Legal update — May 2014

Employment and pensions
Still keeping us on our toes: TUPE and recent developments

Although the flurry of activity at the beginning of the year caused by the introduction of the new Regulations may have died down, TUPE is still very much a live and developing area.

The growth in the body of service provision change case law shows no sign of slowing. Meanwhile there has been a decision in connection with the transferor’s obligation to inform and consult, and the previous discrepancy between TUPE pension protection and auto-enrolment provisions has been ironed out.

For the lowdown on recent TUPE developments read on!

The prospects of completing a marathon when you’ve never run a mile

The EAT has considered the meaning of the word “intends” in the exception to the TUPE service provision change rules which applies where transferring activities are “in connection with a single specific event or task of short term duration” in Robert Sage t/a Prestige Nursing Care v O’Connell and others.

The Claimants were employed by Allied Healthcare Group Limited (Allied) to provide homecare for X, who had severe learning difficulties. The care was provided pursuant to a contract with X’s local authority, North Somerset Council. Following a serious incident at X’s home, Allied gave notice to terminate its contract with the Council. As a result of various problems, including difficulties with X’s behaviour, the Council decided they would make an application to the Court of Protection seeking to transfer X to new accommodation (this would obviate the need for homecare). It was agreed that Prestige Nursing Care (Prestige) would cover the requirements on an ad hoc basis. The Allied employees were told that they were no longer needed as Prestige would be covering an interim period before the court hearing which was expected to be held four weeks later. This was at the beginning of March 2012 and, as the Court of Protection case did not proceed smoothly and had been withdrawn by the December, Prestige continued providing care for X in her home. The Allied employees brought claims for unfair dismissal against Prestige and the Council.

The Council sought to argue that the situation fell outside the remit of TUPE as it was covered by the exemption to the TUPE service provision change rules. It argued that a “hope and wish” that a particular state of affairs would be short term could equate to an intention. However, the EAT disagreed, pointing out that a person may hope or wish for something which is unachievable or uncertain and stated that, “A person may hope to run a marathon but it is meaningless to say he intends to do so if he has never run more than a mile”. While the Council hoped for the duration of the care package to be short term it had no actual control over the duration, and no certainty as to the outcome of the Court of Protection proceedings.

Sub-contracting out services

Will TUPE be triggered even where an incoming provider sub-contracts part of the activities previously undertaken by an outgoing provider? It seems, following the EAT’s recent decision in Qlog Limited v O’Brien, that it may be in certain circumstances, though admittedly the case had a very specific set of facts.

The EAT has held that a Tribunal was entitled to rely on contractual documentation between the parties when determining the “activities” of the service provision change for the purposes of TUPE.

McCarthy Haulage Limited had a contract with Ribble Ltd to carry out transport and delivery services. McCarthy employed drivers to carry out the deliveries
and a transport manager and four shunters who were responsible for managing the deliveries. The contract ended and a new provider, Qlog Ltd, started. Although the transport manager and the shunters transferred to Qlog, it denied that TUPE applied to the drivers on the basis that Qlog would not be providing the transport services as they would be subcontracted to individual haulage providers.

The Tribunal considered that the interpretation of “activities” was critical for determining whether there was a service provision change. In doing so, the Tribunal considered the written agreement between Ribble and Qlog which stated that Ribble "wishes to deliver the provision for part of its transportation, delivery and distribution services from its incumbent provider to [Qlog]”. As a result of this agreement, the Tribunal found that the “activities” which were carried out were principally the transportation of goods. Whilst the mode of carrying out that activity post transfer was very different, the actual activity which Qlog had agreed to provide was the same. The EAT held that the Tribunal had been entitled, when considering the “activities” undertaken by Qlog, to have regard to the way in which these were set out in the contractual documentation between the parties, and concluded that a service provision change had taken place.

Significant factors in the EAT’s decision were that Qlog took responsibility for the entirety of the service, and also that the risk in the good transported passed to Qlog until the point of delivery.

**Share acquisitions and TUPE**

The EAT has considered in *Jackson Lloyd Limited and Mears Group plc v Smith* and others whether a tribunal was correct to hold that employees had transferred to a parent company, following a share purchase by one of its subsidiaries. It also considered whether the employees had been entitled to bring claims for failure to inform and consult in their own names.

