limits are lawful, provided that they do not result in depriving applicants of "any opportunity whatever" of enforcing individual rights contained in directives. This contrasts with cases decided by the Court of Justice post-*Fantask* in which the conduct of national authorities was indeed mentioned as a relevant factor in assessing the compatibility with Community law of national time limits for bringing proceedings (see, *e.g.*, Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia SpA* v. *Amministrazione delle Finanze dello Stato* and *Marine Insurance Consultants Srl and GMB Srl and Others* v. *Amministrazione delle Finanze dello Stato,* judgment of the Court of Justice of 15 September 1998, not yet reported, para. 22).

ANGELA WARD

TRANSFER OF UNDERTAKINGS—DISMISSALS AND VARIATIONS

IN conjoined appeals in *Wilson* v. *St. Helens Borough Council* [1998] 3 W.L.R. 1070, the House of Lords considered two important questions concerning the Transfer of Undertakings (Protection of Employment) Regulations 1981, S.I. 1981/1794, which enact the Acquired Rights Directive (77/187/EEC): first, whether a purported dismissal of an employee, the reason or principal reason for which is the transfer of an undertaking, is effective or is a nullity, and secondly, the extent to which employees are free, expressly or by conduct, to accept variations by the transferee in their terms of employment.

Employees (respectively, in the fuel industry and in a council residential home) were dismissed shortly before a transfer of their undertakings, but offered employment by the transferee on (it was said) less favourable terms. They accepted the offers and worked for the transferee for some time (well beyond the three-month time limit for unfair dismissal claims) before claiming in industrial tribunals that they were employed by the transferee on the same terms as they had been by the transferor. The fuel workers sought declarations; the council workers claimed the difference between their previous and present earnings as unlawful deductions from wages. They argued that their purported dismissals had, in law, never taken place, and that what were therefore variations in the terms of their continuing contracts of employment had been ineffective because they were due to the transfer.

Although a person must be an employee at the moment of transfer for the burden of his rights to pass to the transferee (Regulation 5(3) and Article 3(1)), a dismissal because of an impending transfer is not effective to terminate the employee's

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employment so as to prevent such rights from passing: Case 101/87 *P. Bork International A/S* v. *Foreningen af Arbejdsledere i Danmark* [1988] E.C.R. 3057, applied in *Litster* v. *Forth Dry Dock & Engineering Co. Ltd.* [1990] 1 A.C. 546, H.L. Were it otherwise, the Directive could be circumvented by a "transparent device" (*Litster*). Certain dicta of the European Court of Justice, however, seemed to suggest that the concept of an ineffective dismissal had a wider application. In *Bork*, the Court said that the Directive*"enabl[ed] [employees] to remain in employment* with the new employer on the terms and conditions agreed with the transferor" (emphasis supplied). In Case 105/84 *Foreningen af Arbejdsledere i Danmark* v. *A/S Danmols Inventar* [1985] E.C.R. 2639, the purpose of the Directive was inter alia "protecting workers against dismissals motivated solely by the fact of transfer". The employees argued that the case law disclosed a principle that a purported dismissal whose reason was a transfer was a nullity. Protecting employees against dismissal was inconsistent with their being limited to a "secondary" claim for compensation, which might in any case be unavailable if a relevant qualifying period had not been completed.

The Court of Appeal [1998] I.C.R. 387 was persuaded: "A dismissal effected before the transfer and solely because of the transfer . . . is in effect prohibited and when considering the effect of Article 3(1) is required to be treated as a nullity" (*per* Beldam L.J.). In the fuel industry case "the purported dismissals were ineffective". There was, on the facts, an organisational reason for the council workers' dismissal, which was therefore permitted and effective (see Article 4(1)).

Since the fuel workers had not in law been dismissed, their contracts had merely been purportedly varied. This was ineffective since Regulation 12 renders void any agreement purporting to exclude or limit the operation of Regulation 5 (which effects the "statutory novation" so that "as far as possible, the employment relationship continues unchanged with the transferee" (*A/S Danmols Inventar, loc. cit.*)). This principle is also inherent in the Directive: Case 324/86 *Foreningen af Arbejdsledere i Danmark* v. *Daddy's Dance Hall A/S* [1988] E.C.R. 739.

