

June 2012

## Welcome

Welcome to our revamped quarterly TUPE Update. This aims to provide high level practical insight to those familiar with TUPE. We will focus on current trends, proposals for reform and negotiation of indemnities. Throughout applying a clear focus of assisting you in identifying and mitigating TUPE risk. We hope you find this Update helpful and would value your feedback.



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## Current Trends – Service Provision Change Transfers – What happened to the certainty?

The major change made when the 2006 TUPE Regulations replaced the previous 1981 Regulations was the introduction of an entirely new type of transfer; a service provision change transfer (“SPC Transfer”). It was made clear that the purpose of this was to ensure certainty so that, on an outsourcing, clients, incoming and outgoing service providers and staff would know where they stood. Particularly, it was intended that, other than in exceptional circumstances, TUPE would apply on an outsourcing. Arguably, for a number of years, this has worked. For the majority of outsourcings it has been accepted that TUPE applies.

Unfortunately, however, the more case law we have had on SPC Transfers, the more it seems that the intended certainty has been removed. It is now possible to identify at least 3 different strands of case from which can be derived arguments that there is no SPC Transfer. These are as follows:

### Strand 1 – changes in activities

There are now four EAT decisions on whether changes in the services to be provided, mean that the same activities will no longer be carried out and, therefore, there is no transfer. The essential question to be decided by any employment tribunal, being whether the services are “fundamentally or essentially the same”.

### Strand 2 – service split between multiple service providers/“fragmentation”

Following two EAT decisions, there are effectively now 3 possibilities where a service is taken on by multiple service providers, these being:

- there are a number of different transfers of, discrete parts of the service to different service providers;
- where it is not clear which service provider takes on which discrete part, there is a transfer to the party which in practice takes on the greater part of the service; or
- where it is not clear which service provider takes on which discrete part, the “degree of fragmentation” is such that there is no transfer to any party.

### Strand 3– organised grouping of employees whose principal purpose is servicing client

This is the latest strand which comes out of the EAT decisions in *Eddie Stobart v Moreman* and *Seawell v Ceva Freight*. In the first case, albeit that a group of warehouse employees in practice had been servicing one particular client, it was found that there was no TUPE transfer on the basis that, the staff were not sufficiently organised “by reference to the client”. In the second, the EAT indicated that an organised grouping “connotes a deliberate putting together of a group of employees for the purpose of the relevant client work – it is not a matter of happenstance.” Albeit, therefore, an employee spent 100% of his time servicing the one client, he did not transfer.

### Practical Implications

The impact of the above is to introduce a degree of doubt and some scope for new service providers to run arguments that TUPE should not apply and for clients outsourcing and re-tendering to seek to structure matters so there is no TUPE transfer. Parties seeking to run arguments that there will be no TUPE transfer on an outsourcing will, certainly however be taking on a real risk of claims and, therefore, detailed advice should be obtained prior to taking this course.

The above ties in to the current BIS call for evidence which seeks views on whether or not the SPC Transfer has introduced certainty and, therefore, should be retained or whether it should instead be regarded as “gold plating”; i.e. unnecessary provision, not required by the Acquired Rights Directive, which should be removed.

We are promised a consultation paper in relation to proposed amendments to TUPE later this year.

We will be running a round table event on the proposals for reform on 17 September for those with a particular interest in TUPE. Please let us know if you would be interested in attending.

## Spotlight on Reform – TUPE and Collective Redundancies

There are currently 2 “calls for evidence” from the Government regarding potential reform of TUPE and collective redundancy consultation rules. One of the most interesting points however concerns the overlap between the two.

A practical issue often arises where a purchaser buying a business through a business acquisition, such that TUPE applies, wants, following purchase, to carry out multiple redundancies and, with a view, to minimising its costs, to be able to implement those redundancies as swiftly as possible following purchase.

In advance of purchase, the purchaser will input into a TUPE consultation process with the seller’s staff, inputting in relation to measures it envisages taking after the transfer. The practical point arising is whether there is any means by which the purchaser can reduce the period of post purchase redundancy consultation as a result of its pre-purchase TUPE consultation?

The current technical problem is that the drafting of the collective redundancy obligation means that the purchaser cannot commence minimum required periods of redundancy consultation until it becomes employer; i.e. until the date of transfer. This problem is acknowledged within the call for evidence and it seems clear that the Government is keen to consider in any event whether it would be able to reduce the current minimum 90 day period of consultation where 100 or more dismissals are envisaged.

In practice, however, it should be possible, as the law currently stands, to reduce the timescale of the post-purchase redundancy consultation process and, therefore, save cost. This is because it is legitimate for the purchaser to begin a dialogue in advance of the transfer regarding envisaged redundancies as part of TUPE consultation regarding “measures”.

It is also clear that although dismissals cannot take effect prior to the end of the minimum 90 day period; i.e. a minimum of 90 days from the date of transfer, if in practice, redundancy consultation has been completed in advance of the 90 days, then notice can be given, i.e. notice periods can be commenced.

For example, therefore, as a result of initiating consultation regarding redundancies as part of the TUPE consultation process, an employer may be able to conclude a collective consultation process 60 days after transfer, therefore allowing it to start notice periods running before the end of the 90 day period, effectively saving itself 30 days of employment costs.

## Indemnity Spotlight – Regulation 4 (9) Risk

One of the major risks on any outsourcing where TUPE applies, is the risk of Regulation 4(9) claims where the new service provider will be providing the service from a different location.

By way of reminder, Regulation 4(9) allows an employee to regard themselves as dismissed where there has been, “material change in their working conditions to their detriment”, case law having made clear that there could be such a change, where there is a change in their place of work and that an ETO defence is unlikely to be available.

How then should this risk be allocated within the outsourcing contract between the client and the service provider? The short answer is that both parties may seek an indemnity against this risk from the other party. The client will seek the indemnity on the basis that any such claims necessarily derive from the service provider’s proposals to make changes and, therefore, that the service provider should be liable.

Additionally, the client may argue that, it is incumbent on the service provider to ensure it carries out a proper “sell” to staff regarding any changes and the desirability of working for the service provider with a view to alleviating any staff concerns over location. Therefore, again it should be the service provider which carries this risk. Generally these arguments hold sway. From the perspective of the service provider, however, it may be that proposed cost savings it is envisaging making in provision of the service are contingent on its ability to provide the service from another location; in practice there is little it will be able to do to mitigate the risk and it may, therefore, argue that, it is for the client to deal with the issue of staff who clearly will not want to transfer and to indemnify it against this risk.

## TUPE Support

In addition to our day to day work supporting clients on the full range of TUPE issues, we are developing a TUPE support package designed to mitigate the risk of transfers for clients whose business involves frequent transfers. Please contact us if this may be of interest.