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Legal update ——— May 2017

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TUPE update

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There's never a shortage of new TUPE case-law so here are some recent decisions to keep you up-to-date.

How to determine the "principal purpose" of an organised grouping of employees

The Employment Appeal Tribunal (EAT) has considered how to determine what the "principal purpose" of an organised grouping of employees is in order to decide whether it constitutes a service provision change under TUPE in *Tees Esk & Wear Valleys NHS Foundation Trust v Harland and ors.*

The Trust entered into a contract, which ran from 2005 to 2015, for the care of a patient (CE) with severe learning difficulties. Initially the provision of care involved a team of 27 people, but as CE's condition gradually improved the team was reduced to 11 people who also cared for other service users in the building in which CE lived if required to do so. By 2014 CE only required one-to-one or two-to-one care.

The contact for CE's care went out to tender and Danshell Healthcare Ltd (Danshell) was successful. The Trust argued that the 11 employees assigned to care for CE would transfer under TUPE to Danshell.

At first instance the Employment Tribunal held that there was no service provision change as the group of 11 employees provided care to other Trust patients and therefore the principal purpose had been diluted so that it could no longer be said to be the provision of care to CE. The EAT agreed, holding that the principal purpose should be determined by looking at the dominant purpose of the organised grouping at the relevant time. The Tribunal had been entitled to look at the actual activities being carried out immediately before the service provision change, as well as the intention behind the organisation of the grouping, although neither were necessarily determinative. In this case care for CE had become a subsidiary purpose rather than a dominant one and so no service provision change had taken place.

This is a useful decision in that it highlights that the principal purpose of an organised grouping will not always remain static. Over time the way in which contracts are performed can be subject to change so it will always be useful to look closely at the activities being carried out immediately before the transfer.

Limit to the duty to provide employee liability information

The EAT has held in *Born London Ltd v Spire Production Services Ltd* that it was not a breach of the obligation to give employee liability information under TUPE for the transferor to incorrectly state that an annual bonus paid to transferring employees was not contractual.

Source: Fotolia

Before the transfer took place Spire Production Services Ltd (SPS Ltd) had provided Born London Ltd (BL Ltd) with employee liability information under Regulation 11. It listed the transferring employees' terms under two separate headings, "contractual" and "non-contractual". Under the latter heading it included a Christmas bonus. Following the transfer a number of employees asserted that the bonus was in fact contractual and BL Ltd complained to the employment tribunal that SPS Ltd had not complied with its duty under Regulation 11(2)(b) to set out "those particulars of employment that an employer is obliged to give to an employee", and sought compensation of around £100,000 to cover the lifetime of the contract.

The EAT observed that the notification required by Regulation 11(2)(b) is not limited to contractual terms, and that the EU Acquired Rights Directive required

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notification of "the conditions applicable to the contract or employment relationship" which is not limited to contractual rights. There was no breach of Regulation 11 as the wrongly volunteered information that the bonus was non-contractual was additional information which did not fall within the Regulation 11 requirement.

The obligation to provide employee liability information requires the transferor to set out "those particulars of employment that an employer is obliged to give to an employee" under section 1 of the Employment Rights Act 1996. While non-contractual elements of remuneration will fall within the scope of this there is no obligation to state whether the remuneration is contractual or non-contractual.

The intention of the parties

The EAT has emphasised the importance of using the multi-factorial test when determining whether a TUPE transfer has taken place in *ALNO (UK) Ltd v Turner.*

The Claimant was employed by SJM, a kitchen showroom which provided design and installation services, as the showroom manager. The other person employed by SJM, M, undertook the installation work. ALNO, the Respondent, produces kitchens and promotes its range of products by entering into franchise agreements with third parties, one of which was SJM. It operates only a small number of outlets itself. SJM decided not to renew the franchise agreement. ALNO initially agreed to take on the SJM outlet and the Claimant as an employee, but for various reasons this did not happen for another 18 months, by which time the Claimant had found other work. ALNO and SJM could not agree whether her employment had transferred and the Claimant brought Employment Tribunal proceedings against both. The Employment Tribunal concluded at first instance that the Claimant's employment had transferred from SJM to ALNO. ALNO appealed.

The EAT allowed the appeal. The parties had initially intended that the franchisor would take over the showroom concerned and employ the Claimant. The Employment Judge found, essentially because of this intention, that there was a TUPE transfer when the franchise terminated. However she did not apply the correct, multi-factorial, approach to the question whether a transfer had actually taken place.

M, who carried out the kitchen installation work and who did not transfer, no doubt had tools, equipment and a van and this should have been taken into account when considering whether a transfer had taken place. In addition the showroom ceased to operate for a long period of time and the duration of any stoppage was highly material.

Changing terms and conditions

It's common for transferees to want to change the terms and conditions of transferring employees once a TUPE transfer has taken place. Changes can be made if the sole or principal reason is an economic, technical or organisational reason entailing changes in the workforce (an ETO reason), provided that the variation is agreed, or the terms of the contract permit the employer to make a variation. However, even if an ETO reason has been established it is important to ensure that any variation is agreed by lawful means. Where a collective agreement exists an employer should not seek to bypass it in order to get the result that it wants.

In the recent case of Dunkley and others v Kostal UK Ltd an employment tribunal considered whether an employer's attempt to bypass a recognised trade union by negotiating directly with individual employees amounted to unlawful inducement contrary to section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).

The employer entered into a recognition agreement with Unite to establish a framework for collective bargaining. The agreement provided that formal pay negotiations would take place annually, and that any proposed changes to terms and conditions of employment would be negotiated with the union. When a package including pay increases, a Christmas bonus and some detrimental changes to terms and conditions was rejected in a consultative ballot the employer took the matter into its own hands. It wrote to all employees directly offering the same package, and posted a notice stating that if employees did not agree to the new terms, they would forfeit their Christmas bonus. The employer then wrote again to the employees who had not accepted the pay proposals offering them a 4% pay increase and stating that dismissal might be a possible outcome if agreement could not be reached. A group of employees brought claims in the employment tribunal alleging that their rights under section 145B TULR(C)A had been infringed on two separate occasions by the letters they had received.

The tribunal upheld the claims. Offers had been made directly to the claimants and these offers had the prohibited result (the purpose of the offers was to cease collective bargaining). The tribunal made the point that it is not permissible for an employer to abandon collective negotiation when it does not like the result of a ballot, to then approach employees on an individual basis to strike deals, and then to seek to show its commitment to collective bargaining by securing a collective agreement having effectively destroyed the union's mandate in the process.

It's worth noting that if section 145B is breached, each affected employee can claim a mandatory award from the employment tribunal which is currently set at £3,830.

To summarise…
These decisions clarify that:

- When determining what the principal purpose of an organised grouping is take a close look at the activities being carried out just before the transfer takes place.
- When providing employee liability information to a transferee there is no need to state whether remuneration is contractual or non-contractual.
- The intention of the parties that TUPE will apply is only one of a number of factors to consider. All the facts surrounding the alleged transfer should be carefully scrutinised before it is assumed that TUPE applies.
- If planning to change terms and conditions ensure that there is an ETO reason and that the variation is properly agreed via any collective bargaining mechanism in place.

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