

Mo Baines



The changing face of TUPE

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All change..



- Unfair dismissal
- Collective redundancy consultation
- TUPE changes...

Context....



- Coalition agreement operates on principal of 'one in one out' to 'reduce the burden on employers'
- Equality Act and flexible working
- Agency Workers' Regulations
- Public sector pay
- Public bodies to publish online the job titles of every member of staff and the salaries and expenses of senior officials.
- No fault dismissals – proposals to introduce these scrapped by Vince Cable
- Collective redundancy consultation
- TUPE

Redundancy changes



- Collective consultation – continuing and new requirements
- Collective consultation is required where an employer proposes to dismiss as redundant 20 or more employees from the same establishment within a period of 90 days or less.

Redundancy consultation



- Where that number of employees is 20 – 99, collective consultation must start at least 30 days before the dismissals take effect. The law has not changed in this regard.
- Where the number of employees to be dismissed is more than 99, the minimum period has been reduced – from 90 days to 45 days. The time limit for lodging form HR1 has also been reduced to 45 days.

Meaningful consultation....

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- Employers should be aware that consultation must still be meaningful – which, depending on the circumstances, could mean delaying dismissals to allow for longer consultation.
- Employers should also remember that collective consultation will need to take place with recognised trade unions or elected representatives, and so should allow plenty of time for any election process to take place before the minimum periods start.

Don't back track...



- The new time limits apply to all redundancies where the proposal to dismiss is made after 6 April 2013.
- Doesn't apply to consultations which started before this date..

Unfair dismissal



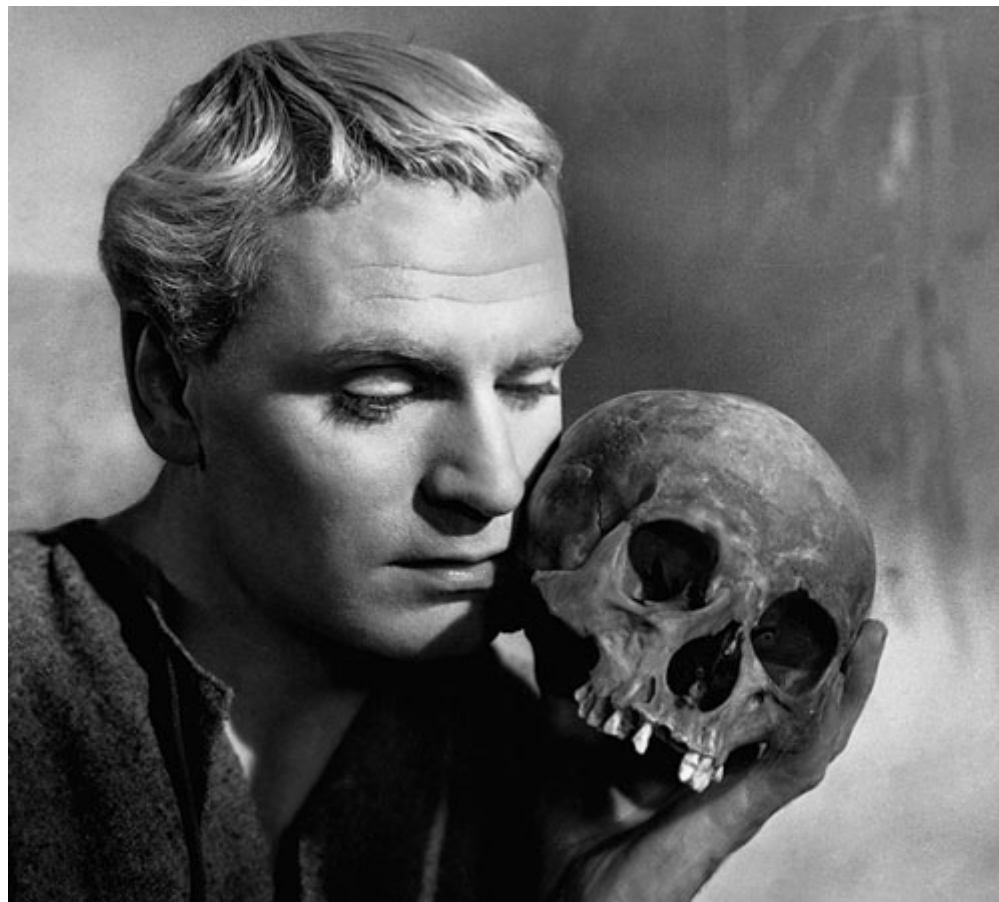
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Unfair dismissal

