



## A closer look

### The application and scope of the TUPE Regulations

The implications of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the “**TUPE Regulations**”) arise frequently for consideration in the education sector, including for example: -

- (i) where there is a contracting in or out by an education body of a service, for example cleaning/catering/security; and
- (ii) in school divestment, where the patron body is the employer

The TUPE Regulations apply where there is a transfer of an economic entity which retains its identity during the transfer process. While there are a number of factors to be taken into account in deciding whether identity is retained, once this is established, all employees, whether full time, part time, temporary or permanent, who are employed on the date of the transfer, will automatically have the rights and obligations of their employment contracts and previous service with the transferor employer transferred to the transferee.

There are also detailed information and consultation obligations on the transferor and transferee under the TUPE Regulations.

Notwithstanding the foregoing, the TUPE Regulations do not address the situation whereby an employee refuses to transfer to the employment of the transferee. As a result, this issue must be addressed by reference to the member state’s implementing legislation. A recent Labour Court decision in *Adina Predut v Rapier Contract Services Limited*<sup>1</sup> provides some useful takeaways for transferors and transferees in such circumstances.

#### The facts

The case involved an employee (the “**Employee**”) who was employed by Rapier Contract Services Limited (“**Rapier CS**”) as a concierge.

A decision was taken by Rapier CS to transfer its concierge business to its sister company Synergy Security Limited (“**Synergy Security**”). All affected staff members, including the Employee, were notified that their employment would transfer to Synergy Security under the TUPE Regulations.

The Employee refused to transfer claiming the transfer would be disadvantageous to her on the basis that Synergy Security could transfer her immediately to any security position within its business and that her role would change from concierge to security. Rapier CS submitted that the Employee’s employment with it transferred under the TUPE Regulations and that the Employee was properly notified of the transfer and legal consequences for her employment. Accordingly, it advised the Employee that it would treat a refusal by the Employee to transfer as a resignation by her from employment.

#### Decision of the WRC

The Employee referred a claim under the Unfair Dismissal Acts 1977-2015 against the transferor, Rapier CS, to the Workplace Relations Commission (the “**WRC**”) claiming she was unfairly dismissed. The WRC had to decide whether the Complainant resigned or was dismissed from her employment with Rapier CS. The WRC noted that the Employee had “*accepted that her work would remain the same after the transfer*”. Accordingly, the WRC found there was no basis to find that the Employee’s employment terminated for reasons other than as a result of her refusal to transfer.

The Employee appealed the decision of the Adjudication Officer to the Labour Court.

#### Decision of the Labour Court

The Labour Court considered the decision of the High Court in *Symantec Limited v Leddy and Lyons*<sup>2</sup> upon which Rapier CS relied and wherein it was noted that the TUPE Regulations do not make any particular provision as to what will occur if employees decide not to transfer. The High Court in that case held that where an employee decides not to transfer in a TUPE situation, a redundancy situation will not automatically arise vis-à-vis the transferor. The High Court confirmed that the objective of the European

<sup>1</sup> UD/17/23

<sup>2</sup> [2010] 1 I.L.R.M. 112

Union Transfer of Undertakings Directive<sup>3</sup> is to allow an employee to remain in the employment of his/her new employer on the same conditions as were agreed with the transferor. Whilst an employee is not obliged to take up this opportunity, where they decline to do so, the purpose and effect of the TUPE Regulations is not to continue the employment contract, and, as such, the employee terminates his/her own employment.

In the case before the Labour Court, the Employee claimed that she refused to transfer to her new employer on the basis that the terms and conditions of her employment in the new company were to her disadvantage. However, the Labour Court, on hearing both parties on this point, found that the Employee's terms and conditions of employment would have been unaffected by the transfer and that her assertions to the contrary were misconceived.

Accordingly, the Labour Court found that Rapier CS did not dismiss the Complainant "but rather that she terminated her own employment when she rejected the transfer under TUPE Regulations".

### Commentary

All education bodies should be aware of the application and scope of the TUPE Regulations and this case provides some useful guidance on the specific issue of refusals to transfer. It is important to note that the transfer in this case was found not to involve any changes to the Employee's terms and conditions of employment and that there had been full cooperation between the transferor and the transferee. The outcome of this case could have been different had the transfer resulted in a change to the terms and conditions of employment and the employee objected to the transfer on such grounds.

Our specialist Education Team regularly advises on the TUPE Regulations and represents education bodies in cases involving the Regulations. We are available to provide practical and legal advice on the operation of this complex piece of legislation in the Irish education sector.

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<sup>3</sup> Council Directive 2001/23/EC