

Service Provision Changes

Service provision changes

A change of service provider may amount to a 'service provision change' within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) whether or not it is also a 'business transfer'

References: TUPE 2006, SI 2006/246, Reg 3(1)(b)

A service provision change may involve any one of three possibilities:

- o outsourcing: where activities cease to be carried out by a person ('a client') on his own behalf and are carried out instead by another person on the client's behalf ('a contractor')
References: TUPE 2006, SI 2006/246, Reg 3(1)(b)(i)
- o change of contractor: where activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ('a subsequent contractor') on the client's behalf, or
References: TUPE 2006, SI 2006/246, Reg 3(1)(b)(ii)
- o insourcing: where activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf
References: TUPE 2006, SI 2006/246, Reg 3(1)(b)(iii)

These three situations all involve the transfer of activities from a 'client' (party receiving the service) to a 'contractor' (party providing the service), or back again, or from one contractor to another contractor, including professional services.

In addition to the need for one of those three situations to apply, the following conditions must be satisfied:

- o (immediately before transfer) the activities must be carried out by an organised grouping of employees (which may be a single employee) situated in Great Britain
References: TUPE 2006, SI 2006/246, Reg 3(3)(a)(i)
- o (immediately before transfer) the principal purpose of the organised grouping must be the carrying out of the activities on behalf of the client
References: TUPE 2006, SI 2006/246, Reg 3(3)(a)(i)
- o (immediately before transfer) the client must intend the activities to be carried out by the transferee
References: TUPE 2006, SI 2006/246, Reg 3(3)(a)(ii)
- o the client must intend the activities not to relate to a single specific event or short-term task
References: TUPE 2006, SI 2006/246, Reg 3(3)(a)(ii)
- o the activities must not consist wholly or mainly of the supply of goods for the client's use. References: TUPE 2006, SI 2006/246, Reg 3(3)(b)

In all cases, irrespective of who is providing the service, there is a 'client' that is the party receiving the service. For there to be a service provision change, the services in question must be carried out on behalf of the same person ('client') before and after the transfer (although the provider of the services will of course change). So, for example, there will not be a service provision change where, in addition to a change of contractor providing the service, the identity of the client on whose behalf the services were performed also changes.

References: McCarrick v Hunter [2012] EWCA Civ 1399

The correct approach to decide whether there has been a service provision change is to consider matters in this order:

References: OCS Group UK v Jones and Ciliza (UKEAT/0038/09/CEA)

Metropolitan Resources v Church Dulwich [2009] IRLR 700

Kimberley Group Housing v Hambley, Leena Homes and Angel Services [2008] IRLR 682

- o firstly, what the relevant activities are (for consideration under reg 3(1)(b))
- o secondly, whether those activities have been transferred over in one of the three ways defined under reg 3(1)(b), and
- o lastly, to consider whether the conditions in reg 3(3) have been satisfied

As regards the first and second of those considerations, the tribunal must assess, on the facts, taking into account any material differences, whether the alleged transferee is performing essentially the same activity as that of the alleged transferor:

References: Metropolitan Resources v Church Dulwich [2009] IRLR 700

Nottinghamshire Healthcare NHS Trust v (1) Hamshaw (2) Perthyn (3) Choice Support (UKEAT/0037/11/JOJ)

- o the statutory words require the tribunal to concentrate upon the relevant activities. Tribunals will inevitably be faced with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks
- o however, a given set of circumstances will not be prevented from qualifying as a service provision change because of some minor difference or differences:
 - between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it, or
 - in the way in which the tasks are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor
- o a commonsense and pragmatic approach is required. The tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the tribunal on the evidence in the individual case before it
- o by way of examples:
 - a difference in the location from which the transferee performs the relevant activities instead of the transferor (a situation which will frequently arise) is highly unlikely, of its own, to be determinative against the existence of a service provision change
 - the addition, in the hands of a replacement contractor, who is performing all of the services carried out by his predecessor, of some additional duty or function is unlikely, unless the addition is of such substance that the activity then being carried on is no longer essentially the same as that carried on by the predecessor, to negate the existence of a service provision change

It may be, however, that in some instances the differences between the service performed originally and those performed after the alleged transfer need not be that great to warrant a finding that a service provision change has not occurred. In one case, an employment tribunal found that only 15% of the activities done after the putative transfer were different from those done before. Despite that narrow margin (ie with 85% of the service being provided remaining the same), the EAT was not prepared to disturb the finding of the employment judge that the service was **not** essentially or fundamentally the same, and hence that there had been no service provision change.

