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— SOLICITORS —

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Employment Law BULLETIN

Welcome to our October employment law bulletin.

This month we cover the long awaited Government response to its TUPE consultation. Many employers will be relieved to see that the Government has done a "U-turn" on its original proposals to repeal the service provision change rules and the employee liability information requirement. Both are to be retained.

It has been widely accepted that these provisions are helpful in clarifying the transfer process and avoiding disputes in employment tribunals. Otherwise the Government proposes to clarify a number of other areas. The new regulations have not yet been published but they will be available soon and the intention is to lay new regulations before Parliament in December with a view to their coming into force in January 2014.

In the EAT we report on cases concerning the importance of following grievance procedures and when a redundancy payment might be lost when an offer of suitable alternative employment is unreasonably refused.

There are no fewer than three cases on service provision change, which of course are now highly relevant in view of the retention of this concept in TUPE. We look at whether stopping private health insurance benefits for an employee reaching a certain age is age discrimination. Finally, our client briefing this month concerns disciplinary procedures and their importance.

May I also remind you of our forthcoming events:

Click any event title for further details.

Stress to Well-being Strategies
· HR Workshop, 5th November 2013

What's New in Employment Law?
Highlights of 2013 plus your 2014 HR Planner

Click on any of the headings below to read more

Wherever you see the BAILII logo simply click on it to view more detail about a case

1: Government response to TUPE consultation and the shape of the new TUPE Regulations

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On 5th September 2013 the Government published its response to the consultation on TUPE. Although the actual Regulations have not yet been published in draft form they will be available soon and it is intended to lay new regulations before Parliament in December with a view to their coming into force in January 2014.

The main changes are as follows:

- The Government will amend the TUPE Regulations to allow renegotiation of terms derived from collective agreements one year after the transfer, even though the reason for seeking to change them is the transfer, provided that overall the change is no less favourable to the employee.
- The Government will amend TUPE to provide for the "static" approach to the transfer of terms derived from collective agreements. This implements the European Court decision in *Alemo-Herronv Parkwood Leisure Limited* [2003] ICR 1116 (where it was held that it is impermissible for Member States to allow clauses in employment contracts allowing for terms to be settled by future collective agreements to which the transferee is not a party).
- The Government will amend TUPE so that changes in the location of the workforce following a transfer can fall within the scope of an economic, technical or organisational reason entailing a change in the workforce, thereby preventing genuine place of work redundancies from being automatically unfair (as they are, under the present case law).
- The Government will amend Regulation 4 and 7 to bring them closer to the language of the Acquired Rights Directive. In other words, at the moment, a variation of an employment contract is void if the sole or principle reason for the variation is the transfer itself *or a reason connected with it*. Likewise, a dismissal is automatically unfair if the sole or principal reason is the transfer itself *or a reason connected with* the transfer.

The amendment will lose the words "or a reason connected with it" clarifying that variations of contracts and dismissals will only be prohibited where they are "by a reason of the transfer itself".

- The Government will make an amendment to reflect the approach set out in the case law, namely for there to be a TUPE service provision change, the activities carried on after a service provision change must be "fundamentally or essentially the same" as those carried on before it.
- The Government will amend the Trade Union and Labour Relations (Consolidation) Act 1992 to make it clear, in statute, that consultation about redundancies which begins pre-transfer can count for the purposes of complying with the collective redundancy rules, provided that the transferor and transferee can agree, and where the transferee has carried out meaningful consultation.
- The Government will improve the TUPE process for micro-businesses by allowing such businesses to inform and consult directly affected

employees where there is no recognised independent union, nor any existing appropriate representatives.

- The Government will retain the rules about employee liability information and extend the time before the transfer when it must be given to the transferee to 28 days.
- The Government will work to improve TUPE guidance.

Significantly, the Government:

- Will ***not*** repeal the service provision change rules;
- Will ***not*** allow a transferor to rely on a transferee's economic, technical or organisational reason to dismiss an employee prior to a transfer;
- Will ***not*** amend Regulation 4(9) of the Directive (which allows an employee to resign in the face of a substantial change in working conditions to the employee's material detriment).

In future Bulletins we shall examine the new Regulations in detail when they are published and we shall be holding a breakfast seminar on new TUPE in early 2014.

