



### Case of the Month

The franchising of the Post Office network has generated much public attention. In ***Royal Mail Group Ltd v Communications Workers Union*** UAEAT/0338/08/DA these changes required the Employment Appeal Tribunal (EAT) to review the nature and scope of the obligation to inform and consult under the TUPE regulations which it held were both affected by the employer's understanding of the transaction.

Massive financial losses led the Royal Mail Group to decide to convert over 200 branches to a franchise status. This test case involved the transfer of six post offices. The respondent to the appeal was the union representing the workers in those branches. The employers said they were advised that TUPE did not apply because their contracts contained a mobility clause which they intended to operate and regulation 4 of TUPE applies the automatic transfer only to contracts which "would otherwise be terminated by the transfer".

The Union presented claims to the tribunal which held that there was a failure to inform and consult properly in breach of Regulation 13 of TUPE. They held that there was a failure to provide information on the legal implications of the transfer and also that the employers had not genuinely believed the implications were as they represented them to be.

The EAT held that the automatic transfer applied (irrespective of the mobility clause) when there were employees in the branches immediately before the transfer. The key question was whether this meant there had been a failure to inform and consult.

In relation to the duty to consult both parties accepted that this was a subjective test and the tribunal had to enquire about the genuine belief and intentions of the transferor. In relation to the duty to inform however the Union argued that the obligation required an objective standard because the wording of the regulation is not to inform based on the understanding of the transferor but simply to say what were the legal, economic and social implications of the transfer. They also argued that it was not open to the EAT to overturn the finding that Royal Mail did not have a genuine belief that TUPE did not apply because this was a matter of fact for the tribunal alone to determine.

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The EAT did not agree. On the point about informing and consulting whilst the scope of the duty had to be objectively determined this was not so for the nature of the duty. In both the duty to inform and the duty to consult this was dependent on the genuine belief of the transferor about the nature of the transaction. The EAT then overturned the finding that the Royal Mail had not genuinely believed that TUPE did not apply. The tribunal had not relied on cogent factors to determine this serious issue, particularly that the employers relied on legal advice, and the case has now been remitted to the tribunal to reexamine this issue. Ironically the success of the employers to date turned on their receiving incorrect advice.

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## Further Information

If you would like further information or to comment in general regarding this case, please contact



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