References: Enterprise Management Services v Connect-Up [2012] IRLR 190

In the context of a service provision change, there is no need to analyse whether or not what transfers is an economic entity which retains its identity in the hands of the transferee, or to look at what assets and employees are transferred, or to consider whether or not new working methods will be used to carry out the same service activities.

References: Metropolitan Resources v Church Dulwich [2009] IRLR 700

Nottinghamshire Healthcare NHS Trust v (1) Hamshaw (2) Perthyn (3) Choice Support (UKEAT/0037/11/JOJ)

References to contractor include subcontractors.

References: TUPE 2006, SI 2006/246, Reg 2(1)

The TUPE 2006 provisions now apply to the whole of the UK, including Northern Ireland.

References: The Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006, SR 2006/177

There will be no service provision change amounting a relevant transfer within the meaning of TUPE 2006, where it is not possible to identify a new service provider who carries out the activities of the old service provider after a service provision change.

References: Thomas-James v Cornwall CC, Case Nos1701021-22, 1701230-31,1701051, 1701059/07 PDF Format

Organised groupings

Guidance by the DTI (now BIS) (originally published in February 2006, but republished in March 2007 and June 2009) states that the definition of organised grouping is intended to apply only where the service provider/client has in place a team of employees 'essentially dedicated' to carrying out the activities to transfer, though they do not need to work exclusively on those activities. 'If a contractor was engaged by a client to provide, say, a courier service, but the collections and deliveries were carried out on each day by various different couriers on an ad hoc basis, rather than by an identifiable team of employees, there would be no service provision change and the Regulations would not apply.'

References: BIS Guidance on TUPE 2006

In order to satisfy the requirement that (immediately before the transfer) there was an organised grouping of employees which had as its principal purpose the carrying out of the activities concerned on behalf of the client:

References: TUPE 2006, SI 2006/246, Reg 3(3)(a)(i)

Eddie Stobart v Moreman [2012] IRLR 356

- o the employees must have been organised in some sense, by deliberate planning or intent, by reference to the requirements of the client in question
- o it is not sufficient that a group of employees were in practice, but without such planning or intent, working mostly on tasks which benefit a particular client, and
- o it is the essence of a service provision change that the 'organised grouping' should have existed prior to transfer, rather than have first come into existence at the moment of transfer

Contracts which are subdivided: more than one potential transferee

Sometimes, on a re-tendering, a service which used to be provided by one contractor under a single contract gets split up, so that the work is done instead by two or more separate contractors, each operating under separate contracts.

In such circumstances, this gives rise to two key questions:

- o is it possible to have more than one transferee under a service provision change?
- o if so, how should it be decided to which transferee any relevant employee's contract transfers?

These are questions which are not easy to answer. The relevant regulation refers to the activity being carried out by 'the transferee', in the singular. There is no explicit provision to deal with the position where a single transferor transfers an activity to *more than one* transferee, and the regulations are silent in relation to the issue of to whom relevant employees should transfer in those circumstances.

References: TUPE 2006, SI 2006/246, Reg 3(3)(a)(ii)

The BIS Guidance (at page 6) states that the regulations governing service provision changes *can* apply where there is more than one transferee:

References: BIS Guidance on TUPE 2006

'It would also potentially cover situations where just some of those activities in the original service contract are re-tendered and awarded to a new contractor, or where the original service contract is split up into two or more components, each of which is assigned to a different contractor. In each of these cases, the key test is whether an organised grouping has as its principal purpose the carrying out of the activities that are transferred.'

The BIS guidance does not, however, have the force of law.

In *Kimberley*, the EAT considered these questions:

References: *Kimberley Group Housing v Hambley*, *Leena Homes and Angel Services* [2008] IRLR 682

- o they took the view that there could, in principle, be a service provision change where there was more than one potential transferee
- o on the question of to whom a relevant employee's contract transfers, they held that the transferee who takes over the greater part of the transferred activities takes all the relevant employees of the transferor

On that basis, the EAT in *Kimberley* held that there was a service provision change, and that the transferee who had taken over the greater part of the transferred activities inherited the contracts of *all* relevant employees of the transferor, and was liable in respect of them.

In the later case of *Clearsprings*, the EAT:

References: *Clearsprings v Ankers* (UKEAT/0054/08/LA)

- o agreed that there could, in principle, be a service provision change where there was more than one potential transferee, but
- o held that no service provision change would take place in such circumstances where the activity is too fragmented

On the facts, the EAT in *Clearsprings* upheld the tribunal's finding that there had been no service provision change, because the activity was too fragmented.

