Minor changes constitute "measures" under TUPE

Prior to a transfer covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), an employer is obliged to provide certain **information** about the transfer to representatives of its affected employees. Where that employer envisages taking "measures" in relation to those employees, it must also **consult** with the representatives with a view to seeking their agreement to the intended measures.

In the recent case of *Todd v Care Concern and Others*, the court decided that even very minor changes to employees' pay arrangements following a TUPE transfer constituted "measures" – giving rise to an obligation to inform **and** consult.

The facts

Ms Todd owned a care home. Out of the blue, she announced to the staff who were at work at the time (approximately a third of the workforce) that she had received an offer from Care Concern to buy her business which she simply could not refuse. She provided very little information to the employees at that meeting, save to inform them that their jobs would be safe and that there would not be any changes to their employment. She did not confirm this in writing or hold any further meetings with the employees. The employees who were not present at the meeting had to rely on the information being passed to them by their colleagues.

The employees brought claims for failure to inform and consult in the Employment Tribunal. Ms Todd was ordered to pay each of the 32 claimant employees 13 weeks' pay (the maximum award).

Ms Todd appealed to the Employment Appeals Tribunal ("EAT").

The decision

A key question in the case was whether Ms Todd had envisaged taking any "measures" in relation to her staff. Her case was that there were no measures and so the duty to consult did not arise.

As is usual, Ms Todd and Care Concern had agreed between them to apportion the employees' salary and holiday costs for the month during which the transfer took place. However rather than dealing with this between themselves, Ms Todd paid the employees their salary for the relevant part of the month at around the date of the transfer as well as an amount in respect of holiday entitlement for the same period. The holiday payment was then to be reclaimed by Care Concern at the end of the month when it would also pay the balance of salary due. There was also a tax rebate made to the employee but they were told not to spend it as it would be reclaimed by Care Concern. The EAT held that because these changes were "*over and above what necessarily occurs as a consequence of the transfer itself*", they constituted "measures". It was irrelevant that the changes were only minor or that the employees were no worse off overall. The court was persuaded by the employees' evidence that they were worried about them, particularly the tax rebate. As a consequence, the EAT determined Ms Todd was obliged to consult with them to reassure them why these transitional arrangements were happening.

The EAT did however consider that the Tribunal's award of 13 weeks' pay per affected employee was excessive. It determined that the maximum award might be appropriate where, say, employees were given no prior warning about the impending transfer. In this case employees were informed about the transfer well before it took place and they had been assured that their jobs were safe and that no changes would be made. The EAT therefore substituted an award of seven weeks' pay and held Care Concern to be jointly and severally liable.

Impact

This case is an important reminder that changes made in the context of a TUPE transfer do not need to be substantial to be considered "measures". Nor do they need to amount to contractual variations. The term "measures" will be given a wide interpretation and will include any changes that are not necessary to give effect to the transfer. This will include situations where the change actually benefits the employee in some way (though in such circumstances it is probably less likely that an employee will want to bring a claim).

It also serves as a reminder that both the outgoing employer and the new employer will be jointly and severally liable for awards for failure to inform and consult under TUPE.

Recommendations

If an employer is unsure as to whether a change constitutes a "measure", to avoid potential claims, it will always be safer to err on the side of caution and consult with employee representatives. Rarely in our experience does a TUPE transfer not involve some form of measures. If the change is simply to deal with apportionment, it is of course possible for the new and outgoing employers to deal with this between themselves, and avoid changing employees' payroll or tax arrangements, which was the problem in this case.

In the contractual documentation, the outgoing employer and the new employer are advised to apportion liability between them for information and consultation failures. The outgoing employer may wish to seek an indemnity from the new employer, should the new employer fail to disclose details of measures it proposes to make after the transfer. Likewise, the new employer may wish to seek an indemnity from the outgoing employer in the event that the outgoing employer fails to comply with its obligation to inform and consult. Another way for the new employer to try to ensure that its future employees are being sufficiently informed (and consulted with where necessary) about the impending transfer, is to agree with the outgoing employer that the new employer will be entitled to sit in on meetings with employees and have a say on all written correspondence with employees and their representatives about the transfer.

If you have any questions about any of the issues raised in this legal update, please contact your usual Employment contact:

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October 2010