

**EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR
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Employment Issues in Collaborative Working and Mergers
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Introduction

Collaborative Working and Mergers

In 2006 the Charity Commission updated its guidance on issues which charities should take into account when considering Collaborative Working and Mergers (CC34 - June 2006 - www.charity-commission.gov.uk).

Charities are being encouraged to explore the possibility of working with others in order to create a better return for their beneficiaries through the use of shared resources. It is not the purpose of this paper to go into any detail regarding the various options available to charities wishing to work together. Further information about these options is available from Wrigleys' website at www.wrigleys.co.uk. Please see Fiona Wharton's paper entitled 'Contexts and Aspects of Governance' on the Articles page, which was presented as part of Wrigleys 2006 Autumn Governance Seminar. What this paper does aim to do is alert you to some of the potential employment issues that might arise where charitable organisations enter in to Collaborative Working arrangements or mergers. It also considers the effect of Collaborative Working or transfers which will be short of a merger between a charity and its commercial partners but yet may have similar legal consequences in terms of employment law.

- Collaborative Working

The Charity Commission describes Collaborative Working as joint working by two or more charities which remain separate organisations. This includes sharing operational functions, such as finance (for example payroll, or purchase ledger) or administration (for example HR); resources such as information technology or premises; sharing technical know how or general information; and for joint service delivery whether as equals or with one organisation working as lead partner or accountable body.

- Mergers

A Merger is described as the transfer or combination of assets (and liabilities) with one or more of the organisations involved restructuring or dissolving so that either a new charity is formed or one charity assumes control of another.

Employment Issues in Collaborative Working and Mergers

It is important to consider a number of issues when considering Collaborative Working or a Merger. Such considerations include: what is the status of those individuals working with the organisation or for the organisation? Who will have responsibility (and liability) for those individuals when charities share or merge resources, be it temporarily or permanently; in part or whole? What liabilities might you inherit as a result of the working with another charity? Whatever arrangements are being entered into, and as a matter of good general practice, it is important to understand who your employees are and what liabilities you might have for them, both currently and for the future.

I am sure you will not be surprised to hear that employment law is described as complex and constantly evolving. Its application can cause particular difficulty for the charity and wider voluntary and community sector - not just because these sectors traditionally work with many volunteers - but also due to the prevalence of flexible terms with staff on part time hours, fixed term and other flexible working. All organisations (commercial as well as those in the voluntary and community sectors) will from time to time be under pressure to streamline, to make efficiencies, and that is often at the cost of good administration. Whilst not a situation entirely unique to charities, in the charity sector resources are often scarce and there is sometimes a pressure to prioritise service delivery over the day to day paperwork concerning the organisation's workforce.

It is also important to understand that existing employees will be anxious whenever there is change on the horizon. Particularly where there is a proposed merger, which is likely to bring about many changes that may affect their future. It is understandable that staff will worry; particularly if they do not feel that they know what is going on or believe that their job is on the line. Whilst that may well be the case, it is often simple uncertainty that causes concern and that concern can result in unnecessary conflict where there is a lack of information or perceived lack of communication from the organisation.

Status

In looking at the employment implications of Collaborative Working and Mergers the starting point is to understand the status of those who work with you or for you.

There is a wide variety of different descriptions of the relationships which you may have with those who provide you services. Historically, the law has sought to reduce those relationships into two categories and make a distinction between employees (who have a contract of service) and a self-employed individual (who has a contract for services). However there are some relationships, such as volunteers and agency, which don't fall neatly under either of the traditional legal definitions. Further, the spotlight has recently fallen on secondments and a recent House of Lords decision gives particular food for thought on this issue (see below).

Why is status important?

