

TUPE: An employment contract can be split between multiple transferees on transfer

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The European Court of Justice has held that, where an undertaking transfers to multiple transferees, contracts of employment can be split so that employees transfer to more than one transferee.

THE FACTS

Ms Govaerts was employed by ISS Facility Services. ISS was responsible for the cleaning and maintenance of various buildings in the city of Ghent in Belgium. The work was divided into three lots, each lot relating to different types of buildings. Ms Govaerts was the project manager covering the work in each of these lots. 85% of her work related to Lots 1 and 3.

ISS was unsuccessful in a retendering exercise. Lots 1 and 3 were awarded to one contractor, Atalian, and Lot 2 was awarded to a different contractor, Cleaning Masters NV. ISS informed Ms Govaerts that she would transfer to Atalian pursuant to the Acquired Rights Directive (the European legislation from which TUPE derives) because she was principally employed to work on Lots 1 and 3. Atalian did not agree that the Directive applied, and her employment terminated on transfer. Ms Govaerts brought claims against ISS and Atalian, seeking compensation in lieu of notice, bonus and leave pay.

The case progressed through the Belgian courts, which ruled that there had been a transfer of an undertaking. The Belgian courts asked the European Court of Justice (ECJ) to consider the effects of the transfer on Ms Govaerts' contract of employment.

The ECJ held that, where a transfer of an undertaking involves more than one transferee, the rights and obligations arising from a contract of employment will transfer to each of the transferees in proportion to the tasks performed by the worker. This could result in splitting a full time contract into several part time contracts. The ECJ held that it will be up to national courts to determine how the contracts are divided, taking into consideration the economic value of the lots to which the worker is assigned or the time that the worker devotes to each lot.

However, the ECJ also held that if a division of the contract is impossible and/or causes a worsening of working conditions or adversely affects the rights of the worker, the transferee(s) would be responsible for any consequent termination of the employment relationship, even if the termination is initiated by the employee.

WHAT DOES THIS MEAN FOR EMPLOYERS?

This is a surprising and important judgment and a significant departure from existing UK case law. Under current UK case law, if there is a TUPE transfer when a business or service is split into two or more parts when it is transferred, the rights and liabilities relating to employees who worked across more than one part of the service/business pre-transfer will not be split between transferees. Instead, the employee will transfer with whichever part of the business/service to which (broadly speaking) they are most closely linked, with time spent in that business/service being an important but not definitive factor in deciding this. This can result in difficult decisions relating to the specific facts of that transfer.

The practical impact of this judgment is problematic. It will usually be hard to "split" employees' day to day work between different employers. It is highly likely that splitting a contract of employment will be detrimental for the employee. In these circumstances, according to this case, the transferees will be liable for the termination of employment of the employee, whether the liability arises as a result of the employee resigning or of the transferee(s) making the decision to dismiss. This means that transferees will be liable for notice payments, unfair dismissal claims and potentially redundancy costs.

Transferees should (where they have a contractual relationship with the transferor) ensure that their contractual protection includes protection against liabilities that transfer under these circumstances.

[ISS Facility Services NV v Sonia Govaerts, Atalian NV, formerly Euroclean NV \(Case C-344/18\)](#)

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