

TUPE assignment – tightening the test? | [back to top](#)

The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) underwent a number of changes last year with the aim of improving their effectiveness and flexibility. There has nevertheless still been a stream of cases affecting the interpretation of TUPE and how it is to apply in certain situations. Some recent cases have also given guidance on the issue of who is “assigned” to an organised grouping of resources or employees.

In *BT Managed Services Ltd v Edwards* (UKEAT/0241/14), the court considered whether an employee who had been on sick leave for over 5 years transferred under TUPE. It was held that the employee should not transfer. The employee was not assigned to the organised grouping, as there was no prospect of the employee ever being fit to return to work and perform the work that had transferred.

Note: This case does not mean that all long term absentees will not transfer. Whilst it will always depend on the facts of each case and the medical evidence available, a temporary absence due to sickness or maternity should not prevent an employee from being in scope to transfer, particularly if there is an expectation of future participation.

The case of *Inex Home Improvements Ltd v Hodgkins* (UKEAT/0329/14) concerned employees who had been temporarily laid off at the time of the transfer. The Employment Appeal Tribunal found that the employees were still assigned to the organised grouping despite being laid off. Their employment had not ended and it was hoped that they would be called back in to do the work under the contract at some point. They therefore transferred to the new service provider.

In *Jakowlew v Nestor Primecare Services Ltd* (UKEAT/0431/14), a service provider had been asked by their client to remove an employee from a contract to provide services. The service provider disciplined the employee, but did not remove the employee from the contract. When the contract was subsequently transferred to a new service provider so did the employee, even though the client had asked the employer to remove the employee in question. Contrast this with *Robert Sage Ltd t/a Prestige Nursing Care ltd v O’Connell* (UKEAT/0336), where the employer adhered to the client’s instruction and removed an employee from a contract. Here, the employee did not transfer to the new service provider when the contract was subsequently lost.

What are the implications of these decisions?

It is vitally important to assess which employees are in scope to transfer in any TUPE situation. As part of any due diligence exercise, transferees should:

- Identify which employees are potentially assigned to the organised grouping and in scope to transfer;
- Not assume that employees on long term sick leave are not in scope to transfer;
- Be aware that temporary cessations in work will not prevent TUPE from applying;
- Investigate whether an instruction to remove a particular employee has been actioned;
- Avoid taking on employees who might have been “dumped” on a contract shortly before a transfer;
- Look at the work the employees undertake and assess whether they have been deliberately organised to undertake that work;
- Try to get access to the employees in scope to transfer to assess the position before any relevant transfer takes place.

The question of assignment is a tricky area of law. Getting it wrong could prove costly and may lead to claims being lodged by aggrieved employees.

Susannah Nicholas
Professional Support Lawyer, Employment
T: 0121 214 1493
E: susannah.nicholas@shma.co.uk