



Contracting and TUPE

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TUPE

- Service provision changes are likely to be covered by TUPE where
 - the services are not materially different after the transfer
 - service is ongoing
 - service is provided by an ongoing grouping of staff

TUPE - Consequence

- All employees employed by the transferor immediately before the transfer are automatically transferred to employment with the transferee on their existing terms and conditions.
- No transfer of an occupational pension. (No Fair Deal for Pensions) But the following do transfer:
 - contractual personal or group pension contributions transfer;
 - occupation scheme benefits:-
 - ill health rights
 - early retirement rights
 - enhanced redundancy rights
 - obligation to contribute up to 6% to pension

TUPE – Material Difference

- A catering contract substituting cold food for a full hot canteen did not constitute a change of service provision.
- Where residents of a care home were moved to small private homes supported by carers there was no transfer as the transferring entity had not retained its identity and no change of service provision due to material difference of activities.

TUPE – Material Difference

- Outsourcing of provision of accommodation and services to asylum seekers.
- New provider of services operated at new location and providing accommodation for shorter terms
- Services were not materially different – TUPE applied as only:-
 - minor difference in tasks;
 - difference in location not critical;
 - introduction of some additional duty or function not material unless it changes the substance of the activity.

TUPE – Change of Service Provision

- No change of service provision where a firm of solicitors retained responsibility for on-going legal services. The expectation of future work did not constitute an activity.
- Even if it did, there was no change in service provision as the client had reduced the scope of the contract by taking some work in house

TUPE – Are the Activities the same?

- In considering whether activities are essentially the same, minor differences may be disregarded.
- Provision of services following transfer may be so fragmented there is no service provision change (“SPC”).
- Even where activities remain essentially the same, an SPC will only take place if:-
 - i. there is an organised grouping of employees which has, as its principal purpose, the carrying out of activities on behalf of a client;
 - ii. the activities are not limited to a single event of short-term duration; or
 - iii. not concerned mainly with the supply of goods.

TUPE – is there an organised group of employees?

- In considering the assignment of a group of employees it is necessary for them to be organised by reference to the client's requirements.
- Night shift worked mainly for client A.
Day shift for client B.
- But no designated teams and previously C.D.E and F clients serviced by same team.
- Implications for you in the way you organise work.

TUPE

- ***Alemo v Herron*** case: the “static” interpretation of provisions on collective agreements has been referred to ECJ.
- Administrations covered by TUPE as the aim is not to liquidate the business – Implication for resources
- Employees who are serving notice remain “assigned”

TUPE

- Dismissals connected to the transfer are automatically unfair unless justified by an economic, technical or organisational reason entailing changes in the workforce (the ETO reason)
- Redundancies due to economic reasons and changes in the job function are likely to be ETO reasons

TUPE – Changing Contract

- Contractual variation was not unfair where the intention was to address a presumed error and not connected to the transfer.
- A contractor dismissed and re-engaged transferring staff in order to apply its performance related pay system. Held the aim was not to harmonise contracts but to improve productivity.

TUPE - Consultation

- TUPE imposes on both the transferor and the transferee an obligation to inform and consult with appropriate employee representatives about employees who may be affected by the transfer.
- Consultation should be with union representatives if there is a recognised union or where there is not, staff must be allowed to elect staff representatives
- Consultation should be meaningful and in good time before the transfer

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