

## **TUPE – Move from direct employment to subcontracting to franchisees was connected to a transfer but justified**

Meter U Ltd provides meter reading services to electricity suppliers and uses only franchisees who are limited companies. Following their success in a retendering exercise, they decided to apply this business model to the contract, dismissing all transferring employees by reason of redundancy with the intention of contracting with franchisees (all individuals who had set up limited companies) instead. The Transfer of Undertakings (Protection of Employment) Regulations 2006 applied to these transfers and the dismissals were found to be connected to the transfer. While Meter U was obliged to carry out an information and consultation process and accept transferring staff it was then able to justify post transfer dismissals with an economic reason which entailed changes to the workforce.

At the first stage, the Employment Tribunal concluded that TUPE did apply to the transfers and the dismissals were connected to the transfer. Under the TUPE Regulations, dismissals that are connected to the transfer are automatically unfair unless the new employer can show that the dismissals were justified by an economic, technical or organisational reason entailing changes to the workforce (an ETO reason). An ETO reason can also be used to justify variations to terms and conditions that are connected to the transfer.

While the move from direct employment of individuals to contracting with franchisees was a different economic model (and the latter was considerably cheaper), the employees argued that the same number of people were required to carry out the work, so there were no changes to the workforce. The Employment Appeal Tribunal disagreed. Genuine franchisees and contractors are not counted as parts of the workforce for TUPE purposes and a move from employing staff to using a franchise model meant a large reduction in the size of the workforce.

The decision in favour of the new employer was not the end of this case. This case was sent back to the Employment Tribunal to consider whether the franchisee arrangement was a

'sham' and an employment arrangement (to avoid TUPE), as argued by some individuals, and to decide whether the redundancy process followed had been fair. Specialist advice is required when accepting staff in a transfer or an outsourcing exercise or where you wish to reduce staff numbers or impose changes. Even if a new employer is entitled to rely on an ETO reason to justify dismissals, a fair procedure must be followed to avoid claims for unfair dismissal.

*Meter U Ltd v Ackroyd & Others UKEAT/0206/11/CEA*

*Meter U Ltd v Hardy & Others UKEAT/0207/11/CEA*

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