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HR MANAGER- BBL LTD



Memorandum

To: Big Business Ltd (BBL)

From: Amberlea Knowles (HR Manager) 2116495

Date: 15th February 2022

Re: Illuminate

Thank you for your recent communication regarding cancelling contract terms with Illuminate, please find below answers to the questions posed and the legal implications and framework that would need to be followed.

1- TUPE Transfer?

1.1 Reasons why likely to be a TUPE transfer?

In the original communication, it is noted that you wish to cancel the contract with illuminate due to expense. It is important to note the following legal stipulations under TUPE – or “Transfer of undertakings” applies in two situations. 1- Business Transfer or 2- service change provision (CIPD, 2022). Under these regulations and the reasons outlined below, it is unlikely to be as simple as cancelling the contract with Illuminate. It is important to evaluate, and risk assess the illuminate and BBL workforce in line with ACAS guidelines to ensure all legal provisions are adhered to.

1.1.1 Business Transfer?

If in this case, if it is assumed that illuminate only employs 15 people that work on sites of BBL for 85% of their time then it would be a “Business Transfer” through TUPE.

A business transfer is where a businesses or part of merge creating one business. As ACAS (2022) outline as part of their guidance, a business will transfer under TUPE if:

- Its main asset has transferred to the new employer, such as equipment or employees.

AND

- “Business activities are the same or similar as before” which in this case, electrical engineering will still be required.

It should be noted that in labour intensive businesses such as electrical engineering the employees are the main asset and as a result, all employees assigned to the business or part of it will transfer with it. (Lewis, 2020). It is recommended that BBL agree with Illuminate what employees would transfer, although this should be the 15 employees that are working on Big Business site if this is the entirety of Illuminate workforce.

1.1.2 Service provision change/ “Insourcing”?

Still TUPE, service provision changes arise when where contracts are reassigned (CIPD, 2022). In this instance, if it is assumed that Illuminate have more than the 15 employees in total and that 15 are assigned to work in BBL,

cancelling the contract with Illuminate will constitute as “insourcing” or bringing work in house as is proposed. All 15 employees contracted to BBL via Illuminate will likely have to be TUPE across to BBL.

In this instance, it is important to note that for a service change provision to be covered by 2006 regs. The activities must be fundamentally the same, in this case although BBL and Illuminate employees have different work assignments it is fundamentally the same category, Electrical engineering.

1.2 Reasons why not be a likely to be a TUPE Transfer?

1.2.3 Percentage time of workload? Illuminate contract BBL 85% of their work.

ET Case *Costain V Armitage and ERH Communications* the EAT found that the reliance on the percentage split of contractual work should not be relied on in this case, it was 67% to determine TUPE transfer.

85% contracted work is undertaken by Illuminate has been suggested in previous communication. In this case, if work is not specifically assigned to individual employees as part of an organised grouping, BBL may not have to TUPE transfer.

1.3.4 Organised Grouping

See EAT Case “*Stobart V Moreman and others*”, where the tribunal found that it is not enough for employees to carry out most of their work for the client, they must be “organised by reference to the clients’ requirements and be

identifiable as the client's team". (CIPD, 2022). Without a recognised "Organised grouping of employees" there will be no service provision change or Business transfer. (Ryley-Partner, 2014).

It may be possible to transfer only part of the employees' contract when working time is split (CIPD, 2022)

1.3.5 Recommendation:

It is important that BBL assesses the following before concluding on TUPE transfer:

- Is Illuminate compromised of 15 employees in total or assign 15 employees from a larger pool – Business Transfer or insourcing?
- Establish the number of employee's assigned to BBL contract and working time spent for individual employees.
- Are Illuminate employee part of an Organised Grouping as defined by the regulation?

2.1 Considerations before deciding TUPE:

- Benefits and risks are calculated, it may be financially favourable to continue outsourcing once costs of the transfer and any potential redundancies, staffing costs are calculated.
- How the transfer will be handled with new and existing employees and how the integration will ensue.
- Is there enough work and is there a risk of redundancy post transfer?

