



TUPE - COLLECTIVE AGREEMENTS

As many employers will no doubt be aware, the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) apply to protect the rights of employees in the event of a change of employer, for example owing to a relevant transfer of a business or a service provision change. Under TUPE, most rights and liabilities under employment contracts transfer to the new employer, including terms under collective agreements.

In *Parkwood Leisure Ltd v Alemo-Herron & others*, the Court of Appeal considered the scope of the transferee employer's liability in respect of salary increases incorporated into contracts of employment by collective agreement. The employees (AH) were initially employed by a local authority, with their terms of employment entitling them to salary increases 'in accordance with collective agreements negotiated from time to time' by the National Joint Council for Local Government Services (NJC).

AH's contracts transferred to C under TUPE in 2002 (1st Transfer), where AH continued to receive salary increases in line with NJC settlements. AH then transferred under TUPE to Parkwood Leisure (PL) in 2004 (2nd Transfer). Subsequent to the 2nd Transfer, NJC negotiated a new settlement. PL was not party to the negotiations and would not pay the increase.

AH claimed unlawful deduction of wages, arguing that regulation 5 of TUPE obliged PL to comply with the terms of their contracts, including salary increases negotiated by the NJC. Following the European Court of Justice's decision in *Werhof v Freeway Traffic Systems*, the tribunal dismissed AH's claim. The EAT overturned the tribunal's finding on the basis that UK law had approved a 'dynamic' approach to employment contracts, i.e. that it was not just the collective agreement in place at the point of transfer that applied, and previous UK decisions showed that TUPE gave employees wider rights than were recognised in *Werhof*. PL appealed.

The Court of Appeal has now held that, despite prior domestic case law to the contrary, the ECJ's decision in *Werhof* indicated that EU law had at all times required a 'static' interpretation of clauses in employment contracts incorporating terms from collective agreements. Regulation 5 of TUPE had to be implemented in line with, and construed in accordance with, the relevant ECJ case law. The UK had no obligation to provide greater rights to employees and, as such, only terms from collective agreements in force at the time of the transfer would transfer to the transferee.

This case helpfully clarifies that employers will only be bound by collectively agreed

terms in the contracts of employment existing at the point of transfer, and not by any subsequent change to those terms where the employer is not party to the collective agreement. In assessing their liability, employers should take care to be clear as to existing contract terms. In particular employers should clarify what collective agreements (if any) are in force at the time of the transfer and what terms are incorporated into the contracts of employment. It seems that they will not, however, need to concern themselves with collective agreements negotiated and affecting the transferor, following the transfer.

Martineau has an experienced team of lawyers who would be happy to discuss with you the potential implications for your organisation.

This bulletin contain a summary of a complicated issue and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.

**Please contact Jane Byford, Partner & Head of Employment Group on:
T: +44(0)800 763 1378 or
E: jane.byford@martineau-uk.com**