Measuring up for TUPE consultation

Charles Wynn-Evans reports on a recent EAT decision – *Todd v Strain & ors* – that considered the concept of 'measures' for the purposes of the collective information and consultation requirements of TUPE. He also looks at the correct approach to determining an award in respect of a breach of those obligations

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Introduction

The penalty for failure to comply with the obligations of collective information and consultation established by regulations 13 and 14 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 can be significant to say the least. The maximum award is 13 weeks' pay per affected employee and the approach to remedy is in principle punitive rather than compensatory.

As any 'measures' envisaged by the transferor and/or transferee must be notified to the appropriate representatives of the affected employees pursuant to regulations 13(2)(c) and (d) and trigger the obligation to consult with those representatives 'with a view to seeking agreement', a crucial issue is what precisely constitutes 'measures'. This issue was considered in *Todd v Strain & ors,* a recent decision of the Employment Appeal Tribunal that also addressed the principles to be applied in determining the remedy for breach of these TUPE obligations.

Measures – a wide concept

The concept of measures has generally been assumed to refer to specific actions to be taken by the transferor or transferee in connection with the transfer, such as dismissals and changes to terms and conditions of employment. A particular example is the replacement of final salary pension arrangements under an occupational pension scheme (which in general terms need not be continued post-transfer by the transferee as a consequence of regulation 10 of TUPE) by defined contribution or other arrangements satisfying the requirements of the Transfer of Undertakings (Pension Protection) Regulations 2005.

In *IPCS v Secretary of State for Defence*, Millett J provided some guidance on the issue of what constitutes 'measures', describing the term as 'a word of the widest import … includ[ing] any action, step or arrangement'. He also observed that 'despite the width of the … words, it is clear that manpower projections may not be measures; though positive steps to achieve planned reductions in manpower levels otherwise than through natural wastage would be'. Moreover, the act of entering into a transaction the consequence of which is the transfer of employees from the transferor to the transferee in accordance with TUPE is not a measure about which consultation is required as it constitutes a matter of 'business policy'.

The EAT considers measures

In *Todd*, the EAT considered the concept of measures in a judgment that has important practical consequences for those devising the requisite information and consultation process in relation to a TUPE transfer. This case concerned the sale of a care home, which led to a claim by 32 of the 64 affected employees complaining of a breach of the TUPE information and consultation regime. The transferor had not arranged the election of employee representatives but had informed a group of approximately one third of the affected employees of the impending sale and confirmed that their jobs were safe, the intention being that they would inform their colleagues of the position.

In a decision in which it found that the transferee had not been at fault, the employment tribunal made the maximum permissible award against the transferor. The employment tribunal held, *inter alia*, that the transferor should have consulted representatives of the affected employees with regard to certain administrative changes that related to the employees' remuneration arrangements post-transfer, one of which was a change to the employees' pay date, and which the tribunal considered were measures for TUPE purposes.

In upholding the employment tribunal's decision, the EAT made a number of valuable observations. The fact that the change that was envisaged with regard to pay dates was not to the disadvantage of the employees in question was irrelevant to the issue of whether it constituted a measure for TUPE purposes. The EAT also did not consider that it was possible to argue that the changes were so trivial as to be *de minimis*. Nothing in the legislation requires a measure to be disadvantageous (or indeed of a particular level of materiality) for its being envisaged (by either transferor or transferee) to trigger the information and consultation obligations of TUPE.

The EAT also appears to have established a distinction between two types of consequence of a relevant transfer in assessing when the collective duty to inform and consult arises under TUPE. Despite the width of the concept of a measure, 'it must nevertheless be something deliberately

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done by the transferor over and above what necessarily occurs as a consequence of the transfer itself'.

Administrative changes that are an inevitable consequence of the transfer will not attract the information and consultation duties. One example would be the simple fact that the new employer's organisation will, by virtue of the transfer, be responsible for making salary payments post-transfer. However, where post-transfer administrative arrangements depart from the normal pre-transfer practice, then information and consultation about those measures may be required under TUPE.

Information assists voluntary consultation

The *Todd* decision not only emphasises that the duties to inform and to consult under TUPE are separate obligations, it also reiterates the point, made by Millett J in *IPCS* and the EAT decision in *Cable Realisations Ltd v GMB*, that the duty to inform does not arise only where there is a duty to consult under TUPE. The duty to inform arises in any event, even if it is only a precursor to 'voluntary' consultations into which the employer chooses, but is not required by TUPE, to enter.

As the EAT put it in *Cable Realisations*, adopting an interpretation which it acknowledged was based on its view of the industrial relations rationale behind TUPE, the duty to inform is designed to allow the employees' representatives to engage in a consultation process with the employer 'on an informed basis', whether that consultation is required by regulation 13(6) of TUPE – which requires consultation with a view to seeking agreement where measures are envisaged – or is voluntary.

In the view of the EAT in *Todd*, 'part of the purpose of the duty to consult must surely be to enable transitional arrangements … to be explained to employees and for them to be reassured, if this be the case, that they will not in any way be prejudiced by them.' This interpretation of the application of TUPE's collective information and consultation regime is presumably intended to avoid the 'needless worry', as the employment tribunal put it, which had been caused to the employees in *Todd*, many of who were low paid, by the lack of communication as to the changes to be made to their pay arrangements.

