

# TUPE CASE LAW UPDATE

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This podcast covers how the recent TUPE case law has developed over the past year, focusing on three TUPE cases which deal with some of the most common scenarios which occur in practice. We consider the impact of the cases on organisations in terms of dealing with transactions and employees in a TUPE context.



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## Transcript

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## **How significant have been the developments in TUPE case law over the past 12 months?**

There have been a number of TUPE cases during 2018 but it has not been a year of ground breaking change. Much of the case law has been reiterating some well-established principles. However, the fact that there is still a steady flow of TUPE case law suggests that the difficulties are often not with the interpretation of the law, but how it applies to a particular sets of facts.

## **Is there a TUPE transfer when services are distributed amongst a number of providers?**

This one of the key areas where there have been a number of service provision change cases in the past and it still causes difficulties. It is where there is so-called 'fragmentation' and the question is whether there is a TUPE transfer to any or all of those potential new providers? Although there can be a transfer to more than one transferee, to meet the test for a service provision change under TUPE, the services have to be fundamentally the same after the transfer. So, it is possible that there would not be a TUPE transfer because the services have become so fragmented; for example where there is no discernible pattern of reallocation of the services to a number of providers going forwards.

In *London Care Ltd v Henry and others* [2018] (an Employment Appeal Tribunal case about the provision of home care services provided by service providers on behalf of a London Borough), services were originally provided by one service provider and then, following a retender by the Council, were provided by several new providers. The Employment Tribunal had found there was a TUPE transfer but some of the new service providers appealed. The Employment Appeal Tribunal decided to send the case back to the Employment Tribunal because it found that that question of fragmentation, in particular, was not considered at the right stage.

The first question under a service provision change test is 'what are the relevant activities?' This must be established as a starting point before considering the second question of whether the new services are fundamentally the same.

When considering the second question, did the fragmentation mean that the services were

not fundamentally the same?

In this case it was relevant that;

- No one contractor took on the majority of the work; and
- Although the transferor had identified a practical approach of working out how the employees were to be divided, there were some difficulties in identifying who transferred to which provider.

This case concentrates on how to apply the legal test for a service provision change correctly but the practical points to consider include:

- Parties dealing with a transfer involving an element of fragmentation should, as far as possible, try to make sure that all parties agree with the plan regarding TUPE and the transfer of staff. This will minimise the risk of a legal challenge later down the line; and
- When entering into contracts where there is a risk of fragmentation of the services later down the line, on termination or part way through the contract, parties should consider what kind of exposure that would create and whether they need specific contractual protection, for example, protection against redundancy costs for service providers in case the services are fragmented and the staff do not transfer.

## Changing terms and conditions after a TUPE transfer?

A frequent source of difficulty for many transferees is the difficulty in changing terms and conditions of the transferring employees because of the restrictions placed on changes by TUPE. Changes where the sole or principal reason is the transfer will not be valid and it is difficult area in practice because the circumstances in which changes are permitted are quite narrowly defined.

Some changes are permitted by TUPE but these are often limited in practice, for example, where there is an economic, technical or organisational reason entailing changes in the workforce, but the employees still need to agree to the change, or if the change is permitted by the terms of the contract, which may not be very common in practice.

Tabberer v Mears Ltd [2018] (Employment Appeal Tribunal) is a useful case for an employer who wants to make legitimate changes to terms and condition after a TUPE transfer. The case concerns the cessation of travel allowances. The background is quite detailed but essentially it concerned the company's decision to remove travel allowances

for staff who had transferred to it following a series of transfers under TUPE. The payment of the allowances dated back to the 1950s but had become obsolete over the years. The Claimants challenged the validity of the change (to remove the allowances) on the basis that the TUPE transfer was the sole or principal reason. Ultimately, the court accepted that while the transfer provided the context for the change, it was not the reason for it. The reason for the change was the genuine belief of the new employer that the allowances were outdated.

This is helpful for employers and confirms that a clear reason for the change that is not the transfer is effective. However, in many cases the facts may well be more nuanced and the causative link with the transfer greater.

## Does a temporary cessation defeat TUPE?

A temporary cessation is a factor to consider but is not in itself determinative. In a Spanish case, *Colino Siguenza v Ayuntamiento de Valladolid and others* [2018], the Court of Justice of the European Union considered the case of the provision of a music school, operated on behalf of a Spanish local authority.

A dispute with the first service provider led to closure of the music school in March and all the staff were dismissed. The school stayed closed until a new provider took over the running of the school in September. The question was whether the fact that the undertaking ceased to operate for 5 months prevented TUPE. The answer was no.

A temporary cessation is only one of the factors for the court to consider in a TUPE transfer. Here, it was relevant to consider other important factors for example, the premises and all material resources were made available to the new provider and a significant part of the closure period spanned the school summer holidays.

This was a case on the business transfer test and in the UK it is more common to consider transfers of services under the service provision change test. However, while the tests are different, there is a similar reluctance from the domestic courts to find that a temporary cessation of work defeats the application of TUPE in that context as well.

For example, under the service provision test, the organised grouping must exist immediately before the transfer. For example, in these cases:

- *Inex Home Improvements Ltd v Hodgkins* [2016] Employment Appeal Tribunal
  - Employees were laid off for 2 months pending the start of the next work order under a framework arrangement. That did not prevent there being an organised grouping of

employees at the point of the transfer and TUPE applied.

- Mustafa v Trek Highways Services Ltd [2016] Employment Appeal Tribunal
  - There was a dispute between the parties resulting in a 3 week gap during which staff were sent home to await further instruction. At the time of the transfer the staff were not physically working but the court confirmed that did not prevent the application of TUPE.

In both types of TUPE transfer, a business transfer and a service provision change, it will be rare for a temporary cessation to defeat the application of TUPE. However, the Employment Tribunal will consider the purpose, nature and length of any cessation when determining whether TUPE applies and each case will always be fact specific.

If you would like to discuss any TUPE issues in more detail, please feel free to contact Louise Clifford.

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