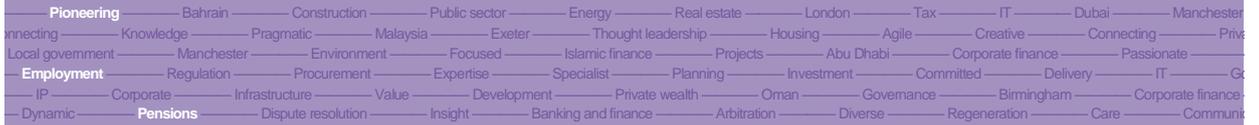




Legal update — November 2016
Employment and pensions
TUPE - recent developments



Although lately the impact of Brexit on TUPE may have taken centre stage, with speculation as to the form TUPE will take and its durability once we leave the EU, there have been a number of case law decisions coming out which we thought you should know about!

When should the existence of an "organised grouping of employees" be assessed?

In Amaryllis Ltd v McLeod the Employment Appeal Tribunal (EAT) considered the issue of an organised grouping. In coming to its decision it considered that the principal purpose of any organised grouping of workers must be assessed at the point immediately before the change of provider, and not historically.

Millbrook Furnishings Ltd carried out work for the Ministry of Defence (MoD) for over 50 years renovating upholstered wood and metal furniture. Between 2003 and 2008 it worked as a sub-contractor to Amaryllis as part of a different contract supplying new furniture as well as renovating old furniture as Amaryllis did not have any furniture renovation facilities in-house. From December 2012 the MoD awarded new contracts under a framework agreement. In 2014 the furnishing renovations contract was retendered. The contract was awarded to Amaryllis.

At first instance the Employment Judge (EJ) held that TUPE applied. He was satisfied that the department had originally been set up with the specific purpose of servicing the MoD contracts, and although the grouping of employees now serviced the customers, the MoD was still the largest customer (with almost 70% of the employees' time being spent on it).

The EAT held that the EJ had been wrong to look at the matter on an historic basis. The relevant time at which there is to be an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client is immediately before the transfer. The EAT observed that, even if there was an organised grouping of employees, during the period between 2003 and 2008 the grouping was not dedicated to carrying out activities

for the MoD as the client of Millbrook at the time was Amaryllis.

In order for a service provision change to take place there must be, immediately before the change, an organised grouping of employees, which has as its principal purpose the carrying out of the activities concerned on behalf of the client. What happened on a historic basis will have no relevance.

Will there be a service provision change when only some of the activities change hands?

The EAT considered whether there could be a service provision change where only part of the activities performed by the outgoing contractor were transferred to the new service provider in Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust & ors.



Source: Fotolia

Bolton council contracted out the provision of services to adults in the Bolton area who are alcohol and/or drug dependent to Greater Manchester West Mental Health NHS Foundation Trust. When the service was re-tendered it was split into two functions; case management services and delivery of interventions. Arch Initiatives was awarded the case management function and Lifeline Project Ltd was awarded the delivery of interventions function. Arch refused to take on any of the Trust employees and they brought a claim, arguing that their employment had transferred to Arch and that they had been unfairly dismissed.

The tribunal found that there had been a service provision change and that there were two organised groupings of employees. Arch appealed, arguing, amongst other things, that although it is possible to

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have more than one transferee in circumstances where the activities are replicated by each of the transferees on a reduced basis, it is not possible for the activities to be split along functional lines between new service providers, as in this case where case management had been split from delivery of interventions.

The EAT identified two key questions; were the activities pre and post-transfer "fundamentally or essentially the same", and was there an organised grouping of employees that had, as its principal purpose, the carrying out of the activities concerned on behalf of the client? It noted that there is nothing in TUPE that expressly requires that the relevant activities should constitute "all of the activities" carried out by the outgoing contractor and rejected the argument that the service provision change regime could not apply in a case involving a division of activities along functional lines.

The decision in *Arch Initiatives* is a useful restatement of the fact that TUPE will still apply when services are divided along functional lines when there is a change in service provider.