Level of award

The *Todd* decision is also of interest in relation to the issue of the remedy for breach of TUPE's collective information and consultation regime. The employment tribunal should assess such an award, in accordance with regulation 16(3), on the basis of what it 'considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty'. Notwithstanding this broad discretion, the EAT held in *Sweetin v Coral Racing* that employment tribunals should follow the approach adopted by the Court of Appeal in *Susie Radin v GMB & ors* to the determination of protective awards for failure to comply with the collective information and consultation required in redundancy situations by s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

In *Susie Radin* Peter Gibson J made clear that the employment tribunal has a wide discretion, but the principles were also established that the purpose of the award is to provide a sanction for breach rather than to compensate employees for consequential loss and that the proper approach is to start with the maximum award and reduce the award only where mitigating circumstances are judged appropriate to justify a reduction.

In *Todd*, the EAT reduced the employment tribunal's award from the maximum of 13 to seven weeks' pay per employee on the basis that the failure was not at the most 'extreme end of the scale so as to justify a maximum award'.

The EAT specifically contrasted the employer's conduct in *Sweetin* where there had been no information or consultation at all – the first that the employees knew about the transfer was when the representative of the new owners announced himself at the premises on the day that it took place – with that in *Todd*. While in *Todd* the process followed and information given was inadequate and therefore the breach more than merely technical, the employer had in fact held a meeting with a significant proportion of the workforce, had given out some basic information and had made clear that the transferee would not be reducing staff numbers or changing terms and conditions.

In emphasising the employment tribunal's discretion as to the appropriate level of an award under regulation 16, *Todd* therefore highlights the potential relevance and importance of two particular issues: the nature of the subject matter of the requisite consultation and the extent of any attempts at consultation. The EAT's view of the appropriate level of award was influenced by the fact that the matters about which there should have been consultation – transitional pay arrangements – were 'not of any great significance'. The EAT also placed a potentially important qualification on the starting point for consideration of an award in case of breach being the maximum award with discounting if applicable for mitigating circumstances. In the EAT's view, this aspect of the *Susie Radin* guidance was 'directed at the case where the employer has done nothing at all, and it should not be applied

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mechanically in a case where there has been some information given and/or some consultation but without using the statutory procedure'.

Peter Gibson J made clear in *Susie Radin* that the employment tribunal has a wide discretion in determining the relevant awards as to what is just and equitable, that the employer's default may vary from a technical to a complete failure to inform and consult and that the deliberateness of the failure and any advice taken may be relevant. To that extent, therefore, *Todd* is a valuable reminder that the *Susie Radin* guidance is more nuanced than establishing a presumption, albeit rebuttable, of a maximum award in cases of breach of TUPE's information and consultation obligations.

An example of a similar approach to that adopted in *Todd*, albeit in the context of collective redundancy consultation, can be found in *National Coal Mining v NUM* where the EAT held that ordinarily a tribunal should award less than a maximum protective award where the employer undertakes 'more than minimal' consultation. As a reminder of the breadth of the tribunal's discretion, the *Todd* decision indicates that a maximum award is not automatic and that such efforts at information and consultation as may have been attempted, even if inadequate, are relevant to the level of any award, as is the substantive significance of the matters about which there should have been consultation.

Analysis

Todd does not reflect a dramatic departure from the previous case law guidance. However, it does expand usefully on the concept of measures and the proper approach to remedy. The decision emphasises the discretion of the tribunal with regard to awards for breach while highlighting the relevance and potential importance of the subject matter of the requisite consultation and the extent to which formal or informal consultations have been conducted.

With regard to the detailed matters about which there should be consultation, *Todd* alerts transferors to the point that practical and administrative matters can constitute measures just as much as more dramatic actions such as relocations, redundancies and changes to benefits and terms and conditions of employment, and therefore will also trigger the consultation obligation. Matters that might otherwise have been analysed as 'social or economic' implications of a transfer – and therefore attracting the obligation to inform under regulation 13(2)(b) but not to consult – can (also) be measures and may therefore need to be addressed in consultation.

Issues that may need to be considered as potentially constituting measures, in addition to dismissals and contract changes, could, depending on the context, include matters as diverse as changes of reporting line, uniform changes, internal management reorganisations and job title changes.

Given the potential seriousness of the consequences of breach of the TUPE information and consultation regime, *Todd* not only reminds those engaged in relevant transfers of the potential importance of indemnities allocating liability for claims of breach as between the parties. It will also encourage careful analysis of the detailed practical and logistical aspects of the implementation of the transaction in question to assess the extent to which they attract the duty to inform and consult.

In light of their obligation – under regulation 13(4) – to notify the transferor of any measures which they envisage making, and the liability which they may incur under regulation 15(5) if breach of that obligation causes any failure by the transferor to comply with its obligations, transferees will also need to be mindful of *Todd* when compiling their measures letters. That said, it can be argued that the *Todd* decision should hold few fears for those who are prepared (and, in the particular commercial context of the transaction in question, are able) to utilise TUPE consultation smoothly and positively to transition the transferring employees to the new employer.

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Cases referred to:

- *Todd v Strain & ors* UKEATS/0057/10/B1
- *IPCS v Secretary of State for Defence* [1987] IRLR 373
- *Cable Realisations Ltd v GMB* [2010] IRLR 42
- *Sweetin v Coral Racing* [2006] IRLR 252
- *Susie Radin v GMB & ors* [2004] ICR 893
- *National Coal Mining v NUM* UKEAT/0397/06/RN