Case Report: TUPE – One Employee Can Constitute a Service Provision

How small can an organised grouping be for TUPE still to apply? On a business outsourcing, if only one person is affected, this is enough, said the Court of Appeal.

Ever since the UK went out on a limb and introduced “service provision change” to be an additional ground where TUPE applies, in addition to where there is a transferring business entity, those who have been concerned with how the extension to TUPE regulations would be interpreted have wondered how small the organised grouping needs to be to trigger a TUPE transfer where a service provision change was involved. Now the courts have given their answer.

The Court of Appeal has considered the issue and in the case of Rynda (UK) Limited v Rhijnsburger, has decided that a single employee can constitute an “organised grouping of employees” under TUPE. In this case, the employee was a commercial property manager with sole responsibility for managing a group of Dutch properties for a client. The manager’s employer was a firm of property consultants. The client, the owner of the properties, decided to bring that service in-house and, while the manager was retained for a short period to continue that service, the issue that arose on the subsequent termination of employment was whether her previous employment with her previous employer constituted continuous service. That brought into consideration whether upon the client bringing the service in-house, this was a service provision change. The Court of Appeal decided TUPE did apply and the manager’s employment had been continuous.

So, while the expression “an organised grouping of employees” would tend to suggest that there should be at least a group of them and not merely one person - that is now not correct. The organised grouping can in fact be one person. Analysing this situation to determine whether a service provision change was involved or not the parties – whether they be transferor business, transferee business or the employee – may need to determine for themselves whether TUPE applies. The Court has given some useful guidance in a four stage test to help them determine that question.

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The issue is that an organised grouping of employees can be one person but there needs to be something more than a random assembly of tasks that that one person performs. The four stage test identified by the Court of Appeal consists of the following:

1. identify the service which the transferor was providing to the client (here, a property management service to an owner of a group of commercial properties);

2. list the activities which the staff of the transferor performed in order to provide that service;

3. identify the employee or employees of the transferor who ordinarily carried out those activities (here, the manager worked exclusively for that one client and did not share any task with colleagues); and

4. consider whether the transferor organised that employee or those employees into an “organised grouping” for the principal purpose of carrying out the listed activities (here, it was a conscious decision to allocate her to this one client).

If it was a random selection of tasks and a matter of pure chance that the employee was providing one service to one client, then that would not be enough to constitute a service provision. However, if there was some conscious element to the designation of tasks to that one employee by the employer, then this would be indicative of a service provision potentially falling within TUPE.

In this case, the property manager worked full time managing a group of properties with no assistance from any other employee. This is often colloquially described as “working in a silo”. In such a situation, the service provision can be created by an employer but if there was more interaction within a group of employees, carrying out different functions and sharing tasks, the organised grouping, if any existed, would comprise them all.

The case is useful, not only to re-emphasise that TUPE can apply in the situation where one person only is involved, but because of the four stage test as set out above.

For employers, it is worth considering whether there are any employees who tend to work in their own “silo”, perhaps carrying out work of a particular type

"The “organised grouping” can be just one person"
exclusively for one client. The employer then should consider whether that is the best way in which the workforce can be structured, given the risk that the client may decide to terminate the service and take the service in house or transfer it to another provider. In that event, as this case demonstrates, a service provision change may occur and that employee may then transfer automatically. This may be the result that the employer wants, in which case there may well be reasons for deliberately structuring a workforce to work for individual clients in silos in this way and thus minimise the risk of redundancy costs should the client terminate the contract.

Clients who want to effect an in-sourcing and terminate an existing service provision, may now find themselves at risk of taking on a single member of staff, which they had not anticipated. Increasingly we are seeing indemnities being sought by clients so that any financial consequences of TUPE applying unexpectedly in this way can be passed to the service provider company. However, indemnities in commercial agreements do not solve the practical and very real issue that an individual is involved whose job is being transferred and they have a right, by virtue of TUPE, to continue to do that job, irrespective of the identity of their new employer.


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