

# TUPE: No service provision change where client changed

Published 2 September 2014

In this case the EAT considered whether there had been a service provision change where there had been a change in the underlying client. They also considered the exemption in the TUPE Regulations for activities which are in connection with a single specific event or task of short-term duration.

## Facts

Mr Ndeze worked as a security guard at Alpha Business Centre, a serviced office complex owned by the London Borough of Waltham Forest and managed by Workspace plc. He was employed by the PCS group, which had a contract with Workspace to provide security. In January 2013 Workspace notified PCS that the business centre would be closing, as it was due to be demolished and replaced by a supermarket. PCS was given notice that its contract with Workspace would terminate on 25 January 2013. PCS was unsuccessful when it tendered for a new contract with Waltham Forest, and the new contract was provided to Horizon Security Services Ltd (Horizon). Waltham Forest had asked Horizon for a quote to cover a period of around eight to nine months.

When Mr Ndeze reported for work on 26 January 2013 he was told to leave, as Horizon were providing the security services with their own guards. Mr Ndeze brought an unfair dismissal claim against PCS, and PCS applied to join Horizon to the proceedings. At a preliminary hearing, an employment tribunal found that there had been a service provision change. It found that Waltham Forest had consistently been the client because the security services were always provided on its behalf. In addition, the tribunal found that this was not a task of short term duration, so there was no exemption from TUPE as a result. Horizon appealed to the EAT.

The EAT overturned the tribunal's decision, holding that there had been no relevant transfer under TUPE. The employment judge had not been entitled to conclude that the security services were being provided on behalf of Waltham Forest simply because it owned the building. PCS and Horizon had different clients (Workspace and Waltham Forest respectively), so there was no service provision change. As there had been no service provision change there was no need for the EAT to decide whether there was an exemption from TUPE under the task of short-term duration exemption. However, the EAT did find that the tribunal had made 3 mistakes when considering this exemption, namely it had:

- Failed to have regard to Waltham Forest's intention when it entered the contract with Horizon;
- Considered what was happening at the time of the employment tribunal hearing (when the business centre had not in fact been demolished), rather than looking at the client's intention at the date of the purported service provision change; and
- Focused on the activities (the provision of security services), rather than the task to be carried out (the guarding of the site pending the demolition of the business centre and the building of the supermarket).

## What this means for employers

This case shows how the service provision change provisions are intended to work where a subcontractor is involved. It also demonstrates how owners of commercial property can, in some circumstances, insulate themselves from the effects of TUPE 2006 through the use of subcontractors. The EAT's comments about the short term duration also give helpful guidance on the exemption which is always hard to establish.

*Horizon Security Services Ltd v Ndeze and another*

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