

# Review

## Human Capital (Employment)



### Change to place of work leaves transferee exposed

Employees have a right under the TUPE Regulations 2006 to resign (but treat themselves as having been dismissed) if a transfer involves or would involve a substantial and detrimental change in their "working conditions". This is in addition to their rights to object to the transfer regardless of any adverse impact and to resign and claim constructive dismissal in response to a fundamental breach of their contract. It has however always been unclear what sort of changes are covered and what an employee has to show in order to bring such a claim. A recent EAT decision throws some light on this issue and highlights the risks involved in changing working conditions in the context of a TUPE transfer.

In *Tapere v South London and Maudsley NHS Trust* Ms T's employment was transferred from one NHS Trust to another. She was told that as soon as possible after the transfer her place of work would change to the transferee Trust's premises, several miles away. Ms T was unhappy about the proposed move because of the effect it would have on her travel and childcare arrangements. She resigned and claimed that she had been dismissed as a result of a substantial change to her working conditions that had been to her material detriment contrary to Regulation 4(9) of the TUPE Regulations. The transferee Trust denied liability and sought to rely on the mobility clause in Ms T's contract of employment. This said she could be moved to other locations "within the Trust". Its logic was that it now had the benefit of the mobility clause by reason of the transfer and therefore that the clause also covered its own locations. The matter went to the EAT where Ms T was successful.

There are a number of interesting points to come out of this decision. First, the EAT made it clear that Tribunals will interpret the ambit of a mobility clause by reference to the geographical area of the employer at the time the clause was entered into. In other words a transferee cannot increase the geographical area in which an employee could be required to work under a mobility clause by substituting its own premises for those of the transferor. A similar principle is applied when interpreting restrictive covenants post-transfer.

Secondly, the EAT gave some guidance on what a Tribunal will be looking for in deciding whether there has been a substantial change in working conditions to the material detriment of an employee for Regulation 4(9) purposes. It said that Tribunals should consider the employee's **own** position and ask whether it is reasonable in the circumstances for him to adopt that position. Whether it was reasonable for the employer to seek to impose the change was immaterial. In this case the EAT said that although Ms T's new place of work was only a few miles away, the change in location would nonetheless disrupt her childcare arrangements and result in a longer journey to work, now also via the M25. This was sufficient to satisfy the test. Ms T was therefore allowed to pursue her claim for a redundancy payment and unfair dismissal against the transferee.

This decision acts as a reminder to employers that anything other than minor changes to an employee's working conditions in the context of a TUPE transfer could give rise to a potential claim, either against the transferor or the transferee. However, because the facts are looked at from the employee's perspective, there can be no lesson taken from this case that a relocation of a few miles and/or having to use the M25 will necessarily constitute a material detriment – this will depend on his starting location, transport links, seniority, domestic arrangements, etc., and will vary from case to case. Employers need to be careful before making any changes to an employee's working arrangements which, even if lawful under the employment contract, could nonetheless be viewed as detrimental. Having said that it is always a risky step for an employee to resign in the context of a TUPE transfer and therefore in practice such claims are still likely to

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be fairly unusual. Another disincentive for employees bringing claims under Regulation 4(9) is that they cannot make a claim for notice pay, as they are treated as having been dismissed with notice.

This decision does not mean that an employee's place of work cannot be changed in the context of a TUPE transfer. After all, this is frequently a consequence of a transfer. Take, for example, a second generation outsourcing situation where the incoming contractor is based at a different location. The Tapere case was quite unusual in that the transferee sought to rely on the provisions of a mobility clause to change Ms T's place of work post-transfer. In most cases where a transferee is based at a different location to the transferor, it would treat this as a place-of-work redundancy and consult accordingly. Whilst it might give transferring employees the opportunity to relocate it would not force them to do so. Employees are less likely to resign in such circumstances – from their point of view it is likely to be more advantageous to transfer across and then pick up a redundancy payment if they do not wish to relocate than to bail out pre-emptively and potentially get nothing.

## EARNINGS DURING NOTICE PERIOD SHOULD BE OFFSET AGAINST COMPENSATION

Earlier this year we reported on an EAT decision (*Stuart Peters Ltd v Bell*) in which it was held that an employee who is **constructively** dismissed without notice or pay in lieu of notice is entitled to unfair dismissal compensation for his entire notice period, even if he has found alternative work during that period

The good news is that the Court of Appeal has recently overturned this decision and held that employers should not have to pay out if a constructively dismissed employee secures alternative employment during, what would have been, his notice period. The only fly in the ointment is that this principle does not apply to ordinary dismissals. It is still the case that if an employee is actually dismissed without notice or pay in lieu of notice he is entitled to unfair dismissal compensation equal as a minimum to his net pay for his notice period, without deduction in respect of any earnings which he has received from alternative employment during that period. There is no real logical reason for the distinction between ordinary and constructive dismissals, but at least employers defending unfair **constructive** dismissal claims will potentially have to pay out less. There is similarly no real logical reason for the notice period losses being any less subject to the usual duty to mitigate than any others, and that particular debate will no doubt resurrect itself at some stage too.

## CONSULTATIONS

**Agency workers:** We have been informed by the Department for Business, Innovation and Skills that it is intending to publish draft Regulations implementing the Agency Workers Directive in mid-October for an eight-week consultation period. We will of course let you know as soon as they are available.

**Additional Paternity Leave and Pay:** The Government will consult shortly on new regulations that will allow new mothers to transfer the last six months of their maternity leave entitlement (with three months paid) to the father. This new right will apply to parents of children due on or after 3 April 2011, to give employers time to adjust. No decision has yet been taken whether to extend SMP beyond the current 39 weeks.

**Equal pay:** The Equality and Human Rights Commission has also published a consultation paper targeted at private sector employers with 250 or more employees. The purpose of the consultation is to seek views on how employers should report on progress on the gender pay gap in private businesses, in light of the Government's plans to encourage private sector employers to carry out this exercise voluntarily - failing which it has a power under the Equality Bill to introduce mandatory reporting in 2013. A link to the consultation document is attached: [EHRC consultation](#)

## SEMINARS AND WORKSHOPS

In October we will be running breakfast workshops on conducting flexible working meetings. If you would like more information on these workshops, please go to [www.hammonds.com/employmenttraining](http://www.hammonds.com/employmenttraining)

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