Static trumps the dynamic approach

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In July 2013, the European Court of Justice in *Herron v Parkwood Leisure* held that employees who TUPE transfer to a new organisation cannot benefit from collectively agreed terms where such terms are agreed after the date of the transfer and where the new employer is not a party to those collective negotiations.

To put this into context, Parkwood Leisure acquired leisure centres in Lewisham via a TUPE transfer, which meant that the Lewisham employees transferred across to Parkwood with their original contracts of employment. These contracts contained clauses to the effect that they would be entitled to the terms and conditions (in particular relating to pay) negotiated from time to time by the National Joint Council (NJC) for local government. Parkwood were not part of the NJC. Post-transfer, the NJC negotiated new terms which increased the employees' pay and which Parkwood refused to implement on the grounds that it was not bound by the new terms of the collective agreement as these were negotiated post-transfer and without its participation. The employees brought unlawful deduction of wages claims, which Parkwood disputed.

The case went all the way through the legal system up to the Supreme Court who referred the matter to the ECJ, who held that Parkwood were right. In essence, the terms and conditions in the transferring employees' employment contracts were frozen as at the date of transfer and could not be updated as a result of further post-transfer negotiations with the NJC.

The impact of TUPE may be further reduced in September 2013 when the government will respond to its TUPE consultation paper, which has proposed to limit the future applicability of terms and conditions derived from collective agreements to one year from the date of transfer.

In the meantime, for employers who inherit staff under TUPE from the public sector, this decision provides a level of certainty over transferring employees salary costs when tendering for service contracts. However, companies in a similar position to Parkwood should note that if the negotiating process of collective agreements allows for their participation, then employees may be able to benefit from collectively agreed terms from time to time.

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