

# TUPE and LSC Contracting

Legal Services Information Note 123  
January 2010

## 1. Introduction

This note provides general information about TUPE<sup>1</sup> in the light of case law to date. It has been prepared for Citizens Advice Bureaux intending to bid for contracts with the Legal Services Commission (LSC) in 2010 and contains advice about how to factor TUPE considerations into your bidding strategy. The points made also apply in similar situations.

The TUPE Regulations derive from the Acquired Rights Directive and the rulings of the European Court of Justice.

As such, substance over form, and underlying rationale, are important tools in applying the TUPE Regulations as they now stand. A commonsense and pragmatic approach is essential. The factual detail, and the degree to which certain elements are present or absent, are central to a soundly-based decision.

There is no room for artificial structures or arrangements or hurried attempts to re-order or re-characterise matters.

## 2. Summary

If you are successful in winning a contract that has previously been provided by another organisation, Citizens Advice believes that TUPE is likely to apply and you may be obliged to take on those of your predecessor's employees who worked on the LSC contract.

Similarly, if you are not successful and another organisation provides LSC funded services in your area, your LSC staff may have the right to transfer to the new provider.

However, in either case, you should bear in mind that the factors that may cause TUPE to apply when a 2010 is won may NOT apply when that contract comes to an end - and *vice versa*.

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<sup>1</sup> The Transfer of Undertakings (Protection of Employment) Regulations 2006

It is also possible that circumstances might so unfold that no TUPE transfers are involved at all, either at the beginning or end of a 2010 LSC contract.

TUPE can be complex in its application and whether it applies in any one case depends entirely on the particular circumstances: you cannot assume that similar circumstances will produce the same result. As the case law reviewed below shows, they may not.

If the employee is not satisfied with the way the situation is handled, he or she can take either or both organisations to the Employment Tribunal.

In any one instance, all 2010 bidders are in exactly the same position - either TUPE will or will not apply to the particular LSC contract bid for. Regrettably, the applicability of TUPE is (rightly in our view) so fact-based that the position can only be determined with certainty after the fact, and subject to the point being tested in proceedings of one sort or another.

Given the lack of certainty about when TUPE may or may not apply, Citizens Advice considers that the only prudent course of action is for an incoming service provider to proceed on the basis that TUPE will apply unless the provider can have a **very** high level of comfort that TUPE will be inapplicable in its particular case.

You need to factor TUPE issues into your budget and action-planning. Potential transferred staff may be on different terms and conditions from yours. You will also need to ensure that someone takes responsibility for establishing whether TUPE applies in your particular circumstances and liaises with the existing provider to find out about the employees potentially affected.

### 3. When does TUPE apply?

The test to be applied in deciding whether TUPE applies where there is a change of service provider is as follows.

There will be a TUPE transfer on any change of service provider if:

- immediately before the change relied upon, there was **an organised grouping of employees** [which can mean just one person] which had as its **principal purpose** the carrying out of **the activities** in question;
- **the client** [LSC in this case] **intends that those activities will be carried out by the alleged transferee** [new service provider];
- **those activities** cease to be carried out by the alleged transferor [old service provider] and **are carried out instead by the alleged transferee**.

To decide if an individual's position is protected by TUPE you have to see if a particular individual can be said to have been **assigned to 'the organised grouping of employees'**. This requirement excludes an employee assigned on a temporary basis or where the employee does not, looked at in the round, spend the greater part of their time undertaking the activities concerned (.

The TUPE test is discussed in more detail in paragraph 8 below.

#### **4. The LSC's view – TUPE does not apply**

The LSC's position is that it does not believe TUPE applies, although it says you should take your own legal advice. One reason for the LSC's general view is that the re-tendering exercise could result in such a fragmentation and restructuring of the LSC's funded work that the pre and post change activities cannot be considered to be the same in any meaningful way. Another reason used by the LSC is that they have never previously specified service delivery in terms of procurement areas and therefore the pre and post change activities are totally different.

#### **5. Case law supporting the LSC's view**

We believe the LSC is largely seeking to rely on the 'fragmentation' argument. If it is a problem to work out who the new employer might be, a tribunal might be tempted to rule that no TUPE transfer has in fact taken place. The LSC cites the case of Clearsprings Management - v Ankers ruling, an Employment Appeal Tribunal case (involving asylum seekers' accommodation and related services).

Here, there were multiple providers pre-and post- the alleged TUPE transfer. One of the providers that lost out on the re-tendering for the north-west region, Clearsprings, argued that its workforce had been transferred across to one of the new providers by virtue of TUPE.

