

Outsourcing: the employment issues

Outsourcing ('contracting-out') is 'the delegation of a business activity undertaken by an organisation to an external supplier'. Whilst the driving force may be financial, the employment issues associated with the transaction can be of vital importance to the success of the project. Outsourcing contracts can be for a range of services such as cleaning, catering, security, payroll administration and human resources, writes Stephanie Merritt, solicitor of Paris Smith LLP

It is important to have regard for The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) which are likely to cover an outsourcing transaction. TUPE contains three important principles for UK employment law:

- The automatic transfer principle: The contracts of employment of all employees are transferred to the external supplier, together with all rights, duties, liabilities and obligations arising out of, or in connection with, their employment.
- The protection against dismissal principle: Any dismissal of an employee because of the transfer itself or for a reason connected with the transfer will be automatically unfair unless the dismissing party can establish an economic, technical, or organisational reason for the termination entailing changes in the workforce.
- The information and consultation principle: both parties (the delegating organisation and the external supplier) are obliged to inform appropriate representatives of all employees that are affected by the transfer about the transfer, and consult with them over any measures proposed in relation to the transfer.

Impact of a breach of TUPE

Ignoring these principles could have very costly consequences for both the delegating organisation and the external supplier. If employees consider their rights under TUPE have been infringed, they may be able to seek redress through the civil courts or the employment tribunals. If complaints are upheld, awards may be made against either party, depending on the circumstances of the transfer. In an unfair dismissal claim, the maximum compensation a tribunal can award will be £76,700 from 1 February 2010. A breach of the information and consultation principle could also result in liability for the payment of up to 13 weeks' pay for each affected employee.

Identifying a transfer

An outsourcing transaction is only caught by TUPE if the post-outsourcing activities are identifiable as the pre-outsourcing activities. In *Metropolitan Resources Ltd v Churchill Dulwich Ltd and ors*, the Employment Appeal Tribunal

("EAT") confirmed that the activities do not have to be identical and TUPE will still apply where there are minor differences in the way those activities are organised or carried out. A tribunal should consider whether the business activity is "fundamentally or essentially the same". The wider the activities are defined the more likely they are to meet this test. In *OCS Group UK Ltd v Jones and anor*, the EAT upheld the tribunal's narrow definition of the relevant contractual services thereby precluding the application of TUPE. It was held that the pre-prepared sandwich and salad bar provided by the incoming party was a different operation to the full canteen service, supplying hot and cold food, operated by the outgoing party. In this case, the tribunal had scrutinised the differences between the two services, as opposed to seeing whether they fitted into a broadly similar category, i.e. the provision of food. Yet, in the case of *Churchill*, it was found that the incoming party continued to provide fundamentally the same service, the provision of accommodation for asylum seekers, despite minor differences such as a new location and the performance of additional services. Therefore, TUPE applied.

Who transfers?

TUPE is designed to cover situations where the delegating organisation has in place a team of employees ("an organised grouping of employees") essentially dedicated to carrying out the business activity which is to be delegated to the external supplier. The employees do not need to work exclusively on the specific business activity and nor does the "team" of employees have to consist of more than one employee. However, TUPE does exclude cases where there is no identifiable grouping of employees.

Generally, the parties will agree which employees are "in scope" to transfer but issues may arise if some employees divide their time between different business activities. The key question will then be to determine whether the employee is "assigned" to the organised grouping of employees subject to the transfer.

People management

Staff will always struggle with change. It will therefore be important to prepare a clear communication plan for consultation with



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the workforce, as information leakages could cause heightened anxiety or raise expectations unnecessarily. This may include holding elections to appoint representatives to ensure compliance with the information and consultation principle. During this process employers should ensure that they do not forget absent employees, such as those on long-term sickness and maternity leave, as they must all be included within the consultation process.

Transfers from the public sector into the private or voluntary sector can cause staffing issues as public sector terms regarding annual leave, sick pay and benefits are generally better. The external supplier must be ready to manage these issues and it will be necessary to have regard for the Code of Practice on Workforce Matters in Public Sector Service Contracts which outlines the minimum expectations for such a transfer.

Redundancy is possible when outsourcing, depending on the external supplier's staffing structure. There is clearly a cost associated with this which may well require negotiating a contribution from the delegating organisation as part of the transaction.

Practical suggestion

TUPE is a complex area and so it is essential to seek early legal advice on whether TUPE will apply. This may affect matters such as pricing and timing. It may also be possible to negotiate an indemnity which will provide some protection against the financial impact of any potential claims resulting from the application of TUPE.

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