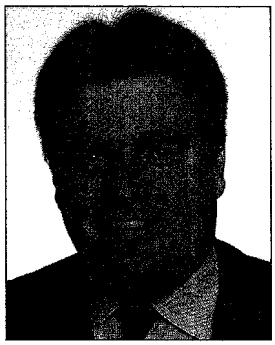
Who is in scope?

Recent decisions highlight the need to consider carefully who is 'in scope' for the purposes of a TUPE transfer, warns Charles Wynn-Evans



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'The tribunal in *McCririck v Channel 4 Television Corporation (1) and IMG Media Ltd (2)* [2014] saw no rational basis for excluding workers, as distinct from employees, from the scope of TUPE, as they are equally affected by a transfer.'

A central issue to determine on the transfer of an undertaking or a service provision change is which individuals fall within the transfer's scope. This determines not only who moves over to the new employer but is also essential to ensuring compliance with two key requirements of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). These are the obligation on the transferor to provide employee liability information (ELI) to the transferee (under reg 11) and the requirements on collective information and consultation (under reg 13).

Contravening TUPE's ELI obligation can be costly, leading to compensation for the transferee's resultant loss. It will receive a minimum award of £500 per employee about whom inadequate information was disclosed (unless the employment tribunal considers that it is not just and equitable to make such an award). Contravening TUPE's information and consultation requirements can also lead to significant awards of compensation given that the penalty for breach can be up to 13 weeks' pay per employee.

In deciding which employees are 'in scope', two particular, and analytically separate, issues need to be considered:

- which individuals are 'employees' for TUPE purposes; and
- whether those employees are 'assigned' to the relevant undertaking or organised grouping of employees.

Defining an 'employee'

Article 2.1 of the Acquired Rights Directive (which TUPE implements into domestic law) provides that an employee for its purposes is any person who is protected as an employee under the national employment law of the member state concerned. Regulation 2(1) of TUPE defines an employee as:

> ... any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly.

It is the use of the words 'or otherwise' which is the key difference from the definition of employment used in s230 of the Employment Rights Act 1996 (ERA). The ERA provides that an employee is:

> ... an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

And that 'contract of employment' means:

> ... a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

Betting on who transfers

In *McCririck v Channel 4 Television Corporation (1) and IMG Media Ltd (2)* [2014], one of the questions

addressed by the employment tribunal at a pre-hearing review was whether, in connection with the age discrimination claims he brought, well-known racing pundit John McCririck was an employee for TUPE purposes. If he was, his employment and related claims would transfer from Highflyer Productions Ltd, which had engaged him, to IMG Media. The latter had taken over production of the Channel 4 racing programme on which he had been a presenter and on which Channel 4 had decided that he should no longer appear.

Mr McCririck had been engaged by Highflyer under a consultancy agreement providing for the supply of services as and when required. There were various commercial terms in this agreement on remuneration, renewal, travel expenses and duties, as well as reasonably standard statements providing that Mr McCririck was a self-employed person and bore his own income tax and national insurance liabilities. Mr McCririck performed work for various other organisations as a television presenter, website and newspaper columnist and what the employment tribunal described as a 'general celebrity'.

For the purposes of Mr McCririck's age discrimination claim and, more particularly, s41(7) of the Equality Act 2010, the tribunal accepted that he was a 'contract worker' supplied by Highflyer to Channel 4. It rejected the contention that Mr McCririck had been running a business and accepted that he was employed by Highflyer for the purposes of s83(2)(a) of the Equality Act. This adopts a wider concept of an employee than the ERA and includes in its definition a contract 'personally to do work', thereby extending the scope of the legislation to workers. The tribunal considered that there was sufficient subordination in Mr McCririck's relationship with Highflyer to justify that finding and that the contract did not have the appearance and characteristics of a deal between two independent businesses.

The issue then arose whether Mr McCririck was also an employee for the purposes of TUPE. The tribunal accepted that, while TUPE was 'not helpfully drawn' in this regard, TUPE applies to 'workers' as well as to 'traditional' employees engaged under contracts of service and apprentices. It rejected the suggestion that the reference in reg 2(1) of TUPE to its protection applying to those working under a contract or apprenticeship 'or otherwise' confined its application to traditional employment status, apprenticeship or other equivalent (but unspecified) categories of person. The tribunal preferred the argument that the words 'or otherwise' took the scope of TUPE beyond the definition of 'employee' used in the ERA and indicated that TUPE is intended to apply to all workers.

Consistent with this, the tribunal accepted that the exclusion of those engaged under a contract for services from the scope of reg 2(1) was to be confined to those in business on their own account rather than workers or consultants more generally. From a policy perspective, the tribunal saw no rational basis for excluding workers, as distinct from employees, from the scope of TUPE, as they are equally affected by a transfer. The tribunal viewed its interpretation as pragmatic, since it questioned how TUPE could:

> ... operate effectively if every transfer necessitated a laborious enquiry into whether staff members were employed under contracts of service or were workers.

