

Employerslaw

Winter 2010



Welcome to the Winter 2010 edition of Employers' Law.

In this edition, we look at how businesses can protect themselves from their employees (or ex-employees), some helpful hints and tips for preparing for an employment tribunal and we also outline the TUPE considerations in outsourcing.

Then we turn to a recent case increasing the scope of employee protection against discrimination, victimisation or harassment on religious or philosophical grounds.

With the continuing trend for redundancies, we warn of the stigma of redundancy as well as the Additional Paternity Leave regulations which the Government hopes will increase parent choice and flexibility.

My intention as editor is to bring you articles that will be of genuine interest and use. If you would like any advice on the issues covered in this edition, please do not hesitate to contact me or a member of the team, details of which are featured on the back page.

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Have you protected your business as far as you can from your employees/ex-employees?

There is a myth bandied about that there is little a business can do to protect itself from its employees/ex-employees should they leave and try to take confidential information and clients with them. Further, that restrictions in the employment contract called 'restrictive covenants', which remain in force after the employment has ended, are unenforceable and 'not worth the paper they are written on'.

Our employment team has dealt with an increasing number of issues in the last year where employees have left or have been poached and have caused damage to the business they left. As a result it is clear that it is becoming increasingly important for businesses to ensure that they have the maximum protection in place.

Every business needs to protect its knowledge, IP, technology, strategic and confidential information, key talent and customer contacts. Properly drafted restrictive covenants can make a big difference and can often prevent employees risk breaching such clauses when enticed elsewhere. Ideally these are all put in place at the start of the employment relationship, since the employee is more likely to agree at this stage rather than later, but a business can at any time put new restrictions in place if they are needed to protect the business. We recommend that your restrictions are reviewed and, by way of guidance, the first in our spring series of workshops in 2010 is on this subject.

The general rule

The general rule is that terms restricting employees' activities after termination in an employment contract are unenforceable and void for being a restraint of trade as they can prevent an individual from

earning a living. However, if an employer can show that it has legitimate business interests to protect (such as confidential information, trade connections and goodwill and the stability of its workforce) and that those restrictions are reasonable in their scope and length in protecting those interests, then they are likely to be enforceable. These types of restrictions are more often found in senior level employment contracts.

Protection during employment

There are a number of clauses which can be included in the contract which can protect the business during the employment relationship. Whilst certain terms may be implied, the advantage of having written express terms is that they can be specifically drafted to reflect the

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circumstances and therefore are more likely to be enforced. Examples of such clauses include the use and control of and definition of confidential information (which normally extends beyond the termination of employment). In addition, restricting the employee's outside activities during that employment, the length of any notice period, and garden leave clauses are other examples.

Protection after employment - post termination restrictions

Generally there are five main restrictions and are as follows:

- 1 Non-solicitation of clients/prospective clients.
- 2 Non-dealing with clients/prospective clients.
- 3 Non-solicitation of senior or key employees.
- 4 Non-interference with suppliers.
- 5 Non-competition clauses.

Non-competition clauses

This type of restriction is harder to enforce than a non-solicitation restriction, since it often prevents a employee from working for a period of time and may be in restraint of trade. However, there have been a number of cases recently where such clauses have been upheld and perhaps have given these clauses a new lease of life.

In *TFS Derivatives Ltd V Morgan (2004)* EWCH 3181, the High Court upheld a non-competition covenant on the basis that a restriction on solicitation would be difficult to police and therefore might not effectively protect the employer's business interests. In *Dyson Technology Limited V Strutt (2005)* EWHC 2814 (Ch) the High Court upheld a non-compete clause as it was reasonably necessary to protect the employer's confidential information. In *Thomas v Farr plc and Hanover Park Commercial Limited, CA (February 2007)*, the High Court and Court of Appeal both upheld that the twelve month non-compete restriction was reasonable and enforceable. This is a reminder that the courts are prepared

to enforce restrictive covenants as long as there is a legitimate business interest to protect, and the restriction is reasonable. In this case, a managing director, Mr Thomas, secured a job with a competitor and then sought a declaration that the non-competition clause was an unreasonable restraint of trade and unenforceable. Mr Thomas was privy to sensitive confidential information that would allow him to devise a strategy for the competitor to undercut his employer. The restriction was narrowly drafted to cover only a particular sector of the insurance industry. This case could have been decided differently had the non-compete clause covered the entire insurance sector. This case emphasises the importance of carefully identifying the real risks posed by an employee on their departure and looking for an appropriate but not excessive way of protecting from that risk.

