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TUPE Service Provision Changes Do Not Apply if the Client Changes at the Same Time as the Contractor

Procurement managers may be pleased to hear that a recent Court of Appeal decision, ***Hunter v McCarrick***, has provided yet another transferee-friendly judgment on the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) for service provision changes (SPC).

Court of Appeal Findings

The Court of Appeal in Hunter emphasised that when considering whether TUPE applies to a service provision change the client needs to be the same both before and after the transfer. In reality, this issue rarely arises, as in normal outsourcing or retendering situations it goes without saying that the client remains the same. However, this case may encourage businesses to use different group companies when engaging new contractors in order to argue that the "client" has changed and that TUPE therefore does not apply.

However, a few words of caution.

Case Comments

First of all, the facts in Hunter were unusual and specific. The (insolvent) company concerned owned a number of commercial properties and had one employee whose role was to fulfil estate management services in relation to those properties. The mortgagee appointed Law of Property Act receivers to take control of the properties, and the receivers then engaged a new property services company to manage the properties. This meant that there had been a genuine change in client at the same time as the change in contractor.

We are well aware of the Tribunal's willingness to take an expansive approach to the application of TUPE and also to look beyond an employer's own corporate identity. Where it suspects that a group of companies has deliberately structured its contractual arrangements in such a way as to avoid the application of TUPE, tribunals may well be tempted to reach a different conclusion to that in Hunter in order to protect those employees who would otherwise have transferred with the work.

Secondly, the Hunter decision does not affect an employee's ability to argue that to take an outsourcing arrangement amounts to a "standard" TUPE transfer, i.e. a transfer of an undertaking or part of an undertaking, which may mean that TUPE applies in any event. In the Hunter case, this argument was not put forward and so was not actually considered by the Court of Appeal.

That said, it is nevertheless encouraging that the Court of Appeal chose to take a more restricted interpretation of the SPC provisions, in common with a number of other more recent cases.

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For example, a number of judgments have confirmed that the “activities” in question (i.e. the service being outsourced or transferred) must be broadly the same both before and after the transfer, providing potential scope for new contractors to argue that they will be providing the service in a completely different way such that TUPE should not apply. Having said that, in Hunter, Elias LJ made clear that there may be situations where the courts should not be “too pedantic” on the question of whether the activities carried on before and after the transfer are sufficiently similar to amount to the same service. These comments may well be used in future to cast doubt on earlier cases on this point.

Similarly, in other recent decisions, the courts have emphasised that for employees to be “assigned” to the grouping of resources in order to transfer under TUPE, the employees need to have been consciously and deliberately identified as forming a particular client team, rather than (as in the Eddie Stobart case for example) simply doing the bulk of the client work as a matter of chance.

Given that the SPC provisions were, in any event, a purely UK-driven embellishment to TUPE, with the rest of Europe dealing only with “standard” TUPE transfers, it seems only right that its application should be carefully managed by the courts. That said, it is difficult to say with any confidence that this trend is one that will continue.

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