2.1.2 Conclusion:

If BBL decide to cancel the contract with Illuminate, it is likely that it will be a TUPE transfer and classed as in-sourcing. It is important that questions in the recommendations are researched before a final decision is made.

3.0 Legal Obligations of BBL for TUPE Transfer?

Once TUPE transfer is identified, both outgoing and incoming business must respect the preservation of rights of the relevant employees (CIPD,2022)

Attached to this memorandum is a checklist to follow from ACAS guidelines.

Outlining the main important points for BBL as follows:

- Identify and agree with Illuminate which employees will transfer
 - Request and check Employee Liability from Illuminate
 - Check warranties and indemnities are correct from illuminate.
 - Inform and consult with Federation of Electrical workers union (If permission granted by Illuminate) and IWU for existing BBL employees.
- The Reasons why, the date the transfer will take place and the LES implications of the transfer must be communicated to the Union Rep.
- (Lewis, 2020)
- Check pension requirements and set up new pension if required.
 - Assume all Terms and conditions, seek legal advice if not possible.
 - Liable for any unfair dismissal claims as a result of the transfer

3.1.1 Legal Obligations of Illuminate for TUPE Transfer?

Like the legal obligations of BBL, Illuminate (Transferor) must follow the below steps to adhere to TUPE guidelines:

- Provide Due diligence information on transferring employees taking note of Data protection laws (GDPR) a minimum of 28 days before the transfer. Failure to comply could result in Tribunal compensation with a minimum award of £500 per incoming employee. (Pinset Mason, 2021)
- Submit a measures letter (Capital Law, 2020)
- Provide warranties and indemnities to BBL.
- Inform and consult with FEW union with regards to the transfer of affected employees.
- Provide BBL with ELI with TUPE information in writing and ensure it is submitted on time and accurate.
- Identify and agree with BBL which employees will transfer.
- Consult with employee representatives about maintaining good relationships post transfer
- Provide information relating to pension of all transferring employees (ACAS, 2022)

4.0 Redundancy Selection:

4.1 LIFO: Potential for discrimination or unfair dismissal claims?

Operating the Last in first out (LIFO) policy has risks attached, especially in relation to Discrimination claims. Although a simpler selection process, it does not consider skills set that would benefit the business. BBL proposes 23 redundancies are to take place, this would affect both BBL existing and TUPE staff from illuminate as only 15 originally TUPE'd across. (Personnel Today, 2008)

Legislation does allow businesses to implement a policy with age bias if it objectifiably justifies a legitimate aim, but BBL should proceed with caution if this is the method employed as Tribunal could decide that the steps were not proportionate or justified and resulted in discrimination which includes an additional compensatory award to claimants.

LIFO may be relevant to selection criteria but should not be used as the sole method for redundancy selection (CIPD,2021)

4.1.2 Informing (BEIS) Legal compliance:

It is important to note that as BBL intends to make more than 20 redundancies, it must inform the Redundancy Payments Service for Business, Energy and Industrial Strategy (BEIS) (CIPD, 2021).

In Addition, you must follow Gov.uk (2022) guidelines and complete a HR1 form (Attached to this email). Please note, should this step not be followed, an unlimited fine can be imposed (Gov.uk, 2022). There is a statutory time limit of 30 days before the first redundancy is initiated that the RPS must receive notification of your intention to make redundancies.

4.1.3 TUPE affected employees and Redundancy implications:

BBL are under law entitled to make redundancies after a TUPE transfer but it is important to note the following criteria:

- 1- There must be a genuine redundancy situation, in this case it is noted that efficiency has outpaced original expectations and required a head count reduction of 23 personnel.
- 2- A requirement to make changes to the workforce based on ETO reasoning. (ETO – Economic, technical or organisational) (ACAS, 2022b). In this instance, the need for redundancy would be a valid ETO as BBL now has more employees than work that needs undertaking.
- 3- Transferors must not be selected less favourably as a result of a TUPE transfer in a redundancy situation, NB issues surrounding LIFO under previous subheading. See Case; *Hare Wine LTD V Kaur (2019)*: the court of appeal ruled that dismissals related to TUPE transfer, in this case LIFO policy could be argued as such, are automatically deemed as unfair.

