

Transfers of Undertakings and The Minimum Wage – Care Home Workers Falling through the Safety Net?

j.snook@shu.ac.uk Sheffield Hallam University, UK

P.Prowse@shu.ac.uk Sheffield Hallam University, UK

J.Prowse@bradford.ac.uk University of Bradford, UK

michael.whittall@fau.de University of Erlangen-Nurnberg, Germany.

This paper presents longitudinal research conducted into awareness of and attitudes towards the UK National Minimum Wage (NMW) through the perspectives and experiences of care homes workers in the North of England. The paper also reports upon the variation of care workers' employment contractual rights caused by transfers of ownership of these care homes. The paper's findings add to knowledge about the significance of a NMW to care workers focussing upon the insecurities articulated by these workers caused by the sometimes rapid changes in ownership regimes in the care homes industry.. The precarious nature of this work presents its own questions too about the efficacy of TUPE rules and regulations as applied to industry and, specifically in this paper, to care home workers. TUPE rules can sometimes be presented as a 'safety net' to workers faced by changes in care home ownership and other professions generally.

Introduction.

This paper presents longitudinal research conducted into awareness of and attitudes towards the UK National Minimum Wage (NMW) as seen through the perspectives and experiences of care homes workers in the North of England.

The paper also reports upon the variation of care workers' employment contractual rights caused by transfers of ownership of these care homes. The paper's findings add to knowledge about the significance of a NMW to care workers and their families, focussing upon the insecurities articulated by these workers caused by the sometimes rapid changes in ownership regimes in the care homes industry. These changes cause understandable concerns about job security for care workers and pose questions about the long-term viability of the care homes model in the UK economy. The precarious nature of this work presents its own questions too about the efficacy of TUPE rules and regulations as applied to industry and, specifically in this paper, to care home workers. TUPE rules can sometimes be presented as a 'safety net' to workers faced by changes in care home ownership and other professions generally.

The paper charts developments that place in doubt the sustainability of the 'safety net' because of a lack of precision in the TUPE rules (as amended), and the ability of business owners to vary employment contracts that threaten to undermine worker rights. The paper is timely because it resonates with contemporary debates about establishing workers rights in the 'gig' economy, also the significance of the NMW and its presentation as a Living Wage (LW) by Government in a time of austerity, which together now forms part of a general literature on low wages and sustainability of income (see, for example, Prowse et al. 2016).

Enforcing rights in the UK workplace

The processes of enforcing employment rights are essentially reactive and rely upon employees to raise issues with confidence and with the knowledge to do so

(Prior and Saundry, 2016). Employees in occupations characterised by low wages and long hours cultures sometimes encounter the dual disadvantages of limited access to information together with few concrete opportunities to counteract employers' policies, some of whom, studies suggest, wish to remove employment legislation enacted by EU Directives (Gumbrell- McCormick and Hyman, 2017). In combination, both employees' limited knowledge of employment rights and the removal of the safety net of EU laws can abandon these employees to more precarious and vulnerable employment environments than in previous decades.

This paper explores the experiences, attitudes and views of UK care home workers typically encountering limited opportunities to enforce employment rights, together with the harsh reality of working in precarious environments with an arguably misplaced reliance upon EU law (TUPE) as their safety net. This papers' focus on the UK care sector provides one analysis of lower paid occupations exposed to threats of takeover, contract variation and re-structuring; in practice these same threats frequently result in lower wage rates, stressful working conditions, limited career progression and loss of established and valued contractual benefits for care home employees.

Background on UK Care workers.

Residential care homes are essentially nursing homes that provide personal care with a qualified nurse on duty in residential homes. They provide nursing care and provision of the type of care that must be required to have specific skills of either a qualified nurse or under supervision of a qualified nurse. Between 2008 and 2013 the value of residential care activities increased by 50.6% (Keynote,

2016). Employment in the sector has also grown from 81,000 full time and 60,000 part time employees in 2008. An analysis of this sector indicates this workforce is projected to increase (Gardiner and Hussein, 2015).

Between 1985 to 2014 the number of people aged 85 and above more than doubled rising from nearly 700,000 to 1.5 million (Keynote, 2015) and between 2015 and 2020 the number of people aged over 65 will grow by 12% (1.1 million). This demographic change is predicted to increase the demand for care (House of Commons Library, 2015). The Care Act (2014) changed the delivery of social care and local government (now commission) rather than to provide care. In the UK the major care home service is delivered by a range of private companies and providers, whose workforce are mainly support/care workers paid on the national living wage pay rates (Grant Thornton, 2014).

The Care Home Sector and Low Pay.

There are long standing concerns about the viability of care homes and the financial models that accompany it. This concern relates to continued cuts in long authority funding for care services and the rates of pay that vary according to whether care workers are employed in the public or private sectors. The Low Pay Commission (LPC) has expressed concern about the reduction in local government funding to pay national minimum wage rates (Low Pay Commission, 2015: 216; Unison, 2015). It is estimated the increase in the national minimum wage to £7.65 per hour affects 275,000 support workers (Resolution Foundation, 2013). Additionally, the United Kingdom Health Care Association calculates that the national minimum wage pay increases require additional

funding from Local Authorities of between £753 million to £1 billion (HM Treasury, 2015; UKHCA, 2015).

