



From start to finish

TUPE and employment in further and higher education

October 2018

The law relating to the Transfer of Undertakings is notoriously complex and is constantly developing. Broadly speaking, the effect of the TUPE Regulation¹ is to preserve the continuity of employment and protect the terms and conditions of those employees who are transferred to a new entity.

When responsibility for the provision of a service, or management of a particular function or activity, is transferred from one educational organisation to another, it is likely, subject to certain qualifying conditions, that the TUPE Regulation will apply.

Examples of cases we regularly encounter involving TUPE within the education sector include:

- A** Groups of staff transferring to or from a contract service provider, for example catering or cleaning staff; **and**
- B** Research groups moving into, or out of, Higher Education Institutions (“**HEIs**”), from or to another establishment

The latter example arose in a recent Labour Court decision under industrial relations legislation involving a worker and an Irish University.²

The facts

The case involved a Research Assistant (the “**Employee**”) who was employed by an Irish University (“**University 1**”) since 1994. From 2006 onwards, the Employee’s role involved conducting research for the Anti-Bullying Centre (“**ABC**”) which was attached to the School of Education in University 1.

In 2013, it was decided that the ABC would be transferred from University 1 to a different Irish University (“**University 2**”). The ABC ceased operations in University 1 on 31 December 2013 and the Employee began working on the transfer of the ABC to University 2. The ABC was subsequently re-established by a Professor at University 2 in April 2014. University 1 engaged with the Professor prior to this and informed him of the obligation to transfer the Employee to University 2.

Under the TUPE Regulation, the Employee should have transferred to University 2 if his ABC work continued there. However, while the Employee wished to remain at University 1, this could not be facilitated because his employment was contingent on the continuation of external funding to the ABC and because there were no other possibilities of work for him. The Employee declined to transfer and was subsequently made redundant in March 2015 as a result.

Compulsory redundancy

The Employee took a claim against University 1 to the Workplace Relations Commission (the “**WRC**”) on the basis that his work was both administrative and research based and that he worked directly for the School of Education. The Employee claimed that by making him redundant, University 1 was in breach of the Haddington Road Agreement (the “**HRA**”) and the Public Service Agreement (the “**PSA**”). The Employee also claimed that University 1 was in breach of its own procedures for failing to consider suitable alternatives to redundancy. The Employee submitted that based on prior decisions of the Labour Court³, with similar facts, he was protected from compulsory redundancy as per section 1.6 of the PSA. The Employee sought to have the redundancy set aside and that he be reinstated in University 1 or in the alternative, be awarded compensation.

University 1 claimed that the Employee’s post was externally funded and that when the ABC closed, his position became redundant. It also sought to rely on Clause 1.6 of the PSA, which was reaffirmed in the HRA and Lansdowne Road Agreement, stating that “the Government gives a commitment that the compulsory redundancy will not apply

1. SI 131/2003 EC (Protection of Employees on Transfer of Undertakings) Regulation.

2. CD/18/95.

3. CD/13/414.

within the Public Service, save where existing exit provisions apply". It was University 1's contention that the Labour Court had previously found that positions in which employees exclusively engage in externally funded research are not protected from compulsory redundancy. It was University 1's submission that this was the position with this post as per the Employee's contract of employment.

Decision

The WRC considered that a genuine transfer of undertakings under the TUPE Regulation had occurred and when the Employee refused to transfer, University 1 had no option but to make him redundant, as there were no alternative positions available for him.

The Employee appealed the decision to the Labour Court who noted that the Employee's work related wholly and exclusively to the ABC and that his employment was terminated in accordance with University 1's provisions in line with Clause 1.6 of the PSA. The Labour Court also noted that University 1 was willing to discuss an ex-gratia payment with the Employee at the time he was made redundant.

The Labour Court set aside the recommendation of the WRC and recommended that the Employee be paid €10,000 in full and final settlement of the claim.

Whilst the Labour Court set aside the recommendation of the WRC, it appeared to accept that a transfer had taken place and the Employee could have accepted the transfer retaining all his existing terms and conditions and continue his work at the ABC in University 2.

Commentary

This case is a reminder that all organisations must be aware of TUPE, especially HEIs involved in expansion and/or transfer of research programmes. We regularly receive queries from our HEI clients in relation to TUPE. Our specialist Education and Employment team is a market leader in the area of TUPE and focuses on commercial realities and solutions reflecting the need to balance commercial imperatives with compliance.

We have extensive experience advising on all aspects of TUPE, especially in cases involving service provision changes and can assist with:

- drafting of transfer agreements
- information and consultation
- due diligence
- managing the integration
- pensions advice; **and**
- bespoke training for HR and management within the HEI sector

The penalties for not applying TUPE correctly can be serious, especially because it is not always apparent when a transfer has taken place. The golden rule is to always seek advice.

Contacts

For more information, please contact:



Margaret Gorman

Partner & Head of Education

+353 1 6644 325

margaretgorman@eversheds-sutherland.ie



Kara Turner

Consultant, Education

+353 1 6644 222

karaturner@eversheds-sutherland.ie



Bernard Martin

Associate, Education

+353 1 6644 234

bernardmartin@eversheds-sutherland.ie

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