

# TUPE: Was there a TUPE transfer where operations were suspended shortly before a change of provider?

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In this case, the EAT considered whether the suspension of services by a sub-contractor shortly before the main contract was awarded to a new provider would prevent the sub-contractor's employees transferring under TUPE.

## The facts

Amey Services (Amey) was appointed by Transport for London (TfL) to carry out road maintenance services. Amey subcontracted some of its services to Trek Highways Services Ltd (Trek). In 2012, TfL awarded the services to other providers, with new contracts due to start on 1 April 2013. Trek's employees were expected by everyone to transfer to the new providers under TUPE.

However, because of a dispute between Amey and Trek, Trek suspended its operations in March 2013 and sent its staff home. Less than two weeks before the new providers took over, the subcontract between Amey and Trek was terminated. Trek sent letters to its employees (who were still at home) telling them their employment would transfer to Amey. Shortly afterwards, Trek went into administration.

Both Amey and the new providers said that TUPE did not apply, and that they would not accept any of the Trek employees. The employment tribunal decided that there was no TUPE transfer to either Amey or the new providers.

The EAT disagreed. The judge said that a temporary cessation of activities (so that the employees were not working in the two weeks before the contract between Trek and Amey was terminated) would not necessarily prevent either a business transfer or a service provision change. It was, however, a factor to take into account in deciding whether (for a business transfer) there is an economic entity to transfer or (for a service provision change) whether there is an organised grouping of employees.

The EAT also considered an argument that Amey was only involved in the task for a short period (the two week period between the termination of its contract with Trek and the contract between TfL and the new providers). Tasks of short term duration are not service provision changes. It decided that Amey's short involvement was not relevant: TfL intended the services to be provided on an on-going basis, even if Amey was only going to be involved in the services for a short period.

## What does this mean for employers?

This is not a surprising judgement, and it reinforces what the EAT said in the *Inex* case. It would be much too easy to avoid TUPE if it could be done by a temporary suspension of services.

The worst TUPE case scenario on an outsourcing is that the parties disagree about the application of TUPE, and the employees (as they did here) have to litigate against everyone to assert their rights. Potential transferees should be very sure of their legal ground if they try to argue that TUPE does not apply. If it looks like TUPE, it usually is TUPE.

*Mustafa and another v Trek Highways Services Ltd and others* UKEAT/0063/15, 29 January 2016

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