Appeal No. UKEAT/0397/13/JOJ
UKEAT/0398/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 27 February 2014
Judgment handed down on 16 May 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

UKEAT/0397/13/JOJ

RR DONNELLEY GLOBAL DOCUMENT SOLUTIONS GROUP LTD APPELLANT

(1) MR P BESAGNI & OTHERS
(2) NSL LTD RESPONDENTS

UKEAT/0398/13/JOJ

NSL LTD APPELLANT

(1) MR P BESAGNI & OTHERS
(2) RR DONNELLEY GLOBAL DOCUMENT SOLUTIONS GROUP LTD RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For RR Donnelley Global Document Solutions Group Ltd	MR TOM BROWN (of Counsel) Instructed by: Messrs DLA Piper UK Princes Exchange Princes Square Leeds LS1 4BY
For NSL Ltd	MR MICHAEL SALTER (of Counsel) Instructed by: NSL Ltd Legal Services 4th Floor Westgate House London W5 1YY
For Mr P Besagni & Others	MS EMMA SMITH (of Counsel) Instructed by: UNISON Legal Services UNISON Centre 130 Euston Road London NW1 2AY

SUMMARY

TRANSFER OF UNDERTAKINGS

Dismissal/automatically unfair dismissal

Economic technical or organisational reason

The Employment Judge did not err in holding that dismissals of transferred employees for refusing to work in a different workplace following a transfer of an undertaking were not dismissals which entailed a "change in the workforce" within the meaning of the unamended **Transfer of Undertakings (Protection of Employment) Regulations 2006** Regulation 7(1)(b) and (2). **Berriman v Delabole Slate Ltd** [1985] ICR 546, **Alemo-Herron v Parkwood Leisure** [2013] ICR 1116 and the **Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 2014** considered.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. These are two combined appeals by NSL Ltd ('NSL') and RR Donnelley Global Document Solutions Group Ltd ('RRD') from the judgment of Employment Judge Baty ('the EJ') sent to the parties on 20 May 2013, by which the EJ decided that the dismissals of all the Claimants were automatically unfair by operation of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE') Regulation 7(1). The EJ held that whilst the dismissals were for an economic and organisational reason they did not entail changes in the workforce so as to bring them within the scope of Regulation 7(2) and the "ordinary" unfair dismissal regime. The sole but important issue on this appeal is whether the EJ erred in holding that the judgment of the Court of Appeal in **Berriman v Delabole Slate Ltd** [1985] ICR 546 limits the meaning of "changes in the workforce" in Regulation 7(2) to changes in their "numbers and functions". Applying this approach, the EJ held that relocation by NSL and RRD of the operations transferred to them from the London Borough of Barnet ('the Council') to Croydon and Lancing respectively and the consequent relocation of workers did not entail "changes in the workforce".

Outline of relevant facts

2. The EJ made the following findings of fact.

3. The Claimants were employed in the parking enforcement and related services department of the Council. Mr Besagni, Ms Wormell, Mr Cheung and Mr Norman were all employed in the notice processing part of the service. Mr Shah and Ms Robertson were employed in the post room and payment processing team. The Council decided to out-source the majority of its parking operations. On about 14 December 2011 the contract to provide

these operations was awarded to NSL to commence on 1 May 2012. NSL intended to transfer back office functions to its offices in Croydon. The Council drew up a relocation protocol which was "shared with but not agreed by UNISON."

4. The Council and NSL recognised that the out-sourcing would result in a TUPE transfer. On 10 February 2012 NSL confirmed to the Council and UNISON that the notice processing part of the parking enforcement service would move to its Croydon operation. NSL also indicated that it would be subcontracting the post room and payment processing operations and that such staff would therefore move to the subcontractor's offices.

5. On 28 February 2012, NSL confirmed that its subcontractor would be RRD. On 26 March 2012, RRD indicated that the payment processing services would move to Lancing, West Sussex.

6. The transfer of the undertaking took place on 1 May 2012.

7. The evidence before the EJ on behalf of RRD and NSL was that:

> **"Whilst they appreciated that given the distances between Barnet and their respective sites at Croydon and Lancing many of the transferring employees would decide not to come and work there, there were jobs there for any who wanted to come."**

8. The Claimants all indicated that they were not prepared to move to Croydon and Lancing. All of the available alternative employment was either a long way from Barnet or involved different skill sets. None of the Claimants were interested in those alternatives.

