Questions & Answers

EMPLOYMENT LAW

Sixth edition

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4 Continuity of employment

Introduction

Continuity of employment is an important concept in employment law. Some employment protection measures depend upon having a minimum period of continuous employment. To be able to make a complaint of unfair dismissal, for example, in accord with **Part X** of the **Employment Rights Act 1996** (**ERA**), an individual is required to be an employee with at least two years' continuous employment, usually, but not always, with the same employer. This qualifying period has been subject to change, depending upon which political party constitutes the government. In 1979, the period was six months. Successive Conservative governments progressively increased this to two years, until it was reduced to one year again after the Labour Party won the general election in 1997. The coalition government elected in 2010 increased the period to two years once again from April 2012.

It is important to remember that not all areas of employment protection need this minimum period of service. Perhaps the most important exception is in the field of **discrimination**. No period of continuous employment is required if an individual wishes to bring a claim for discrimination on any of the protected characteristics (race, religion or belief, sex, sexual orientation, disability, age, gender reassignment, marriage or civil partnership, **pregnancy** and maternity). Indeed the relevant statute provides for protection during the process of applying for a job, so protection is offered before an individual even starts work. Similarly, for example, there is no service requirement with regard to the right to be paid the national minimum wage.

Issues related to the complex area of transfers of undertakings are included in this chapter because one of the effects of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (**SI 2006/246**) (**the TUPE Regulations**) is to maintain continuity of employment when there has been a change in the employer as a result of a relevant transfer.

Continuity

In order to answer any examination question relating to continuity of employment, it is necessary to be aware of a number of issues. These are related to the start date, the definition of a week that counts for continuity purposes, the effect of absences from work, and industrial disputes.

The start date

An employee's period of continuous employment begins on the day on which the employee starts work. In ***General of the Salvation Army* v *Dewsbury*** **[1984] IRLR 222** a part-time teacher took on a new full-time contract which stated that her employment began on 1 May. As 1 May was a Saturday and the following Monday was a bank holiday, she did not actually commence work until Tuesday 4 May. She was subsequently dismissed with effect from 1 May in the following year. The issue was whether she had one year's continuous employment. The EAT held that the day on which an employee starts work is intended to refer to the beginning of the employee's employment under the relevant contract of employment and that this may be different from the actual date on which work commences.

The week that counts

Section 212(1), ERA provides that any week during the whole or part of which an employee's relations with his or her employer are governed by a contract of employment counts in calculating the employee's length of employment. A week is defined as a week ending with Saturday or, for a weekly paid employee, a week ends with the day used in calculating the week's pay: see **s. 235(1), ERA**. Thus if a contract of employment exists in any one week, then that week counts for continuity purposes.

In ***Welton v DeLuxe Retail Ltd*** **[2013] IRLR 166**, an employee resigned when the store in which he was working closed down. More than one week later he started work again for the same employer in a different store. He resigned from this employment and the question then was whether he had enough continuity of employment in order to claim unfair dismissal. The EAT held that continuity of employment had been maintained even though more than a week had passed between resigning from one store and starting at another. The EAT decided that this was the case because the new employment had been offered during the period between working at the two stores. As soon as the employee had accepted the offer of the new post a contract of employment had come into existence so there had not been a week when such a contract did not exist, even though he was not due to start work immediately.

Absences from work

There are a number of reasons for which a person can be absent from work without breaking the statutory definition of continuity of employment: **s. 212, ERA**. These include:

(a) absences through sickness and injury;

(b) absences resulting from a temporary cessation of work;

(c) custom and practice.

***Hussain* v *Acorn Independent College Ltd* [2011] IRLR 463** concerned an economics teacher who worked on a temporary contract from 25 April to 8 July in one year. He was then offered a permanent position which he took up from 5 September. This permanent position came to an end on 12 June the following year. The question was whether he had one year's continuous service in order to put in a claim for unfair dismissal. The EAT held that the period after 8 July was a temporary cessation of work, so that the two periods of employment could therefore be joined up to give the claimant the necessary continuity of service.

A change of employer

Although the continuity provisions normally apply to employment by one employer (**s. 218(1), ERA**), there are situations where a transfer from one employer to another can preserve continuity of employment. One such situation is when there is a relevant transfer under the TUPE Regulations. The TUPE Regulations create a situation where it is as if the original contract of employment was agreed with the new employer. Thus an employee's period of service will transfer to the new employer.

There has been an enormous amount of litigation, both in the UK courts and at the European Court of Justice (ECJ), concerning the provisions of **Directive 2001/23/EC** (on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of undertakings or businesses), and the Regulations in 2006.