The Appeal Tribunal disagreed; but this was because it found that the asylum seekers themselves had been 'dispersed' amongst the various new providers for the north-west region. This had taken place on a wholly random basis such that no TUPE succession could be discerned between the functions of Clearsprings with its pre-transfer cadre of asylum seeker clients and those of the new providers whose post- change cadres of asylum seekers were randomly composed.

## 6. Why Citizens Advice thinks TUPE may apply

However, Citizens Advice remains unconvinced by these arguments. Our view is that the LSC is continuing to fund face-to-face specialist advice, open to the public at large, in various locations. We find it hard to see how such a service can realistically be materially restructured if such a service is to continue to be provided for the population based in and around those locations.

Even where there is wholly new combination or recombination of the types of advice that are being bundled together, those services continue to be available (via the recombined bundling) to the incumbent local population. . . We believe there may be the odd case where this can be shown to happen, but that will be rare. The need for continued provision in the same areas as before (even if they are sub-divided for LSC contract purposes) will drive towards the conclusion that the post-transfer activities remain as they were pre-transfer, that is the provision of advice services to those living in the particular geographic location. Therefore, we believe the relevant employees' contracts of employment may need to be distributed by reference to the particular LSC advisory specialism on which they were principally engaged. The pre-transfer workforce can readily be reallocated (if necessary) so that there is continued provision of the LSC deliverables as before.

In summary, we do not believe that the LSC's argument based on 'fragmentation' is sustainable in the majority of cases. Moreover, we do not accept that the fact that the LSC's use of procurement areas has any bearing: in our view the use of procurement areas is in essence a matter of bidding and contract management - it does not affect the substance of what TUPE seeks to achieve.

## 7. Case law supporting our view

One of the leading cases (Metropolitan Resources - v - Churchill Dulwich (November 2008)) - involving provision of accommodation and related services to asylum seekers - had this to say in a case that involved the loss of a contract by the incumbent provider to a sole successor provider:

*“The statutory words require the Employment Tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are*

*performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A commonsense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the Tribunal in the present case. The Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it.*

The judge in the Metropolitan Employment Appeal Tribunal case also made the following observations in referring to another case:

*“The only appellate decision, prior to the hearing of this appeal, in which [change of service provider and TUPE] has been considered is that of the Employment Appeal Tribunal (Langstaff J presiding) in Kimberley Group Housing Limited v Hambley [2008] IRLR 682, which also concerned the provision of accommodation and related services for asylum seekers, on that occasion in the northeast of England.*

*The transferors provided such services in Middlesbrough and Stockton under contract with the Home Office. On the expiry of the transferors’ contract, contracts to succeed them were awarded to two different organisations, each of which was to operate in both towns..... the Tribunal found that there had been a service provision change and the Appeal Tribunal made the following observation:*

*“35. We conclude that the tribunal here was entitled to come to the view that there was a service provision change. It may be that there are some circumstances in which a service which is being provided by one contractor to a client is in the event so fragmented that nothing which one can properly determine as being a service provision change has taken place. This tribunal considered whether that was the case here and concluded it was not. We think that since there are two overlapping contracts now providing for activities which were previously provided by one provider that the tribunal was entitled to come to that view. Having come to that view the question then turns to what the consequence is. We observe that when a tribunal is examining the question whether there is a service provision change or not it is of course entitled to, and must, look at all the facts and their implications in the round, and it may be that a tribunal wishes to take into account as indicating that there is no service provision change any difficulties in determining who should take responsibility for an employee’s contract after any given date. But as a matter of clarity and logical progression having taken that into account in determining whether there is a service provision change, as this tribunal here in our view was entitled to do, we turn now to what the consequence is.....”*

## 8. More about TUPE

Some of the detail of TUPE is outlined here to help readers understand why TUPE's applicability is so difficult to assess ahead of time.

### Service provision change

As explained above, TUPE describes the circumstances when employees will transfer by way of a service provision change.

To recap, employees will transfer if immediately before the change of service provider:

- there is an 'organised grouping' .... of employees whose 'principal purpose' is to carry out activities on behalf of the client;
- the client intends that the activities will continue after the transfer and are not in connection with a single specific event, or task, of short-term duration; and
- the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

Guidance issued by the Department for Business, Enterprise and Regulatory Reform (BERR) states that these conditions are:

*'...intended to confine [TUPE's] coverage to cases where the old service provider (i.e. the transferor) has a team of employees in place to carry out the service activities and that team is essentially dedicated to carrying out the activities that are to transfer (though they do not need to work exclusively on those activities).'*

TUPE should therefore only apply if an organised grouping of employees provides a service to a particular client base. So, work that is routinely carried out by different people on an *ad hoc* basis will not constitute such a grouping of employees.

