

The Duty to Inform and Consult under Regulation 13 of TUPE

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The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) have provided a wide range of case law since they came into force. Decisions have often been focussed on issues such as what constitutes a relevant transfer or the effect of insolvency on a transfer. However, there has been surprisingly little case law which deals with the Regulation 13 TUPE duty to inform and consult and the Regulation 15 TUPE claim to a tribunal for a failure to inform and consult.

Given that Regulation 15(9) TUPE makes the transferor and transferee jointly and severally liable for any compensation arising from a well founded complaint of failure to inform and consult it is important that, in practical terms, good advice can be given to all parties to any transaction on how to avoid such a complaint. The case of *GMB v Southern Cross Healthcare Group PLC and others* (2390790/2011, 2300133/2010, 2300492/2012), despite being a first instance decision, gives a helpful insight into the practical issues which arise when there is a duty to inform and consult.

Background

Southern Cross was, until autumn 2011, one of the largest operators of care homes in the UK. It operated 752 care homes with 32,000 residents and employed approximately 44,000 staff. The care homes were leased from 80 separate landlords or were owned by Southern Cross but were subject to bank loans. Southern Cross had a recognition agreement with the GMB union which had been signed in July 2005. From the autumn of 2010 Southern Cross faced mounting financial difficulties as a result of declining occupancy rates and pressure on the rates charged to local authorities due to Government

budget cuts. In March 2011 Southern Cross announced to the stock exchange that it was undergoing financial restructuring. Southern Cross attempted to negotiate with the landlords to reduce their rent bill. A Landlord Committee was set up to conduct those negotiations with Southern Cross. In early June 2011 the Landlord Committee took the decision that the best method of securing continuity of care to the residents of the homes they owned was to transfer the homes run by Southern Cross to new operators. Each landlord was to select a new operator to run its homes. Southern Cross management were informed of the landlords' decision in the middle of June 2011. A restructuring committee was established to facilitate the transfers – it included representatives from Southern Cross, the banks and landlords. On 11 July 2011 a stock exchange announcement was made stating that Southern Cross care homes would be transferred to new operators. The transfer of so many thousands of staff to such a large number of new operators provided a huge challenge – Southern Cross had no control over who the new operators would be and there were commercial sensitivities in the negotiations between the landlords and the potential new operators. The banks behind Southern Cross and each landlord also needed to approve the deals and the Care Quality Commission also needed to approve each transfer. In the meantime continuity of care had to be provided for the 32,000 residents despite the floundering finances of Southern Cross. It was against that background that the TUPE information and consultation process began with the GMB. During that process Southern Cross held a number of meetings at which the GMB met with the potential new operators who provided information direct to the union about the proposed transfers. Southern Cross representatives took notes of those meetings and circulated them to the union and the operators. The first wave of transfers occurred on 30

September 2011, the second wave on 14 October 2011, the third wave by 31 October 2011 and all the transfers had been completed by 14 December 2011.

The tribunal claims

The first claim for failure to inform and consult was issued by the GMB in August 2011. A further three claims ensued against a total of 18 operators. The GMB asserted that they had not been delivered (under Regulation 13(5) TUPE) the Regulation 13(2) information ‘long enough before a relevant transfer to enable the employee of any affected employees to consult the appropriate representatives of any affected employees’.

The tribunal findings

The tribunal made a number of findings which may be of practical application in advising clients involved in TUPE transfers. They found:

- ‘delivery’ at Regulation 13(5) includes delivery by email – whatever forms of written communication were usual when the TUPE wording was first formulated, the reality is that by 2011 email was plainly used as a primary means of written communication;
- by organising a meeting at which information is orally provided and providing written minutes to the union Southern Cross complied with the spirit and the letter of TUPE under Regulations 13(2) and 13(5) to provide information. The tribunal accepted that where the transferor set up and introduced meetings with the union at which the transferee attended it was not unreasonable to characterise the contribution of the transferee (recorded by the minutes of the transferor’s note taker) as being in effect provision of information by the transferor in furtherance of Regulation 13(2). It would undermine the purpose of TUPE to deem that

- information supplied direct from the transferee could never amount to compliance with Regulation 13(2);
- although it may appear to be implied in Regulation 13(2) and 13(5) that the information must be physically provided in writing direct from the transferor to the union that is not what is expressly required. The responsibility for information lies with the transferor but in order to give effect to the purpose of the TUPE provisions it is not necessary to read in a requirement that the information be physically provided in a particular form by the transferor direct to the union;
 - the words ‘the employer shall inform’ at Regulation 13(2) can purposively be read as including the situation where the transferor causes the appropriate representative to be informed or procures that the relevant information is provided. Regulation 13(5) can be read as covering the situation where some of the necessary information is provided by a third party where the transferor has made the arrangements enabling such information to be provided or when the information is provided orally, provided the information was clear and able to be understood;
 - there is no express or implied requirement that a transferor is under a duty to provide information as soon as it becomes aware of that information. There is also no requirement that information be provided all at once or in stages;
 - it was entirely feasible for the GMB to undertake meaningful consultation between the 2 September 2011 (when Southern Cross had disclosed all the information pursuant to Regulation 3(2)) and 30 September 2011 when the first wave of transfers occurred.

Practical application

Although the decision is not binding on other tribunals it does give a useful insight into the purposive approach that tribunals may be prepared to take in TUPE cases.

Increasingly business transfers involve more parties with many different agendas and it may become necessary to think laterally about the best way to provide the statutory information without falling foul of TUPE. It appears that it would be arguable in other cases that:

- contact by transferees with employee representatives could constitute delivery of information by the transferor under TUPE (especially if this is facilitated by the transferor and written notes are provided by them);
- delivery of information can be achieved by email (thereby potentially speeding up the process);
- information need not necessarily be provided as soon as it is known by the transferor and/or the transferee as long as it is provided 'long enough' before the transfer to make meaningful consultation possible;
- 'long enough' need not be an extended period – even where there were a large number of employees a period of 28 days was deemed appropriate.

Key

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) –TUPE

GMB v Southern Cross Healthcare Group PLC and others (2390790/2011, 2300133/2010, 2300492/2012)

Extracts

- ‘delivery’ at Regulation 13(5) includes delivery by email
- It would undermine the purpose of TUPE to deem that information supplied direct from the transferee could never amount to compliance with Regulation 13(2)