

# BRIEF UPDATE

FROM THE EMPLOYMENT LAW DIVISION



*In this update, we consider a selection of the most important cases which have been reported since the Transfer of Undertakings (Protection of Employment) Regulations 2006 came into force in April 2006. Details of our forthcoming TUPE seminars on 23rd, 24th and 25th March and 27th April 2010 can be found below.*

TUPE has now been a feature of the employment law landscape in the UK for almost 30 years. The original Transfer of Undertakings (Protection of Employment) Regulations of 1981 were designed to implement European legislation which sought to harmonise the laws of the European member states “relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses”. In essence, TUPE constitutes a legal mechanism in terms of which the rights of employees are protected if the undertaking in which they work is transferred. A transfer may occur, for example, if all or part of a business is sold by means of an asset sale, or if activities are outsourced, “insourced” or re-assigned from one contractor to another. However, in many respects, the original 1981 Regulations lacked clarity and this resulted in significant uncertainty for those involved in transfer situations. In an attempt to reduce this uncertainty and also to reflect various developments at European level, the UK government introduced new TUPE Regulations in 2006, which replaced the 1981 Regulations in their entirety. Four years on, a number of important decisions of higher courts and tribunals have now been reported which provide valuable guidance to employment law and HR practitioners on the manner in which Employment Tribunals are likely to interpret the 2006

Regulations.

## **When does TUPE apply? – identifying a “service provision change”**

When the government introduced the 2006 Regulations, it acknowledged that there had been an unfortunate lack of clarity over the years in relation to the fundamental question of whether or not the TUPE Regulations applied to any given set of circumstances. This was particularly true in relation to outsourcing and, during the period of consultation which preceded the introduction of the 2006 Regulations, the government stated that “ideally, everyone should know where they stand . . . so that employers can plan effectively in a climate of fair competition and affected employees are protected as a matter of course”.

The government’s solution was to introduce two alternative tests of what constituted a “relevant transfer” which would trigger the application of the TUPE Regulations. These tests are not mutually exclusive – if either of the tests is satisfied, then the TUPE Regulations will apply.

The first of the tests (contained in Regulation 3(1)(a)) essentially reflects the traditional definition of a “relevant transfer” which was contained in the 1981 Regulations and which has subsequently been interpreted and refined by courts and tribunals over the years. The novel aspect of the 2006 Regulations was the introduction of a second test (contained in Regulation 3(1)(b)), which made specific reference to so-called “service provision changes”.

The starting point for this new test is that there must be “an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of . . . activities . . . on behalf of a client”. Subject to certain important exceptions relating to the supply of goods and activities of short-term duration, there will be a “relevant transfer” (which will trigger the application of the TUPE Regulations) if these “activities” are outsourced from a client to a contractor, “insourced” from the contractor back to the client, or transferred from one contractor to another.

### Defining “activities” - fresh uncertainty

However, the government decided not to define the term “activities” and there has been considerable debate as to whether the Regulations will apply if, following the transfer, the “activities” are carried out in a different way.

In the case of Metropolitan Resources Limited v. Churchill Dulwich Limited and others (2008), the Employment Appeal Tribunal explained that matters should be looked at in a “straightforward and commonsense” way. It is simply necessary that the post-transfer activities remain “fundamentally or essentially the same” as those which were carried out pre-transfer.

However, an illustration of the uncertainties which can arise in this area is provided by the case of OCS Group UK Limited v Jones (2009). This case concerned the provision of catering services to the BMW car plant in Cowley. OCS had held the contract since 2005 and had provided a centrally located restaurant, a deli-bar and four “satellite” facilities. Each of the “satellites” was required to provide a range of hot and cold meals including English and continental breakfasts, lunches involving soup, and hot meals and sandwiches. In 2007, the catering contract transferred to MIS. They provided a much reduced catering service, involving pre-prepared sandwiches and salads. Mrs Jones, who had been employed as a Chef/Supervisor with OCS, made various claims against OCS, including a claim for a redundancy payment. However, OCS argued that there was no obligation on them to make such payments because Mrs Jones ought to have transferred from OCS to MIS by virtue of TUPE. The Employment Appeal Tribunal had to decide whether or not the TUPE Regulations applied in this case, the key question being whether the “activities” which had been carried out by OCS were now being carried out by the new contractor, MIS. The EAT decided that the Regulations did not apply in this case. The service which was provided by MIS was said to be a “wholly different operation”. The staff were no longer involved in the preparation of hot food and had effectively become sales assistants in a kiosk. The “activities” which had been carried out by OCS had not therefore transferred to MIS and TUPE did not apply in this case.

It would therefore be advisable for all of those involved in potential TUPE transfers to continue to scrutinise each set of circumstances closely in order to reach an informed view as to whether the TUPE Regulations will apply in any given case.

### TUPE and the “rescue culture”

It is also worth noting that particular rules can apply in relation to transfers which take place in the context of insolvency proceedings. Elements of the TUPE Regulations can effectively be disapplied to varying degrees, depending upon the nature of the insolvency

proceedings. Unfortunately, considerable uncertainty still surrounds the extent to which TUPE will apply in the context of administration proceedings, following the decision of the Court of Appeal in the case of Oakland v. Wellswood (Yorkshire) Limited (2009). This is obviously of particular relevance in a challenging economic climate and the Employment Appeal Tribunal is scheduled to hear a group of cases dealing with this issue in the first half of 2010 from which it is hoped that some clearer guidance for practitioners will emerge.

