

12 Days of TUPE

Notes prepared by Claire Darwin, Matrix, for talk to ELA on 7 December 2016

A) EU LAW

1. Brexit Means ?

a. PLC report, 10 November 2016.

2. The Acquired Rights Directive and Insourcing: C-509/14 Administradorde Infraestructuras Ferriarias (ADIF) v Aira Pascual and others.

a. Does ARD now require no more than a change of service provider?

B) UK LAW

General Principles that apply to both types of transfer

3. What transfers?

a. Reg 4(2) of 2006 Regs.

b. Liability for pre-transfer acts of discrimination and harassment:
Vernon v Azure Support Services Ltd and others (2014)
UKEAT/0192/13, UKEAT/0192/13 UKEAT/0193/13?

- c. Liability for pre-transfer acts of discrimination by transferee against an objector: *NHS Direct NHS Trust v Gunn* [2015] IRLR 799?

4. Cessation of Activities:

- a. *Housing Maintenance Solutions v McAteer & Ors* [2015] ICR 87

- b. *Inex Home Improvements Ltd v Hodgkins* [2016] IRLR 13

- i. EAT applied C-287/96 *Landsorganisation Danmark v Ny Molle Kro*

- c. *Mustafa v Trek Highways Services Ltd* [2016] IRLR 326

5. Evidence of events after date of alleged transfer:

- a. *ICTS UK Limited v Mahdi & Others* [2016] ICR 274

SERVICE PROVISION CHANGES

6. The Client (Reg 3(1)(b))

- a. Does ‘a client’ or ‘the client’ mean two clients? *Hunter v McCarrick* [2013] IRLR 26 (CA).

- b. The meaning of ‘on the client’s behalf’: *CT Plus Yorkshire) CIC v Black & Others* UKEAT/0035/16/DM.

7. Next issues for the ET to consider after client has been identified:

- a. What are the relevant activity or activities?

- b. Have those activities transferred?
- c. Have the 3(3) conditions been satisfied?
- d. Was the employee in question assigned to the organised grouping of employees?

8. Activities (3)(1)(b)

- a. The identification of “activity” is critical in many case as per Langstaff P in *Campbell and another v Johnson Controls Ltd* [2012] All ER (D) 220 (May)
- b. Test adopted in case-law is now on statutory footing: Reg 3(2A):
‘References in paragraphs (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.’
- c. *Salvation Army Trustee Company v Bahi* UKEAT/0120/16/RN:

9. The Division of Activities and Fragmentation:

- a. Fragmentation has two meanings in the case-law i) when service contracts (ie the relevant activities) "fragment" or become divided between different service providers; and ii) when there is considerable uncertainty about who the successful contractor will be during a period when no-one is providing that service.

- b. *Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust* [2016] ICR 607

10. Organised Grouping of Employees (Reg. 3(3)(a)(i)

- a. There are two issues:

- i. Is there an organised grouping of employees situated in GB? (NB this can mean one employee see reg 2(1) of 2006 Regs).
- ii. Does that organised grouping of employees have as its principal purpose the carrying out of the activities concerned on behalf of the client *Seawell Ltd v Ceva Freight (UK) Ltd* [2012] IRLR 802 (EAT); *Rynda (UK) Ltd v Rhijnsburger* [2015] IRLR 394.

- b. *Amaryllis Limited v McLeod* UKEAT/0273/15/RN: when should that ‘principal purpose’ be assessed? Historically or at the point immediately before the change of provider?

11. Does TUPE Apply at All?

- a. Reg 3(1)(a): ‘to another person’
- b. Reg 3(1)(b) (i) and (ii): ‘by another person’.
- c. Another person can be ‘Other People (plural)’: *Layton v Hyde Housing Association Ltd* [2016] ICR 261

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