



The impact of long-term incapacity on 'assignment' under TUPE

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The EAT in Edwards provided guidance on whether employees who are permanently incapacitated will be deemed to be assigned to an organised grouping for the purposes of a service provision change under TUPE. What are the issues arising out of this case and what are their significance?

Overview of the EAT's judgment

When considering the question of who is assigned to the organised grouping, the extent to which any given individual contributes (or, in the case of temporarily absent employees, is expected in the future to contribute) to the economic activity of the part of the undertaking that is transferred is a factor that can properly be taken into account by the employment tribunal. Employees who are permanently incapacitated from participating in those activities (unlike those suffering only a temporary incapacity) will not, by definition, be expected to participate in the economic activity of the service provider and are therefore unlikely to be assigned to the organised grouping.

Accordingly, the EAT determined that where an employee is incapacitated from participating in the activities of the part of the organisation that is transferred, without any real likelihood of a return to those activities, that employee is unlikely to be regarded as assigned to the relevant organised grouping for the purposes of TUPE. Therefore their employment will remain with the transferor after the service provision change.

Background

Mr Edwards was originally employed by Hutchison 3G/Orange from 1994 and was assigned to its domestic network outsourcing (DNO) contract. His employment subsequently transferred under TUPE to BT Managed Services in 2009. However, from May 2006 Mr Edwards was signed off sick from work, due to a cardiac condition. While attempts were made by BT to find Mr Edwards an alternative role within the organisation to assist his return to work, all attempts made (save for one or two isolated attempts, which lasted very short periods of time) were unsuccessful. He did not return to work in any capacity after January 2008 and thus remained on indefinite absence.

At the time of the transfer of Mr Edwards' employment to BT, he was deemed to be permanently incapacitated and was in receipt of regular permanent health insurance payments. Initially, these were paid by insurers under a PHI policy put in place by Orange. However, in 2010, the insurance lapsed, but BT continued to make equivalent payments to Mr Edwards, based on its understanding that he had a contractual entitlement to payments until retirement.

In June 2013, as a result of a further tender process, the DNO contract transferred from BT to Ericsson Ltd. Ericsson accepted that TUPE applied to the transfer, but a dispute arose as to whether Mr Edwards was assigned to the organised grouping of employees that transferred.

The tribunal's decision

The Leeds employment tribunal (Employment Judge Davies, sitting alone) held that because Mr Edwards did not contribute to the economic activity of the grouping and there was no expectation that he would ever do so again, he was not assigned to the grouping within the meaning of reg 4(1) TUPE.

Central to the judge's decision was her finding that, in around 2010, BT had taken an active decision to cease its attempts to get Mr Edwards to return to work in any capacity. The sole purpose of retaining his employment with BT was to keep him 'on the books', so he could continue to receive the benefit of the PHI payments, to which BT believed he was contractually entitled until retirement.

On that basis, the tribunal held that, although the costs associated with Mr Edwards' ongoing employment were accounted for within the DNO budget and such contact as there was with him (which was essentially pastoral) was by managers within the DNO contract, those links were

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essentially historic and administrative and occurred 'essentially by default'. Weighing all the factors together, the tribunal concluded as a matter of fact that Mr Edwards was not assigned to the relevant organised grouping immediately before the transfer.

BT appealed the tribunal's decision on the grounds that it had erred in the importance it attached to Mr Edwards' lack of contribution to the activities undertaken under the DNO contract. BT asserted that it was irrelevant whether Mr Edwards participated in the economic activities of the DNO contract and that instead, the decisive test was the one set out in *Botes Building*.

In that case, the Court of Appeal had approved a two-stage test to determine whether an employee is assigned to an organised grouping in circumstances where he or she is on temporary sickness absence. The first is, 'Was the employee employed in the part [of the business that was] transferred immediately before the service provision change?' The second is, 'But for the temporary absence, could the employee have been required to work as part of the relevant organised grouping?' BT submitted that the tribunal should have focused on where Mr Edwards would have been working at the time of the transfer, if he had been able to return.

The EAT's decision

The EAT dismissed the appeal. HHJ Serota QC, sitting alone, held that it was incorrect that the only question to consider was where an absent employee would be working, if the reasons for his or her absence did not apply. In other words, the 'but for' test set out in *Botes Building* was not always applicable. While that test was useful for cases where the absence was temporary and the employee was likely to return to work or may be expected to return to work (such as periods of maternity absence, or short to medium term sickness absence), HHJ Serota held that this principle has 'no resonance or applicability' in cases (such as this) where an employee is permanently unable to return to work (para 68).

