

This month, the Court of Appeal in ***Hazel & anor v The Manchester College*** has once again highlighted the risks involved in changing terms and conditions in a TUPE context. Whilst this case was decided prior to the changes that came into force on 31 January 2014, the outcome under the amended TUPE Regulations is likely to be the same.

Hazel and Huggins were employed as academic staff at HM Prison Elmley in Kent. In August 2009, their employment transferred to The Manchester College after it won a contract to provide offender learning services to certain prisons in the UK. Following the transfer, the College decided it needed to make significant cost savings and proposed a reduction in prison-based teaching staff numbers, various changes to terms and conditions and lower salaries.

Negotiations took place with the relevant trade unions and in the end it proved possible to avoid compulsory redundancies. The College focused on getting staff to accept a pay cut instead. Hazel and Huggins refused to accept the new terms and conditions and, in July 2010, the College terminated their existing contracts, offering to re-engage them immediately afterwards on the new less favourable conditions of service. In the end Hazel and Huggins accepted the new contracts and so preserved their continuity of employment, but this did not stop them bringing at the same time claims of unfair dismissal from their old contracts.

The Employment Tribunal upheld their claims, concluding that the real reason for the dismissals was their refusal to accept the new terms and the College's desire to standardise the terms and conditions of its staff post-transfer. It held that this constituted a reason connected with the transfer and that as the College could not point to an "economic, technical or organisational (ETO) reason entailing changes in the workforce", the dismissals were automatically unfair.

It is long-established law that harmonisation of contracts without more may well amount to an ETO reason but not usually to "entailing changes in the workforce", as it does not involve changes in either the number or functions of the workforce, merely to their terms of service. In this case, the College could not point to any change in the workforce. Hazel and Huggins' jobs had not changed, they were just getting paid less to do them.

When this matter finally came before the Court of Appeal, the College argued that the lower courts had been wrong to focus exclusively on the immediate reason for the two dismissals, namely the refusal to accept new terms, and that they should have taken into account the wider context of the College's cost-saving plans. It argued that the attempt to harmonise terms and conditions was just part of an overall cost saving and rationalisation programme that included workforce changes in the form of voluntary redundancies, and therefore did entail changes in the workforce.

The Court of Appeal disagreed. Whilst it was true that the harmonisation of terms was, in a general sense, related to the proposal for redundancies – they were adopted as part of the same package of proposals – the redundancies had played no actual part in the College's decision to give notice of dismissal to Hazel and Huggins. In this case it was clear that the principal – and indeed the only – reason why they were dismissed was because they had refused to agree to the new terms. If they had agreed, they would not have been dismissed from their old contracts, regardless of the job losses occurring elsewhere.

The Court said that in cases such as this it is important to address three questions:

- 1 What is the "sole or principal reason" for the dismissal? In this case it was because the two employees had refused to agree to the new terms.
- 2 Is the reason for the dismissal the transfer itself or a reason connected with the transfer? If it is the former then any dismissals will be automatically unfair. If it is the latter (as in this case), it is necessary then to consider question 3 below.
- 3 Is there an ETO reason entailing changes in the workforce? Whilst it is not hard to find an ETO reason for wanting to change employment terms, "entailing changes in the workforce" means there also has to be a change in the numbers employed or the functions performed by employees. The Court of Appeal pointed out that when it comes to harmonisation the case law is quite clear and this will not be treated as a reason which entails changes in the workforce.

It is interesting to note the remedy awarded in this case. Rather than a lump sum in compensation, the Court of Appeal upheld the Tribunal's order that Hazel and Huggins should be re-engaged on their old rates of pay, save that these would be frozen until the new Manchester College pay scale caught up with it. It said that such a remedy was entirely in keeping with the spirit of the TUPE legislation to ensure that transferring employees retain their existing terms and conditions following a transfer. Unfortunately for the College it also had the effect of undoing the pay cut that it had tried so hard to introduce. This is something that employers should be aware of when considering making changes to terms and conditions in this way. This outcome could potentially have been avoided if the College had entered into settlement agreements when dismissing the two employees from their old pre-transfer contracts. This was presumably not a viable option in this case, bearing in mind the large number of employees involved in the harmonisation exercise. It also inevitably begs the question of why the employees would agree to sign such an agreement – what would be in it for them, apart from binding themselves to a worsening of their terms of employment?

This decision was based on "old" TUPE, i.e. prior to the introduction of the changes on 31 January 2014. There is now a new test in place governing the fairness of dismissals and the lawfulness of changes to terms and conditions in a TUPE context. Under "new" TUPE changes to terms and conditions will only be void if the sole or principal reason for the change is the transfer. Equally, dismissals will only be automatically unfair if the sole or principal reason for the dismissal is the transfer. The Government has removed the reference to changes (or dismissals) that are merely "connected with" the transfer.

Does this mean that the dismissals in this case would have been lawful under the new test? Opinions differ, but probably not. The new TUPE Guidance makes it clear that if a new employer wishes to change the terms and conditions of incoming staff so as to bring them into line with those of existing employees, then the transfer itself will be treated as the reason for the change. Under "new" TUPE a transfer might be treated as the sole or principal reason even if previously the reason might have been considered to be "connected with" the transfer, rather than the transfer itself. Unfortunately for employers, the new TUPE Regulations are therefore unlikely to assist when it comes to harmonising terms and conditions.

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