

New TUPE — one year on

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It is now over a year since the much trumpeted 'new TUPE' came into force in April 2006 and therefore an opportune moment to take stock of whether anything has really changed in this area of law.

First, a quick reminder of what TUPE actually is. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (replacing the 1981 regulations) are designed to protect employees when the business for which they work transfers from one person (the transferor) to another (the transferee) other than by share sale. TUPE provides that the employees must be informed of the transfer and, where 'measures' (such as redundancies) are proposed there is also a duty to consult. Employees will transfer to the transferee on their existing contracts and any attempt to change the terms will be void. Any dismissal by reason of the transfer will be automatically unfair unless the employer can show that it is for a permitted reason (essentially, redundancy).

The first point to note about the first year of new TUPE is that there have been relatively few reported cases. In some respects, this might be regarded as a sign of the success of the new regulations. It is, after all, much clearer now that TUPE applies in most cases and many of the disputes as to whether TUPE applied which arose under the old legislation would now be futile. The more likely explanation, however, is that the wheels of justice take time to turn. The year has been full of judicial decisions on old TUPE. If pre April 2006 transfers are still being fought about, we can expect disputes about post April 2006 transfers to start appearing in the next year or so.

Of the recent decisions on old TUPE, three are of particular note and relevant to new TUPE.

In *Hynd v Armstrong* it was held that, if the transferor dismisses an employee because he is not required by the transferee, the dismissal will be unfair, even if the transferee would have had grounds to dismiss the employee after the transfer.

In *G4S Justice Services (UK) v Anstey* it was held that, if a transferor dismissed an employee prior to the transfer but then, after the transfer, reinstated the employee on appeal, that employee would be reinstated to the transferee. Conversely, if the transferor declined to reinstate the employee, any tribunal claim arising from the dismissal would be against the transferor. This gives transferors very little incentive to uphold dismissal decisions and every incentive to reinstate employees (unless the transferor had given the transferee indemnities against such claims as part of the transfer).

Finally in *Celtec v Astley* it was held that the common public service practice of seconding people to avoid TUPE transfers did not work. As soon as sufficient people had been seconded to constitute the transfer of an economic entity, their employment transferred under TUPE whether the transferor and transferee liked it or not.

Professional Services

One area of particular interest for the future is how new TUPE will affect the provision of professional services. If a client decides to change its solicitors, accountants, PR agency, or advertising agency, it does not expect the team at the new provider to be identical. This result is, however, possible under TUPE. This will not apply in most cases because employees transfer under TUPE only if they are 'assigned' to a particular activity. A solicitor, accountant, PR consultant or advertising executive who has a number of clients is, therefore, highly unlikely to transfer under TUPE. If, however, these people work exclusively or almost exclusively for one client, there is every possibility that they will transfer.

No doubt there will be some case law on this issue. In the meantime, the biggest effect of new TUPE appears to be on the drafting of commercial contracts. Many of these now specify that:

- the professional services provider should not assign its employees to an account in a manner which would lead them to transfer under TUPE; and
- the professional services provider will indemnify its client (or any new provider) for the costs of dealing with any claims brought by employees alleging that they transfer under TUPE.

No doubt some standard practices and clauses will emerge but, in the last year, Withers has been involved in a number of lengthy negotiations about what indemnity – if any – service providers should give. Furthermore, it is all very well saying that a service provider should not assign employees to an account in such a way that they might transfer under TUPE but, in practice, this is often difficult to achieve in the face of client demands for devoted service by a small group of people they know.

Without a doubt, new TUPE is clearer than old TUPE but this will still be an area of law capable of producing litigation in the years to come.