TUPE and the Poison Pill: implications of *Ferguson and others v Astrea*

Under TUPE 2006 regs 4(4),(5), subject to limited exceptions a purported variation to an employment contract is void if a TUPE transfer is the sole or principal reason for the variation, and is not for an ETO reason entailing changes in the workforce. Despite that apparently clear provision that all such variations are void, Government guidance on the TUPE provisions (as amended in 2014)[1], and EAT dicta[2], took the position that this had no application to cases "when changes are entirely positive from the employee's perspective". As had been pointed out in practitioner commentary[3], that view was always likely to be challenged when faced with a case of the transferor employer saddling a transferee with onerous terms. That proved to be the case in ***Ferguson and others v Astrea Asset Management Limited*** UKEAT/0139/19/JOJ, 15 May 2020, where Littleton's David Reade QC and Charlene Ashiru appeared for the Claimants. But there are potentially important implications which remain to be explored. Significantly it is like to lead to fresh focus on the distinction between what is to be regarded as a variation (or dismissal) by reason of a transfer, and what is merely connected with it.

The Facts in *Astrea*

Astrea concerned the transfer of the management of the assets of the Berkeley Estate in central London (comprising properties worth £5 billion) from Lancer to Astrea. The four claimants were directors of Lancer and its holding company (Holdings), and beneficial owners of Holdings. Two of the claimants, Mr Kevill (the CEO) and Mr Ferguson (Head of Asset Management) had a service agreement directly with Lancer. The other two, Mr Lax (Lancer's Chairman) and Mr Pull (the Finance Director), were engaged by Lancer via their own service companies. In September 2016 Lancer was served with a year's notice of the termination of its management agreement for the Berkeley Estate. The ET found that the Claimants' attempts, led by Mr Kevill, to persuade the Estate owners to either extend the agreement or buy out Lancer's business involved a lack of cooperation in providing information to the owners and making veiled threats that staff would be leaving. The Claimants also awarded themselves substantially enhanced contractual terms –

[1] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf
[2] See ***Xerox Business Services Philippines Inc Ltd v Zeb*** [2018] ICR 419 (EAT) at para 31.
[3] See Lewis (ed), "Transfer of Undertakings" (Sweet & Maxwell) at para A3.16.6, which was relied upon in the Respondent's written argument in **Astrea**.

directly to the service agreements in the case of Messrs Kevill and Ferguson and by virtue of revisions to the service contract with the service companies for Messrs Lax and Pull. These included:

- 15% salary increases (eg to £576,000 in Mr Kevill's case);
- guaranteed bonuses on top of this of 50% of salary whilst retaining an entitlement (as before) to be considered for an additional discretionary bonus;
- contractual termination payments amounting to a month's salary (including bonuses) for each year served as a director of Lancer;
- in the case of Messrs Lax and Pull, an increase in their contractual notice period (payable other than in the event of resignation or summary dismissal) from 12 to 24 months even though their service companies were retained subject to a 12 month break clause
- a new provision that none of the Claimants could be required to travel abroad, contrary to previous practice for at least Kevill and Lax and that the owners of the Estate were based in UAE.

The Claimants agreed that the contracts of any of them who did not transfer would revert to the previous terms. The new contracts were not provided to Astrea until 1 September 2017, which was the final day for provision of employee liability information in advance of the transfer on 29 September 2017.

Shortly before the transfer Astrea notified Mr Kevill that his employment would be terminated immediately following the transfer for gross misconduct. Astrea also stated that it did not accept that Messrs Lux and Pull would transfer, but that if they did they would also be dismissed for gross misconduct. Mr Ferguson did transfer but was dismissed a week later for gross misconduct in relation to the new terms.

The ET decision

Before the ET it was common ground that there was a TUPE transfer under both reg 3(1)(a) (retained identity transfer) and 3(1)(b) (service provision change) and that Messrs Kevill and Ferguson were in scope to transfer. The ET (EJ Goodman) concluded that:

1. Mr Kevill was automatically unfairly dismissed because his dismissal was by reason of the transfer. However any unfair dismissal compensation was reduced by 100% for contributory

fault on the basis that he had devised the plan and led the inflation of contractual terms, had for months been deliberately obstructive of the owner's requests and had been contemptuous of the owner behind his back, using racist language. In the alternative the ET held that he would in any event have been dismissed within three weeks if there had been a fair process. His claims of disability and part time worker discrimination were also rejected.