Furthermore, it is estimated that the National Living Wage added £300 million to local authority costs in 2016/17, a figure projected to rise to £800 million by 2020 (Local Government Association et al 2015). The projected increase in total payroll costs of frontline staff is much higher – £2.3 billion by 2020, added to £1.7 billion of costs already implied by above-inflation increases in the National Minimum Wage (Gardiner 2015).

The LPC recommended pay increases for the national minimum wage, and specifically identified care home employers paid just above the minima rates they set (Low Pay Commission, 2015; Resolution Foundation, 2014). Analysis of national rates found the majority of care workers were more likely to be paid at or below the national minimum wage with an increasing trend towards zero hours contracts (Bessa et al, 2013). The landscape for care homes appears to be one of shrinking financial support from local government juxtaposed against a demand for a living wage from care home workers already amongst the lowest hourly paid workers in the UK labour force.

The structure of this paper is as follows. We present the methodology employed to explore how care home workers in the North of England have encountered variations in their employment terms, conditions and pay rates often triggered by imminent transfers in ownership in specific homes and businesses. The paper then explains the law relating to TUPE (as amended) to contextualise the

circumstances of the ownership changes caused by sale of care homes by transferors (sellers of the homes) to transferees (buyers of the homes). The findings of the data and the analysis are then presented followed by conclusions and recommendations.

Contract Variation and Transfers of Undertakings law.

The rights of an employer to vary employment contracts and undertake business re-organisations are seen as ones of business sense where 'sound' reasons and 'reasonable/ good' grounds for doing so are presented (Lewis et. al., 2011). Upon a merger or transfer of ownership of a UK business as a going concern, the contracts of employment of affected employees undergo novation, thereby becoming contracts with the new employer (Anderman, 1993). Employers may not, under common law, decide to unilaterally vary employment terms since any imposed change causes a breach of the employment contract (McMullen, 1992). Additionally, under common law an employee may decide to freely accept changes to their employment contracts (McMullen, 2012). In this case variations are agreed, and the employment relationship continues unaffected with terms maintained, including length of service and rates of payment.

One of the enduring issues concerning transfers of undertakings under current TUPE regulations is how long after the transfer must the employer maintain previous employment terms and conditions of service? Employers frequently encounter irritations in what they consider an inability to change or vary employment terms following TUPE transfers, including agreement by affected employees (McMullen, 2012). The situation is often, in reality, one where the identical employees provide the same services to the client and the transferee, a new owner, then undertakes to maintain employment conditions as before (Stern, 2012). Where variations are made by employers, and employees withhold their agreement, then the employer has the final option of dismissal of

employees and relying upon the provisions in S. 98 (1) (b) of the Employment Rights Act – citing ‘some other substantial reason’ as a defence to claims of unfair dismissal (McMullen ,2012). The task for the employer is to demonstrate that any changes are unrelated to the transfer or emerge as the result of an ‘economic, technical or organisational’ (ETO) – defined as a reason unrelated to the transfer itself.

The law protecting rights of employees upon transfers of business was given its statutory effect first by The Transfer of Undertakings Directive of 1977 (77/187/EEC) (Acquired Rights Directive) (ARD), and transposed into national law in 1981 (Davies, P. and Freedland, M. 1994; Pitt, 2016) by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended, Acquired Rights Directive 2001/ 23/EC) 1981.

The 1981 regulations were formally replaced in 2006 by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) affecting all transfers of businesses since 2006 (Pitt, 2016). The Coalition Government consulted on the law relating to TUPE and subsequently introduced the Collective Redundancies and Transfer of Undertakings (Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 formally amending TUPE 2006 (Pitt, 2016). The effect of these changes remains in defining that a ‘relevant transfer’ of the business has occurred ‘...which is situated immediately before the transfer in the United Kingdom’ (TUPE 2006 reg. 3(1)(a) with the undertaking defined as the “transfer of an economic entity that retains its identity” (reg. 3 (2)) (Pitt, 2016). What must transfer is the business

or parts of it into other hands – the transferee’s. But what if the business is enduring difficult periods and sees the need to amend or vary those employment contracts? Employers may wish to alter contractual terms and conditions to improve efficient running of the business or to harmonise contracts alongside existing employees in the workforce. Where employers enforce contractual change or dismiss employees immediately after the transfer, then this may be an unfair dismissal. Where employers enforce contractual changes viewed as unacceptable by a substantial cohort of employees, resulting in their resignations, then claims for constructive dismissal may be made against employers (transferees) to Employment Tribunals. TUPE transfer-related dismissals are automatically unfair under the original Regulation 8 (1) (McMullen, 1992) unless there are ‘economic, technical or organisational’ reason/s entailing changes in the workforce – where the fairness of the dismissal is then decided by reference to section 57 (3) of the EPCA 1978 (as amended).

