

Employment

Since the implementation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE), service provision changes have been all the rage. They are very much in favour with the current government, which appears to see encouraging the transfer of services in and out of the public sector as its *raison d'être*. The reality is that after a transfer, the same employees end up providing the same services to the same client and the new contractor is saddled with the employees' original contractual terms, unless they manage to show that the contractual changes are either unrelated to the transfer or are for economic, technical or organisational (ETO) reasons entailing changes in the workforce. Further, TUPE effectively arms employees by:

- allowing an employee to treat his contract of employment as having been terminated, where the relevant transfer involves a substantial change in working conditions to his material detriment;
- expressly permitting an employee to accept a repudiatory breach of contract by his employer and terminate his contract; and
- allowing employees to claim unfair dismissal where the reason for the dismissal is either the transfer itself or a reason connected with the transfer that is not an ETO reason.

The result? Transferring or transferred employees are effectively better protected than other employees from changes to their contractual terms. However, the Employment Appeal Tribunal (EAT) has recently reached decisions in two cases that give employers some more scope to make changes to terms and conditions after a transfer.

In the first, *Enterprise Managed Services Ltd v Dance & others* UKEAT/0200/11, the Williams company and Enterprise Managed Services Ltd (EMS) were both contracted with Modern Housing Solutions (MHS) to provide maintenance services. EMS's contract with MHS was due to expire in March 2009. MHS met with all its contractors and emphasised the need for improved performance in the face of budgetary constraints.

To strengthen the likelihood of winning the MHS contract, in January 2009 EMS

All change please

Charlotte Stern reports on the latest TUPE developments

IN BRIEF

- Transferring or transferred employees can be better protected than other employees from changes to their contract. However, there is some scope for employers to make valid changes to conditions of employment.

introduced performance related pay and different hours, which were accepted by its employees. The Williams company lost its contract with MHS and because EMS won the whole contract, the Williams company employees transferred to EMS in April 2009.

EMS consulted with the Williams company employees about implementing performance related pay but around 20 employees refused to accept the changes, and so EMS terminated their contracts. The employees claimed that they had been automatically unfairly dismissed. However, the EAT found that, since it is open to an employer to effect productivity changes in accordance with ordinary law (presumably due to a SOSR (some other substantial reason)), it does not become unlawful when there has been a relevant transfer if the reason is connected to that drive for productivity changes.

In the second decision, *Smith & Ors v Trustees of Brooklands College* UKEAT/0128/11, the claimant teaching and learning assistants (TLAs) had been working part time but were paid as if they were working full time. Two years after the transfer the college realised that the TLAs' rate of pay must be due to an error and sought to agree a phased reduction in their rates of pay. The TLAs claimed that this variation was void as being in connection with the transfer. The EAT decided that the employment judge was entitled to hold that the agreed variation of the TLAs' salary was valid as it was aimed at achieving harmonisation of all employees' salaries and was not made void by their connection with the TUPE transfer.

Abellio London Ltd

Another recent decision *Abellio London Ltd (formerly Travel London Ltd) v Musse and others; Centrewest London Buses Ltd v Musse and others* UKEAT/0283/11, UKEAT/0631/11, demonstrates the limits to making post-transfer changes to contractual terms. The claimants were bus drivers operating out of a depot in Westbourne Grove. When Abellio London won the contract, they changed the depot to one in Battersea. As this added on between one to two hours to each employee's journey, the claimants resigned, claiming the change was both a repudiatory breach of their contract and a substantial change in working conditions to their material detriment. The EAT agreed that these changes did indeed amount to a substantial change in working conditions to the claimants' material detriment and it upheld their claims.

The future?

The government's "call for evidence" on TUPE issued last November asked whether the lack of provision for post-transfer harmonisation was a significant burden, and also whether it would be helpful if employees could renegotiate terms, as long as they were (overall) no less favourable than before. Gazing into our TUPE crystal ball it seems that changing terms and conditions post-TUPE transfer may become much easier in the future. NLJ

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