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Employees' contracts can be split so they transfer to multiple employers on a TUPE service provision change (UK)

CONTRIBUTOR Amy Cooper*

Summary

In the case of a 'service provision change' under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), where a service is outsourced or re-tendered, the Employment Appeal Tribunal (EAT) has ruled that an employee's contract can be split so they go from working full-time for one employer to working part-time for two or more employers.

Background

TUPE has a broader application than the EU Acquired Rights Directive (ARD) because it contains specific rules which provide that it applies in the event of a 'service provision change' (SPC). Broadly this is where an activity is 'contracted out', or where an activity is ceased by one service provider and taken over by a new provider (which normally happens after a re-tendering process). These types of situations may qualify as an SPC, and so be covered by TUPE, even if for some reason they do not constitute a transfer of an undertaking under the traditional EU law criteria. In this respect, TUPE is an example of UK legislation which 'gold-plated' EU law by going further than it required.

The case discussed in this report follows last year's judgment by the European Court of Justice (ECJ) in *ISS Facility Services – v – Govaerts* (C-344/18), a case concerning a business transfer which involved several transferees. The ECJ ruled that under the ARD, the rights and obligations arising from a contract of employment will be transferred to each of the transferees in proportion to the tasks performed by the worker. The EAT sitting in Scotland has now decided that the same approach will also apply in the context of an SPC under TUPE.

Facts

Between 2012 and 2017, Amey Services Ltd (Amey) undertook a kitchen installation contract for North Lanarkshire Council within its social housing stock. In February 2017, the Council re-tendered the contract, splitting it into two lots defined by geographical location – north and south. The lots were awarded to McTear Contracts Ltd (McTear) and Mitie Property Services UK Ltd (Mitie).

Amey's view was that TUPE would apply to transfer employees' contracts to either McTear or Mitie. Its HR team produced a spreadsheet identifying which workers would transfer to each of the companies based on the amount of time they had spent in each of the two geographical locations. Several employees brought claims in the Employment Tribunal (ET) against Amey, McTear and Mitie.

The ET found that there had been two SPCs, one between Amey and Mitie and the other between Amey and McTear, and that the employees transferred to each of them respectively in accordance with Amey's spreadsheet. McTear and Mitie both appealed to the EAT against this decision. One of the grounds of appeal was based on the judgment in *Govaerts*, which the ECJ had given shortly before the appeal hearing. McTear and Mitie asserted that the ET had been wrong to assume that each of the employees must have transferred to one of the two companies: it had not considered the position of each employee individually and the possibility that some or all of them may have transferred to neither entity.

Judgment

The EAT said that, while there was no requirement to apply *Govaerts* to the UK provisions in TUPE relating to SPCs, it would be undesirable for there to be a difference in approach. It concluded that, in either a business transfer or SPC scenario, there is no reason in principle why an employee may not work for two different

* Amy Cooper is an associate at Lewis Silkin LLP.

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employers so long as the work is clearly separate and identifiable. The EAT sent the case back to the same ET to decide in light of the *Govaerts* decision.

Commentary

TUPE, like other EU-derived employment legislation, has been retained in UK law after Brexit, so ETs and the EAT should continue to interpret it in accordance with relevant ECJ decisions on the ARD. (This is unlike the Court of Appeal and Supreme Court, which are free to depart from such judgments if they consider it right to do so.)

Despite this, the EAT was correct in observing that it was not obliged to apply *Govaerts* in this case, because the TUPE provisions governing SPCs derive solely from domestic law rather than the ARD. It nonetheless decided it was appropriate to do so. Note that the EAT's judgment is binding on ETs in England and Wales as well as Scotland, because it is a single appellate court regardless of where its decisions are made.

This gives rise to various practical issues for both transferor and transferee employers, such as:

- How should an employee's contract be split? Salary could be apportioned but how would you divide the employee's time between the two contracts? Which days/times would each employer have the employee?
- What if the employers don't agree on what should happen?
- How should the issue of time and expense for travelling between the employers be dealt with?

The EAT gave no guidance on these matters, so we will have to wait for further case law to see how ETs are likely to approach these types of cases. It is hard to see many SPC scenarios where it would be practically workable for workers to be employed by more than one transferee at a time. The situation may often have involved the re-tendering of a contract, with two or more competing businesses being the successful transferees. Those businesses may not want to employ someone who is also working for a competitor.

It seems inevitable that an employee will undergo substantial contractual changes where their contract is split between two or more employers. This could give rise to a claim under TUPE unless the relevant employer could show that there was an economic, technical or organisational reason for the change(s).

One commercial solution for employers who find themselves in this scenario might be to try to reach agreement with the transferor and other potential transferees about which employees they will each take on. This could result in a scenario where none of the workers suffer any loss and so reduce the likelihood of claims.

The prospects of all parties agreeing to such a deal are, however, probably slim. If there is no viable job for an employee post-transfer, they will most likely suffer loss – how should the liability for that be apportioned? Or if the transferees cannot agree on the arrangements for sharing employees post-transfer, and they are only offered employment for a percentage of their pre-transfer hours, how would liability be apportioned? When the case reported above returns to the ET, it will have to decide who is liable for what and the transferor may also face some liability.

In addition, even if the employees agree to an alternative arrangement proposed – such as working 100% of their time with one transferee despite the fact that by operation of TUPE they would transfer to three different transferees – there is a risk that the companies could be regarded as trying to contract out of TUPE.

We will have to wait and see how these unresolved questions will play out. In the meantime, employers would be well advised to consider carefully potential transfers where there is going to be a degree of fragmentation. Whereas fragmentation has previously been used as a strategy by employers seeking to avoid a TUPE transfer, the EAT's decision means it might be less likely to operate to 'defeat' TUPE.

