Albion Chambers, Broad Street, Bristol BS1 1DR
and 29 Park Street, Taunton TA1 4DG

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol

clerks@albionchambers.co.uk
www.albionchambers.co.uk

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Albion Chambers EMPLOYMENT AND PROFESSIONAL DISCIPLINARY TEAM NEWSLETTER

TUPE Special

Two new members

Albion Chambers is delighted to announce the fantastic news that two new practitioners are joining our employment and professional disciplinary team.

Ben Norman, called in 2000, is a very experienced barrister, he was formally the head of civil at 18 St John Street Chambers, Manchester before moving to the South West. In recent times he has been running a national employment-law consultancy, continuing to represent parties in Employment Tribunals across the UK.

Matt Jackson, called in 2011, is very well known to many of you, both for his crystal clear, insightful, Daniel Barnett employment law updates and also the recent Supreme Court decision of *Jhuti v Royal Mail* (2019). He joins us from 10 KBW, London but throughout his time at the Bar he has been based in Bristol. Matt brings a wealth of first instance and appellate employment law experience, including non-employment discrimination cases litigated in the County Court.

Ben and Matt will be joining us from early spring and will be clerked by Steve Arnold.

TUPE

Transfer delays and business changes

The issue

Breaks in trading are common when businesses are bought and sold, and similarly, it is unsurprising that there will be differences in the running of businesses before and after a sale or commercial transfer.

But what impact do these factors have on whether there was a TUPE transfer?

Delays in transferring the business

The writer was recently involved in a case in Bristol ET where the anticipated closure of a public house was two weeks prior to the purported TUPE transfer and commercial transfer to new landlords. The actual closure was, in fact, three months, due to an asbestos-related issue. During the three-month closure the previous landlady was told the pub may not re-open, that there would no longer be a TUPE transfer and the staff should be made redundant. The Claimants and landlady sought advice and issued their case in the ET before the pub re-opened. As it happened, one of the landlords who originally intended to take over the pub signed the new lease one month after the claim was issued.

There is a number of relevant cases where a transfer might take effect even when there has been a break in operation.

Case Law Review

Wood v Caledon Social Club Ltd [2010] UKEAT/0528/09/CEA

Principle: The temporary cessation of work does not in and of itself preclude the existence of a transfer.

This concerned the club area of a community centre where there were bars, kitchen and a beer cellar. The club stopped trading whilst they waited for a new licence to be granted. In this case the Employment Tribunal found that there was no TUPE transfer because the temporary cessation of the bar had prevented a relevant transfer. However, the EAT allowed the appeal and ruled that "the economic entity did not cease on 16 September; it was temporarily suspended until the bar re-opened on 6 October" *(paragraph 12).*

Alno (UK) Ltd v Turner [2016] UKEAT/0349/15/DA

Principle: The length of the delay may be relevant; a longer cessation can mean there is no transfer.

Alno was distinguished from *Wood* (above) on differing factual circumstances and, primarily, that the delay was much much longer. In *Alno* there were structural defects in the building that needed repair; this prevented occupation of the premises and the business had not re-opened prior to the final hearing at the ET.

The EAT allowed the appeal in *Alno*, holding that if the Tribunal first accepts that this economic entity existed, *"it must apply a multi-factorial test in order to decide whether that economic entity transferred"* (paragraph 22). This means that the fact the economic entity ceased to operate is a relevant factor but no more than that, and the Tribunal should consider the facts of the case.

Alno also usefully summarises the authority of *P Bork International A/S v Foreningen af Arbejdsledere I Danmark* [1989] IRLR 41. In *Bork* the lessee of a factory dismissed its workers and

terminated the lease. The factory was sold immediately and the new owner started to operate again a few weeks later. The new owner recruited exclusively from existing staff and purchased stock from the previous lessee. The delay in *Wood* and *Bork* was a few weeks whereas in *Alno* the delay was 18 months.