Various rulings have focussed on the situation where employees have apparently accepted new terms and conditions of employment – but the issue of employees’ decision to accept new terms of employment does not automatically make it a binding agreement.

Further significant change in this area was introduced in relation to pension entitlements under the Transfer of Employment (Pension Protection) Regulations 2005. Effectively this provision requires that where transferors of business’ contributed to occupational pensions before any transfer, then the transferee must offer employees the option of belonging to a similar scheme

once the take over is complete. So this means that employees are not automatically transferred on exactly the same pension terms as before. The result is that, with the exception of pension schemes and entitlements, employees must be transferred on exactly the same contractual terms and conditions as before the transfer. If employees are transferring from a public service pension scheme, for example, NHS pension scheme (NHSPS) or Local Government Pension Scheme (LGPS) then these rights do not automatically transfer over (Marshall, 2016). Limited protection exists from the Pension Protection Regulations (the Transfer of Employment {Pension Protection} Regulations) requiring new employers to offer transferring employees identical pension contributions of up to 6%, which can then be paid into a defined contribution scheme (i.e. a group personal pension plan). There currently is no requirement under TUPE to replicate existing defined benefits that the transferring employees were entitled to before the transfer in schemes such as the NHSPS or LGPS.

TUPE Reg.4 2005 also provides another significant rule in confirming that contractual variations are void if the sole reason for the variation is the transfer itself (Pitt, 2016). Regulation 4 (5) of the 2005 TUPE Regulations (of the amending Redundancies and Transfer of Undertakings) provides three scenarios under a new Regulation 4 (5) where employer-led variations in the contract may be instigated even for existing employees. First, variations may be permissible where the ETO reason is claimed, but this must entail changes in the workforce at the establishment where the employee is currently employed or changes to the actual workplace site (Reg. 4 (5A)) (Pitt, 2016). Second, if the transfer is the

reason for the variation (and the contract permits variation), it will be potentially valid too. Third, TUPE reg.4 (5B) provides that where terms are derived from collective agreements then these can be varied one year after any transfer, this is conditional upon the contract overall being no worse than previously (Pitt, 2016). The current position after the implementation of the amending TUPE 2014 Regulations in relation to contract variation is one where, it is suggested, existing employee rights may have been lessened (Pitt, 2016).

The (Protection of Employment) (Amendment) Regulations 2014 preserves in reg.7 that any dismissals of employees before or after the transfer remain automatically unfair if the sole or principal reason was the transfer, unless an ETO reason exists entailing changes in the workforce meaning a change in the numbers or job functions of the workforce (Berriman v Delabole Slate Ltd 1985 ICR 456). Where an ETO reason entailing such changes are shown by employers then the dismissal/s are not automatically unfair but qualify as redundancy (where applicable) or are made under the 'some other substantial reason' provision – S.98 (1) (b) of Employment Rights Act 1996 (McMullen , 2012) making dismissals fair if satisfying a requirement of reasonableness (Pitt ,2006). Practically speaking employees no longer enjoy the situation prior to the 2014 regulations where dismissals for a reason connected with a transfer, even if not the transfer itself could be automatically unfair (Pitt, 2006). Prior to the 2014 regulations case law (e.g. Hazel and Another v The Manchester College, 2014) decided that when employers used the defence that the ETO entailed changes in the workforce, this must not mean dismissal of one employee and re-engaging another in her place, and the Court of Appeal stressed that the rights of

employees to preserve existing conditions of employment prevailed over employer's interests to achieve harmonisation of those terms across the business (See McMullen, 2014). Traditionally, entailing 'changes in the workforce' was a narrow expression limited to redundancies or re-deployments (McMullen, 2014), and any attempt to enlarge the scope for changes to be implemented beyond these areas was considered in some case law to include attempts to expand the rights of employers to dismiss those workers they regarded as unskilled for the task was a possibility (see EAT in *RR Donnelley Global Document Solutions Group Ltd v (1) Besagni and (2) NSL Ltd* UKEAT/0397/13/OJ). As McMullen (2014) suggests, this move "...would greatly undermine employee rights on the transfer of undertaking".

Where the employer succeeds in showing that there was an ETO for a dismissal then this does not mean that the action was lawful. The current regulations in TUPE 2006 Reg. 7(3) provide that the ETO dismissal may be a redundancy (entitling employees to a monetary settlement) or alternatively the some other substantial reason qualification, leaving the matter to be judged either fair or unfair on the circumstances of the case to be determined by the Employment Tribunal.

Where redundancy emerges as a result of a TUPE transfer then it must be the subject of a consultation process under the EU Directive on Collective Dismissals (75/129/EEC) (as amended) and now the Trade Union and Collective Labour Relations (Consolidation) Act (TULCRA) 1992 and TUPE 2006 Regs. 13-16. The latter regulations require employee representatives to be consulted by both transferor and transferee by supplying appropriate information including

the transfer itself and its 'legal, economic and social implications' (Reg. 13 (2)). (Pitt, 2016). Where measures are to be undertaken affecting the workforce then these elected representatives must be informed and consulted by transferor and transferee and listen and respond to their concerns and those of the employees. The employer must undertake consultation "with a view to reaching agreement". Although this measure may seem watertight, Pitt (2016) observes that the period for consultation remains unspecified and only long enough before the transfer for redundancies to enable consultation to be undertaken.

