

UK Appeal Decision Gives Further Guidance on Appropriate Penalties for Failure to Inform and Consult on a TUPE Transfer

15 October 2010

On 13 October, the UK's Employment Appeal Tribunal (EAT) handed down its decision in *Todd v Care Concern*. This case concerned a seller's failure to properly inform and consult with employees regarding an impending transfer. The EAT held that the maximum statutory award of 13 weeks' pay should *not* be the starting point for failure to inform and consult in cases where the employer has made some attempts (albeit limited) to comply with the statutory obligations.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provides protection for employees on the sale of assets or a business or on a change of service provider and requires an employer to inform and consult with representatives of the affected employees. Affected employees are "any employees of the transferor or transferee who may be affected by a transfer or by measures taken in connection with it."

Where an employer has failed to comply with the requirement to inform or consult (or to organise the election of employee representatives) a claim may be brought before the employment tribunal. If the tribunal finds the complaint well founded, it has the power to make a declaration to that effect and can award "appropriate compensation" payable to the relevant affected employees of up to 13 weeks' gross pay for each affected employee. Unlike some statutory awards, there is no limit on the amount of pay. The Tribunal must also consider what is just and equitable compensation having regard to the seriousness of the failure of the employer to comply with his duty.

The case of *Todd v Care Concern* involved the seller of a care home giving limited information to employees about an impending transfer. The seller also failed to arrange for the election of appropriate representatives as required by TUPE, and accordingly gave no information to, and did not consult with, any such representative. At first instance the tribunal awarded the affected employees maximum compensation of 13 weeks' gross pay.

However, the EAT held that the tribunal had been wrong in principle to award the maximum compensation in circumstances where some (though inadequate) information had been given to the employees and the measures requiring consultation were of limited significance.

The EAT also distinguished the guidance given by the Court of Appeal in the case of *Susie Radin Ltd v GMB* (2004) where no information was given to the affected employees. The EAT confirmed that "taking the maximum award as the starting point and discounting . . . should not be applied mechanically in a case where there has been some information given and/or some consultation but without using the statutory procedure."

The award was reduced to seven weeks' pay and the EAT was able to exercise its powers under section 35 of the Employment Tribunals Act 1996 to substitute the level of the award without the question of compensation being remitted.

Further, the tribunal had made no award against the buyer; however, the EAT held that the tribunal was obliged by TUPE to find the buyer jointly and severally liable with the seller.

This decision is helpful for employers as it recognises that in a scenario where the "perfect" information and consultation process has not taken place, but where an employer has provided some information and/or consulted with employees, any employment tribunal award should take account of this and should not automatically be set at the maximum statutory award of 13 weeks' gross pay for each employee.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

London

Mark S. Dichter	+44 (0)20 3201 5663	mdichter@morganlewis.com
Christopher Hitchins	+44 (0)20 3201 5654	chitchins@morganlewis.com
Matthew Howse	+44 (0)20 3201 5670	mhowse@morganlewis.com

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