within a business, *irrespective of any change of ownership*."[39]

This gave the concept of "transfer of an undertaking" a potential application far wider than the TUPE Regulations and associated case law had done so far.

In *Daddy's Dance Hall*, the ECJ made the position as regards a change in ownership very clear indeed:

> "The Directive is therefore applicable where, following a legal transfer or merger, there is a change in the natural or legal person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of the undertaking, *regardless of whether or not ownership of the undertaking is transferred*." [40]

The same point was made in *Ny Molle Kro*, where the ECJ said:

> "Employees of an undertaking whose employer changes without any change in ownership are in a situation comparable to that of

[39] ibid para 11.

[40] Case 324/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* [1988] ECR 739, paragraph 9.

employees of an undertaking which is sold, and require equivalent protection."[41]

Nevertheless the English courts were still slow to accept the principle that a transfer of an undertaking could take place without a transfer of ownership. In *Spence*,[42] the Court of Appeal treated an earlier decision of the House of Lords on the issue of transfer (decided under different legislation) as still the leading case.[43]

It took infraction proceedings by the Commission to bring about an acknowledgment by the U.K. that the requirement of change of ownership was incompatible with the Acquired Rights Directive. The Commission had felt for some time that the U.K.'s transposition of the Acquired Rights Directive had been inadequate. In 1992 the Commission produced its full reasoned opinion, which listed seven respects in which the 1981 TUPE Regulations, and the U.K. courts' application thereof, were inadequate.[44]

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[41] Case 287/86 *Landsorganisationen i Danmark v. Ny Molle Kro* [1987] ECR 5465, para 12.

[42] *Secretary of State for Employment v Spence* [1986] ICR 651.

[43] *Melon v. Hector Powe Ltd.* [1981] ICR 43; [1981] 1 All ER 313.

[44] *Commission Report to the Council on progress with regard to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses* (1992).

Five of those seven complaints were the subject of infraction proceedings against the U.K., namely:

(1) Requiring a transfer of ownership.

(2) Confining transfers to "commercial ventures".

(3) Failing to provide for the designation of employee representatives where this had not occurred voluntarily in practice.

(4) Failing to require the transferee or a transferor who envisages measures in relation to his employees to consult with the representatives of his employees in good time on such matters with a view to seeking agreement.

(5) Failing to provide for effective sanctions in the case of failure to inform and consult workers' representatives as required by the Directive.

The action was heard by the ECJ in January 1994, and the court gave its judgment in June the same year.[45]

On the issue of the change of ownership requirement, the ECJ found that the House of Lords decision in *Litster* had already corrected the law. The U.K.'s submission on this point, summarised by the court, reveals the extent to which the U.K. was prepared to concede that the Acquired Rights Directive itself should be the starting point in assessing the scope of a worker's rights:

> "…The United Kingdom submits that since, according to the case-law of the House of Lords, the UK Regulations must be interpreted in accordance with the Directive and the Court's interpretation of

[45] Case C-382/92 *Commission v United Kingdom* [1994] ECR 2435.

> it, *their scope is the same as that of the Directive, even if the Regulations do not expressly state* that a transfer thereunder does not necessarily involve the transfer of the property of the undertaking."

Thus the U.K. courts were obliged to leave behind the requirement that a transfer of an undertaking must involve a change in ownership, so that in *Dines*[46] and *Kelman*,[47] the English Court of Appeal and the Scottish EAT respectively concluded that the change of ownership requirement was no longer to be applied.

The history of the change of ownership assumption provides an especially neat illustration of the way in which the mechanisms provided by the system of European law can come together to force a change in the law of a member state. At first there was the case law of the ECJ, beginning with *Spijkers*, which made it clear that a change of ownership was not a necessary component of a transfer of an undertaking. Next came *Litster*, in which the House of Lords held that the 1981 TUPE Regulations must be interpreted in line with that case law and the terms of the Directive. Finally infraction proceedings by the Commission produced an ECJ decision confirming the direction that U.K. law would be obliged to take in future. What is perhaps most remarkable about this history is the length of time which it took for the logic of the 1985 decision of the ECJ in *Spijkers* to become fully accepted in UK law.