Regulation 3(1)(a) of the **TUPE Regulations 2006** states that the Regulations apply, first, to a transfer where there is a transfer of an economic entity that retains its identity and, second, to a service provision change. An economic entity is defined in **reg. 3(2)** as 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. **Regulation 3(1)(b)** provides that the Regulations also apply to a service provision change. These are relevant to outsourcing situations and are meant to ensure a wide coverage of the Regulations. A service provision change takes place when a person (client) first contracts out some part of its activities to a contractor; when such a contract is taken over by another contractor (so-called second-generation transfers); and when the client takes back the activity in-house from a contractor. Whereas, however, a relevant transfer consists of an 'organised grouping of resources', a service provision change requires there to be 'an organised grouping of employees, situated in Great Britain, which has, as its principal purpose, the carrying out of activities concerned'.

Other issues dealt with include transfers out of insolvency. The government wished to encourage a rescue culture by making such transfers easier to achieve. The TUPE Regulations had been seen as an obstacle to rescuing all or part of an insolvent company, because the rescuer might have been obliged to take on all the insolvent organization's employees on their current terms and conditions.

Where a trade, business, or undertaking is transferred to a new employer, then continuity is also preserved by **s. 218(2), ERA** and the employee's length of service moves to the new employer, although, as pointed out in ***Nokes* v *Doncaster Collieries* [1940] AC 1014**, this is likely to require the knowledge and consent of the employee. There

are a number of specific situations where continuity is also preserved: see **s. 218(3)–(10), ERA**.

Section 219, ERA provides that the Secretary of State may make provisions for preserving continuity of employment. The current regulations are the **Employment Protection (Continuity of Employment) Regulations 1996 (SI 1996/3147)**, which serve, in **reg. 2**, to protect continuity of employment, in relation to a dismissal, where an employee is making a complaint about dismissal or making a claim in accordance with a dismissal procedures agreement. Continuity is also protected, in relation to a dismissal, as a result of any action taken by a conciliation officer or the making of a compromise agreement.

Question 1

Critically consider the approach of statute and the courts to the concept of 'continuity of employment' in relation to employment protection.

Commentary

Continuity of employment is important because a number of statutory rights depend upon it. The question requires you to display your knowledge about what is meant by continuity of employment and when it does and does not apply.

There is a lot of material on this subject and one challenge in answering the question is to remain focused. It would be quite easy to wander off into detailed discussions of those areas that require a minimum period of continuity of employment, e.g. in making a claim for unfair dismissal. It would be wrong to end up discussing unfair dismissal, rather than the concept of continuity.

Examiner's tip

This is not a difficult question, but you need to have an answer that starts with why continuity is important, then discusses what the rules are, followed by the exceptions to the rules.

Answer plan

- Why is continuity of employment important?
- When does continuous employment commence?
- What is continuous employment?
- Some absences do not break continuity
- The rules normally apply to employment with one employer except where continuity is transferred

Suggested answer

Continuity of employment is important as a number of statutory rights, such as the right to be protected from unfair dismissal, the right to receive written reasons for a dismissal, the right to take parental leave, and the right to extended maternity leave, depend upon the employee having a period of continuous employment with an employer.

An employee's period of continuous employment begins, as stated in **s. 211, ERA**, on the day on which the employee starts work. In ***Welton v DeLuxe Retail Ltd*** **[2013] IRLR 166** the EAT held that the day on which an employee starts work is intended to refer to the beginning of the employee's employment under the relevant contract of employment and that this may be different from the actual date on which work commences.

There is a presumption that an individual's period of employment is continuous, unless otherwise shown: **s. 210(5), ERA**. Thus the onus is on those that wish to challenge the presumption to show that there was not continuous service within the definition in the Act. It is likely, however, that the presumption of continuity only applies to employment with one employer. **Section 212(1), ERA** states that any week during the whole or part of which an employee's relations with his or her employer are governed by a contract of employment counts in computing the employee's period of employment. A week is defined in **s. 235(1), ERA** as a week ending with Saturday or, for a weekly paid employee, a week ending with the day used in calculating the week's remuneration. Thus if a contract of employment exists in any one week, then that week counts for continuity purposes, see ***Sweeney*** **v** ***J & S Henderson*** **[1999] IRLR 306**, where an employee worked under a contract of employment with the employer during each of the two weeks in question and thus fulfilled the requirements of **s. 212(1), ERA**. This was despite the fact that the employee worked for another employer during the same period.