5.0 Legally compliant and Fair process to deal with redundancies:

5.1 Less than two years' service?

An important consideration to make employees with less than 2 years' service do not have statutory protection against unfair dismissal. Any employees under the two-year threshold could be terminated without the requirement for BBL to demonstrate fair process (Davidson Morris, 2020)

It is pertinent to note that this may or may not affect TUPE from illuminate and although the transferors have only been “employed” by BBL for 9 months, there continuation of service would have transferred from Illuminate.

However, it is important for BBL that although there is not a legal requirement for employees that fall under the 2-year threshold to have a fair process with dismissal, it is important for BBL to demonstrate that dismissals are not as a result of the transfer as this would automatically be deemed unfair by an employment tribunal.

On this basis, it is advised that the following steps are followed as a legally compliant but fair process for all employees affected.

5.1.2 Inform and Consult- Collective Consultation:

As noted, BBL intends to make 23 employees redundant. Legally any redundancies over the threshold of 20 means that by law BBL must hold collective consultation with IWU. (Gov.uk, 2021)

Before consultation, it is important that management at BBL provide IWU with the following information in writing:

- The Reason why redundancy is necessary, and the number of employees affected.
- Selection pools and criteria
- Time frames and how consultation will take place
- How redundancy pay will be worked out for individuals affected.

(ACAS,2021)

It may be best practice for BBL to have a redundancy plan to encompass consultations and time frames. It may also be necessary to hold individual redundancy conversations with affected employees to ensure effective consultation takes place.

5.1.3 – Voluntary Redundancy (VR):

BBL should explore whether any employees would like to self-select for voluntary redundancy. It will save costs and time overall. However, it could lead to more experienced staff with higher redundancy award electing for VR , it is important to make it clear that as the employer, the final decision is from BBL. (CIPD,2022)

5.1.4 Selection pools and Criteria:

Pinewood Repro LTD t/a County Print V Page (2010), Tribunal ruled that it was a case of unfair dismissal as PAGE did not give individual feedback on redundancy scoring. As a result, employers should consider providing employees with an explanation of their scoring whilst providing a chance to employees to challenge scoring.

Another factor to consider is to ensure that the criterion is fact based and quantifiable. This enables BBL to provide subjective data in decision making for individual redundancies. (Lewis & Sergeant, 2020)

CIPD (2022b) provide examples of fair Selection criteria as:

- “Skills, qualifications and knowledge
- Employee disciplinary records
- Up to date Appraisals”.

It is advised to BBL that weighting of criterion is agreed with IUW and employees as part of the consultation process before being implemented. This reduces the risks of unfair dismissal claims as a result of redundancy practice.

5.1.5 Selection Pool requirement:

Selection Pools, as it is assumed that all employees carry out the same role at BBL, only one selection pool is required but it must include all 45 employees to ensure fair and compliant process. Where there are job variations such as Managers, it must be clearly defined into a separate pool of affected employees. It is advised that the IUW and FEW are consulted with the construction of selection pools.

5.1.5 Avoiding an unfair redundancy process:

- Collective and individual meetings with affected employees following timescale of 30-day consultation.
- Fair Pool and criteria selection.
- BBL must attempt to limit redundancies through re-deployment of employees
- Provide reasonable paid time off for employees to seek alternative employment.
- Notice of redundancy will be given in line with employees Terms and Conditions in Employment contract.
- Provide information about grievance and appeals process.
- Ensure Redundancy payments are in time and as originally outlined.

(ACAS, 2022b)

6.0 Terms and conditions changes:

BBL are entitled to make contractual changes if the changes are reasonable and are not detrimental to employees (ACAS, 2021). Changing terms of employment contract carries risk of Breach of contract, discrimination and

unfair dismissal claims at ET, so it is important that guidelines are followed, and individuals are consulted appropriately and fairly to avoid the possibility of a discrimination claim.

It is necessary because of the quantity of employees affected that BEIS are notified via HR1 form as noted above and that IUW and FEW is informed of proposed changes so that “Collective Bargaining” (TUC, 2022) can take place.