The EAT concluded that the Tribunal had been entitled to find that the share sale to Mears Ltd triggered a coextensive but separate transfer to the parent company, Mears Group plc (M Group). In coming to this conclusion the Tribunal had taken account of a statement of intent made by M Group that employees would be moving over to it, the arrival of its integration team, and the fact that day-to-day control of Jackson Lloyd’s (JL’s) business activities had passed to M Group. The EAT also upheld the Tribunal’s finding that affected employees had been entitled to bring claims for failure to inform and consult in their own names. Although JL had an employee representative committee on which elected representatives served for 12 month terms of office there had not been any nominations or elections after August 2009. As the share sale took place in October 2010, the mandate of representatives who had served on the committee had expired. There had been no TUPE consultation and no evidence that consent to the representatives continuing to act after expiry of their terms of office had been sought or obtained.

Generally, in most share acquisitions, there will be no change in the identity of the employer and therefore no TUPE transfer. However, on the facts of this case, having used the subsidiary to purchase the shares of the target company, the parent company had assumed control of its business and had told employees that they would be moving over to it.

**Claim for failure to inform and consult can only be brought against transferor**

Can employees bring a direct claim against a transferee for failure to provide information to a transferor? This was the question which the EAT had to resolve in *Allen v Morrisons Facilities Services Limited*. The Tribunal had held that it was bound by an unreported decision of the EAT (*Mitie Group v Mullenax*) to hold that the claim must be made against the transferor. However, it said that, free from authority, it would have decided that a claim could be brought against the transferee.

The EAT disagreed, holding that employees can only bring an action for failure to provide information under Regulation 13 (the duty to inform and consult representatives) against their employer (the transferor). An order for compensation against the transferee will only be awarded if the employees can establish that the transferor is in breach of their Regulation 13(2) obligations, and the transferee shows that it was not reasonably practicable for them to perform their duty because the transferee had failed to provide information to the transferor under Regulation 13(4). Regulation 13(4) obliges the transferee to give the transferor information about any measures that it envisages it will take in relation to any affected employees who will become employees of the transferee after the transfer, to enable the transferor to comply with its information and consultation obligations. The case against the transferee had settled which meant that the employees could not bring an action against the transferor; as a result the claim against the transferee failed.

Where a transferor has asked for details of proposed measures which the transferee has declined to provide, or only provides in part, the transferee may be at risk of being joined into the proceedings if a claim for a failure to inform and consult has been made against the transferor.

Meanwhile the calculation of protective awards in respect of collective redundancy and TUPE consultation has been considered by the EAT in *London Borough of Barnet v Unison and another*. Here although the
Tribunal awarded less than the maximum award (Barnet carried out some consultation during a series of redundancy and transfer exercises, but did not provide a complete list of its agency workers), it identified the "starting point" for calculating the protective awards and the TUPE compensation as the maximum statutory period. In Susie Radin v GMB the Court of Appeal stated that the right approach where there has been no consultation is to start with the maximum protective period and only reduce it where there are mitigating circumstances. The EAT concluded in this case that this did not mean that the starting point was the maximum where some consultation had taken place.

Auto-enrolment and TUPE
The Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2014, which contain changes to the Transfer of Employment (Pension Protection) Regulations 2005 came into force on 6 April 2014.

The changes to the pension protection regime operating on a TUPE transfer offer the transferee the option of matching the transferor's level of employee contributions as an alternative to the old requirement of matching the employee's chosen contribution rate up to 6%. The amendments are intended to resolve the way in which the TUPE pension protection requirements and the auto-enrolment obligations interact. Previously transferring employees could end up being entitled to receive more generous pension contributions than were available to them before a TUPE transfer, particularly if the transferor paid contributions only at the statutory minimum level applying to an automatic enrolment scheme. As a result, what was previously a requirement on the transferor to pay 1% of qualifying earnings becomes an obligation on the transferee employer to match contributions up to 6% of pensionable pay.

As of 6 April when a transferee intends to use a money purchase scheme, or a stakeholder scheme, to satisfy the pension protection requirements of TUPE, these requirements will be satisfied in either of the following scenarios:

- Where the employee pays less than 6% of his remuneration as a contribution, it matches that amount. For contributions at or above 6% the employer must contribute a minimum of 6%.
- Where the transferring employer had been required to make contributions, and these were solely for the purpose of producing money purchase benefits, the transferee matches at least that amount.

Learning points
- In order to fall within the "single specific event or task of short-term duration" there has to be a proper intention that the event or task will indeed be short-term. It will not be enough to hope that this will be the case.
- Make sure that any contractual documentation entered into for services being provided clearly reflects the agreement of the parties so that if the way in which the activity is carried out post-transfer is different, this is set out clearly. This should avoid the danger of an incoming provider who subcontracted out services subsequently finding that these services are covered by TUPE.
- Claims for a failure to inform and consult can only ever be made against the transferor.

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