The employment concerned must relate to employment with one employer (**s. 218(1), ERA**), although this can include associated employers. The test for control amongst such employers is normally decided by looking at who has the voting control, but there might be, in exceptional circumstances, a need to look at who has de facto control (see ***Payne*** **v** ***Secretary of State for Employment*** **[1989] IRLR 352**).

The question of whether such a rule can amount to indirect sex discrimination or whether it can be objectively justified was considered in ***R*** **v** ***Secretary of State for Employment*** **ex parte** ***Seymour-Smith and Perez*** **[2000] IRLR 263**. This case was brought when the qualifying period was two years and the complainants were individuals who were stopped from bringing a complaint for unfair dismissal because they did not have the necessary two years' continuous service. They complained that the proportion of women who could comply with the two-year qualifying period was considerably smaller than the proportion of men. The House of Lords referred a number of questions to the ECJ, who ruled (**[1999] IRLR 253**) that the entitlement to compensation and redress for unfair dismissal came within the scope of **Art. 119** of the **EC Treaty** (now **Art. 141**) and the **Equal Treatment Directive** (**76/207/EEC**). The government argued that the extension of the qualifying period should help reduce the reluctance

of employers to take on more people. The Court was sympathetic to the government's case and accepted objective justification and also that the qualification period did have a disparately adverse effect on women.

Absence from work means not performing in substance the contract that previously existed between the parties. Such a definition applied to a coach driver whose work was greatly reduced by the miners' strike in 1984. A substantial part of the individual's work was removed, but the employee was able to claim a temporary cessation of work (see ***GW Stephens & Son* v *Fish* [1989] ICR 324**).

There are a number of reasons for which a person can be absent from work without breaking their statutory continuity of employment. However, it should be noted that, under **s. 212(1), ERA**, any week 'during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment'. It is only in situations where the circumstances fall outside this subsection that the provisions in **s. 212(3)** and **(4)** apply. These are, first, if the employee is incapable of work as a result of sickness or injury: **s. 212(3)(a), ERA**. Absences of no more than 26 weeks under this category will not be held to break continuity. The second situation is if there is a temporary cessation of work. According to **s. 212(3)(b), ERA**, absence from work on account of a temporary cessation of work will not break continuity of employment. The word 'temporary' is likely to mean a short time in comparison with the period in work. Thus seasonal workers who were out of work each year for longer than they actually worked could not be considered to have continuity of employment (see ***Berwick Salmon Fisheries Co Ltd* v *Rutherford* [1991] IRLR 203**). In ***University of Aston in Birmingham* v *Malik* [1984] ICR 492**, an individual who was employed on regular fixed-term contracts to teach was held to have continuity). During the summer the employee prepared for the coming year's teaching and the EAT decided that this amounted to a temporary cessation of work. A similar decision was reached in ***Cornwall County Council* v *Prater* [2006] IRLR 362**, where an individual who worked on a number of assignments as a home tutor over a period of ten years was held to be an employee. The breaks between assignments were to be treated as temporary cessations of work. Third, absence from work in circumstances under which, by custom or arrangement, the employee is regarded as having continuity of employment, may not break the statutory concept of continuity. In ***Booth* v *United States of America* [1999] IRLR 16**, the employees were employed on a series of fixed-term contracts with a gap of about two weeks between contracts. On each return to work they were given the same employee number, the same tools and equipment, and the same lockers. Despite the employees arguing that this arrangement was designed to defeat the underlying purpose of the legislation, the EAT could not find an arrangement that would require, in advance of the break, some discussion and agreement that continuity could be preserved. It was clear that the employer did not want such an arrangement.

A week does not count for the purposes of calculating continuity of service if during that week, or any part of it, the employee takes part in a strike: **s. 216, ERA**. Periods when the employee is subject to a lockout do count for continuity purposes. However, in neither case is continuity itself broken.

Although the continuity provisions normally apply to employment by one employer, there are situations where a transfer from one employer to another can preserve continuity of employment. One such situation is when there is a relevant transfer under the TUPE Regulations. These Regulations create a situation where it is as if the original contract of employment was agreed with the new employer. Thus an employee's period of service will transfer to the new employer.

Where the trade, business, or undertaking is transferred to a new employer, then continuity is also preserved by **s. 218(2), ERA** and the employee's length of service moves to the new employer (see ***Nokes v Doncaster Collieries*** [1940] AC 1014).

Question 2

The XYZ Fruit Co Ltd has decided to reduce its work force. It plans to achieve this by dismissing all those with less than two years' continuous service, so that none of the individuals concerned can make a claim for unfair dismissal. The dismissals took effect last week.

A number of those sacked believe that they have cause for complaint and come to you for help.