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[46] *Dines v Initial Healthcare Services Ltd* [1995] ICR 260.

[47] *Kelman v Care Contract Services Ltd* [1995] ICR 260.

The "*commercial venture*" assumption

The third assumption was that the protection offered by the 1981 TUPE Regulations was restricted to "any trade or business in the nature of a commercial venture" (see regulation 2(1)). It was not entirely clear during the 1980s whether this restriction was contrary to the Acquired Rights Directive or not. Indeed, the *Spijkers* test as to whether there had been a transfer of undertaking – namely, "whether the business in question retains its identity" – did, at least arguably, treat "undertaking" as synonymous with "business".

However, as noted above, the Commission in its 1992 list of the alleged inadequacies of the TUPE Regulations included the "commercial venture" restriction. The correctness of this criticism was confirmed very shortly afterwards, in May 1992, by the case of *Redmond Stichting*.[48] In that case, the ECJ clarified that the Acquired Rights Directive applied in full force even to transfers within the voluntary and non-profit making sectors:

> "[T] he fact that in this case the origin of the operation lies in the grant of subsidies to foundations or associations whose services are allegedly provided without remuneration does not exclude that operation from the scope of the Directive. The Directive, as has already been stated, is designed to ensure that employees' rights are safeguarded, and covers all employees who enjoy some, albeit limited, protection against dismissal under national law."

[48] Case C-29/91 *Dr Sophie Redmond Stichting v Hendrikus Bartol* [1992] ECR 3189.

This judgment and the pressure applied by the Commission finally produced a response from the U.K. government in July 1993, with the passing of the Trade Union Reform and Employment Rights Act 1993 ("TURERA"). Section 33 of TURERA, which was brought into force on 30th August 1993,[49] removed from regulation 2(1) the words "…but does not include any undertaking or part of an undertaking which is not in the nature of a commercial venture".

We pause there to note that TURERA also inserted new sub paragraphs (4A) and (4B) into Regulation 5, enabling an employee to object to a proposed transfer. These sub-paragraphs were inserted into TUPE in order to implement Article 3(1) of the 1977 Directive in the light of the European Court of Justice judgment in *Katsikas v Konstantinidis*.[50] The U.K.'s current position regarding the ability of employees to object to a transfer under the 2006 Regulations is dealt with below.

Returning to the commercial venture restriction, for reasons which are not clear, the U.K. continued to argue in Case C-382/92[51] that the "commercial venture" restriction was not in conflict with the Acquired Rights Directive, notwithstanding the fact that that restriction had been removed from the regulations some four months before the case was even heard. The ECJ had little truck with this argument, finding that:

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[49] Trade Union Reform and Employment Rights Act 1993 (Commencement No 1 and Transitional Provisions) Order 1993.

[50] Joined cases C-132/91, C-138/91 and C-139/91, [1992] ECR 6577; [1993] IRLR 179.

[51] Case C-382/92 *Commission v United Kingdom* [1994] ECR 2435.

> "…by restricting the application of the national rules transposing the Directive to transfers of profit-making undertakings, the United Kingdom has failed to fulfil its obligations under Article 1(1) of the Directive."

This judgment did no more than confirm what the U.K. government had already acknowledged in 1993, when it passed TURERA. Again, however, what is perhaps most remarkable about this episode is how long (just over 11 years) regulation 2(1) of the 1981 TUPE Regulations was able to survive.

Indeed, the restriction is still posing problems in the U.K. case law. In the 2006 *Celtec* case[52] in the House of Lords, a number of the claimants were debarred from relying on the TUPE Regulations as against their not-for-profit public sector employer, because they had been transferred before section 33 TURERA had come into force. These claimants were forced instead to rely on the Directive itself, since their employer was an emanation of the state.