Status is important because, dependant on the status of the individual concerned, employment rights may follow. Although we talk in terms of employment rights, you may take the view that it is more a case of an employer's obligations. Certainly, the last decade has seen a plethora of new legislation that has increased the rights of employees and workers with the consequent increase in employer obligations. Well established rights include the right not to be unfairly dismissed, the right to receive redundancy pay and the right to a minimum period of notice. In addition new or enhanced rights have been introduced relating to age, disability, sex and race discrimination, flexible working and maternity and paternity leave. There are also obligations under Health and Safety legislation and an employer's liability for the actions of employees in the course of their duties (known as vicarious liability). Where there are employees there are inescapable obligations and liabilities.

This paper does not go into any great detail about the various tests that apply in determining status. You can find further information on Wrigleys' website at www.wrigleys.co.uk. Please see <http://www.wrigleys.co.uk/charity/page.php?c=2&p=4> and in particular Fiona Wharton's paper entitled 'Atypical Workers' from Wrigleys 2005 Employment Update Seminar

In looking at employment status the Courts have time and time again referred to an "irreducible minimum of mutual obligation" where an organisation is obliged to offer work and the individual obliged to accept it (see *Montgomery -v- Johnson Underwood Ltd*). However else the organisation and individual may dress up their relationship the courts will repeatedly come back to this point. In doing so the Courts seek to identify the existence of a contractual relationship, and then define what that relationship is.

Above I refer to the increase in employment rights for employees, though employment rights now apply more and more to the "worker". The worker is more widely defined so as to catch not only those categorised as "employees" but a wider group of people whose main requirement is simply to undertake to perform personally any work or services under a contract. There is no requirement of mutual obligation as in the definition of an "employee" and accordingly the true test to determine whether a person can be classed as self employed is whether they have a right to send a substitute to do the work on their behalf. Whether they ever exercise such a right is another matter. "Worker's rights", as opposed to simply "employee rights", have emanated from European legislation. A good example being the Working Time Regulations, which brought into force the (EC) Working Time Directive, providing the right to specified rest periods, maximum weekly working time and paid annual leave.

Worker rights have gained in importance, such as the right to a minimum wage and paid holidays. More significantly the definition of employment used in discrimination legislation will include 'a contract to personally execute any work or labour' i.e. it will apply more widely to "workers" as opposed simply to the traditional definition of "employee". In the landmark and highly publicised case of *Percy v Church of Scotland [2005]* a minister of religion, usually considered to be an office holder and therefore not

an employee, was able to pursue a claim for sex discrimination. The minister claimed she was unfairly treated because of her gender after resigning from her post as associate minister for six glen parishes in the Presbytery of Angus in 1997. The minister was able to bring her claim because she satisfied the requirement to perform personally the work set out under her contract with the Church of Scotland.

Specific Relationships which can cause difficulty

I would highlight two different relationships which can cause difficulty.

Volunteers

There are two principal areas of concern. Administratively it may be convenient to pay volunteers a flat daily rate to cover expenses, but where that bears no resemblance to the expenses incurred and allows an individual to profit, then you are at risk of establishing an employment relationship.

For example in the case of *Chaudri v Migrant Advisory Services [1997]*, Mrs Chaudri was paid travel and subsistence when she lived local and finished work by lunch time. Her expenses were paid when she was off work on holiday or sick.

There can be a thin line between what constitutes an employment relationship and simply volunteer status. Whereas in the case of *Chaudri* the tribunal found an employment relationship in existence, in *South East Sheffield Citizens Advice Bureau –v Grayson [2004]* the Employment Appeal Tribunal (EAT) found that no employment relationship existed.

Grayson claimed disability discrimination and sought to show that volunteer advisors were employees in order to bring the number of employees in the organisation above the small employer exemption which applied at that time. The small employer exemption was scrapped on 1 October 2004.

Grayson, along with other volunteers, had an unsigned volunteer agreement which provided for a minimum weekly commitment, amongst other things. The EAT ultimately found that although the volunteers were working under a contract it was not a contract of employment. The EAT highlighted that the minimum commitment did not amount to an obligation to provide or accept work, but simply the parties reasonable expectations as part of managing the work of the CAB.

