

Still caught by TUPE - transfers involving a split of functions

A great number of our clients deliver public services under contracts obtained by competitive tendering. When undertaking this kind of service delivery, it is necessary to determine whether and how the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) operate.

Where TUPE applies, the employment rights of employees engaged directly by the previous employer in activities related to delivering the service will automatically transfer to the new contractor.

Determining whether such a transfer will occur can be difficult where the services provided under the contract will be delivered in a different way.

In the recent case of [Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust](#) the Employment Appeal Tribunal (EAT) shed some further light on the matter. The case related to the provision of services to individuals with alcohol and drug dependency in the Bolton area. The services had been provided by the Trust through its Alcohol and Drugs Directorate.

The council conducted a retendering exercise. Tenders were required either to bid for case management services or for the delivery of interventions.

Arch Initiatives was awarded the case management function and the interventions function was awarded to another organisation. The Trust ceased providing the services on 31 December 2012. The Trust employees who had been performing the case management services brought tribunal claims to the effect that their contracts of employment transferred to Arch Initiatives from 1 January 2013 and that since the company had not taken any of them on they had been unfairly dismissed.

The EAT found that there had been a change of service provision on 1 January 2013 from the Trust to Arch Initiatives. There were two organised groupings of employees, those who had been principally performing the case management function in relation to drug services and a single employee who had managed the alcohol services.

In order for employment rights to transfer under TUPE, the activities carried out by the new provider must be fundamentally the same as the activities carried out by the previous contractor who has ceased to carry them out. Arch Initiatives argued that the split in the activities in the new contract along functional lines prevented the transfer of rights under TUPE, as the activities to be delivered under the new contract were not fundamentally the same as the activities that had been carried out directly for the Trust.

The EAT rejected this argument stating that there is nothing in the TUPE regulations that requires that the relevant activities should constitute “*all of the activities*” carried out by the outgoing contractor.

The court noted that in previous judgments, TUPE could still apply where a single provider of services contracted with more than one new provider to deliver those services in the future.

It was consistent with that principle for the court to say that where, as in this case, different elements of the previous activities were subsequently split between more than one contracting party, TUPE should still apply.

A change in the nature of the activities carried out by employees under a new contractor will be a relevant consideration in assessing whether the activities have ceased, but it must be more than substantially the same activities being separated and carried out by different contractors.

Therefore, the EAT held that there was an organised grouping of employees whose principal purpose was the carrying out of the relevant activities and the requirements of a TUPE transfer were satisfied.

Contracting to provide services can be a competitive business with slender margins and high demands on those participating. This case underlines in addition the due diligence and scrutiny of transferring activities that is required to avoid facing unintended consequences.

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