The *"contracting out"* assumption

The "commercial venture" restriction had been the underpinning of the fourth assumption, namely that the 1981 TUPE Regulations did not apply to public sector

[52] *North Wales Training and Enterprise Council Limited (t/a Celtec) v Astley* [2006] UKHL 29.

contracting out, in particular under the CCT scheme adopted by the U.K. government. This assumption was not challenged by the Commission in Case C-382/92.

It was, as explained above, an assumption that was actively promoted by the U.K. government throughout the 1980s and early 1990s. It was, furthermore, an assumption of vital importance to the success of the CCT scheme. It has been estimated that, between 1989 and 1992, 28,000 full time employees were transferred out of local government posts in the U.K. as a direct result of the CCT scheme.[53] The majority of those workers either lost their posts altogether, or had their terms and conditions changed.[54] It was, of course, only possible for such changes to take place if the Acquired Rights Directive had no application. The same was true of private sector contracting out.

The assumption that such transfers were not covered by the TUPE Regulations at all was dramatically overturned by a series of ECJ decisions from 1993 onwards. The first of these cases was *Rask & Christensen*,[55] where it was held that the contracting out by a private company of its canteen services to another company for a fee amounted to a transfer of an undertaking for the purposes of the Acquired Rights Directive. Importantly, the ECJ held that it did not matter: (i) whether the service was performed exclusively for the owner of the undertaking; (ii) that the private company continued to

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[53] Local Government Management Board, *Survey of the Employment Effects of Central Government Initiatives, March 1991-March 1992* (Luton: LGMB, 1993).

[54] Radford and Kerr, cited above.

[55] Case C-209/91 *Rask and Christensen v ISS Kantineservice AS* [1992] ECR I-5755.

own assets; or (iii) that the private company in question was under an obligation (contractual or statutory) to provide the canteen service.

The implications of this judgment for public and private sector contracting out in the U.K. were obvious; it could no longer simply be assumed that the TUPE Regulations did not apply. The Home Office in particular, embarking on a programme of prison privatisation, was faced with very considerable problems. The position eventually adopted was that since it was not clear whether the 1981 TUPE Regulations would apply, caution required the Home Office to proceed as if they did.

In a debate on the topic on 3rd February 1993, the Home Secretary (Kenneth Clarke) somewhat grudgingly acknowledged that the 1981 TUPE Regulations would probably apply:

> "I think that it is fair to say that, when the EC Directive and the TUPE regulations were drawn up, the draftsmen did not have in mind the type of transfer of work from the public to the private sector, which has been one of the achievements of successive Conservative Governments and which we remain committed to continue. The result has been considerable discussion across Whitehall, and outside, about TUPE's effect ...
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> In any event, to resolve doubt, we have decided that we shall apply the provisions of the regulations, so that the successful tenderer

will take over protected employment contracts and collective agreements."[56]

The correctness of the U.K. government's changed stance as to contracting out was confirmed in March 1993 by the English High Court, in the case of *Kenny*.[57] This case concerned the transfer of prison education services from a local education authority to a further education corporation, following competitive tender. The High Court had no hesitation in holding that this was a TUPE transfer, and in so doing stated that the courts should take a "realistic and robust" view as to the applicability of the regulations. Crucially, the High Court referred only very briefly to domestic decisions of the EAT, and then entered into a lengthy discussion of seven ECJ decisions on the Acquired Rights Directive, demonstrating that it was now the European and not the domestic jurisprudence which was the correct starting point in any analysis.

Rask was followed by a series of ECJ decisions, the reception of which into English law demonstrates how far the domestic courts were by now prepared simply to apply to European jurisprudence directly. Perhaps the most dramatic of these decisions, which came shortly after *Rask*, was *Christel Schmidt*,[58] in which the Court held that a single part-time cleaner in a bank was entitled to protection under the Acquired Rights Directive

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[56] HC Deb, 3 February 1993, Vol [ ], c425

[57] *Kenny v South Manchester College* [1993] IRLR 265.

