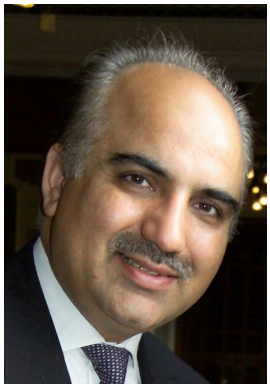


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# "Review of 2013 Hot Topics: TUPE & Constructive Dismissal cases"

This paper highlights some key learning points arising from the following cases relating to service provisions changes under TUPE (first 4 cases) and constructive dismissal (last 6 cases): -

1. *Swanbridge Hire & Sales Ltd v Butler* - Employment Appeal Tribunal, 13th November 2013;
2. *Lorne Stewart PLC v Hyde* – EAT, 1st Oct 2013;
3. *Rynda (UK) Limited v Rhijnsburger* – EAT, 9th Sept 2013;
4. *Ceva Freight (UK) Limited v Seawell Limited* – [2013] CSIH 59,Court of Session (Inner House, Extra Division), 21st June;
5. *Mba v Merton LBC* – [2013] EWCA Civ 1562, Court of Appeal (Civil) 5th Dec 2013;
6. *Croft Vets Ltd v Butcher* – [2013] Eq LP 1170, EAT 2nd Oct 2013;
7. *Little v Richmond Pharmacology Ltd* - [ 2013] Eq LR, 1153, EAT 20 Sept 2013;
8. *Blackburn v Aldi Stores Ltd* – [2013] IRLR 846, EAT 29 July 2013;
9. *Borrer v Cardinal Security Ltd* – EAT, 16 July 2013; and
10. *Redbridge LBC v Dhinsa* – [2013] ICR D33, EAT 7 June 2013 (appeal pending);

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## TUPE CASES:

1. The ***Swanbridge case*** is a timely reminder that Employment Judges must address the intention of the relevant client letting the contracts subject to TUPE and, in particular, whether the activities of the transferee were in connection with a single event or task of a short-term duration. The key question to be considered was not whether the client intended the activities to be carried out but whether the client intended the activities to be carried out in connection with a task or event of short-term duration. The intention was an necessary first step in determining whether there was a service provision change under Reg 3 of TUPE. Equally, the work had to be identified, not in terms of an event, but in terms of the activities; with only the latter being the subject of TUPE.

2. The EAT in ***Lorne Stewart PLC*** reinforced the importance of looking, again, at the activities pre- and post transfer. Whether the activities were of a type that the client was bound to give to the contractor, or the contractor was bound to accept if offered, was not a relevant consideration in the Tribunal's consideration and the essential questions for a tribunal in remained those summarised in Enterprise Management Services Ltd v Connect-up Ltd [2012] I.R.L.R. 190.
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3. The EAT in dismissing the appeal in ***Rynda (UK) Ltd*** reinforced that it was the objectively assessed intentions of the employer's principle purpose that was relevant, pre- and post transfer (*Ceva Freight (UK) Ltd v Seawell Ltd* [2013] CSIH 59 was duly considered) and the particulars, in that appeal to support perversity of the Tribunal's judgement, disclosed no material capable of sustaining such a challenge, especially as the threshold of success, on appeal, was a high one, as determined by *Crofton v Yeboah* [2002] EWCA Civ 794.

4. The Court of Session (Inner House, Extra Division) in refusing the appeal in ***Ceva Freight (UK) Ltd v Seawell Ltd*** emphasised that: (1) where activities were carried out by the collaboration, to varying degrees, of a number of employees who were not organised as a grouping having as their principal purpose the carrying out of the activities for the client, it was not legitimate to isolate one employee on the basis that s/he devoted all or virtually all of his / her working time to assisting in the collaborative effort; and (2) where activities were carried out by a plurality of employees, the reference in Reg 2 definition to a single employee did not warrant disaggregation of that group of employees.

