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## labour and employment lawflash

19 July 2013

### ECJ Issues Ruling in *Alemo-Herron v Parkwood Leisure Ltd*

*Court holds that, where a transferee employer is not a party to collective negotiations, it should not be bound by the outcome of those negotiations.*

On 18 July, the Court of Justice of the European Union (ECJ) handed down its long-awaited judgment in *Alemo-Herron v Parkwood Leisure Ltd*.<sup>1</sup> In *Alemo-Herron*, the ECJ held that employees who transfer to a new organisation are not entitled to the benefit of collectively agreed terms where (1) those terms are agreed to after the date of the transfer and (2) the new organisation was not a party to the negotiation of those terms. This decision provides welcome clarification on the impact of collective agreements following a Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) transfer and goes some way to resolving the contradictory case law that exists on this issue.

#### Background

The claimants in *Alemo-Herron* were originally employed in the public sector by the London Borough of Lewisham. Their employment contracts entitled them to pay increases in accordance with collective agreements negotiated from time to time by the National Joint Council for Local Government Services (the NJC). Following an outsourcing exercise in 2002, the claimants transferred to a private company, CCL Ltd., under TUPE. In May 2004, they were transferred again under TUPE to Parkwood Leisure Ltd.

In June 2004, a new agreement was reached with the NJC that awarded a pay increase to relevant employees for the period of April 2004 to March 2007. As only public authorities can participate in the NJC, Parkwood was not a party to the negotiations for the new agreement and declined to comply with the new NJC terms.

The employees subsequently brought claims for unlawful deductions from wages, arguing that, under TUPE, the contractual terms incorporating the NJC collective agreement had transferred to Parkwood, and, therefore, Parkwood was obliged to increase the employees' pay.

#### Progress Through the UK Courts

The Employment Tribunal dismissed the employees' claims based largely on a previous ECJ decision,<sup>2</sup> which the tribunal said confirmed that updates in collective agreements could not bind an employer that inherited employees as a consequence of TUPE. The employees then appealed to the Employment Appeals Tribunal (EAT), asserting that the Employment Tribunal had been wrong not to follow domestic cases. The EAT allowed the appeal, following which Parkwood appealed to the Court of Appeal. Parkwood successfully argued that TUPE only binds employers to any collectively agreed terms that were in force at the date of the transfer and not any renegotiated terms that were agreed to after the transfer. The final domestic recourse for the employees was to appeal to the Supreme Court. In considering the case, however, the Supreme Court believed that the law in this area was not clear and, in August 2011, the Court stayed the UK proceedings and made a reference to the ECJ on the issue.

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1. Case C-426/11, *Alemo-Herron v Parkwood Leisure Ltd.*, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=139749&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2860634>.

2. Case C-499/04, *Werhof v Freeway Traffic Systems GmbH & Co KG*, 2006 E.C.R. I-2397.

## Static or Dynamic Approach

Parkwood's contention was that TUPE takes a snapshot of entitlements at the date of transfer and that amendments thereafter are for the employees and their new employer to agree upon together. This is referred to as the "static" approach. The employees argued that TUPE preserved their right to have the NJC set pay on an ongoing basis. This is referred to as the "dynamic" approach.

The questions referred to the ECJ by the Supreme Court concerned whether a "static" or "dynamic" approach should be taken in interpreting TUPE.

## Advocate General's Opinion

In February 2013, Advocate General Cruz Villalón gave his opinion on this matter.<sup>3</sup> His decision favoured the dynamic approach, provided that the transferee's obligation to accept future collectively agreed terms is not "unconditional and irreversible". However, this would ultimately be a matter for UK courts to decide. In his opinion, Villalón noted that, under English law, the transferee's obligation is not "unconditional and irreversible" because the parties are (theoretically at least) free to agree to a variation of the contract, whereby the reference to collective negotiations could be removed.

## The ECJ's Judgment

The ECJ ruled that, where the transferee does not have the opportunity to participate in the negotiations pursuant to a collective agreement that are concluded after the date of transfer, the outcome of these negotiations should not bind the transferee. Applied to the facts of this case, Parkwood should not therefore be bound by any pay increase set out in the NJC collective agreement, which was agreed to after the transfer in May 2004.

In reaching its decision that a static approach should be taken on the facts of this case, the ECJ noted that the purpose of the Acquired Rights Directive (the Directive)<sup>4</sup> is not just to protect the rights of employees but also to seek a fair balance between the interests of the employees and those of the transferee. It recognised that the transferee must be in a position to make changes necessary to carry on its operations. A clause that essentially regulates working conditions in the public sector is likely to considerably limit the freedom of a private employer to make such changes. In curtailing the transferee's freedom in this respect, the clause would undermine the fair balance between the interests of the transferee, in its capacity as employer, and those of the employees.

The ECJ also noted that the Directive must be interpreted in accordance with the Charter of Fundamental Rights of the European Union and, in particular, the charter's provisions relating to freedom to conduct business. This freedom to conduct business necessitates a contracting party being able to assert its interests in a contractual negotiating process. In this case, Parkwood was unable to participate in the collective bargaining process and, as such, its contractual freedom was significantly impaired to the point that the impairment could adversely affect Parkwood's freedom to conduct business.

## Implications

Whilst the ECJ did not rule that dynamic clauses would never be enforceable against a transferee employer, it would appear that, where the collective agreement originates from the public sector and the transferee operates in the private sector (as is often the case), the static approach is to be preferred. For organisations that provide services to the public sector in particular, this is therefore a very welcome decision, which provides a level of certainty and control over salary costs that will greatly assist both when operating existing contracts and when tendering for new contracts in the future.

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3. View the advocate general's opinion at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=133963&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1339210>.

4. The Acquired Rights Directive, 2001/23/EC, was transposed into English law by TUPE.

# Morgan Lewis

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