



*Eatons*

## TUPE and 'Off-shoring'

The Employment Appeal Tribunal (EAT) has handed down a decision which will be of interest to anyone considering selling their business, or a part of their business, to a buyer from abroad.

Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) states that the legislation applies when there is 'a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity'.

In *Holis Metal Industries Ltd. v GMB*, the EAT has considered the issue, previously untested in UK case law, as to whether TUPE has the potential to apply to the transfer of a business or service entity outside the UK – in this case to Israel and therefore outside the EU.

Newell, owners of the 'Swish' blind manufacturing business, had a factory in Tamworth. There were 180 workers at the plant of whom 76 were represented by the GMB union. Newell sold the track and pole manufacturing part of the business, which was due to be closed, to Holis, a company based in Israel. The 107 staff working in that part of the business were informed that the operation was to be moved to Israel and unless they agreed to move also they would be made redundant following the transfer. In the event, although some of the plant and machinery was moved to Israel, none of the employees wished to go and all were made redundant by Holis shortly after the transfer. For administrative reasons, however, the redundancy payments were paid by Newell. The GMB union claimed that there was a breach of the duty to inform and consult over the transfer. Holis sought to strike out the claim but the Employment Tribunal (ET) Chairman, in a preliminary ruling, decided that the TUPE Regulations did apply to a transfer of a business which after transfer is based outside the United Kingdom and also outside the European Union. Holis subsequently appealed against the decision.

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The EAT held that TUPE can apply to transfers outside the UK, even though enforcement may present a problem. Such a decision would be in line with the aims of TUPE and, since the business was originally based within the UK, there was sufficient connection with the UK to give jurisdiction to UK courts. However, each case must be decided on the specific facts. Also, there will still be an issue as to whether the entity to be transferred has retained its identity as required under Regulation 3(1)(a). This too will depend on the facts of the individual case. Accordingly, the case was referred back to the ET.

For advice on all aspects of employment law please contact Maureen Singleton, Head of Corporate and Employment Department, on Tel: 01274 728 327.

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