
The HR Forum

TUPE : No service provision change TUPE when activities not “fundamentally and essentially the same ” – 1st October 2009

Background:-

1. TUPE 2006 applies firstly to a “relevant transfer” e.g. when an undertaking/business passes hands to a new owner (the Denning test – is this the same business in new hands?) (“original TUPE”) but also secondly to the concept of “service provision change” (“new TUPE”);
2. A “service provision change” occurs where “activities” carried out before the transfer are carried out by another after the transfer. This can arise where:-
 - A body ceases to carry out activities on its own behalf and assigns them to a contractor (i.e. contracting out); or
 - The activities cease to be carried out by one contractor and are reassigned to a subsequent contractor or contractors (i.e. change of contractors); or
 - The activities cease to be carried out by the contractor or subsequent contractors and are brought back in-house to the client (i.e. contracting in).
3. Under original TUPE, the essential test as to whether there had been a TUPE transfer was whether the “undertaking” had “retained its identity” (same business in new hands). Under service provision change new TUPE, the concept of “retaining identity” is not referred to and is apparently not required.
4. However, in ***Metropolitan Resources Limited v (1) Churchill Dulwich Ltd in liquidation (2) Cambridge and others [2009] IRLR 700***, the EAT confirmed that whilst “activities” pre-service provision change TUPE need not be identical to post service provision change “activities”, it would be sufficient if they are “fundamentally and essentially the same” as those carried out pre-transfer.
5. In ***OCS Group UK Limited v Jones and another UKEAT/0038/09***, the EAT upheld the Tribunal decision that the service provision changes of TUPE did not apply to the re-tendering of a catering contract but where the Tribunal had found that the activities carried out by the incoming contractor were wholly different to those carried out by the outgoing contractor.

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6. The “transferor” contractor (OCS) entered into a contract to provide catering service to the BMW car plant at Cowley. This provided for a central restaurant and deli bar facilities plus four satellites. There were a range of hot and cold meals and the staff spent a great deal of time in preparation of hot meals i.e. there were a number of chefs. The “transferee” contract MIS took over the catering contract but this provided a substantially reduced meals service, selling only pre-prepared sandwiches and salads. There was no requirement for hot food preparation and there were numerous changed job functions when comparing how the OCS contract was carried out and the MIS contract was carried out.
7. The Tribunal found that the MIS contract was materially different to the OCS contract and had essentially moved from the provision of a full canteen service to becoming simply sales assistants in a kiosk selling sandwiches.
8. OCS appealed on the basis that the Tribunal had failed to properly identify the core activities, namely the provision of food and catering services for the staff of the BMW plant. The EAT however said relying on the Churchill case, that the Tribunal was entitled to make the findings that it did.
9. This case will be a relief to incoming contractors that Tribunals are prepared to narrowly define contractual services when considering service provision change under TUPE 2006. However there will not always be such marked differences in the nature of the contractual services and in each case it will be a question of fact.



If you would like any further information on the topics covered in these notes please contact Andrew Cross, Head of Employment Law, Brabners Chaffe Street, on 0151 600 3062 or andrew.cross@brabnerscs.com

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