

Importance of employees' rights in franchise resales

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When a franchisee sells his business, the franchisor needs to ensure he has complied with the law that regulates the rights of his employees.

Failure to do so can result in difficulties for the incoming franchisee and cause financial loss to both the franchisee and the franchisor. A recent case involving a Toyota dealership franchise provides a timely reminder for franchisors.

The recent Employment Appeal Tribunal (EAT) case of *Shields Automotive Ltd v Langdon* and another, considered what compensation award should be made by the tribunal following a technical breach of the information and consultation provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and in particular, the obligations in relation to the election of appropriate representatives.

TUPE considerations

Under regulation 13 of TUPE, there is an obligation on the outgoing franchisee and the incoming franchisee to inform and consult appropriate representatives of affected employees, long enough before a relevant transfer takes place.

Regulation 14 of TUPE concerns the election of employee representatives and requires, amongst other things, the following.

- The employer shall make such arrangements as are reasonably practicable to ensure the election is fair.
- All employees on the date of the election are entitled to vote for such representatives.

Failure to inform or consult in accordance with the requirements of TUPE may lead to an employer being ordered to compensate affected employees to the extent that is just and equitable having regard to the seriousness of the failure, but not exceeding 13 weeks' actual pay. Any such award must be punitive (that is, to punish the employer), rather than to compensate the employee.

With this in mind, we can turn to the facts of the case and the rulings of the Tribunal and the EAT case.

Facts of the case

The outgoing franchisee, Shields Automotive held a Toyota franchise and was involved in the sale of motor vehicles in Scotland. With effect from August 9, 2011, the franchise was transferred to Arnold Clark Automobiles Ltd, affecting a number of employees who, with the exception of one, all transferred to Arnold Clark.

Despite the transfer being agreed in March 2010 and by July 2011, the heads of terms being in place, it took until 2pm on August 2, 2011 for the outgoing franchisee's employees to be informed of the potential transfer of the franchise, and the employees were only given until 5pm that same afternoon to nominate representatives.

One affected employee, a Mr Langdon elected not to vote due to concerns about the short timescales.

Another, a Mr Brolly had a day off, which Shields was aware of, and did not therefore have the opportunity to vote. No reason was put forward by Shields as to why the elections could not remain open until early on August 3, to give Mr Brolly the opportunity to vote.

The results of the election saw one outright leader, who was duly elected as the first representative, and a tie for second place. On the basis that one of the tied employees was to be absent from work on the day of the forthcoming consultation meeting, Shields unilaterally approved the other employee as the second representative.

Mr Langdon and Mr Brolly brought claims based on a failure to comply with the information and consultation requirements under TUPE. At first instance, the tribunal did not criticise the quality and content of the consultation undertaken, but nevertheless considered that Shields had failed to ensure that there

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was a fair election process, highlighting failure to set an appropriate timescale for the election, and failure to inform the affected employees of the tie-break situation when selecting the second representative.

On the first point, the tribunal found that Shields should have extended the nomination timescale so as to ensure that no employee would be excluded due to their regular working pattern. On the second point, the tribunal found that the unilateral decision compromised the fairness of the election.

The ruling

At first instance, Mr Langdon was awarded two weeks pay and Mr Brolly seven weeks pay, the difference representing the fact that Mr Langdon was adjudged not to have been disadvantaged by the tie-break issue as he had opted not to vote.

On appeal, EAT agreed that there had been a failure to comply with the relevant provisions of Regulation 14 of TUPE. On the timescale point, it accepted that, whilst Mr Brolly had technically been entitled to vote, he had not been afforded the opportunity to exercise that entitlement. On the tie-break point, EAT concluded that the final selection was made by the employer, rather than the employees.

EAT disagreed with the approach to compensation taken by the tribunal. EAT took into account that any compensation awarded should be punitive rather than compensatory, and it considered that the vast differences awarded to the claimants did not reflect this. →

It considered that more emphasis should have been placed on the seriousness of the breaches, rather than their impact on each employee.

EAT also referred to the case of *Todd v Strain* where there had been a failure to inform and consult, albeit some information had been shared on an informal basis with employees. In that case, the employees were awarded seven weeks actual pay in respect of the failures by the employer.

The tribunal in the Shields case was of the view that the breach of the TUPE regulations by Shields was less significant than that by the transferor in *Todd v Strain*, and yet it made the same award to Mr Brolly as had been made to the employees in the latter case (i.e. seven weeks actual pay).

Given that EAT considered there to have been a full consultation by Shields, it deemed the breach of Regulation 14 in relation to the election of appropriate representative to be a technical breach and accordingly kept Mr Langdon's award at two weeks' pay, whilst reducing Mr Brolly's to three weeks.

Lessons for franchisors

There are lessons to be learnt here by franchisors who consent to their franchisees selling their businesses.

Clearly, it is important for the franchisor to ensure that where a TUPE transfer occurs, the outgoing franchisee informs and, where necessary, consults with appropriate representatives pursuant to Regulation 13 of TUPE.

It is also important to ensure that at the outset of any TUPE transfer process the outgoing franchisee ensures that the election of appropriate representatives is not overlooked and that it carries out a fair election process. This should be a condition precedent of the franchisor's consent to the sale.

Although it is clear from the judgment in Shields that an Employment Tribunal can (and will) reduce awards so that they are at a level that is appropriate, taking into account the extent of the breach and if it is a technical breach only. Where there are a large number of affected employees, who can claim that the election of appropriate representatives

has not been carried out in accordance with Regulation 14 of TUPE, the cost of the awards and the adverse impact on the franchisee's business could be significant.

It is open to an Employment Tribunal to make the transferor and transferee jointly and severally liable in respect of any compensation payable (i.e. the employees bringing the claims could choose to bring a claim against either or both of the parties).

As the incoming franchisee will have little or no control over how the outgoing franchisee carries out the election process, the franchisor should oblige the outgoing franchisee to fulfil its legal obligations.

The franchisor should also ensure that as part of the incoming franchisee's due diligence process in acquiring the franchise, he satisfies himself that Regulation 14 has been properly followed or seeks warranty and/or indemnity protection against any claims and compensation awards for failure to comply with TUPE Regulations.



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Women in Parliament

Members of EWIF, the women's franchise group, on a tour of the Houses of Parliament with their host, Justin Tomlinson (seated), MP for Swindon North. His wife Jo is a pet care franchisor. EWIF is to hold a London regional meeting in the House. From left are: seated – Linda Price (Swimtime), Carole Stubbs (Why Franchise), Tomlinson and Vickie

Knighton (Why Franchise). Standing – Mandy Bagot (Cloud Bookkeeping), Sally Findlay (Recognition Express), Howard White (Mundays), Jane Masih (Owen White), Louise Harris (Wilkins Chimney Sweep), Louise Bruce (Big Red Box PR), Anne-Marie Wilkins (Diddidance), Karen Sherr (Musical Minis) and Helen Thompson (Kyros Franchising).

