GLOBAL EMPLOYMENT LAWYERS

When can a share sale trigger TUPE?

The TUPE Regulations* protect the rights of employees on the sale of a business providing for their automatic transfer to the purchaser with continuity of service. There is no equivalent protection for employees on the sale of the shares in their employer because their relationship with their employer is not impacted by the mere change of owner. TUPE gives employees enhanced rights including:

- consultation rights;
- enhanced dismissal rights;
- protection from changes to terms and conditions; and
- a right to object and walk away from their contract.

It is well established that the sale of the shares in company will not, by itself, trigger the application of TUPE. However, in practice there is often either a formal “hive up” of the business to its new owner or a less formal process of operational integration. When does this trigger the protection offered by TUPE?

ICAP v Berry [2017] concerned the sale by ICAP of its global broking business to Tullet Prebon. Prior to the sale the business was separated from ICAP’s remaining business and assets were moved into legal entities which were then sold. The legal entities that were sold included the group services company that employed each of the staff employed in the business.

The defendant was serving notice of termination of employment and on gardening leave at the time of the sale. He alleged that his employment had transferred under TUPE and he sought to exercise his right to “object” under TUPE - with the effect that he was immediately released from his contractual notice period and free to immediately join a competitor.

It was common ground that the simple acquisition of control did not constitute a transfer within TUPE. His case was that a new parent company took control of the global broking business and, as a result, they became employer for TUPE purposes. He pointed to the following:

- Services such as HR and legal were centralised.
- Strategic targets and consolidated systems and procedures were introduced across the Tullet’s global broking business.

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- A unified brand was adopted.
- ICAP's governance and management structure were replaced by Tullet's governance and management structure.
- ICAP directors on the boards of the target companies were replaced with Tullett nominees.
- ICAP's global broking business was integrated into Tullet's global broking business overseen by an integration management office with desk mergers, integration of IT systems, global corporate functions, systems, controls and pay.
- Cost synergies from redundancy and redundancies.
- Changes to employee terms and conditions of employees

The judge rejected the claim holding that at the level of their day to day management the business of ICAP and Tullet continued to be run in the same way as before. He pointed to the fact that the business continued to be run from separate premises, with two distinct brands and with no change to what employees were doing. He found that there was no evidence of substantial mergers of desks nor that pay was centralised or made uniform. He held that the integration plans were entirely consistent with a parent company asking its subsidiaries to make savings in the running of the business and did not mean that it had become the employer of the staff or become responsible for the day to day running of the business.

The decision will be of particular significance in businesses (such as broking or other financial or professional services businesses) where there is the risk of the loss of key staff or in unionised environments where there is a risk of a large scale failure to consult claim.

*The Transfer of Undertakings (Protection of Employment) Regulations 2006 which implement the Acquired Rights Directive 2001/23 in the UK.

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