TUPE 2014 and the emperor's new clothes

CLAIRE DARWIN, Matrix Chambers

The view of the Department for Business, Innovation & Skills, as set out in its new guidance, is that the effect of the amendments made to the 2006 regulations by the 2014 regulations is to introduce a new and expanded test for when a variation will be void under new reg 4, or a dismissal will be automatically unfair under new reg 7. For the reasons set out below, I think this is wrong.

For the purposes of this article, I will refer to the 2006 regs prior to the 2014 regs coming into effect as the 'old regs', and the 2006 regs after the coming into effect of the 2014 regs as the 'new regs'. The new regs came into effect on 31 January 2014.

Variations

As is well-known, new reg 4(4) does not contain the second limb of old reg 4(4), under which a variation of the contract was void if the sole or principal reason for the variation was a reason connected with the transfer that was not an ETO reason entailing changes in the workforce. Accordingly, new reg 4(4) and the first limb of old reg 4(4) are almost identical.

The first limb of old reg 4(4) was: 'Any purported variation of the contract shall be void if the sole or principal reason for the variation is (a) the transfer itself.' New reg 4(4) reads: 'Any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.'

Notwithstanding the near identical wording of new reg 4(4) and the first limb of old reg 4(4), the view of BIS, as set out on page 22 of the new guidance, is that new reg 4(4) contains a new and expanded test: 'The new test introduced by the 2014 Regulations is not the same as the old test of the sole or principal reason being the transfer itself. Under the 2014 amendment, the transfer might be the sole or principal reason even if that reason might previously have been considered to be "connected with" the transfer, rather than the transfer itself. It will depend upon the circumstances of any particular case.'

Similar views were expressed in the Government's response to the consultation on proposed changes to the 2006 regs, published in September 2013. However, there is nothing in either of the enabling Acts, or the 'Explanatory Note to the New Regulations', to support this view.

New test?

It's correct that the new regs contain a 'new test', in the sense that the second limb of old reg 4(4) has effectively been repealed, and therefore the circumstances in which a variation may be void under the new regs have been considerably narrowed. Under the old regs, most challenges to TUPE-related variations were brought under the second limb of old reg 4(4), since that limb ('reason connected with transfer') was a much easier threshold to satisfy than the first limb ('sole or principal reason is the transfer itself'). Some of the cases previously argued under the second limb may well have come within the first limb of old reg 4(4) – had they been argued as first limb cases. This practice will need to be taken into account by courts seeking to apply the case law decided under the old regs.

However, is BIS correct to suggest that cases in which the reason was previously considered by the courts to be merely 'connected with' the transfer will now be caught by new reg 4(4), and that new reg 4(4) is therefore significantly wider than the first limb of old reg 4(4)?

In order to answer this question, one has to look first at how the courts are likely to construe new reg 4(4) and whether they are likely to find that it differs in meaning

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from the first limb of old reg 4(4). It seems unlikely that the omission of the word 'itself' in the new reg 4(4) is of any significance since the word 'itself' is generally used only for emphasis. However, no doubt some lawyers will seek to argue that the omission is significant and has had an effect on the meaning of new reg 4(4).

Further, it is an established principle of statutory interpretation that when the Secretary of State continues to use words or phrases that have a settled meaning in case-law it is to be presumed that the Secretary of State intended those words or phrases to continue to have that same meaning. The court is likely to infer that had he wanted to widen or radically change the meaning of new reg 4(4) to include circumstances previously covered by the second limb of old reg 4(4), then he would not have used almost identical wording to the first limb of old reg 4(4). It seems likely, therefore, that the courts will find that new reg 4(4) is identical in meaning to the first limb of old reg 4(4).

A related question is whether the repeated assertion by BIS in official statements, such as the new guidance, that the meaning of new reg 4(4) is wider than the meaning of the first limb of old reg 4(4), will affect the meaning of new reg 4(4). This seems unlikely. While the new guidance will be admissible as a potentially persuasive authority on the legal meaning of the regs, the courts are unlikely to give it any more weight than they would the views of an academic author. Indeed, in a number of recent cases the Court of Appeal has emphasised that it is for the judiciary, not the executive, to decide the meaning and effect of legislation and that little weight should be given to official statements by government departments as to its meaning (see, for example, Risk Management at [227]).