Non-solicitation/poaching and non-dealing restrictions

Non-solicitation/poaching/non-dealing restrictions normally prevent a former employee from contacting customers, prospective customers, suppliers and employees with a view to inducing them to leave. Non-dealing restrictions are more restrictive, as it prevents former employees from dealing with any client, customer or supplier, even if they are approached by that former client, customer or supplier. In *Beckett Investment Management Group V Hall (2007)* EWCA Civ613, the High Court initially held that the 12 month non-dealing restrictions were arbitrary and that three months would have more appropriate. However, the Court of Appeal rejected this and upheld the twelve month non-dealing restrictions finding them reasonable and valid. This was due to the seniority and significance of the individuals in question.

Enforcing restrictive covenants

A breach of a restrictive covenant is essentially a breach of contract and damages may be awarded for the loss of profit suffered by a business. An interim injunction (a court order) may also be sought by the employer to enforce the restrictive covenants in the course of any such proceedings. Obviously the potential success of any action depends on the circumstances and the drafting of the clauses in question.

Conclusion

Although restrictive covenant cases often depend on their own facts and circumstances, with proper drafting of such clauses, businesses can protect themselves and their business interests. Drafting of restrictive covenants requires particular skill and consideration of the potential risks to a business. Downloading precedents or using standard documentation will be unlikely to give the business the protection it seeks. It is very important therefore that when businesses provide contracts to new employees or when they are reviewing existing contract that this whole area is given proper attention. It does not cost a lot to put them in place but without them it could cost the business considerably more in lost revenue.

If you wish to ensure your business has the maximum protection, please contact a member of the employment unit (details on the back page) as they would be happy to help with drafting any such restrictions or to review your current contracts to ensure that as far as possible your business has the maximum protection it can achieve.

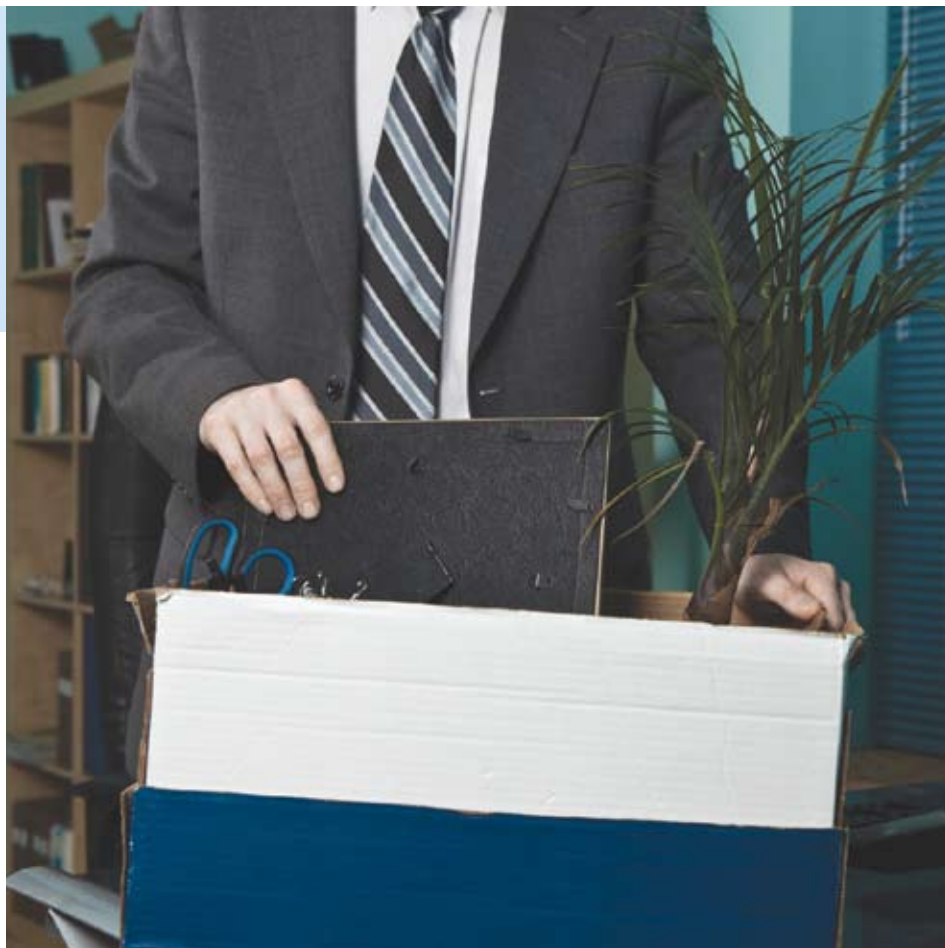
'...the original employer would remain liable for these 'stigma damages'.'