- Julia thinks that the requirement to have two years' continuous employment before an unfair dismissal claim discriminates against women workers.
- Joshua joined the company two years ago, but has been absent from work for the last three months because of an injury sustained at work. It is not known at the present time whether this injury will permanently stop him from returning to work.
- Tom is a fruit packer who has worked for the company off and on for three years. His work tends to be seasonal and he is laid off when there is little or no fruit to pack.
- Mina is an executive who has only been with the company for nine months. She joined because her previous employer, by whom she had been employed for six years, was taken over by the XYZ Fruit Co.

Provide legal advice to each individual with regard to their circumstances in relation to having sufficient continuity of employment in order to make a claim.

Commentary

This question concerns issues related to continuity of employment and you are asked to consider each one in turn. There are four people to advise, so you will need to be very focused in your answer in order to deal with all four in the limited time available. Julia's complaint is about the interesting subject of sex discrimination and continuity; Joshua's problem is about how time spent absent through sickness is counted for continuity purposes, and there is also the suggestion that he might be permanently disabled; Tom's problem is whether it is possible for seasonal workers to establish continuity; and the issue for Mina is whether her employment was transferred in order to maintain her continuity of employment.

Answer plan

- Does the requirement for two years' continuous employment amount to sex discrimination?
- Does absence due to a work-related illness break continuity of employment?
- What effect does a temporary cessation of work have upon continuity of employment?
- Is it possible to count service with a previous employer for the purposes of continuity of employment?

Examiner's tip

Make sure that you deal with each of the four people's issues and allocate the same amount of space and time to each. Unless otherwise indicated, the same amount of marks are likely to be allocated to each person.

Suggested answer

In order to establish a claim for indirect discrimination, under **s. 19(1), Equality Act 2010**, the continuous service requirement would need to have been shown to be a provision, criterion, or practice that equally applied to male workers, but that would put women at a particular disadvantage when compared to men, and it could not be shown that the provision, criterion, or practice was a proportionate means of achieving a legitimate aim.

This issue of indirect sex discrimination was considered in ***R* v *Secretary of State for Employment* ex parte *Seymour-Smith and Perez*** **[2000] IRLR 263**. The complainants were individuals who were stopped from bringing a complaint for unfair dismissal because they did not have the necessary two years' continuous service. They complained that the proportion of women who could comply with the two-year qualifying period was considerably smaller than the proportion of men. The House of Lords referred a number of questions to the ECJ (**[1997] IRLR 315**). The ECJ held (**[1999] IRLR 253**) that the entitlement to compensation and redress for unfair dismissal came within the scope of **Art. 141** of the **EC Treaty** (now **Art. 157 TFEU**) and the **Equal Treatment Directive**, but that it was for the national courts to verify whether the statistics showed that the measure in question had a disparate impact on men and women. The Court accepted that the qualification period could have a disparately adverse effect on women and that the onus was on the Member State to show that the alleged discriminatory rule reflected a legitimate aim of its social policy, and that this aim was unrelated to any discrimination based on sex. The government argued that the extension of the qualifying period should help reduce the reluctance of employers to take

on more people. The Court was sympathetic to the government's case and accepted objective justification.

It would seem unlikely, therefore, that Julia's complaint would be successful, as the period of continuous service required is two years. In order to arrive at a different conclusion it would need to be shown that the government's justification no longer applied.

Joshua appears to have the necessary two years' continuous employment to make a claim for unfair dismissal. If during his illness absence the contract of employment was still in effect, then continuity is not broken: **s. 212(1), ERA** applies. This would mean that Joshua would have the relevant period of continuous employment. However, if no contract of employment covered this period, the question arising is whether the period of absence due to a work-related illness is to be counted as part of that two years' service. If it is not, then he will have less than the period required. However, in these circumstances, **s. 212(3)(b), ERA** provides that any week during the whole or part of which an employee is incapable of work in consequence of sickness or injury counts in calculating the individual's period of employment. There needs to be a causal relationship between the absence and the incapacity for work in consequence of sickness or injury. The absence from work also needs to be related to the work on offer (see ***Pearson* v *Kent County Council* [1993] IRLR 165**). If Joshua had been offered different work, for which he was suitable, from that which he normally did, the tribunal would have to decide whether the employee was absent from that newly offered work as a result of the sickness or injury.