Housing Maintenance Solutions Ltd v McAteer and Ors [2014] UKEAT/0440/13/LA

Principle: The date of transfer of the undertaking dictates the date on which the contracts of employment transfer, not vice versa.

In the writer's recent case in Bristol ET it was held that a three-month closure did not prevent a transfer, neither did the public house still being closed at the time the claim was issued. This was a situation where there was a series of transfers under Regulation 4(3), which concluded with the staff transferring to the new landlord when the business re-opened.

Differences in how the business was operating

Continuing the narrative, when the public house was taken over by the new landlord, it was under the umbrella of a different part of the brewery. As such, the freedom the new landlord had over pricing, product stock and accountants was curtailed significantly. There was also no flexibility over when to put offers on and what those offers would be. This was different from when the previous landlady ran the public house as she could choose her prices, stock, deals, her accountants among other things.

There is a number of factors to consider when deciding whether the identity of the business was retained and the case of *Cheeseman and others v R Brewer Contracts Ltd* [2001] IRLR 144 is the touchstone case in this area.

Cheeseman set out the relevant factors as follows:

1. the decisive criterion – whether the entity in question retains its identity, as indicated, among other things, by the fact that its operation is actually continued or resumed;
2. necessary to consider all the factors characterising the transaction in question, but each is a single factor and none is to be considered in isolation;
3. among the matters thus falling for consideration are:
   - the type of undertaking;
   - whether or not its tangible assets are transferred;
   - the value of its intangible assets at the time of transfer;
   - whether or not the majority of its employees are taken over by the new company;
   - whether or not its customers are transferred;
   - the degree of similarity between the activities carried on before and after the transfer; and
   - the period, if any, in which they were suspended;
4. in determining whether or not there has been a transfer, account must be taken, among other things, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on;
5. the absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but is certainly not conclusive;
6. when no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.

So what happened?

In the writer's recent case, despite the public house operating under a different much more restrictive umbrella of the brewery, and the fact that no previous employees were taken on and the pub had an extensive refit, the ET found that the identity of the business was held to be the same. The site was operating as a public house before and after the refurbishment and the contractual differences in the leases did not change the identity of the business entity.

Far from a clear-cut decision.

Lucy Taylor, Simranjit Kamal (Pupil)

TUPE transfers

Employee or worker? Does it matter?

An analysis of the first instance decision of *Dewhurst and others v Revisecatch (1) and CitySprint (2)* (December 2019)

All employment lawyers follow with interest the various gig-economy decisions. How far will courts go in providing workers with rights akin to employees? A few years ago, the outcome of gig-economy decisions were hotly debated, which way will the Court decide? But now, it comes as no surprise when yet another decision favours the expansion of workers' rights, irrespective of how the original regulations were drafted.

But how does that trajectory towards convergence apply to the heavily 'black-letter' law of TUPE?

Scope of article

This article is not an in-depth review of workers' rights, nor will it go into any sort of depth about the different types of worker under the ERA 1996. For the purposes of this article it is sufficient to know that the workers concerned were 'limb (b)' workers, so s.230(3)(b) workers.

Background

For a number of years it has been suspected that workers (who don't truly fall within the definition of the self-employed "contract for services") may fall within the TUPE definition of an 'employee' pursuant to r.2(1) of TUPE 2006, namely:

"any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services".

For our purposes, let's zoom in on the phrase "or otherwise".

In the case of *Dewhurst* there was a TUPE transfer. A group of cycle couriers, who were workers, did not 'transfer' as they were treated by the transferor, for all purposes, as not falling within the scope of TUPE. Although there could never be a (sustainable) argument that such workers would/could be unfairly dismissed in such circumstances, the consequences of the Tribunal decision would affect whether the transferor would be required to provide liability information to the transferee about the workers and also, whether protective awards would be payable for the failure to consult and provide pre-transfer information. The decision would also have a knock-on effect on a holiday-pay claim, under the WTRs.