2. Mr Ferguson was also automatically unfairly dismissed by reason of the transfer, and there was a 25% uplift in the award for non-compliance with the ACAS code (as there would have been for Mr Kevill but for the 100% reduction due to contributory fault). In his case there was no reduction in the award, on the basis that the only conduct in which he participated was the variation of contract and in relation to that (a) he was a follower rather than a leader and (b) he had a lot else on his mind due to his wife's ill health. Nor was there evidence to suggest he would have been dismissed if there had been a fair process.

3. Messrs Lax and Pull were not assigned to the entity or organised grouping of employees who transferred and as such no liability transferred to Astrea. Their claims against Astrea (including for unfair dismissal and unlawful deduction of wages) therefore failed. They therefore remained employees of their service companies, and there was not claim against those companies as there was no indication that they had been dismissed by them.

4. Some of the varied terms were valid either (a) because they reflected the previous practice (an apparent increase in pension contribution and holiday entitlement) or (b) they arguably reflected market standard (in relation to extended D&O insurance cover) or (c) in the case of the salary increases on the basis that the ET regarded it as fulfilling a legitimate commercial interest to keep pace with inflation and the market[4]. There was no cross-appeal against this finding.

5. However the other revised terms, in relation to guaranteed bonus, termination payments and notice and travel abroad, were by reason of the transfer. The ET concluded that they were not agreed for any legitimate purpose of Lancer and were instead designed to compensate the Claimants as owners of the company for loss of its business contract and, possibly only in the case of Mr Kevill, to punish the owners "for using TUPE to acquire the management

[4] ET Reasons para 157. This was on the basis that whilst they were directors/ shareholders, they had not been paid the 3% salary increases paid to staff because they could instead leave money in the business, whereas on transfer they would merely be employees so that would not be the case.

of the Estate, rather than purchase of the business".[5] On that basis the ET held that the terms were void on the basis, as the ET put it, of TUPE reg 4(4) read together with the principle that EU law cannot be used for abusive of fraudulent ends ("the EU abuse principle").

6. An award of three weeks pay was made in favour of each of the Claimants in respect of a failure by the transferor employer (Lancer or the service companies) to comply with TUPE collective information obligations due to Astrea's delay or failure, in breach of TUPE reg 13(4), to provide information as to measures it envisaged taking in connection with the transfer. Astrea had not provided its measures letter until 3 days prior to the transfer. In not making a higher award, the ET took into account the delay in providing the revised contracts to Astrea and that there was an element of tactical play on both sides in trading access to business information against provision of employee information[6].

The EAT decision – overview

In overview:

- The EAT rejected the appeal against the finding that the contractual variations were void. That conclusion is the main focus of this note.

- There was no cross-appeal against the finding that the Messrs Kevill and Ferguson were unfairly dismissed by reason of the transfer or against the unfair dismissal award made in favour of Mr Ferguson. In relation to the award made against Mr Kevill, the EAT allowed an appeal against the contributory fault finding on the basis of failure to make adequate findings as to causation, but upheld the conclusion that he would have been fairly dismissed following a fair procedure in any event.

- The EAT also rejected an appeal as to the quantum of the award under reg 13(4) TUPE (provision of measures information) and that the award should be made in favour of all Lancer's employees rather than only the Claimants; it could only be made in favour of the particular claimants bring a claim.

[5] ET Reasons para 164.
[6] ET Reasons para 140.

- The EAT also allowed the appeal against the finding that Messrs Lax and Pull were not assigned to the entity/ organised grouping of employees that transferred and remitted the issue (along with the contributory fault issue) to the ET.

The assignment issue

Whilst this note focusses on the aspect of the decision in ***Astrea*** concerning variation of terms, the approach to Messrs Lax and Pull provides an interesting illustration of the application of the principle in ***Albron Catering BV v FNV Bondgenoten*** (C-242/09) [2011] I.R.L.R. 76 (CJEU) that there is no need for a direct contractual relationship with the transferor – treated in this instance as being Lancer (although it was put in the alternative by the Claimants as being the service companies). It appears to have been common ground that, if Lax and Pull were assigned to Lancer and (as found by the ET and not challenged on appeal) were employed by their service companies, there would not only be a transfer of the non-contractual employment relationship with Lancer but also:

- Subject to the arguments as to whether the varied terms were void, there would be a transfer of the terms of the service contract between Lax and Pull and their service companies; and
- there would be a right to claim unfair dismissal against Astrea based on being employees prior to the transfer of the service companies.

That analysis might be thought to fit more comfortably on the basis of there being a transfer from the service companies to Astrea, but in effect sidestepped the need to establish this.