Although it is likely that Joshua will be successful in his claim that he does have sufficient continuity of service to make a claim for unfair dismissal, there also appears to be an issue related to disability. If he were able to show unfavourable treatment as a result of a disability—**s. 15(1), Equality Act 2010**—then he might have a substantial claim under that Act. The employer's knowledge of an applicant's disability is relevant when considering whether an individual has been treated less favourably for reasons of disability (**s. 15(2), Equality Act 2010**). Tom has three years' service, but as a seasonal worker. This means that there are periods when he will not be working, i.e. there will be no contract of employment. The issue is what effect these temporary cessations of work have on his continuity of employment. According to **s. 212(3)(b), ERA**, absence from work on account of a temporary cessation of work will not break continuity of employment. The word 'temporary' indicates a period of time that is of relatively short duration when compared to the periods of work. Although it was possible to look back over the whole period of an individual's employment in order to come to a judgment, 'temporary' was still likely to mean a short time in comparison with the period in work (see ***Berwick Salmon Fisheries* v *Rutherford* [1991] IRLR 203**). Thus seasonal workers who were out of work each year for longer than they actually worked could not be considered to have continuity of employment (see ***Flack* v *Kodak Ltd* [1986] IRLR 255, CA**, where a group of seasonal employees in a photo-finishing department tried to establish their continuity of employment).

Other seasonal workers who were regularly out of work for long periods were in the same position, even though, at the beginning of the next season, it was the intention

of both parties that they should resume employment (see ***Sillars* v *Charrington Fuels Ltd*** **[1989] IRLR 152, CA**). See ***University of Aston in Birmingham* v *Malik*** **[1984] ICR 492**, where breaks in July and August, during which an academic prepared future teaching, were held to be a temporary cessation, not breaking the individual's continuity of employment. In Tom's case, therefore, one would need more information about the overall period of employment and the periods of absence to come to any conclusion, although the precedents would suggest that he is unlikely to succeed in a claim.

Mina has apparently less than the necessary two years' service, but there is the possibility that her time spent with her previous employer will have transferred, so that all the previous six years' service can be added to her time spent at the XYZ Fruit Co. This may have been achieved by the operation of the **TUPE Regulations 2006**. If her work was part of an entity that retained its identity on transfer (see ***Spijkers* v *Gebroeders Benedik Abattoir*** **[1986] ECR 1119**), and the transfer was not achieved only by a share purchase (see ***Berg and Busschers* v *Besselsen*** **[1989] IRLR 447**), then her continuity of service may have transferred also. Where the trade, business, or undertaking is transferred to a new employer, then continuity is also preserved by **s. 218(2), ERA** and the employee's length of service moves to the new employer. There have been difficulties in defining when a business has transferred, rather than a disposal of assets taking place. ***Melon* v *Hector Powe Ltd*** **[1980] IRLR 447** concerned the disposal, by the employer, of one of two factories to another company. The disposal included the transfer of the work in progress and all the employees in the factory. The Court held that there was a distinction between a transfer of a going concern, which amounted to a transfer of a business that remains the same business, but in different hands, and the disposal of part of the assets of a business.

Further information is therefore required, in Mina's case, with respect to whether a transfer took place, before it can be established whether there is sufficient continuity of service to make a claim for unfair dismissal.

? Question 3

Mel had been employed by Contract Cleaners Ltd (CCL) for some three years. He had been employed on a contract for the cleaning of Middlesex Airport during the whole of this period. The cleaning contract has just been put out for re-tendering and won by New Cleaners Ltd (NCL).

The new contractor does not take over any of the assets of CCL and refuses to employ any of their employees. Instead, NCL moved its own employees and equipment into the airport to carry on the cleaning work.

CCL claimed that there has been a transfer of an undertaking, in accordance with the **TUPE Regulations 2006**. As a result, CCL refused to make Mel and his colleagues redundant, claiming that they were now employed by NCL. This was denied by NCL.

Advise Mel and his colleagues as to whether the TUPE Regulations apply in their situation, whether they have a claim, what they have a claim for, and against whom.

Commentary

The question is about the applicability of the TUPE Regulations in relation to outsourcing. This is a subject that has been considered by the ECJ on a number of occasions and has also resulted in many cases in employment tribunals and at the Employment Appeal Tribunal.

This question is inviting you to display your knowledge of these contradictions. The transferor employer claims that the Regulations do apply, while this is denied by the transferee employer.

Answer plan

- What is the purpose and effect of the TUPE Regulations?
- When does a relevant transfer take place?
- How did the ECJ define a transfer of an undertaking?
- How did the Court of Appeal deal with the confusion resulting from the ECJ decisions?
- What is meant by a service provision change?

Examiner's tip

The best way of answering the question is to begin with an explanation of what protection is offered by the TUPE Regulations and what are the consequences of deciding whether they apply or not. There will then need to be an analysis of the cases leading to the current situation and why it is not certain what the outcome of any litigation will be.