In practical terms ownership and regime changes in UK care homes focus upon the numbers of staff in the home (ensuring compliance with staffing levels), on wage bills (as margins are often so tight), and difficulties emerge with generous benefits package which are linked to the financial performance of the current employer (Bernstein, 2016). Where due diligence is not followed it is possible that new information which comes to light leaves risk and additional costs needing to be constantly and formally assessed in the light of the TUPE transfer. The issues for transferred employees / workers are that TUPE provides an initial safety net, but after the period of one year TUPE can be eroded as " ...regulations only protect the worker at the time of the transfer...if the transferee makes changes, the employee has little choice but to accept these changes." (Marshall, 2016: 38). It is this loss of security that undermines the TUPE safety net and exposes employees and workers to widespread contractual changes and variations that can spell hardship and alienation from the role of care home worker. We now explain our methods and approaches; this is followed by a short

review of findings including workers' experiences in local care homes affected by TUPE transfers. We present our findings and conclusions.

Methods and data collection.

The data collection was split into three discrete phases. The first phase comprised a focus group of care home partners involving local authorities, care home owners and 8 GMB employee representatives and local and national politicians. The semi-structured interviews comprised a smaller private for profit care home owner (NEXUS) and a national care home Director to contrast the local, regional and national perspectives for employers (PLEXUS) and another Care Company operating regionally in the care sector linking care homes and operating domiciliary care. (Texas). Alongside the interviews a focus group was formulated from care sector owners during an invitation by the researchers to contribute to a care sector forum in December 2015. The representatives in the forum set out an agenda for the challenges to the sector and participants forum. The Focus group comprised of local authority representatives (n=1), independent care home owners (n=4) and GMB employee representatives (n=8) examining care home issues.

From the focus group the 8 GMB union representatives were arguing for higher rates of pay above the national living wage. When the GMB Representatives met in the group they focussed on the concern for transfer of undertaking regulations (TUPE) where local authority employees were transferred to private care homes and the increasing increase in lower pay for care assistants and the care home bonuses were paid exclusively for managerial staff. It was from these focus

groups that we decided to visit care homes represented by GMB officers and to speak to workers undergoing TUPE transfers or in a post TUPE phase typically one or two years after the transfer to new ownership regimes.

Discussions with the focus groups revealed that in many privately owned homes that the demands of the market were clear. For example, management bonuses were high compared to the three care home managers (representing single care homes, regional care homes and two local managers who were national providers all accepted that paying the national living wage rates were a challenge.

Some issues were faced by all care homes. One manager of the regional care provider highlighted issues of staff shortages and local authority differentials in payment rates meant that some homes were uneconomic:

“ [We have] Shortages of nurses and have to pay significant agency fees to hire them and cover our homes and we simply cannot retain nurses. Our overall labour turnover is low but the reality is we subsidise the low local authority funding by private residents paying higher fees. This works in some areas but where local provision of local authority funded residents are increasing as a percentage our private funders are not enough to cross-subsidise local authority fees.” [Regional Care Home Director with Residential Care Home Group., Focus Group].

In contrast, a single Care Home Owner also stated the support for care home staff stating:

“Care home workers are our key assets but we cannot pay them any more money and they deserve more. They are our `raw assets` and we are dependent on

their efforts and the local authority fees are simply not enough to fund extra pay for our staff' [Small Single Care Home Owner. Focus group].

The second phase explored research questions focussed on the effects of the national minimum wage rates from 2016-2020 and on employer's capacity to pay for the increases and the effects on retention, motivation and attrition. The second phase also examined skills related to pay rates and the potential for the non-statutory Living Wage accredited by the Living Wage Foundation. These issues were supplemented by exploring how employers, unions and local government can achieve the non-statutory living wage and the strategy to achieve this within an environment of UK Austerity.

Case 1-Currently a local single care home NEXUS, based in the same region and a recent investment venture purchased from a national operator Four Seasons. NEXUS was a single operator trading since purchasing the 70-bed residential care home from four seasons in 2014. This was a family based venture funded by the family and the first business venture.

Case 2-company PLEXUS was negotiated with the largest provider of care homes in the UK, employing 35,000 staff and over 500 care homes nationally. In contrast PLEXUS was a national care home operator originally purchased by a hedge fund in 2012. PLEXUS have a significant range of care homes but also manage 15,000 beds in specialist mental health hospitals.

Case 3-TEXAS was a Care Company operating regionally in the care sector linking care homes and operating domicillary care.