Organisations must also be careful with 'senior' volunteers for example, charity shop managers, where it can be easy for an expectation of availability to exist establishing an employment relationship. Arrangements with volunteers require the allowance of significant flexibility to the volunteer. An expectation that a volunteer carries out regular shifts, manages others and a level of dependency on that volunteer may lead to a finding of employee status rather than simply a helping hand to whom limited liabilities and obligations are owed.

Agency

The difficulty in identifying the status of agency staff is that they may be self-employed, they may be employed by the employment agency or business which provides them, or they may be employed by you. The usual tests, and considerations, apply and although the Courts have recently been increasingly ready to hold that the organisation which makes use of their services is the employer, although recently the Tribunals have been moving back towards a stricter interpretation and separation between employment and agency status

Whilst regarded as a fairly novel case on its facts, the case of *Muscat -v- Cable & Wireless* is a good example of where the Court has been willing to find that an organisation using the services of staff provided through an agency is the employer of that member of staff. Muscat provided his personal services through a service company. He was the only director, the only shareholder and the only employee. This is very common in the ICT sector and where senior executives take on consultancy roles for an organisation that has just 'retired' them. Muscat's company didn't contract directly with the end user, Cable & Wireless but used an agency. The Court held that, on the facts, there was an implied contract of employment. Muscat was an employee of Cable & Wireless even though he supplied his services through his own limited company and through an agency. Muscat was issued with an employee number by C&W and was included in the C&W headcount.

The EAT has recently set out some much needed guidance on the factors to be considered in determining whether an employment relationship underlies an agency contract. It is suggested that it should be a rare case which will justify the finding of an employment relationship where the arrangements between the agency worker and end user are genuine and give effect of the actual working relationship, for example where there was no pre-existing employment relationship between the worker and end user. There remains a warning to employers that the risk area lies where there has been a pre-existing employment relationship and where the employee then takes on the role of a self-employed contractor. The EAT has suggested that recent cases where Tribunals have made a finding of an employment relationship are not imposing any implied contract of employment but rather stating that the original contract of employment has not been brought to an end by the new (agency) contract superimposed over the employment relationship. *James -v- Greenwich Council*.

Terms and Conditions of Employment

A distinction has to be made between a contract of employment, which will exist from the moment the employment relationship begins, and a Statement of Particulars which all employees are entitled to have under s1(1) of the Employment Rights Act 1996 (ERA). The ERA sets out what must be included in the Statement. I do not intend to go through all of the requirements in this paper but the fundamental details that should be contained in the Statement include the names of the employer and employee, the date of

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employment commencement, remuneration, hours of work, holiday entitlement, job title and place of work. (For further information please see 'Contracts and Handbooks' from the 2006 Employment Update Seminar, available from our website www.wrigleys.co.uk). If an employee is not provided with a Statement which satisfies the requirements of the ERA within 2 months of employment commencing then the Employment Act 2002 states that an employer may have to pay compensation of between two and four weeks pay for every employee where the required Statement does not exist. An employee may refer the matter of failure to provide a Statement to an Employment Tribunal.

The contract itself, however, need not be in writing and may be written or oral. The advantage of being in writing is that it may be easier for you to show what had been agreed in the event of any dispute. However even if it is in writing it may not contain all of the terms agreed or which affect the employment relationship. For example you may simply have omitted to include something which later turns out to be significant.

Often provisions which affect the employment relationship may be set out in a staff handbook. It is possible for matters which are in the staff handbook to have contractual effect even though you may not want them to, for example specific procedures which are to be applied in the event of any grievance or disciplinary action. Failure to follow those procedures closely enough may give rise to a breach of contract claim against the organisation.

Other terms may be implied. An important implied term is the duty of trust and confidence which underpins the employment relationship. A breach of this duty, for example unfair treatment (see, for example, *Percy -v- Church of Scotland* above), has led to many claims to the employment tribunals for wrongful and unfair dismissal.