- From one to two years – the time employees have to work for their employer before they can file an unfair dismissal claim.
- Pay-outs capped at 12 months' pay or £74,200, whichever is the lower
- New charges to be introduced to lodge a claim of £250 and a further £950 if it goes to a hearing.

TUPE or not TUPE



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TUPE background



- The Transfer of Undertakings Protection of Employment (TUPE) Regulations
- European law in the form of the Acquired Rights Directive 1977.
- This Directive was revised in 1998 and a consolidated Directive was adopted in 2001[2001/23/EC].



- Last major revision to TUPE regulations within the UK was in 2006 [The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246].
- These regulations introduced a number of changes, including provisions which relate to ‘service provision changes’, which are of particular significance in a local authority context, where certain types of services are subject to transfer to new employers.

Why change TUPE



- According to the Government's consultation paper there is a commitment to review employment law for *'employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive'*.

Service provision changes

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- ‘**Service provision changes**’ covers situations whereby a contract to provide a service to a client is let, re-let or ended by bringing the service back in-house.
- The 2006 Regulations set out a number of conditions that must be met in order to fall within the scope of the Regulations; the main one being that in the case of a service provision change ***an organised group of employees must exist immediately prior to the change, which has as its principal purpose, to provide the service in question to the client.***
- For example in the case of a cleaning contract that is specific to a school then the staff working on that contract.

What is Government asking?



- Seeking views on whether this provision should be repealed bringing the Regulations back to their pre-2006 status;
- Government suggests the 2006 provisions have actually imposed unnecessary burdens on business.



Impact on SMEs?

- In theory - the service provision changes work in favour of SMEs who can bid for work against incumbents in the knowledge that if they are successful they will inherit the staff to carry out the work.
- This also means they necessarily take on employment liabilities too, which can be a disincentive to bid.
- Also argued that re-tendering a contract often occurs where the client is unhappy with those working on it and knowing that if the contract changes hands, the same personnel would still be working on the contract is a reason not to bother re-tendering

APSE view...



- Greater fragmentation of client base in public services (academies, free schools and greater devolved budgets)
- Particular concern in FM services to schools
- Local authorities need to manage staffing and budgets
- If you don't have TUPE you have what?
- Redundancy liabilities on the public purse.



Other factors

- Regulations are complex but is it regressive to simply remove the service provision changes?
- Removal could still lead to legal challenge surrounding the non-application of TUPE and the scope of the EC Directive
- Challenges surrounding redundancy and dismissals within domestic employment law.



Other changes

- Duty to inform and consult
- Employee liability information
- Dismissals based on future conduct of the new employer
- ETO changes

Duty to inform and consult

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- *The duty to inform and consult on collective redundancy rules*
- *Interaction with TUPE information and consultation requirements (regulation 13).*
 - Where there is an overlap between TUPE and redundancy consultation requirements
 - As a transferee employer is not actually the 'employer' before the transfer takes place, doubt as to whether any consultation with transferring staff, prior to transfer, by or on behalf of the transferee, for collective redundancy purposes, can count towards satisfying redundancy consultation requirements
 - Argued that this means pre-transfer consultation cannot count, then the process is delayed, until after the transfer and any redundancies would not take effect until the end of the applicable period.
 - The Government sees advantage in allowing collective redundancy consultation by the transferee with the employees who are likely to transfer to take place before the transfer.

