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West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

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'Outsourcing, TUPE and the far flung parts of the UK'

The purpose of the Transfer of Undertakings Regulations (TUPE) is to protect workers when their employer changes. But the protection that TUPE offers falls well short of guaranteeing those workers that they will still have a job when the dust of a transfer has settled. Dismissing an employee simply because of transfer is automatically unfair. But an employer can justify a dismissal if the reason for it is 'an economic technical or organisational reason entailing changes in the workforce'.

That is quite a mouthful and so it is not surprising that people tend to use the shorthand of an 'ETO' dismissal. The danger of using this handy TLA (three-letter acronym) however is that we focus on the wrong thing. Almost any business reason for dismissal will be either economic, technical or organisational. The key requirement of an ETO reason is that it 'entails changes to the workforce'. That means - as the Court of Appeal held in *Berriman v Delabole Slate Ltd* – that the reason involves changes to either the *size* or *composition* of the workforce.

So employees transferred under TUPE are not protected from redundancy - at least where that involves a reduction in employee numbers. More difficult is when the new employer needs the same number of employees, but wants to operate from a different location. This is an issue that has really come to the fore in recent years as services can increasingly be provided by contractors operating remotely. A key part of the economies that a contractor can provide often comes from operating from their established locations – which could be anywhere in the UK. Local Government employees on the other hand are usually employed under contracts that specify a place of work within a limited geographical area. The new employer cannot simply instruct them to relocate – but can it dismiss them and offer them alternative work in a new location?

In the recent case of *Osborne and 29 others v Capita Business Services Ltd Barnet Council* had contracted out a wide range of services – including human resources - to Capita. There was no doubt that this was a TUPE transfer and the staff assigned to those services duly transferred to the new employer. That was not the end of the matter, however, and over the course of the next nine months the 30 claimants found themselves without a job. Each of their circumstances was different but it seems that services that had previously been carried out within Barnet itself were, after the transfer, disbursed among various locations operated by Capita. Some jobs were located in Coventry, others in Belfast, and others in Blackburn, Carlisle, Sheffield and Darlington. All of the employees were offered continued employment - but it seems that they weren't willing to relocate and were eventually dismissed. The question was whether the dismissals were automatically unfair or whether they were for an ETO reason.

It was accepted in this case that a mere change in location was not a change in the workforce and so could not amount to an ETO reason. Luckily for Capita it had not only relocated most roles but also split them up so that one person's functions were to be divided between two or more different locations.

The EAT held that the dismissal of those employees was for an ETO reason because there had been a change in the functions carried out by employees – not just a change in their location.

It would take a very cynical person to suggest that the dividing of roles in this way was a deliberate ruse by Capita to ensure that there was an ETO reason for the dismissal of any employees who refused to relocate. But in any event there is no need to go to such lengths in the future. The rules have now changed.

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) Amendment Regulations 2014 (CRATUPEAR for short!) changed the definition of ETO reasons in respect of transfers which take place on or after 31 January 2015. Under the new provisions the phrase 'changes in the workforce' includes a change to the place where the employee works. A dismissal for refusing to move to a new location would now count as an ETO dismissal and will not be automatically unfair. Where the move is supported by a genuine business need on the part of the contractor and where there is appropriate consultation and consideration of alternatives then the dismissal will probably be fair.

If the Tribunal thinks that the contractor is simply trying to engineer a situation in which employees are forced to leave, then that will of course be a different matter.

What the Osborne case shows is that TUPE does not really protect employees from losing their jobs after a transfer. Ironically, it is still quite difficult to change terms and conditions following a transfer - harmonisation is a real no-no - but it seems that it is relatively straightforward (legally at least) to completely change someone's job and move them to a far-flung location. If the change is significant enough then an employee who is presented with the choice will be regarded as having been dismissed – even if he or she accepts the new role.

The offer of a completely new job as a fait accompli is taken by the Tribunal to amount to dismissing the employee and offering alternative work - a principle first established in the case of Hogg v Dover College back in 1990.

Such a dismissal would probably amount to a redundancy on the basis that the employer no longer needs the employee to work in the place where he or she is currently employed. If the employee refuses to accept the alternative role then he or she is likely to be entitled to a redundancy payment. In theory the employer can withhold a redundancy payment suitable alternative work is unreasonably refused – but no tribunal is likely to find that it is unreasonable of an employee to refuse a job that would involve moving house.

Keep in Touch

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