Clearly it is important that you know what terms affect your relationship with your staff as failure to identify correctly who your employees might lead to a breach of the ERA provision that a Statement of Terms is required and, perhaps, more importantly greater employment liabilities that you had not contemplated. An incorrect assumption on status might lead you to treat that individual in an altogether different way than the manner that you would have taken had you known that individual was an employee.

So what is the effect of Collaborative Working and Mergers?

Clearly it will depend upon the way in which you are collaborating. The simple sharing of information is going to raise less concerns than the pooling of, say, HR resources with one charity agreeing to run the HR function for the other.

Where you are sharing information, what information is it? Do your contracts have confidentiality terms? It may be important to ensure that the contract entered into with the collaborating party has as strong a requirement to keep confidential the information being passed as your organisation has.

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Where you are sharing resources, such as administration as well as confidentiality issues, what about Data Protection rights? If personal data is leaving your organisation do you have the requisite consent; have you taken steps to ensure adequate security of that data in accordance with your statutory duties? Your organisation should have obtained consent from the data subjects providing that information to use and store that information for purposes made known to the data subject. The consent may be specific to your organisation and accordingly sharing that information with a collaborating party may take you outside of that consent. Such information may have been gleaned from data subjects that are your own staff. It is important to gain their specific consent (particularly as it may include sensitive personal data, such as medical records) to sharing that information to avoid a potential employer-employee conflict. Likewise, as a result of collaboration you may come into possession of confidential information and personal data and should check to ensure that your continued possession and use is lawful.

Greater scope for confusion exists where you start to share staff, where there is a blurring of the relationship between employer and employee. If you send staff on secondment to another organisation (including for example your own trading subsidiary), or they second staff to you, what arrangements will you make for the management and control of those staff members? Who disciplines seconded staff? Who is responsible for their work?

Secondment

A recent decision in the House of Lords raises particular practical issues when considering secondment arrangements between collaborating parties. In *North Wales Training and Enterprise Council Ltd (t/a Celtec) -v- Astley and Others*, Astley was one of a number of civil servants that was seconded by the Department of Education (DofE) to Celtec. Celtec were one of a number of Training and Enterprise Councils ("TECs") that took over the management function of government funded post-16 vocational training and enterprise activities in England and Wales. At the time of the secondment the transfer of the employee's contract of employment was not considered with the DofE, Celtec and the employees all being of the view that the DofE remained the employer of the secondees. In fact, the employees remained members of the Civil Service Pension Scheme. After a while, TECs were permitted by the government to employ their own staff and accordingly Astley, along with other seconded government staff, was offered employment with Celtec or otherwise return to the DofE for redeployment. Astley was seconded between 1990 and 1993, when she joined Celtec. She was later made redundant and told that her period of continuous employment did not include her time at the DofE.

The House of Lords had to decide when the transfer of undertaking occurred between the DofE and Celtec in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as this was crucial to whether Astley had continuous service inclusive of her time at the DofE. The upshot of the findings of the House of Lords was that the employees in this case were deemed to have transferred to Celtec in 1990, regardless of the wishes and the understanding of the parties in the case. Following a reference to the European Court of Justice on the issue, the majority of the Lords decided that the transfer took place when the responsibility for management of the

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function of vocational training moved from DofE to Celtec. The parties cannot agree to delay the transfer of the employees unless the employees opt out of the transfer. Accordingly, it would appear the Courts will set aside the contractual arrangements between collaborating parties concerning the control and management of staff on secondment, where there is a genuine transfer of an undertaking. This is of particular concern to the NHS in its PFI arrangements, though the issue of secondment should be thought through carefully by all organisations entering into collaboration arrangements where there is a desire to second employees though where it is intended that a transfer of employment is not to occur.

Under TUPE, however, an employee can opt-out from the transfer of employment to the new employer, though this must be carefully managed. By opting out of the transfer of employment the employer enters into a new contract of employment with the transferee, which allows for a secondment to the transferee, whilst the employment relationship continues to exist with the original employer. It is crucial, however, that employees are opting out are fully appraised of their rights. This is the process followed in NHS PFI arrangements for the secondment of NHS staff to PFI service providers.

