

EMPLOYERS - KNOW THE LAW

## When a business is transferring, when do you consult with employees?

Specialising in Employment Law, Maxine Orr, a Partner with Worthingtons Solicitors, discusses the rights of employees under the Protection of Employment Regulations.

Businesses are bought and sold daily with the result that employees are automatically transferred under the protection of the Transfer of Undertakings (Protection of Employment) Regulations 1981. These ensure that employees' terms and conditions of employment are preserved. A dismissal relating to a transfer is automatically unfair and the purchaser of any going concern will 'inherit' all employees and their terms and conditions without exception and be responsible for any claims brought by disgruntled employees, even those with less than one year's service. The Employment Appeal Tribunal in London South considered the legal implications of "failing to consult" with employees when a business in liquidation was sold and an employee subsequently dismissed by reason of redundancy.

On the 15th April 2003 Millrise Limited issued its employees with one month's notice of redundancy. On the 30th April 2003 the company went into liquidation and its undertaking was sold as a going concern to S G Printers, trading as Colourflow. Mr Howard was a lithographic printer at the Company's premises from March 2002. He served his one month's notice and his termination date was the 14th May 2003.

Mr Howard issued proceedings in an Employment Tribunal for unfair dismissal, outstanding wages and a failure to consult. His complaint of unfair dismissal was successful as he has been dismissed contrary to the Transfer of

Undertakings (Protection of Employment) Regulations 1981. As this was clearly a relevant transfer all employees ought to have transferred to the purchaser at the date of transfer. However, his complaint of failure to consult was unsuccessful. The Tribunal, in considering the regulations, stated that the duty to consult only applied to appropriate representatives and as Mr Howard was not an "appropriate repre-

“As there were no representatives or recognised trade union, the Employer is obliged to invite the employees to elect representatives or to “give to each affected employee” the required information in respect of the proposed transfer of the business.”

sentative” he was not entitled to claim for compensation under this. He appealed on this one issue to the Employment Appeal Tribunal.

His appeal was founded on his belief that under Regulation 10 of the TUPE regulations (as amended) there is a duty to “consult all the persons who are appropriate representatives of any of the affected employees”. As defined, appropriate representatives are recognised Trade Unions or elected representatives. The legislation goes on to state that failure to consult will result in an award of appropriate compensation - defined as “such sum not exceeding 13 weeks’



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pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer”.

Mr Howard argued that as there were no representatives, by way of a recognised trade union under the regulations, the Employer is obliged to invite the employees to elect representatives and where they fail to do so the employer

must “give to each affected employee” the required information in respect of the proposed transfer of the business. The tribunal accepted his argument and his case was remitted to an employment tribunal to consider the appropriate amount of compensation.

The Tribunal noted in its judgement that this matter had not previously been the subject of any reported decision.

This highlights the importance of taking professional legal advice prior to making decisions especially in complicated matters like the sale of a business or a redundancy exercise. [@1](#)