

TUPE – A Cautionary Tale from the EAT

Introduction

A recent decision of the Employment Appeals Tribunal (“EAT”) serves as a useful reminder to all employers of the importance of giving careful consideration to the possible application of the Transfer of Undertakings Regulations (“TUPE”) to any change in the structure of a business.

The Law

The law in this area was recently set out in “Transfer Regulations – the Commercial Context Explained” (IRN02 – 11/01/2012). Essentially, by way of summary and reminder, if a business or part of a business is taken over by another employer as a result of a merger or transfer, the rights of the employees are protected by TUPE.

For a transfer of an undertaking to take place, the following conditions must be met:-

- There must be a change in the person (either an individual or a company) responsible for the undertaking/business.
- The previous economic activity of the undertaking/business must be carried on by the new employer.
- The undertaking/business must be transferred as a “going concern”.

Where such a transfer occurs, the new employer is legally bound to take on any existing staff, on their existing terms and conditions, or on such terms and conditions as are no less favourable than those which he or she had under the previous employer.

Pension rights are excluded from the provision of the Regulations. However, where there is a pension scheme in operation in the original employers business at the time of the transfer, pension legislation provides as follows:-

- If the scheme is an occupational pension scheme covered by the Pensions Acts, the protections given by that legislation apply, and;
- In the case of other pension schemes, the new employer must ensure that rights up to the date of transfer are protected.

There are no hard and fast rules governing what is, and what is not, a transfer of an undertaking as it is a technical issue which must be dealt with on a case by case basis. Often, one entity winds down its business and makes its employees redundant and some months later a new entity starts running essentially the same business with new staff. Consideration is often not given to how TUPE might impact in such situations as a recent determination of the EAT, involving an Arts Centre, demonstrates.

Facts of the Case

The Claimants were employed by the first named Respondent, (“the transferor”), and were made redundant and accepted their redundancy payments on the 31st August 2008. The transferor was responsible for the establishment and ongoing management of an Arts Centre.

The Arts Centre was funded by KCC, the Arts Council and box office receipts. The transferor leased the premises from KCC. Claimant number 1 worked as a technical manager and Claimant number 2 worked as front of house manager.

The transferee, RAC Limited, was incorporated on the 13th February 2009, come six months after the Claimants had been made redundant. Positions similar to those held by the Claimants were advertised in February 2009 and both applied but were unsuccessful.

The Claimants therefore took a claim to the EAT alleging that their redundancies in 2008 were not genuine redundancies and that what had in fact occurred was a transfer of an undertaking which should have resulted in the protection of their employment.

The Claimants sued both the transferor and the transferee. The transferor had in fact been wound up at the date of hearing by the EAT. Claimant number 1 alleged he suffered serious bullying while employed by the transferor and contended there was a campaign to get rid of him. Claimant number 2 said she had been assured that, when the Arts Centre re-opened, she would get her job back, which did not happen.

During the course of the evidence, it became clear that, in July 2008, staff of the Arts Centre were put on protective notice and were told their jobs were at risk. In mid July 2008, staff was told that the transferor would cease to trade from the 31st August 2008 and their jobs were being made redundant. Claimant number 1 received his redundancy payment on the 31st August 2008 and was told that his job was gone and that it was a genuine redundancy.

Claimant number 2 gave evidence to the effect that when she was informed she was being made redundant, she felt pressurised into signing the relevant redundancy form.

Both Claimants gave evidence that, following their redundancy, events continued to be held in the Arts Centre from the 3rd October 2008 onwards. Both Claimants were surprised that they were not asked to carry out their previous roles in respect of these events.

Both Claimants were also surprised to see their jobs advertised in 2009 but nonetheless applied for those positions. Both Claimants were unsuccessful in securing their positions at interview.

In defence, evidence was given by the Assistant Chairman of the transferee. During this evidence, it was confirmed that the limited company receives a grant from KCC, a grant from the Arts Council and revenue is generated at the box office, which was exactly the same arrangement which had existed when the Arts Centre was run by the transferor. The Board comprised of two County Council representatives and five appointees from the voluntary sector. The Assistant Chairman was approached to join the new company. He had been involved in community projects and had a background in HR. He chaired a subcommittee which set the criteria for upcoming interviews and designed an assessment system. He had

no involvement in interviewing employees for positions and the positions were advertised in February 2009.