Accordingly, BIS's view as to the effect of the new regs is not in itself enough to change the meaning of the clear words used in those regs.

If the above is correct, then a transfer will only be the sole or principal reason for a variation under new reg 4(4), if that would also have been the position under the old regs. Accordingly, a reason that is merely connected to a TUPE transfer will not be caught by new reg 4(4). Further, it follows that the case law on the first limb of old reg 4(4) remains good law. However, given that, as is explained above, most cases were argued as second limb cases, there is very little appellate guidance on the first limb of old reg 4(4).

Dismissal

Like new reg 4(4), new reg 7 no longer contains the 'reason connected with the transfer' limb previously found in old reg 7(1)(b). Accordingly, new reg 7(1) provides that an employee is automatically unfairly dismissed 'if the sole or principal reason for the dismissal is the transfer'. This is to be contrasted with the wording of the first limb of old reg 7(1), which provided that an employee was automatically unfairly dismissed if 'the sole or principal reason for the dismissal was either the transfer itself; or …' Again, save for the omission of 'itself', the wording of the first limb of old reg 7(1) and that of new reg 7(1) is identical.

BIS believes that new reg 7(1) contains a new and expanded test. Indeed, the new guidance suggests: 'Whether the transfer is the sole or principal reason for a dismissal will depend upon the circumstances. *For cases to which the 2014 amendments do not apply, the test was whether the sole or principal reason for the dismissal is the transfer itself, or a*

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reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. This new test could cover cases where the sole or principal reason for the dismissal was, under the old test, considered to be connected with the transfer.'

Again, given that the Secretary of State elected to use almost identical wording in the new and old regs, it seems unlikely that the meaning of new reg 7(1) differs from the meaning of the first limb of old reg 7(1). Further, it seems unlikely that anything said by BIS in its new guidance, or elsewhere, could alter this. Accordingly, BIS is wrong to suggest that new reg 7(1) could apply to cases in which the sole or principal reason for the dismissal was a reason connected with the transfer that was not an ETO reason, unless the first limb of old reg 7(1) would also have applied.

It follows that the case law on the approach to old reg 7(1) remains good law. Indeed, as the test required by both old and new reg 7(1) replicates the approach in all unfair dismissal cases, the applicable principles are well known (see Underhill LJ in Manchester College at [22-23]).

Extenuating circumstances

A final grumble about the new guidance, which states at page 22: 'Where an employer changes terms and conditions simply because of the transfer and there are no extenuating circumstances linked to the reason for that decision, then the reason for the change is the transfer. Where there are some extenuating circumstances, then whether or not the sole or principal reason for any purported variation is the transfer is likely to depend upon the circumstances.'

It is unclear what the new guidance means by extenuating circumstances. However, unless the reference to extenuating circumstances is an opaque reference to regs 8 and 9 (which apply if there are relevant insolvency proceedings and which, if applicable, can have the result that regs 4 and 7 are disapplied), then it is patently not the case that 'mitigating factors' (the usual meaning of 'extenuating circumstances') would have the effect of breaking the chain of causation between a transfer and the reason for the variation. Further, it is difficult to see how any mitigating factors could be relevant to the employment tribunal's assessment of whether the sole or principal reason for the variation was the transfer or not.

As is clear from the above, the new guidance is far from the model of clarity that we were promised in the Government's response to the consultation. Further, the views expressed in it by BIS do not represent an accurate statement of the law, and are likely to be largely disregarded by the courts when the new regs come before them.

KEY:

New guidance	'New Guide to the 2006 TUPE Regulations' issued in January 2014
2014 regulations	The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014
2006 regulations	Transfer of Undertakings (Protection of Employment) Regulations 2006
Risk Management	*Risk Management Partners Ltd v Brent London Borough Council (London Authorities Mutual Limited & anor, interested parties)* [2010] LGR 99
Manchester College	*The Manchester College v Hazel & anor (No 2)* [2014] IRLR 392