In a case where there is an arrangement to second staff which does not involve a transfer under TUPE there are nevertheless questions over responsibility for employees seconded by one organisation to another. It is important to be aware of who will be deemed in control of a temporary member of staff. In taking on secondees it is important to ensure that the contractual arrangements between the parties deal with the issue of employment and contain the necessary indemnities in the event that your organisation is imbued with a liability connected with the seconded.

In the case of *Hawley -v- Luminar Leisure [2005]*, a nightclub was sued for an injury caused by a door supervisor. The door supervisor had been provided by a security company which had subsequently gone into liquidation and it was claimed that he was not employed by the club.

The Court accepted that the door supervisor had not been employed by the club for all normal employment purposes, but had been a 'temporary deemed employee' for the purposes of fixing the club with vicarious liability. Here it seems that the Court focussed on the issue of the extent of control exercised by the club. If a temporary employer has the right to control the manner in which a labourer does his work, so as to be able to tell him the right way or the wrong way to do it, then he should be responsible when he does it the wrong way as well as the right way.

This doesn't just affect your responsibility for seconded staff, but also re-enforces your responsibilities for volunteers.

Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

Where you are looking to share resources you will have to consider whether this is a new resource or simply restructuring an existing resource. Are you transferring staff to another organisation to help provide this resource? Are they transferring staff to you? Similar issues apply when you look to make a wholesale merger, in which case TUPE must be considered.

In practice

TUPE talks in terms of a relevant transfer of an economic entity or effecting a service provision change, such as contracting out, contracting in and re-tenders. Charities are not excluded from this and the economic entity test can be satisfied by not-for-profit structures.

Detail concerning TUPE and further information on how and when TUPE will be applied is available from the Wrigleys website. Please see 'Transfer of Undertakings' from our 2006 Employment Update Seminar, a copy of which is available on our website at <http://www.wrigleys.co.uk/charity/page.php?c=2&p=4>.

Whether or not TUPE applies will depend on how the merger is structured. Some charities may outsource some of their backroom functions and where this continues unchanged after the merger there is no reason for TUPE to apply.

Some charities may effect the merger by one charity becoming the corporate trustee of the other. This effects a change of the Trustees only. There is no change in the employer and therefore this is not a relevant transfer under TUPE.

Some Charities may hold staff in a trading subsidiary. Again, staff continue to be employed by the same employer, the trading subsidiary, and so there has been no transfer.

Effect

TUPE has two aims. The first is to promote consultation between employers and employees. This will include trade unions and elected representatives.

Secondly, and perhaps what employers will recognise as the most significant effect of TUPE, is that where a relevant transfer takes place the effected employees are to be protected. This is done by automatically transferring the contracts of employment of the employees concerned from one employer to another and limiting the steps that the new employer can take to change those terms, effectively 'ring fencing' those terms going forward.

An employee does have the choice whether or not to accept the transfer but in refusing to do so there is a deemed resignation without any rights to claim against either the old or

the new employer unless there is some other proposal for alternative employment (see above in terms of secondments following the Celtec Case).

In addition to the contract of employment transferring, the new employer also inherits all of the old employer's liabilities in connection with that contract. Anything done prior to the transfer by the old employer is deemed to have been done by the new employer and will include claims such as bullying, discrimination and other unfair treatment.

TUPE applies these principles automatically. They apply even where the employee does not know that a relevant transfer has occurred or who the new employer is. They apply, even though the new employer may not be aware of any liability to a transferring employee.

Recent changes to TUPE impose an obligation on the old employer to notify certain employee liability information but this may come too late for the new employer to back out or to avoid liability, particularly in local authority re-tender situations where there is generally no direct contact between the old and new employers. Where it is practicable, however, it is wise that any organisation that is considering the transfer to it of employees from another organisation requests as much information as possible on the terms, conditions and liabilities owed to those employees.

