

Splitting Employees under TUPE transfers - ECJ Ruling



A contract of employment can be fragmented if there is a service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”)

The Employment Appeals Tribunal (“EAT”) in the recent case of *McTear Contracts Ltd v Bennett and Mitie Property Services UK Ltd v Bennett*, has confirmed that a full-time employment contract can be split between a number of transferees into a number of part-time contracts if there is a service provision change under the TUPE.

Case:

McTear Contracts Ltd v Bennett and Mitie Property Services UK Ltd v Bennet UKEATS/0023/19/SS

Facts:

The case involved a client local authority who re-tendered a contract for replacement of kitchens within its social housing stock which had previously been carried out by a single contractor, Amey Services Limited (“Transferor”), who had two dedicated teams assigned to this work.

The contract was awarded to two new contractors on a geographical basis, namely *McTear Contracts Ltd* and *Mitie Property Services UK Ltd* (together the “Transferees”).

The case concerned a dispute over the assignment of the Transferor’s employees to the Transferees. The Transferor looked at the locations for which work had been carried out by the two teams and concluded, taking a broad-brush approach, that one team related to the north, and the other the south. Two employees had not been allocated to a particular team but the Transferor sought to allocate one of these employees to each of the Transferees to take a “pragmatic” approach.

Outcome:

The Employment Tribunal found that the Transferor had correctly split the employees. However, the Transferees appealed against this decision.

Upon the appeal, the EAT applied the principle in a previous case (namely, *ISS Facility Services NV v Govaerts* [2020] ICR 1115) and confirmed that regulation 3(1)(b) of TUPE also applied to “service provision” changes and held that the employees who transferred from the Transferor may transfer to both the Transferees, but on a part-time basis for each Transferee.

What does this mean for you?

This is an important decision and employers within the health care sector need to be mindful of this decision should they obtain a social care tendering contract. This is because if an employer acquires a social care tendering contract but that tendering contract is also awarded to another social care provider or multiple social care providers, if there is a service provision change under TUPE, the employer could find themselves having to effectively share employees who have transferred under TUPE under the tendering contract.

This may provide many difficulties from an employment law perspective, including:

- How will the working hours between the transferees (if there are multiple) be split?
- How will annual leave be managed? This will effectively need to be approved by multiple employers
- Employers will also need to ensure compliance with the Working Time Regulations 1996 if the employees are working for multiple companies

If the transfer is deemed unworkable across the number of transferees, employers will need to carefully consider how the multiple transferees can fairly dismiss the employees.

If you have any questions in relation to this case update, please do not hesitate to contact a member of Napthens' Employment team.