He contended that no activities took place in the centre in the period February to July 2009.

In its determination, the EAT stated that, in its opinion, the protection of workers is paramount in the application of the TUPE. Having considered the evidence of both parties, the Tribunal considered that there had been a transfer of undertaking. The EAT applied the case of *Jozef Maria Antonius Spijkers –v- Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV* (Case 24/85), and stated that it must look at the circumstances of the case in their totality and not make a decision based on one single factor. In doing so, the EAT considered the following:-

- The entity in question retained its economic identity throughout the period;
- The essential function of the Arts Centre remained the same;
- The same assets were used in the running of the Arts Centre;
- The same funding structure of the centre applied during the tenure of the first named Respondent and now under the tenure of the second named Respondent.

Furthermore, the EAT noted that evidence had been given that both Claimants' jobs existed in the new entity. In the circumstances, the EAT considered that no real redundancy situation had existed. The Tribunal followed the case of *P. Bork International A/S, in liquidation –v- Foreningen of Arbejdsledere I Danmark, acting on behalf of Birger E. Petersen, and Jens E. Olsen and others –v- Junckers Industrier A/S* (Case 101/87) which deals, inter alia, with the issue of the termination of employment prior to a transfer being effected. The Tribunal followed this decision.

Evidence was taken from both parties as to whether or not activities in the Arts Centre continued between September 2008 and July 2009. It was accepted by both parties that there were certainly activities between September 2008 and December 2008. However, the transferee maintained that the transferor carried out no further activities from January 2009 until it was dissolved in April 2009. In turn, it was maintained that the transferee, although incorporated in February 2009, did not hold its first event until July 2009. In the circumstances, the transferee maintained that there was no economic activity at all in the centre between January 2009 and July 2009.

The EAT, however, did not accept this position.

There was an independent report commissioned by KCC concerning the ongoing running of the Arts Centre in or about August/September 2008 which was not finalised until March 2009. This indicated to the EAT that there was an ongoing plan to run the Arts Centre and its activity was never formally wound down. It was common case between the parties that there is an industry recognised quiet period for theatres called "dark periods" which allow a theatre time for essential maintenance. The EAT accepted the evidence of the Claimants that the period between January and July 2009, or part thereof, could have amounted to a "dark period". Furthermore, it was also accepted in evidence that there was a recruitment period

between January 2009 and May 2009 for the Arts Centre which would also indicate an ongoing activity.

The case of *Dr. Sophie Redmond Stichting –v- Hendrikus Bartol & Ors* (Case C-29/91) was opened by legal counsel on behalf of the Claimants in support of the involvement of a public authority in the case. The public authority referred to was KCC and, although not a party to the proceedings, the EAT considered it had a high level of involvement in the running of the Arts Centre but under the control of the transferor and again under the transferee and had significant influence on the running of the Arts Centre to the detriment of the Claimants.

Both Claimants gave evidence of their attempts to mitigate their loss which the Tribunal accepted. While both Claimants had sought re-instatement as their remedy, neither the Claimants nor the Respondent made any argument for or against this proposition at the hearing. Having considered the matter, the Tribunal determined that compensation was the appropriate remedy.

The Tribunal found that both Claimants were unfairly dismissed and that relief would lie against the transferee because the transfer of undertaking under TUPE had taken place. In determining the appropriate award, the EAT took account of the amounts already paid to and accepted by the Claimants when they were made redundant.

The Tribunal awarded the first named Claimant €40,000 and the second named Claimant €35,000 under the Unfair Dismissals legislation.

Lessons to be Learned

Above all, this case demonstrates that a break in time between the ending of involvement in a business by one entity and a new entity taking over does not necessarily defeat TUPE. The new entity may find itself liable for the rights and entitlements of the employees of the old entity, as transpired in this case.

Careful consideration should be given to facts of each situation to ensure that TUPE is not an issue. Along with potential liability for unfair dismissal as outlined above, liability can also arise for a failure to consult with employees which liability may attach to both the transferor and the transferee.

Employers ignore TUPE at your peril!

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