



Legal update — September 2018

## Employment TUPE Update

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### Here is our latest update of all the TUPE developments and case law you need to know about.

#### Temporary cessation of activities

What happens when there's a temporary cessation of activities? Will this be enough to defeat the operation of TUPE? The European Court of Justice (ECJ) has recently looked into this and, following its decision, such a cessation will not necessarily, by itself, mean that TUPE does not apply.

#### Potential TUPE transfer even when there was a five-month gap between old and new contracts

The ECJ has held that there could be a transfer of an undertaking for the purposes of the Acquired Rights Directive (ARD) where the contract to operate a Spanish music school terminated for non-performance and the service was resumed by another contractor after a gap of five months in *Colino Sigüenza v Ayuntamiento de Valladolid and others*.

Mr Sigüenza worked for Musicos, a small private company which operated a municipal music school for a public authority. Due to a sharp decline in pupils and, following a collective dismissal procedure, Musicos dismissed all its staff and ceased all activities. It was subsequently wound up. A new contract to operate the music school was then awarded which began five months' later. Mr Sigüenza brought unfair dismissal claims against Musicos, the public authority and the new contractor.

When the Advocate General gave his opinion a few months' ago, he found that there was no transfer of an undertaking. He concluded that there was no economic activity as Musicos had been incorporated solely for the purposes of tendering for the music school contract (it did not provide services to anyone other than the public authority), so when the contract came to an end so did the activity of Musicos. However, he held that if the ECJ found that there was an economic entity which retained its identity then the fact that there was a five-month gap in services did not necessarily preclude a finding that this was a going concern.

The ECJ has held that there could be a transfer of an undertaking for the purposes of the ARD. Here the economic activity required a significant amount of material resources (musical instruments, facilities and premises) which were all made available to the new contractor, and, in the view of the Court, it did "not appear able to be regarded as an activity based on manpower".

The ECJ concluded that a temporary suspension of activities did not preclude the possibility of an economic entity retaining its identity. It found that this was particularly the case as, in the five months for which the activities ceased, three of the months were school holidays. The ECJ left it to the referring court to decide whether or not there was a transfer of undertakings, taking into account all of the factual circumstances.

#### Take into account the purpose, nature and length of the cessation

The ECJ's finding that this was a going concern ties in with UK case law where it has been found that a temporary cessation of activities does not necessarily defeat the operation of TUPE, though the purpose, nature and length of the cessation will all be relevant to whether TUPE applies.

In *Mustafa and another v Trek Highways Services Ltd and others* the EAT held that where a subcontractor had suspended its operations shortly before the main contract was awarded to a new contractor, the temporary suspension of 12 days did not destroy the entity. It disagreed with the tribunal which held that as the employees were not employed "immediately before" the putative transfer TUPE could not apply. The EAT found that there was nothing in TUPE itself that requires the organised grouping of employees to be actually engaged in the activity before the service change takes place. It also suggested that the reasons why the activities ceased to be carried out will usually be immaterial and so the argument that TUPE did not apply because the reason for the termination of the contract was a commercial dispute was an "opportunistic stance".

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Following *Mustafa* it is clear that a temporary cessation of work will not necessarily defeat the argument that TUPE applies. Tribunals will have to consider the length of the cessation and the reason behind it before coming to a conclusion, especially where the service or other activities, along with the equipment and other resources also transfer.

In *Inex Home Improvements Ltd v Hodgkins and others*, another case dealing with a temporary cessation of work, the EAT considered whether employees who had been temporarily laid off work immediately before a service provision change could be part of an organised grouping of employees.

The claimants were employed to carry out painting and decorating work on a contract where the work was released in tranches. One of the orders was completed in December 2012 and it was anticipated that the next would be released in January 2013. As there was no work for the claimants they were temporarily laid off and in January the work was issued to another company. The EAT considered that the temporary absence or cessation from work did not, in itself, mean that the employees did not have the protection of TUPE. It suggested that employment tribunals may also consider the length of the cessation and the purpose or reason for it when determining whether TUPE applies.

In the earlier case of *Wood v (1) Caledon Social Club Ltd (2) London Colney Parish Council* the EAT found that, where a transferor surrendered the premises licence of a bar, and the transferee taking over the bar later obtained a premises licence and ran the bar with its own people, the economic entity had not ceased, but merely been suspended until the bar reopened. It followed that there was a relevant transfer.

#### **Public administrative functions exemption from TUPE**

The EAT has given guidance on whether the transfer of a public health team commissioning health services was a TUPE transfer in *Nicholls & ors v LB Croydon*. Regulation 3(5) of TUPE provides that an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public authorities is not a relevant transfer, an exemption which is usually interpreted very narrowly.

Croydon Primary Care Trust transferred its public health team (which was concerned mainly with the commissioning of public health services) to the London Borough of Croydon. Under the provisions of the Health and Social Care Act 2012 the Secretary of State has the power to put in place transfer schemes intended to govern the transfer of employees from the NHS to local authorities. A staff transfer scheme was put in place as it was considered that TUPE did not apply as Regulation 3(5) kicked in.

Certain aspects of TUPE were not replicated in the scheme, and the right to claim automatic unfair dismissal was time-barred, so the claimant's dismissed after this date could not rely on the transfer scheme and sought to rely on TUPE instead. At first instance the tribunal held that there was no "relevant transfer" because Regulation 3(5) applied due to the fact that the public health team's activities involved the exercise of public authority.

The EAT stated that it was necessary to consider the activities being exercised by the state in the particular case and to determine whether these activities constituted "exercising public powers", or carrying on an economic activity by offering goods and services on the market. It agreed that the public health team's activity in purchasing or commissioning health services was not an economic activity. However, it also noted that the tribunal had found that all, or almost all, of the work done by the public health team could be, and was, offered by "non-state actors operating in the same market". This was a strong indication that the public health team was carrying on an economic activity and the tribunal had failed to explain its reasons for coming to the conclusion that it wasn't carrying out such an activity. The issue was remitted to a differently constituted tribunal for reconsideration.

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