Suggested answer

The **TUPE Regulations 2006** replaced the 1981 Regulations of the same name. These were introduced to give effect to the **Acquired Rights Directive (77/187/EEC)**, amended in 1998 by **Directive 98/50/EC** and consolidated into **Directive 2001/23/EC**). The purpose of the Directive and the TUPE Regulations is to safeguard the employment relationship and contracts of employment of employees in the event of there being a change in the natural or legal person who is their employer. In the event of there being such a change all the transferor's rights and obligations arising from the contract of employment are transferred to the transferee employer. In this case it will be as if Mel's contract of employment had been entered into with NCL Ltd. **Regulation 4(1), TUPE Regulations**, provides that a transfer does not operate to terminate a contract of employment. **Regulation 7(1)** provides that any dismissal for reasons connected to the transfer will be unfair in accordance with **Part X, ERA**.

The outcome in this case will depend upon whether a relevant transfer or a service provision change has taken place. If such a transfer or change has occurred, then Mel will have a claim against NCL. As he has the necessary minimum of one year's (two years' from April 2012) continuous service and was employed at the time of the transfer (see ***Litster* v *Forth Dry Dock Engineering* [1989] IRLR 161**), he will be able to make a claim for unfair dismissal. If no transfer has taken place then his claim will rest against CCL.

In ***Berg and Busschers* v *Besselsen* [1989] IRLR 447**, the ECJ held that the Directive applied as soon as a change occurs of the natural or legal person operating the undertaking. The test, therefore, is whether the change in contractors has resulted in a change in the natural or legal person running the operation.

The ECJ, in ***Spijkers* [1986] ECR 1119**, defined a transfer of an undertaking as the transfer of an economic entity that retained its identity. The case concerned an abattoir that was sold by a company which then became insolvent. The abattoir was closed for a period and Mr Spijkers was not employed by the new owners. The ECJ looked at the purpose of the **Acquired Rights Directive** and concluded that it was to ensure the continuity of existing employment relationships. The Court listed a variety of factors that might indicate whether the entity had retained its identity and stated that each of these factors was only part of the assessment. One had to examine what existed before the transfer and then examine the entity after the change in order to decide whether the operation was continued.

In ***Rask and Christensen v ISS Kantineservice A/S* [1993] IRLR 133,** the ECJ considered a situation where a company had outsourced its internal catering operation. The Court relied upon the decision in ***Spijkers*** and the various factors that had been listed in that case. It concluded that there was an economic entity that retained its identity, and therefore a relevant transfer had taken place.

In the case of ***Dr Sophie Redmond Stichting* v *Bartol* [1992] IRLR 366**, it was established that the transfer need not be that of a commercial organization. This case concerned a charity that provided assistance to drug-dependent people living in the Netherlands. The funding for the enterprise was provided by the local authority. When this funding was switched from one organization to another, the Court held that a transfer of an undertaking had taken place and that the entity had retained its identity.

This whole approach reached its climax in the case of ***Schmidt* [1994] IRLR 302**, which concerned a part-time cleaner in a bank branch office. The ECJ concluded that the Directive could be applied to a situation such as the outsourcing of work carried out by a single person. It also concluded that the absence of the transfer of tangible assets was not conclusive.

The important outcomes of this judgment were that, first, the size of the operation was not an issue; second, that the test is whether the activity continued or resumed after the transfer; and third, that there need not be a transfer of tangible assets, even in a labour-intensive activity such as the cleaning of a bank branch office. This view was confirmed in ***Merckx* [1996] IRLR 467**, where a company that held a Ford dealership had gone into liquidation. Ford awarded the dealership to another business and the Court held that there had been a relevant transfer, even though no tangible assets had passed to the new dealership from the old. The activity of the dealership continued in the same sector and subject to similar conditions. This approach was followed in the

UK, in, for example, ***Kenny* v *South Manchester College*** **[1993] IRLR 265** and ***Wren* v *Eastbourne DC*** **[1993] IRLR 245**. Both of these cases concerned outsourcing.

Confusion as to the meaning of what is a transfer of an undertaking was then caused by the ECJ in ***Süzen*** **[1997] IRLR 255**. This case also concerned a cleaning activity, but of a secondary school. The Court held that an entity cannot be reduced to the activity that it carries out. The transfer of an activity only, such as cleaning, could not be a relevant transfer. This seemed to weaken the application of the Directive. It might now be possible for a transferee employer, in a labour-intensive business, to deny the applicability of the Regulations by not transferring any assets and not transferring any of the current employees working on a contract.