2: When an employee stated that "I have no alternative but to resign my position", were these words ambiguous?

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No, said the EAT in *The Secretary of State for Justice v Hibbert*.

The issue in this case was whether a claim for dismissal was lodged out of time. This turned on the effect of the letter of resignation from the Claimant.

After problems with work the employee wrote to her employer saying:

"I am of the view that there has been a fundamental breach of my employment contract by my employer and have no alternative but to resign my position".

The letter was dated 29 June 2012. The employer offered to give the employee time to reconsider. She did not. The employer then wrote accepting the employee's resignation, requiring her to provide 4 weeks notice, and indicating that her last day of work would be 27 July 2012.

If the effective date of termination was on 29 June 2012 the claim was out of time. If it were 27 July 2012, it was in time.

The Employment Tribunal Judge considered that the 29 June 2012 letter was unambiguous as to resignation but not as to the date of termination of the contract, which was still to be settled. The claim was therefore in time.

The EAT disagreed. In *Southern v Franks Charlesly & Co* [1981] IRLR 278 the Court of Appeal considered words such as "I am resigning" were unambiguous. In the present case the EAT considered that the words used by Ms Hibbert were also unambiguous. There was no question of a decision being taken in the heat of the moment and the letter was written on legal advice. The fact that the employer required her to give 4 weeks notice and stated that her last working day would be 27 July 2012 and that she was paid for that period had no legal effect. As a matter of fact she resigned on 29 June 2012. The unfair dismissal claim was lodged out of time.

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3: Employer's failure to provide impartial grievance appeal process could breach the implied duty of trust and confidence

This was one of the findings of the EAT in *Blackburn v Aldi Stores Ltd*.

Mr Blackburn worked as an LGV driver at a transport depot operated by Aldi. It was Mr Blackburn's assertion that concerns he had raised with the deputy transport manager at the depot, Mr Gallivan, regarding health, safety and training at the depot had resulted in him being sworn at and dealt with in an abusive manner on a number of occasions. On 9 June 2009, Mr Blackburn had an argument with Mr Gallivan in which he again claimed to have been sworn at, this time in the presence of another driver. Following this incident Mr Blackburn submitted a grievance letter in which he raised, amongst other issues, health and safety, lack of training and his treatment by Mr Gallivan.

Aldi's written grievance procedure provided for a grievance to be dealt with by either a section manager or the logistics director. Requests for appeal were to be submitted to the next level of management, whereupon there would be a meeting and a final decision would be made.

In the event, Mr Blackburn's appeal was dealt with by the regional managing director, Mr Heatherington. Having investigated the matter, Mr Heatherington accepted some of the points made by Mr Blackburn, but also accepted Mr Gallivan's denial that he had sworn at and abused Mr Blackburn. Mr Blackburn's subsequent appeal was also dealt with by Mr Heatherington. At the appeal hearing, Mr Heatherington confirmed his earlier decision, and indicated to Mr Blackburn that there could be no further appeal. As a consequence, Mr Blackburn resigned claiming constructive unfair dismissal on the grounds that Aldi had committed a repudiatory breach of the implied term of mutual trust and

confidence by, inter alia, effectively denying him an appeal.

At first instance, the Tribunal dismissed the claim of constructive unfair dismissal. In doing so, it asserted that the implied term of trust and confidence simply required an employer to allow an employee the opportunity to bring a complaint, to have that complaint heard and to give reasonable consideration to it, but did not require the employer to follow any set procedure.

On appeal, the EAT rejected this assertion. Observing that a grievance procedure should be given its normal meaning in the employment context, and that, in this regard, the ACAS Code of Practice, which provided for an appeal which "*should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case*" was a reliable indicator of the employment context, the EAT held that failure to adhere to a grievance procedure was capable of amounting to a breach of the implied term of trust and confidence. Whether any given failure did amount to such a breach stood to be assessed by applying the test identified in *Malik v BCCI*. In other words, did it amount to, or form part of, conduct by the employer "*calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*" without reasonable and proper cause.

The case was remitted to the Tribunal for reconsideration.

4: Redundancy payments: when is refusal of suitable alternative employment reasonable?

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If an employee is redundant he or she may lose their right to a statutory redundancy payment if an offer is made by the employer of suitable alternative employment and this is unreasonably refused by the employee.