All three case interviewees were asked for the employers' perspective of the effects of the National Living Wage increases and the potential for the non-statutory Living Wage. Particular focus was on the strategic picture for the companies and how they managed the skills and challenges in the labour market for the labour markets

The third phase comprised researchers conducting a number of telephone interviews with full and part time care home employees and zero hours workers / contracts (ZHC). We also gained access to care staff via the GMB Union (representing workers affected by changes to contract terms and conditions. A set menu of questions was addressed to all interviewees and confidentiality was assured before and after the interviews. We undertook 45 minute telephone interviews with care workers, nurses and cleaners (n= 29). The areas explored included Care assistants' roles, pay and conditions, understanding of the living wage and opportunities for more pay, satisfaction and dissatisfaction with their role [January-July 2017].

We conducted semi-structured telephone interviews in the third phase producing primary data to examine the working conditions of care home workers, specifically pay rates, shifts, caring duties and responsibilities, training requirements and career paths all making demands upon their working environment and developing changing attitudes towards work. These interviews were recorded and professionally transcribed. The data was collated, themed and categorised according to age, gender, hours worked, contractual status, hourly rates, rate above NLW, time in employment, overtime rates, home / sick pay scheme membership, reductions in working terms and conditions and size /type of care home.

This primary data is supported by interview and ad hoc commentary in form of the secondary data from GMB officials in the field operating in an advisory and representative capacity to the care home workers as part of a wider campaign to increase membership and to embed the NMW in both the public and

private sectors (see for similar campaigns, for example, Prowse et al, 2016).

Central to the paper are the care home workers' awareness of the NMW and experiences related to it and impact upon them.

Twenty seven semi-structured interviews were conducted with care workers either via face-to-face and pre-arranged telephone conversations whilst off duty and away from the care homes premises. Interviewees ranged across a cross section of skills, ages, occupation and experiences. We included questions about care workers knowledge of the NMW and the law, specifically their awareness of transfers of undertakings legislation and preservation of contractual employment rights as defined by TUPE 2006 (as amended). The purpose of the methodology was to collate views, opinions and reactions of care workers with differing levels of skill, knowledge, experience and awareness of the changing nature of the care working industry in an identifiable local geographical area. The interviews were professionally transcribed, the findings first categorised, analysed and presented in this paper across the themes (specified above) capturing orientations towards work, levels of satisfaction in work and awareness of the NMW and its impacts upon the working practices of these care workers. We also balanced these perspectives with semi-structured interviews with owner managers and employee managers in care homes in the same geographical locations.

Contemporaneously we attended local care homes where the GMB union was representing employees and ZHC workers where there were often threats to change employment terms and conditions after the sale of the business to private owners after moving away from local authority control. These employees

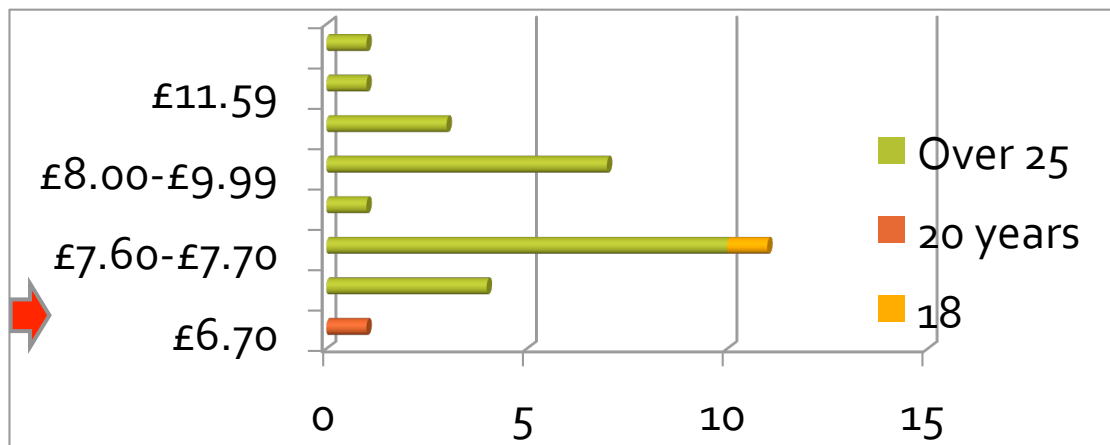
/ workers faced diminished contractual conditions as we introduced ourselves as researchers and then recruited volunteer interviewees on site.

The following figure shows the actual wages of interviews from telephone conversations N=29:

Figure 1: Contractual Hourly Pay of Care-home employees and ZHC workers

How Much Is Your Contractual Hourly Pay?

[NMW: £7.50 £5.60 for ages 18-20 and Real LW £8.20]



This figure shows that pay remained just over the statutory wage rate and that expectations for pay rises amongst interviewees was universally low.

Respondents were from 15 different care homes in Yorkshire (UK).

