

Employment Update - TUPE bulletin

September 2009

Case notes

Post-transfer relocation risks constructive dismissal claims

Employees relocated on a TUPE transfer may be able to claim constructive dismissal where a mobility clause only refers to the transferor's worksites or where the change causes material detriment from the employee's viewpoint.

Tapere v South London and Maudsley NHS Trust [More...](#)

Existence of a 'service provision change' is a question of fact

When trying to establish whether there has been a TUPE 'service provision change' for the purposes of Regulation 3(1)(b), a tribunal should consider whether the activities carried out by the alleged transferee are essentially the same as those carried out by the alleged transferor.

Metropolitan Resources Ltd v Churchill Dulwich Ltd [More...](#)

TUPE Transferees face ongoing equal pay claims

The Court of Appeal has upheld an EAT ruling that means transferees may face substantial equal pay claims from employees whom the transferor should have paid at the same rate as a pre-transfer comparator.

Gutridge v Sodexo [More...](#)

Transferor's collective agreements may bind transferee

If an employee's contract of employment provides that pay is set by collective agreements negotiated by the transferor and union from time to time, this will continue to apply even after the employees have transferred under TUPE to a transferee.

Alemo-Herron v Parkwood Leisure [More...](#)



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Any comments or queries?

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Case notes

Post-transfer relocation risks constructive dismissal claims

Employees relocated on a TUPE transfer may be able to claim constructive dismissal where a mobility clause only refers to the transferor's worksites or where the change causes material detriment from the employee's viewpoint.

The case concerned an individual who transferred under TUPE from one NHS Trust to another. Her place of work changed from Camberwell to Beckenham. The mobility clause in her terms and conditions of employment allowed her original employer to move her to work at other locations "within the Trust". The EAT ruled that, following a TUPE transfer, this continued to cover only the transferor Trust's locations. TUPE does not operate to expand the scope of such a clause to cover the transferee's workplaces.

TUPE allows an employee to claim constructive dismissal where there is a substantial change to working conditions to the employee's material detriment. The term "working conditions" is not just confined to contractual terms but also extends to physical conditions. The EAT has confirmed that, while the test for substantial change is an objective test which looks at the facts of the particular case, the test for detriment is subjective. The Tribunal should consider the employee's own viewpoint. In this case, because the relocation resulted in extra travelling time which disrupted the employee's childcare arrangements, it was deemed that the employee had suffered a material detriment.

Transferees in this situation may have to consider treating the situation as a geographical/ workplace redundancy situation if the employees are unwilling to relocate. This will need to be factored into the pricing and/or any indemnities.

Tapere v South London and Maudsley NHS Trust

Existence of a 'service provision change' is a question of fact

When trying to establish whether there has been a TUPE 'service provision change' for the purposes of Regulation 3(1)(b), a tribunal should consider whether the activities carried out by the alleged transferee are essentially the same as those carried out by the alleged transferor.

Migrant Helpline, a charity which provides accommodation to asylum seekers, ended its contract with Churchill Dulwich Ltd, which housed asylum seekers at Barry House, and entered into a new contract with Metropolitan Resources Ltd to re-house them at Coombe Farm. Churchill Dulwich claimed that there had been a TUPE service provision change and that its employees at Barry House should therefore transfer to Metropolitan Resources to work at Coombe Farm.

In order for a TUPE service provision change to have taken place there must have been activities that ceased to be carried out by Churchill Dulwich, which were subsequently carried out by



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Metropolitan Resources. The EAT held that the service provided at Coombe Farm was essentially the same as that provided at Barry House and a service provision change had therefore taken place under TUPE.

The EAT rejected the argument that minor differences in the way in which the service was provided (such as the location and duration of accommodation) changed the nature of the services, as there was no requirement for the services to be identical in every detail. The EAT further held that although the Barry House employees did not all move to Coombe House on the same day, this did not prevent them from transferring under TUPE. It confirmed that a service provision change can take place over a period of time and as a series of transactions.

Metropolitan Resources Ltd v Churchill Dulwich Ltd

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TUPE Transferees face ongoing equal pay claims

The Court of Appeal has upheld an EAT ruling that means transferees may face substantial equal pay claims from employees whom the transferor should have paid at the same rate as a pre-transfer comparator. TUPE applies to transfer the salary level the employee ought to have received pre-transfer, even if the comparator hasn't transferred to the transferee and the transferee has no knowledge of the inequality (and therefore no opportunity to rectify it).

The Court of Appeal also confirmed that claims in relation to the pre-transfer period must be brought within six months of the transfer. Claims in relation to the post-transfer period can be made at any time up to six months after employment with the transferee ends (and can cover up to six years' arrears).

Gutridge v Sodexo

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Transferor's collective agreements may bind transferee

If an employee's contract of employment provides that pay is set by collective agreements negotiated by the transferor and union from time to time, this will continue to apply even after the employees have transferred under TUPE to a transferee. Pay rates agreed by the transferor post-transfer will bind the transferee.

This goes further than is required by ECJ law, which allows rights to be frozen at the point of transfer. It will be particularly significant for businesses which have acquired ex-public sector employees under TUPE. The ruling is being appealed.

Alemo-Herron v Parkwood Leisure

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