The Respondent that was asserting

that 'or otherwise' did not extend to limb (b) workers because TUPE specifically excluded the self-employed under 'contract for services', and that 'or otherwise' was simply a vestigial organ, due to previous uncertainty under the 1977 Directive. In short, 'or otherwise' was a distraction and added nothing to the debate.

The EJ in this first instance decision disagreed, coming to the following conclusions:

"Applying those principles, I can properly give effect to the Acquired Rights Directive by concluding that the words 'or otherwise' are to be constructed so as to embrace limb (b) workers."

The Judge went on to state that:

"This interpretation does not 'go against the grain' of Tupe 2006, the purpose of which … is to preserve the employment/labour law rights of those who work within an undertaking when that undertaking changes hands. Our 'general employment law' protects both limb (b) workers and traditional employees, at different levels of protection, and both of these classes have their rights preserved by Tupe 2006."

Conclusions

Various unions have been looking for the right vehicle to litigate this important issue and they have found it in the case of *Dewhurst*. With some fortune, it would appear, Mr Dewhurst, one of the couriers and lead Claimant in this case, also happens to be the Vice President of the trade union IWGB (Independent Workers Union of Great Britain) and, therefore, he and they were remarkably well-placed to pursue this case.

Of course, it is a decision of the Employment Tribunal and, therefore, not binding on others. Most commentators suggest that the decision will be appealed. However, this writer is not so sure. Where the rationale as set out by the Employment Judge in *Dewhurst* is pretty clear, the gig-economy companies (including the Respondent in this case) may well decide to let sleeping dogs lie, to allow them to argue the point on a case-by-case basis rather than risk being boxed-in by a decision of the EAT. Tactically, folly to appeal?

Interesting times.

Richard Shepherd

TUPE and furloughing

The recent announcement of the CJRS scheme provoked some concern about the status of employees who have been subject to TUPE transfers after the relevant date.

The concern was caused by the requirement for an employee who is to be furloughed to be on the PAYE roll of the company placing them on furlough on the relevant date, (this was 28 February, now 19 March). Of course, despite the fact that TUPE'd employees are treated as having worked for the transferor since the commencement of their whole employment, that does not retrospectively place them on the PAYE roll. Obviously, considering both TUPE and CJRS are designed to protect employees, this was a considerable lacuna.

Fortunately, updated guidance, issued 9 April, has confirmed that employees who have transferred pursuant to TUPE, will be able to be furloughed under the CJRS.

Alec Small

Horses for courses

Organising a workforce to take advantage of TUPE. A view from the EAT

The EAT recently considered the question of whether the *deliberate* organisation of workforce to take advantage of the benefit of a TUPE transfer would or should prevent a 'Service Provision Change' (SPC).

In the case of *R & M Williams Limited v (1) Ian Williams Limited (2) Shane Mattravers and Others*, (judgment not published at date of drafting) the EAT held that the reorganisation of a workforce to match the structure of work under a new contract in anticipation of TUPE is permissible and meets the requirements for a service provision change.

Brief facts

Ian Williams Ltd (R1), the purported transferor, provided building-maintenance services to Cardiff City Council. The Council put its contract out for re-tender but stipulated that it was to be split into three geographical regions, and no single bidder could be successful in more than one area.

R & M Williams Limited (R2), the appellants in EAT and the purported transferee, won the bid for one of the three geographical areas.

R1 was unsuccessful in all of its bids. In response to this news, two months prior to the transfer date it rearranged its workforce to 'match' the geographical arrangement under the new tender. This was done with the explicit intention that it would be captured by TUPE and the corresponding workforce within the respective geographical regions would be transferred. This intention was communicated to the client and the other parties.

At first instance

At first instance, the Tribunal sitting in Cardiff held that the there was an SPC under TUPE. Despite there being a fragmentation of the services geographically, the Tribunal found that the activities under the contract remained fundamentally the same and, consequently, there was no bar to TUPE taking effect.

