

# loopholes

## Loopholes appear in service provision transfers

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provides protection to employees when the business in which they work is transferred to another owner. In some cases it is clear that the same business is being operated by another party. However, in some cases it can be more difficult to identify, and a detailed analysis to assess whether the same 'economic entity' exists before and after the transfer often depends on which assets have been transferred. However, what about a business providing just a service, for example, cleaning or security? Could it fall outside the scope of TUPE? The previous government thought it should not and in order to remove any uncertainty whether employees in service industries were protected in a transfer situation in 2006, TUPE was amended to expressly include situations where work was outsourced, brought back in-house or where the service provider changed.

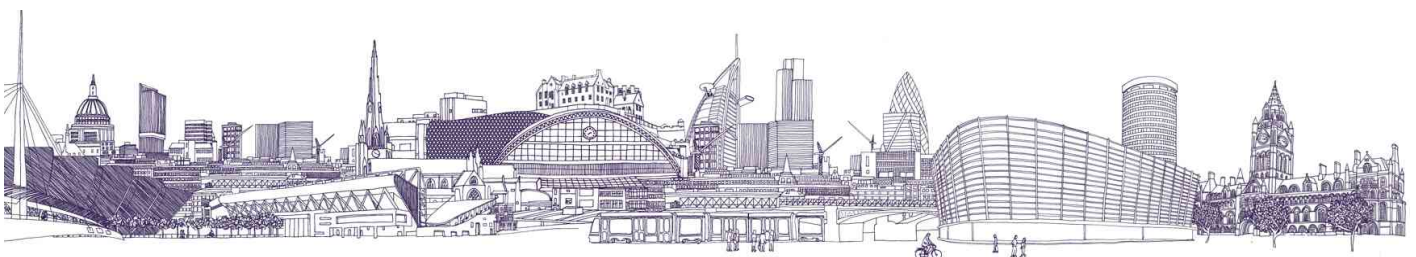
The fact that TUPE protection would apply to employees following any change in service provision was seen as a positive step for both employer and employee. It meant that in any tendering situation, the parties would know from the start where they stood and there would be a 'level playing field' in relation to bids etc. It was also considered that this new certainty would have the effect of reducing the likelihood of Employment Tribunal claims as employees would automatically transfer.

However, there has recently been a spate of cases showing that despite the expanded wording in TUPE, disputes can still arise about the application of the regulations and some employees will still find that they fall outside the protection granted.

The case of *Pannu -v- Geo W King Ltd and others* illustrates an express exclusion under the amended TUPE provisions which prevents a transfer of employment in certain circumstances. In this case, the transferor had been involved in the supply of parts to a client. When that business got into financial difficulties and the client turned to another supplier the employees did not transfer to the new supplier. TUPE provides that where the service consists wholly or mainly of the supply of parts for the client it is excluded from the definition of a service provision transfer.

In *Enterprise Management Services Ltd -v- Connect-Up Ltd*, the contract for carrying out IT support for schools within a certain council's district was re-tendered and given to a new contractor. The employees of the old contractor lost their claims that they should have transferred to the new contractor. It was found that the IT support was being carried out in such a different way that the activities were not the same post transfer and again the transaction fell outside the protection given by TUPE. It was emphasised that whether the activities are the same or not is a question of fact. In this case a reduction to the total school coverage and the removal of curriculum support was sufficient to distinguish the two.

The third recent case, *Hunter -v- McCarrick*, concerned the situation where there was a change in the identity of the service provider, and at the same time, a change in identity of the client. This was the first case reported since the 2006 changes where this situation had been considered in the appellate courts. It was ruled that the new wording did not cover it. Wherever there was a change in client in addition to a change in service provider, the employment protection rights under service provision transfers would not apply. It would appear that in such situations, the arguments will have to be based on whether there has been a transfer under the standard provisions that require the same economic entity to be identified.



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## **Comment**

Introducing the concept of service provision transfers was controversial. Questions have been asked as to whether the changes place too high a burden on business. As part of an ongoing review of employment laws, the government has asked for evidence as to whether the provisions have had any positive impact. Whether these decisions will be viewed as positive for that purpose or not remains to be seen.

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