The underlying facts in *Kimberley* and *Clearsprings* are extremely similar, yet in one case there was found to be a service provision change, and the other there was none. There is no adequate explanation in the judgments as to what the distinguishing factor might be.

One point is tolerably clear: all reported judgments of the EAT to date that have dealt with the issue have been unanimous in holding that there **can** be a service provision change transfer when there is more than one transferee. Hence, although there may be respectable arguments to the contrary (ie to the effect that a

service provision change transfer can only be made out if there is a single transferee), on the current state of the authorities, that first point is not up for debate.

However, on the assumption that there can, in principle, be a service provision change transfer when there is more than one transferee, a number of other knock-on problems arise.

Fragmentation

As noted above, the EAT in *Clearsprings* upheld the tribunal's finding that there had been no service provision change, because the activity was too 'fragmented'.

References: *Clearsprings v Ankers* (UKEAT/0054/08/LA)

The pronouncements by the EAT on the issue of whether or not an activity is 'too fragmented' for there to be a service provision change have, with respect, given rise to some confusion. It has been unclear on the face of a number of judgments whether this referred to:

- o fragmentation of the service *prior* to the alleged transfer, or
- o fragmentation of the service *as a result of* what occurred during the process of the alleged transfer

If the EAT in *Kimberley* meant fragmentation *prior* to the transfer, then this observation is unobjectionable: that would clearly go to the issue of whether or not, immediately before transfer, the activities were carried out by an organised grouping of employees as their principal purpose.

References: *Kimberley Group Housing v Hambley*, *Leena Homes and Angel Services* [2008] IRLR 682

TUPE 2006, SI 2006/246, Reg 3(3)(a)(i)

By contrast, whether or not the activity *became* fragmented *as a result of the transfer itself* is, arguably, irrelevant:

- o the regulations make no requirement that the activities be carried out by an organised grouping *after the transfer*; indeed they do not require any analysis at all of the way in which the activity is provided post-transfer
- o unlike business transfers there is no requirement that there be an 'economic entity which retains its identity' after the transfer

In the EAT judgment in *Connect-Up*, Judge Clark:

References: *Enterprise Management Services v Connect-Up* [2012] IRLR 190

- o makes clear that he believes that Langstaff J, in *Kimberley*, was referring to fragmentation of the activity **as a result of** the putative transfer, as opposed to prior to it
- o puts beyond doubt that he (Judge Clark), when giving judgment in *Clearsprings*, was looking at the effect of fragmentation **as a result of** the putative transfer
- o is clearly looking at fragmentation **as a result of** the putative transfer in *Connect-Up* itself

Thus *Connect-Up*, building on *Kimberley* and *Clearsprings*, provides fairly clear authority for the proposition that where a service activity, on transfer, fragments between several different possible transferees, that very fragmentation may be a reason for finding that no service provision change transfer has occurred at all.

And yet the statutory underpinning for this proposition remains unclear:

- o *Kimberley* in no way spells out how the structure of the regulations leads to the conclusion that fragmentation of an activity which occurs on transfer can defeat application of the service provision change provisions
- o nothing in Judge Clark's judgments in *Clearsprings* or *Connect-Up* clarifies any further how this principle derives from the wording of those provisions

One could speculate on that derivation as follows:

- o as noted above, it was made clear in *Metropolitan Resources* that a critical question is whether the activities carried on by the subsequent contractor after the relevant date are fundamentally or essentially the same as those carried on by the original contractor
References: *Metropolitan Resources v Church Dulwich* [2009] IRLR 700
- o it is arguable that fragmentation as a result of the transfer between various different putative transferees has the effect of creating a post-transfer activity which is **not** fundamentally or essentially the same as the original activity, **for the very reason** that it has become fragmented, whereas before it was not

However one might also argue, on the contrary, that the fact that an activity is now done by a variety of different parties (where before it was done by one) has no effect whatsoever on the **nature** of the activity itself, and hence is irrelevant to the question of whether the post-transfer activity is fundamentally or essentially the same as before.

At the very least, it will take a further EAT judgment to resolve these questions in a satisfactory manner. More likely, the issues will only be clarified when a pertinent case reaches the Court of Appeal.

Who transfers to whom

Where there is more than one potential transferee, the issue of who transfers to whom on a service provision change transfer will be of central and fundamental practical importance to the parties involved. It is an issue that cries out for simplicity and clarity in the principles to be applied under the law in determining the answer.