Further, in finding that there ET had erred in relation to the question of assignment the ET concluded that the ET had erred in focussing on how much work they were carrying out for Lancer rather than whether they were assigned to that business. The reasoning proceeded on the basis that it would not be sufficient if they were only "partly" assigned to that undertaking. That is certainly the orthodox understanding. It is consistent with the view in ***Kimberley Group Housing Limited v Hambley*** [2008] ICR 1030 EAT that even if there are two transferees of the parts of the business on which an employee worked, the rights and liabilities cannot be split between them. However that conclusion has recently been contradicted by the CJEU in ***ISS Facility Services NV v Sonia Govaerts, Atalian NV*** C-344/18 26th March 2020. There the

claimant worked as a project manager dealing with cleaning contracts in relation to buildings dividing into three lots. After a tendering process two lots moved to one transferee and one to another. The CJEU concluded that the rights and obligations under the employment contract transferred to each transferee in proportion to the tasks performed by the worker, and that it was a matter for the domestic court to consider how this would be assessed. The decision suggests that the ***Kimberley House*** approach is no longer good law so far as concerns a transfer to more than one transferee. Further, if there can be a split of responsibilities for an employment contract between transferees, that also begs the question as to whether there can be a split between the part of the business transferred and that retained, and therefore whether the orthodoxy in ***Astrea*** that it is not possible to be partly assigned to an undertaking remains correct.[7]

Application of TUPE reg 4(4) to variations favourable to employees

The headline grabbing aspect of the EAT's decision will clearly be the conclusion on TUPE reg 4(4). The ET decision rolled together the EU abuse principle and reg 4(4). That approach would leave scope to argue that changes benefitting employees would not generally be void, but only where the abuse principle applied. The EAT however was clear that the reg 4(4) and the EU abuse principle provided separate and alternative ground on which the variations were void.

As to the approach to TUPE reg 4(4), the Claimants' argument was that it should be read as limited to adverse variations so as to accord with the worker protection objectives of Directive 2001/23. An important aspect of the Claimants' argument rested on the decision in ***Power v Regent Security Service Limited*** [2008] ICR 442 (CA). In relation to TUPE 1981 it was held that in order to comply with the Directive, employees may elect whether or not to enforce a term varied by reason of the Directive. That enabled the Court to sidestep the difficult question of whether a term – in that case the increase in retirement age - was to be regarded as beneficial or detrimental. However TUPE 1981 did not contain a term equivalent to reg 4(4) TUPE expressly providing that a variation is void. At most it was to the effect that the Directive does not require that TUPE have the effect of treating beneficial changes as void. It did not support the conclusion that the Directive prevents

[7] The controversial and in some respects problematic decision in ***ISS Facility*** is discussed in detail in the next release of Lewis ed, ***Transfer of Undertakings*** (Sweet & Maxwell), in chapter A3 which is authored by Jeremy Lewis, Martin Fodder and David Reade QC of Littleton.

the approach of treating all such variations, whether beneficial or detrimental to employees, as void. Nor did any of the EU decisions, such as ***Daddy's Dance Hall***[8], address that issue.

The EAT noted that, broadly, the purpose of the Directive is to safeguard rights which may otherwise be damaged by reason of a transfer rather to improve them. It considered that this pointed again a construction which required the protection of rights (or liabilities) which, whether in favour of an employer or employees, are only acquired by reason of the transfer. Further, whilst the Directive had a worker protection purpose, in ***Alemo-Herron***[9] it was also established that it also seeks to ensure a fair balance between the interests of the transferring employees and those of the transferee. The EAT might have added that certainty is also a legitimate objective: see ***Celtec Ltd v Astley*** [2005] I.C.R. 1409 (ECJ). Both those considerations were pertinent given, as the EAT noted, the inherent uncertainty that may arise as to whether a variation (such as the retirement age in ***Power***) is to be regarded beneficial or adverse, and the unsatisfactory and uncertain position outcome if contractual rights are dependent on the subjective view of the individual employee who might change their mind from time to time (presumably subject to estoppel considerations).

The EAT also accepted in the alternative that the EJ had been entitled to find the terms were void by applying the EU abuse principle[10]. The key elements of the principles are that:

(a) objectively the purpose of the EU rules is not achieved despite the conditions for them being met; and

(b) the subjective intention is to obtain and advantage from the EU rules by artificially creating the conditions for obtaining the advantage.

As to the first condition, it could be said here that the purpose of the EU rules was safeguarding employee rights, whereas instead the variation served the different purpose of improving the Claimants' rights, by foisting the onerous new terms on the transferee. The second condition, of an intention to obtain an improper advantage by carrying out a purely formal or artificial transaction, was also met on the EJ's findings. The EAT concluded that she was fully entitled on the evidence to reach her implicit conclusion that the new terms involved an abuse of EU law.

