TUPE: beneficial contractual changes were void because they were by reason of the transfer

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TUPE: beneficial contractual changes were void because they were by reason of the transfer

In this case, the EAT considered whether four company

directors were entitled to rely on contractual terms which had been put in place shortly before a TUPE transfer and were designed to significantly improve their position post-transfer.

What does the law say?

Where an employer inherits employees following a TUPE transfer, it is unable to change their contractual terms where the transfer is the sole or principal reason for the change. An attempt to do so will be void.

However, in the 2007 case of **Power v Regent Security Services Ltd** the Court of Appeal held that the incoming employer was bound by more favourable contractual terms that it had agreed with the transferring employees. This decision has been understood to mean that employees should be able to rely on positive changes to their contracts, even if they are transfer-related. Non-binding Government guidance also suggests that contractual changes which are "entirely positive" for the employee are allowed.

What happened in this case?

Mr Ferguson and three fellow claimants (the **Claimants**) were directors of Lancer Property Asset Management (**Lancer**). Lancer provided estate management services to a single client, Berkeley Square Estate, in respect of a portfolio of 140 properties worth £5.5 billion owned by the Royal Family of Abu Dhabi.

Berkeley Square Estate terminated the contract with Lancer and moved its business to Astrea Asset Management Ltd (**Astrea**). This amounted to a service provision change under TUPE. Two months before the transfer took place, the Claimants made a series of extremely favourable changes to their own terms and conditions, including introducing rights to generous pay rises, guaranteed bonuses and termination payments, as well as increasing their notice periods.

Two of the Claimants were not accepted by Astrea. The remaining two transferred to Astrea but were dismissed shortly afterwards. All four brought claims against Astrea, including for the contractual termination payments introduced just before the transfer took place. The Employment Tribunal rejected the claim on the basis that the pre-transfer changes were abusive because the Claimants had sought to take advantage of the effect of TUPE to award themselves additional compensation. The Claimants appealed to the EAT.

What was decided?

The EAT dismissed the Claimants' appeal on two grounds.

First, the Claimants had sought to argue that the restriction on transfer-related variations only concerned changes which were unfavourable to the employee. The EAT rejected this argument, referring to the fact that the underlying purpose of the TUPE legislation is to safeguard the rights of transferring employees, not to improve them. The Powercase was distinguished on the basis that, amongst other things, the contractual variation in that case had occurred after the transfer. The EAT concluded that TUPE prevented any purported variation by reason of the transfer, regardless of how favourable it is to the employee.

Second, the EAT agreed with the Employment Tribunal that the Claimants' actions had amounted to an abuse of the TUPE legislation. The pre-transfer variations had been designed to improve the Claimants' position and obtain an improper advantage, rather than to safeguard rights.

What are the learning points?

In a business sale situation, a buyer will usually require a seller to agree not to change employees' terms and conditions in a specified window before the transfer without the buyer's consent. Outsourcing situations are more complicated, since the incoming contractor has no direct contractual relationship

with the outgoing contractor. For this reason, the outsourcing agreement between the client and the contractor usually includes a similar restriction on the contractor changing terms pre-transfer. If it does not, it's possible that the incoming contractor will seek indemnity protection from the client to cover any losses suffered as a result of any such changes. This latest decision is helpful in that it provides that, even without such contractual protection, any changes made by reason of the transfer will not be enforceable.

Ferguson and others v Astrea Asset Management Ltd

If you would like to discuss any of the issues raised in this article please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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