Beware the stigma (damages) of redundancy

Previously, damages in respect of 'stigma' suffered by an employee were only awarded if the employee's future employment prospects were damaged by the reputation or actions of the former employer. Following the Court of Appeal case of *Chagger v Abbey National plc and another* [2009] EWCA Civ 1202, a former employer may have to pay stigma compensation to a dismissed employee where prospective employers are unwilling to hire the employee because he brought discrimination proceedings against the former employer.

The case also gives additional guidance on calculating compensation in respect of a dismissed employee's future losses.

This appeal was concerned with the award of damages in respect of Mr Chagger's discriminatory dismissal. Mr Chagger, who was of Indian origin, was the only employee selected for redundancy from a pool of two. His colleague, who kept her job, was a white woman. The employment tribunal found that the manager who made the selection had been influenced by the fact that Mr Chagger was Asian and the decision to make Mr Chagger redundant was on racial grounds. Following his redundancy Mr Chagger was unable to find another job despite his efforts to do so, which were described by the tribunal as 'the most thorough, extensive and



well documented any member of the tribunal could recall ever having seen'.

One issue of the appeal was whether Abbey should pay compensation for losses suffered by Mr Chagger as a result of the stigma he had suffered following his dismissal and tribunal claim. Abbey argued that it should not be held liable for potential employers being unlawfully influenced by the fact that Mr Chagger had brought proceedings against his former employer. However, the tribunal decided that it was appropriate for Mr Chagger to be compensated for this and Abbey as the original employer would remain liable for these 'stigma damages'.

It was also decided that when compensating an employee for future loss of salary, a tribunal need not necessarily limit this to compensation for the period that the employee would have worked for the former employer, but may also include the period the employee may expect to wait before obtaining another job on an equivalent salary. Employers should always bear this in mind when dismissing high salary employees. The focus on the commerciality of a dismissal should include consideration of how likely the employee in question is to find another job on an equivalent salary and how quickly this will happen.

To employers, these decisions may appear to be more evidence of an employee bias in the tribunal. However, it should be noted that for stigma damages to be considered by the tribunal, an employee must submit extensive evidence to show they have tried but failed to find a new job before a tribunal is entitled to conclude that stigma damages are appropriate. Another positive outcome of this case for employers is the decision that a reduction in compensation may be made in a claim for a discriminatory dismissal, if the employer can show that the employee would have been dismissed regardless of whether or not the discriminatory act took place.

To lawyers, this case serves to reinforce the best practice advice given to employers. Employers should ensure that when decisions are made in such situations, they are impartial and plausible and that supporting documents are prepared and kept. If a claim gets to a tribunal hearing, an employer will have an excellent chance of defending it if there was objective reasoning behind their decision making and if they have the paperwork to show this.

