

By Jumoke Adejimola

A recent case (23 February 2012) re emphasises the protection that TUPE provides to both employer and employees and the importance of correctly following TUPE transfer regulations. In the case of *Gabriel v (1) Peninsula Business Services Ltd (2) Taxwise Services Ltd* UKEAT/0190/11, the employee won her appeal against the judgement of the employment tribunal. Ms Gabriel, a marketing consultant, lodged a complaint of sex and race discrimination claim against her employer. Unknown to her, her employment had been transferred from Peninsula to Taxwise, following a corporate reorganisation. She did not receive the email that was sent notifying the employees of the transfer and that terms and conditions of employment remained the same. She did not think to check the identity of her employer when the Second Respondent's name appeared on her payslips and p60, as her pay remained the same. When she issued her claim, she named Peninsula as the respondent then later added Taxwise.

The history of her claims is as follows. On 1 April 2009, Ms Gabriel was transferred without her knowledge to the Second Respondent. On 25 June 2009, she submitted a grievance to the First Respondent's HR manager, as she believed that the First Respondent was her employer. On 8 September 2009 and 13 March 2010, she lodged her complaints of sex and race discrimination against the First respondent. On 16 March 2010 she wrote to the First Respondent indicating that she was unsure of who her employer was. Around 19 April 2010 she joined the Second Respondent to the claims and on 20 April 2010, the First Respondent advised her that the Second Respondent was her employer.

The Employment Tribunal held at a pre-hearing review that it had no jurisdiction to hear her claim against Peninsula, because it was time-barred, but her claims against Taxwise were in time (time was extended for one of the claims against Taxwise). However, the Employment Appeal Tribunal disagreed with this decision. The EAT held that she had remained an employee of Peninsula as there was no relevant TUPE transfer under the TUPE regulations, so pre-TUPE contract law applied in these circumstances. An established principle of contract law is that there can be no transfer of employment without consent or knowledge. As there had been no consent or even implied consent, it was held that Peninsula was her 'general employer' and she could pursue claims against both employers.

This case demonstrates the risks associated with ignoring TUPE regulations, employers should seek legal advice before they transfer employees to another undertaking, otherwise they may end up with liabilities for transferred employees.

What are the procedures under TUPE? The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), is a complex area of UK law which protects the rights of employees when they are transferred from one undertaking to another. All rights, powers, duties and liabilities connected to their employment also transfer to the new employer and the pre-transfer employment contracts are treated as if they are between the employees and the new employer.

The new employer will have responsibility for any employment claims that employees have immediately before the transfer. For example, if an employee has lodged a sex discrimination case against the outgoing employer, before the transfer, the liability of this claim will transfer to the new employer.

TUPE imposes legal obligations under regulations 13-15 on both the outgoing employer and incoming employer. They are required under the regulation 13(2) to consult and inform representatives of the

transferring employees about the proposed transfer long before the transfer date. The outgoing employer is required to provide information to employees of any measures that the incoming employer will implement that will affect the transferring employees, such as changes to job descriptions or redundancies. The incoming employer will also have to inform and consult its own employees that will be affected by the transfer.

Employee liability information must be provided to the incoming employer by the outgoing employer. This includes the identities, ages, copies of contracts of employment, collective agreements and in the preceding two years, details of any grievances, disciplinary matters, actual or potential claims against the organisation by the transferring employees. This enables the incoming employer to identify any risks of employment tribunal claims by transferring employees.

Interestingly, MR Justice Akenhead limited the protection of TUPE in the case of *Law Society of England and Wales v Secretary of State for Justice & Anor* [2010] EWHC 352 (QB). The claimant had sought clarification on the employment position of its employees where the functions of the Legal Complaints Service were transferred to the new Office for Legal Complaints. The judge decided that there was no transfer of an undertaking in this case because the economic entity had retained its identity. He warned against 'jumping to the conclusion that the mere fact that the service provided by the old and new undertaking is similar does not justify the conclusion that there had been a transfer of an economic entity'.

*Jumoke Adejimola works for the Free Representation Unit in London, representing clients in all matters pertaining to employment law. She also is a contributor to the EELC, the Official Journal of the European Employment Lawyers' Association.*