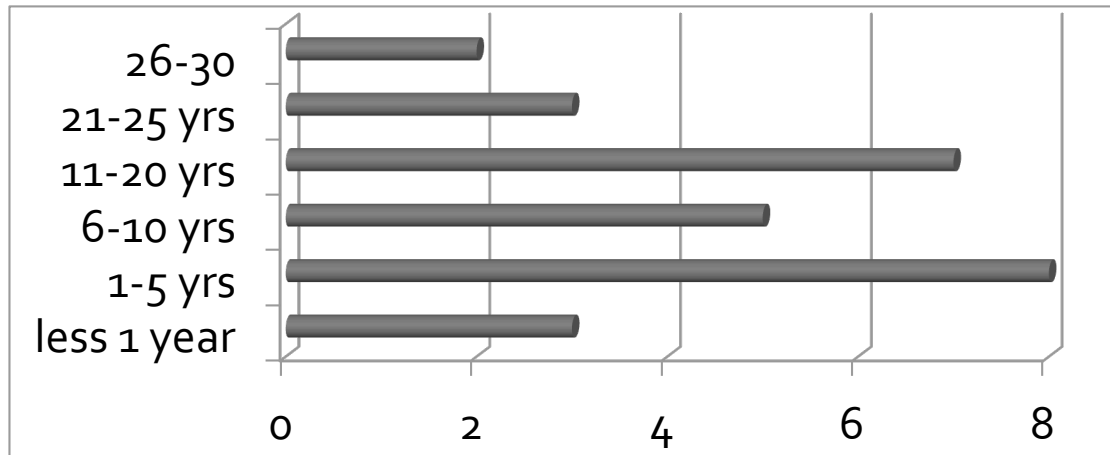
Employment varied from full time (n=17) and Part-time status (n=11) and zero-hours (n=1) and worked in no other additional jobs apart from their care home post.

Ethnicity: Respondents were predominantly white numbering (n=27), African Caribbean (n=1) and Asian (n=1). Ages varied from 18-71 years with an average

of 45 years (under 20 (n=2), 25-40 (n=5), 41-50 (n=12), 51-65 (n=9) and over 70+ (n=1).

The time / tenure of employment in the care sector varied as the following figure (2) demonstrates:

Figure 2: How Long Have You Worked in Your Care Home?



Employees worked in the care sector between than 1 year (n=3); 1-5 years (n=8); 6-10 years (n=5); 11-20 years (7), 21-25 years (n=3), 26-30 years (n=1) and over 31 years (n=2). This figure shows that employees had varying levels of employment service and roles, but none were protected from takeover or regime changes across the sector.

Hourly wages for over 25 year olds in care homes varied but they were paid between £7.20-£7.50(n=4), £7.60-£7.70 (n=11), £7.91-£7.99 (n=1), £8 to £9.99 (n=7), then night duty workers and managers paid £10-£10.99 (n=3), £11.59 (n=1) and £18.19 per hour. One 20 year old was paid £6.70 per hour. (The National Living wage in 2017/18 was actually £7.50 per hour and the Real living wage was £8.20 per hour.

Five night shift workers and 15 care home workers working at the weekend were mainly paid the same hourly rate with no additional enhancements.

Staff working in care homes between 1-5 years numbered 28% (n=8), working 6-10 years were recorded at 17% (n=5), 11-20 years totalled 24% (n=7), and we saw 21% working between over 21 years (n=6).

Retention in the care homes researched was high with 55% working less than 10 years, and 45% working in same organisation for over 10 years. Job titles varied from duty manager/nurse (N=2), night shift worker (N=3), Night-care assistants (n=5) care assistant (N=16), activities co-ordinator (N=1), cleaner (N=1), and kitchen assistant (N=1).

TUPE and NLW issues:

Following the three phases we identified clear themes concerning care-home workers in their own locality. For the purposes of this paper these themes are explained below and are explored in relation to the TUPE transfers that had been undertaken or were due for transfer at the time of our attendance at the care home. We purposely accompanied GMB representatives to those care homes to interview the care home workers. A significant issue identified after the transfer of 15 care homes was that part-time and full-time workers were paid less per hour for any additional time they worked beyond their contract.

All the respondents (care home workers) expressed concern about pay reductions following the transfer of care homes from local authorities and the consequent loss of protected pay after 2 years by TUPE regulations. This was a serious issue that undermined wages, motivation and dignity of the care home workers. For example:

“Basically...we’ve been TUPE’d over and as the union said, because we’ve gone through the two year period they (new owners) can do away with double time at weekends...and they are looking at hourly rates dropping me from £11.59 to £9.28 per hour....”. {Full time night care manager; Respondent 10}.

One situation typified the issues that post-TUPE transfers and conditions of employment caused, more specifically that part-time workers in 15 homes were paid less after their guaranteed TUPE rates expired for any additional time they worked. If the transfer contract stated the fixed hours, then any additional hours were paid at lower rates than council rates on all occasions at a NLW rate minimas of £7.50. Managers reflected upon the symbolic rates of retention:

“I think my main thing is pay. I’m fully aware that we’ve lost a lot of staff because of pay” {Deputy Manager, Respondent 5}

The increase in NLW also affected staffing and care workers’ perceptions of pay and retention. The comments included:

“My pay is completely changed. I actually earn the same amount that I did 10 years ago...” {Care worker: Respondent 18}