The logical difficulties of the Court of Appeal's approach to the dismissal question are considerable. How can a dismissal be a nullity—and therefore without legal consequence—yet unfair (under Regulation 8(1)) giving rise to a right to compensation? (For robust views on this see *Cornwall County Care Ltd.* v. *Brightman* [1998] I.C.R. 529, E.A.T.) In the House of Lords, Lord Slynn (with whom Lords Browne-Wilkinson, Steyn, Clyde and Hutton agreed) set matters straight. On a transfer the employee acquires against the

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transferee all those rights which he had against the transferor. What those rights are depends on the law governing the contract. In English law dismissal terminates the working relationship between employer and employee. Contracts of employment are not generally specifically enforceable, so the employee is left with a right to seek damages for wrongful dismissal, if appropriate, or statutory compensation (or, exceptionally and as a matter of discretion, reinstatement or re-engagement). These are the liabilities passed to the transferee. Nothing in the Directive says that there cannot be a dismissal because of a transfer; rather, as the tribunal in the fuel workers' case sensibly observed, the transfer "shall not . . . constitute *grounds* for a dismissal" (Article 4(1), emphasis supplied). "It is because the dismissal is effective that provision is made for it to be treated as unfair for the purposes of awarding compensation" (*per* Lord Slynn). This was consistent with the ECJ case law, whose "overriding emphasis" was to safeguard the *existing rights* of employees on a transfer. The transferor or transferee cannot use a transfer as justification for a dismissal, but if he dismisses none the less, the former employee's rights and remedies are a matter for national law. Since these employees had been effectively dismissed and had not complained of unfair dismissal within the time limit, they were without a remedy.

Strictly, the issue of variation did not arise since the earlier contracts had come to an end. Lord Slynn considered it none the less. It is important since it is common for the transferee to seek to change employees' terms of employment. In the council workers' case, the Court of Appeal was upheld: the reason for imposing new terms was not the transfer but the fact that the home could not continue without organisational changes. Had it been otherwise the purported variation would have been ineffective.

The reason for the purported variation in the fuel workers' case was the transfer alone: in principle it should have been ineffective. But the employees had accepted statutory statements incorporating the new terms eight months after the transfer, and had worked on: one worked for two-and-a-half years; the other was still there after six. Lord Slynn was—understandably—reluctant to accept that an employee's acceptance of varied terms—either expressly or by conduct—could remain ineffective for so long, but was less helpful as to how the problem might be resolved: "there must, or at least may, come a time when the link with the transfer is broken or can be treated as no longer effective". The question would have been referred to the ECJ had it been decisive of the case.

Their Lordships' excision of the concept of an ineffective dismissal is to be welcomed. But there is evidently much to be done on the

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questions of variation raised in this case. If the English courts feel unable to decide them without the assistance of the ECJ, there look set to be more cases such as this in which the English courts offer guidance on what the guidance of the ECJ actually means.

THOMAS ROE

ELECTRONIC EAVESDROPPING AND ANOMALIES IN THE LAW OF EVIDENCE

THERE is nothing wrong with the Court of Appeal decision in *R.* v. *Aujla* [1998] 2 Cr.App.R. 16. Almost everything is wrong, however, with the law that the court was called on to interpret, and the decision is interesting because it shows this up.

The defendants were awaiting trial for smuggling illegal immigrants from Holland, and a preliminary question arose as to whether the prosecution could use as evidence the tape-recordings of incriminating telephone calls that the defendants had made in Holland. The calls had been intercepted by the Dutch authorities, acting legally under local law, and collaborating with the English police.

Where the English police tap telephones in England, the fruits of their eavesdropping are—surprisingly—inadmissible in evidence; and this is so whether they listened in legally or illegally. This is the effect of section 9 of the Interception of Communications Act 1985, which says:

> (1) In any proceedings before any court or tribunal no evidence shall be adduced and no question in cross-examination shall be asked which (in either case) tends to suggest
> (*a*) that an offence [of tapping telephones illegally contrary to s. 1 of the Act] has been or is to be committed by any of the persons mentioned in subsection (2) below; or
> (*b*) that a warrant [from the Home Secretary authorising a tap under s. 2 of the Act] has been or is to be issued to any of those persons;
> (2) The persons referred to in subsection (1) above are—
> (*a*) any person holding office under the Crown;
> (*b*) the Post Office and any person engaged in the business of the Post Office; and
> (*c*) any public telecommunications operator and any person engaged in the running of a public telecommunication system.

Obviously, when the Dutch authorities tap telephones in Holland they act neither under the English legislation on telephone-tapping nor in contravention of it, so there could be no question of the evidence being excluded under section 9 as such. The defence, however, argued that the strict letter of the statutory provision was

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