“Offshoring business processes to popular offshore destinations such as India and China is likely to fall within TUPE.”

Outsourcing—Two Key New Cases, Separately Covering Offshoring and Agency Staff

Two cases have been reported in the last week in the United Kingdom which have important implications for outsourcing offshore and for an outsourcing encompassing personnel engaged as agency staff.

In the first instance, the Employment Appeal Tribunal (EAT) has given its non-binding view on whether the Transfer to Undertakings (Protection of Employment) Regulations 2006 (TUPE) applies to cover a transfer of a business (or services) outside of the UK (and the EU), in the case of Hollis Metal Industries Ltd v GMB and anor. As regards agency staff, the Court of Appeal has given some clarification as to the possibility for implying an employment contract directly between the agency worker and the end-user.

Cross-Border Transfers Covered in Theory

TUPE covers the “transfer of an undertaking” and “service provision changes”. The latter wording was introduced in 2006 expressly to cover outsourcing transactions, and applies where “an organised grouping of employees situated in Great Britain”, which has as its principal purpose the carrying out of activities on behalf of an organisation, ceases to carry out those activities and they are taken up by another person.

When TUPE applies, any employees who are assigned to the undertaking being transferred or the services being outsourced are entitled to follow their work—that is, their contracts of employment automatically transfer on the same terms and conditions, together with all associated rights, obligations and liabilities.

Whilst Hollis related to a transfer of a business rather than a service provision change, the logic that was applied can be extended to both. On the facts of this case, there was no transfer of a business outside of the UK, however, the judge was urged to express his views on whether TUPE could apply in theory. In this regard, whilst his views were not the central issue determining the case in hand and therefore non-binding, they are nonetheless persuasive. In the judge’s view, a cross-border TUPE transfer is possible in theory, regardless of whether the “transferee” is based inside or outside the EU, making this one of the first cases to give much needed guidance to a situation that many outsourcing experts had been discussing since the prolific growth in offshore outsourcing began in Europe.

The probability that an offshore outsourcing required employers to adopt the same approach with its employees as they would for an EU-based outsourcing had been in issue because although TUPE clearly states that a business (or services) must be...
situated in the United Kingdom before its transfer in order to be covered, the law is silent as to where it needs to end up. The EAT’s view in *Hollis* was that a purposeful approach was the correct one, which would protect affected employees even if the transfer is to be across borders, and even if it is outside of the EU.

Following the EAT’s view expressed in *Hollis*, the commonly held opinion of outsourcing experts that offshoring business processes to popular offshore destinations such as India and China is likely to fall within TUPE has been given a much-needed judicial validation with the EAT stating that the relevant provision of TUPE “is clearly aimed at the modern outsourcing of service provision, particularly call centres, whether inside or outside the EU”.

**Potential Implications for Offshoring**

Whilst many organisations adopt a prudent and cautious approach in all other respects when offshoring, TUPE is often (erroneously) ignored by many. If TUPE does apply, as the EAT suggests, then the common practice of the transferor making the affected employees redundant becomes risky, as any dismissals effected in connection with the transfer are likely to be automatically unfair (with the maximum compensation capped at approximately £73,000 per employee).

In this regard, it is not enough to dismiss the problem as the transferee’s, following the fairly recent Scottish case of *Hynd v Armstrong and Ors*, which confirmed that the transferor cannot rely on the transferee’s reasons for the dismissal to avoid a claim of unfair dismissal. With increasing certainty that TUPE will apply to an offshoring, employers might also fall foul of the additional information obligations and consultation requirements that TUPE imposes, if an employer treats the process as a redundancy process only.

Practically speaking, most affected employees are more likely to take redundancy or a similar settlement where this is offered, rather than asserting that their jobs have transferred abroad. Coupled with this there will be a practical difficulty for employees in pursuing claims against a foreign transferee in another jurisdiction, however, if TUPE does apply, employees could object to the transfer and potentially raise the argument that the move abroad would amount to a fundamental breach of contract entitling them to resign and claim constructive dismissal; or to a substantial change in terms and conditions to their material detriment, entitling them to resign and claim dismissal. Case law suggests that in such circumstances, employees can claim against the UK-based transferor, thus avoiding the tricky problem of enforcing English law against the foreign transferee.

**Offshoring Practice**

There are many requirements on an organisation when it pursues offshoring whether or not the organisation is a veteran or a novice at offshoring its business processes. This case serves as a useful reminder to organisations that the issues in this area are never static, demanding a constant refreshing of approach and expertise to ensure that the totality of risks are managed effectively. The business case for offshoring, when balanced with the increased risk to an organisation that offshoring presents, needs to yield a healthy net-positive result in almost all respects to make it worthwhile.

A costly mistake with the way that an offshore process is run or the contract is structured can wipe-out a business case very rapidly. It is not enough to rely on the supplier organisations to solve the problems for you; as the cases in this area highlight, ultimately many of
the issues are not just their problem to resolve.

**Court of Appeal Hands Down Major Agency Workers Judgment**

In the second of the cases highlighted, the Court of Appeal’s judgment last week in *James v London Borough of Greenwich* confirmed that only on grounds of necessity can an employment tribunal imply a contract of employment between an agency worker and the end-user of his or her services. The court decided that the question of whether an agency worker is an employee of an end-user is a question to be decided in accordance with the common law principles of implied contracts.

Previously cases like *Dacas v Brook Street Bureau (UK) Ltd* had suggested that it might be possible to imply a contract of employment between an agency worker and the end-user (giving the worker the chance to bring an employment claim directly against the end-user) where, for example, the worker had been engaged to work for the end-user for a particular period of time, with the cases suggesting that 12 months might be an appropriate period.

Following the judgment in *James v London Borough of Greenwich*, however, it seems clearer that the court will only imply a contract of employment where it is necessary to do so, although what constitutes “necessity” remains a developing area.

**Considerations**

When an organisation decides to outsource it often does so quickly, demanding results in highly compressed timescales. A successful outcome is only achieved when the processes used are as robust as the desire for the results. These processes have to deal with the entire range of risks and, as both of these cases highlight, this includes the way that an organisation engages with and manages its affected workforce since the steps that are taken and the manner by which the risks are dealt with can be a determining factor of success.