9. As the Claimants indicated they would not move to Croydon and Lancing, they were dismissed on 31 May 2012 on grounds of redundancy.

10. The EJ held at paragraph 53:

> **"The reason for the claimants' dismissal was therefore that they were not prepared to move to Croydon/Lancing."**

This conclusion was repeated in paragraph 75.

The relevant statutory provisions

11. **Transfer of Undertakings (Protection of Employment) Regulations 2006**:

> **"7. Dismissal of employee because of relevant transfer**
>
> **(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—**
> **(a) the transfer itself; or**
> **(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.**
>
> **(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.**
>
> **(3) Where paragraph (2) applies—**
> **(a) paragraph (1) shall not apply;**
> **(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held."**

12. **Directive 2001/21/EC**:

> **"Article 4**
>
> **The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."**

The conclusions of the EJ

13. The EJ rightly recognised in paragraph 56 that there is no definition in TUPE of what amounts to "entailing changes in the workforce" in the phrase "an economic, technical or organisational reason ('ETO') entailing changes in the workforce". Nor is there a definition in Directive 2001/23/EC.

14. The EJ referred to "the leading case" of **Berriman**. He rightly summarised **Berriman** in paragraph 57 as:

> **"…a case about an employer's attempt to standardise terms and conditions in connection with a TUPE transfer, as a result of which it offered Mr Berriman a reduced rate of pay, he resigned and was held to have been constructively dismissed."**

At paragraph 59 the EJ cited passages from the judgment of Browne-Wilkinson LJ including that which recorded that counsel for Delabole Slate Ltd accepted that for there to be "changes in the workforce":

> **"…what must be shown are changes in the number of the workforce or possibly changes in the job descriptions of the constituent elements of the workforce, or possibly changes in the job descriptions of the constituent elements of the workforce, which, although involving no overall reduction in numbers, involves a change in the individual employees which together make up the workforce."**

Browne-Wilkinson LJ observed:

> **"In the present case, the reason for the employer's ultimatum was to produce standard rates of pay-not in any way to reduce the number in their workforce.**
>
> **…**
>
> **The reason itself (i.e. to produce standardisation in pay) does not involve any change either in the number or the functions of the workforce.**
>
> **…**
>
> **…the phrase 'economic, technical or organisational reason entailing changes in the workforce' in our judgment required that the change in the workforce is part of the economic, technical or organisational reason. The employer's plan must be to achieve changes in the workforce. It must be an objective of the plan, not just a possible consequence of it."**

15. At paragraph 66, the EJ cited a passage from the judgment of the Employment Appeal Tribunal ('the EAT') in **London Metropolitan University v Sackur** UKEAT/0286/06/ZT in which HH Judge McMullen QC expressed the opinion in paragraph 28 that the judgment of the EAT in **Crawford v Swinton Insurance Brokers Ltd** [1990] IRLR 42 did not depart from **Berriman** and that:

> **"…the correct approach to regulation [8(1) and 8(2)] is that an ETO defence may be available where changes in the workforce are entailed by reason of a reduction in the numbers, or of the functions being changed, of relevant employees."**

16. At paragraph 67 of his judgment the EJ quoted from paragraph 7.68 of the Department for Business Innovation and Skills, Transfer of Undertakings (Protection of Employment) Regulations 2006 – Consultation on Proposed Changes to the Regulations January 2013 ("the Consultation Paper"). The Consultation Paper stated that the Government:

> **"…is considering amending TUPE so that a change in the location of the workplace is within the meaning of 'entailing changed in the workforce' and therefore can be classed as an ETO. This will align the ETO under TUPE with the definition of redundancy for the purposes of the unfair dismissal law."**

17. The EJ held at paragraph 81 that the reason for the dismissal of the Claimants was both economic and organisational within the meaning of TUPE Regulation 7(2). He held:

