TUPE transfers and the issue of 'an organised grouping of employees'

How important is the connection between a service provision change and '*an organised grouping of employees*' under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)? Recent cases have highlighted the difficulty in interpreting the meaning of '*an organised grouping of employees*' under the regulations.

A service provision change is where a service provider is replaced. Under Regulation (3)(1)(b), a service provision change occurs in a situation where the supply of services are taken over by a contractor, on behalf of a client. It also occurs where a new contractor takes over from the contractor acting on behalf of a client. Another form of service provision change is where the supply of services are no longer carried out by a contractor or subsequent contractor, instead, the client takes the service in-house. In commercial language, these changes are known as out-scourcing, re-tendering and in-sourcing.

However, Regulation 3 (3)(a)(i) states that immediately before the service provision change, there must be an *'organised grouping of employees .....which has as its principal purpose the carrying out of activities concerned on behalf of the client '.* If there is, there is a TUPE transfer of employees to the new service provider. If there is not, there is no service provision change and therefore no TUPE transfer of employees.

Seawell Ltd v Ceva Freight (UK) Ltd and Another IRLR 802 EAT is an interesting case which was heard by the Employment Appeal Tribunal (EAT) in April 2012. One employee was affected by what appeared to be a service provision change - he lost his job as a result. His employer (Ceva) insisted he was no longer an employee because of a service provision change, resulting in a TUPE transfer of his contract of employment to the client. The client (Seawell) insisted that no such transfer had occurred. Effectively, the employee had been dismissed, but which company was liable for the dismissal?

Mr Moffat was employed by Ceva Freight (UK) Ltd as a logistics co-ordinator at their warehouse in Dyce. Around April 2008, Seawell became one of its clients. On their behalf, Ceva purchased and received goods and materials which were stored in the warehouse, then shipped to relevant oil platforms.

From the outset, Seawell had made it clear that the arrangement with Ceva would not be long term, it intended to bring the work in-house. Ceva's workforce was divided up into 'inbound goods' and 'outbound goods'. Mr Moffat was in the 'outbound goods' group which had eight employees. Mr Moffat spent 100% of his time working on the Seawell account, whilst four other employes spent far less time on the Seawell account, between 10 – 30% for each of them.

From 1 January 2010, Seawell ceased being a client of Ceva. From this date Seawell carried out all the work on its own behalf. In correspondence between the solicitors of the two companies, Seawell refuted an assertion by Ceva that Mr Moffat had transferred to Seawell under TUPE. Ceva subsequently wrote to Mr Moffat in December 2009 advising him of a TUPE transfer and instructing him to report to work at Ceva on 5 January 2010. Mr Moffat made a claim to the Employment Tribunal against both companies for unfair dismissal.

The Employment Tribunal carefully considered the facts and reached the conclusion that Mr Moffat, as a single employee, could constitute ' *an organised group of employees'* and that his principal purpose was the carrying out of activity for the Seawell account. Therefore, there was a service provision

change, resulting in Mr Moffat's contract of employment transferring under Regulation 4 to Seawell. Seawell was held liable for unfair dismissal and liable to pay compensation to Mr Moffat of £24,652.72 even though he had never worked for them.

Seawell appealed against the decision. The Employment Appeal Tribunal allowed the appeal. The EAT stated that the 'outbound' operation was not a grouping of employees deliberately organised to work on the Seawell contract or that the Seawell work was the principal purpose of the group. That Mr Moffat spent all his time on the Seawell contract was not sufficient for him to meet the definition of '*an organised grouping of employees'* on his own. Whilst the TUPE regulations allow for a single employee to meet the definition, Mr Moffat did not. This is because he did not actually do 100% of all of the '*activities concerned*', there were other employees also working on the Seawell account. When Seawell took back the work, they took the whole contract back, not just Mr Moffat's work.

The EAT concluded that Mr Moffat had been unfairly dismissed by Ceva, not Seawell, and that they were liable to pay him compensation.

There are important points that businesses should note from this decision. A business transfer or service provision change with a potential TUPE situation should always be guided by expert legal advice. Whether or not TUPE will apply is not straightforward, it is a complex area of law.

One important question for a business to ask about a service provision change is, 'Has a service provision change occurred that fits the definition under the TUPE regulations?' This should be entwined with the question 'Will the employee or employees transferring fit the description of an organised grouping of employees?' You must be able to show a deliberate grouping for that specific client. These and other relevant questions should be the concern of both parties involved in a service provision change.

No assumptions should be made by service providers about whether employees will transfer. A mistake could result in expensive litigation, defending claims brought by employees adversely affected by a failed TUPE transfer.

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