
TUPE: Service provision change

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In this case, the EAT decided there could be a service provision change where only part of the activities performed by the outgoing contractor were transferred to the new service provider.

The facts

Bolton Council contracts out the provision of services to adults in the Bolton area who are alcohol and/or drug dependent. Until December 2012, the services were provided by Greater Manchester West Mental Health NHS Foundation Trust through its Alcohol and Drugs Directorate.

Bolton Council conducted a re-tendering exercise in which the services previously provided by the Trust were split into two functions, which broadly took the form of case management services and delivery of interventions. As a result, the Trust ceased to provide any of the services. Arch Initiatives was awarded the case management function and Lifeline Project Ltd was awarded the delivery of interventions function.

Those Trust employees who had been performing the case management services argued their employment transferred to Arch and, since Arch had not taken on any of the employees, they had been unfairly dismissed.

The tribunal found there had been a service provision change from the Trust to Arch, and there were two organised groupings of employees. In one group were the Trust employees who had been performing, as their principal purpose, the case management function in relation to drugs services. The other group was comprised of one employee, who was a nurse and team manager in relation to alcohol services.

Arch appealed, arguing that, for there to be a service provision change (as opposed to a business transfer) there could not be a transfer of part of a service, and that it is not possible for the activities to be split along functional lines between new service providers, as in this case where case management had been split from delivery of interventions.

The EAT dismissed the appeal, holding that a service can be split into two or more activities and transferred to different providers, and this will not prevent a service provision change. There is nothing in TUPE that requires all of the activities to be transferred to the new provider. The EAT also held that it is possible for there to be two (or more) organised grouping of employees in any one service provision change.

What does this mean for employers?

This is a useful decision, which shores up the clarity that TUPE 2007 was intended to provide in relation to outsourcing situations. It reminds employers that a common sense and pragmatic approach should be taken when looking at service provision changes. It also reminds employers, in preparation for a re-tendering or transfer of services, to consider whether there is more than one organised grouping of employees, particularly in relation to transfers involving diverse services. It does not, however, undermine arguments that may be made about fragmentation. A split in activities will be relevant in deciding whether or not activities pre and post-transfer are "fundamentally or essentially" the same - whether a split changes the fundamental nature of the services will depend on the facts in each situation.

Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust & ors UKEAT/0267/15, 19-21 January 2016

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