

TUPE AND COLLECTIVE AGREEMENTS

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INTRODUCTION

1. Terms and conditions of employment are often found, especially in the public sector, not in the individual contracts of employment themselves, but in collective agreements between the employer and trade unions, collective agreements which are expressly incorporated into the individual contracts. If the employer and the unions agree changes in the collective agreement then the individual contracts will automatically be varied accordingly.

2. The only issue is liable to be whether particular provisions of the collective agreement are apt for incorporation into the individual contracts. As to that see eg Kaur v MG Rover Group Ltd [2004] EWCA (Civ) 1507, [2005] ICR 625 (Court of Appeal).

3. The only issue that is until there is say a privatisation of the undertaking and there is a TUPE transfer of the employees from the public sector employer to a private sector employer. The private sector employer will not be party to that collective agreement with the public sector unions or any collective agreement. Nor will he wish to be.

4. After the transfer, however, the former employer and the unions may agree to changes in the collective agreement. What happens then? Do the transferred employees have the benefit (or burden) of these changes?

5. This is the question which has arisen in Parkwood Leisure Ltd v Alemo-Herron and others [2011] UKSC 26, (2011) ICR 920, (2011) IRLR 696 (“Parkwood”). This case has reached our Supreme Court. On 15 June 2011 they made a Reference to the Court of Justice of the European Union, as the European Court of Justice (“the ECJ”) is now called.

6. Parkwood arose under TUPE 1981. However, the same position, whatever it may be, applies under TUPE 2006. Moreover, it arises, of course, from the Acquired Rights Directive (“the Directive”).

7. My 11 KBW colleagues, Adrian Lynch QC, and Deok Joo Rhee, act for Parkwood. I am much indebted to them in the preparation of this paper and talk.

PARKWOOD: THE FACTS

8. It all started in the London Borough of Lewisham. The Claimants in Parkwood were employed by Lewisham Council in its Leisure Department. In the usual way, the Claimants’ respective individual contracts of employment with the Council incorporated the agreements on terms and conditions agreed by the National Joint Council for Local Government Workers (“the NJC”), and incorporated those agreements as they might be from time to time.

9. However the time came when Lewisham contracted out its Leisure Department. Initially it did so to CCL Ltd. There was a TUPE transfer.

10. Later on CCL transferred the leisure services contract with Lewisham to Parkwood. Again there was a TUPE transfer.

11. After the TUPE transfer to Parkwood the NJC agreed a new collective agreement. This agreement covered local authority workers of the same type as the Claimants.

THE ISSUE

12. The issue that then arose was whether the former Lewisham employees, by then employed by Parkwood, were entitled to the benefit of the new terms and conditions agreed by the NJC, or, to put it the other way round, whether Parkwood were lumbered with these new terms and conditions, notwithstanding that they do not belong, and are not able to

belong, to the NJC, or to participate in its processes. In the jargon of the relevant European case law, the legal issue is whether it is only “static” contractual rights that transfer on a TUPE transfer, or whether the contractual rights that transfer are “dynamic” rights.

13. The difference between “dynamic” and “static” is between, on the one hand, the transferred workers enjoying an ongoing right to whatever is agreed in the NJC from time to time by way of public sector pay rates even after the transfer to a private sector employer, and, on the other hand, those workers being entitled only to the rights that they enjoyed at the date of the TUPE transfer and not to subsequent variations agreed in the NJC.

14. The UK has taken the dynamic approach: see eg Whent v Cartledge Ltd [1997] IRLR 153 (EAT). As the Supreme Court put it in paragraph 7 of Parkwood, had this issue been solely one of domestic law the question would have been open only to one answer.

ENTER EUROPE

15. A rather, perhaps very, different approach, however, was taken by the ECJ in a case from Germany, Werhof v Freeway Traffic Systems GmbH, Case C-499/04, (2006) IRLR 400, (2006) ECR I-2397, (2006) 2 CMLR 44 (“Werhof”). Herr Werhof had been employed on terms which incorporated the terms agreed in a collective bargaining process. His employment transferred to Freeway. This was what we would call a TUPE transfer. Freeway did not belong to that collective bargaining process.

16. The German legislation giving effect to the Directive confined the effect of the (TUPE) transfer to the transfer of “static” rights. The effect of this was that Herr Werhof was entitled to his contractual rights as they were when he transferred to Freeway, but he was not entitled to new terms agreed in the Collective Bargaining body after that transfer.

17. The issue referred by the German Court in Werhof for the consideration of the ECJ was whether that German provision was inconsistent with Germany’s obligation under EU law

to apply the Directive. The ECJ decided that the German law confining transfers to static rights was not inconsistent with its EU obligations.

PARKWOOD SO FAR

18. The Employment Tribunal in Parkwood decided that only static rights transferred and that the transferred employees were not entitled to the new terms agreed by the NJC after the transfer. The EAT, however, allowed the employees' appeal.

19. The Court of Appeal restored the ET's decision, (2010) EWCA Civ 24, (2010) ICR 793, (2010) IRLR 298. The Supreme Court has not determined the issue, but has referred it to the ECJ.