If you would like more information on this or a related matter please contact Paul Gaff on 01293 742739 or email paul.gaff@thomaseggar.com

'There is no longer a requirement that employees raise a grievance before making certain claims...'

Preparing for your day in court...

In the current economic climate, our employment team is seeing the number of employment tribunal claims rocket. Disgruntled ex-employees are finding it difficult to get another job and therefore have no reason not to put in a claim. They are becoming increasingly savvy and realise that they do not need legal representation to make a claim; the process doesn't have to cost them anything. However, for the employer, the costs can be significant, not least due to the management time taken up by defending a claim.

We are finding that many of our clients are deciding to fight claims, rather than settle out of court. They want to send a message to other employees that simply by issuing a nuisance value claim, they cannot expect a big payout. Whether you decide to negotiate an early settlement or fight the claim to the bitter end, this article provides a few hints and tips which will help you along the way.

Arrival of the ET1

An ET1 landing on your desk in the morning may be the first point at which you are aware that a current or ex-employee has a complaint. There is no longer a requirement that employees raise a grievance before making certain claims (such as for discrimination and whistleblowing) and therefore you may not have any warning that a claim is on the horizon.

If you are instructing solicitors, you need to tell them about the new claim and send a copy of the ET1 over to them as soon as possible. The timescale for responding is tight, so don't let it fester on your desk for a week before dealing with it.

You will also need to speak to the people who were involved (for example the manager who made the decision to dismiss) and find out from them what happened so that you have the necessary facts which will form part of the response.

Documents

All documents relevant to the claim will need to be disclosed to the claimant. The exceptions to this rule are documents which are 'without prejudice' (such as negotiations regarding potential settlement) or privileged documents (meaning that they were created for the purposes of obtaining or giving legal advice - broadly correspondence between you and your solicitor).

The documents will come from a variety of sources, but principally the employee's personnel file, the staff handbook and internal communications.

Emails between managers are disclosable. This sometimes comes as a surprise to companies. So that email from one of your directors to the ex-employee's manager telling the manager to 'just sack him' before the disciplinary process had started is likely to end up in the tribunal bundle! If the documents are already in existence, there is little you can do to remedy this. However, you might want to consider giving your managers training on this issue for the future.

It is best to gather the documentary evidence together as soon as you receive the ET1. That way, you can review it as part of putting together the response to the claim. If you are instructing solicitors, it will also help them to piece



together what happened and identify whether there are any weaknesses in your defence at an early stage.

Discrimination questionnaires

If a claimant is making a discrimination claim, sometimes they will serve a discrimination questionnaire on you. It is important to respond to a discrimination questionnaire within the prescribed time limit (within eight weeks of receipt) as failure to do so means that the tribunal can draw adverse inferences from your failure to respond within the timescale, or from evasive replies.

Discrimination questionnaires are often lengthy and it can be an onerous task compiling your responses to them. The message is: start getting the necessary information for the answers together as soon as possible, otherwise you will run out of time.

Witnesses

If the claim proceeds to a final hearing, you will need to call the people who were involved in the dismissal etc as



witnesses. It is a good idea to get them on board at an early stage and ensure that you have been notified of any dates when they are unavailable to attend a hearing so that the tribunal can be informed of dates to avoid.

Mitigation

One issue which will arise during the course of preparing for a tribunal hearing is whether the claimant has mitigated his loss (ie whether he has made sufficient efforts to try to get another job). The onus is on the respondent company to show that there has been a failure to mitigate.

The upshot of this is that you need to be able to persuade the tribunal that there are other jobs out there on a similar salary to which the claimant was previously on for which the claimant is qualified. I would suggest that you undertake regular job searches (eg on recruitment agency websites) from the moment the ET1 arrives and keep the results of those searches. They can later be disclosed and used as evidence in a

remedies hearing (where the tribunal will decide how much compensation the claimant should be awarded, if any).

And finally...

