SQUIRE SANDERS

WATCH OUT IF……. ON A TUPE TRANSFER YOU ACQUIRE EMPLOYEES WHO ARE COVERED BY A COLLECTIVE AGREEMENT.

You may find that you are bound by terms agreed by other people after you become the employer.

In 2002 the London Borough of Lewisham's leisure activities were contracted out to a private sector company, CCL Ltd, which subsequently sold the business to Parkwood Leisure Ltd. Left over from their time at Lewisham, there was a clause in the contracts of employment of the transferring employees which said that their terms and conditions would be in accordance with collective agreements "negotiated from time to time" by the National Joint Council for Local Government (NJC). In June 2004 (i.e. after the TUPE transfer to Parkwood) a new and more generous collective agreement was reached by the NJC. Parkwood refused to increase the transferred employees' pay in accordance with it on the basis that it was not a party to the collective agreement, let alone the amendment to it and was not therefore bound by it.

The affected employees brought claims for unlawful deduction from wages in the Employment Tribunal. The big question – did the words "negotiated from time to time" include negotiations on that agreement after the employer had ceased to be a party to it?

There are two schools of thought here. First, that the contractual linkage to the NJC agreement is frozen as at the point of transfer, meaning that the only terms to transfer to Parkwood were those from the NJC agreement as it stood at that moment in time. Or second, that the "negotiated from time to time" wording meant that their terms and conditions followed the NJC agreement even though these changes happened after they had left it. The two are often described as "static" and "dynamic" respectively.

Historically the UK position has been that the dynamic position applied, i.e. that it was possible for a contract of employment to contain by reference some other terms not yet agreed. This would apply if its wording allowed for that, for example by making references to future agreements or "as in force from time to time", or similar. However in 2006 the ECJ decided in ***Werhof –v- Freeway Traffic Systems*** that the static approach was the right one, and that the transferee employer would inherit only the terms of the collective agreement as they then stood.

The Supreme Court in ***Parkwood*** referred this tricky issue back to the ECJ for guidance as to the inter-relationship of those "dynamic clauses" and the Acquired Rights Directive (and hence TUPE).

The Advocate General's Opinion (which is the first stage in the European decision making process) can be summarised as follows:

- There is nothing in the ARD which prohibits the UK from allowing dynamic contract terms which refer to future terms of collective agreements to transfer on a TUPE transfer.
- The ECJ's ***Werhof*** decision was decided very much on its specific facts and did not make a general ruling that dynamic clauses which refer to future collective agreements cannot be transferred.
- If, as in ***Werhof***, an employee's contract of employment contains a "static" reference to a collective agreement, this cannot subsequently be transformed into a "dynamic" reference. In other words, a transferee employer cannot be bound by future amendments to collective agreements if this was never anticipated in the first place.
- There is nothing to stop the UK from amending the scope of TUPE with the aim of limiting or prohibiting the transfer of such clauses. Furthermore, there is also nothing to stop the UK from taking advantage of the exemption in the ARD (but not so far in our domestic law) which expressly limits the post-transfer effects of a collective agreement to one year.

So where does this leave transferees? The current UK position is that transferees are not bound by post-transfer variations to collectively agreed terms. However, transferees should be aware that this seems highly likely to change in light of the Advocate General's Opinion, which will probably be followed by the ECJ and then ultimately by the UK's Supreme Court.

But that is not the end of the matter. To complicate matters further, the UK Government is currently consulting on proposals to amend the TUPE Regulations 2006 and has already indicated that if the ***Parkwood*** ruling went the wrong way (it has already made it clear that it believes the static approach should apply) it will probably make amendments to TUPE to reflect this. It is already considering whether to limit the period during which terms and conditions derived from collective agreements must be observed to one year following the transfer, but it is likely to want to go further in light of this ruling.

The safest approach for transferees (especially those inheriting employees from the public sector whose terms and conditions are most likely to incorporate collectively agreed terms) is to carry out careful due diligence to identify whether the transferring employees' contracts refer to a specific collective agreement or future agreements, and where possible to seek suitable indemnity protection to cover off the possibility of future pay rises, etc. being imposed beyond its control. Do not assume that linkages to collective agreement changes in future are necessarily broken by the employees no longer being part of the workforce governed by that agreement.

Further Information

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