Information and Consultation

Duty to Inform - The duty is to inform all affected employees, not just those transferred. This will potentially cover all staff in each organisation involved in a transfer or merger.

Information must cover:

- The fact of the transfer
- Timings and reason
- Legal, economic and social implications
- 'Measures' to be taken in relation to effected employees

This information must be provided 'long enough before a relevant transfer to enable consultations to take place' and 'with a view to reaching agreement'. The key is to provide sufficient quality information to allow a meaningful dialogue.

Duty to Consult - This is separate from the duty to inform. It only applies where the new employer envisages 'taking measures' in relation to effected employees. What 'taking measures' means is not defined but will cover any proposed changes to terms and conditions, restructuring and terminations

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In order to satisfy your obligations to inform and consult you should consider joint meetings, involving staff from each of the organisations involved. This has the advantage of letting each see that the others share their fears and have the same questions and concerns.

You can never have too much consultation. You can have bad consultation and if it is bad enough you will suffer a loss of morale than can destroy the whole transfer and merger process. If your consultation is bad enough your procedure will be defective, it may be unfair and staff may be entitled to compensation or damages.

Terms and Conditions

As already highlighted one of the principal effects of TUPE is to 'ring fence' existing terms and conditions of employment and limit the opportunity for the new employer to change them. It is therefore very important that any organisation which is taking on transferring employees has as much information as possible about the terms and conditions that apply.

It is important to remember that it is not just about what the contracts say; that is if there actually are any written contracts. You need to consider the status of those who work with or for the organisation and who are potentially to transfer. You need to be clear what their terms and conditions of employment are, not just what benefits they may be entitled to. It is also important to discover exactly who is likely to transfer employment as there is often a risk that someone is missed, for example an employee on maternity leave, long terms sickness or perhaps even on sabbatical or secondment elsewhere.

Harmonisation

Whilst it is one of the fundamental aspects of the protection afforded by TUPE that the terms and conditions of transferred staff are "ring fenced", this does not mean to say that such terms and conditions cannot be varied by the new employer. What TUPE prevents is any change to those terms and conditions arising by reason of the transfer itself.

Once the transferred employees have been assimilated into the new organisation there may be commercial or other pressures on the new employer to seek to harmonise terms and conditions across its entire staff. Ignoring for a moment the effect of TUPE, any variation to terms and conditions can only be implemented if both parties expressly agree to the change. If the employer seeks to unilaterally impose new terms such a variation of the contract of employment may amount in law to a dismissal and an offer of re-employment on the varied terms. This may entitle the employee to claim wrongful and unfair dismissal. However this does allow an employer to ensure that all staff are on similar if not identical terms and conditions.

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Bringing back the effect of TUPE, a variation made by reference to the transfer itself is void. There are limited exceptions under the Economic, Technical or Organisational changes test, which I do not propose to go into in this paper. In a slight but significant change of emphasis the EAT recently held that it is only changes which are to the employees detriment that will be void. The individual employee will have the choice of determining whether the old or new terms are more beneficial. Where new terms have been offered the employer will be contractually bound to honour those commitments.

Of course what one employee may decide is a detriment, and therefore void, is not necessarily what another employee may decide is to their detriment. In this particular case the issue focused on the contractual retirement age which post-transfer was increased to 65 and which the employee claimed he was entitled to rely upon. ***Power -v- Regent Security Services***

There is no time frame set out in the text of TUPE to give guidance as to whether or not the change is made by reference to the transfer and that is an issue of fact which will be determined by the tribunals. Case law has demonstrated that an employee dismissed two years after a TUPE transfer for refusing to accept a change in an important contractual term was dismissed for a reason connected with that transfer (***Taylor -v- Connex South Eastern Ltd***).