> **"The relocation to the specialist units of NSL and RRD was intended to produce efficiencies and therefore save costs; it was therefore economic. Similarly the relocations were to centrally organised premises which would service a range of clients and the operations of which were organised differently. They were therefore organisational."**

18. The EJ then considered whether the relocation entailed changes in the workforce. The EJ rejected the submission by counsel for RRD, Mr Brown, that the Court of Appeal in **Berriman** were not restricting the meaning of "changes in the workforce" to "numbers and functions". These factors derived from counsel's concession in that case. The EJ rejected this submission holding:

> **"82. …That is true but it does not stop the Court of Appeal agreeing with that, which they implicitly do in Browne-Wilkinson LJ's judgment and expressly in the head note. If they did not, Browne-Wilkinson LJ would have almost certainly set out other circumstances where it could apply, but he does not do that. That applies notwithstanding that the case of Berriman is about changes to terms and conditions other than a change of location."**

The EJ continued:

> **"83. Furthermore if there was any doubt, the passage quoted above from Sackur makes clear that the defence is available in the case of changes to numbers and functions. Again, had it applied in other circumstances it would have been stated in Sackur by His Honour Judge McMullen. I therefore find that Berriman, by which I am of course bound, limits the defence in regulation 7(1)(b) to numbers and functions."**

19. The EJ held at paragraph 86:

> **"86. It follows therefore that the dismissals were for a reason connected with the transfer which was not an economic, technical or organisational reason entailing changes in the workforce and that they were all therefore automatically unfair dismissals. The claimants' unfair dismissal claims all therefore succeed."**

20. If he were wrong in his conclusion and the Claimants had been dismissed for an ETO, the EJ held that the dismissals would have been by reason of redundancy (paragraph 87) and would have been fair for the purposes of the **Employment Rights Act 1996** ('ERA') section 98(4) (paragraph 93). There is no cross-appeal from these findings.

The submissions of the parties

21. Mr Brown for RRD submitted that the EJ erred in treating **Berriman** as setting out the limits of "entailing changes in the workforce" within the meaning of TUPE Regulation 7(2). The EJ treated the two matters referred to in **Berriman**, changes in overall numbers of "the whole body of employees" or changes in the functions of the employees looked at as a whole, as the only matters which can constitute "changes in the workforce". Mr Brown contended that the ratio of **Berriman** does not preclude a change in number of employees employed at a

particular location from constituting a change in the workforce within the meaning of Regulation 7(2).

22. Mr Brown submitted that **Berriman** must be considered in the context of the claim in that case. An employee was constructively dismissed when he refused to accept changes in his terms and conditions introduced to harmonise rates of pay for all the transferee's employees. Changes in rates of pay do not per se affect how or where the workforce does its work, what it does or the numbers of employees. Counsel submitted that it was unsurprising that attempts by the employers in **Berriman**, **Sackur** and **Hazel and another v Manchester College** [2014] EWCA Civ 72 to rely on ETO defences failed. The dismissals in these cases were by reason of the transferee's attempts to change the terms and conditions of employment of transferring employees.

23. Mr Brown referred to the judgment of HH Judge McMullen QC in paragraph 27 of **Sackur** in which he stated that the restriction of the ETO defence to the two situations explained in **Berriman** "was to some extent attenuated" by the judgment in **Crawford**. However he held in paragraph 29 that:

> **"…Berriman remains good law and is not adjusted or made significantly more flexible by Crawford, Crawford simply being an application of the clear words in Berriman."**

Mr Brown submitted that the EJ was wrong to regard himself as bound by judicial recasting of the ETO defence. The Court of Appeal in **Hazel** said nothing one way or the other as to whether a change in location of employees was a change in the workforce.

24. Before the EJ, counsel on behalf of the Claimants had relied upon the then proposed amendment to TUPE to include a change in the location of the workplace within the meaning of

"entailing changes in the workforce" as indicating that meaning was not included before such an amendment. Mr Brown contended that the amendment clarified rather than changed TUPE Regulation 7. Further, he observed that contrary to the position taken by counsel for the Claimants, the amendment which has now been introduced is not contrary to EU law.