### **Will a temporary cessation of activities pre-transfer affect the operation of TUPE?**

The EAT considered whether TUPE applied where a subcontractor had suspended its operations shortly before the main contract was awarded to a new contractor in *Mustafa and another v Trek Highways Services Ltd*.



Source: Fotolia

At first instance the tribunal held that there had been no business transfer or service provision change where a subcontractor's employees had been laid off as a result of a commercial dispute with the main contractor, a highway maintenance company. The subcontract was terminated by consent 12 days before the new contract was due to commence. The employees turned up at the premises of the main contractor and were turned away, they then approached the new contractor who refused to accept that TUPE applied on the basis that the reason for termination of the contract was a commercial dispute. The tribunal, in agreeing that TUPE did not apply, held that the claimants were not

employed "immediately before" the putative transfer and so the necessary conditions for a service provision change were not made out.

The EAT remitted the case back to the tribunal. It held that the tribunal had been wrong to focus on the fact that no work had been carried out for a period of 12 days. Although there was a temporary cessation of activity this did not destroy the entity. The EAT found that there was nothing in TUPE itself that requires the organised grouping of employees to be actually engaged in the activity before the service provision change takes place. Similarly there was nothing to suggest that a temporary cessation of activities precludes the continued existence of the organised grouping. A temporary cessation of work did not mean that a grouping of employees was no longer organised.

It is clear following the decision in *Mustafa* that a temporary cessation of work will not necessarily defeat the argument that TUPE applies. Tribunals will have to consider the length of the cessation and the reason behind it before coming to a conclusion. The reason behind the temporary cessation of the activities will also usually be irrelevant.

### **Similarity of activities pre- and post-transfer**

The EAT has recently dismissed an appeal against a decision that the claimants' employment had transferred under TUPE in *The Salvation Army Trustee Company v Bahi & ors*.

Coventry City Council provided a range of services to homeless people. The council had provided its services to the homeless through a network of 22 separate contracts with different providers. The Claimants were employed by Coventry Cyprenians Ltd (CCL), a charity which provided accommodation based support for men and women under contract for the council. CCL assessed potential service users and, if they were accepted, allocated a support worker to assist them while they lived in one of the houses provided. The expectation was that service users would be moved onto other accommodation, generally in the private sector.

The council wished to do away with the 22 separate contracts and merge the provision of homelessness and ex-offender support through a single point of access. The Salvation Army Trust (SAT) was awarded a contract for this purpose. For a while it seemed likely that CCL would be taken on by SAT as a subcontractor, but in the event this did not occur. The Employment Tribunal declared that the contracts of employment of four support workers were transferred to SAT from CCL because the activities that CCL ceased to carry out on behalf of the council were fundamentally the same as the activities carried out instead by SAT on behalf of the council. The activities were identified as the provision

of accommodation based support for homeless men and women and the input of a support worker to facilitate the individual returning to mainstream private accommodation as soon as reasonably practicable.

The EAT dismissed the appeal. It held that the activities must be defined in a common sense and pragmatic way and that too narrow a focus in deciding what the activities were should be avoided. The EAT concluded that the Employment Judge had taken the correct approach, steering "a correct course between the twin dangers of overgeneralisation and pedantry".

### **Does an employee transfer if absent on long-term sickness at the date of transfer?**

In *BT Managed Services v Edwards* the EAT found that an employee who had been off work for six years and had no prospect of returning was not "assigned" to an organised grouping for the purposes of TUPE and so did not transfer.

Mr Edwards worked for Orange, the IT and communications services provider, in its domestic network outsource (DNO) division. From May 2006 he was taking long periods of sick leave due to a heart condition, and did not work after January 2008. He received regular permanent health insurance (PHI) payments. In July 2009 Orange's DNO division was outsourced to BT Managed Services Ltd (BTMS) and Mr Edwards transferred under TUPE. In 2010 a conscious decision was taken by two managers in the DNO division to keep Mr Edwards on permanent sick leave so that he could continue to receive PHI payments.

In June 2013 the DNO division transferred to Ericsson and Ericsson refused to take on Mr Edwards, maintaining that his long-term absence prevented him from being "assigned" to the division at the time of the service provision change.