According to the case law, whether an offer is suitable is judged objectively by looking at the type of role offered as against the skills and attributes of the employee. However, whether the employee is reasonable in refusing the offer involves a subjective test. This can take into account the employee's personal circumstances for turning down an offer. In other words, an offer of alternative employment could be "suitable" but due to an employee's personal circumstances, there may be good personal reasons for turning it down. In that case the employee will still receive a statutory redundancy payment.

This point was emphasised in *Devon Primary Care Trust v Readman*. In this case Mrs Readman had been employed by Devon Primary Care Trust and its predecessors since 1976. In 1985 she began community nursing and became a "community modern matron". She was responsible for community and district nursing in the Teignmouth area. Following an amalgamation of services Mrs Readman was told that she was at risk of redundancy. She unsuccessfully

applied for a lead role in the new structure but was then offered the role of "modern matron" at Teignmouth *hospital*. As a modern matron, 10% of her duties would be senior management, 45% in the role of hospital modern matron and 55% percentage as team/clinical leader. Mrs Readman rejected the "modern matron" role on the ground that her career path and qualifications were in *community nursing*. She had not worked in a hospital since 1985 and did not wish to do so now.

The employment tribunal held that the role of modern matron was one of suitable alternative employment. But it went on to find that she had unreasonably refused the offer. The EAT, on appeal, disagreed and considered, not having worked in a hospital for 23 years, it was not unreasonable for Mrs Readman to refuse to do so now.

The Court of Appeal remitted the case back to the employment tribunal. The reasoning of both the employment tribunal and the EAT was unsatisfactory.

The Court of Appeal stressed that the correct approach was to consider whether the refusal of suitable alternative employment was reasonable given the particular situation of the employee in question. There was no scope to apply a band of reasonable responses. This was a matter of fact for the employment tribunal.

The tribunal should also have considered that at the back of Mrs Readman's mind was a thought of moving to Canada and that her preference for having the redundancy pay out in order to move to Canada might have influenced her. But this was ultimately a question of fact for the employment tribunal to determine what the reasons for the refusal were and what relevant weight they had in the employee's decision-making process.

5: TUPE: Service Provision Change (1)

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Can there be a service provision change within the meaning of regulation 3(1)(b) of TUPE even though the client was not obliged to guarantee any level of work to the service provider? Yes said the EAT in *Lorne Stewart Plc v (1) Hyde (2) Crowley (3) Planned Maintenance Engineering Ltd t/a Carillion*. Carillion held a contract for maintenance work for Cornwall County Council under a "framework agreement". Work was given to Carillion under this agreement, although the Council was in power to place it elsewhere and, also, Carillion had the ability to decline work offered to it. But in practice, the Council gave all the work to Carillion and Carillion accepted it when given.

The contract came to an end and after a retendering process Lorne Plc (LS) took over the service under an agreement containing similar provisions to the expired agreement with Carillion. LS refused to take Messrs Hyde and Crowley

under TUPE. LS denied there was a service provision change. This was despite the fact that the Council, in evidence, said that the situation was "largely unchanged from previous years".

In this case it was conceded that, immediately before the change, there was an organised grouping of employees of Carillion which had, as its principal purpose, the carrying out of the activities concerned on behalf of the Council and that it was intended, that, following the service provision change, those activities would be carried out by LS. The employment tribunal then found that the Claimants were assigned to that organised grouping of employees and concluded there was a relevant transfer and found in favour of the employees' claim for unfair dismissal.

On appeal, LS argued that as the work that fell under the framework agreement did not involve a mutual commitment until the work was offered and undertaken meant there could not be a service provision change. LS argued that it was crucial that there was no working in relation to the Claimants going on at the point of the transfer. It submitted there must be work upon which the employees were working at the material time which was going to continue after the transfer. LS, it was argued, had no more than an opportunity or change for obtaining that type of work in the future.

In the EAT, his Honour Geoffrey Burke QC considered that the correct approach was set out byHHJ Peter Clark in *Enterprise Management Services Ltd v Connect Up Ltd* (UKEAT/0462/10). In HHJ Burke's opinion, the questions set out in *Enterprise* were to focus the attention of the tribunal on what was actually being done before and after the claimed service provision change. Whether the work being done before the transfer was work which the client was *bound* to give the contractor or the contractor was bound to accept if offered was not a relevant consideration. To put it in the vernacular, the focus must be upon what was actually going on "on the ground".