[58] Case C-392/92 *Christel Schmidt v Spar under Leihkasse der früheren Ämter Bordesholm, Keil und Cronshagen* [1994] ECR I-1311.

when the bank decided to outsource that cleaning. This decision demonstrated an increasing willingness on the part of the ECJ to descend into issues of fact which would normally be ones for the domestic courts. The following passage is illustrative in this regard (emphasis added):

> "According to the case-law of the Court … the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question retains its identity. According to that case-law, the retention of that identity is indicated inter alia by the actual continuation or resumption by the new employer of the same or similar activities. Thus, in this case, where all the relevant information is contained in the order for reference, the similarity in the cleaning work performed before and after the transfer, which is reflected, moreover, in the offer to re-engage the employee in question, is ***typical*** of an operation which comes within the scope of the Directive and which gives the employee whose activity has been transferred the protection afforded to him by that Directive."

If the retention of one part-time cleaning worker without any transfer of assets or management structure was "typical" of a transfer under the Acquired Rights Directive, then it was perhaps legitimate for U.K. employment lawyers to ask themselves whether there were any contracting out situations which would not be covered.

Despite the breadth of the Court's dictum in *Christel Schmidt*, the U.K. courts applied the decision without any attempt to narrow or limit its importance. Indeed, in two cases decided in 1995, the EAT adopted *Christel Schmidt* with an apparent degree of enthusiasm. In one case,[59] the EAT formulated the test as follows: "An economic entity may well just comprise activities and employees", considering that another way of asking the question was to ask "Is the job previously done by the employee still in existence?" In the second case[60] the EAT held that "an economic entity may consist only in the provision of or the right to provide services". These cases created what has been termed "a quasi presumption that TUPE would apply in virtually all cases of outsourcing, provided, of course that the identity of the undertaking remained unchanged".[61]

In the event, the ECJ itself stepped back from the extreme position it had adopted in *Christel Schmidt*. In *Rygaard*,[62] it was held that a relevant consideration was whether an entity was "autonomous from an organisational point of view in the sense that persons and possibly materials have been allocated for its completion", in other words whether it was a "stable economic entity". Arguably, this definition would not have included the single cleaner in *Christel Schmidt*.

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[59] *Isles of Scilly Council v Brintel Helicopters Ltd* [1995] IRLR 6.

[60] *Kelman v Care Contract Services Ltd* [1995] ICR 260.

[61] McMullen, *Business Transfers and Employment Rights* (Looseleaf, 1998), para 5/108.

[62] Case C-48/94 *Rygaard v Stro Molle Akustik A/S* [1995] ECR I-2745.

The decision in *Süzen*[63] confirmed the retreat from *Christel Schmidt*. In *Süzen*, the Court reasserted that the issue of whether there had been a transfer was one for the national courts to assess, on the basis of the *Spijkers* criteria. Furthermore, it was held that a mere changeover of contractors would not give rise to a transfer, unless there was a concomitant transfer from one undertaking to the other of significant tangible or intangible assets or the taking over by the new employer of a major part of the workforce in terms of numbers and skills.

The *Süzen* approach was rapidly incorporated into U.K. case law by the Court of Appeal in *Betts*,[64] a decision that illustrated once again that the decisions of the ECJ were now to be treated as the appropriate starting point. The EAT also applied *Süzen* directly.[65]

Summary

The second period which this paper identifies, which covers the eight years or so between the decision of the House of Lords in *Litster* and the decision of the Court of Appeal in *Betts*, saw a dramatic change in the way in which the TUPE Regulations were interpreted by the U.K. courts. Some changes - for instance the removal of the "commercial venture" requirement - had been made by way of legislative amendment, in the face of legal action

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[63] Case C-13/95 *Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR I-1259.

[64] *Betts v Brintel Helicopters Ltd* [1997] ICR 792.