5. **Key messages for practitioners re above TUPE cases:** Focus on what are the tasks/activities to be carried out pre- and post transfer date and for how long, to determine whether or not TUPE will or will not apply. Focus must also be upon what was actually happening "on the ground" and the cases of Enterprise and *Metropolitan Resources Ltd v Churchill Dulwich Ltd (In Liquidation)* [2009] I.C.R. 1380 were supported. Equally, Reg 3(3) of TUPE did not need any judicial construction as the words were straight forward.

## CONSTRUCTIVE DISMISSAL CASES:

6. The Court of Appeal took the opportunity in ***Mba v Merton LBC*** to reinforce that the court ought not to enquire into an asserted belief – in that case, Christianity and working or not on a Sunday - and should judge its validity by objective standards, as an individual was at liberty to hold his/her own religious beliefs, however irrational or inconsistent they might be. The real issue in the case, therefore, was whether the local authority could show 'a proportionate means of achieving a legitimate aim' under Reg 3(1)(b)(iii) of the Employment Equality (Religion or Belief) Regulations 2003. In that context, the Tribunal had found that the imposition of Sunday working by the local authority was proportionate and, as such, the appeal was dismissed.

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7. In the ***Croft Vets Ltd case***, the employer had failed to make reasonable adjustments by not paying for private psychiatric services and counselling for an employee who was suffering from a severe depressive episode triggered by work-related stress. The issue for the EAT was not that it involved the payment of private medical services, but the payment was necessary to enable the employee to return to work and to cope with the work difficulties. In addition, there is no statutory duty to consult the employee, but the duty arose from the general implied duty of trust and confidence between the parties.

8. In the ***Leeds Dental Team case***, the EAT highlighted that what was important was the objective test, and not the subjective intentions of an employer. The principle set out in *Tullett Prebon PLC v BGC Brokers LP* [2011] EWCA Civ 131 were, therefore, reinforced – that all relevant circumstances should have been taken into account and that the case did not depart from the traditional tests set out in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666.

9. The case of ***Little v Richmond Pharmacology Ltd*** is a useful reminder that a decision taken to refuse - in that case, an employee's flexible working request whilst she was on maternity leave - was not conclusive but conditional, as it was subject to a right to appeal. Having exercised that right, successfully, the employee did not suffer personal disadvantage and, as such, there was no sex discrimination.

10. The ***case of Blackburn*** is also instructive; in that, a failure by an employer to adhere to its grievance procedure was capable of amounting to or contributing to a breach of the implied term of trust and confidence in an employment contract. Whether it did do so, was a matter for the Tribunal to determine on the facts using the *Malik v BCCI SA (in liquidation)* [1998] AC 20 test. Whilst the grievance procedure should not be read as a statute, the ACAS Codes were relevant and reliable indications of the employment context, which stated that the appeals should be impartial and, where possible, dealt with by a manager not previously involved.

11. As respects zero based hours contracts, the ***case of Borrer*** is worth reading; in that, the EAT held that in determining the true agreement between the parties – zero hours or not - all the relevant evidence had to be examined, including the written terms of the contract, how the parties conducted themselves in practice and their expectations of each other. The recent case of *Autoclenz Ltd v Belcher* [2011] UKSC 41 was applied. In addition, the relevant bargaining parties had to be taken into account in deciding the relevant terms of any written agreement. In the present case, there were no stipulated hours in the contract, but the employee's working hours were specified to him by the line manager on a weekly basis. There could be no conclusion that he had no guaranteed hours of work as the true

position, in practice, was that he had 48 hours per week contractual entitlement. The case highlights, therefore, the importance of ensuing contractual certainty of the intentions and the terms captured in the written agreements, with relevant practice to back up such terms, as the courts will, invariably, look behind the label attached to contracts.

12. Last but not least, the case of ***Redbridge LBC v Dhinsa*** has been included in this review as it confirms that the definition of police service in section 200 (2)(a) of the Employment Rights Act 1996 was a service as a member of a constabulary maintained by an enactment. The constables employed by the local authority had made declarations before a JP and undertaken obligations to enforce the local byelaws and regulations applicable in the parks. It was clear, therefore, that they were constables under section 2 of the Parks Regulations Act 1872 and, as such, excluded from bringing unfair dismissal proceedings against their employer. The case is the subject of an appeal and I will be surprised if it is overturned on appeal.

13th January 2014

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