

# Review

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## SERVICE PROVISION CHANGES

If people know anything about the Transfer of Undertakings (Protection of Employment) 2006 Regulations (TUPE) it is that it preserves your terms and conditions of employment if your employer transfers its business to another company. Whilst this is essentially true, the 2006 Regulations extend protection to in-sourcing and out-sourcing through the inclusion of the service provision change.

### What is a service provision change?

A service provision change (SPC) is defined at Regulation 3 and covers situations where:

- A contracts out to B a service it used to do for itself (outsourcing);
- B stops carrying out a service it used to perform for A and is now done by C; or
- B stops carrying out a service it performs for A and which A now performs for itself (in-sourcing).

This provision is potentially far reaching as it applies to all services, from catering to accounting services, which a business has transferred or contracted out or in.

# What is the effect of a transfer?

The businesses involved must inform and consult about the transfer/SPC with the employees' representatives, normally a trade union, or the employees themselves if no one is willing to act as representative. All the employees (other than those who object) will then automatically transfer over under the terms and conditions of their previous contract. A dismissal arising as a result of the transfer will automatically be unfair unless it is for an economic, technical or organisational (ETO) reason. All employers, regardless of size, will have to inform and consult with its employees every time a contract it works on is transferred to/from another company and any employees assigned to that contract cannot be dismissed as a result (subject to the reservations outlined above).



## What are the relevant claims?

As outlined above, any employee dismissed as result of the transfer can potentially bring a claim for unfair dismissal. If their contract is changed following the transfer they may also have a claim for breach of contract, unlawful deduction from wages or constructive dismissal, depending on the nature of the breach. Employee representatives or employees can also bring protective award claims for breaches in the duty to inform and consult.

## How have Tribunals applied the new rules so far?

**Metropolitan Resources Ltd v (1) Churchill Dulwich Ltd and (2) Martin Cambridge and Others (2009) UKEAT/0286/08; WLR 217** is only the second SPC case to be heard before the Employment Appeal Tribunal. In this case the Claimants, Martin Cambridge and others, were employed by Churchill Dulwich ("Churchill"). Churchill had a contract with Migrant Helpline ("MH") to provide accommodation to asylum seekers on its behalf. Churchill provided 140 beds and also interviewed, screened and provided information to the asylum seekers.

In September 2006 Metropolitan Resources Ltd ("MRL") began to provide accommodation to the MH on a short term contract but did this in a different location to Churchill. MH were impressed by the services MRL provided, decided not to renew Churchill's contract which was due to end in March 2007 and instead immediately transferred the asylum seekers staying at Churchill's property to the property run by MRL. The contract between MRL and MH was virtually identical to the one Churchill had. From 26 January 2007 asylum seekers began to be allocated to MRL rather than Churchill and MH's staff who worked at Churchill's property began working at MRL's property. By the end of January 2007 only a few asylum seekers who had medical problems remained at Churchill. Churchill was contractually obliged to provide beds until March but in practice both it and MH knew that the accommodation would not be and was not used. In February Churchill wrote to MH advising that it thought TUPE applied and asked for the name of the new provider. MH gave Churchill MRL's details and Churchill wrote to MRL informing them about the Claimants and stating that they were assigned to the service that MRL now provided. The Claimants continued to work at Churchill until the contract expired on 31 March 2007. On 2 April 2007 the Claimants showed up to work at MRL's premises. MRL interviewed them and sent them home.

The main question for the Employment Appeal Tribunal was: were the activities carried out by Churchill on behalf of a client (Migrant Helpline) carried out instead by MRL?

The Employment Appeal Tribunal held that the service provision concept should be interpreted broadly. The activities do not have to be exactly the same – they just have to be fundamentally or essentially the same. It also upheld the Employment Tribunal's finding that, on the facts, the date of the transfer was 26 January 2007 when MRL began supplying accommodation and not 31 March 2007 when Churchill's contract ended.