As with Redundancy, 30 days statute limit also applies.

As outlined by ACAS, (2021) Any T&C change that is of financial detriment to the employee will usually be classed as a breach of implied trust and confidence even when a variation clause is included in the original contract.

It is noted that you intend to link mobility clause changes with pay review, it is important that you clarify whether the pay review will compensate the employee appropriately and as a result of the change will not make them worse off.

It is also pertinent to include fair and adequate notice of the changes affecting employees. Failure to follow this step could result in ET claims for constructive, unfair dismissal as in the case of *United Bank Ltd v Akhtar (1989)* and similarly to that of *Nationwide Building Society v Benn (2010)*, whereby the consultation period was inadequate and there was not a valid ETO defence for making changes to the employee’s contract.

There are 3 main ways that BBL can approach contractual changes to force through

The contract variation:

- **Agree changes with employees through consultation and issue a new employment contract.** – Incentives may be helpful in this instance as outlined above.
- **Make changes unilaterally** – This can constitute as a breach and amount to repudiation of the contract. Claims for unfair dismissal could result if consultation and reasonability is not factored in.
- **Dismissal and re engagement** – This strategy could be employed if agreements are unable to be made. This is not without risks of ET claims and can in some instances be classed as a redundancy dismissal. (CIPD,2021)

6.1 TUPE considerations for affected employees:

After a TUPE transfer, an employer can only make changes to an affected employee's contract if there is a valid ETO reason for the change. (ACAS, 2021) In this instance, the need for improving flexibility thus improving profitability may be a valid reason to imply changes. It is important that the contract change is unrelated to the transfer, in this case it may be deemed as separate.

7.0 Contractual clause:

Having a variation clause is beneficial in that employees may assume that changes to the contract are permissible. However, the clause does not guarantee that management can impose changes to contract without employee mutual agreement. (CIPD,2021). It is likely that an employment tribunal would not accept that changing the mobility of an entire workforce to cover a

large geographical area would be classed as “reasonable”. Consultation and a sound business reason for the change, however, is more likely to satisfy Employment Tribunal should the issue escalate that far.

In the absence of a mobility clause, it is more challenging to impose changes.

In the case of *United Bank v Akhtar (1989)* it is important to note that there is a requirement to act reasonably and address individual concerns as in this case, *Akhtar* was successfully awarded compensation for constructive dismissal.

8.0 Advantages and disadvantages of options identified:

8.1.1: Agree changes with employees through consultation and issue a new employment contract.

Advantages:

- Less legal challenge
- More harmony and chance of retention of experienced staff.
- Incentivising contractual change, there is a higher probability of collective agreement.

Disadvantage:

- Highlighted through engagement survey that most employees adverse to greater mobility resulting in no agreement sought.
- Still a chance of legal challenge as employees may “Stand and Sue” and claim for breach of contract and unfair dismissal. (CIPD, 2021b)

8.1.2: Make changes unilaterally:

Advantages:

- Changes made to contract as desired by BBL
- Only advantageous if majority agree with contractual change, less precedence in ET.

Disadvantages:

- This can constitute as a breach and amount to repudiation of the contract.
Claims for unfair dismissal could result if consultation and reasonability is not factored in. (Lewis, Sergeant, 2020)
- High level of ET claims, low levels of workforce to continue business activities.
- Risk of discrimination claims which have high compensatory awards.
- Unlawful theoretically to make changes to employment contract without mutual consent. (Lewis, Sergeant, 2020)

8.1.3: Dismissal and Re-engagement:

Advantages:

- Improve operational efficiency thus increased profitability.
- Increased flexibility and mobility
- More widely practiced in pre pandemic era. One in ten businesses used fire and re-hire in the last year (Breese, Geraghty, 2021)
- Legal but risky practice.

Disadvantages:

- Loss of employee trust in the organisation
- Redundancy process needs to be followed which is more costly.
- ACAS advises this should only be used as a last resort. (Breese, Geraghty, 2021)
- legal challenges such as unfair dismissal, discrimination of breach of contract.

- Potential redundancy cost for employees that refuse to be re hired.
- Government opposition to the practice could result in legislative changes

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