It is therefore important that if seeking to introduce changes to terms and conditions, any connection with the transfer is removed. By way of an example, it is good practice for an employer to undertake a regular general review of their employment contracts and benefits provided to staff. Say every 12 - 18 months. Provided changes are made across the board are not solely restricted to the transferred employees there is a greater chance of establishing that the changes do not relate to the transfer but rather some general business re-organisation.

There is also the possibility of waiting. Allow time to take its course so that through staff turnover, promotions and other factors unconnected with any transfer terms and conditions can be updates and in that way harmonised.

This isn't to say that changes cannot, or should not be made. The first stage is to consult on the business case for the changes and seek agreement. However there is always a risk of an organisation getting caught up in endless consultation to the nth degree. At some point you have to take the decision to leap. There is always the risk of fallout, the possibility that a claim may be brought, but you need to consider the benefit of the change you want to make.

One of the dangers in any transfer or merger situation is to try and dress up the process as something other than what it is. If it is a marriage of un-equals consider whether there is more advantage to you in describing it as a takeover rather than a merger. If you have to look at redundancies then you need to establish an Economic, Technical or Organisational change to defend a claim of unfair dismissal connected to a transfer. Establishing the need for redundancies will be more difficult if you have avoided

discussing the parties' respective financial positions and the need to make changes as part of your consultation.

Two Tier Workforce and the Code of Practice

One of the major criticisms of TUPE is that it seeks to protect the contractual position of transferring employees. Other employees whether already employed or joining after a relevant transfer do not have this same protection. This has led to what has been referred to as the two tier work force, where there are different employees on perhaps substantially different terms and conditions of employment, and which can in fact give rise to multiple tiers within a single organisation. New employees coming in to an organisation can create unrest amongst existing employees where terms such as pay and holiday are deemed more favourable to those provided to the existing workforce. This can be the case particularly where there are existing pay structures in place with newcomers remunerated outside of the structure.

In particular new joiners are often employed on less generous and often substantially inferior terms and conditions ranging across pay and other benefits, hours and job security.

The Cabinet Office Code of Practice on Workforce matters in Public Sector Service Contracts (March 2005, updating earlier practice) seeks to ensure the fair treatment for employees working in local public services whether they are employed directly or by a service partner.

The two key principles of the Code are:

- that in circumstances where TUPE may not apply the principles of TUPE are to be followed; and
- to ensure that new joiners to service partners are offered fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees.

The Code does allow some flexibility in that the terms and conditions are to be considered "in the round" as a package allowing a trade off rather than requiring identical provisions. This includes specific provision to be made for pension benefits, similar to the rules that now apply on pension transfers.

Following changes to TUPE which came into effect in April 2006 it is less likely that TUPE would not apply to situations where charities and other voluntary and community organisations are seeking to take on public service delivery contracts, but the effect of the Code of Practice are still substantial, in particular as they extend protection to new joiners.

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Summary

Many of the employment concerns you may have about Collaborative Working and Mergers will be resolved by ensuring that you have your own house in order. Ensure that your own contracts, policies and procedures are up to date and effective. Ensure that you are aware of who your employees are and of the liabilities you may have to those that work for you or with you.

If you are considering or already engaging in Collaborative Working or Merger, then choose your partners carefully. Ensure that you are provided with enough information concerning any employees that you may be taking on as part of the collaborative process and ensure that you are fully aware of any existing liabilities that you may be taking on as a result. When seconding staff or taking on secondees it is important to ensure that where there is no intention for those staff to leave the employ of the original employer that the appropriate steps are taken to avoid a transfer under TUPE. It is simple, the closer a working relationship you have with any other organisation then the more checks you will need to make, but make sure that you ask the right questions. It is easy to forget when entering into the new partnership. As Trustee's don't spend all your time considering what the new name is to be. Recognise the employment risks and address them.

Whether it is Collaborative Working, a Merger or anything in between, the goodwill of those who work with you or for you is essential. It is therefore vital to ensure that those you work with are kept apprised of developments, are consulted and that conflict due to a lack of information is avoided.

Where TUPE applies, it should not be avoided but properly managed.

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