Browne Jacobson

Fragmenting employment contracts

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ISS Facility Services NV v Govaerts

Last year, the CJEU considered the issue of fragmentation in connection with a TUPE transfer in the case of ISS Facility Services NV v Govaerts and another.

Ms Govaerts was a project manager employed by ISS Facility Services NV (ISS). ISS was responsible for the cleaning and maintenance of various buildings, split into three "lots" in the city of Ghent in Belgium. Ms Govaerts' work was spread across all three of the lots.

After a public tender, ISS lost the contract to supply cleaning and maintenance services. Lots One and Three transferred to Atalian NV and Lot Two was transferred to Cleaning Masters NV. Approximately 85% of Ms Govaerts' time was spent on Lots One and Three and the remaining 15% on Lot Two.

The CJEU considered three possibilities:

(1) Ms Govaerts' employment could be split between the transferees depending on the time spent working for each assignment;

(2) Ms Govaerts' employment would transfer only to the transferee to whom she worked the most of her time; or

(3) Ms Govaerts would not transfer at all.

Option 2 was rejected as this would be unfair to the transferee – they would inherit a full-time employee but only part of her work. Option 3 was rejected as the employee would lose her job. Option 1 was held to be the correct approach as this would ensure a fair balance between protecting both workers and transferees.

The CJEU did stress that there were practical considerations to take into account. The above apportionment approach would therefore only work where division of the contract as a result of the transfer is possible and where it doesn't worsen the individual's working conditions or otherwise adversely affect their rights. If division was not possible or would adversely affect the individual's rights then the transferee(s) would be liable for any consequent termination of the employment relationship, even if this is initiated by the individual.

The above approach represented a rather radical departure from the previous approach taken. Prior to this judgment, employees (or any liability in respect of employees) have always transferred to one other entity or been held not to transfer at all. However, at the time, there was the caveat generally applied in commentary that the ECJ's judgment only applied in the case of business transfers under Regulation 3(1)(a) of TUPE and not to service provision changes under Regulation 3(1)(b) of TUPE.

This has now all changed as a result of the EAT's decision in McTear Contracts Limited v Bennett and others.

McTear Contracts Limited v Bennett and others and Mitie Property Services UK Limited v Bennett and others

Here, a local authority retendered work relating to the replacement of kitchens within its social housing stock. The work previously had been carried out by one contractor, Amey Services Limited (Amey). Amey employed two teams of employees who worked fairly independently of each other, but across all of the local authority area.

Under the retender, the work was split into two lots – based on a geographical split of north and south. McTear Contracts Limited (McTear) secured one lot, and Mitie Property Services UK Limited (Mitie) the other. The case concerned a dispute over the assignment of Amey employees to the two lots. Amey 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 Amey sought to allocate one of these employee to each lot to take a "pragmatic" approach.

The Employment Tribunal agreed with Amey's allocation of employees.

Both Mitie and McTear appealed to the EAT, challenging the Tribunal's approach to the allocation of employees. In particular, it was argued that the Tribunal had not considered the possibility that some employees may not have transferred anywhere, not being part of an organised grouping. The issue of whether Govaerts should apply was also added as a ground for consideration as part of the appeal following the publication of the CJEU's decision.

The EAT considered whether Govaerts should apply in the case of service provision changes under Regulation 3(1)(b) of TUPE and (perhaps unsurprisingly given that there was no opposition to this approach from any of the parties) concluded that it should.

The EAT held that:

"There is no reason in principle why an employee may not, following such a transfer, hold two or more contracts of employment with different employers at the same time, provided that the work attributable to each contract is clearly separate from the work on the other(s) and is identifiable as such. The division, on geographical lines, of work previously carried out under a single contract into two new contracts is, in principle, a situation where there could properly be found to be different employers on different jobs."

This case will now return to the Employment Tribunal to apply the Govaerts principles to each of the claimants individually.

What does this mean in practice?

It is not at all unusual for fragmentation issues to arise as a result of retenders for service contracts. Whilst the Govaerts principle may well on the face of it appear to be the fairest for all concerned, it is highly unlikely to be without its issues in practice. In what circumstances will it be "possible" to divide an employment contract? When will there be a "worsening" of working conditions as a result? No doubt both will be the subject of lengthy debate when dealing with services being split across different transferees, as will the proportions of any assignments.

Employees with previously only one employer may find themselves with several part-time roles – administratively, this could cause difficulties with annual leave (for example, needing multiple approvals to take a week off), or working time restrictions where overtime is possible with multiple employers. If splitting the contract is deemed unworkable, how will multiple transferees conduct a fair dismissal procedure for employees with over two years' service (even assuming they could each show an ETO reason)?

In Kimberly Group Housing Limited v Hambley and others, the EAT acknowledged that there may be circumstances where services become so fragmented that it is impossible to say that there has been a service provision change. However, this is now called into doubt as a result of McTear and the application of Govaerts to service provision changes. In Govaerts, one of the questions referred to the CJEU was whether there would be no transfer:

"…if it is not possible to determine separately the extent of the worker's employment in each of the transferred parts of the undertaking."

The CJEU didn't directly address this but rather rejected outright the possibility of there being no transfer where undertakings are split as this would deprive the Acquired Rights Directive of any effectiveness.

In light of McTear, a similar approach would now be required for service provision changes – and in circumstances where it is impossible to identify which activities have gone where, quite how employment contracts are meant to transfer, or alternatively, liabilities will be split across different transferees is anyone's guess. However, "clients" in outsourcing arrangements who wish to reorganise how services are provided to them through fragmentation may find themselves on the receiving end of requests for substantial indemnities from incoming transferees.

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