

Understanding TUPE 2006

It is now one year on from the introduction of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which came into force on April 6 2006, replacing the 1981 Regulations.

Surprisingly, there have been no reported decisions on the new Regulations, however the last 12 months have seen a number of significant cases based on the 1981 Regulations and these cases now affect transfers. The key points are summarised below.

1. The date upon which a TUPE transfer takes place depends on the facts of the case and may not be the date specified in the contract by the parties. In the case of *Celtec v Astley* a number of employees were seconded to the purchaser of the business prior to the contractual transfer date. The European Court of Justice ruled that a transfer occurs on the date that the responsibility for carrying on the business passes to the purchaser and cannot be postponed.

In this case, as the responsibility for the business had already passed to the purchaser, the transfer date was deemed to be the earlier date. This is an important point as in practice contractors often assist and carry out services prior to the contractual transfer date and therefore could find that they incur liabilities for failure to consult, etc., as the transfer date has already occurred.

2. From the case of *Power v Regent Security*, it is now clear that where new contractual terms are agreed after a TUPE transfer, the employee can 'cherry pick' between the new terms and his or her old terms of employment thereby picking out the elements of contract which are most favourable to them.
3. In the case of *London Metropolitan University (LMU) v Sackur*, LMU tried to harmonise terms and conditions of employment some two years after the transfer. Some of the employees refused to accept the changes and claimed unfair dismissal. The Employer tried to argue that there had been an economic technical or organisation reason (ETO) which justified the changes. The

Employment Appeal Tribunal held that as the changes did not involve changes in the number of employees and/or functions of employees that this was not an ETO reason. As you can see, making changes to employee's terms and conditions post transfer is extremely difficult and problematic. Great care must be taken by employers when embarking upon this exercise to avoid liabilities and unwanted consequences. TUPE is a complex area and can often lead to claims against employers.

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