TUPE and ETO's

What is an ETO Defence Under TUPE?

ETO reasons are used in two main areas, after a transfer has taken place -
• Dismissal
• Variations to terms and conditions of employment

Examples of an ETO reason are –
• **Economic Reasons** - where the demand for output has fallen and profitability is unsustainable without dismissing staff
• **Technical reasons** - where the transferee wishes to use new technology and the transferring employees do not have the required skills
• **Organisational reasons** - where it is not practical to transfer employees due to the location of the transferee

When is an ETO Defence Under TUPE Not Fair?

• A dismissal or variation to terms and conditions of employment by either the transferor or transferee which is connected to the transfer will be automatically unfair unless there is an ETO reason entailing changes in the workforce
• If the reason for the dismissal or change to the terms and conditions of employment is the transfer, then even if the employees agree to it, it will be void

Can an ETO Reason be used to Change T&C's or Dismiss an Employee in anticipation of a TUPE Transfer and Rely on the Transferee's ETO Reasons?

• No, the transferor can not change terms and conditions of employment in anticipation of a TUPE transfer
• The ETO reason must relate to the transferor's future conduct of the business and be relevant after the transfer

Reasons Connected/Not Connected to the Transfer

• For an ETO reason to be valid, the transferee must establish a change in the workforce, normally a workforce reduction
• If the employer wishes simply to harmonise terms and conditions of employment then that will not be sufficient to implement the changes without a valid ETO reason

Example of a Reason Unconnected to the Transfer

• The transferee needs to train employees to use the machinery used by the transferee
• The reason for the change is prompted by a ‘knock-on effect’ of the transfer and not solely the transfer itself
• The reason is not exclusively connected to the transfer and the change is therefore valid

Example of a Reason Connected to the Transfer

• The transferee wishes to make changes to harmonise terms and conditions of employment with their existing employees
• The changes are by reason of the transfer itself and are therefore void
• In this case the transferee and employee may agree a variation of the contract if the sole or principal reason for the variation is a reason connected with the transfer that is an ETO reason
Can the Transferee change Terms and Conditions of Employment if the changes will Benefit Employees?

- Case law confirms that the transferee can change terms and conditions of employment which are to the benefit of the employee

Other Considerations

Other considerations are –
- One alternative to harmonising terms and conditions of employment is for the transferee to dismiss employees, enter into compromise agreements with them to waive claims, and then re-engage them on new terms and conditions of employment. However, this can put transferees at risk of unfair dismissal claims if any employees decide not to agree or to subsequently argue that the agreement is void
- If there is a change as a result of the transfer that is a detriment to the employees they will be able to resign and claim unfair dismissal
- If an employee who has transferred applies for another position with the transferee and are appointed, they can be offered the position on revised terms and conditions of employment
- There is no time period after which terms and conditions of employment can be automatically changed
- Employees must still have one year’s service to bring a claim under TUPE 2006 unless they can argue unfair dismissal for asserting their statutory rights

Key Questions

1) Is the transferee going to change terms and conditions of employment/dismiss employees?
2) Will this change impact on the council? e.g. if the transferee is a co-operative which the council has shares in or a private company owned by the council cost saving will have a direct impact on the council as opposed to the transferee being an established private company
3) If so what is the reason for implementing the change, for example -
   (i) Economic sustainability? – e.g. to ensure the future of the company
   (ii) To provide competitive salary packages - e.g. a newly established private company (via a management buy-out for example) may need to make to its salary package comparable to private sector salary packages to compete with the private market and retain staff
4) If the change for a valid reason i.e. an ETO reason?
5) What is the council's interest/responsibility in ensuring valid reasons for change? (see reasons for question 2)