[65] *Superclean Support Services plc v Lansana and Wetton Cleaning Services Ltd* EAT/281/96; *Connick Tree Care v Chapman* EAT/889/97.

by the Commission. Other changes - for instance the reading in of words in *Litster* - were wholly case law developments. The net effect of these changes was to overturn each of the four assumptions identified above.

The period of consolidation and expansion: 1998 onwards

The reception of the Acquired Rights Directive in the U.K. entered a third phase around 1998. In the period after 1998, the courts and the government have expanded the scope of TUPE, such that the protections offered by the 2006 Regulations and the U.K. case law now go beyond those envisaged in the Acquired Rights Directive itself.

Refining the test: 1998-2001 at the European level

The first step towards a consolidation of the law relating to transfers of undertakings came at a European level with the adoption on 29th June 1998 of a new Acquired Rights Directive, Council Directive 98/50. The new Directive did not seek significantly to alter the scope of the original Directive. The only major changes related to insolvency, and to information and consultation, which are not examined in this paper. Furthermore, Member States were given just over three years, until 17th July 2001, to transpose the Directive.

The 1998 Directive refined the definition of a transfer of an undertaking so as to incorporate the case law of the ECJ. The new definition of a transfer, in Article 1.1 of the Directive, provided (insofar as material) as follows:

1. (a) This Directive shall 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.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive 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 ancillary.

(c) This Directive shall apply to public and private undertakings engaged in economic activities *whether or not they are operating for gain*. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive."

It will be noted that Article 1(b) expressly incorporated the *Süzen* definition of an undertaking, and that Article 1(c) gave legislative effect to the ECJ decision in *Stichting Redmond*. By excluding an administrative reorganisation of public administrative

authorities, or the transfer of administrative functions between public administrative authorities, article 1(c) gave effect to the ECJ decision in *Henke*.[66]

That a degree of harmony had been reached at the European level as to the appropriate test for the transfer of an undertaking was illustrated in December 1998, when the ECJ gave its ruling in *Vidal*, *Santner*, *Montana*, *Hidalgo* and *Ziemann*.[67] *Hidalgo* and *Ziemann* concerned "second-generation contracting out", that is the replacement of a first contractor by a second contractor. *Vidal*, *Santner* and *Montana* concerned the bringing of a previously contracted-out service back in-house. Following *Süzen*, the Court held that there was no presumption of a transfer in contracting out cases, but rather that the Acquired Rights Directive would apply only if the contracting out involved the transfer of a stable economic entity. Notably, the Court employed language which very closely dovetailed with that of Article 1.1(b) of the 1998 Directive, holding that an "economic entity" was "an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised".[68]

1998 did not of course mark the end of all debate as to the application of the Acquired Rights Directive in particular cases. However, together with the decisions in *Vidal &*

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[66] Case C-298/94 *Henke v Gemeinde Schierke & Verwaltungsgemeinschaft "Brocken"* [1996] ECR 1-4989.

[67] Cases C-127/96 *Vidal*, C-229/96 *Santner* and C-74/97 *Montana* [1998] ECR I-8179; Cases C-73/96 *Hidalgo* and C-247/96 *Ziemann* [1998] ECR I-8237.

[68] ibid, para 34.

Others, the 1998 Directive did mark the beginning of a consensus as to what was the correct test to apply. This consensus was illustrated by the adoption on 12th March 2001 of Council Directive 2001/23, which repealed both the 1977 and 1998 Directives, replacing them with a single consolidated document.