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[8] ***Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/***S (C–324/86) [1989] 2 C.M.L.R. 517 (ECJ).
[9] ***Alemo-Herron v Parkwood Leisure Ltd*** (C-426/11) [2013] I.C.R. 1116 (CJEU).
[10] For a recent instance of the application of the abuse principle in the context of Directive 2001/23, see ***Ellinika Nafpigeia AE v Panagiotis Anagnostopoulous and Others*** (C-664/17),13 June 2019.

In the light of the conclusion as to the EU abuse principle, the issue arises as to whether this undermines the policy considerations bearing on the EAT's conclusions as to the scope of TUPE reg 4(4). It at least reduced the risk of injustice to the transferee, by providing a mechanism to avoid changes designed simply to obtain a benefit with a proper commercial purpose. It might also be said that this gives scope to draw a distinction between the very different considerations that are liable to apply where changes are agreed by the transferor pre-transfer with a view to binding the transferee, and by the transferee after the transfer. Pre-transfer there is the prospect not only of management employees to seek to benefit themselves at the transferee's expense in the way that the Claimants' were found to have sought to do, but also to agree terms with other staff which, from the transferee's perspective, may be regarded as onerous contractual changes – in effect poison pill terms for the transferee to swallow, with the intention of disadvantaging the transferee competitor. Very different considerations apply where changes are agreed post-transfer by the transferee, where it is more difficult to identify the public policy considerations requiring that freely agreed variations in favour of the employee should be rendered void due to being by reason of the transfer.

These considerations would not wholly dispose of the policy considerations identified by the EAT as to uncertainty that might arise from a distinction drawn either on the basis of the employee's right to elect what terms to accept or by limiting the application to adverse changes. It might also be argued that an even-handed approach to the effect of changes being by reason of the transfer serves the objective of achieving a fair balance in accordance with the principle highlighted in ***Alemo-Herron***. Difficult issues would also be liable to arise as to the application of the abuse principle in more nuanced cases than those which arose in ***Astrea***. There might for example be difficulties in identifying whether generous changes in advance of a transfer were merely an abusive attempt to saddle a transferee with onerous terms or were intended effectively as a reward for loyalty, or indeed merely reflected that the transferor's resolve to resist demands was lessened by the knowledge that it would be the transferee picking up the bill. In the event, given the ET's findings of fact, there was little benefit to the Claimants in arguing for a more limited departure from the literal wording of reg 4(4) by reference to the EU abuse principle.

Implications of the approach to reg 4(4)

The approach adopted by the EAT raises the issue of how to avoid anomalous consequences which might otherwise arise in striking down freely agreed contractual variations in favour of employees. A typical scenario would be a case where the transferor or transferor provides some additional incentive, such as an additional incentive scheme or agreement to other contractual changes, to persuade employees to remain with the business post transfer.

The EAT suggested three possible answers:

1. The requirement that the transfer be the reason or principal reason for the variation.
2. The exception for an ETO reason entailing changes in the workforce
3. The possibility of estoppel arguments.

The second of those alternatives may be put to one side due to its narrow application to changes brought about by changes in the number, functions (if sufficiently important[11]) or workplace of employees. The focus is therefore likely to fall on the other alternatives.

As to the possibility of relying on an estoppel, HHJ Shanks suggested that in a case such as ***Power v Regent***, where post transfer there was an agreed change in retirement age from 60 to 65, and the transferee subsequently sought to go back on this, the claimant might have been able to rely on an estoppel in answer to reliance on reg 4(4). The decision of Behrens J. in ***New ISG Ltd v Vernon*** [2008] ICR 319 Ch D provides an example of judicial willingness to rely on estoppel concepts in favour of affected employees in a TUPE context. As an alternative basis for his decision that there could be an objection after the date of the transfer, it was accepted that an employer who had concealed the fact of a transfer was estopped by its own wrongdoing from asserting that it was too late to object to a transfer. HHJ Shanks suggested that the position in relying on estoppel would be more difficult if the variation was agreed with the transferor. That need not however be the case given that under reg 4(2)(b) TUPE the pre-transfer acts of the employer in relation to the employee are treated as having been done by the transferee. Indeed a failure by the transferor to provide information that that the term could be void may entail a breach of the collective information obligation under reg 13(2)(b) TUPE.

[11] ***Osborne v Capita Business Services Ltd*** UKEAT/0048/16/RN 17 June 2016.