As noted above, the EAT in *Kimberley* ruled that the transferee who takes over the majority of the activities inherits 100% of those transferred. However, what would occur where a contract is split in two, with each potential transferee taking 50% of the activities? This is not just a sterile question: a re-tendering process might be arranged in this way *deliberately* with a view to defeating the service provision change rules
References: *Kimberley Group Housing v Hambley*, *Leena Homes and Angel Services* [2008] IRLR 682

Langstaff J also stated in *Kimberley* that it may be that any difficulties in determining who should take responsibility for an employee's contract after any given date may be taken into account by a tribunal as indicating that there is no service provision change at all. With respect, this observation is somewhat problematic:

- o it is hard to understand why this factor should be considered relevant: it would seem to go only to how the activity is organised after the service provision change (which is arguably irrelevant) and not at all to whether or not there was an organised grouping performing the activity *before* the service provision change (which is a precondition for there being one)
- o it gives rise to great uncertainty as to:
 - how great these difficulties have to be before a service provision change transfer will be defeated, and
 - how, where a tribunal determines that there **is** a service provision change transfer to more than one transferee, that tribunal should go on to resolve those 'difficulties' in order to decide to whom a given employee transfers

Using TUPE 2006 to poach a contractor's employees

The regulations governing service provision changes operate irrespective of the nature of the event which brings about the transfer of service activities. Provided the other criteria are satisfied, they will apply where a client company terminates a service provision contract with its contractor, whether lawfully or otherwise. This

opens the door to client companies terminating commercial service provision contracts with the deliberate intention of engaging the service provision change provisions.

For example: a client company has entered into a multi-year contract under which a contractor provides a certain service for a price that is fixed throughout the contract's duration. Part way through the contract, the client, although happy with the service it is receiving, becomes dissatisfied with how much it costs. If the contractor's employees who are providing the service constitute an organised grouping, the client might decide:

- o to terminate the contract immediately (rather than seeking to renegotiate its terms with the contractor)
- o with the intention of taking the provision of the service in-house
- o with the result that the regulations governing service provision changes operate so as to transfer the contractor's relevant employees to the client

Although those transferred employees will retain their previous terms and conditions, the client company might, by this manoeuvre, eliminate the contractor's profit element from the amount it pays for the service.

A client might also adopt this tactic to try to get certain employees of contractor A (with whose services it is satisfied) transferred to contractor B, in circumstances where contractor B is prepared to provide the service to the client more cheaply.

There are obvious potential pitfalls to such strategies. If the client terminates the original service provision agreement in breach of contract, the contractor whose employees have been poached in this way may well sue for damages for loss of profit. Hence the advisability of behaving in this manner will depend on the nature of the termination provisions in the original agreement.

One tactic for contractors seeking to avoid losing their employees in this way would be to seek to ensure that such employees do not constitute an organised grouping, the principal purpose of which is to provide a particular service to a particular client. This might be achieved by ensuring that each employee's working efforts are spread as evenly as possible across multiple clients and/or providing multiple different services. However using this approach to avoid employees becoming 'essentially dedicated' will not always be practicable.

Single events and short-term tasks

TUPE 2006 requires an intention on the part of the client that, after the change, the service provision activities will be carried out by the transferee 'other than in connection with a single specific event or task of short-term duration'. TUPE 2006 does not state where the burden of proof lies in establishing an intention to transfer. Note that the relevant intention relates to the transfer of activities not employees.

References: TUPE 2006, SI 2006/246, Reg 3(3)(a)(ii)

The EAT in *Liddell's Coaches* held that for the exception to apply:

References: *Liddell's Coaches v (1) Cook (2) Gold (3) Abbey Coaches* (UKEATS/0025/12/BI)

- o although a relevant task (in connection with which the activities are to be carried out) must be of short-term duration, the qualifying words 'of short-term duration' do not apply where the activities are to be carried out in connection with a single specific event
- o however, this makes no practical difference, because anything that can properly be characterised as an 'event' will be of short-term duration anyway
- o there is no requirement that the activities themselves (as opposed to the task or the event) be of short-term duration: hence there will be no service provision change (ie the TUPE 2006 exception will apply) where the client intends activities to be carried out over a long-term period, provided that those activities are to be carried out in connection with either a single specific event or a task of short-term duration

In its response to consultation, the DTI (now BIS) said that the exemption 'could be misused by clients who deliberately break up longer-term contracts into a series of smaller contracts of a short-term duration. This potential loophole can be closed or greatly narrowed by ensuring that the client's 'intention' must be to ensure that each contract is distinct and not part of a deliberate design to let linked contracts to the same con-

tractor in the future. Employment tribunals are accustomed to assessing the motivation of parties when considering cases put before it'.

