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LGR and employment legal issues



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Early workforce planning is key

- Map out staffing structures to meet the needs of the new authority.
- Which roles are affected?
- Will there need to be redundancies?
- Will new posts be created?
- Will there be changes to terms and conditions?
- Any potential changes will affect the type or nature of the consultation required.

TUPE – the Henke exception

- The Transfer of Undertakings (Protection of Employment) Regulation 2006 will generally apply where there is an incorporation of one organisation into another, or the merger of more than one organisation into an entirely new entity.
- However, Regulation 3(5) of the TUPE Regulations states:

(5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer.



Local Government (Structural and Boundary Changes) (Staffing) Regulations 2008

- The Staffing Regulations state that, notwithstanding regulation 3(5) of TUPE, the transfer functions from a predecessor council to a single tier council in connection with one or both of a structural change and a boundary change shall be treated all purposes as a relevant transfer within the meaning of TUPE.
- The Heads of Paid Service issue.



Local Government Restructuring

Guidance on Staffing Issues

A “reasonable” approach should be taken

- 6.3.6 In relation to the chief executives of predecessor councils, the Government expects all parties concerned to take a reasonable approach. It may be that some such chief executives would like to be considered for posts in the new single tier council – perhaps the chief executive post or a senior management board post. The

requirement in the Staffing Regulations for the post of head of paid service of the new single tier council to be recruited by means of open competition clearly enables chief executives of predecessor councils to apply for this post.

Where will the work function be transferred?

Careful planning will be needed

If more than one unitary authority is being proposed for the area, where will the work function the employees are assigned to transfer?

Will new unitary authorities have the staff they need to deliver the services?

Employees may feel uncertainty which will need to be managed.

“...assigned to the organised grouping of resources or employees.”

- There is no definition of what is meant by “assigned” for the purposes of a TUPE transfer.
- This a question of fact.
- There is no specific percentage of time which an employee must devote to a business unit before being regarded as assigned to it.
- TUPE does not transfer any employees who are only temporarily assigned to the organised grouping.
- For some employees it will not be clear if they are assigned to functions transferring to a new unitary authority – for example those who are undertaking corporate functions.

Consultation

- There will be statutory duties to consult depending on what process is being followed.
- Consultation and communication will need to include any appropriate trade union representatives.
- Essential to engage with trade unions at an early stage to maintain good employee engagement.
- This will assist in creating a positive culture in the new unitary authority.

Which is the correct legal process?

What these changes are will feed into the legal requirements to inform and consult with staff and trade unions.

- Are there different terms and conditions in each organisation and what are these?
- Are there “measures” that will need to be consulted on as part of a TUPE transfer?
- How many staff are affected? Are collective consultation obligations triggered?
- When is it anticipated any of these changes will take place?
- If there is a re-organisation, will this meet the redundancy definition?

Definition of redundancy

Section 139(1), Employment Rights Act 1996

An employee who is dismissed shall be taken to be dismissed by reason of **redundancy** if the dismissal is wholly or mainly attributable to -

(a) the fact that his employer has ceased or intends to cease -

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business -

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

Fire & Rehire / Replace

Now: The Code of Practice on fire and rehire was put in place in July 2024. The practice remains lawful, albeit increasingly high-risk from a reputational and industrial relations perspective.

What the Act says: Dismissals to impose changes to certain key contractual terms (pay and performance, required number of working hours and time off, variation clauses and other changes to be defined in regulations (this may include benefits)) will be automatically unfair if the reason for the dismissal is that the employee did not agree to the employer's attempts to vary these terms, or because the employer intended to employ or engage another person on varied terms to carry out substantially the same role. The ban also extends to dismissals aimed at imposing new flexibility clauses covering these protected terms.

There is a LIMITED qualified exception for employers acting in response to financial difficulties affecting their ability to carry on business as a going concern (and specific exceptions for Local Authority and Public Sector employers)

Fire and re-hire exception – public sector employers and local authorities

A dismissal will not be automatically unfair if the following apply

Local authorities must be able to show at the time of an employee's dismissal, both of the following apply:

- The local authority was subject to a "*relevant intervention direction*", specifying that the reason (or one of the reasons) for the direction was that the local authority was undergoing financial difficulties and containing provisions for financial management or governance, and the local authority shows that the reason for the restricted variation was to eliminate or significantly reduce, or significantly mitigate the effect of, such financial difficulties.
- In all the circumstances, the local authority could not reasonably have avoided the need to make the restricted variation.

Public sector employers will need to demonstrate that the reason for the restricted variation was to eliminate, prevent or significantly mitigate the effect of, any financial difficulties which, at the time of the dismissal were affecting or likely in the immediate future to affect the public sector employer's ability to carry out their statutory function.

Changing terms and conditions – the Local Government Association proposal

- Although dismissal and re-engagement is used as a last resort by councils, removing it as a possibility without a replacement mechanism for making contractual changes would impact on their ability to implement equal pay structures or deliver local government reorganization.
- The LGA therefore proposed a widening of the exception to the automatic unfair dismissal protection so that it would also apply where the financial difficulties were affecting a public authority's ability to perform its functions within budget, and where the reason for the variation of the contract was to reduce inequality between terms of work in accordance with the requirements of the EqA 2010, to ensure value for money in the delivery of public services or to effect local; government reorganisation.



Equal pay considerations

- Whilst there may be common job titles across authorities, the workers may not be doing the same work as functions may be split differently between authorities.
- An analysis of the terms and conditions and skill set of those undertaking these roles will be essential in order to avoid challenges from an equal pay perspective.
- These considerations will need to take place as early as possible.
- What will happen to existing equal pay litigation?

Preparation of accurate employee data will be essential

Accurate employee data around roles and functions will be essential.

Particularly important if staff are transferring.

Job roles and descriptions will also feed into any redundancy process, changes to terms and conditions etc.

Consider data protection implications.

Support mechanisms for staff

- Re-organisation can be a unsettling time for staff.
- Open and honest communication about what's changing, what's protected and how decisions are made will be essential to maintain morale and minimise employee and industrial relations issues.
- Consider how the “us vs them” mindset can be addressed.
- How can a cohesive culture in the new unitary authority be achieved?
- Senior management will be key.

Thank you for listening

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