In this case, therefore, it was not necessary for the work that the employees did to be work which the Council were obliged to provide to a particular service provider. The key issue was what actually was happening *in practice* before and after the service provision change.

6: TUPE: Service Provision Change (2)

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In order for there to be a service provision change under regulation 3(1) (b) of TUPE there must, prior to the service provision change be an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned.

The Court of Session in *Ceva Freight (UK) Ltd v Seawell Ltd*(approving the

EAT decision in Seawell [2012] IRLR 802 and the EAT decision in *Eddie Stobart Ltd v Moreman* [UKEAT/0223/11]) has stressed the point that an organised grouping of employees means a conscious organisation by the employer of its employees into a grouping – in the nature of a "team" which has, as its principal purpose, the carrying out of the activities in issue. This conscious putting together of a client team means that it is not a question of "happenstance". If the employees are not so organised, even if they work on the project concerned, they will not transfer under TUPE.

This was the case, in *Seawell* itself where a number of employees worked on a contract for a client but not all of them exclusively. One individual happened to work 100% of his time on the contract but because he and his colleagues were not organised, consciously, into a client team, that individual did not transfer under TUPE. Although TUPE states that an organised grouping of employees may comprise a single employee, the Court of Session envisaged this would apply more apply to a case where the activities in question could be, and are, carried out by a single individual: "for example, the needs of a client of a cleaning firm may be a for single cleaner, or a firm of solicitors may undertake to provide a single qualified solicitor to advice full time a client such as an insurance claims handler". It is not legitimate, said the Court, to isolate one of a number of employees on the basis that the employee in question devoted all or virtually all of his working time to assisting in the collaborative effort. Where the activities were carried out a "plurality" of employees, the reference in the TUPE definition to a single employee does not allow "disaggregation" of a number of employees who, although collectively assisting with a contract, were not organised into a client team for that purpose.

7: TUPE and Service Provision Change (3)

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However, in *Rynda (UK) Ltd v Rhijnsburger* the EAT considered such a case of a sole employee who *was* regarded to be an organised grouping of employees.

In this case the Claimant had worked for Rynda from the beginning of 2011. She was first employed by Drivers Jonas Deloitte under a fixed term contract to manage premises in the Netherlands. Subsequently she took on responsibility both for the Dutch portfolio and also a German portfolio of properties. Latterly, partially for health reasons she ceased working on the German property portfolio and managed, solely, the Dutch properties. At the time she joined Rynda she was the only member of staff engaged in managing the office property portfolio in the Netherlands. She was dismissed in October 2011 having, seemingly, insufficient continuity of service to bring an unfair dismissal claim. She therefore claimed there was a TUPE transfer from Drivers Jonas Deloitte before she took up employment with Rynda.

The EAT had the benefit of the Court of Session decision in *Seawell* and noted the requirement that there must be a conscious organisation by the employer of its employees into a grouping in the nature of a team which has, as its principal purpose, the carrying out of the activities in question. Of course, a single employee, under TUPE can be that organised grouping of employees.

The EAT found that there was a group comprised only of the Claimant performing the relevant activities and the employment judge at first instance had found that this was not a matter of "happenstance" but rather the outcome of the then employer's conscious decision that from March 2010 she was to work exclusively on the Dutch property portfolio. That was to be "exclusively" both in the sense that she was the only company employee managing that property portfolio and that was to be the sole focus of her work.

This, considered the EAT, was a clear finding of fact, satisfying the rigorous test in *Seawell*. The individual was therefore an organised grouping of employees comprising herself, the principal purpose of which was to carry out the activities concerned. Incidentally the EAT considered that whether the principal purpose was to be judged on the subjective intent of the former employer or whether one was to have regard to an objective assessment of the employer's principle purpose was another issue to be decided. It considered that the focus must be on the objectively assessed intentions of the employer, which was satisfied here.

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8: Was stopping permanent health insurance benefits once the employee turned 55 age discrimination?