TUPE 2006 is not intended to apply to contracts where there is no ongoing relationship. Examples given by the BIS Guidance (at page 7) are:

References: BIS Guidance on TUPE 2006

- o where there is a dedicated project team of employees working on a contract to organise a single conference. TUPE would not apply to transfer them to a different contractor used to organise a second conference
- o a contract to provide security advice to the Olympic organisers over several years up to 2012, which would be covered by TUPE 2006, whereas a contract to provide security staff to protect athletes at the event itself would not

Doubt has now been cast on the second example set out in BIS guidance.

The EAT in *Liddell's Coaches* considered that the example in the BIS guidance had wrongly conflated 'activities' with 'event'. The Olympics were a single specific event, and the provision of security advice in connection with the Olympics was to carry out 'activities' (ie provision of the advice) in connection with a single specific event (ie the Olympics). It considered therefore that TUPE 2006 would not apply to such a contract. References: *Liddell's Coaches v (1) Cook (2) Gold (3) Abbey Coaches* (UKEATS/0025/12/BI)

Supply of goods

The regulations governing service provision changes are intended to cover the provision of services and not the supply of goods.

For example:

- o where there is a change of contractor supplying food and drink to a staff canteen run by a company for the company to sell on to its staff, this would not constitute a service provision change. Conversely, where the contractor running the canteen on a company's behalf changes, that would constitute a service provision change (this example comes from the BIS guidance)
References: BIS Guidance on TUPE 2006
- o where the activities of an organised grouping of workers were dedicated to manufacturing vehicle parts for a specific third party vehicle manufacturer, the decision of that third party to buy those parts from a different supplier instead did not constitute a service provision change. In that context, the fact that that organised grouping had previously been providing a service directly to their employer was of no relevance
References: *Pannu v Geo W King* [2012] IRLR 193

Practical issues

Many of the same considerations apply to the outsourcing of a services contract as to business acquisitions.

Additional concerns arise only because the contract will be of limited duration. This means that the parties should consider including exit provisions applying at the end of the contract as well as at the start. These normally cover:

- o agreement by the contractor to provide employee information at the end of the contract
- o warranties
- o additional indemnities covering employee termination costs if TUPE 2006 does not apply when the contract ends to transfer employees to the new contractor
- o mirror-image indemnities regarding the liabilities which will transfer to it or the second generation contractor at the end of the contract (arising from the contractor's acts during the contract period)

Although the new contractor will not be a party to the contract, it can enforce rights created for its benefit against the old contractor under the Contract (Right of Third Parties) Act 1999, unless this is excluded by the contract.

Where the service being transferred is not the whole business, it is important to identify who transfers and who doesn't, and to make sure the contract deals with what happens when employees who are expected to transfer under TUPE 2006 don't and when there are additional employees not expected to transfer who do.

Secondment

Sometimes, the customer may agree to second to the contractor additional staff who are not assigned to the relevant part at the time of the transfer. The customer may want the contractor to agree not to poach these staff for itself.

Retention of key personnel

In view of the transfer of liabilities at the end of the contract, the customer may also want to consider:

- o restricting the contractor's ability to change the employees' terms and conditions, to prevent substantial improvements in terms which could hinder a later transfer
- o preventing the contractor from reassigning employees to other activities, to ensure existing employees are retained as a discrete team providing the service being outsourced
- o retaining control or involvement in appointments to key posts, to stop the contractor transferring good employees elsewhere within its business and replacing them with bad employees it wants to get rid of
- o preventing the contractor from firing key employees except for gross misconduct
- o restricting the contractor's ability to poach employees for a period after the contract ends
- o preventing the contractor from using subcontractors to provide the service
- o preventing the contractor from trying to frustrate the re-tendering process by introducing changes to terms and conditions which apply after the contract ends, such as future pay rises and enhanced redundancy entitlements

If key personnel include self-employed individuals, the parties will need to negotiate with those individuals to agree to assign their contracts to the contractor as they will not be transferred under TUPE 2006.

If the employees are to provide the services at the customer's premises, the customer may also want to require the contractor to ensure:

- o that they comply with its security arrangements
- o that they comply with its health and safety arrangements
- o that they comply with its equal opportunities policies
- o that they maintain the confidentiality of any information confidential to the customer that they acquire while on their premises
- o that they submit to the day-to-day control and direction of the customer's managers