25. Mr Brown submitted that if **Berriman** inadvertently created authority for a proposition that a change in location could not be an ETO reason entailing changes in the workforce, such a rule of law would be incompatible with EU law. He relied upon the judgment of the CJEU in **Alemo-Herron v Parkwood Leisure Ltd** [2013] ICR 1116 in which the court considered a referred question as to whether Directive 2001/23 precludes a member state from providing that dynamic clauses referring to collective agreements negotiated and agreed with the transferor after the date of a transfer of an undertaking are enforceable against the transferee. Counsel referred to paragraphs 27 and 36 of the judgment in which the court held:

> **"27. Since the transfer is of an undertaking from the public sector to the private sector, the continuation of the Transferee's operations will require significant adjustments and changes, given the inevitable differences in working conditions that exist between those two sectors.**
>
> **…**
>
> **36. Article 3 of Directive 2001/23, read in conjunction with article 8 of that Directive, cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the Transferee's freedom to conduct a business: see by analogy, *Deutsches Weintor eG v Land Rheinland-Pfalz* (Case C-544/10 6 September 2012, paragraphs 54 and 58)"**

Mr Brown submitted that the judgment in **Alemo-Herron** illustrates that the Procurement Directive and the Acquired Rights Directive 2001/23 are not incompatible. Whilst the judgment of the CJEU in **Oy Liikenne Ab v Pekka Liskojärvi and another** [2002] ICR 155 illustrates that the Directive does not allow for the reduction of transferring employees' terms and conditions on a transfer, the court made no observation on whether a change in location of the workforce was a permitted ETO. Accordingly Mr Brown submitted that there is no

principle of EU law which precludes a change in the location of the workforce being regarded as a change in the workforce for the purposes of the Directive or TUPE.

26. If, as he contended, the EJ erred in holding that the Claimants were dismissed for a reason connected with the transfer that was not an ETO entailing changes in the workforce, Mr Brown submitted that in accordance with the findings of the EJ the dismissal should be held to be fair.

27. Mr Salter, counsel for NSL, adopted the submissions made by Mr Brown.

28. Ms Smith for the Claimants submitted that the EJ did not err in holding that the effect of the judgment in **Berriman** was to limit "changes in the workforce" in TUPE Regulation 7(1) to changes in the numbers of employees employed or to the jobs which those employees do. The EJ found that the reason for the dismissal of the Claimants was that they were not prepared to move to Croydon or Lancing. Applying **Berriman**, the change in location where employees would work was not a change in the workforce. Ms Smith pointed out that the conclusion of Browne-Wilkinson LJ in **Berriman** at page 551C that the reason for the dismissal, to produce standardisation in pay, does not involve any change in either the number or the functions of the workforce, is the ratio of the decision. It is for this reason that there was no change in the workforce. The proposition in **Berriman** was repeated by Underhill LJ in **Hazel** in paragraph 14 as setting out the requirement for establishing an ETO defence.

29. Ms Smith contended that the phrases used by Underhill LJ in **Hazel** "the changes in the actual numbers employed" and "to use the common shorthand, 'redundancies or redeployment'" are not capable of being read to include "changes in the numbers employed in a

particular place". The ordinary meaning of "changes in the workforce" does not include a change in the workplace". Ms Smith observed that Underhill LJ referred to the "common shorthand" of "redundancies or redeployment" not to the statutory definition of redundancy in section 139(1) of the ERA. The statutory definition includes a reference to cessation or diminution of the requirements of the employer for employees to carry out work in the place where they were employed.

30. Ms Smith contended that there would have been no need for the new TUPE Regulation 7(3A) to be inserted by the **Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014** if "changes in the workforce" had already included "a change to the place where employees are employed by the employer to carry on the business of the employer…". It was contended that Regulation 7(3A) brought about a change in the law.

31. Ms Smith submitted that the judgment in **Alemo-Herron** does not alter earlier European case law on the Acquired Rights Directive, then 77/187, such as **Foreningen AF Arbejdsledere I Danmark v Daddy's Dance Hall A/S** [1988] IRLR 315. The protection provided by the Acquired Rights Directive against dismissal because of a relevant transfer is mandatory. Ms Smith referred to the opinion of the Advocate General in **Oy Liikenne** in which he considered whether the then Acquired Rights Directive, 77/187, was incompatible with Directive 92/50 relating to the co-ordination of procedures for the award of public service contracts. At paragraph 28 he held that it was not. At paragraph 33 and 34 of his Opinion, AG Leger observed that the purpose of Directive 92/50 was to put service providers who wished to compete for the award of a contract in equal competitive conditions. He observed that once a

tender has been accepted, the successful tenderer "is required to respect the rights of the workforce laid down by the Directive".