The government tried to resolve these issues by not only clarifying the meaning of a transfer of an undertaking in the 2006 Regulations, but also by introducing the concept of a service provision change. **Regulation 3(1)(b)** provides that the Regulations also apply to a service provision change. These are relevant to outsourcing situations and are meant to ensure a wide coverage of the Regulations. A service provision change takes place when a person (client) first contracts out some part of its activities to a contractor; when such a contract is taken over by another contractor (so-called second-generation transfers); and when the client takes back the activity in-house from a contractor. Whereas, however, a relevant transfer consists of an 'organised grouping of resources', a service provision change requires there to be 'an organised grouping of employees, situated in Great Britain, which has, as its principal purpose, the carrying out of activities concerned'. An example of a service provision change can be found in ***Metropolitan Resources Ltd* v *Churchill Dulwich Ltd*** **[2009] IRLR 700**, where there was a change of contractor providing accommodation for asylum seekers. This even met one of the criteria for a service provision change, namely a transfer from one contractor to another of an organized group of employees carrying out the service.

It is probable, although it cannot be said with absolute certainty, that an employment tribunal will hold that a service provision change has taken place here. It would have been much less certain prior to the 2006 Regulations, although it would have been likely to have been shown to be a relevant transfer. In this situation, Mel will have a claim against the transferee, NCL. A refusal to transfer employees would automatically be an unfair dismissal as in **Part X, ERA**. If the employment tribunal concludes that there has not been a relevant transfer, then Mel and his colleagues continue to be employees of CCL. They may have a claim for unfair dismissal and for redundancy payments against CCL.

? Question 4

The **Tupe Regulations 2006** have the effect of simplifying the 1981 Regulations and of expanding their scope. The result is likely to be greater certainty of application and less litigation than in the past.

Critically discuss this statement.

Commentary

The government replaced the **TUPE Regulations 1981** in 2006 with new Regulations of the same name, with the aim of simplifying them and making it easier to know when to apply them. This question is really testing your knowledge of the changes and asking you to critically consider them in order to assess whether their aims will be achieved.

Answer plan

- Confusion as to the applicability of the original TUPE Regulations
- Introduction by the government of the concept of service provision changes
- The special problems related to outsourcing
- Transfers of insolvent enterprises
- Changing terms and conditions
- Conclusions

Examiner's tip

There are many cases associated with this subject and you need to have a knowledge of the most significant ones.

Suggested answer

The replacement of the **TUPE Regulations 1981**, which took place in 2006, is the result of amendments to the **Acquired Rights Directive.**

One of the issues that has caused a great deal of litigation, both in the domestic courts and in the ECJ, is when precisely the Regulations apply in outsourcing situations. For a long time there had not been any of the clarity of application needed by employers and their legal advisers. There have been apparently contradictory judgments in ***Schmidt*** **[1994] IRLR 302** and ***Süzen*** **[1997] IRLR 255** at the ECJ, subsequently reflected in ***Betts*** **v** ***Brintel Helicopters*** **[1997] IRLR 361, CA** and ***ECM Ltd*** **v** ***Cox*** **[1999] IRLR 599** in the Court of Appeal in the UK.

The government has gone back to the starting point, defined in ***Spijkers*** **[1986] ECR 1119**, that the key question is whether there has been a transfer of economic entity that has retained its identity. If the answer is yes, then there is likely to have been a relevant transfer of an undertaking for the purposes of the **Acquired Rights Directive**. The ECJ

defined an economic entity as 'an organised grouping of resources which has the objective of pursuing an economic activity' (see ***Seawell Ltd* v *Ceva Freight Ltd*** **[2012] IRLR 802**).

The **Tupe Regulations 2006** have followed this definition of an economic entity and further developed it by introducing the concept of 'service provision changes'. A service provision is where a party enters into an arrangement to contract out to another organization the ongoing provision of a service or services. This can include the initial contracting out of the service, the changes of contractors that might result from further competitive tendering, and the situation where the service provision is taken back in-house (see ***Metropolitan Resources Ltd* v *Churchill Dulwich Ltd*** **[2009] IRLR 700**). In contrast, the Court of Appeal held that a service provision change did not take place in ***Hunter* v *McCarrick*** **[2013] IRLR 26**. The problem here was that the client of a property management company had become insolvent and the administrator appointed a new property manager. Thus the client had changed and this meant that a service provision change had not taken place. The new Regulations result in two questions being asked to decide whether there is a relevant transfer. First, is there a service provision change to take place and, second, are there, prior to the change, employees assigned to an organized grouping of employees, the principal purpose of which is to perform the service activities in question specifically on behalf of the client concerned? If so, then the employees assigned to the organized grouping shall be treated in the same way as where the Regulations do apply.