Respondents compared reported pay discrepancies between care workers and internal colleagues in other roles: *“I know a couple who work in the kitchen and one in the care home...and it’s hand to mouth every week”* (Night care assistant; Respondent 24). A night care worker who started at a rate of £7.50 per hour in November 2016 and who experienced minimum rate rises stated that: *“Whoever thinks that people can live on £7.50 per hour obviously does not live in the real world....”* {Night care assistant: Respondent 23}

Findings revealed that 17 respondents who transferred from local authority or private care homes under TUPE arrangements had their conditions

reduced after ownership changes from local authority (public ownership) to new private owners. Other long serving employees undergoing TUPE changes faced permanent changes and losses to previously established payment systems such as time and a quarter or three quarters at weekends. This situation was perfectly exemplified by two interviewees who had always received these premiums for weekend working, but now had them under threat of withdrawal from new owners:

“Well, it would have a big effect because it would, in my circumstances...mean about a £60 a week drop (reduction)...” {Part time care home employee. Respondent 15}.

A further example of reductions to pay rates and premium payments was given by a long serving care home worker:

“My hourly rate is £7.99 but they (new care home owners) are proposing it’ll be £7.58...and they are proposing taking all our extras and paying us one basic rate for Bank Holidays....” (Full time care home worker: Respondent 12).

This particular employee was facing a reduction in take home pay and losses of premium payment and benefits for working the statutory Bank Holiday. Another common complaint was that as the new owners from the private sector claimed that they could not make the expected profits, they saw this reason as acceptable for making cuts to long-standing care workers/ employees salaries and incomes:

“...They (new owners) say they are losing money and want us not on the councils...but on their terms and conditions...”. {Full time care home worker: Respondent 14}.

TUPE pay and conditions were therefore initially protected but then revised: hourly rates of pay stayed the same but, enhanced additional pay for bank holidays, nights and weekends were changed to basic rates.

Furthermore, twelve care homes reported further concerns. For example, after two years of TUPE that had frozen their terms and conditions upon transfer, the employers then labelled the established premium payments as '*enhancement pay*' for working weekends, night shift bonus rates and additional holidays for long service. Post TUPE the employment conditions for all grades of staff were reduced throughout most ex-local authority care homes, leading to the re-grading of pay rates for all staff in the twelve care homes affected. This loss of '*enhancements*' reduced the overall take-home pay and conditions of 17 respondents, plus 2 night managerial staff and a Deputy Manager. Basic hourly pay rates and hours were not reduced, but premium additional rates for night allowances, but weekend and shift premiums were reduced, holiday entitlements were also reduced to the statutory minimum; also additional shift and pay rates for nights, weekends and bank holiday rates covered under TUPE ceased in 8 night workers' cases. These changes reduced the overall pay rates in some respondent's cases significantly. Respondents stated how this would affect their income:

"Well I am going to lose approximately £3,500 a year plus 5 days reduced holidays" {Night Team Manager, Respondent 4}

"They're trying to get us onto their new contract. This is why we've got the union in. That's from what we got from council (when we transferred). For a 24 hours shift we were paid a single enhancement of £18.05. That's for working these

shifts like 5 to 10pm. But they're cutting that out and, they're proposing to stop that. It means over a month that's £18.05 to me. I think all changes work out at nearly £2000 per year." {Shift care assistant: Respondent 7}.

A night care manager {Respondent 10} identified that the loss of pay enhancements of £63 per week for night allowances and double time at weekends stated:

"Well, that's going to reduce my enhancement and put me below the breadline...I'm going in and doing more work for less pay...It'll affect my family life because my husband cannot work because he's really poorly. I'm the breadwinner. I might have to sell the house and everything. It's going to affect my life...." {Night Care Manager: Respondent 10}

Therefore, these interviewees, all ex-local authority care workers experienced reduced pay and conditions after TUPE arrangements ended. These are examples related to us in the case of TUPE transfers. We heard and documented many more examples of hardship caused by changes to working terms and conditions. Care home workers faced many more problems in relation to pensions, opportunities for training and improvement to wages and conditions that are beyond the remit of this paper.

Discussion

The evidence from the research and its three phases indicated that a move from local government to private sector delivery is a more important factor where owners and employers have a focus upon delivery of profits compared to quality

care. The local and national owners clearly focused upon development of efficiencies in the care model and reduction of labour costs. Compression of labour costs results in workers receiving falls in incomes, shift premia rates, reductions in sickness pay, bank holiday rates and shift work; all are being reduced to the minimum hourly rates.

Conclusion

A phenomenon is emerging that TUPE workers transferred from local authority employment are facing unprecedented demands upon their working conditions as total wages and salary levels are decreasing in a 'race to the bottom'.

