

TUPE: Changing terms and conditions following TUPE transfer

Published 12 October 2018

The facts

The claimants were electricians who had originally been employed by Birmingham City Council. They were subject to several TUPE transfers, ultimately to Mears Ltd. When they were employed by the Council, they were paid a travel time allowance to compensate them for the loss of a productivity bonus caused by the need to travel to different depots. The travel allowance had been paid since 1958, when there were up to 40 depots. Over the years, most of the depots had closed and productivity bonuses were phased out. Before the transfer to Mears, managers had questioned the continued payment of the travel time allowance, and the advice from HR had been that the allowance should be paid. That employer continued to pay the allowance, believing it to be a legal requirement.

After the electricians had transferred to Mears Ltd, Mears stopped making payments of the travel time allowance, on the basis that the engineers did not meet the eligibility criteria for entitlement to the allowance. The trade union raised a grievance, which was rejected by Mears Ltd. A claim was brought, with Mears arguing that their engineers were not contractually entitled to the travel allowance. The employment tribunal disagreed, holding that there had been unauthorised deductions of wages in respect of the non-payment of the allowance. Mears appealed unsuccessfully to the EAT.

However, the ET and the EAT in their judgments had referred to the payments as “outdated” and “prehistoric”. Quoting this, Mears Ltd wrote to the electricians, giving notice that the allowance was “inappropriate, but also it fails to support our business needs going forward and it is wholly unfair on the remainder of the workforce who operate in exactly the same way as the [electricians] and who have not presented any claim to travel allowances.” The letter gave notice that Mears no longer intended to be bound to pay the allowances, with effect from September 2012.

The electricians claimed that the removal of the allowance was void under the provisions of TUPE that protect terms and conditions of employment from being varied where the sole or principal reason for the variation is the transfer or a reason connected with the transfer. On this basis, they claimed that they had suffered unauthorised deductions. An employment tribunal rejected the claims, finding that the operative reasons for the contractual variation were not the TUPE transfer, but were due to the fact that the allowance was outdated and the adverse findings of the tribunal and EAT in the earlier claim. Any contractual entitlement had therefore ceased when Mears ceased to pay the allowance in 2012.

The electricians appealed. They argued that the adverse findings by the EAT and tribunal in the earlier claim were connected to the transfer, and that it had been perverse of the tribunal to have found otherwise. The entire subject matter of the earlier litigation had been the TUPE transfer and their entitlement to the allowance following the transfer, and there was a clear and continuing link with the transfer. The reason given in the letter from Mears - that it was unfair on other members of staff - showed a clear intent of harmonisation. If the tribunal’s interpretation of TUPE was right, TUPE would be ineffective and open to easy avoidance, as any earlier adverse judgment would be relied on as itself providing the reason for a variation of contractual terms. They also argued that it was perverse of the tribunal to have found that Mears’ belief that payments were outdated was not a reason connected with the transfer.

The EAT dismissed the appeal. The tribunal had found that the outcome of the earlier litigation had been the context for the decision to vary the contract, not the reason for it. The litigation had determined the electricians’ contractual entitlement, irrespective of any transfer. The reason for the decision was that the allowance was outdated. Additionally, the employer’s reason had not linked back to the transfer. The belief that the allowance was outdated and justified did not arise purely on the occasion of or because of the transfer: it was a pre-existing belief.

Although Mears Ltd had been faced with the issue on the occasion of the transfer, it was an issue that had confronted management regardless of any transfer, and it would be no different to a new manager coming into the workplace and learning of such an entitlement. The reference to unfairness in the workforce did not show an intent to harmonise, but the need for fairness across different job groups regardless of transfer.

Accordingly, the tribunal’s decision was not perverse, and the variation was not void under TUPE.

What does this mean for employers?

It is not easy for employers to show that the sole or principal reason for a change in terms and conditions in the context of a

TUPE transfer is not the transfer (and, as employers will know, harmonisation of terms and conditions is not permitted under TUPE). If the sole or principal reason for the change was the transfer, the change will be void, irrespective of how long after the transfer the change is made. The question that tribunals will ask is “what was the reason the transferee acted as it did?” Here, it was clear on the evidence that the underlying reason would apply even if the transfer had not happened.

Potentially, there are other claims that employees can bring in situations like this, and employers should be aware of this before deciding to implement the change. These include claims of constructive dismissal and resignation on the basis of a substantial change to working conditions to the employee’s material detriment.

[Tabberer and others v Mears Ltd and Others](#)

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