One of the problems in second-generation transfers of contracts, i.e. when a contract changes hands as a result of competitive tendering, is that the new contractor is not always aware of all the liabilities owed to employees that transfer across. There are also other liabilities, such as any actions that employees take against their employer for such matters as breaches of statutory rules on health and safety or discrimination. These have transferred with other liabilities, making the new employer, the transferee, liable for all sorts of costs that may not previously have been known (see ***DJM International Ltd* v *Nicholas*** **[1996] IRLR 76**).

The amended Directive gave Member States the option to introduce changes requiring the transferor to notify the transferee of all outstanding rights and obligations in relation to the employees who will be transferred. The government has taken advantage of this option and introduced a number of simple rules, which provide that the transferor in a prospective transfer is to be required to give the transferee written notification of all the rights and obligations in relation to employees to be transferred: **regs 11** and **12, TUPE Regulations 2006**. If any of these rights and obligations change before the transfer, then there must be written notification of the changes. If special circumstances make this not reasonably practicable, then it must be done as soon as is reasonably practicable, but no later than the completion of the transfer.

This will help enormously those contractors who have suffered as a result of inadequate information, although it still does seem to leave open potential loopholes. Will contractors, for example, be able to change their pricing if there are late notified changes to the employees' terms and conditions?

The original Directive made no mention of transfers out of insolvent enterprises, even though many transfers of undertakings result from the rescue of part or the whole of

insolvent undertakings. The ECJ recognized at an early stage that this created a problem for the rescue of such businesses (see ***Abels* v *Administrative Board* [1985] ECR 469, ECJ**). If the new employer was required to take on all the employees of the insolvent business together with their current terms and conditions and any other liabilities in relation to them, then this might act as a significant disincentive. Thus there is a distinction to be made as to whether the insolvency proceedings are designed to liquidate the assets, in which case the Regulations do not apply, or to rescue the business, in which case they do apply. The distinction is not always easy to make—administration proceedings have not been held not to constitute insolvency proceedings, even though that might be the ultimate outcome: ***OTG Ltd* v *Barke* [2011] IRLR 272**. The purpose of the changes is to encourage a rescue culture by making transfers out of insolvency easier to achieve. The government's approach is that the government would pay any debts owed by the insolvent transferor to the employees up to the limits set in the ERA. This will include debts to employees who are still in work by virtue of having transferred. The government appears to be treating the employees as if they had been working for an insolvent enterprise and had not been rescued by a transfer. This is, presumably, likely to be a less expensive option for them than allowing the enterprise to go into liquidation and the work force becoming unemployed. The remaining debts are transferred to the transferee.

Under the 1981 Regulations it was not possible to change the terms and conditions of employees by reason of the transfer (see ***Wilson* v *St Helens BC* [1998] IRLR 706, HL**). It was possible to change them, however, if the change was as a result of an 'economic, technical or organisational reason entailing a change in the work force' (an ETO reason). The meaning of what is an ETO reason has been less than clear. Unfortunately, the 2006 Regulations do not seem to attempt any clarification of the meaning of these terms, although they do suggest that the new Regulations will make it easier to make transfer-related changes for an ETO reason. These will be subject to the normal rules regarding the ability of an employer to change the terms and conditions of employees. In ***Spaceright Europe Ltd* v *Baillavoine* [2012] IRLR 111, CA**, the Court held that the removal of an expensive employee from the payroll by an administrator in order to make the sale of the business more attractive can be a dismissal by reason of the transfer, and for an ETO reason to exist there must be an intention to change the workforce and to continue to conduct the business as distinct from the aim of selling it.

In insolvency situations, however, the proposals follow the amended Directive and provide for situations when it will be possible to make such changes. When there is no ETO reason, it will still be possible to make changes if they are reached by agreement between either the transferor or the transferee and the appropriate representatives of the employees, and they are designed to safeguard employment opportunities by ensuring the survival of the undertaking or business concerned.

Two of the objectives of any reform of the TUPE Regulations must be the establishment of certainty of application and, linked to this, an end to the unfairness in the treatment of affected employees. This unfairness is especially evident in relation to those in the private sector and those who are affected by second-generation transfers, and further.

Further reading

Employment Rights on the Transfer of an Undertaking: a guide to the 2006 TUPE Regulations; 2012 Department for Business Innovation and Skills; **<https://www.gov.uk/government/publications/tupe-a-guide-to-the-2006-regulations>**.

McMullen, J. 'An analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006' (2006) 35(2) ILJ 113–39.

Sargeant, M. and Lewis, D., *Employment Law*, 6th edn (Harlow: Pearson, 2012).