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Transfers of Employment from the Public Sector and Redundancy Costs

The extent to which the rights of workers are protected when they get a new employer is important not only for the employees but also their employers.
***Adam Kelly** an associate at Simcocks Advocates explains why.*

In recent times, this topic has assumed increased importance in the case of the supply by the private sector (directly or on behalf of government) of services some of which may previously have been supplied directly by the public sector, in many areas. Local examples, in the Isle of Man, might include the Glenside Resource Centre and nursery education which has been a hotly debated topic recently. Similar issues apply to the management of other publicly owned assets and facilities on the Island.

A common reaction to the perceived need to reduce the scope of government is that savings can often only be achieved at the cost of redundancy. There may be, of course, situations in which some redundancies may be unavoidable. However, in the UK and other EU countries where there is formal transfer of undertakings legislation - which transfers the rights of workers when the business which employs them is transferred to a new owner - redundancy would probably not be first item on the agenda. If some part of an activity previously carried out by government is to be supplied in future in the private sector then the initial question is whether a transfer of an undertaking will occur. If so, the legislation applies, and the acquiring party will take over the continuity of service of the staff concerned. Otherwise the liability remains with the employing government body.

However, there are dangers in taking the transfer of undertakings legislation for granted. For example, in a recent case in the UK involving the closure of a care home for the

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elderly, the transferring NHS Trust felt that the arrangements it had made for the ongoing care of its residents involved a transfer of its activities. Nevertheless, the Employment Appeal Tribunal disagreed (*Nottinghamshire NHS Trust v Hamshaw* 2011) with the result that the Trust remained liable for the employment costs. On the other side of the coin, there is anecdotal evidence in UK with regard to redundancy payments being made to public sector workers whose services it turns out are still required and have to be purchased perhaps at higher cost and perhaps also from an entity which has been gratuitously relieved, at tax payer expense, from the costs associated with continuity of employment.

In the Isle of Man, of course, things are different. In some cases it will be obvious that a transfer has occurred. In other cases and in the absence of comparable legislation, agreement has to be reached requiring the transferee of the activities concerned to offer the relevant employees offers of employment on terms comparable to those they previously enjoyed, including continuity of employment but (usually) excluding pensions. It is a process that has the advantage for the transferee of identifying the activities being transferred and any changes in them which might be involved, so that it is unlikely that the sort of confusion which arose in the *Hamshaw* case referred to above would be repeated in a Manx context. Where a transfer occurs, paragraph 8 of Schedule 5 of the Employment Act 2006 and section 11 of the Redundancy Payments Act 1990 provide that the continuity of employment of employees transferring to the new employer will be unbroken.

Where an activity previously carried on by government is taken over – in whole or part- by the private sector, then the transferee would be well advised to secure protection against the employment liabilities it is assuming, including the following:

- Indemnity against any differences between the terms offered by the transferee to the employees concerned and those which applied immediately before the transfer;
- Check that all necessary information has been supplied in connection with the employees concerned and any necessary consultations which have been carried out;
- Where the transfer is part of an outsourcing arrangement, ensure that on its termination the employees concerned (and any replacement or additional employees) are re-employed by the transferor or replacement service provider and request an indemnity accordingly;
- Where the transfer is from the public sector, check that procurement and tendering requirements have been met.

In many cases (particularly where a private sector provider supplies some of the services previously supplied by the public sector) there may be reluctance on the part of the transferee to accept that a transfer is involved, with a corresponding expectation that redundancy and other employment costs will be met – or at least contributed to - by government as a condition of the service being provided in future. On the government side, however, it would be necessary to consider the reasonableness of any such proposals and whether it is properly within the powers of the government body concerned

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to agree to them. If this aspect of the transaction is questionable in any way it would be open to an auditor to seek directions from the court pursuant to section 10 of the Audit Act 2006 whether any unnecessary payment of redundancy costs by public sector bodies might be contrary to law and, in any event, liable to scrutiny by the Public Accounts Committee.

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