Permanently ill employee did not transfer under TUPE

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An employee who had been unable to work due to illness for 6 years and would not be returning to work was not assigned to the group transferring under TUPE, so his employment did not carry over to the incoming employer. The employee was simply 'on the books' in order to continue to receive permanent health insurance, therefore lacking the necessary involvement

in the work being done by the transferring team to be regarded as part of it.

Mr Edwards worked for Orange in its domestic network outsource (DNO) division and had been on permanent sick leave since January 2008. From 2009, Mr Edwards was receiving regular payments from the company's permanent health insurance provider. In July 2009, the DNO division at Orange transferred to a subsidiary of BT and Mr Edwards and his colleagues transferred to BT under TUPE. It became apparent in 2010 that Mr Edwards would never return to work, so he continued to receive permanent health insurance payments as he had before the TUPE transfer. In June 2013, the DNO division transferred again, this time from BT to Ericsson. Ericsson refused to accept BT's argument that Mr Edwards transferred to Ericsson as part of the division despite his absence.

Ericsson was right to object, as the Employment Appeal Tribunal held that Mr Edwards did not transfer under TUPE in 2013. The EAT held that, in order for Mr Edwards to have transferred, he would either need to have been involved in some way with the work being carried out by the DNO division before the transfer, or be expected to return in future to carry out the work after the transfer. As he met neither of the criteria, he was not part of the DNO team, but instead had a merely administrative or historical connection to it.

The EAT was at pains in this case to make clear that its judgment applies only to the relatively rare situations in which employees have no prospect whatsoever of returning to work. In the majority of cases, where employees are expected to return to work at some point in the (however distant) future, the likelihood is that they would transfer under TUPE.

BT Managed Services Ltd v Edwards and another UKEAT/0241/14

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