

The recent case of *The Manchester College v Hazel (1) & Huggins (2)* has once again highlighted the risks involved in seeking to change employees' terms and conditions of employment in the wake of a TUPE transfer.

Changing terms and conditions of employment post-transfer is never without risk. The TUPE Regulations 2006 make it clear that any purported variation of a contract to the employees' detriment will be void if the sole or principal reason for the change is the transfer itself or a reason connected with the transfer, unless the employer can point to an "economic, technical or organisational (ETO) reason entailing changes in the workforce". Equally, any TUPE-related dismissal will be automatically unfair unless the employer can show that it was for an ETO reason entailing changes in the workforce.

What do we mean by an "ETO reason"? The precise meaning is uncertain, but it would include such things as a downturn in profitability of the business, a change in the nature of the equipment or production processes or a reason relating to the management or organisational structure of the business, e.g. a restructure. It is not hard to find such reasons for wanting to change employment terms, but establishing an ETO reason will only take an employer so far. In order to rely on the ETO defence an employer also has to show that the ETO reason "entails changes in the workforce". This means there has to be a change in the numbers employed or the functions performed by employees and that change is a necessary and integral part of the process rather than an inadvertent side-effect of it. The obvious example is where an employer makes redundancies as part of a post-transfer restructuring exercise.

A mere variation to contracts of employment will not usually entail changes in the workforce if it does not involve a change in either the number or functions of the workforce. The only exception is if the variation effectively requires employees to do different jobs. This means that a transferee is actually placed in a weaker position than an ordinary employer in unfair dismissal claims involving changes to terms and conditions of employment, as the employer discovered to its cost in *The Manchester College v Hazel (1) & Huggins (2)*.

Hazel and Huggins were employed as academic staff at HM Prison Elmley in Kent. In August 2009 their employment transferred to Manchester College, after it won a contract to provide offender learning services to certain prisons in the UK. No jokes about captive audiences, please.

Following the transfer, the College decided it needed to make £5 million in cost savings and proposed a reduction in staff numbers as well as changes to terms and conditions, including a new pay scale. Negotiations took place with the relevant trade unions and in the end it was not necessary to make any compulsory redundancies and the College focussed on getting staff to accept a pay cut instead. The Claimants refused to accept the new terms and conditions and in July 2010 the College terminated their existing contracts and offered to re-engage them on the new conditions of service. In the end the Claimants accepted the new contracts, but this did not stop them presenting claims of unfair dismissal under their old contracts. They argued that their dismissals were automatically unfair under the TUPE Regulations 2006 because the principal reason for the dismissal was a reason connected with the transfer, i.e. the transferee's wish to change their terms to match those of its existing staff.

The Tribunal upheld their claims, finding that the real reason for dismissal was the Claimants' refusal to accept the new terms and the College's desire to harmonise the different contracts of employment it had inherited as part of the transfer. Yes, there had been redundancies (which would entail changes in the workforce), but this did not change the fact that the Claimants had been dismissed for the reason of harmonisation (which did not). It pointed out that in order to rely on the ETO defence in dismissing employees for failing to agree to new terms it is not sufficient for an employer to make some other employees redundant alongside the harmonisation process. It is the reason for dismissal of the particular employee that must entail a change in the workforce. In this case the College could not point to any change in the workforce (the Claimants' jobs had not changed) and the dismissals were therefore automatically unfair. The Tribunal then went on to order the College to pay the Claimants their old rate of pay, albeit this would be frozen until the new pay scale caught up with it. In doing so, it rejected the College's arguments that this could result in discontent amongst other employees, the majority of whom had gamely accepted the new (lower paid) terms and conditions.



The EAT took a similar view. It said the Tribunal was entitled to find that once the Claimants were told they were not at risk of redundancy and the redundancy process had ended, harmonisation of conditions was next on the agenda. As new terms do not amount to a change in the workforce, the Tribunal was correct in its construction of TUPE. It rejected the College's argument that the Tribunal should have considered "holistically what was going on at the Respondent's establishment, which was both to effect redundancies and to make changes in the terms and conditions" and that "the issue was not simply one of harmonisation to make the terms and conditions look neat but was part of a larger process of effecting change caused by economic necessities".

It can often be difficult in practice to distinguish between changes that are aimed at harmonising terms and conditions (which will always be void) and those that are made for some other reason, for example as a response to changing economic conditions. Frustratingly for employers, much will depend on the Tribunal's findings of fact. For example, in another recent case, ***Enterprise Managed Services Ltd v Dance & ors***, the EAT was prepared to accept that employees who were dismissed because they did not agree to new terms and conditions after a TUPE transfer had not been automatically unfairly dismissed, because the real reason for the change was an attempt to improve productivity rather than harmonisation. On such thin lines do these things depend.

Many businesses have concerns about this approach to the ETO defence (as evidenced by the recent responses to the Government's Call for Evidence on TUPE) and feel that the rules (as interpreted by the Courts) are unduly restrictive. Moreover, it makes it better for the incoming employer to sack people rather than try to preserve their employment by offering slightly worse terms. So much for "Protection of Employment" as part of TUPE's intentions! This case will do nothing to change that unhappy impression.



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The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

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