At first instance the tribunal held that Mr Edwards had ceased to be assigned to the "relevant organised grouping" in 2010 when BTMS decided to keep him permanently absent. On appeal, the EAT agreed. It found that Mr Edwards was permanently unable to return to work (there was no expectation that he would, at some point in the future, return) and he could therefore have no further involvement in the economic activity performed by the DNO division.

It's worth noting that the facts of *Edwards* are unusual. The EAT distinguished the situation where an employee is permanently unable to return to work from a situation where an employee is simply on long-term sick leave. Provided that the absence from a grouping is temporary (as in cases of sickness or maternity leave) employees will continue to be assigned.

*Edwards* was due to be heard by the Court of Appeal but has now settled so, for the time being, this is the final word on the subject. It follows that employers should ensure that they manage long-term absence properly. The possibility of employees eventually returning to work should not be ruled out.

### **Tasks of "short-term duration"**

In *ICTS UK Ltd v Mahdi and others* the EAT considered the issue of whether a tribunal can take into account events following the putative transfer date when determining whether a client intended the activities to be in connection with a "task of short-term duration".

ICTS had a contract with Middlesex University to provide security at its Trent Park campus. The campus closed in 2012, but ICTS continued to guard the vacant site. The site was purchased in July 2013 by a Malaysian university, AUCMS, who were planning a major redevelopment. ICTS continued to provide security but in October 2013 AUCMS informed ICTS that it would appoint a new security company, First Call Secure Group Ltd (First Call), with effect from 11 November. First Call refused to take on any of the ICTS security guards, claiming that there had been no relevant transfer under TUPE. It argued that ICTS had originally been providing security for an operating campus and had then entered into a contract to secure what was intended to become a building site, pending completion of the major renovation of the site. In other words, the construction project was a "task of short-term duration".

The Employment Judge held that there had been no relevant transfer as a "task of short-term duration" had indeed been carried out. This task was the provision of security for an unoccupied site in order to retain valuable buildings in good condition. The Employment Judge found that it was logical to infer that the site would only remain unoccupied for a limited period while the refurbishment was carried out, despite the fact that there was no evidence as to how long this period was likely to be.

The EAT disagreed and remitted the case back to the tribunal. It held that the Employment Judge should have considered events occurring after 11 November 2013. Although the exception is predicated on the client's intention at the time of a transfer, the EAT held that subsequent events can be relevant in deciding what the relevant intention was, and should be taken into account where appropriate. In this instance the Employment Judge had failed to take into account the fact that, as at the date of the tribunal hearing, no planning permission had been granted for any major building project at the site and no building work had taken place.

It is interesting to note that this decision appears to contradict an earlier EAT decision in *Horizon Security Services Ltd v Ndeze and another*. Here it was held that it was the client's purported intention at the date of the service provision change which was pertinent.

While these two decisions do appear to be inconsistent, it is worth noting the comments made in *Mahdi* that it is important to appreciate the distinction between evaluating the client's intention by reference to the ultimate outcome as at the hearing date (which is likely to be an error of law), and using post-transfer events to cast light on the intention of the relevant party at the relevant time. Evidence from after the supposed transfer pertaining to what was discussed, documented or done may well have a bearing on what the client intended.

### To summarise...

These decisions clarify that:

- For a service provision change to take place there has to be an organised grouping of employees, immediately before the change, which has as its principal purpose the carrying out of activities on behalf of the client.
  - TUPE will still apply when services are fragmented provided that the activities pre- and post-transfer are "fundamentally or essentially the same" and that there's an organised grouping of employees.
  - A temporary cessation of activities pre-transfer will not necessarily defeat an argument that TUPE applies.
  - When deciding whether activities pre- and post-transfer are similar a common-sense approach should be followed and a narrow focus avoided.
- If an employee is permanently unable to return to work they will not be assigned to the organised grouping transferring.
  - In determining whether a task is of short-term duration so as to defeat the operation of TUPE it will be necessary to consider the client's intention as well as post-transfer events.

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