The ECJ continued after 2001 to refine its approach to the application of this test in contracting out cases. n the last five years a distinction has been developed between transfers of asset-reliant entities, for which a transfer of employees is not decisive, and transfers of labour-intensive entities, which must be still be assessed on the basis of the *Süzen* test.[69]

1998-2006: the U.K. case law

As explained above, the U.K. courts became well accustomed by 1998 to applying the case law of the ECJ directly. Moreover, in the period from 1998 to 2006 the U.K. courts were especially predisposed to begin with the European legislation and case law since, until April 2006, the 1998 Directive or the 2001 Directive had not been fully transposed into U.K. law. By way of illustration, in the recent *Celtec* case, the House of Lords framed the issue in a TUPE case not as one of the construction of TUPE, but primarily as one of the construction of the Directive.[70] Notably, in the same case, the House of Lords

[69] Case C-172/99 *Oy Liikenne AB v Liskojärvi and Juntunen* [2001] ECR I-745; Case C-340/01 *Abler v Sodexho MM Catering Gesellschaft mbH* [2003] ECR I-14023.

[70] *North Wales Training and Enterprise Council Limited (t/a Celtec) v Astley* [2006] UKHL 29, para 10, per Lord Hope.

found that the principles laid down by the ECJ in the *Simmenthal*[71] case obliged it to lay aside its own procedural rules, so as to allow the respondents to argue a new point for the first time in the House of Lords, since it was necessary for them to do so in order to have an effective enforcement of their rights under Community law.

The most important development in the last eight years or so, however, has been an increasing tendency for the U.K. courts to go *beyond* the interpretations placed on the Acquired Rights Directive in the case law of the ECJ.

As might be expected, given the contentiousness of the area, the best illustration of this tendency comes from the contracting out cases. In one of the first contracting out cases in the period after *Süzen*, the EAT reluctantly held[72] that there had been no transfer of an undertaking between two contractors responsible for the running of job clubs for the Employment Service. Since no employees or assets passed between contractors, it is submitted that this was a correct decision on the facts. What is apparent from the judgment, however, is the uncertainty which the EAT felt that *Süzen* had introduced:

> "In our view [*Süzen* and *Betts*] introduced an unfortunate level of uncertainty. … Employees, for whose protection the Directive and the Regulations were designed, are left to take their chances in court. It is an unhappy state of affairs.

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[71] Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA (No 2)* [1978] 3 CMLR 263.

[72] *Computer Insight Ltd v Stewart* EAT/121/97.

> Nevertheless our hands are tied. We must apply the law as it currently stands on the basis of the precedents binding on us. So too must industrial tribunals."

The EAT's lack of confidence in the *Süzen* approach soon prompted it to begin to venture beyond the protections offered by the ECJ. In *ECM*,[73] the defendant company deliberately failed to take on 19 workers when it was awarded a contract because it was aware that, if the awarding of the contract constituted a "TUPE transfer", it would inherit unfair dismissal claims by those workers against the transferor. In order to avoid qualifying as a "TUPE transferee", following *Süzen*, the defendant company took on none of the workers. The EAT had no truck with this, placing its own restriction on the *Süzen* test:

> "24. In this case, on the tribunal's findings, the transferee did not take on the men precisely because they were asserting that the Regulations applied and were threatening proceedings on that basis. … *The issue as to whether employees should have been taken on cannot be determined by asking whether they were taken on*.
>
> 25. It seems to us that we should adopt a purposive approach to the interpretation of the Regulations so as to give effect to the

[73] *ECM (Vehicle Delivery Service) Ltd v Cox* [1998] IRLR 416, EAT.

> Government's obligations thereunder. We cannot and do not accept that it would be proper for a transferee to be able to control the extent of his obligations by refusing to comply with them in the first place. There is nothing in the *Süzen* decision which requires us to adopt that course."

This decision was subsequently upheld by the Court of Appeal[74] and, in another case, the EAT again distinguished *Süzen* on the same basis.[75]

The notable point which arises out of these cases is that the U.K. courts had effectively created an exception of their own to the rule in *Süzen*, to the effect that there would be a "deemed transfer" where the transferee's failure to take on workers was motivated by a desire to avoid the provisions of the Acquired Rights Directive. This was not an exception which had any authority in the ECJ jurisprudence.