A tribunal hearing does not have to be viewed as a negative thing. We have clients who have made a point of fighting (and winning!) high profile claims within their organisation and have actually seen a reduction in the number of claims they have received in the following months. Additionally, it tends to give your managers (including those not involved in the tribunal hearing) a bit of a scare and therefore prompts them to ensure they follow the correct procedures in the future.

So the message is: get your house in order as soon as the ET1 arrives and the tribunal process could actually be beneficial for your organisation.

For more information on this or a related matter please call Kylie Coulter on 01635 571016 or email kylie.coulter@thomaseggar.com

Newsbrief

Employment Winter 2010 event series

The employment team is delighted to invite you to our Winter 2010 event series, taking place across our office network from January to March. These seminars are free of charge and places are allocated on a first come first served basis. Each session will last approximately one hour with refreshments provided on arrival.

Topics include:

Protecting your business from your employees/ex-employees

Learn how businesses can protect themselves against unfair competition by ensuring that employees agree from the beginning not to steal your intellectual property, approach clients or undermine your relationship with suppliers.

Managing the tribunal process

We show you how best to defend yourself from the beginning to the end of a tribunal.

Green shoots

With the economic recovery just around the corner, we explore how best to organise your people from recruitment to building in flexibility to new employment contracts.

For dates, venues and further details on booking your place at these events, please visit our website:

www.thomaseggar.com/events or alternatively, please contact Katie Pow at: katie.pow@thomaseggar.com

'... the scheme is designed to minimise the administrative burdens on employers.'

Additional paternity leave regulations

The Government hopes to grant parents additional choice and flexibility as to how they use their paternity and maternity leave. A consultation has taken place which gave employers and parents a chance to view and comment on the forthcoming draft regulations before legislation is brought before Parliament.

Currently, employed fathers are entitled to two weeks paid paternity leave and a mother 52 weeks maternity leave, of which up to 39 weeks are unpaid.

The new provision is designed to give greater flexibility and to provide parents with more choice in child care responsibilities, and a more equitable share of leave entitlements.

Additional Paternity Leave (APL) gives mothers the right to be able to transfer the last six months of their maternity leave, or part of that leave, to the father once the mother has returned to work. Some of this leave can be taken during the mother's maternity pay period.

The leave must be taken any time from 20 weeks after the child is born and must end by 12 months after the child is born.

Like current paternity leave, the new right is not limited to 'father'. It will also include partners and civil partners of mothers and adopters adopting from within the UK where there is an entitlement to statutory adoption leave.

The good news for you is the scheme is designed to minimise the administrative burdens on employers.

The Government has adopted a 'light touch' manner to the question of how the entitlement to leave and pay will be verified by the employer. Fathers will be required to 'self-certify' by providing details of their eligibility to their employer. This avoids the need to involve HMRC or the mother's employer in the verification process although you are still free to carry out additional checks

to verify the information. You should be aware that HMRC will conduct random checks to ensure the system is not being abused by employers and employees.

In general the father must produce:

- details of the expected week of the child's birth, the actual date of the birth and the dates which he has chosen to take the leave;
- confirmation that he has responsibility for the upbringing of the child and will be taking leave for the purpose of caring for the child; and
- a declaration to confirm the name and address of the mother, the date the mother intends to return to work and the mother's National Insurance number. This declaration must be signed by the child's mother in order to confirm that the information provided is correct.

Additional Statutory Paternity Pay (ASPP) may also be available for those entitled to APL although there are a number of further conditions. A father will only be entitled to receive ASPP if the child's mother was entitled to Statutory Maternity Pay; and the child's mother has returned to work. Additional evidence will be required to claim ASPP.

You should be aware that the regulations contain obligations and rights which are familiar to other family friendly rights, eg notice provisions to change a proposed period of leave or return to work early, the right to return to the same job and not to be selected for redundancy. You should keep these in mind if you happen to undergo a redundancy consultation



when a member of staff is on paternity leave or plan to change their job role on their return.