32. Ms Smith contended that the ordinary interpretation of "changes in the workforce" does not include changes in the location of the workforce. Counsel submitted that it was difficult to think of changes in the workforce apart from changes in their overall numbers or functions. Accordingly the EJ did not err in concluding that the dismissals of the Claimants for refusing to change location of where they were to work were not dismissals "entailing a change in the workforce".

Discussion and conclusion

33. The EJ found as a fact that the reason for the Claimants' dismissal was that those transferred to NSL were not prepared to move to Croydon and those transferred to RRD were not prepared to move to Lancing. At paragraph 81 the EJ held that the dismissals were both for economic and organisational reasons connected with the transfer. There was no appeal before me from those findings. The determinative issue for the purpose of deciding whether the dismissals were "automatically unfair" was whether dismissals for those reasons entailed changes in the workforce within the meaning of TUPE Regulation 7(1)(b) and (2). If they did not, the dismissals would be "automatically" unfair. If they did, it was agreed that the dismissals would be for an ETO reason. The fairness of the dismissal would then be determined under ERA section 98(4). On the findings of the EJ it was agreed that if the dismissals were for an ETO reason entailing changes in the workforce they were fair within the meaning of ERA. These claims fell within the majority of cases of which Underhill LJ observed in **Hazel** at paragraph 22 that this second element, "entailing changes in the workforce", is likely to be decisive.

34. Several factors are to be taken into account in determining the meaning of "entailing changes in the workforce", in TUPE Regulation 7(1)(b) and (2): the ordinary meaning of the words taken in context, the domestic authorities on the meaning of the words, whether the amendment to Regulation 7 by the TUPE (Amendment) Regulations 2014 sheds any light on the interpretation and whether their meaning is affected by the European jurisprudence.

35. As Browne-Wilkinson LJ observed in **Berriman** at page 551F, some meaning must be attributed to the words "entailing changes in the workforce" otherwise their inclusion after "economic, technical or organisational reason" would be otiose. In **Berriman** Browne-Wilkinson LJ held that:

> **"…the word 'workforce' connotes the whole body of employees as an entity: it corresponds to the 'strength' or the 'establishment'."**

In my judgment "workforce" is made up of workers, people. "Workforce" is not "workplace" or any other physical or abstract concept such as the way in which work is organised or where it takes place. These would fall within the first limb of Regulation 7(1)(b) as an ETO.

36. In **Berriman** the Court of Appeal considered whether a constructive dismissal arising from refusal to accept harmonised changes in terms and conditions of employments as a result of a transfer of an undertaking entailed changes in the workforce. The Court of Appeal held that changes in the workforce must be an objective of the employer's plan not just a possible consequence of it. Further to recording a concession made by counsel for the employers, Browne-Wilkinson LJ held at page 551E:

> **"Changes in the identity of the individuals who make up the workforce do not constitute changes in the workforce itself so long as the overall numbers and functions of the employees looked at as a whole remain unchanged."**

Underhill LJ in **Hazel** analysed the ratio of **Berriman** in paragraph 14:

> **"What Berriman then establishes is that the requirement of the ETO defence that the reason in question should 'entail changes in the workforce' means that it should entail changes in the actual numbers employed or in any event in the jobs which the employees do – to use the common shorthand 'redundancies or redeployment'."**

37. There is not an exact correspondence between an ETO entailing changes in the workforce and dismissals for redundancy within the meaning of the ERA. Not all ETO dismissals entailing changes in the workforce are dismissals for redundancy. Regulation 7(3)(b) provides that ETO dismissals entailing changes in the workforce may be regarded as for redundancy or otherwise for a substantial reason for dismissal such as to justify the dismissal of an employee holding the position which that employee held within the meaning of ERA Section 98(1)(b). Dismissals for redundancy within the meaning of ERA section 139 could have been excluded from the scope of the automatic unfair dismissal provision of Regulation 7(1). They were not. The meaning of the ERA section 139 includes in the definition of dismissal for redundancy the concept of dismissal due to a cessation of business in a particular place or a reduction of requirements for employees to carry out work in a particular place. This specific reference is absent from the unamended Regulation 7(2). In my judgment on the ordinary language of the unamended Regulation 7, the concept of change in location of the employees' workplace is not included in "changes in the workforce".