Yes said the employment tribunal in *Witham v Capita Insurance Services Limited* (ET Case No. 2505448/12)

Mr Witham had been receipt of benefits from Capita under a PHI scheme arranged between Capita and an insurance provider. The payments stopped when he turned 55.

He had been denied the opportunity to join a more favourable PHI scheme arranged in 2002 which would have entitled him to receive PHI payments until he turned 65. The insurance company were not prepared to indemnify Capita in respect of PHI payments if the employee was not "actively at work" when applying to join. Mr Witham was then ill and in receipt of benefits under the original PHI scheme and therefore not eligible for the new scheme.

It was held by the employment tribunal that Capita had directly discriminated against Mr Witham because of age. Nor could this be justified as a proportionate means of achieving a legitimate aim. The employer stated that its

legitimate aim was to admit as many employees into its pension and PHI schemes as possible within the constraints of the insurance company's conditions. But the Tribunal did not accept that the employer had this as an aim, as the offer of PHI membership was selective. Nor was stopping the PHI payment an appropriate and necessary means of achieving that purported aim. By ceasing to cover Mr Witham the employer had reduced the number of employees within the PHI scheme. This was hardly promoting its stated objective; and the employer's budgetary considerations in funding the PHI scheme were not to be taken into account.

Further, there was indirect age discrimination because the employer applied a provision criterion or practice (the "actively at work" criterion) which put employees over a certain age at a particular disadvantage. For the same reason as applied in the direct discrimination claim, this also could not be justified.

Finally, on the facts of the case, the employment tribunal decided that Mr Witham had a contractual right to receive his PHI payments until the age of 65 because an earlier purported variation of employment terms and the policy entitlement was ineffective.

9: Disciplinary procedures: client briefing

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This client briefing highlights the key issues an organisation should consider when conducting a disciplinary procedure connected with misconduct or poor performance.

The ACAS Code of Practice was introduced in 2009 to replace the statutory disciplinary procedures. Employers required to follow the Code in disciplinary situations.

Why is it important to follow the ACAS Code?

It can avoid a finding of unfair dismissal

The ACAS Code was introduced to help organisations and employees deal effectively with issues of alleged misconduct or poor performance. When deciding whether an employee has been unfairly dismissed for misconduct or poor performance an employment tribunal will consider whether the organisation has followed a fair procedure and has taken the ACAS Code into account when considering whether an employer has acted reasonably or not.

It can affect the level of compensation

If an employee's claim is successful, but either the organisation or the employee has failed to follow the ACAS Code, the level of compensation awarded can be affected:

- If the organisation unreasonably failed to follow the Code, the employment tribunal may increase the employees compensation by up to 25%
- If the employee unreasonable failed to follow the Code, the employment tribunal may reduce their compensation by up to 25%

How should misconduct or poor performance be handled?

Investigate the issues

- The employer must carry out a reasonable investigation of the issue (for example by conducting an investigatory meeting with the employee under investigation). Any investigatory meeting should not result in disciplinary action without a disciplinary hearing taking place first.
- If paid suspension is necessary during the investigation it should be as brief as possible and kept under review. The employer should clarify that this is not in itself a form of disciplinary action.

Inform the employee of the issues in writing

- If, following the investigation, it is found that there is a case to answer, the employer should notify the employee in writing of the alleged misconduct or poor performance and its possible consequences in sufficient detail to enable them to respond at a disciplinary hearing.
- The notification should set out details of the disciplinary hearing, including the time and place of the hearing.
- The disciplinary hearing should be held without unreasonable delay. However, the employer must ensure the employee has reasonable time to prepare their case.

- Any written evidence (for example witness statements) should be provided to the employee.

There must be a disciplinary meeting or hearing

- The business should not make a decision to dismiss or take other disciplinary action without a disciplinary hearing or meeting taking place first.
- If the employee is persistent or unable or unwilling to attend, without good reason, the employer is entitled to hold a meeting or hearing in their absence and make a decision on the available evidence
- Both the employer and the employee should give advance notice of any witnesses they intend to call.
- At the hearing:
    - The employer should explain allegations and go through the evidence;
    - The employee should be allowed to set out their case and answer the allegations; and
    - The employee should have a reasonable opportunity to ask questions, present evidence, call relevant witnesses and raise points about any information provided by the businesses witness.