The Tribunal also accepted the submission on behalf of R1 that the 'last-minute' reorganisation of workforce, two months prior to the transfer date, did not preclude TUPE from taking effect. In this case the ET found that the definition of an "organised grouping of employees" as under reg. 3(3)(a) was met. It further found that the 'motive' of the transferee for the reorganisation was an irrelevance, so long as it intended to create the organised grouping and intended for the organised grouping to work on the 'activities' concerned. The activities before and after the transfer remained the same, and the principle purpose of the group was to work for the same client, Cardiff City Council.

On appeal

Three grounds of appeal were advanced in the EAT, the President and two lay members hearing the case. The primary focus of the appeal was on whether the deliberate reorganisation of the workforce to correspond with the new geographical split would prevent a service provision change.

To supplement the primary argument

the appellant also submitted that there had been fragmentation of services as a result of Cardiff City Council's decision to divide the contract into three parts and, as the argument went, the activities under the new contract were not, therefore, 'fundamentally the same'.

The final ground of appeal concerned whether the Employment Judge erred in law in deciding that the reorganisation of the workforce prior to the transfer and assignment to the particular geographical area was not temporary, i.e. post-reorganisation the contract only had six-to-eight weeks before the new contract began and, therefore, the appellant submitted, this falls within the exclusion of 'temporary assignments'.

The decision

The EAT rejected all three grounds of appeal; the decisions and reasoning of the ET were upheld.

The EAT undertook a close examination and consideration of the regulations themselves, in order to assess whether the transferor can deliberately reorganise with the explicit motive of gaining the benefits of TUPE. The EAT referred to the wording of the reg. 3(3)(a), '[the organised grouping's] its principle purpose'.

By particular reference to 'its', the EAT held that the regulation clearly intended to denote that consideration had to be given to the purpose of the grouping of employees. The motive or intention of the transferor in deliberately organising the group was irrelevant. So long as the group of employees carry out the same activities immediately before the transfer there will be a service provision change.

In relation to the other grounds of appeal, particularly that in relation to fragmentation, the EAT held that although the analysis of the Employment Judge in the first instance was a little opaque, the conclusion reached was correct; in short, there is a distinction to be drawn between 'services' and 'activities'. Fragmentation of services does not automatically prevent a service provision change. In this case the activities remained fundamentally the same, even if now fragmented geographically. If the appellant's submissions were to be accepted, any fragmentation at all would prevent a TUPE transfer.

Finally, on the issue of the 'temporary' nature of assignment, the EAT decided that the length of the time the employee has been assigned prior to the date of transfer is not the determinative factor. Determination of what is 'temporary' is a factual exercise. Even where the assignment is only a short period prior to the transfer, in this case, the employees were assigned to an organised group of employees immediately before the date of transfer and, further, their assignment was not temporary. This ground of appeal was also dismissed.

Conclusion

It is suggested that the cumulative effect of the decision is significant. It confirms that once the transferor is aware of the transfer taking place, it is not precluded from reorganising the workforce so as to ensure that the employees transfer with the work. However, there must be careful consideration in the individual circumstances of any purported transfer, whether the activities remain fundamentally the same despite the transfer, and whether the employees have to be organised deliberately to work for the same client, carrying out the same activities.

This was not a case where there was any evidence or allegations raised about fraud or 'dumping' of employees. It should be remembered that the transferor was explicit in its intention and communicated it to other the other parties. Therefore, where employees who otherwise would not meet the requirements but are purposefully 'arranged' to bring them within TUPE transfer, it remains unlikely that this would be permitted under the cloak of TUPE.

Darren Stewart
Ehsan Oarith (Pupil)

Albion Chambers Employment and Professional Disciplinary Team

Team Clerk
Stephen Arnold

Nicholas Fridd
Call 1975

Richard Shepherd
Call 2001
Team Leader

Stephen Roberts
Call 2002

Darren Stewart
Call 2002

Simon Emslie
Call 2007

Matt Jackson
Call 2011

Alec Small
Call 2012

Lucy Taylor
Call 2016

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