It is perhaps unfortunate that this issue has not yet been fully addressed at appellate level as greater clarity on this issue would be valuable. However, this decision supports the argument that TUPE does not apply only to traditional employees. This analysis cannot extend the unfair dismissal protection afforded by TUPE since only those who are employees for the purposes of the ERA have unfair dismissal rights. Nevertheless, the potentially wider category of worker needs to be considered to ensure compliance with TUPE's various other obligations.

Absence and assignment

Only those who are 'assigned' to the transferred undertaking (in the case of a transfer of an undertaking under reg 3(1)(a) of TUPE) or to the organised grouping of employees conducting the relevant activities (in the case of a service provision change under reg 3(1)(b) of TUPE) transfer automatically from transferor to transferee. Regulation 2(1) of TUPE makes clear that, for these purposes, 'assigned' means ' assigned other than on a temporary basis'.

Mere absence is not sufficient to take an individual out of scope. For example, in Marcroft, *the employee in question was put on garden leave during his notice period.*

Mere absence is not sufficient to take an individual out of scope. For example, in *Marcroft v Hartland (Midlands) Limited* [2011], the employee in question was put on garden leave during his notice period. The Court of Appeal upheld the employment tribunal's decision that he remained assigned to the relevant undertaking despite having handed in his notice. Even though he was only on call during the notice period, he had remained part of the relevant team.

Long-term sickness absence

In *Edwards v Ericsson Ltd (1) BT Managed Services Limited (2)* [2014], an employee who was absent from work received payments under his original employer's permanent health insurance (PHI) arrangements and these continued after his transfer to BT Managed Services (BTMS) on a TUPE transfer. BTMS did consider the possibility of a return to work but

in 2010 decided to keep the claimant permanently absent in order to continue to receive PHI payments. While employed by BTMS, the claimant's job title did not change, he was not assigned away from his original business area and there had been some informal contact with him. The tribunal accepted that the claimant would not have been fit to return to his existing role as a fixed operations engineer and, if he had returned, an alternative role would have needed to be considered either in his original business area or elsewhere within the BT Group. There was then a further TUPE transfer to Ericsson, which did not accept that the claimant was assigned to the activities transferring to it, although these incorporated the functions in which the claimant had been working before his illness.

The employment tribunal noted that the question of assignment is one of fact and referred to the leading authority of *Botzen v Rotterdaamsche Droogdok Maatschappij BV* [1985] as establishing the correct test. It also referred to *Duncan Web Offset (Ltd) v Cooper* [1995] and *Edinburgh Home-Link Partnership v City of Edinburgh Council* [2012] to support the proposition that whether an individual is assigned depends on issues such as:

- the amount of time they spend on one part of the business or another;
- the amount of value they give to each part;
- the terms of their contract showing what they could be required to do; and
- cost allocation between different parts of the business.

The tribunal also noted that the fact that an employee is absent on sick leave does not in itself mean that they are not employed in the part of the undertaking transferred. This issue was specifically addressed in *Fairhurst Ward Abbotts v Botes Building Ltd* [2004], in which it was held that a person on sick leave, like a person on holiday, study leave or maternity leave, can remain employed in the undertaking even though they are not actually at their place of work.

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In *Edwards*, the tribunal considered the correct approach was to ask the factual question of whether the employee was assigned to the group in question, looking at all the relevant circumstances. It considered that the part of the business where the employee might have been required to work if they had not been absent on sick leave might be one factor but was not determinative.

On the facts, the tribunal found that the claimant did not transfer to Ericsson, which was perhaps surprising given:

- he had transferred into BTMS under TUPE;
- he had counted for the relevant headcount and cost allocations during his employment by BTMS;
- he was never formally moved or assigned elsewhere within the business;
- contact with him was via managers from his business area;
- there was no evidence he was permanently unfit for work; and
- had he been fit to return, his original business area would have been the starting point for seeking a role for him.

Nonetheless, the tribunal held that the decision to keep the employee permanently absent in order to continue to receive PHI payments meant that, as a matter of fact, he ceased to be assigned to the relevant activities as he had no involvement in pursuing the relevant economic activities at the time of transfer. It is understood that this case is the subject of an appeal to the EAT.

A contrasting decision on sickness absence

A contrasting decision, albeit in a very different forum, but which again demonstrates the fact-sensitive nature of the issue of assignment for TUPE purposes, is *Linard v CT Plus Ltd (1) London Borough of Waltham Forest (2)* [2013]. This was a determination by the Deputy Pensions Ombudsman concerning an individual's entitlement to an ill-health pension. One issue in this case was whether the individual, who was absent from work due to long-term sickness, had transferred from the employment of the London Borough of Waltham Forest to CT Plus. The transferee, CT Plus, sought to argue that she had not transferred to its employment but that her employment had terminated before the transfer. This argument was based on a decision made by the former employer to decline ill-health retirement on the grounds that her condition might respond to treatment under consideration at the time.