### Information and consultation obligations

In addition to the protection which is afforded to transferring employees at an individual level, the TUPE Regulations also operate at a collective level by requiring the transferor and transferee to provide information to representatives of their “affected employees” and to consult with the representatives in certain circumstances. There can be significant penalties for employers who fail to properly fulfil their information and consultation obligations, with the Employment Tribunal empowered to award up to thirteen weeks’ pay to each affected employee.

The information which must be provided includes the “legal, social and economic implications” of the forthcoming transfer for the affected employees. In the recent case of Royal Mail Group v CWU (2009), the Royal Mail had given inaccurate information to employees regarding the legal implications of a proposed transfer to WH Smith as a result of a mistaken but genuine belief that the transfer did not apply to them. The Court of Appeal considered whether the employer must guarantee that the information which they provide is accurate. It decided that the requirement to provide information on the legal implications of the transfer “does not amount to a warranty that the legal position, as advanced by the employer, is correct”. However, it also stated that there is an obligation on the employer to provide the representatives of the affected employees with “a considered view” of the legal implications of the transfer.

One other question which has arisen is the extent to which the new employer is legally obliged to enter into consultation with the transferring employees after the transfer date. On the present state of the law, the answer is that there would appear to be no such post-transfer obligation. This point was considered by the Employment Appeal Tribunal in the recent case of UCATT v. Amicus, Glasgow City Council and others (2008) and the answer given by the EAT was that consultation obligations end on the transfer date. The EAT took the view that an obligation on the transferee to engage in consultation after the transfer date would be “unduly burdensome to transferee employers and potentially unworkable”.

### **Changes to working conditions – the risk of a “material detriment” dismissal**

It is well-established that, when the TUPE Regulations apply, employees of the old employer (“the transferor”) who are assigned to the undertaking at the point of transfer have the right to transfer into the employment of the new employer (“the transferee”) with their period of continuous service and their existing terms and conditions of employment preserved (although certain special rules apply with regard to pensions). Any dismissal which is carried out solely by reason of the transfer will be automatically unfair. Further, any employee who would be part of the transferring group has the right to object to the transfer, in which case they effectively walk away on the transfer date, with no claim against transferor or transferee. It has always been the case that resigning or objecting employees could also seek to claim constructive dismissal in a TUPE context, provided that they were able to demonstrate that the usual test for a constructive dismissal (i.e. a repudiatory breach of contract) was met. However, Regulation 4(9) of TUPE 2006 introduced a new and important additional safeguard for transferring employees, stating that they would also be treated as being dismissed if they resign, in the context of a TUPE transfer, where the transfer involves or would involve “a substantial change in working conditions to their material detriment”.

This new provision was examined by the Employment Appeal Tribunal in the case of *Tapere v. South London and Maudsley NHS Trust* (2009). Ms. Tapere had been employed as a member of the procurement team at Lewisham Primary Care Trust, but her employment was transferred to the South London and Maudsley NHS Trust by virtue of TUPE. It was intended that her place of employment would move from Camberwell to Beckenham, although this did not happen immediately. Ms. Tapere indicated her unhappiness with this proposed change and ultimately resigned. The Employment Tribunal had to address the question of whether she had been dismissed in terms of Regulation 4(9). Had there been a “substantial change” in her working conditions which was to her “material detriment”? The Tribunal decided that, when viewed objectively, the move to a new location – which was only 2.5 miles further away from her home – did not constitute a substantial change in working conditions which was to her material detriment.

However, on appeal, the Employment Appeal Tribunal decided that the question of whether or not the change was to Ms. Tapere’s “material detriment” ought to be viewed from her subjective point of view, rather than on an objective basis. It noted that the new journey would disrupt Ms. Tapere’s childcare arrangements and would also involve a longer journey or an altered journey on the M25, which she “did not find attractive”. Viewed from her perspective, there was a proposed substantial change to her working conditions which was to her material detriment. She was therefore entitled to treat herself as

being dismissed in accordance with Regulation 4(9).

It has been pointed out that a dismissal in terms of Regulation 4(9) need not necessarily be an unfair dismissal and it will still be possible for the employer to argue that the dismissal was fair. However, where the material detriment results solely from the transfer itself it would seem that such an argument may be difficult to sustain. If the material detriment was connected with the transfer, it will be open to employers to argue that it was for an “economic, technical or organisational reason entailing changes to the workforce”. The *Tapere* case was remitted back to the Employment Tribunal to assess the fairness of the dismissal and we await further guidance on the tests that are likely to be applied by Tribunals in cases such as this. However, the case does certainly serve as a warning for those who are taking on employees under TUPE and who may be proposing a substantial change in working conditions which any of the employees may view as being to their “material detriment”.

#### **TUPE Seminar**

***Geoff Clark is a partner in our Employment Law Team who has extensive experience of advising on TUPE. Geoff will be presenting a free TUPE seminar on 23rd, 24th and 25th March and 27th April 2010. The seminars in March are fully booked but there are a limited number of places available at the seminar on 27th April.***

***Where***                    ***Paul & Williamsons LLP, Union Plaza, 1 Union Wynd, Aberdeen***

***Time***                      ***Registration from 12.00  
Seminar 12.30 – 2.00***

***A light lunch and refreshments will also be served.***

***If you wish to reserve a place at the seminar on 27th April, please click on the link below.***

***Mailto:trainingsolutions@paull-williamsons.co.uk***