Provisions are not materially affecting this 'race' once TUPE as a safety net has lost its initial impact in protecting employee rights. The notion that employment conditions for care home workers are preserved intact beyond a year or sometimes two is doubted by the research reported here. This is a regional study, and exploratory on trends in reducing terms and conditions in a single region and does not indicate any national trends. What it does show is that TUPE cannot prevent variations in contractual terms; indeed this has not been the expected outcome since *Daddy's Dance Hall A/S*: {Case 324/86 (1988) IRLR 315} commenting upon variations:

"...The Directive can be relied upon only to ensure that the employee is protected in his relations with the transferor..." . As commentators suggest: " TUPE does not last forever." (McMullen, 2012: 362). The real challenge for the employer representatives and employees in this paper and elsewhere is, given the current economic uncertainty and Brexit, is to demand that employers identify 'sound' and 'good' reasons for post-transfer re-organisations, necessitating contractual

changes which are not linked to the initial transfer, and are ones that any sensible employer would make to preserve the business in its current form and workforce numbers.

TUPE changes are profound as they preserve rights for an unspecified time, and are subject to the vagaries of the economy and market. Changes in ownership require adherence to terms and conditions for the current workforce, not incoming ones. After a reasonable and unspecified period has expired post-TUPE transfer {usually one year only} this research shows that variations are made to workers conditions and rights, causing immediate hardship and losses of established payment systems. Payments once viewed as essential such as premium weekend, shift and night rates are being viewed by employers as 'enhanced' payments and thus eroded and replaced by new rates that cause hardships for workers. This is an unfolding crisis for those workers, families and their dependents. The evidence that is anecdotally received from care home workers affected by these conditions is that when such wages and loss of premium payments become unsustainable, then these workers move to the retail sector or other roles in which they feel more valued and trained. This position of shift and change in labour market social mobility will be the subject of further papers and research.

Whilst extant research explores the care homes sector in crisis, this research and paper has explored the reality of those employed in the sector and shows that ownership regimes once they are beyond TUPE and its limited very safety net, owners then purposely erode conditions, tenure and security incrementally. This research also demonstrates that the law as represented by TUPE is not a safety net for low paid workers in the care homes sector. These are

lived experiences of increased poverty for care home workers who are unable to influence the ownership regimes of their employers; the EU and domestic law is not serving employees and workers, but instead exposing them to the loss of any safety net or security of tenure under the aegis of TUPE.

References

Anderman, S.D. (1993), *Labour Law: management decisions and workers' rights*, Butterworths, London.

Bernstein, A. (2016), 'Protecting businesses during a transfer: facing TUPE issues', *NRC*, Vol.18, p228-230, April.

Davies, P. and Freedland, M (1994), *Labour Legislation and Public Policy*: Oxford clarendon Press .

Gardiner, L. and Hussein, S. (2015) *As if we cared: The costs and benefits of the living wage for social care workers*, Resolution Foundation. March available on <http://www.resolutionfoundation.org/publications/as-if-we-cared-the-costs-and-benefits-of-a-living-wage-for-social-care-workers/>

Grant Thornton (2014) *Residential Elderly Care: UK sector review*. London: Grant Thornton. Available on <http://www.grant-thornton.co.uk/Documents/Private-Residential-Elderly-Care-UK-sector-review.PDF>

HM Treasury (2015) *Policy Paper Summer Budget 2015*, 8th July 2015, HC264 (London, House of Commons).

Keynote (2016) *Care Homes: Market Report on Social Care in the UK*, Keynote Market Report.

Local Government Association, Association of Directors of Adult Social Services, Future Funding (2015). *Adult social care, health and wellbeing spending review submission: a shared commitment, 2015 Spending Review submission*. Available at: www.local.gov.uk/publications/-/journal_content/56/10180/7523718/PUBLICATION (accessed on 26 July 2018).

Low Pay Commission (2015) *National Minimum Wage: The Low Pay Commission Report 2105*, March 2015, Cm 9017, HMSO.

Lewis ,D. , Sargeant, M. and Schwab, B. (2011), *Employment Law. The Essentials.*, Chartered Institute of Personnel and Development, London.

Marshall, J. (2016), 'The unseen pension risks of TUPE', *Practice-Management*,

Vol. 26, No.06, pp.38-40, June.

McGumbrell, R. and Hyman, R. (2017), "What about the workers? The implications of Brexit for British and European Labour", *Competition and Change*, (0), (0), 1-16.

McMullen, J., (1992), 'Takeover, Transfers and Business Re-organizations', *Industrial Law Journal*, vol.21, No.1, March, pp.15-30.

McMullen, J., (2012), Re-structuring and TUPE, *Industrial Law Journal*, volume 41, Issue 3, pp. 358-362.

Prowse, P., Prowse, J and Snook, J. (2019), "Charting the rise of in-work poverty: The case of care workers in Yorkshire and Humberside, Evidence to the Low Pay Commission, April.

Prior and Saundry (2016), The Potential Impact of Brexit on employment rights and fairness at work, ISPER Brexit series, University of Plymouth.

Resolution Foundation (2014), *More Than a Minimum: The Resolution Foundation Review of the Future of the National Minimum Wage: Final Report*, (London, Resolution Foundation/Barrow Cadbury).

Stern, C, (2012), "All change Please", *New Law Journal*, Vol.162, pp.480.

United Kingdom Health Care Association (UKHCA) National living wage in the Homecare sector Open letter to Rt Hon. George Osborne MP available on http://www.ukhca.co.uk/mediastatement_information.aspx?releaseID=232675