Proposals



- ***The Government proposes to legislate to enable pre-transfer consultation to count towards collective redundancy requirements***
- Will this overlap allow more unscrupulous contractors using this mechanism to 'cherry-pick' which staff it wants to take upon a transfer?
- Barriers: if a contract is lost from one contractor to a rival company, since it would depend upon information about the current workforce, and access to the current workforce, being made available to the incoming party is it workable?
- Is it de facto fast track redundancy?
- But ... current uncertainty for staff equally unacceptable

Employee liability information



- ***Employee liability information is the information which must currently be provided by the transferor to the transferee - set out in regulation 11(2) and essentially covers:***
 - The identity and age of the employee; the particulars of employment that an employer is obliged to give an employee (eg. under section 1 of the Employment Rights Act 1996; information about any disciplinary action, grievances, claims or possible claims in relation to an employee within the last two years
 - Information of any collective agreement which will transfer over
 - Regulation 11 requires that this information is provided at least 14 days before the relevant transfer, unless there are special circumstances which make this not reasonably practicable. If there are special circumstances, the information must be provided as soon as reasonably practicable. The transferee can complain to an Employment Tribunal about the transferor's failure to provide the information, and may receive compensation if the failure is established.

Proposals



Government consultation exercise found that:

- Detailed information about employees was passed onto the new employer at the last minute (14 days prior to transfer);
- Delays created difficulties in areas such as setting up payroll arrangements
- Misperceptions about restrictions under the Data Protection Act (which have in fact already been clarified by the Information Commissioner in the case of TUPE transfers) and an inability to otherwise comply with obligations under Regulation 13 which relates to disclosure of measures upon transfer by the new employer.

The Government is therefore proposing to

- Repeal the Employee Liability Information requirements in Great Britain
- Amend Regulation 13 (Duty to inform and consult representatives) 'to make it clear that the Transferor should disclose information to the Transferee that is necessary for the parties to carry out their information and consultation obligations'.
- Coupled with new guidance and model contract clauses - will both simplify arrangements and encourage co-operation between the parties, since liabilities could be apportioned for failure by the parties to follow TUPE obligations.
- But will taking a deregulatory approach lead to less confusion, or less litigation?
- The changes could send out a very mixed message to those involved in TUPE transfers!

Dismissals based on future conduct of the new employer



- A dismissal prior to transfer, which is connected with the transfer, is automatically unfair even if there is an ETO, but that ETO relates to the transferee's future conduct of the business (for example, that the transferee needs fewer employees to continue the work).

So to avoid this...



If the transferor does dismiss employees who would have transferred in anticipation of the transfer, the liability for automatic unfair dismissal transfers over to the transferee.

So..... the way to avoid this liability for automatic unfair dismissal (where there is an ETO) is for the employees to remain employed by the transferor and then be dismissed following the transfer by the transferee.

Proposal



- Rely upon the transferee's ETO to dismiss prior to transfer and
- The question should be whether the dismissal is fair in all the circumstances, rather than that it is automatically unfair.
- Will this benefit employers with business planning, organisation and decreasing costs (e.g. it would spare employers the cost of keeping open redundant buildings).
- Public sector ... public purse – cost of litigation and impact on local economies

Changing face of TUPE



- Impact on local councils
- Impact on services (particularly those affected by service provision changes)
- Bigger picture in a public purse context
- Should we contract in a bargain basement context?
- Socio-economic reasoning
- Relocation of services
- Industrial complex of reform...!

LOCAL SERVICES

LOCAL SOLUTIONS



Contact details

Mo Baines, Principal Advisor

Email: mbaines@apse.org.uk

Association for Public Service Excellence

2nd floor Washbrook House, Lancastrian Office Centre, Talbot Road,
Old Trafford, Manchester M32 0FP.

telephone: 0161 772 1810

fax: 0161 772 1811

web: www.apse.org.uk



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