

TUPE and 'organised groupings'

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In *Ceva Freight (UK) v Seawell*, Mr Moffat was employed by Ceva Freight, a logistics and freight company, and worked in the "outbound team". Although the team worked for a variety of clients, unlike his colleagues, Mr Moffat spent 100% of his time working on the account of one client, Seawell. In fact, Mr Moffat's contract specifically said that he had been

employed for the purpose of enabling the contract with Seawell to be performed.

When Seawell decided to transfer the work in-house, Ceva asserted that Mr Moffat's employment transferred to Seawell under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). This was disputed by Seawell and Mr Moffat's employment was terminated. He brought claims against both Ceva and Seawell for unfair dismissal and breach of the TUPE information and consultation obligations.

TUPE applies in two scenarios. First, where there is a "business transfer" and second, in the event of a "service provision change" (which, generally speaking, captures outsourcing and insourcing arrangements). In order for there to be a service provision change, there must be an 'organised grouping' of employees whose principal purpose is carrying out the work which is transferring. For these purposes, an "organised grouping" can consist of one employee but the group must be specifically and consciously organised by the employer for the purpose of the activities in question.

In this case, the Employment Appeal Tribunal and Court of Session (Scotland) held that although Mr Moffat spent all of his time working for Seawell, he was ultimately part of a team whose principal purpose was outbound work, not Seawell's work. Ceva had specifically and consciously grouped Mr Moffat within the "outbound team". Although Mr Moffat worked solely on the Seawell account, Ceva had not "organised" him in a group for this purpose. Therefore, there was no service provision change and no TUPE Transfer.

This case disproves most employers' assumptions that an employee who spends all of his time on one contract must transfer in an outsourcing/insourcing arrangement and follows a line of cases narrowing the circumstances in which TUPE will apply. This is expected to be reflected in the new TUPE Regulations (expected later this year). For now, employers

should bear in the mind that the fact that an employee spends 100% of his time working for one client is not sufficient on its own to establish a TUPE transfer.

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