Employers involved in such transactions should consider the following:

- The company organising the tender needs to think about prefiguring a structure some time in advance, clarifying which employees are organised to which group, to try to avoid a complicated situation where employment contracts need to be split.
- Transferors should organise employees in such a way that they are more likely to transfer to a specific transferee in the event this scenario arises, so that any transfer is more straightforward.
- It will generally be helpful to have a discussion with the other businesses involved early on in the process about how practically the parties are going to deal with the situation and try to agree which employees should transfer to which transferee and/or remain with the transferor.
- If there are employees who do not clearly transfer to one transferee, perhaps because they work for more than one part of the business, a decision should be made on what should happen to them.
- The parties should also try to reach agreement on how matters will be handled and who will carry the risk and liability if things go wrong.

If employers fail to prepare in advance in this way the current state of the law may leave them with complicated, unworkable arrangements and potential liability for other parties' actions and mistakes.

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Comments from other jurisdictions

Germany (Martina Ziffels, Luther Rechtsanwaltsgesellschaft mbH):
The decision of the ECJ in the *ISS Facility Services* case (C-344/18) sheds new light on a controversial academic discussion in Germany. To date, there has been no decision by a German court concluding that an employment relationship must be split as a result of a transfer of an undertaking. In order to understand the quite considerable criticism of the decision of the ECJ expressed in Germany, it is necessary to understand in which situations the ECJ's decision may be relevant.
While there are regularly no difficulties if the entire business is transferred to a new employer, there may be significant problems with the assignment of employees if only one or more parts of the business are transferred to one or more new owners. This can occur in a variety of situations: on the facts on which the ECJ's judgment was based, insofar as this can be seen from the reasons for the judgment, the employee performed her work for several different operational parts of the business on a pro rata basis in each case. The employee could not be assigned to one of the operational units. Another constellation occurs if management or overhead functions have to be assigned, for example shared services or central administrative functions. For such functions, case law has ruled that these employees are not transferred to a new acquirer by way of a transfer of business if the transfer of business does not cover the entire business but only other parts of the business in which the employees concerned were not active.
The case law of the Federal Labour Court (*Bundesarbeitsgericht*) requires for the transfer of the employment relationship to the new owner in the respective part of the business that the employee was active in. It is not sufficient that the employee works indirectly for an operating unit, for example in an administrative overhead position or in shared services. The employee's job must be integrated into the structure of the respective operating unit, otherwise there is no transfer of the business to the new owner. The employment relationships of these employees are therefore only transferred to the acquirer if the latter also takes over the departments in which these employees were involved. In this case, an allocation is generally possible.
However, the legal question dealt with by the ECJ becomes relevant if employees work for different parts of their employer's business. In the case of employment relationships that are integrated into more than one part of the business, various solutions are discussed. However, splitting the employment relationship into two (or more) part-time employment relationships, which the ECJ concludes, has not been seriously discussed in Germany so far. The practical problems already mentioned are too much of a barrier. The opinions in the academic discussion are probably predominantly based on where the focus of the employee's activity lies. If it is possible to determine a focus of the employment relationship according to quantitative aspects, the employment relationship should be assigned accordingly. There are considerably different opinions in the way the focus of employment is determined and the period of time to be considered in doing so. However, the ECJ considered this approach to be blocked because the interests of the new owner must not be disregarded. Other opinions want to completely exclude the transfer of business for employment relationships that cannot be clearly assigned, or grant the employee a right of choice or solve the case by means of a special right of termination on the part of the employee.
The recommendations to employers in the run-up to a transfer of business are predominantly the same as those described in Amy Cooper's case report. Employers are therefore well advised to prepare themselves in case of doubt that employees are not clearly transferred to a specific new owner.
An outlook could be as follows: it seems hardly conceivable that the Federal Labour Court will come to the same decision as the ECJ and decide on a split of employment relationships, since the rights of the employee, whose employment relationship with the employer is largely determined by the agreed activity, but also by the agreed working hours, are largely disregarded. If the Court should come to such decision, the consequence will be many practical problems to be discussed and to be solved in the interests of the new owners as well as the employees. It therefore remains to be seen when the German Federal Labour Court will have to rule on a case that requires a discussion of the ECJ's ruling.

Italy (Caterina Rucci, Katariina's Gild): From an Italian perspective, the solution proposed by the UK Tribunal looks somehow too complicated in comparison to the situation. If a service provision change results in two different subjects going to provide the services instead of one, the question is why?
The reason in this case is quite simple: these services were apparently provided in a (quite) wide geographic area and could and were therefore divided into two, north and south. Presumably, once re-tendered, two services providers were chosen, on the basis of this geographic criterion.
It is also easy to imagine that there were border areas, in the middle of the two geographic parties.
The services provided do not look too complicated from the outside. It would therefore be much easier and rational that the internal borders of the two areas were split, and assigned to one or the other provider. There is no logical reason therefore, to have 'employees' split into two parties and assigned to both providers when it is clear that it makes much more sense that all employees keep a full-time position, instead of having some assigned to two part-time contracts and others to full-time ones.

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Nor does the activity carried out look as if it keeps its identity by having some employees positions split into two parties.
And if a ratio of Transfer of Undertakings exists, this is the employees' protection, a principle which EU Directives express as well if not more than TUPE.
Employment lawyers know that having a full-time job is normally much better than having two part-time ones. Due to this reason, the decision of the UK Tribunal looks € quite illogical, much more complicated than a mere re-tendering system making clear which services were to be considered 'north' and which 'south', without the need to split some employees' working lives in two.

Subject: Transfer of Undertakings, Employees who Transfer/Refuse to Transfer

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