July 2009

Review

Employment

When does a change in service provider constitute a TUPE transfer ?

In *Metropolitan Resources Ltd v Churchill Dulwich Ltd & ors* the EAT has now made it clear that in trying to work out whether a change in service provider constitutes a TUPE transfer the parties (and ultimately a Tribunal) should ask themselves two questions. First, whether the activities in question have ceased to be carried out by one party (e.g. the client or contractor) and are now being carried out instead by another party (e.g. a new contractor)? In answering this question they should focus on whether the services provided after the change are **fundamentally or essentially the same** as those provided before the change. They should then go on to ask the second question i.e. whether immediately before the change there was an organised group of employees dedicated to providing the service. If the answer to both of these questions is yes, there will be a "service provision change" for TUPE purposes. The only exception would be where (after the change) the service is provided only in connection with a single specific event or a task of short term duration.

Are the services provided after the change fundamentally or essentially the same?

In this particular case CDL had a contract with MH, a charity organisation, to provide accommodation for asylum seekers. Before this contract expired MH entered into a replacement contract with MRL for the provision of asylum accommodation at a different location. CDL received no more asylum seekers from 26 January 2007 and all other asylum seekers were allocated to MRL. When CRL's contract with MH expired in April 2007, its employees claimed that there had been a transfer to MRL of their employment under the TUPE Regulations, i.e. a service provision change.

The EAT confirmed that there had been a TUPE transfer not when the contract formally ended in April but on 26 January when the new contract with MRL was entered into and no new asylum seekers were sent to CDL. It said that from that point the essential service or activity provided by MRL was the same as that provided by CDL, namely the provision of accommodation to asylum seekers.

The EAT made it clear that the mere fact the transfer did not wholly take place on one day, that MRL was based at a different location, that the activities were not identical after the transfer (MRL provided some additional services) and that the employees did not transfer on the date identified as the date of the transfer was not fatal to the existence of a service provision change under the TUPE Regulations. Having said that, it did accept that in certain circumstances not relevant to this case the outgoing activities may become so fragmented that it is not possible to say that there has been a service provision change, for example because the activities have been split up in such a way as to no longer be recognisable. This decision and its focus on the issue of whether the services are fundamentally or essentially the same means that more rather than fewer transactions are likely to be covered by the TUPE Regulations, and since this is to some extent a question of impression, appeals will be hard to mount.

HOW DO YOU ASSESS WHETHER SOMEONE IS DISABLED?

Employers should be careful about how they treat sick employees who have medical treatment to control their conditions - they could still come within the ambit of the Disability Discrimination Act 1995.

We are all familiar with the test for disability under the DDA 1995: an employee is disabled if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The Act makes it clear that an impairment will be treated as substantial for these purposes if it would be "likely" to have a substantial adverse effect but for the fact that measures (e.g. medical treatment) were being taken to treat or correct it. For example, if an employee with diabetes is taking medication then whether his impairment has a substantial adverse effect should be decided by reference to what his condition would be like if he were not doing so.

But what does the term "likely" mean in this context? Does the employee with diabetes have to show that it is "more probable than not" (i.e. greater than 50%) that his impairment would have a substantial effect if he were not taking medication or simply that there is a "real possibility" that this could happen? This sounds like the purest of semantics, and indeed in the vast majority of cases the distinction between the two tests will be meaningless – but in some cases these fine issues of degree could be the difference between an employee being disabled or not. There is a decent argument that the probability of something which "could well" happen may be less than something which is actively "likely", i.e. more likely to happen than not.

What does the term "likely" mean?

The House of Lords in *SCA Packaging v Boyle* has said that "likely" means "could well happen". In other words they adopted a broader and less exacting test than was previously understood to be the case – especially as the Statutory Guidance that accompanies the DDA says that "likely" means "it is more probable than not that it will happen"! Going forward it means that if an employee is undergoing medical treatment then an employer should assume that the impairment in question would be substantial if there is a real possibility of it having that effect without the medical treatment. Statistical likelihood seems less important as the test.

It will usually be clear whether a condition would have a substantial effect on an employee's ability to carry out normal day-to-day activities but for his taking measures to treat or correct it. There will however always be less straightforward cases and employers simply need to be aware that employees may need to be treated as disabled even if they do not outwardly appear to be so.

The word "likely" appears several times in Schedule 1 to the DDA. There is a real possibility, indeed an active likelihood, that it will be interpreted in the same way throughout the Act.

AND FINALLY...

…..one other disability discrimination case that may be of interest.

Since the House of Lords' decision in *Malcolm* last year it has been very difficult for disabled employees dismissed following a period of sickness absence to succeed in claims of less favourable treatment under the DDA 1995. This is because the Lords effectively said that provided an employer can show that it would have treated a non-disabled employee in the same way there is no less favourable treatment.

As suspected, however, the Tribunals have become more creative to ensure that disabled employees are not left without a remedy. The EAT in *Fareham College Corporation v Walters* confirmed that a failure to make reasonable adjustments for a disabled employee (such as consideration of alternative employment or a phased return to work) could render his dismissal an unlawful act of disability discrimination if those adjustments would have avoided the dismissal.

The vast majority of employers would take these steps prior to dismissal as a matter of course but this case highlights the risks of failing to do so and means that the effect of the *Malcolm* decision has been watered down slightly, as employees are more likely to run a "failure to make reasonable adjustments" argument instead.

Mark Shrives-Wright
Partner & Head of Leeds Human Capital
E: mark.shrives-wright@hammonds.com

Nick Jones
Partner & Head of Manchester Human Capital
E: nick.jones@hammonds.com

David Whincup
Partner & Head of London Human Capital
E: david.whincup@hammonds.com

Teresa Dolan
Partner & Head of Birmingham Human Capital (Employment)
E: teresa.dolan@hammonds.com