Furthermore, the fact that this exception went beyond the ECJ jurisprudence was effectively acknowledged by the Court of Appeal in *ADI*.[76] In that case the court was faced with another situation in which a transferee had deliberately failed to take on any employees from the transferor, so as to avoid the effect of the TUPE regulations. Two of the three appeal judges (the majority) followed the *ECM* case, applying the U.K.

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[74] *ECM (Vehicle Delivery Service) Ltd v Cox* [1999] IRLR 559, CA.

[75] *Magna Housing Association Ltd v Turner* EAT/198/98.

[76] *ADI (UK) Ltd v Firm Security Group Ltd* [2001] IRLR 542, CA.

exception to *Süzen*. The dissenting judge argued that the conditions set out in *Süzen* had to be followed strictly and said that he was unable to reconcile the view of the majority with the ruling ECJ jurisprudence on the issue.

The domestic exception to the rule in *Süzen* was again confirmed by the Court of Appeal in *RCO*,[77] where the court produced its most definitive synthesis of the domestic and European case law to date. One of the court's central propositions was that:

> "The fact that none of the workforce is taken on is relevant to, but not necessarily conclusive of, the issue of retention of identity."

It is open to question whether this proposition can be reconciled with the dictum of the ECJ in *Süzen* that:

> "The factual circumstances to be taken into account in determining whether the conditions for a transfer are met include in particular … the question whether or not the *majority* of the employees were taken over by the new employer"

It is apparent therefore that, in relation to the contracting out of labour intensive concerns, the U.K.'s domestic case law has now gone beyond the protections offered under the Acquired Rights Directive and the ECJ case law. It should not be pretended that all judicial resistance to the Directive has ceased. In the recent *Celtec* case, one of the U.K.'s most senior judges remarked that the Directive introduced a "fiction" which was "…in many ways unsatisfactory: it fails to represent the commercial reality of the arrangement

[77] *RCO Support Services v UNISON* [2002] IRLR 401.

and very probably is the opposite of what the respondents themselves thought to be the case at the time."[78] However, what can be said is that the U.K. courts have learnt to live with the Directive and the Regulations in a way which bears little resemblance to the initially narrow construction adopted in the first period we have identified.

The 2006 TUPE Regulations

Furthermore, this year the U.K. government has legislated so as to grant a degree of protection going considerably beyond the Acquired Rights Directive. The 2006 TUPE Regulations, which are the U.K. government's first wholesale recasting of the original 1981 Regulations, and which finally transpose the 2001 Directive, came into effect on 6th April 2006. It is not within the scope of this paper to give a full summary of the new regulations. For present purposes, four features of those regulations deserve particular attention.

First, the 2006 TUPE Regulations, following the 2001 Directive, incorporate many of the case law developments of the last 24 years.

Regulation 3(4) states that the regulations apply to "public and private undertakings engaged in economic activities whether or not they are operating for gain". This incorporates the result of *Stichting Redmond.*

[78] *North Wales Training and Enterprise Council Limited (t/a Celtec) v Astley* [2006] UKHL 29, para 92, per Lord Carswell.

Regulation 3(5) provides that "an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer". This incorporates Article 1(c) of the 2001 Directive, which itself gave legislative effect to the ECJ decision in *Henke*.

Most importantly, regulation 3(1)(a) adopts the same definition of the expression "transfer of an undertaking" as is provided for in the 2001 Directive and in *Vidal & Others*.

Second, regulation 3(1)(b) applies protection under the Regulations to a "service provision change". This is a concept which is not provided for by the 2001 Directive or the ECJ case law, and which is therefore autonomous to the 2006 TUPE Regulations. The expression "service provision change" is defined very widely (see the annex to this paper for the full text). The definition includes, effectively, any situation where one person ceases to perform an activity which is then taken up by another person, so long as there was, prior to the changeover, an organised grouping of employees whose principal purpose was to carry out those activities on behalf of the client. The precise implications of this very wide definition will have to be worked out in the case law over the coming years.