WERHOF

20. So what was decided in Werhof? Was it no more than that the German "static only" legislation was not inconsistent with the Directive? Or was it that the Directive does not transfer "dynamic" contractual rights?

21. The ECJ's conclusion in Werhof was based in part on the wording of the Directive, but also on four matters of principle, as follows:-

- (1) The principle of freedom of contract: a transferee employer should not be bound by agreements reached by a third party body to which that employer does not belong;
- (2) The importance of parties to a contract being free to agree their own terms and conditions and of employers being allowed to manage their own businesses;

- (3) The importance of interpreting the Directive consistently with the fundamental principles of the EU and in such a way that it does not risk violation of rights protected by the European Convention of Human Rights (“ECHR”), including the right under Article 11 of freedom to associate or not to associate with others; and
- (4) The fact that the Directive does not protect “mere expectations” or “hypothetical advantages”: it protects actual contractual rights as they existed on the transfer.

THE UK POSITION

22. If the transfer of “dynamic” rights is found by the ECJ in Parkwood to be inconsistent with the Directive then that is the end of the matter. Only “static” rights will transfer. The UK domestic approach will have been trumped by Werhof.

23. If, however, the transfer of “dynamic” rights is held by the ECJ in Parkwood not to be inconsistent with the Directive, albeit not required by it, then it would be up to each Member State to decide whether to confine the transferred rights to “static” rights, as Germany has done, or to provide for the transfer of “dynamic” rights, ie, in the UK, whether or not to “gold plate” TUPE.

24. Gold plating EU measures is not flavour of the month with the Conservative wing of the Coalition Government, but is in principle permissible. Section 2(2) of the European Communities Act 1972, pursuant to which TUPE is made, is in wide terms. It does not confine any measures made under it to doing the minimum necessary to give effect to a directive.

25. To be within the powers of the subsection, the measure merely has to arise out of or be related to an EU obligation. See paragraph 24 of the decision of the Supreme Court in Risk Management Partners Ltd v Brent LBC [2011] UKSC 7, (2011) LGR 169.

26. However, both the Court of Appeal and the Supreme Court have held in Parkwood that Regulation 5 of TUPE does not indicate any intention to go beyond giving effect to Article 3 of the Directive: see paragraphs 27-30 inclusive of the Supreme Court's Judgment. In other words, if the Directive, as a matter of EU law, transfers only "static" rights, the same would seem to be true of TUPE, in its current form, as a matter of domestic law (whether or not that is what Article 11 of the ECHR requires).

27. It is therefore at present unclear:-

- (1) Whether, as a matter of EU law, a "dynamic" interpretation is precluded: this is what the ECJ will have to determine in Parkwood; and
- (2) If it is not precluded, whether, as a matter of domestic law, a "dynamic" interpretation is to be preferred: the Supreme Court (when Parkwood comes back to it from the ECJ) would need to resolve the tension between what it has said about the domestic position ("dynamic"), and what it has said about the intention behind Regulation 5 of TUPE (the same as the intention behind Article 3 of the Directive, whatever the ECJ in Parkwood may elucidate that to be).

GOING FORWARD TO LUXEMBOURG

28. The employees' case is essentially that:-

- (1) Werhof did not deal with issues relating to the transfer of contractual rights, rather it turned on the different German arrangements and principles that apply to collective bargaining processes;
- (2) In any event, Werhof is no more than authority for the proposition that a Member State is not precluded by its EU obligations from providing that only static contractual rights transfer, and the ECJ in Werhof did not determine that Article 3 of the Directive was concerned with transferring only static rights and that anything beyond that was outside of the scope of Article 3; and
- (3) Even if it is recognised that a national provision does no more than give effect to the EU parent directive, the Courts of Member States are free to interpret the national provision as they wish pursuant to national principles of interpretation, so long as that does not involve a violation of EU principles, and if that gives rise to a different interpretation of the national provisions as compared with the ECJ's interpretation of the parent directive then that is irrelevant.

29. No doubt it will be a lengthy period before Luxembourg provides an answer. Even the Advocate General's Opinion is by no means imminent.

30. The essential battleground is likely to be as follows:-

- (1) What is the scope of the ECJ Judgment in Werhof?
- (2) What is the correct approach for the Courts of Member States in interpreting national legislation which is found to do no more than give effect to a parent directive, when the meaning of that directive has been authoritatively interpreted by the ECJ?

- (3) What is the impact of policy considerations, especially the significance of Article 11 of the ECHR and the right to freedom of association and not to associate, on the determination of the Reference?

- (4) In particular, what is the impact of the potential relevance of Article 11 of the ECHR on those principles of interpretation of national provisions by the Courts of Member States?

CONCLUSION

31. The law is uncertain and will be so for some time. Meanwhile transferee employers cannot be sure that they will be unaffected by changes in collective agreements with the original employer.

32. The transferee employer might seek to obtain an indemnity from the original employer, at any rate if the original employer is also the transferor employer, but where a local authority is concerned this could (albeit probably not) give rise to vires issues.

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