SUMMARY

2014/35 No service provision change where underlying client not the same (UK)

<p>The Employment Appeal Tribunal (EAT) has confirmed that, in order for there to be a transfer of an undertaking meeting the service provision change definition (which is a UK-specific provision), the services carried out before and after the change must be on behalf of the same client. It has also commented on the exception for a “single specific event or task of short-term duration”.</p>

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Background

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is the UK legislation implementing council directive 2001/23/EC (the Acquired Rights Directive (the Directive)). TUPE applies if there is a 'relevant transfer', which could be either a transfer of "an economic entity which retains its identity" (a transfer of an undertaking as defined by the Directive) and/or a "service provision change". The idea of a service provision change is specific to TUPE and is not found in the Directive and it involves activities which are being carried on by an organised grouping of employees switching from one person[1] to another. It occurs where:

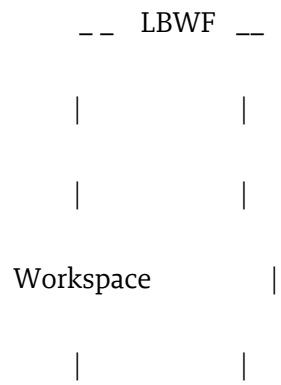
a client ceases to carry out activities on its own behalf and assigns them to another (a contractor) to carry out on the client's behalf (outsourcing);
the activities cease to be carried out by a contractor on a client's behalf and are reassigned to another (a subsequent contractor) to carry out on the client's behalf (second generation outsourcing); or
the activities cease to be carried out by a contractor or a subsequent contractor on the client's behalf and are instead carried out by the client on its own behalf (bringing outsourced activities back in-house).

The client must intend that the relevant activities will, following the change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration. This exception for short-term tasks is specific to the service provision change definition in TUPE and the legislation does not give any guidance about how to determine what 'short-term' might mean in practice.

Facts

The case concerned a contract to provide security at the Alpha business centre. The Alpha centre was located on a site owned by the London Borough of Waltham Forest (LBWF) but was managed by a separate entity called Workspace Plc. Workspace had engaged PCS to provide security at the centre. When plans were made in January 2013 to demolish the centre and build a supermarket there, LBWF terminated its contract with Workspace and Workplace terminated the security contract with PCS. LBWF then asked PCS and another firm called Horizon Security Services to quote to provide security services on the site for an interim period of approximately eight to nine months until the site was razed. LBWF awarded this contract to Horizon and informed PCS that it had been unsuccessful.

The following diagram illustrates what happened:



PCS	Horizon

Mr Ndeze was a security guard employed by PCS and working at Alpha business centre. Initially PCS told Mr Ndeze that he would transfer under TUPE to Horizon. Rather confusingly however he was also told by PCS that he should attend their office and he would be given details of another PCS site where he would be redeployed. When he attended the site, a different manager told him that he would be employed by LBWF in future and he should leave. He then returned to the Alpha business centre site but was told by Horizon that he had not transferred to them and that he should leave. Mr Ndeze brought an unfair dismissal claim against PCS, and PCS applied to join Horizon to the proceedings.

Judgment

The employment tribunal held a preliminary hearing on 16 September 2013 to determine if there had been a transfer of Mr Ndeze's employment from PCS to Horizon. The tribunal found that there had been a service provision change and therefore a TUPE transfer to Horizon. In particular, it held that the activities were carried out for the same client – LBWF – and that this was an example of second-generation outsourcing (the second type of service provision change listed above). It also held that the exception about specific events or tasks of short-term duration was not engaged. Horizon appealed.

The EAT overturned the employment tribunal's finding that there had been a service provision change under TUPE, relying on the Court of Appeal's ruling in *Hunter - v - McCarrick* [2013] IRLR 26 that the service provision change definition requires the services before and after the change to be on behalf of the same client. In this case, PCS was providing services for Workspace, whereas Horizon contracted with LBWF.

The EAT also overturned the finding that this was not intended to be a task of short-term duration on the basis that the tribunal Judge had failed to consider certain relevant issues. The EAT held that the tribunal should not have considered what the situation was at the time of the hearing (when security services were still being provided by Horizon and no date had yet been set for the centre's demolition) but rather what the client *intended* at the date of the purported transfer. At that time LBWF had intended that security services should be provided for only eight to nine months until the business centre was taken down. The tribunal should

also have contrasted the past period of the task (some 16 years) with the proposed duration of the future task when considering whether or not it was intended to be short-term in duration. Finally, the tribunal had erred by focusing on the 'activity' rather than the 'task' to be carried out (i.e. what the activities were in connection with). Previously the task had been the provision of security services for a business centre. Ultimately, the task (albeit still involving security services) became guarding a site pending the demolition of the buildings and the building of a supermarket.

The EAT did not determine what 'short-term' might mean in these circumstances. It would have remitted the question back to the tribunal for it to reconsider in light of the relevant factors it had identified but given its ruling on the first ground of appeal there was no need for this. It therefore quashed the decision of the tribunal and substituted its own judgment, that the claimant had not transferred to Horizon.

Commentary

This case illustrates how the service provision change definition is rather limited, applying only where there is one level of sub-contracting (client and contractor) rather than where there are multiple layers of subcontractors. Given the fact that in many industries (such as construction) there are often many layers of subcontractors this is a significant gap in the legislation.

Neither the employment tribunal nor the EAT considered whether or not the other definition of 'relevant transfer' (a transfer of an economic entity which retains its identity) was met. It is not clear from the case reports why this was, but the most likely explanation is that this possibility was not set out in the pleadings. It is impossible to know, therefore, whether or not this other definition might have been met on the facts of this case but it seems at least possible.

On the issue of 'tasks of short-term duration', the EAT's comments highlight that the important issue is what was in the mind of the client at the time of the possible transfer, not what may or may not have happened subsequently. This decision also illustrates how important it is to consider what happened in the past when trying to determine what 'short-term' might mean. The EAT's distinction between the two 'tasks' before and after the purported transfer is, however, difficult to understand or apply.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): Given that the Dutch legislature has simply transposed the Acquired Rights Directive without adding provisions on service provision change, a Dutch

court would have had to apply the 'classic' transfer of undertakings rules. I expect it would have found that the activities transferred (if that was the case – see below), that the provision of security services is a labour-intensive activity and that the employees who previously performed that activity continued to do so after the change in the contractual relationships. A Dutch court would therefore probably have upheld the tribunal's decision that there was a transfer. The fact that PCS's client changed would not, I believe, have been considered relevant.

I agree with the author of this case report that the EAT's distinction between 'activity' and 'task' is difficult to apply. The EAT saw the task in this case as 'what the activities were in connection with'. Before the change in contractual relations, the activity of providing security services had been – so I assume – in relation to an *operational* business centre, afterwards they were in connection with the guarding of *empty* buildings pending their demolition. Is this perhaps another way of saying that the activities changed? I can imagine that the type of activities involved in providing security services in an operational business centre – directing visitors, taking telephone calls, distinguishing the occupants and their visitors from unauthorised intruders, etc. – may have been different than the type of activities involved in guarding an empty site.

Footnote

[1] The "person" may be a legal entity.

Subject: TUPE, Service provision change

Parties: Horizon Security Services Ltd - v - Ndeze

Court: The Employment Appeal Tribunal

Date: 19 May 2014

Case number: [2014] UKEAT/0071/14