Perhaps unsurprisingly, it was found that the employee had transferred, not least because she was listed as one of the employees wholly or mainly engaged in the provision of the relevant services in the transfer agreement between Waltham Forest and CT Plus. Moreover, CT Plus had treated her as its employee by inviting her to a meeting to discuss her continued absence from work and by considering her ill-health retirement entitlements. Various PAYE coding notices also indicated

she had become employed by CT Plus.

Suspension from relevant activities

The dispute in *Robert Sage Ltd t/a Prestige Nursing Care Limited v O'Connell* [2014] arose from the termination by North Somerset Council of a contract with Allied Healthcare for the care of a person with severe learning difficulties, X, and its award to Prestige Nursing Care. One of the claimant employees had been working with X but had been suspended from her duties prior to the termination of the contract and its award to Prestige (which of itself led to a dispute about whether TUPE applied). The tribunal held that the claimant was assigned to the contract to care for X because the test was essentially a contractual one. Although she was the subject of disciplinary proceedings and despite the council's reluctance for her to remain involved in X's care (which might subsequently have justified her dismissal), she remained employed at the transfer date and so her contract transferred to Prestige.

The EAT upheld an appeal against this finding. While the terms of an employee's contract are relevant to determining whether the individual is assigned to a part of the business transferred, the question is primarily to be answered by deciding where they would have been required to work immediately before the transfer. The employee in question should not have been held to be in scope for TUPE purposes, having been removed from the performance of the contract.

Involvement is not assignment

Costain Limited v Armitage (1) ERH Communications Ltd (2) [2014] makes clear that whether there is an organised grouping of employees for the purpose of establishing a service provision change and whether an employee is assigned to that grouping are analytically distinct issues, although they overlap. They must therefore be addressed separately. Moreover, this case reiterated that being involved in the activities which transfer is not the same as assignment to the relevant undertaking or organised grouping of employees. It is not to be assumed that, in relation to a service provision change, every employee carrying out work for the client is assigned to the relevant organised grouping. Lady Smith made this clear in *Argyll Coastal Services Ltd v Stirling & ors* [2012], in which she also noted that the question of assignment:

> ... is not a mere formality. It can only be resolved after a proper examination of the whole facts and circumstances.

Those commercial parties and advisers who rely on percentage-based evidence as conclusive in establishing assignment or otherwise for TUPE purposes should heed the valuable, if uncontroversial, observation made in *Costain* by HHJ Eady QC that the question of assignment will not:

> ... be answered simply by reference to the percentage of time worked by the employee on the particular contract unless the factual context demonstrates why that would be the relevant test in the particular circumstances.

As she put it, evidence demonstrating that an individual spent 100% of their time on a contract might only be a 'snapshot of the position at a particular moment in time'. Equally:

> ... there might be cases where a tribunal finds that an employee is assigned to the organised group, but at a particular period spent less than 50% of their time on that work.

In this particular case, the decision of the employment tribunal, whose focus was on the question of percentages, could not stand since the EAT could not be certain that it had approached the question of assignment after a proper examination of the whole facts and circumstances. Accordingly, the matter was remitted to a fresh tribunal.

Fact-sensitive issues

The cases discussed in this article demonstrate the legal tests to be applied in assessing who is in scope for the purposes of a TUPE transfer. Also, because the issues are inherently fact sensitive, they show the need to conduct due diligence to ensure that the parties appreciate the application of TUPE; can ensure compliance with its collective information and consultation and employee liability information obligations; and have the necessary information to be able effectively to address commercial issues about the treatment of employees. ■

Being involved in the activities which transfer is not the same as assignment to the relevant undertaking or organised grouping of employees.

Argyll Coastal Services Ltd v Stirling & ors
[2012] UKEATS/0012/11

Botzen v Rotterdaamsche Droogdok Maatschappij BV
[1985] ECR 519

Costain Ltd v Armitage (1) ERH Communications Ltd (2)
[2014] UKEAT/0048/14

Duncan Web Offset (Ltd) v Cooper
[1995] IRLR 633

Edinburgh Home-Link Partnership v City of Edinburgh Council
[2012] UKEATS/0061/11

Edwards v Ericsson Limited (1) BT Managed Services Limited (2)
[2014] Case no 1806030/2013

Fairhurst Ward Abbotts v Botes Building Ltd
[2004] EWCA Civ 83

Linard v CT Plus Ltd (1) London Borough of Waltham Forest (2)
Determination by the Deputy Pensions Ombudsman, 14 May 2013

Marcroft v Hartland (Midlands) Ltd
[2011] EWCA Civ 438

McCririck v Channel 4 Television Corporation (1) and IMG Media Ltd (2)
[2014] Case no 2200478/2013

Robert Sage Ltd t/a Prestige Nursing Care Limited v O'Connell & ors
[2014] UKEAT/0336/13