The legislation is geared up to protect you. The Government is seeking to strike the right balance, taking into account the need to keep the administration of leave and pay relatively simple; the need to provide certainty over when leave can be taken and when it starts; and the need to provide you with a level of protection against abuse. This is all good news. The Government has recognised the potential added pressures on business and they are keen to minimise these as much as possible. Where statutory payments are concerned, the Government also needs to consider the balance between these interests and protecting the taxpayer from the consequences of payments made or claimed in genuine error or fraudulently.

The regulations have been generally well received with only a few minor anomalies to be ironed out before they are enacted. It is the Government's intention that the legislation be brought into force from April 2010, with effect for parents of babies due from April 2011, so you should begin thinking about reviewing your policies to bring them in line with the legislation sooner rather than later.

If you would like any further information on this or a related matter please call Simon Fenton on 01635 571038 or email simon.fenton@thomaseggar.com

Climate change - a philosophical belief?

Employers have long had to deal with employee protection against discrimination, victimisation or harassment on religious or philosophical grounds; however, the recent decision in *Grainger plc and others v Nicholson* UKEAT/O219/09 marks a dramatic increase in the scope of such protection, and potentially leaves employees with much greater scope to bring claims founded on scientific, political, and even diet related 'philosophical' beliefs.

In the instant case Mr Nicholson, after his position as Head of Sustainability at Grainger plc was made redundant in July 2008, asserted that (amongst other claims) he was dismissed because of his belief that mankind was headed toward catastrophic climate change and in the existence of a moral duty to live in a manner that mitigates or avoids this, and to persuade others to do the same.

Since coming into force in December 2003 the Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660 ('the Regulations') have prevented discriminatory treatment of employees on the grounds of religion, religious belief or similar philosophical belief. However, from April 2007 the type of philosophical belief capable of legal protection was arguably widened to cover any philosophical belief after the ancillary removal of the word 'similar' by the Equality Act 2006.

In only the second case on the point since this change, the tribunal (at pre-hearing review and later on appeal) considered whether Mr Nicholson's alleged belief in climate change could fall within the meaning of philosophical belief; it held that it could, and provided specific guidance on the possible nature of 'philosophical belief' under the Regulations.

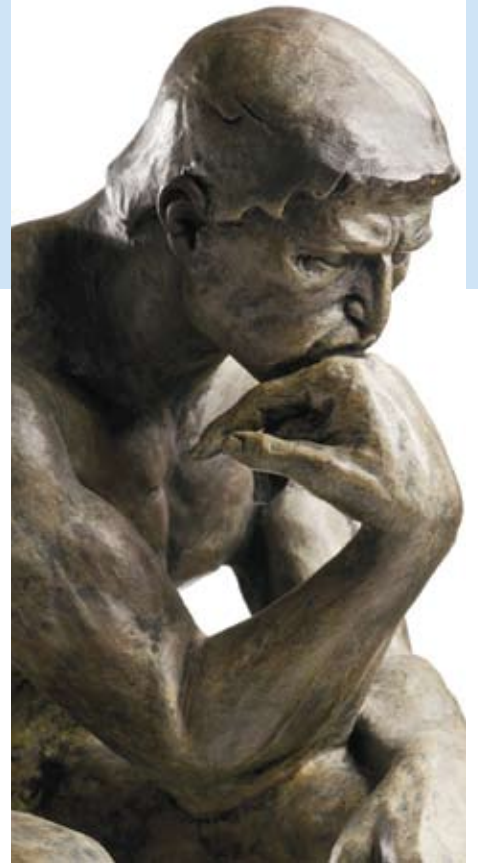
Any such philosophical belief must be genuinely held and not merely an opinion or view based on information currently available; it must be as to a weighty and substantial aspect of human life and

behaviour; it must be able to attain a certain level of cogency, seriousness, cohesion and importance, and be a belief worthy of respect in a democratic society that is not incompatible with human dignity, nor in conflict with the fundamental rights of others.

In light of the respect attributed to climate change in global politics, the tribunal considered all the above factors to be satisfied. Mr Nicholson's views were considered to be not merely opinion, but in fact strong beliefs affecting most aspects of his life (eg how he lives, how he travels, what he buys and what he eats). It is clear however, that a mere assertion of such a belief will not suffice and that a cross-examination is likely to be required to evidence the strength of any purported belief.