### 'Activities': is there continuance or fragmentation?

*Kimberley Group Housing Limited v - Hambley and others* was a case where two new providers under separate contracts undertook a single provider's former activities).

The Employment Appeal Tribunal proceeded to analyse matters as follows:

- identify the activities;
- identify the organised grouping of employees;
- assess which activity has 'gone' to which new provider;
- determine which employees are assigned to that activity.

A TUPE transfer was found to have occurred. In this instance, all the employees concerned fell to be allocated to only one of the two new providers, Kimberley, the overwhelming provider overall: there was no 'apportionment' of employees.

*Clearsprings Management Ltd v Ankers*

Here, no transfer took place - the re-provisioning of accommodation etc. to asylum seekers was so fragmented that one could not discern continuity of activity in relation to which there had been a succession. As a result, one could not reallocate the employees to the three new service providers.

*Thomas-James and others v Cornwall County Council and others*

In summary:

- Cornwall County Council (CCC) was one of 17 providers to LSC of employment and welfare advice - it had a team to resource this.
- Callers were routed to the next available adviser from any one of the 17 providers with relevant specialism.
- CCC did not bid when LSC put the contracts out to tender.
- 9 successor providers were appointed by the LSC.
- No TUPE transfer was found to have occurred. The 'activities' in this instance could not be said to be the same pre-and post-change of provider given the way in which the giving of advice was organised by caller routing - the provision of the advice was inherently randomised amongst a disparate number of individuals who happened to be organised into teams, provider by provider.

In short, there was no traceable assumption of activities by any successor provider from CCC.

*Organised grouping of employees and principal purpose: Lees Lloyds Whitley and Barnetts*

Law firms have most recently been subject to TUPE claims, e.g. where a firm loses a client and there has been a team (of one, two or more) who, say, did all that client's property or debt collection work. TUPE has been found to apply - e.g. *Royden v Barnetts*.

There may be some unanticipated consequences, perhaps:

- the client fails to get away from what it might regard as unsatisfactory lawyers;
- the old law firm loses what it might regard as valuable staff;
- the new law firm service provider may have bid at a low price to find itself with unanticipated overhead costs as the lawyers from the client's previous law firm were paid more than its own staff and whose quality is unknown.

In this context keep in mind two points:

- a single employee can constitute an 'organised grouping of employees' under TUPE; but
- only employees 'assigned' to the service concerned will transfer under TUPE.

In practice, it may be difficult for an employee to prove that enough of their duties are 'assigned' to the activities concerned if they have split duties and responsibilities (i.e. if only part of their time is spent doing work on the customer's outsourced service).

### **Assigned**

In *Royden v Barnetts* (above) the tribunal only transferred employees whose duties mostly consisted of work done for the relevant client (all other work was described as 'a relatively peripheral element of [their] duties'). The tribunal refused to transfer other employees because considerably less than half their work related to the transferred service.

In *Kimberley Group Housing Limited v - Hambley and others* (a case where two new providers under separate contracts undertook a single provider's former activities) the point was made that:

'What is to be focussed upon is essentially the link between the employee and the work or activities which are performed.'

### **Disregard of irrelevant differences in changeover of service provision occurring: *Metropolitan Resources v Churchill Dulwich***

The following were insufficient to disturb a finding that there **was** a change in service provision, and therefore TUPE applied:

- there was no single -cut-off day for switchover as between service providers;
- different locations were used under the successor arrangements;
- new service provision commenced without prior service provider's staff being used; and
- additional functions or duties were performed as part of the new service provision.

## **9. Advice and Support**

If you would like to discuss potential TUPE issues, contact Bureaux Direct. The service is staffed by a team of experienced advisers who can offer support, guidance and share good practice. If necessary, they can also make efficient referrals within and outside the Citizens Advice service. Bureaux should always

consult BMIS before they use the helpdesk to check that their enquiry is not dealt with there.

To contact the helpdesk:

- [bureauxdirect@citizensadvice.org.uk](mailto:bureauxdirect@citizensadvice.org.uk)
- **0845 120 2035**

Bureaux Direct is available each weekday from 9.00am to 5.00pm.

**Citizens Advice - Legal Support  
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