

Report No: RMB/22/07
Meeting Date: 10th October 2007
Agenda Item No: 8

**REPORT TO THE SOUTH EAST FIRE AND RESCUE SERVICES REGIONAL
MANAGEMENT BOARD**

FiReControl Project Progress Report – TUPE

KEY ISSUE/DECISION

The Regional Management Board need to decide who should make the redundancies within the nine Fire and Rescue Services within the South East Region either the Local Authority Controlled Company or the Fire and Rescue Services.

EXECUTIVE SUMMARY

This report seeks agreement on the region adopting a common approach to who they believe should make the redundancies. Having obtained legal advice from both the South East Regional Legal Advisor and Denton Wilde Sapte whom provide legal advice to Communities and Local Government (CLG), this report recommends the Local Authority Controlled Company make the redundancies. By adopting a common approach, Fire and Rescue Services within the South East Region will reduce the possibility of legal and Union challenge.

CONSULTATION

The South East HR Managers were tasked in July 2007 to liaise with their legal representative and research the issues and risks regarding whether the Local Authority Controlled Company or their own Fire and Rescue Service should make the redundancies. Each HR Manager and legal advisor has shared their advice with their Chief Officer and it is believed Members have been briefed accordingly.

At this moment in time, no formal consultation with the Fire Brigades Union / Representative Bodies has taken place, this will follow in due course once the legal stance has been explored and agreed within the South East Region.

RECOMMENDATIONS

It is recommended that the Regional Management Board decide to follow the TUPE Regulations 2006 and opt for the Local Authority Controlled Company to make the redundancies.

REASONS FOR RECOMMENDATION

Evidence suggests (see attached Risk Assessment – Appendix B) that it is too risky for Fire and Rescue Services to go against legislation and make the redundancies, as they are likely to open themselves up to challenge, and possibly an employment tribunal resulting in a compensation payment.

INTRODUCTION

As part of the change to Regional Control Centres, arrangements will need to be considered as to how existing staff will “transfer” to the new organisation from their current Fire Service.

Communities and Local Government (CLG) have requested that each of the nine regions across England affected by the regionalisation of control rooms, debate and decide how they want to progress in terms of TUPE (Transfer of Undertakings Protection for Employees 2006) and any preceding redundancies. It is worth noting that TUPE is the key legal focus on the staffing issues surrounding this project and any subsequent HR processes/legislation will arise out of the TUPE transfer situation.

The Transfer of Undertakings (Protection of Employment) Regulations 2006, is now the main piece of legislation governing the transfer of an undertaking, or part of one, to another. The regulations are designed to protect the rights of employees in a transfer situation enabling them to enjoy the same terms and conditions with continuity of employment as formerly.

Originally, CLG took legal advice from Denton Wilde Sapte, with a view to securing a route whereby the employing Fire and Rescue Service could manage their own staff in a compassionate manner, look at redeployment, retirement and if need be, handle any redundancies, as opposed to transferring all control room staff under TUPE to the new Local Authority Controlled Company (LACC) and the LACC making the redundancies. A key point in this process being that it would be easier to redeploy staff working for a Fire and Rescue Service (FRS) or indeed a County Council, rather than a new organisation such as the LACC. In technical terms what CLG wanted each FRS to do, was to “borrow” the LACC’s Economical, Technical or Organisational (ETO) reason. However, recent case law in Scotland in Hynd –v- Armstrong challenged this very route and made it very risky for FRSs to borrow the LACCs ETO reason.

Chiefs Officers and Members have been advised by both HR and Legal professionals on the best approach to take and this report seeks Member approval of the recommended course of action. The outcome, in practice, preferably, needs to be unanimous as to whether the FRSs or the LACC make the redundancies.

BACKGROUND

When the Hynd –v- Armstrong case arose, CLG went back to Denton Wilde Sapte for further information, and was given the following advice:

“I regret to say that I cannot offer the department any degree of certainty as to the arguments of this difficult question. I think that, initially at least, tribunals would take a lot of persuading to depart from the line of cases cited in the culminating in Hynd. To test this matter properly it would probably be necessary to argue the case through the higher appellate and/or seek a reference to the ECJ in Luxembourg. Resolution of the question would be unlikely to come without the expenditure of a considerable amount of time and cost.

The department could await the bringing of tribunal claims once the fire control transfers start to take place, or it could be proactive in seeking legal certainty by initiating proceedings in the High Court seeking declaratory relief (with the possibility of the ECJ).

Denton Wilde Sapte was asked to consider obtaining the necessary declaratory relief. However their Solicitor advised that to do so would take several years due to the fact that the matter would be referred to Europe. The DTI would also want to be involved.”

The view from the South East lawyers is that the TUPE should be followed, and that all staff should transfer under TUPE to LACC and it will be for them to decide whether or not it is reasonable for an employee to transfer, if it is not reasonable, then the person will have their employment terminated the reason being that they will be in a redundancy situation.

The view from the East Midlands which is the first region to “go-live,” is for the LACC to make the redundancies.

ANALYSIS AND COMMENTARY

The view from CLG up until recently has always been that the FRS should make the redundancies for a number of reasons and these are highlighted in Appendix A. However, the recent case of Hynd highlighted the risks in the Transferor (FRS) borrowing the Transferee's (LACC) ETO reason and the view from CLG is now that it is for each Regional Management Board to decide, preferably unanimously, who should make the redundancies e.g. the FRSs or the LACC. However, Members attention should be drawn to their own legal/HR advice.

This report highlights some of the risks regarding the FRSs making the redundancies in the Risk Assessment in Appendix B. You will note, that there are a lot of significant risks associated with this route.

The report also highlights in Appendix C the risks associated with the LACC making the redundancies and Appendix D illustrates the pros for the LACC making the redundancies.

However, if the Regional Management Board or individual Fire and Rescue Services decides that the Fire and Rescue Services should make the redundancies, advice from both the South East Legal Group and Denton Wilde Sapte is that all employees facing redundancy should sign a Compromise Agreement waiving their rights to any future employment claim.

Richard Howe (CLG) has asked that once a decision is made by the RMB, this should be put in writing to him, and providing he is in support of the decision, he (CLG) will meet the cost of any penalty imposed by tribunal.

OPTIONS

There are only two options available, either the Local Authority Controlled Company or the Fire and Rescue Services make the redundancies.

IMPLICATIONS

Perceived Positive – from a compassionate point of view, it would seem kinder to the fire control staff for the Fire and Rescue Services to manage the redundancies and this very sensitive situation. Staff know who their manager is and where to seek help and advice from.

Perceived Negative - For the FRSs to make the redundancies this would mean going against the TUPE Regulations 2006, regional and national legal advice and recent case law, which could be costly should a successful claim be brought by a disgruntled employee.

CONCLUSION

Each FRS has been briefed by their HR and Legal Representative and has forwarded their views to the Regional Project Director. At this moment in time, Kent and East Sussex have provisionally voted for the FRSs to make the redundancies and the other seven Services have voted for the LACC to make the redundancies.

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BACKGROUND PAPERS: none
