

As storm clouds gather, it pays to know your rights

If you are asked to change roles or transfer your employment to another organisation, a grasp of employment law could provide a lifeline

With the new government settled into Holyrood and continuing economic uncertainty, it is predicted that we will soon see further changes to many public-sector organisations. Increased outsourcing, collaboration and partnering will be on the horizon, particularly in the further education sector.

Employers looking to encourage staff to change roles or transfer their employment contracts to another organisation will be mindful of the employment law considerations.

Public-sector workers are protected by the Cabinet Office Statement of Practice, in particular the statement on staff transfers in the public sector, published in 2000 and revised in 2007. Statutory guidance has also been issued by Scottish Ministers under section 52 of the Local Government in Scotland Act 2003 on contracting by Scottish local authorities.

This statement and guidance provides that public bodies should conduct transfers or contracting-out exercises on the basis that staff will transfer under TUPE - the Transfer of Undertakings (Protection of Employment) Regulations 2006 - unless there are exceptional reasons not to.

Even if TUPE does not apply in strict legal terms, the guidance for public departments is that staff should be treated no less favourably.

Consultation by the Treasury has recently closed on proposed amendments to the Fair Deal Policy, which deals with treatment of pension provisions on public-sector staff transfers. This policy offers "broadly comparable" pensions to staff who are compulsorily transferred from the public sector. As the Scottish Government has direct responsibility for public service pension schemes, it will need to decide what approach it will take once the consultation is completed. While the legal status of the policy or guidance may be debatable, public-sector organisations expect employers to pay heed to them within contractual terms, and their implications are far-reaching.

The TUPE regulations afford employees rights, on "business" transfers, to the same continuity and terms and conditions of employment they had previously. They specifically apply to "public and private undertakings engaged in economic activities, whether or not they are operating for gain". This can include outsourcing by public-sector and other Government agencies of ancillary services. However, "an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities" is not a relevant transfer for the purposes of TUPE.

The scope of TUPE is vast and many employers will not be aware of its potentially far-reaching consequences. Briefly, TUPE will apply when there has been a "service provision change", including contracting-out, re-tendering and in-sourcing of services, and when certain conditions have been met, namely:

- there is an organised grouping of individuals which has as its principal purpose the carrying out of the activities on behalf of the client;
- the client intends that the activities will, following the service provision change, be carried out by the transferee, other than in connection with a single specific event or task of short-term duration; and
- the activities concerned do not wholly or mainly consist of the supply of goods for the client's use.

Even if one of these conditions fails, a TUPE transfer may still exist if the "business transfer" test is satisfied, ie, there has been "a transfer of an undertaking, business or part of an undertaking or business ... where there is a transfer of an economic entity which retains its identity".

Mergers, collaboration and partnering have the potential to fall under the auspices of TUPE. If it does apply, employees will be transferred over to the new employer, who will be legally bound to provide the transferred staff with the same terms and conditions of employment as before - except in relation to their occupational pensions.

There are also obligations which must be met before the transfer. Failure to do so can be expensive, with protective awards for failure to inform and consult being up to 13 weeks' pay per affected employee; and penalties starting at £500 per employee on the transferor for failing to provide statutory information on employees.

As regards cost sharing, HM Revenue and Customs has just released its consultation document on the UK's implementation of the VAT cost-sharing exemption. The EU directive states that member states shall exempt from VAT:

"... the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of joint expenses, provided that such exemption is not likely to cause distortion of competition."(EU directive 2006/112/CE, Article 123(1)(f))

The enactment of this exemption into UK VAT law, likely in 2012, will be good news for FE colleges that want to share services with each other, and indeed like-minded third parties. To date, the cost implications, with a VAT rate of 20 per cent, have been prohibitive. This opens up business models underpinned by suitable legal structures for cost-sharing opportunities.

Public-sector organisations considering collaborative, partnering or merger arrangements should bear TUPE and impending VAT changes firmly in mind at the planning and implementation stages of their strategy - and make sure they are aware of the possible pitfalls.

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