However reliance on an estoppel may not be straightforward. Clearly the circumstances in which the issue is liable to arise may vary widely. It may be that the varied terms are entered into after legal advice and the parties could, in the light of the decision in ***Astrea***, be expected to understand the risk of the changes being void. Further, at least in the event of an employer seeking to resile from terms agreed by reason of a transfer it might be regarded as detracting from the TUPE protection, and the effect given to ***Daddy's Dance Hall***, if the employer could found an estoppel on the basis of reliance on the employee's indication of assent to the varied terms. There may be greater scope for an employee to rely on estoppel. Indeed in some cases this may be consistent with the application of the EU abuse principle, as where an employer agreed contractual changes to induce employees to transfer and then seeks to resile from this. However, especially where there are a range of terms agreed, for the employee but not the employee to be able to resile from terms may be said to result in a lack of even-handedness. Depending on the circumstances in which the issue arises, there may also be a difficulty as to impermissibly using the estoppel as a sword to found a claim rather than as defence.

An alternative line of argument is to focus on whether even though a variation may be connected to the transfer, it can be said that this can be regarded as other than by reason of the transfer itself. Despite the time now elapsed since the 2014 amendments removed the alternative of a variation being void (or a dismissal unfair) by reason of only being connected to a transfer, the scope for distinguishing between conduct by reason of a transfer and only matters connected with it remains relatively unexplored. The approach in ***Astrea*** may be expected to bring a fresh focus to this, not only in relation to variations upon which the employee seeks to rely but also detrimental changes. They key issue, as noted by HHJ Shanks (at para 21), is whether the principal reason "is properly to be categorised in some other way". The issue is illustrated by the ET's conclusion that the salary increases (other than the guaranteed bonuses) were not to be regarded as void, even though introduced by reason of changes arising from the transfer and the fact that this would involve no longer being directors or shareholders. On one view the conclusion might be explained on the basis that the ET were applying an approach to reg 4(4) such that changes were only void if they infringed the abuse principle. But an alternative reading of the decision is that because these changes were regarded as having a legitimate commercial justification they could be categorised or regarded as having been merely connected to the transfer but not by reason of it.

However reasoning which rests on whether there is a legitimate commercial justification has much wider potential application. It is pertinent in particular to some of the perennial issues facing transferees. One is the question of whether it is possible to seek to protect the interests of the business being acquired by agreeing fresh restrictive covenants that may need to be tailored having regard to the nature of the transferee business (see eg ***Credit Suisse First Boston (Europe) Ltd v Padiachy*** [1999] ICR 569 and ***Credit Suisse First Boston (Europe) Ltd v Lister*** [1999] ICR 794 CA). In some cases it might be possible to argue that the transfer is merely the occasion for the change, and there are distinct reasons that would have applied irrespective of the transfer as to the need for the new covenants, or that the mere fact that the transferee takes a different view from the transferor as to the need for the covenants does not mean they are by reason of the transfer. But in other cases, as in ***Padiachy***, the connection may be closer; in that case it was the very fact of the transfer that gives rise to the concern that employees would leave and hence the need for the new covenants. But it remains arguable, applying the principle drawn from ***Alemo-Herron*** as to the need for a fair balance between the interests of the worker and employer, that the need to protect the business can be regarded as a separate commercial justification that, though connected to the transfer, can be regarded as distinct from the transfer itself.

Another common problem is the question of how to deal with equal pay issues that may arise consequent on acquisition of a business: see eg ***Manchester College v Hazell*** [2014] ICR 989 (CA). Generally harmonisation of terms on a TUPE transfer is regarded as a prime example of a variation by reason of the transfer: see eg ***Martin v South Bank University*** (C-4/01) [2004] I.C.R. 1234 CJEU. An argument may be made that mere harmonisation can be distinguished from changes that are made for some separate valid objective such as to meet equal pay obligations. That view derives some support from the CJEU's approach in ***Boor v Ministre de la Fonction Publique et de la Reforme Administrativ***e (C-425/02) [2004] E.C.R. I-10823. That view might be further supported on the basis that it cannot be the case that reg 4(4) TUPE should stand in the way of achieving equal pay. Previously it might have been argued that the employer might instead of imposing detrimental changes to achieve equal pay could level up terms. That answer loses its force when beneficial changes are also caught by reg 4(4) TUPE.

In practice arguments are arguments based both on estoppel and seeking to distinguish between reasons connected to the transfer and by reason of the transfer itself are likely to be run in the alternative, and to be deployed much more regularly in the light of the EAT's decision in ***Astrea***.