Inform the employee of the decision in writing

After the hearing, the decision should be sent to the employee in writing without unreasonable delay. Written warnings should set out:

- The nature of the misconduct or poor performance
- The improvement required
- The time scale for improvement
- How long the warnings will remain current
- The consequences of further misconduct (or failure to improve) within that period
- The employee's right to appeal the decision and the procedure they need

to follow to do so

The employee has right of appeal

- If the employee feels the disciplinary action against them is unjust, they may appeal in writing, specifying the grounds of the appeal.
- If the employee brings a tribunal claim without first appealing, any compensation awarded may be reduced.

Practical steps for organisations to take to improve their disciplinary procedures

- Involve employees in developing workplace procedures and make sure those procedures are transparent and accessible to employees
- Encourage managers to manage conduct and performance issues quickly and informally before they get to a disciplinary stage
- Investigate issues thoroughly. Even if the employee has attended an investigatory interview, always hold a disciplinary hearing once all the evidence is available, and allow the employee to put their side of the story before making any decision
- Keep written records, including minutes of meetings
- Communicate decisions effectively and promptly, setting out reasons

10: A Fair Deal for Staff Pensions: Staff Transfers from Central Government: New Guidance

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The *Fair Deal* policy was introduced in 1999. *Staff transfers from central Government: a Fair Deal for staff pensions* was published by the Treasury in June 1999. There was further guidance on bulk transfers. The approach taken in the original *Fair Deal* was that where staff were compulsorily transferred from the public sector the new employers to give them access to an occupational pension scheme which was broadly comparable to the public service pension scheme they were leaving. Staff who were compulsorily transferred from the public sector also had to have the same protection on subsequent compulsory transfers.

The interim report of the Independent Public Service Pensions Commission found that the provision of final salary pension schemes in the public sector,

combined with the requirements of the *Fair Deal*, were a "barrier to the plurality of public service provision".

On 5 July 2012 the Government announced that the *Fair Deal* was to be reformed.

HM Treasury has now issued the new guidance (October 2013). In the future, staff that are compulsorily transferred from the public sector will be offered continued access to a public service pension scheme, rather than being offered a broadly comparable private pension scheme. All staff whose employment is compulsorily transferred from the public sector under TUPE, including subsequent TUPE transfers, to independent providers of public services will retain access to their current employer's pension arrangements.

The new guidance comes into effect immediately (although changes will be made necessary to public sector schemes to accommodate the new guidance). Until this happens the old *Fair Deal* policy will apply. But it is hoped that the new *Fair Deal* will apply in all cases from April 2015.

The guidance applies directly to central Government departments, agencies, the NHS, maintained schools (including academies) and any other parts of the public sector under the control of Government Ministers where staff are eligible to be members of a public service pension scheme. The guidance does not apply to best value authorities where the Best Value Authorities Staff Transfers (Pensions) Direction will still apply.

11: Welsh Government Consultation on revised Code of Practice on Workforce matters

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In the last decade, the UK and Welsh Governments issued Codes of Practice on workforce matters in the context of staff transfers from the public sector to supplement the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector.

The UK and Welsh Governments issued the first codes on workforce matters in local authorities service contracts in 2003 and in 2005 a further code which dealt with public sector service contracts other than those emanating from local authorities. (The Welsh Code was reissued in 2008). The aim of these codes was to prevent the "two-tier workforce". In other words when applicable, they would obliged a contractor not only to apply TUPE terms to transferring employees but also to new joiners under the contract.

The English local authority (2003) and public sector (2005) codes were withdrawn in 2010 and 2011 respectively, and replaced by a set of "Principles of Good Employment Practice". But the Welsh codes still remained. Now the

Welsh Government is consulting on improving these so called "two-tier workforce codes" that apply in Wales only. The revised code would require service providers to offer employment to new joiners on fair and reasonable terms and conditions which are, overall no less than favourable than those of transferred employees.

However, a major change in the revised Welsh Government is that the draft code defines a "new joiner" as including both new employees to the service provider *and existing employees of the service provider* who have transferred to work on a contract given by the terms of the code. The consultation document was issued on 26 September 2013 and consultation will close on 20 December 2013.

If you'd like to contact us please email john.mcmullen@wrigleys.co.uk