

## Contracts come and contracts go... Do employees last forever?



In the competitive business environment contracts are often won and lost. We are frequently consulted regarding the employment implications, especially in relation to TUPE (transfers of undertakings) and redundancy.

With the spotlight on these areas as a result of recent changes to the law set out in new Regulations in force on 31 January 2014, now is an opportune time to review the legal issues arising in relation to winning/losing contracts, and to provide an update in relation to these changes.

### Service provision changes

Where a "service" is outsourced, insourced, or moves from one contractor to another, there may be a "service provision change", which is one type of "TUPE transfer".

For this to apply, there is a change in the party carrying out certain "activities", and before the transfer, there must be an "organised grouping of employees" whose "principal purpose" is to carry out these activities.

### Gaining a contract

When organisations gain a new contract to provide services, they need to consider whether there are any TUPE implications. Getting accurate and reliable information from the outgoing contractor may be difficult, but the key issue is to consider whether the old service provider had an organised group

or team whose main purpose was to work on that contract. If so, the assigned employees will have the right to transfer to your employment, with their continuity of service and terms of employment intact.

If the old contractor tells their employees that they now work for you, and you refuse to take them on, then the claim is against you, if TUPE applied.

It is vital to be alive to TUPE issues when tendering, consider what the implications could be and try to seek additional information so you can assess the risks.

### Losing a contract

Loss of a major contract can be a concerning time for any organisation, and redundancies may require to be considered. It is vital, however, to consider whether you had an organised group or team of employees working principally on that client's business. If so, it may be that as a matter of law they become employees of the new contractor (thereby avoiding the need for dismissals and redundancy).

Employers of staff who are to transfer to another employer must properly inform and consult elected representatives of the affected employees. Failure to do so can give rise to claims worth 3 months' pay for each employee.

Where you lose a contract and TUPE does not apply, managing the transition will be important and may include potential redundancies. Specialist advice should be sought to ensure a fair process is followed and claims minimised. Failure to follow the correct approach could give rise to expensive claims.

### Summary

Whether you have secured or lost a contract, you need to be aware of the potential TUPE issues and take specialist advice to ensure that the risks are minimised.

## In this edition

Contracts come and contracts go... Do employees last forever?

A review of the legal issues arising in relation to winning and losing contracts.

TUPE: What are the changes to the existing law from 31 January 2014?

A summary of the changes ahead effecting the current legal position.

What has the employment team been up to?

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## TUPE: What are the changes to the existing law from 31 January 2014?

The new Regulations include the following changes to the current legal position:

- There is now confirmation in the Regulations that for there to be a “*service provision change*”, the activities pre and post transfer must be “*fundamentally the same*”.
- The circumstances in which changes to terms and conditions after transfer can be permitted have been revised, making it a little easier for employers. Also, there have been technical changes to the circumstances in which a dismissal will be “*automatically unfair*”.

- The old employer has to provide employee liability information 28 days before the transfer (if the transfer is after 1 May 2014). Previously, the requirement was 14 days before the transfer.
- Employers with less than 10 employees, who do not have any representatives, can consult directly with employees (if the transfer is after 31 July 2014) rather than holding an election.
- It will be possible for collective consultation about post-transfer redundancies to take place before the transfer actually occurs.

## What has the employment team been up to?

Throughout 2013 we dealt with a wide range of employment issues, representing clients in a variety of Employment Tribunals cases, providing strategic “behind the scenes” advice as well as supporting clients through large scale redundancies and complex disciplinary procedures.

A few highlights from the past 12 months include:

Management of a large scale redundancy procedure for a large international company closing one of its UK sites, which involved foreign and Scots law with TUPE and redundancy issues.

Dealing with a number of contentious claims in various forums, including successfully defending an unfair dismissal claim raised in the Newcastle Employment Tribunal and managing complex discrimination claims.

Caroline and the team continue to work hand in hand with **bto**'s clinical defence

team representing doctors and dentists accused of misconduct or other employment related issues.

David was asked to speak at several specialist events, including: conducting seminars for the Institute of Directors, the Law Society's Employment Law Group, the Royal Faculty of Procurators in Glasgow, Central Law Training and the Scottish Discrimination Law Association.

David and the team continued to provide specialist advice to the education sector, which includes advising colleges (and senior staff) in relation to mergers and managing TUPE transfers.

David's media appearances included discussions on Radio Scotland and a column for the Sunday Mail's “*The Judge*”.

Douglas dealt with a large amount of corporate support and TUPE work, including a number of transactions, as well as numerous tribunal claims, in the complex area of TUPE and insolvency.

## Update

The Government has indicated that the following changes will take effect from April 2014:

- All employees can request flexible working (with a duty to consider such requests “reasonably”)
- Statutory discrimination questionnaires to be repealed
- Claimants are to provide details of proposed claims to ACAS to allow conciliation before claims can proceed
- Tribunals can impose financial penalties on employers found to have breached employment rights.

Changes from The Welfare Benefits Up-rating Order 2014 SI 2014/147 coming into force on 6 April 2014:

- An increase in statutory sick pay from £86.70 to £87.55
- Increases in maternity pay, ordinary and additional paternity pay, and adoption pay from £136.78 to £138.18.
- For the purpose of calculating maternity allowance, the Order will come into effect on 7 April 2014.



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