One potential problem concerning "service provision changes" arises from the fact that although the government originally intended that "professional services" would be excluded, no such exclusion appears in the Regulations. So, where banks, consultancies,

law firms and accountancy firms lose to a competitor a major client for whose business a dedicated team has been assembled, this will probably be treated as a "service provision change" which engages the 2006 TUPE Regulation. This is certainly an area to watch in the next few years.

In this second respect therefore, the 2006 TUPE Regulations appear to have gone substantially beyond the Acquired Rights Directive and its associated case law.[79] Because of the U.K.'s broad definition of "service provision change", it is unlikely that *Süzen* will continue to arise in U.K. litigation in the areas of public or private sector contracting out. The new Regulations will have the effect of including almost all contracting out situations.

Third, the 2006 TUPE Regulations innovate, possibly with less success, in the area of changes to terms and conditions of employment.

Regulation 4(5) provides that an employer and employee may agree a change in terms and conditions of employment if "the sole or principal reason for the variation is (a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or (b) a reason unconnected with the transfer". This is an attempt to enable transferred employees, in very limited circumstances, to agree to a change in their terms and conditions. The effectiveness of this exception remains to be seen, since variations under sub-paragraph (a) of this regulation would appear to

[79] As they were permitted to do by section 38 of the Employment Rights Act 1999.

contradict the rule established in *Daddy's Dance Hall* that any waiver of an employee's rights under the 2001 Directive is invalid. The U.K. government appears to have reasoned here that it would be inconsistent to permit the dismissal of an employee for an "economic, technical or organisational reason entailing changes in the workforce", but not to allow variations of contract on the same basis. This is an approach which is logically unimpeachable, but which has no obvious basis in the Directive, and would appear to contradict both ECJ[80] and EAT[81] case law.

Fourth and finally, regulations 4(7) to 4(9) of the 2006 TUPE Regulations clarify the position regarding the ability of an employee to refuse to be transferred. In short, under regulations 4(7) and 4(8), an employee may refuse to be transferred, and if he so refuses: (i) his contract of employment will come to an end on the day of the transfer; and (ii) he shall not be regarded for any purposes as having been dismissed. The only exception exists where an employee refuses to be transferred because the transfer would involve a substantial change in his working conditions. In this latter case, the employee shall be treated as having been dismissed by "the employer" (regulation 4(9)).

Conclusion

[80] Case 324/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* [1988] ECR 739.

[81] *CSFB (Europe) Ltd v Padiachy* [1998] IRLR 504, QBD; *CSFB (Europe) Ltd v Lister* [1998] IRLR 700, CA.

The above analysis leads to three conclusions. First, not only has the U.K. learned to live with the Acquired Rights Directive, but it has also even begun to embrace its guiding principles more broadly than the European Court itself. In particular, in the 2006 Regulations the U.K. government has adopted an ultra-wide definition of "transfer of an undertaking", hoping that the legal certainty which employers will acquire as a result will outweigh the economic costs of reduced flexibility.

Secondly and more generally, the history of the Acquired Rights Directive in the U.K. provides a compelling illustration of the effectiveness of the mechanisms of Community law to bring a Member State's interpretation of a directive into line with its intent. The three phases discussed above have seen the U.K. move from barely disguised hostility to the Acquired Rights Directive, through a period of tension, to arrive at the present position where the protection offered by the 2006 TUPE Regulations now exceeds that of the directive itself.

Thirdly and finally, whilst it would be easy to attribute this pattern to the change in administrations (from Conservative to Labour) which occurred in the U.K. in 1997, and to the differing social policy which was introduced as a result, this would be wrong. As demonstrated above, the majority of key changes had already happened by 1997. The key period was that beginning in the late 1980s, when pressures from: (i) the domestic courts; (ii) the ECJ; and (iii) the Commission compelled the U.K. to modify its interpretation of the Acquired Rights Directive.

ANNEX

Definition of “service provision change” in Article 3 of the 2006 TUPE Regulations

“3. —(1) These Regulations apply to—

…

(b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (3) are satisfied.

…

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use."