More interestingly, it was also found that beliefs based on political philosophies such as socialism, Marxism, communism or free-market capitalism may qualify; this is so despite settled opinion that political beliefs or the support of a political party did not fall within the ambit of the Regulations. So too could scientific beliefs like Darwinism or even creationism fall within the Regulations, and even one-off beliefs such as vegetarianism and pacifism appear to qualify.

Although it may appear that the floodgates have opened, the requirement that beliefs be worthy of respect in a democratic society aims to restrict potentially 'problematic beliefs' such as those homophobic or racist political



philosophies. It should also be noted that whilst the Grainger plc decision undoubtedly has significant implications, the key issue of whether Mr Nicholson actually suffered discrimination on the basis of his belief has yet to be proven.

Even if Mr Nicholson's beliefs were ignored by the company there remains a sound difference between a right to hold protected beliefs and a right to impose them on others; the fact that Grainger plc refused to act in accordance with an employee's belief does not in itself amount to discrimination and so this decision should not be seen as the thin end of the wedge for similarly based complainants. Nevertheless it is clear that, for employees, the scope of protection is undoubtedly growing.

For more information on this or a related matter please contact Esther Smith, partner on 023 8083 1203 or email esther.smith@thomaseggar.com

TUPE considerations

- to outsource or not to outsource...

The decision to outsource services is often considered to be a sound one in the UK and Europe's increasingly competitive markets. However, can a business actually be sure it is making a good commercial deal when outsourcing, and can the new service provider really undertake the service in a better or more cost effective manner?

Where the Transfer of Undertakings (Protection from Employment) Regulations 2006 ('TUPE 2006') are concerned, the answer is possibly not.

TUPE has historically ensured that, for those business transfers falling within its ambit, all employee rights, obligations and liabilities resting with the transferor at the time of the transfer, pass to the transferee. Outsourcing has long since been recognized as falling within the scope of TUPE but this was formalized with the implementation of the new TUPE regulations in 2006. These substantially widened the obligations to confirm and codify their application to the outsourcing of business services to 3rd party contractors, the transfer of those services to a different third party contractor, and also the bringing of those services back in-house (in-sourcing).

Whilst the supply of goods or the buying-in of services on a one-off basis is generally exempt, TUPE does pose significant problems for businesses that regularly compete and tender for services currently provided by other organisations.

In many cases the liabilities undertaken by a transferee cannot be properly identified until after the transfer has taken place. Whilst TUPE 2006 provides that a transferee must now be given certain limited information to assess the potential liabilities being undertaken (such as the minimum employee liability information), the compulsion to provide this does not arise until 14 days before the transfer actually takes place. Given that a process of tendering will commence much earlier than this, businesses will often be forced to 'contract blind' as it will be almost impossible to know what liabilities exist at the time a tender is entered into.

Also, given that the current service provider (and employer of any employees in scope for transfer) is usually in direct competition and has no contractual relationship with the incoming company, the ability to rely on non-statutory commercial arrangements to provide information earlier is likely to be minimal.

As well as the difficulty in identifying the terms and conditions of employment, the task of indentifying which employees, if any, form part of an organized grouping of staff dedicated, or materially dedicated, to the transferring contract is also a potential headache. An outgoing provider may well want to off-load as many staff with the contract as possible so as to avoid redundancy costs or the burden of dealing with underperformance issues; this may well lead the outgoing provider to misrepresent the number of employees in scope for transfer. Again, the company tendering for work is left in a difficult position to challenge information presented to them by a party with whom it has no contractual relationship.

On a practical level the decision to outsource services or change service provider based on poor performance may well result in the same employees providing the service via a new company, and with the same issues continuing as a result. Further, businesses reintroducing services in-house may well find themselves burdened with cumbersome and unexpected liabilities as additional staff employed by the previously contracted party may transfer with the services 'back' to the outsourcing business.

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