HHJ Serota further held that there is a 'clear link' between identifying the organised grouping and determining who is assigned to it (para 68). As TUPE itself defines an organised grouping by reference to the performance of a particular economic activity, the fact that the employee plays no part in the economic activity and will not do so in the future 'almost

by definition' means that he or she cannot be regarded as assigned to the relevant grouping (para 67).

Having a mere historical or administrative connection to the grouping (such as being included within its headcount for budgeting purposes or having pastoral contact from its managers) is not enough to amount to an assignment of that person's employment where that individual does not, and is never expected to, participate in the economic activity or service provided by the relevant organised grouping.

The appeal to the Court of Appeal

On 15 June 2016, Longmore LJ granted permission for BT to appeal to the Court of Appeal. BT argued that the tribunal (and the EAT) wrongly treated contribution to the economic activities of the organised grouping as critical and should, instead, have considered 'the organisational framework within which the claimant's [employment] relationship took effect' as set out by the ECJ in *Botzen* and that the test in *Botes Building* – ie where the employee would be required to work if not absent – is determinative. However, the case has subsequently settled, so we will never know whether the Court of Appeal would have agreed with this view or not.

Comment

HHJ Serota in the EAT remarked that the case was 'quite unlike any other', due to Mr Edwards only retaining 'a very limited administrative connection' to the relevant grouping (para 68). Certainly, the facts are unusual: it will be an exceptional case that replicates the particular circumstances of a TUPE transfer of part of an undertaking with a historic connection to an employee who remains employed for the sole purpose of continuing to receive PHI payments. Nevertheless, the issues raised by this case do potentially have wider implications.

First, although HHJ Serota was careful to highlight the unusual factual circumstances and the distinction between Mr Edwards' permanent absence and cases where employees are temporarily absent, it is possible to conceive of other situations in which a similar issue may arise; for example, it is not uncommon for an employee who has suffered illness or injury giving rise to a degree of permanent incapacity, but not complete incapacity from all work, to be absent pending final assessment of what he or she is, or is not, capable of doing.

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If the activities carried out by the transferred grouping would necessarily require certain capabilities, questions may arise as to whether such an employee remained assigned to that grouping. In such a case, the *Botes Building* test (where he or she would have been working if not absent) may provide some assistance, but so may the factors identified in this case – namely, whether there was any real expectation that the employee would again contribute to the relevant activities.

Second, outside the specific context of employee absence (whether temporary or permanent), the extent to which it is relevant to consider an employee's contribution to the economic activities of the relevant organised grouping when determining whether he or she is 'assigned' to that grouping, is likely to have a bearing on the approach which employment tribunals adopt more generally in the more familiar cases of difficulty in this area – such as in the case of employees whose time is divided between different activities or whose activities may be characterised as ancillary rather than central to the core economic activities that are transferred.

More practically, for transferors, this case demonstrates the need to actively manage absent employees so as to ensure that, should a TUPE transfer occur, there is clarity about their status and the expectations as to whether and where they will work in the future. This may well lead to discussions surrounding the nature of an employee's incapacity and whether it is indeed permanent or merely long-term.

Maintaining some sort of dialogue with employees who are on long-term sick leave about their expected return to work, when fit enough, may help support the transferor's case in such situations.

Meanwhile for transferees, it will be important to be clear about the status of employees on long-term sick leave or other long-term absence before deciding whether to accept or dispute the transfer of their employment. Transferees could consider trying to obtain medical reports in respect of absent employees in order to determine whether they have a reasonable prospect of returning to work within the relevant grouping.

KEY:

<i>Edwards</i>	<i>BT Managed Services Ltd v Edwards & anor</i> [2016] ICR 733
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
<i>Botes Building</i>	<i>Fairhurst Ward Abbotts v Botes Building</i> [2004] ICR 919
<i>Botzen</i>	<i>Arie Botzen & ors v Rotterdamshce Droogdok Maatschappik BV</i> [1986] 2 CMLR 50

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The group can be accessed at: <http://tinyurl.com/ELAINhouse>