Employment news - autumn: Location, location

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A more optimistic employment landscape and improved commercial confidence may result in a corresponding increase in sales and purchases of businesses, outsourcing, mergers and other transactions that trigger the Transfer of Undertakings (Protection of Employment) Regulations (TUPE), the rules that protect employees when a business is transferred. The recent case of Tapere v South London and Maudsley NHS Trust is a reminder of how TUPE principles govern changes to working conditions – in this case a change in the transferred employee's place of work.

Mrs Tapere's employment transferred under TUPE from Lewisham Primary Care Trust to the South London and Maudsley Trust. Her place of work changed from Camberwell to Beckenham. All other terms and conditions remained the same. Mrs Tapere brought a grievance complaining that the extra travelling time would disrupt her childcare arrangements. She resigned and claimed constructive dismissal.

The tribunal made the following observations on the mobility clause in Mrs Tapere's contract of employment with the Lewisham Trust:

- The clause stated that she could be required to work at other locations 'within the Trust'. The tribunal decided that this did not prevent Mrs Tapere from being moved to a different geographical location, as the words 'within the Trust' did not add anything to the meaning. As a result, when her employment transferred to the Maudsley Trust, the mobility clause applied to the locations that that Trust owned or operated.
- The short increase in the distance between Mrs Tapere's home and her old and new workplaces meant that requiring the move was reasonable and did not constitute a fundamental breach of contract.
- Mrs Tapere's journey time was not materially longer; therefore there had been no 'substantial' change to her detriment.

Mrs Tapere appealed to the EAT which disagreed with the tribunal's findings. It made the following key points:

- The words 'within the Trust' in the mobility clause were not surplus. They were clearly part of the meaning of the clause and restricted the area in which the mobility clause operated.
- The contract had to be construed at the time it was entered into so that Mrs Tapere could only be moved to locations that were 'within the Trust' at the time her employment commenced.
- Whether or not there had been a substantial change in working conditions would be a simple question of fact.
- The correct approach was to consider the employee's position and ask whether it was reasonable for him or her to object to being relocated. This looked at the impact of the change from the employee's standpoint.

The EAT's reasoning in this case reflects the purpose of TUPE, which is to preserve transferring employees' terms and conditions of employment and protect employees from detriment on transfer. The EAT held that the ET decision had increased the scope of the geographical area in which Mrs Tapere could be required to work, thereby altering her original employment terms to her detriment. This defeated the object of TUPE.

Implications for Employers

An employer taking on staff under a TUPE transfer should make sure that it gives early consideration to any likely changes to working arrangements. This will enable advance planning in order to try and resolve any issues early or, in a worst case scenario, reconsideration of the overall deal if it looks like there are going to be insurmountable issues post transfer. Mrs Tapere's case will be particularly relevant when employers are considering purchasing part of another business where the transferor employer will retain use of its premises. At that point, the transferee employer should carefully consider and, if necessary, take legal advice on, its ability to move employees to its own location(s).

This case shows that the impact of the proposed change has to be considered from the employee's point of view. Does the employee regard the change as detrimental and, if so, is that a reasonable position for the employee to adopt? As this is a subjective test, any question about whether or not there is a material detriment is most likely to be interpreted in the employee's favour unless he or she is taking a clearly unreasonable stance.

The principles set out in this case could also apply when considering the enforceability of restrictive covenants after a TUPE transfer. New employers taking on staff in circumstances where TUPE applies should review any contractual post-termination restrictions and, in particular, definitions of 'competitors' or 'competing businesses'. Technically, the benefits of any restrictive covenants transfer to the transferee employer under TUPE. However, definitions used when drafting covenants can cause problems and need to be carefully examined.

The case of Morris *Angel & Sons Ltd v Hollande* looked at the scope of a restrictive covenant in a contract of employment after a TUPE transfer. The clause in question was a non-dealing clause preventing the employee from dealing with 'any person, firm or company who has at any time during the one year immediately preceding…done business with the group'. The issue was how 'group' should be construed. Did it mean the

original group of the old employer, or did it mean the transferee group? The Court of Appeal stated that the restrictive covenant should be interpreted and construed as identifying the group at the time the contract was entered into, in this case, the group of the old employer. Therefore the new employer could not benefit from the covenant in relation to its own customer base.