38. The amendment to Regulation 7(2) effected by the 2014 (Amendment) Regulations by expressly including:

> **"…a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act)."**

is indicative of an amplification of the meaning of "changes in the workforce". The Consultation Paper on proposed changes to TUPE which preceded the introduction of the 2014 amendments recognised that the interpretation by the courts had not included a change in location of where work would be performed as a change in the workforce. By the proposed amendment the Government wished to align "changes in the workforce" with the definition of redundancy in the ERA.

39. There is no decision of the CJEU directly on the issue of whether dismissal on a transfer of an undertaking for an economic or organisational reason entailing a change in the location of the employees' place of work entails "changes in the workforce". As is well established, the objective of the Acquired Rights Directive as explained in Preamble (3) is to provide for the protection of employees in the event of a change of employer, in particular to ensure that their rights are safeguarded. Ms Smith rightly submits that the judgment in **Alemo-Herron** does not alter the earlier European jurisprudence on the mandatory nature of the obligations in the Acquired Rights Directive. This ruling of the CJEU in **Alemo-Herron** does not affect the obligation of the transferee to respect transferring employees' rights when, as in a change of location, those are known. As observed by the court in Oy Liikenne at paragraph 23, the cost consequences of a transfer of an undertaking can be built into the bid made by a putative transferee.

40. It is not unusual for a transferee to carry on the transferred business at a different location and to require employees to work there. This was stated in the Consultation Paper. It was recognised that existing court decisions that "entailing changes in the workforce" in Regulation 7 did not include "a redundancy situation" in relation to employees' place of work

meant that transferees "could face claims for automatic unfair dismissal in genuine redundancy situations." The comment was made at paragraph 7.69 of the Consultation Paper:

> **"It may be a particular problem for outsourcing, where changes to the location of the workforce may be more likely to occur and may be necessary in some cases, due to the new service provider being located in a different area from the incumbent provider."**

In my judgment the fact that many transfers of undertakings, including service provision changes, will involve a change in the location of where employees work, negates rather than supports an interpretation of "entailing changes in the workforce" which includes a change in the location of the workforce. If that interpretation were adopted, employees dismissed for refusing to relocate on a transfer of an undertaking would be deprived of the protection of a finding of "automatic" unfair dismissal. In my judgment, in the absence of clear language as that now introduced by amendment, such an interpretation would go against the grain of TUPE. The compatibility of the amendment with Directive 2001/23 is not an issue to be considered in this appeal.

41. I remain of the view expressed obiter in **Meter-U Ltd v Ackroyd** [2012] ICR 834 at paragraph 40 that:

> **"…changes in numbers of employees or in their duties are not the only changes which may constitute 'changes in the workforce' within the meaning of Regulation 7."**

Whilst to fall within TUPE Regulation 7(2), the changes must be to the body of people constituting the workforce, in my judgment they could also include, for example, a requirement that the workforce have additional skills or qualifications needed even if the jobs they perform remain the same. For economic or organisational reasons changes in techniques to carry out existing jobs may be needed requiring the workforce to have additional skills. Dismissals of

unskilled workers for that reason may arguably be for an ETO reason entailing a change in the workforce within the meaning of TUPE Regulation 7(2).

42. Whilst it may be arguable that changes in numbers or functions referred to in **Berriman** may not be the only "changes in the workforce" falling within TUPE Regulation 7(2), in my judgment dismissals of employees by reason of or connected with a transfer of an undertaking for refusing to change the location of their workplace are not dismissals which entail changes in the workforce within the meaning of TUPE Regulation 7(2). The appeal is dismissed.