## Practical Implications

- Find out as soon as possible who the new provider will be and advise them that TUPE applies.
- Only employees who spend the majority of their time on the service will transfer. It may be helpful to rearrange duties so that people will not automatically transfer if they do not wish to.
- Be aware of who the Transferor and Transferee are i.e. who performed the service and who will perform it? These are the businesses that will be liable for protective awards and unfair dismissal claims and both need to be named in an Employment Tribunal Claim.
- Be careful with time limits (3 months) and take early advice



# REDUNDANCY AND AGE DISCRIMINATION



## “LAST IN FIRST OUT” LIVES ON

**The Court of Appeal has confirmed that length of service can be justified under age discrimination legislation as part of the process of deciding who is to be made redundant – even it does disadvantage younger more junior employees. (Rolls Royce plc and Unite the Union 2009 EWCA CIB 387).**

You can find the High Court decision in this case in the Spring issue of the Employment Law Review (issue 19).

**The Court of Appeal found:-**

- rewarding loyalty and achieving a stable workforce as part of a fair process of redundancy selection are legitimate reasons for including length of service as a selection criteria.
- using length of service is proportionate when balanced against the fact that it can discriminate against younger more junior employees provided it is only one of a substantial number of criteria and it is not the only determining factor.
- length of service as a criterion for redundancy is a “benefit” for the purposes of the exemption from the age discrimination legislation
- applying length of service as a criterion for selection can be exempt from the age discrimination legislation altogether as it reasonably fulfills the employer’s business need of having a loyal and stable workforce.
- having already included length of service as a criterion for redundancy selection in a collective agreement and in the individual’s contract of employment and continuing to follow those terms and benefit from the collective agreement is fulfilling a legitimate aim even if the business needs of the employer have now changed.

**In reaching their decision, the members of the Court made the following comments:**

- “...to reward long service by employees in any redundancy selection process is, viewed objectively, an entirely reasonable and legitimate employment policy, and one which a conscientious employer would readily and properly negotiate with a responsible Trade Union”
- “...by negotiating the collective agreements, the employer was put in the commercially valuable position whereby it could implement a scheme for redundancy in a peaceful fashion”
- “...all that needs to be shown is that there is a legitimate aim, not that the objective served is necessarily the best way of serving the narrow financial interests of the employer”
- “...the reasonable employer for the purposes of Reg 32(2) might well be expected to be motivated not simply by its narrow financial self-interest but also by enlightened self-interest, and

thus take into account the interest of the employees generally as one of the factors to which it should have regard in determining the business need of the undertaking...”

**In this case it is relevant whether it was proportional to use length of service as a criterion for redundancy selection as:**

- The collective agreement, “represented a compromise of the parties’ respective negotiating positions for mutual benefit”
- “...younger employees could score on equal terms on the other criteria”
- “The length of service criterion was included for the principled reason that it was employees who had served longest who were likely to find it most difficult to find new employment.”
- “...all employees also stand to benefit from there being a basis of selection for redundancy which was agreed between the union and the employer and which could therefore be implemented more quickly and easily and at less cost to the employer.”
- “The situation where there is a collective agreement is different to the situation where the employer has a redundancy scheme that has not been negotiated on behalf of employees.”

## Practical Implications

- Length of service CAN be justified under and exempt from the Age Discrimination Legislation – BUT probably only when used together with other criteria.
- It will assist employers defending age discrimination claims (and unfair dismissal claims based on unfair selection) if the arrangements have been collectively agreed.
- Where length of service as a redundancy selection criterion is already in a collective agreement, employers have good reason to follow it even if that is not what they would agree to now (for unfair dismissal purposes employers would have to justify any departure from collectively agreed criteria in any event.)
- As length of service as a criterion for selection is a “benefit” for the purposes of the exemption, employers applying last in first out either alone, or with other criteria, are unlikely to be vulnerable to age discrimination claims on this ground by Claimants with less than 5 years service because, under the exemption, it is only necessary for the employer to show that the use of length of service was reasonably fulfilling a business need where the Claimant has more than 5 years service.

# STOP PRESS!! Malcolm is mitigated

The Employment Appeal Tribunal has, in *Fareham College v Walters* UKEAT/0076/09, held that dismissing someone can be unlawful disability discrimination when a reasonable adjustment was available at the point of dismissal which, if made, would have prevented the dismissal. Disabled employees will now be able to rely on the duty to make reasonable adjustments rather than the disability related discrimination provisions which were radically changed by Malcolm (reported in Issue 18 of the Employment Law Review).

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