



DIRECT PAYMENTS v TUPE

Introduction

We have acted for a UKHCA member who took on a contract from a former provider at a time when direct payment arrangements were introduced. We were not advising the care provider at the time when the company took on the contract. Our client did not take on the employees of the former provider and those employees subsequently claimed unfair dismissal on the basis that their employment should have transferred to our client under TUPE. An Employment Tribunal upheld those claims.

Factual Background

The case concerned the provision of care for two adults with serious brain injuries, M and S. The local authority was responsible for their care and contracted with the Disabilities Trust to provide that care. Due to the level of care that was needed, the Disabilities Trust employed nine people to provide that care. The local authority became increasingly concerned about the care being provided to M and S and, as a result, it initiated discussions with our client. Our client was reassured by the local authority that TUPE would not apply on taking over the contract.

Two weeks before the contract was due to be transferred to our client, the Disabilities Trust expressed the view that TUPE would apply. A few days later, the possibility of setting up direct payments was discussed and it was agreed that our client would provide care arrangements directly to M and S under the direct payments regime. The employees of Disabilities Trust argued that they were entitled to transfer to our client under TUPE. Our client (who we were not advising at the time) refused to accept those employees and used its own staff to service the contract.

The Legal Issues

TUPE applies in two situations:

1. Where there is a transfer of an economic entity which retains its identity.
2. Where there is a service provision change. This includes a situation where activities cease to be carried out by a contractor on a client's behalf and are carried out instead by a subsequent contractor.

In defending the case, our client argued that the care arrangements which were provided for M and S changed so significantly following the transfer of the contract that it could not be said that there had been a transfer of an economic entity which retained its identity. Our client argued that the service provision change could not apply since there had been a change in the identity of the client: initially this had been the local authority but, following the introduction of direct payments, it became M and S in their own right.

Tribunal's Decision

The Tribunal noted that, following the introduction of direct payments:

1. Our client received the benefit of all the materials, equipment and documentation which had been obtained, used or created by the Disabilities Trust for the purposes of caring for M and S.
2. Our client would continue to receive the benefit of supervision by the local authority.
3. Our client would have the confidence that payment for its services would be made from the resources of the local authority.
4. Our client had the benefit of all the policies, procedures and programmes that had been put in place by the Disabilities Trust.

In light of these factors, the Tribunal concluded that our client would simply slot into the position formerly occupied by the Disabilities Trust in the totality of the care package provided to M and S.

The Tribunal also concluded that the local authority and our client wanted to avoid TUPE. In the local authority's case, they wanted to avoid TUPE because they considered that the employees had not delivered appropriate care to M and S in the past. They realised that, if TUPE applied, that might defeat the object of changing the people providing care for M and S. Against this background, the Tribunal concluded that direct payments were introduced as a way of avoiding TUPE.

The Tribunal concluded that there had been a transfer of an economic entity which had retained its identity and therefore that TUPE applied. The Tribunal also addressed the issue of whether or not there had been a serious provision change and concluded that there had, on the basis that the local authority have remained the "client" throughout.

Conclusions

This case should serve as a warning to UKHCA members that there is a real risk of TUPE applying whenever contracts are taken over from previous providers. Even where direct payments are being introduced and even where the clients are unhappy with the staff providing care to them, it is quite possible that TUPE could still apply. UKHCA members should therefore take legal advice whenever they take on a contract where care has previously been provided by somebody else to ensure that they understand the risks involved.

Paul Roberts of Keelys Solicitors can provide further advice on the issues raised in this note and would also be happy to provide a copy of the Tribunal's detailed decision. His e-mail address is: proberts@keelys.co.uk

This note sets out general advice based on the facts of one particular case. It should not be relied upon and you should take specific legal advice which takes into account your own circumstances.