RadcliffesLeBrasseur

Employment Briefing

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Case of the Month

In many respects TUPE rules operate in a logic free zone. Why for example must information be provided to representatives in sufficient time to allow consultation to take place if the absence of any measures means there is no need to consult? How long is "sufficient time" to allow for a non-existent event? The rule seems pure Alice in Wonderland.

Another oddity is the rule about who consults whom. The generally accepted position is that each employer consults its own employees before the transfer. The buying employer has to tell the selling employer if any measures are envisaged by him but the selling employer then consults his affected employees about the measures he "envisages" the buyer has in mind. The rules say the consultation has to be with a view to seeking agreement but the employees' representations are made to the wrong person. Again the logic of the Red Queen prevails.

Perhaps this is why, in *UCATT* v *AMICUS and others* (UKEAT/0007/08) several trade unions argued that the buying employer has a duty to consult with his employees after the transfer in addition to the duty to consult before the transfer. If the argument succeeded then at least the employees would be dealing with the correct employer.

When the case was run before an employment tribunal in Glasgow it was given short shrift. They said that TUPE was formulated on a pre transfer timetable. They also pointed out that the time for bringing a claim about breaches of the rules runs from the date the transfer is completed which is not reconcilable with an obligation to consult after that event.

But some advocates are not easily daunted. Off the unions went to the Employment Appeal Tribunal in Edinburgh to try their luck again. They argued that whilst the seller's duty to consult was restricted to the time before the transfer that was not so for the buyer. They pointed to the oddity of the duty on buyers to provide information about their intentions being divorced from an obligation to consult about them. They also argued that the Acquired Rights Directive contained no cut off date for the buyer's duty to consult. They said that the TUPE rules should be interpreted on a purposive basis to give effect to the Directive. Overall they said it was the intention of the Directive to oblige buyers to consult with transferred employees after the transfer on the measures they envisaged taking though they did not apply this argument to employees who joined after the transfer date.

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Lady Smith dismissed all of these arguments. She said it was clear from both the Directive and TUPE that the obligation to provide information applied before the transfer. The purpose of the information was to provide the basis on which consultation took place (if it was necessary). If an employee was to object to transferring this had to be done before the date it took place and not after. She also pointed out that buyers often have to put arrangements in place in advance of a transfer in order that it can take place. There would be no point in consulting about such measures after the event. Also if the argument was accepted it might require consultation about matters on which no information had been provided because the idea arose after the transfer. In the absence of information she said that such consultation would be meaningless. She robustly refused to refer the case to the European Court of Justice.

So with perfect logic the case was dismissed leaving the underlying illogical rule intact.

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Further Information

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