

TUPE and non-employees

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) covers those who are employed immediately prior to a transfer i.e. when a business is transferred from one owner to another. We have long advised that because there is a risk self-employed consultants, casual workers or other atypical workers may have been incorrectly identified, working arrangements should be closely scrutinised in advance of a transfer to ensure that no one is excluded from the TUPE process who may be able to establish employment status.

The need to think broadly about who your employees are in advance of a transfer has been heightened by the recent European case of *Albron Catering BV v FNV Bondgenoten & anor*. In that case the Claimant (the person who initiated the action) was employed by a service company that employed Heineken’s employees to work in operating companies within the group. The Claimant was working for HN which provided catering services to the group and those services were outsourced by HN to Albron Catering BV. In determining whether the Claimant had been employed by HN the court had regard to the wording of the acquired rights directive which the TUPE regulations implement in domestic law. That directive refers to rights arising from the contract of employment OR “from an employment relationship existing on the date of the transfer”. In the light of that wording it was held that it was not necessary for the transferring organisation to be the employee’s contractual employer if the organisation was responsible for running the transferred business. In this case it was held that HN fulfilled that requirement and thereby established an employment relationship with the employee and the Claimant was covered by the acquired rights directive on that basis.

Although the decisions of the European Court are not immediately binding on private employers Tribunals are required to interpret domestic law in the light of European case law and may now be more willing to consider the application of TUPE where an employee is effectively controlled by the transferor even if that organisation is not their contractual employer.

Additionally the definition of “employee” in the TUPE regulations refers to “any individual who works for another person whether under a contract of service ... or otherwise.” Employees may argue that this construction should be interpreted broadly in line with the interpretation in the *Albron Catering* case.

Organisations also need to be conscious that those outside their core staff could be covered by TUPE and investigate employment arrangements. Where possible, indemnities should be sought from the receiving organisation to provide for any unforeseen employment liabilities that arise.

Albron Catering BV v FNV Bondgenoten and anor (C-242/09)

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